

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: Municipality of Santa Isabel DATE: March 3, 2009
Docket No. A-09-1
Decision No. 2230

DECISION

The Municipality of Santa Isabel (the Municipality) appealed the September 18, 2008 determination of the Administration for Children and Families (ACF) to terminate the grant awarded to the Municipality for a Head Start program and an Early Head Start program. ACF based the termination on its finding that the Municipality failed to correct two deficiencies identified in a follow-up review of the Municipality's programs conducted on May 2, 2008. ACF subsequently withdrew one of the deficiency findings pending its receipt and review of the Municipality's audit report for the fiscal year ending June 30, 2008. ACF Br. at 1-2, 21 n.13.

The Municipality challenges the termination on the grounds that 1) the Municipality corrected all other deficiencies identified in ACF's initial review and substantially complied with the regulation that was the basis for the remaining finding of an uncorrected deficiency, and 2) the remaining uncorrected deficiency resulted from a longstanding operating deficit that the Municipality was taking measures to reduce. ACF moved to dismiss the appeal for failure to meet the requirements for the content of an appeal in 45 C.F.R. § 1303.14(d). The Municipality requested that the Board deny ACF's motion to dismiss and grant the Municipality "an oral hearing." Reply dated 12/22/08, at 1. For the reasons explained below, we deny ACF's motion to dismiss. As we also explain, however, the Municipality has not disputed any material fact alleged by ACF as a basis for the termination, and has not identified any valid legal basis for reversing ACF's determination to terminate the grant. Accordingly, we conclude that an oral proceeding would serve no purpose, and we uphold ACF's determination on summary judgment.

Legal Background

Head Start is a national program that provides comprehensive child development services. 42 U.S.C. § 9831; 57 Fed. Reg. 46,718 (Oct. 9, 1992). The Head Start program serves primarily low-income children, ages three to five, and their families. Id. The Early Head Start program provides "low-income pregnant women and families with children from birth to age 3 with family-centered services that facilitate child development, support parental roles, and promote self-sufficiency." 45 C.F.R. § 1304.3(a)(8).

Head Start grantees (including Early Head Start grantees) must comply with a range of requirements related to administrative and fiscal management and the provision of high quality services responsive to the needs of eligible children and their families. The Head Start performance standards codified in 45 C.F.R. Part 1304 cover the entire range of Head Start services and constitute the minimum requirements that a Head Start grantee must meet in three areas: Early Childhood Development and Health Services; Family and Community Partnerships; and Program Design and Management.

ACF identified the deficiency in question as related to "Program Design and Management." The definition of "deficiency" in section 1304.3(a)(6)(i) includes "[a]n area or areas of performance in which an Early Head Start or Head Start grantee agency is not in compliance with State or Federal requirements. . . and which involves: . . . (C) A failure to perform substantially the requirements related to . . . Program Design and Management."

Under the Head Start Act, the Secretary is required to conduct a periodic review of each Head Start grantee at least once every three years. 42 U.S.C. § 9836a(c)(1)(A). If, as a result of a review, the Secretary finds a grantee to have a deficiency, he requires the grantee to correct the deficiency immediately, or within ninety days, or by the date specified in a Quality Improvement Plan (not later than one year after the grantee received notice of the deficiency). 42 U.S.C. § 9836a(e)(1)(B) and (e)(2)(A)(ii). The Secretary "shall . . . initiate proceedings to terminate" the Head Start grant if the grantee fails to meet the performance standards promulgated by ACF and does not correct such deficiency. 42 U.S.C. § 9836a(d)(1).

Section 1303.14(b)(4) of 45 C.F.R. provides for ACF to terminate funding if a grantee "has failed to timely correct one or more

deficiencies as defined in 45 C.F.R. Part 1304." A single uncorrected deficiency is sufficient to warrant termination of funding. 45 C.F.R. § 1303.14(b)(4) (authorizing termination for failure to correct "one or more deficiencies"); The Human Development Corporation of Metropolitan St. Louis, DAB No. 1703, at 2 (1999). A grantee always bears the burden to demonstrate that it has operated its federally-funded program in compliance with the terms and conditions of its grant and the applicable regulations. Norwalk Economic Opportunity Now, Inc., DAB No. 2002, at 7 (2005), citing, *inter alia*, Rural Day Care Association of Northeastern North Carolina, DAB No. 1489, at 8, 16 (1994), *aff'd*, Rural Day Care Ass'n of Northeastern N.C. v. Shalala, No. 2:94-CV-40-BO (E.D.N.C. Dec. 19, 1995).

