

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Blackfeet Tribe
Docket No. A-15-92
Decision No. 2675
January 26, 2016

DECISION

Blackfeet Tribe (Blackfeet or the Tribe) appealed the May 26, 2015 determination of the Administration for Children & Families (ACF) that Blackfeet is subject to a penalty in the amount of \$297,612 for misuse of funds provided under the Tribal Temporary Assistance for Needy Families (TANF) program. ACF imposed the penalty after finding Blackfeet’s corrective compliance plan (CCP) unacceptable, denying Blackfeet’s request for a reasonable cause exception to the penalty and rejecting Blackfeet’s subsequent request to submit a second CCP. On appeal, Blackfeet argues that a penalty should not be imposed because its CCP was acceptable—or if not, it should have been permitted to submit a second CCP—and because it had reasonable cause for an exception to the penalty.

For the reasons set forth below, we find no merit in Blackfeet’s arguments, and we uphold the penalty in the amount of \$297,612. As we also explain below, pursuant to the applicable regulations, the amount of TANF funds to which Blackfeet is entitled for the next year will be reduced by the penalty amount and Blackfeet must expend non-federal funds to replace the federal funds that would have otherwise been available for its TANF program.

Legal Background

Title IV-A of the Social Security Act (Act) authorizes the Secretary of Health & Human Services to provide eligible Indian tribes with annual “tribal family assistance grants” (TFAG) that enable those tribes to offer employment, vocational training, and other welfare services that help needy families attain self-sufficiency. 42 U.S.C. § 612(a) (Act § 412(a)); *see also* 45 C.F.R. § 286.35 (tribes may use TANF funds for expenditures that

“[a]re reasonably calculated to accomplish the purposes of TANF” or “[w]ere an authorized use of funds under the State plans for Parts A or F of title IV of the Social Security Act, as such parts were in effect on September 30, 1995”).¹

The regulations for the TANF program state that if ACF determines that an Indian tribe “misused its Tribal Family Assistance Grant [TFAG] funds, . . . we will reduce the TFAG for the following fiscal year by the amount so used.” 45 C.F.R. § 286.195(a)(1). The regulations also state that “[i]f a Tribe uses the TFAG in violation of the provisions of the Act, the provisions of 45 CFR part 92, OMB Circulars A-87 and A-133, or any Federal statutes and regulations applicable to the TANF program, [ACF] will consider the funds to have been misused.”² *Id.* § 286.200(b).

The regulations further provide that if ACF “determine[s] that a Tribe is subject to a penalty, [ACF] will notify the Tribe in writing.” 45 C.F.R. § 286.220(a). Within 60 days of receipt of this notice, a tribe may submit a written response to ACF that:

- (1) Demonstrates that our [ACF’s] determination is incorrect because our data or the method we used in determining the penalty was in error or was insufficient;
- (2) Demonstrates that the Tribe had reasonable cause for failing to meet the requirement(s); and/or
- (3) Provides a corrective compliance plan as discussed in § 286.230.

Id. § 286.220(b); *see also id.* §§ 286.220(a)(5), 286.225(a), and 286.230(a).

The regulations continue:

- (c) If we find that the Tribe was correct and that a penalty was improperly determined or find that a Tribe had reasonable cause for failing to meet a requirement, we will not impose the related penalty

¹ The applicable regulations define “TANF funds” as “funds authorized under section 412(a) of the Act” and “TFAG or Tribal Family Assistance Grant” as “the amount of the block grant funded under section 412(a) of the Act for each eligible Tribe.” 45 C.F.R. § 286.5. For convenience, except where quoting, we use the term TANF funds to refer to the funds generally as well as the amount received by a tribe.

² Section 286.45(d) states: “All provisions in OMB Circular A-133 and in 45 C.F.R. part 92 are applicable to the Tribal TANF program.” After the period at issue here, the Office of Management and Budget (OMB) consolidated the content of OMB Circular A-133, as well as other circulars, into one streamlined set of uniform administrative requirements, cost principles, and audit requirements for federal awards, currently published in 2 C.F.R. Part 200. *See* 78 Fed. Reg. 78,590 (Dec. 26, 2013). In addition, 45 C.F.R. Part 92 was superseded by the “Uniform Administrative Requirements, Cost Principles, and Audit Requirements for HHS Awards” published in 45 C.F.R. Part 75. *See* 79 Fed. Reg. 75,871, 75,889 (Dec. 19, 2014).

(d) If we determine that the Tribe has not demonstrated that our original determination was incorrect or that it had reasonable cause, we will notify the Tribe of our decision in writing.

Id. § 286.220(c), (d).

