Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: L.I. Child and Family Development Services, Inc.
Docket No. A-07-72
Decision No. 2160

DATE: March 11, 2008

DECISION

L.I. Child and Family Development Services, Inc. (LICFD) appeals a decision by the Administration for Children and Families (ACF) disallowing $66,888 LICFD claimed under the Head Start program as salary and related expenses for a Head Start employee. ACF disallowed the claimed costs on the ground that LICFD had employed the sister of LICFD's Chief Executive Officer (CEO), in violation of provisions of Head Start law and regulations prohibiting any taint of family favoritism in the conduct of Head Start programs.

The record in this appeal consists of the parties' briefs, their responses to written questions by the Board, their comments during a telephone conference the Board convened after reviewing their responses as summarized in a letter from the Board, and their submissions after the telephone conference.

As explained below, we conclude that LICFD's employment of the CEO's sister violated the statute as well LICFD's own personnel policy and was contrary to ACF's longstanding policy applying the statutory requirement. Accordingly, we sustain the disallowance, although we remand the case to ACF to provide LICFD with information on how ACF determined the amount of the disallowance.

Applicable law and regulations

Head Start is a national program providing comprehensive developmental services, including health, nutritional, educational, social and other services, to economically disadvantaged preschool children and their families. See 42 U.S.C. § 9831. The Department of Health and Human Services (HHS), through ACF, provides funds to grantees to serve as Head Start agencies within designated communities and periodically

reviews their performance in meeting program and fiscal requirements. See generally 42 U.S.C. § 9836.

As relevant to this appeal, the Head Start Act provides that —

> (1) Each Head Start agency shall observe standards of organization, management, and administration that will ensure, so far as reasonably possible, that all program activities are conducted in a manner consistent with the purposes of this subchapter and the objective of providing assistance effectively, efficiently, **and free of any taint of partisan political bias or personal or family favoritism.** Each such agency shall establish or adopt rules to carry out this section, which shall include rules to assure full staff accountability in matters governed by law, regulations, or agency policy. . . .
>
> * * *
>
> (3) Each such agency shall adopt for itself and other agencies using funds or exercising authority for which it is responsible, rules designed to--
>
> * * *
>
> (C) guard against personal or financial conflicts of interest;

42 U.S.C. § 9839(a) (emphasis added).[1] The Head Start regulations provide that -

> Head Start agencies and delegate agencies shall conduct the Head Start program in an effective and efficient manner, free of political bias or family favoritism. . . .

45 C.F.R. § 1301.30.

---

[1] These provisions were previously codified as 42 U.S.C. § 9839(a) and (a)(3). They were recodified as sections 9839(a)(1) and (a)(3)(C), with minor wording changes not relevant here, by Public Law No. 110-134 (Dec. 12, 2007). For convenience, we refer to this provision simply as 42 U.S.C. § 9839(a).

Background

ACF regional office staff visited LICFD in April 2005 after receiving an anonymous letter containing what ACF considered "serious allegations" about LICFD program officials' conduct in the administration of LICFD's Head Start program, including the allegation that its present CEO (initials DG) and the Training Coordinator (VH) were sisters. LICFD Ex. 1, at 1, 3 (June 22, 2005 letter from the ACF Regional Office and attached site visit report). Allegedly, the CEO had rehired VH after she had been terminated (by the prior CEO, LICFD Ex. 3, at 2) and had also given her a substantial raise. LICFD Ex. 1, at 3. In August 2004 ACF regional office representatives had discussed the issue of nepotism with LICFD management staff including the Board Chairperson, the then-CEO (MBW), and DG, who was then Director of Quality Assurance. ACF representatives were then concerned about nepotism at LICFD and warned that it was unallowable. In response, LICFD management subsequently assured ACF that DG's sister VH's employment had been terminated. Id.

ACF's review of LICFD's personnel records during the April 2005 site visit and LICFD's correspondence to ACF following the site visit report disclose the following information about the CEO's and her sister's employment with LICFD. Id.; LICFD Exs. 2, 3 (letters dated July 11 and 29, 2005, respectively, and attachments to exhibit 3). LICFD first hired DG as a teacher in 1983, promoted her through various positions (including Director of Quality Assurance, in which she took on responsibility for supervising the "Team Leaders" in June 2004), and then appointed her acting CEO effective November 1, 2004, after the prior CEO was relieved of her duties.[2] LICFD hired DG's sister, VH, as a social services specialist in 1993, and she held various positions before her title was changed from Center Manager to Training and Research Analyst, effective August 30, 2004, with no change in salary. LICFD described this as a lateral transfer effected by its prior CEO, who had not posted the Training and Research Analyst job because LICFD had received no responses to earlier advertisements for a similar position. LICFD laid off VH effective September 13, 2004. The prior CEO, MBW, claimed that ACF had required this action.[3] LICFD Ex. 3, at 2.