Case Background

The Municipality, one of 78 municipalities in Puerto Rico, has been providing Head Start services since 2002. ACF Br. at 6. It received a single grant award to operate both a Head Start program and an Early Head Start program (which we refer to collectively here as its Head Start program). ACF Ex. 22. Effective May 4, 2005, ACF designated the Municipality as a high-risk grantee and placed it on "restricted funding" based on findings of the single agency audit conducted pursuant to Office of Management and Budget (OMB) Circular A-133 for the fiscal year ending June 30, 2003. ACF Br. at 7; ACF Ex. 4, at 1; ACF Ex. 22, at 2. (The awarding agency may designate a grantee as high risk and include special conditions or restrictions in its award if the agency determines that the grantee is not financially stable or is otherwise not responsible. 45 C.F.R. § 92.12.)

From March 25 to March 30, 2007, ACF conducted an on-site monitoring review of the Municipality's Head Start and Early Head Start program. In a review report dated August 27, 2007, ACF identified five deficiencies as defined in section 1304.3(a)(6)(i), i.e., noncompliance with a federal requirement involving a failure to perform substantially requirements related to Program Design and Management. ACF Ex. 2, at 2 (same document at Municipality Ex. 2). ACF stated that all of these deficiencies "must be corrected within the specified time period" (*id.* at 1) and directed the Municipality to submit a Quality Improvement Plan (QIP) detailing a six-month plan for corrective action (*id.* at 2). The Municipality submitted a QIP and two amended QIPs, all of which were disapproved on the ground that they did not adequately describe the actions or timelines to correct the deficiencies. ACF Exs. 12-14. ACF conducted an on-site follow-up review from April 27 to May 2, 2008 to determine whether the Municipality had corrected the deficiencies

identified in the review report. The September 16, 2008 report on this review (Municipality Exhibit 3) indicated that the Municipality's noncompliance with three of the five previously-identified deficiencies had been corrected. The report also indicated that there were two uncorrected deficiencies. One of the findings of an uncorrected deficiency, which ACF withdrew, involved noncompliance with OMB Circular A-133 requirements for corrective action on audit findings.¹ The remaining uncorrected deficiency found by ACF consisted of noncompliance with the standards for financial management systems in 45 C.F.R. § 92.20(b)(3), which states:

(3) Internal control. Effective control and accountability must be maintained for all grant and subgrant cash, real and personal property, and other assets. Grantees and subgrantees must adequately safeguard all such property and must assure that it is used solely for authorized purposes.

ACF's initial review report described the Municipality's noncompliance as follows:

The grantee did not establish and maintain effective control over and accountability for all grant cash to ensure it was used solely for authorized purposes. The audit report for the year ending June 30, 2005 showed the Internal Revenue Service (IRS) had seized approximately \$577,000 of restricted Municipality of Santa Isabel funds for failure to pay Social Security taxes. The grantee also owed \$1,410,000 in money overdue to the Retirement Fund.

The Finance Director said, and provided documentation in support of, current payroll taxes were being paid, including taxes on Early Head Start personnel, for which the grantee received subsequent reimbursement from ACF. However, as of the review's completion, delinquent payments to the Retirement Fund system and the IRS had not been fulfilled. The grantee did not properly liquidate all payroll benefit costs charged to the Early Head Start award, therefore, it did not maintain effective control over and accountability for all grant funds.

ACF Ex. 2, at 3-4.

¹ ACF stated that it was "temporarily" withdrawing this finding. ACF Br. at 1, 21. ACF did not advise the Board while the appeal was pending that it was reinstating this finding.

In finding that this deficiency had not been corrected, ACF stated:

The grantee did not maintain effective control and accountability to ensure grant funds were used solely for authorized purposes. The grantee paid past-due Social Security taxes, kept payments up to date as required, and paid past money owed to the retirement fund. However, as of April 30, 2008, the grantee was delinquent in paying into the retirement fund for January through April 2008.