The regulations also provide that if a tribe “does not claim reasonable cause [it] will have 60 days from receipt of the notice described in § 286.220(a) to submit its corrective compliance plan to [ACF].” *Id.* § 286.230(b). If a tribe claims but “does not demonstrate reasonable cause [it] will have 60 days from receipt of the second notice described in § 286.220(d) to submit its corrective compliance plan to [ACF].” *Id.* § 286.230(c). The contents of a CCP are described in section 286.230(d). ACF has 60 days from the date it receives the CCP to accept or reject it. *Id.* § 286.230(e), (f). If the plan is accepted, ACF “will not impose a penalty against a Tribe with respect to any violation covered by that plan if the Tribe corrects the violation within the time frame agreed to in the plan.” *Id.* § 286.230(g)(1).

Finally, the regulations provide that ACF “will formally notify the Tribe of a potential reduction to the Tribe’s TFAG [Tribal Family Assistance Grant] within five days after [ACF] determine[s] that a Tribe is subject to a penalty and inform the Tribe of its right to appeal to the Departmental Appeals Board (the Board)....” *Id.* § 286.240(a).

We identify other legal provisions below where appropriate.

Factual and Procedural Background

The following facts are drawn from the parties’ briefs and exhibits and are undisputed.³ Blackfeet operates a TANF program for which it received over \$3,000,000 per year from April 2006 through November 30, 2010. ACF Ex. B at 3. To be eligible for the benefits provided by the program, an applicant must be an enrolled member of Blackfeet. *Id.* at 2. The amount of benefits received is based primarily on household composition and income. *Id.* at 3.

In 2005, Blackfeet hired Sandra Sanderville as its TANF Director. Appeal Br. at 1; ACF Ex. B at 4. In December 2013, Sanderville was indicted in the federal District Court for the District of Montana on two counts of theft, including Theft from an Indian Tribal Government Receiving Federal Grants (Count I). ACF Ex. B at 1-2. Count I of the indictment states that Sanderville—

³ We identify additional undisputed facts in the Analysis section of the decision where appropriate.

devised and executed a “split-check” scheme whereby ineligible persons were given TANF benefits, and eligible persons were given excessive TANF payments, and thereafter would return a portion of the transacted TANF check to [Sanderville], resulting in an aggregate loss of over \$288,000, more or less, to the Blackfeet TANF program[.]

Id. at 5.

In February 2014, Sanderville pled guilty to Count I of the indictment. ACF Exs. C, D. By letter dated March 11, 2014, ACF notified Blackfeet that, in light of the facts to which Sanderville pled guilty, ACF “must hold the Tribe accountable for the misuse of Federal funds, and, in accordance with the regulations at 45 CFR 286.195(a)(1) and 45 CFR 286.200, the Blackfeet Tribe is subject to a penalty of \$297,612.” Blackfeet Att. G at 1.⁴ ACF’s March 11, 2014 letter also notified Blackfeet of the options available to it at that point, i.e., dispute the penalty, claim reasonable cause, submit a CCP, or appeal the penalty to the Board. *Id.*

On May 12, 2014, Blackfeet submitted a CCP to ACF. Appeal Br. at 4-5, citing Blackfeet Att. H. Blackfeet appealed the penalty to the Board by letter dated July 14, 2014 (e-filed on July 15, 2014 and docketed as No. A-14-94). Also on July 14, Blackfeet submitted an “addendum” to its CCP to ACF. Blackfeet Appeal Br. at 5, citing Blackfeet Att. I. The addendum outlined a plan to repay \$297,612 to ACF in the event its appeal to the Board was denied. *Id.* In a September 9, 2014 letter to Blackfeet, ACF found Blackfeet’s CCP unacceptable because it did not include any provision for repayment of the misused funds. Blackfeet Att. N. ACF also advised Blackfeet that it had the option of disputing the penalty, claiming reasonable cause, or appealing the penalty to the Board. *Id.* Blackfeet then withdrew its July 14, 2014 appeal to the Board, stating that it was interested in exploring other options identified in ACF’s September 9, 2014 letter, and the Board closed the case on its docket. Docket No. A-14-94, Blackfeet ltr. dated 10/3/14; Blackfeet Att. O (Board ltr. dated 10/10/14).

By letter dated November 4, 2014, Blackfeet requested an exception to ACF’s penalty determination based on reasonable cause. Blackfeet Att. P. By letter dated December 19, 2014, ACF denied the request and advised Blackfeet that it had the option of disputing the penalty or appealing the penalty to the Board. Blackfeet Att. Q.

⁴ ACF’s letter does not explain how it determined the penalty amount. However, Blackfeet does not dispute that the amount of funds diverted by Sanderville was \$297,612 and submitted a January 10, 2014 letter from the TANF Supervisor in its Manpower Program to a Special Agent in the Office of Inspector General that lists “over-payments” to 15 individuals totaling \$297,612 (Blackfeet Att. F).

By letters dated February 2, 2015 and February 19, 2015, Blackfeet requested that it be permitted to enter into a second CCP since its request for a reasonable cause exception had been denied. Blackfeet Exs. R, S.

