

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: Wisconsin Department of Workforce Development
Docket No. A-06-18
Control No. A-05-02-00031
Decision No. 2137

DATE: December 18, 2007

DECISION

The Wisconsin Department of Workforce Development (Wisconsin) appealed the determination of the Administration for Children and Families (ACF) requiring Wisconsin to repay the federal share of overpayments that Wisconsin made under the former Aid to Families with Dependent Children (AFDC) program in title IV-A of the Social Security Act (Act). ACF based its determination on an Office of the Inspector General audit of AFDC overpayments recovered by Wisconsin from July 1, 1996 through September 30, 2001. Wisconsin recovered \$10,385,998 of the disallowed overpayments after October 1, 2006, when AFDC was replaced by the Temporary Assistance for Needy Families (TANF) program. Wisconsin recovered the remaining \$325,340 in the three months prior to October 1, 1996, during which Wisconsin had begun to implement its TANF program.

On appeal, Wisconsin argues that it had properly accounted for the federal share of the AFDC overpayment recoveries by spending the recovered funds for TANF benefits. Wisconsin also argues that even if repayment is required, Wisconsin need repay the federal share of only the net amount of overpayment recoveries, after offsetting its costs of recovering the overpayments. In addition, Wisconsin argues that it should not be required to pay accrued interest on the disallowance amount.

As discussed in detail below, we conclude that, under the applicable law, Wisconsin may not account for the federal share of its AFDC overpayment recoveries by using these funds to pay for costs incurred for TANF purposes because this would permit Wisconsin to exceed the cap on federal funding for TANF. We further conclude that ACF properly required Wisconsin to repay the federal share of the AFDC overpayment recoveries without any

offset. Finally, we conclude that it is outside the scope of the Board's review to consider Wisconsin's argument regarding the accrued interest.

Legal Background

Title IV-A of the Act originally established a program of aid for needy dependent children and the parents or relatives with whom they were living, known as the AFDC program. The Act provided for reimbursement of a percentage "of the total amounts expended" by a state during each quarter "as aid to families with dependent children under the State plan." Section 403(b) of the Act.¹ The Act set out detailed requirements for a "State plan for aid and services to needy families with children." Section 402(a)(1)-(44). The Act also provided for reimbursement of a percentage of state expenditures "found necessary by the Secretary for the proper and efficient administration of the State plan." Section 403(a)(3)(D).

States had a responsibility under title IV-A AFDC programs to recover overpayments made to individuals or families. The AFDC regulations at 45 C.F.R. § 233.20(a)(13)(i)(A) (1995) required that "[t]he State must take all reasonable steps necessary to promptly correct any overpayment" The regulations defined "overpayment" as "a financial assistance payment received by or for an assistance unit [individual or family] for the payment month which exceeds the amount for which that unit was eligible." Section 233.20(a)(13)(i) (1995).

Section 403(b) of the Act set out "[t]he method of computing and paying" states for the amounts expended under an approved State plan. This section provided in relevant part that the amount to be paid to a state shall be-

reduced by a sum equivalent to the pro rata share to which the United States is equitably entitled, as determined by the Secretary of Health and Human Services, of the net amount recovered during any prior quarter by the State or any political subdivision thereof with respect to aid to families with dependent children furnished under the State plan

Act, section 403(b)(2)(B). The parties do not dispute that an overpayment recovered pursuant to 45 C.F.R.

¹ The sections of the Act cited in this decision were codified at 42 U.S.C. §§ 601 et seq.

§ 233.10(a)(13)(i)(A) (1995) is an "amount recovered" within the meaning of section 403(b).

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Public Law No. 104-193, amended title IV-A to establish a program of "Block Grants to States for Temporary Assistance for Needy Families" (TANF) that would replace the AFDC program. Section 401(a) of the Act as amended states in relevant part that the purpose of the amended title IV-A "is to increase the flexibility of States in operating a program designed to- (1) provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives" Each state which submits a State plan outlining how it will conduct the program and making certain certifications is eligible for an annual "State family assistance grant" (SFAG). The amount of the SFAG is based on amounts previously paid to the state for AFDC and several AFDC-related programs. See section 403(a)(1) of the Act. Thus, while federal funding for each state's AFDC program was open-ended, there is a "cap" on TANF funds. A state's SFAG is reduced on a dollar-for-dollar basis if in the prior year the state failed to meet a "maintenance of effort" (MOE) requirement to annually expend state funds equal to a percentage (usually at least 80%) of its historic expenditures for certain types of benefits or services. See section 409(a)(7) of the Act; 45 C.F.R. Part 263.²

ACF authorized Wisconsin to receive TANF funding beginning August 22, 1996, the date it began implementing the TANF program. See ACF Br. at 10, citing ACF Ex. 2, at 5 and ACF Ex. 12, at 1. Any AFDC expenditures for that period were to be deducted from Wisconsin's TANF funding. ACF Ex. 12, at 1.