An interview with the Financial Consultant confirmed the payments were not made. A review of purchase orders and copies of certified checks for the period October 2005 through April 2008 found an approximate balance of \$64,051 due the retirement fund for the Early Head Start and Head Start programs. The grantee did not make required payments to the retirement fund, demonstrating it did not properly liquidate all payroll benefit costs. The grantee did not maintain control over and accountability for its retirement funds; therefore, it remained out of compliance with the regulation.

ACF Ex. 3, at 2-3 (same document at Municipality Ex. 3). In its September 18, 2008 termination notice, ACF identified this uncorrected deficiency, as well as its now withdrawn deficiency finding, as grounds for terminating the Municipality's Head Start grant pursuant to 45 C.F.R. § 1303.14(b)(4).² ACF Ex. 1, at 2. The Municipality wrote to the Board appealing the termination of financial assistance for its Head Start and Early Head Start programs. Letter dated 10/17/08, at 3. The Board acknowledged receipt of the appeal by letter dated October 27, 2008, and set a briefing schedule in accordance with 45 C.F.R. Part 1303. The Board also requested that in its initial submission, ACF clarify the grounds for the termination. In particular, the Board asked ACF to explain how each of the two uncorrected deficiencies identified in the termination letter "falls within the definition of 'deficiency' in 45 C.F.R. § 1304.3(a)(6)." 10/27/08 letter at 3. In its November 21, 2008 response, ACF provided the requested clarification but stated that it was "temporarily" withdrawing one of its findings of an uncorrected deficiency. In addition, ACF moved to dismiss the appeal for failure to comply with the

² Although ACF's termination letter does not specifically refer to Early Head Start, it is clear from the references to both Early Head Start and Head Start in ACF's brief and in the on-site review reports that ACF intended to terminate funding to the Municipality for both of these programs. The grant award documents also reference both programs.

requirements of 45 C.F.R. § 1303.14(d). That regulation states, in pertinent part, that a "grantee's appeal must":

- (1) Be in writing;
- (2) Specifically identify what factual findings are disputed;
- (3) Identify any legal issues raised, including relevant citations;
- (4) Include an original and two copies of each document the grantee believes is relevant and supportive of its position
- (5) Include any request for specifically identified documents the grantee wishes to obtain from ACF . . . ;

* * * * *

Section 1303.14(e)(1) provides that "[i]f in the judgment of the . . . Board a grantee has failed to substantially comply with the provisions of [section 1303.14(d)], its appeal must be dismissed with prejudice." The Municipality filed a brief dated December 22, 2008 opposing ACF's motion to dismiss and requesting an "oral hearing." 12/22/08 Reply at 1.

Analysis

Below, we first explain why we conclude that it is not appropriate to dismiss the appeal pursuant to section 1303.14(d). We then explain why we conclude based on the record before us that termination of the grant is warranted without further proceedings.

The appeal meets the requirements of section 1303.14(d) and should not be dismissed.

ACF's motion to dismiss the appeal alleges first that the appeal does not raise any legal issues. We disagree. In its appeal, the Municipality objects to "the severity and harshness of the measure adopted by [ACF] despite the efforts and corrective endeavors undertaken by the municipality since 2005 to efficiently administ[er] its Head Start and Early Head Start Program." 10/17/08 Appeal at 4. In particular, the Municipality argues that its noncompliance resulted from a longstanding operating deficit that it was taking measures to reduce. *Id.* at 4-6. Even if, as ACF suggests, this is simply an equitable argument as to which the Board can grant no relief, that does not mean that it does not raise a legal issue within the meaning of section 1303.14(d). The Municipality also asserts that it had "achieved substantial compliance," or "made significant improvements," with respect to the payment of payroll benefit costs. 10/17/08 Appeal at 3-4. ACF characterizes this as "an

admission by the grantee that, at the time of the follow-up review, it was not in full compliance with the Head Start regulations cited in the review reports." ACF Br. at 26. At the same time, however, ACF recognizes that this might constitute a legal argument that termination is not warranted if, as the Municipality contends, it substantially complied with the requirement at 42 C.F.R. § 92.20(b)(3) that was the basis for ACF's finding of an uncorrected deficiency. Id. We conclude that it is reasonable to read the appeal as making this argument, i.e., that full compliance is not required, and that this is a sufficient basis for finding that the appeal met the requirements of section 1303.14(d).