---

[2] While the contemporaneous record describes DG as the acting CEO, we refer to her for simplicity's sake as the CEO, and to her predecessor in that position as the previous or prior CEO.

[3] LICFD asserts that there is no documentation

(continued...)

VH was rehired to her position effective November 1, 2004, retroactive to the date she had been laid off. DG, who had become CEO after the prior CEO was relieved of her duties, made the decision to rehire her sister and "signed off" on that decision. Id.; LICFD Ex. 2, at unnumbered 2nd page.[4] LICFD asserted that this action was taken after the CEO, along with the Board of Directors and the Policy Council, "became aware that [VH] was laid off without proper foundation because in [her] last position there was no direct line supervision by [DG]." LICFD Ex. 3, at 2. On December 13, 2004 VH's salary was increased retroactive to November 1, 2004 pursuant to a personnel action signed by the CEO and by VH's immediate supervisor. Id.; LICFD Ex. 1, at 3.

ACF's disallowance determination states that LICFD's rehiring of the CEO's sister and increasing her salary retroactively, actions authorized by the CEO, were in violation of the Head Start Act at 42 U.S.C. § 9839 and the Head Start regulations at 45 C.F.R. § 1301.30.[5] In response to LICFD's arguments that it did not

---

[3](...continued)
supporting the prior CEO's claim that ACF had required her to terminate VH. LICFD response (Feb. 25, 2008). LICFD does not dispute that the prior CEO informed the Policy Council that she had been told by ACF to lay off employees based on kinship, or that ACF regional office representatives had discussed the issue of nepotism with LICFD prior to the site visit. It is irrelevant to our decision why VH was laid off.

[4] The CEO, DG, reported in a letter to ACF in March 2006 that LICFD's Board of Directors had directed her to rehire her sister. Attachment to LICFD Resp. to ACF Motion for Remand (Aug. 13 2007), at 2. However, Policy Council officials, in a letter to ACF dated July 5, 2005, stated that DG made the decision to reinstate VH, her sister. LICFD Ex. 2, at unnumbered 2nd page. We need not resolve this seeming conflict, as it is clear that DG took action to rehire her sister, whether on her own or at the direction of the Board of Directors.

[5] ACF originally disallowed $409,773, consisting of the $66,888 currently on appeal plus the following amounts. First, ACF disallowed $3,220 in salary and related expenses for another employee based on the prohibition on family favoritism. We summarily affirm that disallowance because LICFD stated, in its notice of appeal, that it did not dispute this portion of the disallowance and admitted that the employee had been hired by the
(continued...)

understand the Act or regulations to preclude the kinship situation at issue here, ACF cited what it characterizes as a longstanding policy that grantees may not hire immediate family members of employees who have responsibilities relating to the selection, hiring, or supervising of employees.[6]

Analysis

LICFD argues that it complied with the terms of the statute and regulation and that rehiring the CEO's sister does not constitute family favoritism. LICFD argues that disadvantaging relatives in the absence of family favoritism would be discriminatory and that

---

[5](...continued)
prior CEO without the approval of LICFD's Policy Council that is required by Head Start regulations. ACF also disallowed $325,861 in direct-charged salary and related costs that ACF determined were properly classified as administrative expenses and which exceeded administrative cost limits for Head Start grants, and $13,804 for fundraising expenses. During the appeal the parties completed a settlement agreement resolving the disallowance of the last two amounts, and in accordance with the parties' agreement, we do not address these expenses here. E-mail from ACF Counsel (Dec. 10, 2007).