Analysis

1. Under applicable law, Wisconsin may not account for the federal share of AFDC overpayments recovered after October 1, 2006 by augmenting its TANF grant.

There is no dispute that, while the AFDC program was still extant, a state could account for the federal share of AFDC overpayment recoveries by reducing on a quarterly basis the amount of federal funds it would otherwise have claimed under the

² In addition to this "basic MOE" requirement, there is a "contingency fund MOE" requirement for states receiving amounts from the Contingency Fund for State Welfare Programs. See §§ 403(b)(6) and 409(a)(10) of the Act and 45 C.F.R. § 260.30.

AFDC program. The primary issue in this case is how a state must account for the federal share of AFDC overpayment recoveries after the AFDC program ended. Wisconsin argues that it properly accounted for the \$10,385,998 recovered after October 1, 2006 by adding this amount to its existing balances of TANF funds in the Federal Payment Management System, all of which were subsequently expended for the TANF program.³ See ACF Ex. 5. ACF maintains that Wisconsin is required to repay this amount to the Department of Health and Human Services in cash.

The Board addressed a similar situation in Iowa Dept. of Human Services, DAB No. 1874 (2003) and later in Texas Dept. of Human Services, DAB No. 1954 (2004). In Iowa, the Board found that Iowa's use of AFDC overpayment recoveries for new cash assistance payments under TANF violated general appropriations law prohibiting the application of federal funds to "objects" other than those for which the appropriations were made. See DAB No. 1874, at 4-5. In its appeal, Texas took issue with the Board's analysis in Iowa, arguing that the Board failed to consider that AFDC and TANF served the same purpose as well as the fact that the AFDC appropriations bills authorized funds for payments under title IV-A to remain available until expended. See DAB No. 1954, at 5. The Board found these arguments unavailing, concluding that even if funds appropriated for AFDC could be used to pay for costs that would otherwise be funded by TANF, "program-based limitations" prohibit the use of AFDC funds "to augment a state's TANF grant." Id. at 5-6 (emphasis in original). In particular, the Board stated:

³ In its initial brief, Wisconsin took the position that it had accounted for the AFDC overpayment recoveries by **reducing** the amount claimed under its TANF grants. However, Wisconsin subsequently changed its position, stating:

Wis. DWD used its "federal Payment Management System" to credit its repayments of recovered AFDC overpayments to its existing balances of TANF funds during the period from September 1996 through July 2002. Wis. DWD included the amount of approximately \$10.7 million in its available TANF funds due to these repayments. Between March 2003 and December 2004, Wis. DWD fully spent its TANF grants for the years 1997 through 2003.

See WI letter to Board dated 7/7/06 (also at ACF Ex. 5); see also ACF Br. at 14.

Section 403(a)(1) of the Act sets a dollar limit, or cap, on the amount of expenditures that can be reimbursed as costs of the TANF program. If a state that had claimed all of the funds to which it was entitled under the cap were permitted to use AFDC funds for costs of its program under TANF, the total amount of program costs paid with federal funds would exceed the TANF cap.

Id. at 5. In support of this conclusion, DAB No. 1954 also noted that: 1) former section 403(b)(2)(B) of the Act did not authorize states to make expenditures that would not otherwise be authorized under title IV-A; 2) nothing in the "transition rules" in section 116(b) of PRWORA provides for using AFDC funds for TANF costs; and 3) although section 404(a)(1) of the Act, as interpreted by ACF, authorizes the use of TANF funds for AFDC costs, there is no comparable provision in the Act for using AFDC funds for TANF costs. Id. at 5-6.