By letter dated May 26, 2015, ACF advised Blackfeet that it has “exhausted [its] options with [ACF]” and that the letter constituted ACF’s “final determination” that Blackfeet “is subject to a misuse of funds penalty in the amount of federal Tribal TANF dollars that Ms. Sandra Sanderville, the former Director of the Tribe’s TANF program, stole.” Blackfeet Att. T at 1-2. Blackfeet timely appealed that determination.

Analysis

We note at the outset that Blackfeet does not dispute ACF’s determination that it misused TANF funds within the meaning of section 286.200(b). ACF found that Blackfeet violated two provisions of 45 C.F.R. Part 92:

First, 45 C.F.R. § 92.22 limits grant funds to the allowable costs of the grantees. Allowable costs are only those “reasonably calculated to accomplish the purpose” of Part IV-A of the Social Security Act. 42 U.S.C. § 604. Section 92.22 also incorporates the applicable cost principles, which state that allowable costs must “be necessary and reasonable for proper and efficient performance and administration of Federal Awards.” 2 CFR Part 225 Appendix A (codifying OMB Circular A-87). Therefore, allowable costs do not include payments to ineligible TANF recipients and overpayments to eligible recipients. Further, 45 C.F.R. § 286.45 states that “a tribe may not use Tribal Family Assistance Grant Funds to provide assistance to families or individuals that do not otherwise [meet] the eligibility criteria contained [in the] Tribal Family Assistance Plan.” The Tribe also violated 45 C.F.R. § 92.20(b)(3), which provides that “[e]ffective control and accountability must be maintained for all grant and subgrant cash, real and personal property, and other assets. Grantees ... must adequately safeguard all such property and must assure that it is used solely for authorized purposes.” The Tribe, as the Federal grantee, is responsible for assuring that funds are used for authorized purposes. Failing to do and thus violating provisions of Part 92 means that the Tribe has misused TANF grant funds.

Blackfeet Att. T at 3. Although Blackfeet does not challenge the determination that it used TANF funds for the reasons stated by ACF, Blackfeet argues that it is not subject to the penalty for that misuse because (1) it demonstrated reasonable cause for the misuse of funds; (2) it submitted an acceptable CCP; or (3) ACF should have given it an opportunity to submit a second CCP. We address these arguments in turn below. We then explain the effect of our decision to uphold the misuse of funds penalty.

I. ACF's determination that there was no reasonable cause for Blackfeet's misuse of TANF funds was not arbitrary or capricious.

Section 286.225, captioned "How may a Tribe establish reasonable cause for failing to meet a requirement that is subject to application of a penalty?," provides in relevant part:

- (a) We will not impose a penalty against a Tribe if it is determined that the Tribe had reasonable cause for failure to meet the requirements listed at § 286.195(a)(1) The general factors a Tribe may use to claim reasonable cause include, but are not limited to, the following:

- (3) Isolated, non-recurring problems of minimal impact that are not indicative of a systemic problem.

In its request for a reasonable cause exception, Blackfeet asserted that it had reasonable cause for the misuse of its TANF funds under section 286.225(a)(3) because "the misuse of funds came at the hands of one individual," Sanderville, who "alone orchestrated a sophisticated scheme to defraud the Tribe." Blackfeet Att. P at 5. According to Blackfeet, "Sanderville's ability to unilaterally control access to the Tribal Assistance System (TAS) enabled her to perform her criminal scheme over a period of years, without being detected." *Id.*

In addition, Blackfeet alleged that when employees of the Blackfeet Manpower Program (which "provides direct oversight over the Blackfeet Tribal TANF Program") became aware of Sanderville's "suspicious activity" in late 2010, they worked "on implementing safeguards within the TANF Department to prevent further fraudulent activities." Blackfeet Att. P. at 6. These activities included "installing the 'Relia-Card' software on the TAS; upgrading the TAS database, which included adding additional safeguards to the system; providing training on the new software and upgrading the system; creating stringent policies and procedures; and creating new 'Case Reviewer' and 'Fraud Recovery' positions, intended to monitor and detect fraudulent activity." *Id.*; *see also* Blackfeet Att. G.

In its letter rejecting Blackfeet's claim of good cause, ACF stated:

We considered your reasonable cause claim under the isolated, non-recurring problems of minimal impact factor; as well as whether your claims generally amount to reasonable cause since the list of factors outlined in section 286.225 is illustrative but not exclusive. The grounds stated to support your reasonable cause

claim detail largely internal administrative issues that do not amount to reasonable cause for why the misuse of funds occurred. Furthermore, the fact that only one employee carried out the theft does not in itself demonstrate that the theft and misuse of TANF funds is an isolated problem of minimal impact that is not indicative of a systemic problem.

Blackfeet Att. Q at 1-2.