[6] The disallowance letter also cites a regulation requiring that a Head Start grantee's Policy Council approve decisions to hire or terminate any person who works primarily for the grantee's Head Start program, 45 C.F.R. § 1304.50(d)(1)(xi). ACF had determined that LICFD's Policy Council did not approve VH's selection to her position. LICFD Ex. 1, at 3. LICFD disputed that determination and submitted a letter that four Policy Council officials had sent to ACF in response to the site visit report, asserting approval of the decision to hire VH. LICFD Ex. 2. ACF before the Board has not challenged LICFD's assertion of Policy Council approval or otherwise addressed this basis for the disallowance. The disallowance letter also cites, without discussion, a regulation requiring that grantees establish and implement internal controls to safeguard federal funds. 45 C.F.R. § 1304.50(g)(2). ACF's site visit report cites this regulation in an appendix but does not indicate whether it relates to the hiring of VH or to other findings that are not at issue here. LICFD Ex. 1; Attachment to ACF Motion for Remand. In any case, ACF has not cited section 1304.50(g)(2) before the Board. We thus conclude that ACF is not now relying on these additional regulations as bases for the disallowance, and we do not address them further.

its personnel policy, to which ACF never objected, protects kinship hiring. LICFD also argues that ACF's policy is not a permissible interpretation of the statute and regulation, and that, in any case, it did not have notice of ACF's policy. For the reasons explained below, we reject those arguments and conclude that LICFD's employment of the sister of its CEO violated the statutory prohibition on family favoritism as well as the plain terms of LICFD's personnel policy.

LICFD argues that the statute and regulations do not bar kinship employment and prohibit only actual family favoritism. The Head Start statute, however, requires that Head Start grantees conduct their programs not just free of favoritism but free of even a "taint" of family favoritism. Clearly, Congress intended to reach beyond actual favoritism to preclude situations that could well give rise to an appearance of impropriety detrimental to public confidence in the grantee's ability to administer the federally-funded Head Start program in an objective manner. Such appearance could certainly raise a "taint" of family favoritism. One effective way for a grantee to achieve the goal of the statute would be to avoid hiring immediate family members of employees who have supervisory authority over all employees, as well as the authority to take action to hire and fire employees. The unusual situation here, where the CEO not only hired her sister to an administrative position, but made the hiring retroactive to the date that the sister had been laid off by the prior CEO and then proceeded to increase her sister's salary retroactively, is precisely the sort of action that gives rise to a "taint" of family favoritism in violation of the statute.

The statute also requires that grantees essentially have rules ensuring that they conduct their Head Start programs free of any taint of family favoritism. LICFD argues that it complied with this requirement by adopting a personnel policy, to which ACF did not object, that does not bar kinship employment but does prohibit any "direct line management relationship between two or more members of the same family." LICFD Ex. 16 (personnel policy).[7] LICFD argues that it observed its policy by assuring

---

[7] The policy in question, under the heading "Employment of Relatives," states:

> Persons shall not be barred from employment by reason of kinship to an employee. There shall, however, be no direct line management relationship between two or more members of the

(continued...)

ACF that the CEO who, as noted earlier, "signed off" on the decision to rehire her sister, "would hereafter have no input in, nor will she sign off on any [personnel] determinations which involve" her sister, actions which would be undertaken instead by the Board of Directors, "in consultation with administration, but to the exclusion of" the CEO. LICFD Brief at 7. LICFD argues that to show a violation of the statute and regulation ACF would have to show that LICFD violated its personnel policy or establish that LICFD had actually engaged in family favoritism based on the facts surrounding the employment of VH, and that ACF has not made either showing here.

We conclude that any failure by ACF to have objected to LICFD's personnel policy cannot be reasonably construed as signaling acquiescence or approval of the decision to rehire the CEO's sister. The LICFD policy's statement that kinship would not bar employment did not inform ACF that LICFD would consider it permissible to hire an immediate family member of its CEO in an administrative position, in an action taken by the CEO, especially where the LICFD policy prohibits any "direct line management relationship" between family members. In this respect, LICFD's policy does not on its face even permit LICFD to employ the CEO's sister, as LICFD argues. Every employee in an organization who is subordinate to the organization's CEO is arguably in a "direct line management relationship" with the CEO, particularly since, in this case, the organization's CEOs could, and did, initiate actions to lay off, rehire, promote and increase the salary of the particular employee in question.[8]

---

[7](...continued)
same family. Departments of the agency that have access to confidential employee information are not permitted to employ relatives of current L.I. Head Start employees. Immediate family members or domestic partners may not be employed at the same work site.

LICFD Ex. 16. While the policy in the record is not dated, neither party disputes that it applied to the time period in question.

[8] As noted, LICFD reported to ACF that the CEO's sister was terminated or laid off at the insistence of the previous CEO, and was later rehired by her sister. LICFD Ex. 2, at unnumbered 2nd page; Ex. 3, at 2. While such decisions must be approved by the grantee's Policy Council, there is no doubt from the record

(continued...)