Wisconsin does not comment on the Board's analysis in Texas. Nor does Wisconsin dispute ACF's assertion that permitting Wisconsin to spend all of its TANF block grant funds plus the federal share of the AFDC overpayment recoveries on the TANF program would result in Wisconsin exceeding TANF's statutory cap, and, therefore, in receiving more federal funds for TANF purposes than authorized by statute. See ACF Br. at 14, citing ACF Ex. 21, at 3 (Declaration of Charles Sigl). Instead, Wisconsin argues that it accounted for its AFDC overpayment recoveries in accordance with a May 2000 program instruction, TANF-ACF-PI-99-2 (Revised), that stated that AFDC overpayment recoveries may be "credited to the TANF grant." See ACF Ex. 8, at 2. This statement does not apply to the facts of this case, however. As the Board pointed out in Texas, TANF-ACF-PI-99-2 (Revised) did not authorize a state to augment its TANF grant, but rather required that the amount of cash drawn down under a state's TANF grant be reduced by the amount of its AFDC overpayment recoveries. DAB No. 1954, at 7. In this situation, the federal share of cash from the recoveries would substitute for federal cash the state otherwise would have been entitled to draw down for allowable TANF expenditures.

In any event, Wisconsin does not appear to have relied on any misreading of TANF-ACF-PI-99-2 (Revised). Wisconsin does not deny that it failed to repay in cash the federal share of its AFDC overpayment recoveries both before this program instruction was issued and after it was rescinded by a September 2000 program instruction directing states to repay in cash the federal share

of recoveries of AFDC overpayments made before October 1, 1996 (TANF-ACF-PI-2000-2 (ACF Exhibit 9)).

Accordingly, we conclude that, under the applicable law, Wisconsin may not account for the federal share of its AFDC overpayment recoveries by using these funds to pay for costs incurred for TANF purposes because this would permit Wisconsin to exceed the cap on federal funding for TANF.⁴

2. Under applicable law, Wisconsin was required to reduce its quarterly claim for AFDC funds by the amount of AFDC overpayments recovered before October 1, 1996.

As indicated previously, the disallowance also included the federal share of AFDC overpayments recovered by Wisconsin in July through September 1996, totalling \$325,340. At the time of the recoveries, Wisconsin's AFDC program was still ongoing, although ACF also authorized TANF funding for Wisconsin from August 22, 1996 through September 30, 1996. Prior to the quarter ended September 30, 1996, Wisconsin had reduced its quarterly claim for AFDC funds by the amount of AFDC overpayments recovered in each quarter. However, the auditors found that Wisconsin did not do so for the quarter ended September 30, 1996 and did not repay the federal share of its AFDC overpayment recoveries for this quarter in cash. According to the auditors, "State officials attributed the unreturned AFDC cash recoveries to timing differences between State and local agency record keeping and reporting procedures for overpayment recoveries." ACF Ex. 2, at 8.

Wisconsin's briefing does not separately address this part of the disallowance, but the \$325,340 appears to be included in the amount that Wisconsin states it added to its TANF grant. We conclude that Wisconsin could not properly account for these funds in this manner. At the time the overpayments were recovered, section 403(b) of the Act provided a mechanism for accounting for the federal share: reduction of the quarterly

⁴ Wisconsin appears to suggest that it would not have spent funds in excess of the TANF cap but for "the length of time taken by the federal audit review process." WI Reply Br. at 2. However, the final audit report is dated August 5, 2002. See ACF Ex. 2, at 4. Wisconsin does not claim to have fully expended its TANF funds until after the date of that report. See WI Reply Br. at 2; ACF Ex. 5. In any event, Wisconsin had legal notice of the cap on federal funding for TANF established by section 403(a)(1), so it is irrelevant when the auditors questioned Wisconsin's transfer of AFDC overpayment recoveries to TANF.

AFDC payment by the federal share of the net overpayments for prior quarters. Thus, Wisconsin should have reported its AFDC overpayment recoveries in its AFDC quarterly expenditure report (QER) for the quarter ended September 30, 1996.⁵ Even if local agencies had not reported their overpayment recoveries in time for Wisconsin to report them on that QER, as Wisconsin suggested to the auditors, we see no reason why Wisconsin could not have revised the QER at a later date to include the previously unreported AFDC overpayment recoveries. Moreover, Wisconsin could not have reasonably relied on TANF-ACF-PI-99-2 (Revised) as authorizing it to account for its AFDC overpayment recoveries in another way since that program instruction was expressly "effective for recoveries made after 9/30/96." See ACF Ex. 8, at 1.

3. Wisconsin has shown no basis for an offset against the amount of AFDC overpayment recoveries that must be repaid in cash.

Wisconsin argues in the alternative that the amount of AFDC overpayment recoveries to be returned should be reduced to reflect the net amount recovered after subtracting costs Wisconsin allegedly incurred to obtain the recoveries. According to Wisconsin, the amount owed after offset would be \$5,738,167.⁶ WI Br. at 8.