Blackfeet argues before us that ACF erred in determining that it had not shown reasonable cause for its misuse of TANF funds. According to Blackfeet, “although the misuse of funds was administrative in nature, the actual misuse came at the hands of one employee who had developed a sophisticated scheme to avoid being detected.” Appeal Br. at 12. Blackfeet continues: “The Tribe itself did not benefit from Sanderville’s actions. As soon as the Tribe became aware of Sanderville’s actions, it took corrective initiative. Given that the Tribe did not initiate the misuse of funds, and took immediate action implementing procedural safe guards, reasonable cause exists to exempt the Tribe from the misuse of funds penalty.” *Id.* Further, Blackfeet asserts that, contrary to what ACF found, “Sanderville’s actions were an isolated problem limited to the conduct of Sanderville herself” since “[n]o other employee from the Tribe was associated with and or charged criminally in connection with Sanderville” and “Sanderville was the first employee of the Tribe to engage in this type of criminal activity involving the misuse of TANF funds.” *Id.* at 12-13; *see also id.* at 11 (arguing that reasonable cause exists pursuant to section 286.225(a)(3) because “Sanderville’s unilateral actions constituted an isolated incident; her conduct was of minimal impact, in that she acted alone; . . . nor did her activity have a direct adverse effect on the TANF client[ele]; and lastly, her activity was not indicative of a systematic problem, due to the fact that this was the first time this type of criminal activity took place within the Manpower Program.”).

We find no error in ACF’s determination because it is consistent with the applicable regulations and constitutes a reasonable exercise of ACF’s discretion. We apply this standard based on longstanding Board precedent, summarized in the Board’s decision in *University of California*, DAB No. 2662 (2015). There the Board stated as follows:

To the extent that an adverse determination reflects a reasonable exercise of programmatic discretion or expert judgment, the Board will ordinarily not interfere. *See, e.g., Okla. Dept. of Human Servs.*, DAB No. 963, at 6-7 (1988) (holding, in a dispute involving a cost allocation plan approved by the cognizant agency, that the Board would defer to agency expertise “absent a compelling reason for concluding that the approved plan was improper”); *S.D. Dept. of Social Servs.*, DAB No. 465, at 4 (1983) (“This Board has often held that it will not

substitute its discretion for that of the Agency where the Agency's decision is in accordance with the rules and the Agency's exercise of its discretion is reasonable.”); *Ca. Dept. of Health Servs.*, DAB No. 170, at 10 (1981) (“Where a matter involves an exercise of programmatic judgment, the Board will not normally interfere.”).

DAB No. 2662, at 11 (2015). Here, section 286.225(a)(3) identifies as one basis for finding reasonable cause the existence of “[i]solated, non-recurring problems of minimal impact that are not indicative of a systemic problem.” We conclude that ACF reasonably found this provision inapplicable on the facts of this case. Sanderville’s ability to divert Blackfeet’s TANF funds for so long without being detected is indicative of systemic problems in the administration of Blackfeet’s TANF program. Blackfeet’s own CCP listed numerous vulnerabilities and flaws in Blackfeet’s financial management procedures for its TANF program that contributed to Sanderville’s ability to misuse TANF funds, including the following:

- The Tribal TANF program had no internal monitoring processes set up.
- The TAS database program was set at security level one.
- [Sanderville] carried a hand-picked, case load of child-only cases, where children were added and she was able to manufacture bogus participants/families.

- [Sanderville] was given full security access, by the compliance officer, to the TAS database and was able to restrict access to certain account information from other staff members, as well as the ability to delete case notes, notices, payments, etc.
- Tribal TANF benefits were issued in check form. There was room for manipulation of TANF amounts as well as double and sometimes triple issuance on a monthly basis.
- [Sanderville] implemented the early issuance of TANF checks, to be used only under strict circumstances. However, she misused this practice, keeping certain participants on the regular monthly issuance. These participants thereby receiving double issuance of monthly TANF amount.

- There was no internal protocol to report fraud within the [Blackfeet Tribal TANF Program] or for participants to report other participants and/or staffs suspected fraudulent activities.

Blackfeet Att. H at 1. Thus, Blackfeet in effect acknowledged that the misuse of funds was attributable at least in part to several systemic problems, even if Sanderville acted alone and there were no other instances of such criminal activity in Blackfeet’s Manpower Program.

Moreover, the fact that once Sanderville's scheme had been exposed, Blackfeet took corrective action to prevent a similar scheme from occurring in the future does not mean that the problem itself was "non-recurring." Indeed, Sanderville's unlawful diversion of TANF funds occurred repeatedly over a period of several years.

Furthermore, contrary to what Blackfeet argues, the impact of Sanderville's diversion of TANF funds is significant. Blackfeet itself says that it "has exhausted Tribal resources to ensure that the problems cause[d] by Sandra Sanderville have been identified and corrected." Blackfeet Reply Br. at 7. In addition, Blackfeet had less federal funding available to provide services during the years Sanderville was diverting TANF funds.