LICFD did not cite any definition of "direct line management relationship" that would rule out such a conclusion. The employment of the CEO's sister also violated the LICFD policy because the policy forbids the employment of an immediate family member at the same work site; LICFD did not dispute ACF's assertion that the CEO's sister worked in LICFD's central administration at the same location as the CEO.

That LICFD adopted special, ad-hoc procedures intended to exclude the CEO from further involvement in personnel matters concerning her sister illustrates the problematic nature of the decision to rehire her sister and the difficulty inherent in reconciling that decision with the language of LICFD's own personnel policy. LICFD recognized the problematic nature of the hiring decision when it stated, in correspondence to ACF, that it was inappropriate for the CEO to have signed off on the decision to rehire her sister and to have increased her salary, even if there were no direct line supervision between the CEO and her sister. LICFD Ex. 3, at 2. Thus, LICFD itself recognized that its special procedures were not sufficient to avoid the appearance of family favoritism resulting from the CEO's involvement in the hiring and pay decision concerning her sister.

Thus, we conclude that neither the statute nor LICFD's own policy could reasonably be construed as permitting it to hire its CEO's sister, particularly since she was to work at the same location as the CEO.

Additionally, ACF established that it and its organizational predecessor have had a longstanding interpretation of the statute and regulation as requiring that grantees "prohibit the hiring of any individual if a member of that individual's immediate family is employed in . . . a position having responsibilities relating to the selection, hiring, or supervising of employees," with "immediate family" defined as including siblings (as well as spouses, parents, or children). The former Office of Human Development Services (OHDS), a predecessor agency to ACF, published this interpretation in the *Federal Register* in 1982 (under the heading "Conflict of Interest or Nepotism") as part of proposed revisions to the OHDS Discretionary Grants Administration Manual (GAM).[9] 47 Fed. Reg. 44,474, 44,496 (Oct.

---

[8](...continued)
of the active role that the CEO played in these actions.

[9] ACF was established in 1991 from organizational
(continued...)

7, 1982).[10] The GAM revisions were adopted as final in 1986. 51 Fed. Reg. 6936, 6939 (Feb. 27, 1986). The notices publishing the proposed and final revisions indicate their applicability to Head Start grants.

LICFD does not dispute that the GAM language prohibited the rehiring of the CEO's sister. Instead, LICFD argues that the GAM revision is not a permissible interpretation of the statute or regulation, which LICFD says do not bar kinship employment and prohibit only actual family favoritism. LICFD also argues that it did not have notice of the interpretation, noting that the GAM was not among the applicable authorities listed in the standard terms and conditions of LICFD's notice of grant award for the relevant period.

However, as we discussed above, the statute's reach extends beyond actual favoritism to prohibit even any taint of family favoritism and thus prohibited LICFD from rehiring the CEO's sister, in an action taken by the CEO. Nothing in the statutory language prevented ACF or its predecessor from requiring that grantees not employ immediate family members of staff members who have responsibilities relating to the selection, hiring, or supervising of the grantees' employees.

Additionally, the public was afforded constructive notice of the GAM revisions through the publication in the *Federal Register*, pursuant to a requirement then in the Head Start statute that all Head Start rules, guidelines and instructions be published in the *Federal Register*. 42 U.S.C. § 9839(d) (1992), Pub. L. No. 97-35, § 644(d) (Aug. 13, 1981); 47 Fed. Reg. 44,474. Even though ACF does not contend that the GAM is a current manual that continues to be maintained (ACF Reply at 2), the policy interpreting the family favoritism provisions has not been rescinded or revoked by any subsequent *Federal Register* publication. LICFD has not

---

[9](...continued)
components of other HHS offices, including the OHDS Administration for Children, Youth, and Families, which administered the Head Start program. 56 Fed. Reg. 15,885 (Apr. 18, 1991); 56 Fed. Reg. 42,332 (Aug. 27, 1991).

[10] LICFD expressed puzzlement over ACF's use, in ACF's submission to the Board, of the citation "34 Fed. Reg. 44496" for this policy, one sentence after ACF used the correct citation for the notice containing the policy, 47 Fed. Reg. 44,474. In context, it is clear that ACF was citing to page 44,496 of that notice, and that the citation to volume 34 was an error.

argued that it relied on the absence or revocation of such a policy in drafting its own personnel policy, which in any event did not support LICFD's action here.