As Wisconsin notes, a similar argument was made by the state in Texas. The Board there found that the language of former section 403(b)(2)(B) of the Act "on its face requires a state to account only for the amount of AFDC overpayment recoveries net of any costs the state incurred to obtain these recoveries." Texas at

⁵ Due to the length of time required to identify and collect an overpayment, it is likely that the overpayment recoveries in July through August 1996 were attributable to overpayments for prior quarters.

⁶ In calculating this amount, Wisconsin indicated that it had made a downward adjustment of \$187,067 because the amount of AFDC overpayment recoveries was overstated. WI Br. at 7. ACF stated that Wisconsin had reported some "TANF collections" as AFDC overpayment recoveries, but asserted that the auditors "already took these TANF collections into account" in calculating the amount of AFDC overpayment recoveries. ACF Br. at 25, citing ACF Ex. 1, at 1 (audit worksheet) and ACF Ex. 2, at 7. Since Wisconsin's reply brief does not challenge ACF's assertion, we find that ACF correctly represented that the repayment amount identified by the auditors reflects this adjustment.

8. However, although the Board stated that an offset "was in theory permissible," the Board found that Texas had previously charged the recovery costs to its TANF grant (which ACF had determined was permitted by the TANF statute) and "therefore currently has no unreimbursed recovery costs which could be offset against its AFDC overpayment recoveries."⁷ Id. at 9. The Board declined to issue "an advisory opinion" regarding whether Texas is required to repay the federal share of its AFDC overpayment recoveries based on its "expectation that it will in the future have unclaimed recovery costs to offset against them." Id.⁸

Wisconsin claims that its situation is distinguishable from that in Texas because it can identify AFDC recovery costs that have not been reimbursed. WI Br. at 10. The recovery costs identified by Wisconsin include "the administrative costs allocable to the collection of AFDC overpayments by Public Assistance Collections Unit," specifically, "administrative costs

⁷ ACF characterizes as "dicta" the Board's statement that an offset is in theory permissible and also asserts that the Board does not have jurisdiction to consider the offsets claimed here. See ACF Br. at 28-30. It is unnecessary to address ACF's position on these matters in order to uphold the disallowance in this case. As we noted in Texas, however, ACF did not dispute that, "while the AFDC program was still in existence, [section 403(b)(2)(B)] allowed a state to simply report the net overpayments that it had collected and ACF to then reduce the next payment of AFDC funds to the state by the federal share of that amount." DAB No. 1954, at 8.

⁸ The Board noted in any event that Texas' proposal to reduce its TANF grant by the amount previously charged to that grant for AFDC recovery costs, thereby making these costs available for offset against its AFDC overpayment recoveries, and to charge its TANF grant a corresponding amount for expenditures for TANF benefits that Texas had not previously claimed, raised several questions. Those questions included: 1) whether the amount previously charged to its TANF grant for AFDC recovery costs was properly allocated to the AFDC program in accordance with its cost allocation plan, and 2) whether Texas could document that it had allowable expenditures for TANF benefits a) which it had not claimed, b) which had not been used to satisfy its TANF maintenance of effort requirement, and c) which could be filed within the two-year period specified in section 1132 of the Act or qualified for an exception to the two-year filing requirement. DAB No. 1954, at 10.

for AFDC collections," "administrative costs for fraud/program security," and "administrative costs for local fraud/program integrity." WI Reply Br. at 4; WI Br. at 6-7. Wisconsin states, however, that "[t]he proposal for the PACU [Public Assistance collections Unit] administrative costs is to amend the appropriate reports so that these amounts are not treated as TANF costs of TANF MOE [maintenance of effort] and are instead treated as costs of AFDC overpayment collection." WI Reply Br. at 4. In this statement, Wisconsin effectively admits that the costs may have been used for the required MOE, without which its TANF grant for later years would have been reduced. Even if Wisconsin has not been "reimbursed" for these specific expenditures, therefore, changing the treatment of these expenditures could affect Wisconsin's entitlement to federal TANF funds. Thus, we conclude that, as was the case with respect to the asserted recovery costs in Texas, these administrative costs are not presently available for offset.

ACF's brief sets out other grounds for finding that the administrative costs may not properly be used to offset Wisconsin's AFDC overpayment recoveries. For example, ACF points out that nearly one third of the alleged administrative costs were incurred after the audit period. See ACF Br. at 29. In view of our finding that the administrative costs are not presently available for offset, we need not discuss the other grounds here, although we note that, to the extent that Wisconsin even addressed these grounds, its arguments are not persuasive.