Blackfeet does not identify any basis other than section 286.225(a)(3) on which ACF should have found reasonable cause. However, as noted above, ACF stated that it also considered "whether [Blackfeet's] claims generally amount to reasonable cause since the list of factors outlined in section 286.225 is illustrative but not exclusive." Blackfeet Att. Q at 1. ACF determined that Blackfeet's request for a reasonable cause exception "detail[ed] largely internal administrative issues that do not amount to reasonable cause for why the misuse of funds occurred." *Id.* While ACF did not specify what it meant by "internal administrative issues," ACF presumably was referring to Blackfeet's assertion in its request for a reasonable cause exception that Sanderville was able to divert TANF funds by taking advantage of the vulnerabilities and flaws in Blackfeet's internal procedures for administering its TANF program. We conclude for the reasons discussed above that ACF reasonably determined that this was not a basis for finding reasonable cause. ACF might have been referring as well to Blackfeet's assertion that it "had reasonable cause for not detecting that Sanderville was providing TANF clients with overpayments" because the Department of Internal Affairs in the Blackfeet Manpower Program, which investigated Sanderville's activity starting in 2010, did not inform either the Director of the Manpower Program or the Tribal Chairman of "the specific details of such activity" until 2013. Blackfeet Att. P at 7. However, as previously noted, Sanderville's diversion of TANF funds ended about November 30, 2010. Thus, even if details of the investigators' findings were withheld from Blackfeet until 2013, that has no bearing on whether there was reasonable cause for Blackfeet's failure to either prevent the diversion of funds or detect it earlier.

Based on the foregoing, we conclude that ACF did not err in denying Blackfeet's request for a reasonable cause exception pursuant to section 286.225.

II. ACF did not err in finding Blackfeet's corrective compliance plan unacceptable.

Section 286.230 provides that a tribe may avoid imposition of a penalty if it submits a CCP that is accepted by ACF and "corrects the violation within the time frame agreed to in the plan." Section 286.230(c), (g). The tribe "must outline" in its CCP:

- (1) Why it failed to meet the requirements;
- (2) How it will correct the violation in a timely manner; and
- (3) What actions, outcomes and time line it will use to ensure future compliance.

Section 286.230(d).

Blackfeet submitted a CCP on May 12, 2014 that provided for a year-long process during which Blackfeet would complete certain actions to achieve the following objectives: “Improve record keeping in TANF case management”; “Improve overall review of cases and finances and develop additional safeguards against fraud”; “Develop a Fraud reporting procedure and inform clients and employees about the process. Commitment to compliance with all laws, regulations and guidelines governing federally funded program”; “Increase awareness about fraud and encourage transparency within Manpower. Reduction of fraud & abuse-open door policy for employees reporting encourages communications”; “Build Partnerships to ensure that outside support and review are available when fraud cases arise”; “Improve program organization and workplace flow, have more staff available for reporting, and a process where clients are clearly monitored.” Blackfeet Att. H at 4-6.

ACF determined that the CCP was not acceptable because it “did not meet all of the regulatory requirements.” Blackfeet Att. N at 1. ACF stated specifically that “to be acceptable, the plan must explain why the Tribe failed to meet the requirements underlying the penalty, *describe how it will correct the violation (repayment of funds)* in a timely manner, outcomes and timeline the Tribe will use to ensure future compliance, and include a certification by the Chairman that the Tribe is committed to correcting the violation in accordance with the plan.” *Id.* at 2 (italics added). ACF noted that soon after receiving Blackfeet’s plan, it contacted Blackfeet “to discuss the additional information required in order for the CCP to be accepted and approved” and specifically asked Blackfeet “to revise the CCP to include information on how the Tribe planned to repay the misused funds.” *Id.* ACF further noted that Blackfeet submitted an “addendum” to its CCP that “outlined a repayment plan” for use only in the event Blackfeet’s appeal to the Board was unsuccessful. *Id.* It was reasonable for ACF to infer that the addendum thus did not provide for repayment of the amount diverted by Sanderville as a corrective action but instead was simply a proposal to repay this amount if the Board determined that Blackfeet was subject to the penalty.

Before us, Blackfeet does not dispute that its CCP did not provide for repayment of the amount of TANF funds diverted by Sanderville. However, Blackfeet takes the position that section 286.230 does not require such a provision, stating:

Nowhere within the plain language of 45 CFR § 286.230 does it require the Tribe to describe how the misused funds will be repaid, including repaying such amount with Tribal funds. The corrective compliance plan must identify the action steps,

outcomes, and time frames for completion that the Tribe believes will fully and adequately correct the violation. It makes no sense that the ACF is mandating that the Tribe include repayment information in their CCP in the first place. The whole purpose of the Tribe entering into a CCP is to avoid the imposition of the penalty.

Blackfeet Appeal Br. at 9 (emphasis in original).

ACF maintains that where the violation consists of misuse of TANF funds, “correcting the violation requires making the grant whole by replacing the misused funds.” ACF Br. at 12. In support of its position, ACF points to language in the preamble of the final rule for the Tribal TANF program explaining how ACF has implemented the statutory requirement that, prior to imposing certain penalties against a tribe, ACF give the tribe the opportunity to enter into a CCP. The preamble states in pertinent part:

. . . . Our determination to accept a plan will be guided by the extent to which the Tribe's plan indicates that it will correct the situation leading to the penalty.