ACF also established that it has given notice that it still regards the nepotism policy from the GAM as effective by publishing, at two websites intended to provide information to Head Start grantees, the Board's decision in Utica Head Start Children and Families, Inc., DAB No. 1749 (2000). The Board there relied on and quoted the nepotism policy from the GAM in holding that a grantee that employed the daughter of its Executive Director as its Fiscal Director "failed to conduct its program in a manner free of family favoritism as required by the Head Start Act, regulations and policies." Utica at 13.

LICFD also argues that it would be discriminatory and unreasonable to deny persons employment solely because of a family relationship absent any showing of favoritism and reports that it faces discrimination complaints by employees terminated by its prior CEO based on kinship. LICFD proposed a hypothetical example, i.e., the employment of a secretary who is related to a CEO but who does not report to the CEO and is stationed at a Head Start center 40 miles distant from the CEO's worksite, to illustrate what LICFD considers the unreasonable result of a stringent enforcement of ACF's nepotism policy. LICFD argues that ACF's speculation, during the telephone conference, that it might not take action against the hypothetical grantee showed that, in contrast to the terms of ACF's purported nepotism policy, ACF actually makes ad hoc decisions on whether there is favoritism in each case of kinship employment. LICFD argues that this ad hoc approach to evaluating family favoritism is consistent with LICFD's view of the statute and regulation, and that ACF must therefore make a showing of actual family favoritism here.

LICFD's hypothetical example is not analogous to this situation, as both the CEO and her sister worked in central administration at the same location. Additionally, ACF's decision not to take action in response to a violation it does not view as significant does not mean that ACF has abandoned its nepotism policy. We are not prepared to conclude that ACF may not elect to conserve limited administrative resources by declining to take action in cases of kinship employment that ACF views as insignificant or which may not give rise even to a "taint" of family favoritism. As ACF clearly considers LICFD's (and the CEO's) decision to hire the CEO's sister to be significant, we find LICFD's arguments as to its hypothetical to be beside the point.

LICFD also notes that ACF made no changes to 45 C.F.R. § 1301.30 when, in 1996, it revised the Head Start regulations, including revisions to section 1301.31 addressing grantee personnel policies on the recruitment and selection of staff. 61 Fed. Reg. 57,185 (Nov. 5, 1996). LICFD argues that ACF at that time could have amended Part 1301 to incorporate the GAM nepotism provision that was published in the *Federal Register* had ACF considered it as a still-effective interpretation of the statute and regulation. However, the stated purpose of the 1996 rule was "to carry out the language in the 1994 amendments to the Head Start Act providing for an update of the Head Start Program Performance Standards." 61 Fed. Reg. 57,186. The 1994 amendments, the Head Start Act Amendments of 1994, title I of Public Law No. 103-252 (May 18, 1994), made no changes to section 9839(a) of 42 U.S.C., and so it is of no particular moment that ACF, in implementing the 1994 law, did not elect to make changes to the regulation that was based on section 9839(a). If anything, the absence of any alteration to the provisions relating to nepotism suggests that ACF intended no change in its interpretation of this statutory provision which had not been amended.

Finally, LICFD in its brief stated that ACF had not set forth how it had calculated the $66,888 amount of the disallowance related to ACF's determination LICFD had improperly rehired the CEO's sister. LICFD noted that her salary and fringe benefits "for the 2004-05 fiscal year" was $59,066.52, comprising $49,226.46 plus fringe benefits of 20%. LICFD Br at 6, n.3. ACF did not address LICFD's concern, and the record does not indicate how ACF calculated the disallowance or what time period was covered by this portion of the disallowance. Accordingly, while we sustain the full disallowance amount of $66,888 in principle, we remand the appeal to ACF so that it may inform LICFD how it calculated the disallowance. ACF should provide that information to LICFD in writing within 30 days after receiving this decision. If LICFD disputes ACF's determination of the disallowance amount, it may return to the Board for consideration of that issue only, by filing a written notice of appeal of that determination to the Board within 30 days after receiving it. See 45 C.F.R. Part 16.

Conclusion

For the reasons stated above, we sustain in principle the disallowance of $66,888 in salary and related expenses paid to the CEO's sister. As stated above, we remand the appeal for ACF to inform LICFD how ACF determined the amount of the disallowance. ACF should provide that information to LICFD within 30 days after receiving this decision. LICFD may appeal ACF's determination of the disallowance amount to the Board

within 30 days after receiving ACF's determination. Also as stated above, we summarily affirm the disallowance of $3,220 in salary and related expenses, for another employee, that LICFD stated in its notice of appeal that it did not dispute.

/s/
Judith A. Ballard

/s/
Constance B. Tobias

/s/
Leslie A. Sussan
Presiding Board Member