The other AFDC recovery costs identified by Wisconsin are incentive payments to counties made pursuant to a State statute permitting counties to retain 15% of AFDC benefits that are recovered due to the efforts of an employee. ACF argues, however, and we agree, that these costs would not have been allowable as AFDC costs and, accordingly, may not be set off against the federal share of the AFDC overpayment recoveries required to be repaid in cash. To be allowable, a cost must, among other things, be "necessary and reasonable for the proper and efficient performance and administration of Federal awards." OMB Circular A-87, Att. A, ¶ C.1.a.⁹ The Board has stated that, to be necessary, costs must be-

⁹ OMB Circular A-87 was made applicable to the title IV-A AFDC program by 45 C.F.R. § 92.22 (1994). The quoted provision has been in effect since 1995. 60 Fed. Reg. 26,484 (May 17, 1995).

"integral to overall efficient program operation." [New York State Dept. of Social Services, DAB No. 1072, at 9 (1989)] . . . They need not be indispensable or the only way possible to reach the objectives [of the program], but costs that are tangential or unrelated to the specific goals of the program are not "necessary."

New York State Dept. of Health, DAB No. 1636, at 14-15 (1997). Moreover, it is a fundamental principle of grants management that a grantee is required to document its costs, and the burden of demonstrating the allowability and allocability of costs for which funding was received under a grant rests with the grantee. See, e.g., Washington State Dept. of Social and Health Services, DAB No. 1214 (1990); see also 45 C.F.R. §§ 92.40-92.42 (1994). Wisconsin did not meet that burden here since it did not offer any evidence to show that incentive payments over and above the actual administrative costs of collection were necessary to obtain the AFDC overpayment recoveries. Wisconsin appears instead to rely merely on the fact that the incentive payments were required by State statute. As ACF points out, however, if that sufficed to make the incentive payments a necessary cost of the AFDC program, "States could redirect the entire Federal share of overpayment recoveries to their counties or other political subdivisions" in the form of incentive payments "by legislative fiat." ACF Br. at 38.¹⁰ ACF also points out that section 1903(p)(1) of the Act authorizes 15% incentive payments to political subdivisions of a state that collect Medicaid support payments and other payments for medical care owed to Medicaid recipients. ACF argues persuasively that it is reasonable to infer from the absence of a comparable provision in the former title IV-A that Congress did not intend incentive payments to be allowable costs of the AFDC program. Finally, Wisconsin points to nothing in AFDC regulations or guidance indicating that ACF had determined that incentive payments were reasonable for administration of the AFDC program.

Thus, we conclude that the incentive payments were not necessary costs of the AFDC program and could not be used to reduce the federal share of overpayment recoveries required to be refunded to ACF.

¹⁰ ACF also notes that Wisconsin law does not authorize any incentive payments for recoveries under the State-only public assistance program, which calls into question whether incentive payments were necessary to recover federally funded overpayments.

4. The Board has no authority to waive interest accrued on the disallowance amount.

In its September 27, 2005 letter to Wisconsin requiring repayment, ACF stated that "[i]n accordance with regulations of Title 45 CFR 30.13(a), interest will be charged from the date of this letter on amounts not repaid or refunded within 30 days of the mailing of this letter." At 4.

Wisconsin takes the position that it is "not appropriate to assess interest on any amount that may still be found to be due," arguing that since it transferred the federal share of the AFDC overpayment recoveries to its TANF program, "the federal government has had the benefit of all of the overpayment funds returned in this manner during the audit period." WI Br. at 2.

As ACF indicates, this matter is outside the scope of the Board's review in this case. See ACF Br. at 51. In White Mountain Apache Tribe, DAB No. 1787 (2001), the Board stated that-

we do not have the authority to waive any interest which may accumulate on a disallowance. Interest itself is not part of the disallowance. Once the Board concludes that there is a valid debt, the Federal Claims Collection Act regulations at 45 C.F.R. Part 30 provide a separate process for the Secretary (or his designee within an operating division or regional office) to determine how the debt should be repaid. United Maine Families, DAB No. 1707 at 5-6 (2001).

DAB No. 1787, at 5. Accordingly, we do not consider this matter further.

Conclusion

For the reasons discussed above, we uphold the disallowance in full.

_____/s/
Leslie A. Sussan

_____/s/
Constance B. Tobias

_____/s/
Judith A. Ballard
Presiding Board Member