In instances where a Tribe used its TFAG in a manner that is prohibited (see §286.200 on misuse of funds), we will expect that it will remove this expenditure from its TANF accounting records and provide steps to assure that such a problem does not recur.

65 Fed. Reg. 8478, 8514 (Feb. 18, 2000) (cited in ACF Br. at 12) (emphasis added).

We conclude that ACF did not err in finding Blackfeet’s CCP unacceptable. Although section 286.230 does not expressly state how a tribe is to correct a violation that involves the misuse of TANF funds, ACF did address this matter in the preamble to the final rule. The Board generally accords deference to a federal agency’s permissible and reasonable interpretation of ambiguous program regulations as long as the party affected had actual notice of that interpretation that was timely and adequate or did not rely to its detriment on another reasonable interpretation. *See, e.g., Missouri Dep’t of Soc. Servs.*, DAB No. 2184, at 2 (2008). We find the interpretation of section 286.230 in the preamble to be permissible and reasonable. If expenditures that are made for unauthorized purposes are permitted to remain on a tribe’s accounting records as charges to the TANF program, then the violation cannot truly be said to have been corrected. Moreover, Blackfeet does not allege that it was unaware of this interpretation or that it relied on another reasonable interpretation to its detriment.

Blackfeet argues that the “only accounting prerequisite required under the law obligates the Tribe to remove the funds that were misused (\$297,612) from the TANF account records,” Blackfeet Appeal Br. at 9-10, but fails to consider what this “accounting prerequisite” actually means. Removing unallowable expenditures from a tribe’s TANF accounting records plainly means removing them as charges to federal TANF funds, but

that is just the first step a tribe must take. Once the unallowable expenditures are shown on the tribe's accounting records as charges to non-federal funds, the tribe must account for the amount of federal funds used for these expenditures by showing them as unobligated federal funds.

After a grant has ended, the "grantee must immediately refund to the Federal agency any balance of unobligated (unencumbered) cash advanced that is not authorized to retained for use on other grants." 45 C.F.R. § 92.50(d)(2). Under the TANF regulations, a tribe is authorized to retain unobligated funds from one fiscal year for use in future fiscal years. *See* 45 C.F.R. § 286.60 (a tribe may "reserve amounts awarded to it, without fiscal year limitation, to provide assistance, benefits and services" in accordance with the TANF regulations specifying proper uses of Tribal TANF funds).⁵ Thus, Blackfeet was required to either refund unobligated funds in the amount of \$297,612 to the federal government or carry over funds in that amount to its TANF grants for later fiscal years. Since Blackfeet's CCP plan did not indicate that Blackfeet would take either of these actions, ACF did not err in finding the CCP unacceptable.

Blackfeet also argues that it is unreasonable to read the regulations as requiring that an acceptable CCP provide for repayment of the amount of misused funds because that would leave a tribe in no better position than if it were subject to the penalty for misuse of funds. Blackfeet Appeal Br. at 9; Blackfeet Reply Br. at 3-4. Blackfeet's argument appears to be premised on its belief that the effect of imposing the penalty is only to reduce the amount of its TANF grant. As we discuss in section IV below, this premise is incorrect. Moreover, even if the financial consequences of entering into a CCP and paying the penalty are the same, there may be other reasons why a tribe might prefer to enter into a CCP.

III. ACF did not err in denying Blackfeet an opportunity to submit a second corrective compliance plan.

As noted above, after ACF found Blackfeet's May 12, 2014 CCP unacceptable, Blackfeet withdrew its appeal pending before the Board and sought a reasonable cause exception from ACF. After ACF determined that Blackfeet had no reasonable cause for its misuse of TANF funds, Blackfeet requested an opportunity to enter into a CCP. ACF proceeded to impose the penalty, stating that Blackfeet had previously submitted a CCP that was unacceptable and that "45 C.F.R. Part 286 does not provide for a second opportunity to submit a CCP." Blackfeet Att. T at 1.

⁵ This provision was published as a final rule amending 45 C.F.R. Part 486 in 2010. 75 Fed. Reg. 17,313 (Apr. 6, 2010) (adopting without change interim final rule published at 74 Fed. Reg. 25,161 (May 27, 2009)).

Blackfeet contends that ACF erred in not permitting it to submit a second CCP for the following reasons:

The ACF should not be permitted to deny [the] Tribe's request to enter into a CCP based on a Federal Regulation that is silent on the issue. 45 CFR part 286 does not specifically prohibit the Tribe from being afforded an additional opportunity to enter into a CCP, after their prior CCP had been rejected. Even if the Tribe's CCP was previously denied by the ACF, the ability of the Tribe to enter, albeit, another CCP emerged when the ACF issued its September 9, 2015 letter [finding the May 12, 2014 CCP unacceptable and advising Blackfeet that it had the option of disputing the penalty, claiming reasonable cause, or appealing the penalty to the Board]. 45 CFR 286 § 230(2)(b) [sic] specifically authorizes the Tribe to enter into a CCP IF the ACF denied their reasonable cause claim (emphasis added). When the ACF offered the Tribe the ability to claim reasonable cause, it effectively opened the door to other options under 45 CFR part 286, including the right of the Tribe to enter into a CCP.

Blackfeet Appeal Br. at 14.

ACF acknowledges that the "regulation does not expressly address whether a tribe can propose a second CCP if it claims reasonable cause after [the tribe] and ACF have already failed to reach an agreement on a CCP." ACF Br. at 15-16. However, ACF states that it "interprets its regulations to allow a tribe to exercise one or more options in turn, but, once a tribe exercises an option, it cannot, at a later point, seek to exercise that option again." *Id.* at 16. According to ACF, this interpretation is reasonable "[b]ecause the regulation provides an opportunity for a grantee to revise an unapprovable plan to make it approvable[.]" *Id.* ACF also points out that it "has to have administrative finality, and one opportunity to exercise each option ensures that administrative finality." *Id.*

We conclude that Blackfeet was not entitled to submit a second CCP. The regulations provide that once ACF notifies a tribe of its determination that the tribe violated TANF requirements and is subject to a penalty, a tribe may appeal that determination to the Board or may pursue the matter with ACF in one or more of three ways before appealing to the Board: by demonstrating to ACF that its determination is incorrect; by showing reasonable cause for the violation; and by submitting an acceptable CCP to ACF. Section 286.220(b). The regulations also provide that "[d]uring the 60-day period beginning with the date [ACF] receive[s] the corrective compliance plan, [ACF] may, if necessary, consult with the Tribe on modifications to the plan." Section 286.220(e). As ACF points out, this provision gives a tribe an opportunity "to revise an unapprovable plan to make it approvable." We see no basis for inferring that a tribe is entitled to yet another opportunity to submit a CCP if it fails to submit a CCP that is acceptable even after being given an opportunity to revise it.

Moreover, we find no support in section 286.230 for Blackfeet's position that a tribe is entitled to submit a second CCP. That section states in relevant part, "A Tribe that does not demonstrate reasonable cause will have 60 days from receipt of the second notice described in § 286.220(d) to submit its corrective compliance plan to us." Section 286.230(c). Section 286.220(d) in turn states, "If we determine that the Tribe has not demonstrated that our original determination was incorrect or that it had reasonable cause, we will notify the Tribe of our decision in writing." On their face, these provisions contemplate that a tribe will make any request for a reasonable cause exception before submitting a CCP. While ACF here allowed Blackfeet to submit a request for a reasonable cause exception after Blackfeet submitted an unacceptable CCP, it does not follow that the denial of that request would trigger the right to submit a second CCP.

Blackfeet also asserts that it "has been afforded procedural options and timelines not specifically authorized within 45 CFR part 286" and argues that "ACF cannot on one hand, deny the Tribe's request to enter into a [second] CCP because such option is not specifically found within 45 CFR part 286, but on the other hand, provide options, timelines and hold the Tribe to standards not found within 45 CFR part 286." Blackfeet Appeal Br. at 14, 16. To the extent the Board and ACF deviated from the procedures in Part 286, they did so because those procedures do not contemplate the situation where a tribe submits a CCP while simultaneously appealing a penalty determination to the Board. Those "deviations" sought to provide Blackfeet with sufficient time and opportunity to exercise its regulatory options under the situation it presented at the time of its first appeal. The Board's and ACF's efforts to ensure that Blackfeet had an opportunity to pursue with ACF each of the options set out in the regulations for avoiding a penalty do not have any bearing on the question whether Blackfeet was entitled to submit a second CCP.

- IV. Under the applicable regulations, the amount of TANF funds to which Blackfeet is entitled for the next year will be reduced by the penalty amount and Blackfeet must expend non-federal funds to replace the federal funds that would have otherwise been available for its TANF program.

In its response to the appeal, ACF addressed Blackfeet's contention that an acceptable CCP providing for repayment of the amount of misused funds would have the same effect as a penalty as follows:

A repayment of the funds as part of a CCP is different from a penalty because a tribe does not lose any Federal funds. Had Blackfeet entered a CCP, it would have had to repay to the TANF grant \$297,612 in funds it misused. With a penalty, Blackfeet will lose \$297,612 in Federal funds and then also have to replace those \$297,612 as required by 45 C.F.R. § 286.195 for a total of money lost of \$595,224.

ACF Br. at 13 n.4. According to Blackfeet, however, if a penalty is imposed, “[t]he total loss for the Tribe would be \$297,612, not \$595,224.” Blackfeet Reply Br. at 3. Blackfeet states that it has always been its understanding, from the time it received ACF’s March 11, 2014 letter, “that the Tribe was subject to a penalty of \$297,612 and nothing more.” *Id.* at 4. Blackfeet continues: “If there was a possibility of the Tribe losing \$595,224, then the ACF had a duty of informing the Tribe of such a potential loss. The Tribe has never received any written correspondence from the ACF informing the Tribe that its total loss for the misuse of Federal funds could be \$595,224. . . .” *Id.* In addition, Blackfeet argues that section 286.195(a)(1) “clearly states that the Tribe is subject to a single penalty in the amount of the misused funds. Nowhere within the regulation does it say that the Tribe is liable to repay the misused funds and be subject to a penalty.” *Id.*

We conclude that ACF correctly described the effect of imposition of the misuse of funds penalty on Blackfeet as resulting in a loss of \$595,224. Section 286.195(a)(1) provides that if ACF determines that a tribe misused its TANF funds, ACF “will reduce the TFAG for the following fiscal year by the amount so used.” Blackfeet does not dispute that the amount misused was \$297,612. Thus, Blackfeet’s TANF grant for the next year must be reduced by that amount. However, pursuant to section 286.195(c)(1), Blackfeet will incur an additional loss. That section provides: “If we reduce the TFAG payable to a Tribe for a fiscal year because of penalties that have been imposed, the Tribe must expend additional Tribal funds to replace any such reduction.” The preamble to the final Tribal TANF regulations explains this provision as follows:

Replacement of Penalty Amounts

Section 409(a)(12) of the Act requires a State to expend its own funds to replace any reduction in its SFAG due to the imposition of a penalty. This is to prevent recipients from also being penalized for the State's failure to administer its program in accordance with the requirements of the Act. We believe that a similar failure by a Tribe should not cause Tribal TANF recipients to be penalized. For this reason, in the same fiscal year as a penalty is imposed, at §286.195(c)(1) we require a Tribe to expend Tribal funds to replace any reduction in the TFAG resulting from penalties that have been imposed. . . .

65 Fed. Reg. 8478, 8511 (Feb. 18, 2000).⁶ Thus, section 286.195(c)(1) requires that Blackfeet expend \$297,612 of its own funds to replace the amount of TANF funds that would have been available for its TANF program had the \$297,612 penalty not been imposed. In other words, Blackfeet must expend for its TANF program in the next year the same amount that it would have received from ACF if its TANF grant were not reduced by the amount of misused funds. The total loss to Blackfeet as a result of imposition of the penalty is therefore \$595,224.

Moreover, Blackfeet's claim that it did not have adequate notice of this requirement has no merit. This requirement is clear on the face of section 286.195(a)(1) and (c)(1). In addition, ACF explained this requirement in its March 11, 2014 and May 26, 2015 letters. The first letter stated in pertinent part that if Blackfeet did not pursue any of its options for avoiding the penalty or appeal to the Board within 60 days of its receipt of the letter, ACF —

will impose the misuse of funds penalty totaling \$297,612 by reducing the Tribe's grant authorization for the immediately succeeding fiscal quarter from the date of this letter. In such case, the Blackfeet Tribe will be required to expend additional Tribal funds in fiscal year 2015 . . . to replace the reduction in its grant due to this penalty, as specified in 45 CFR 286.195(c)(1) and the regulatory preamble to the final Tribal TANF rule (see Federal Register/Vol. 65, No. 34/Friday, February 18, 2000, page 8511).

3/11/14 ltr. at 2. The second letter stated in pertinent part that if Blackfeet did not appeal—

we will impose the penalty by reducing the Tribe's grant authorization for FY 2016. Also the Tribe will be required to expend additional Tribal funds in FY 2016 to replace the reduction in its grant due to this penalty, as specified at 45 C.F.R. § 286.195(c)(1).

⁶ Section 409(a)(12), which applies to TANF grants to states, is captioned "Requirement to Expend Additional State Funds to Replace Grant Reductions. . ." and states in pertinent part: "If the grant payable to a State . . . for a fiscal year is reduced by reason of this subsection [providing for penalties], the State shall, during the immediately succeeding fiscal year, expend under the State program funded under this part an amount equal to the total amount of such reductions." There is no similar provision in section 412, the Tribal TANF statute, nor is section 409(a)(12) among the provisions made applicable to the Tribal TANF program by section 412(g). However, we are bound by ACF's validly promulgated regulation.

5/26/15 ltr. at 3. Accordingly, Blackfeet had ample notice of the effect of the misuse of funds penalty.⁷

Conclusion

For the foregoing reasons, we uphold ACF's determination to impose a \$297,612 penalty on Blackfeet for misuse of TANF funds.

/s/
Christopher S. Randolph

/s/
Leslie A. Sussan

/s/
Sheila Ann Hegy
Presiding Board Member

⁷ We note that ACF's March 11, 2014 letter indicates that ACF would reduce Blackfeet's TANF grant "for the immediately succeeding fiscal quarter" after the date of the letter, while ACF's May 26, 2015 letter indicates that ACF would reduce Blackfeet's TANF grant for fiscal year 2016 (which began October 1, 2015). Since Blackfeet did not raise any question as to when the reduction would begin if the penalty were upheld on appeal, we do not address that matter here.