ACF also asserts that the Municipality's appeal does not meet the requirements of section 1303.14(d) because it does not specifically identify the factual findings that are disputed and is devoid of any substantive documentation supporting the Municipality's position or any request for specifically identified documents the Municipality wishes to obtain from ACF. While it is clear that the Municipality's appeal raises no genuine dispute of material fact regarding the findings underlying the termination, section 1303.14(d) does not require that an appeal raise factual as well as legal issues in order to survive a motion to dismiss. The Municipality's appeal does include some documentation in support of its equitable argument, two audit reports by the Puerto Rico Comptroller's Office, both dated June 22, 2005 (Municipality Exs. 1-5). These documents, the Municipality asserts, show that "as of fiscal year 2005, the municipality was facing its worst deficit for the last 10 years[.]" 10/17/08 Appeal at 4. In any event, the Municipality was not required to submit its own exhibits since the Municipality has indicated it intends to rely on ACF's exhibits to support its appeal. See 12/22/08 Reply at 6 (unnumbered).

Even if the Municipality had raised neither legal nor factual arguments in its appeal, however, we conclude that it would not be appropriate to dismiss the appeal for failure to meet the requirements of section 1303.14(d) under the circumstances of this case. As indicated above, the Board requested that ACF clarify its conclusion that each of the uncorrected deficiencies originally at issue constituted a deficiency under section 1304.3(a)(6)(i). Since, in the Board's view, the termination letter did not clearly explain the legal basis for the termination, it would be unfair to dismiss the Municipality's appeal on the ground that it did not set forth with sufficient specificity its grounds for challenging the termination.

Accordingly, we deny ACF's motion to dismiss the appeal for failure to meet the procedural requirements in section 1303.14(d).

ACF may properly terminate the Municipality's Head Start grant based on its undisputed finding of an uncorrected deficiency.

Head Start grantees are entitled under the regulations to an evidentiary hearing to contest the basis for ACF's termination decision (or decision to deny refunding or suspend a grant for more than 30 days). See 45 C.F.R. § 1303.16. However, the Board has held that, under appropriate circumstances, it may grant summary judgment in a Head Start termination case without violating a grantee's right to a hearing. See, e.g., Camden County Council on Economic Opportunity, DAB No. 2116, at 3 (2007), citing, inter alia, Philadelphia Housing Authority, DAB No. 1977, at 7 (2005), aff'd, Philadelphia Housing Auth. v. Leavitt, No. 05-2390, 2006 WL 2990391 (E.D.Pa. Oct. 17, 2006). In particular, the Board has stated that "[s]ummary judgment is appropriate when there is no genuine dispute as to any material fact, and the moving party is entitled to judgment as a matter of law." Camden County Council on Economic Opportunity at 4. The Board has also entered summary judgment against a Head Start grantee sua sponte where it found that there was no dispute of material fact and that ACF was entitled to summary judgment as a matter of law. See Head Start Board of Directors, DAB No. 2148 (2008), and The Connector (Making the Connection), Inc., DAB No. 2191 (2008) (upholding suspensions of Head Start grants for more than 30 days).

In the latter two cases, upon receipt of the appeal, the Board ordered the grantee to show cause why the Board should not summarily uphold ACF's determination. We conclude that no such order is necessary here. Although ACF moved for dismissal of the Municipality's appeal rather than for summary judgment (also referred to as summary disposition), ACF asserted in its motion that the Municipality had not identified any disputed factual findings. The Municipality does not challenge this assertion in its reply to ACF's motion, and we find no disputes of material fact in the record before us. Moreover, section 1303.14 of the Head Start regulations does not provide another opportunity for a grantee to identify factual disputes or to raise additional legal issues following the submission of its appeal. Thus, the only question before us is whether any of the legal arguments made by the Municipality in its appeal (and further addressed in its reply) provide a basis for reversing ACF's determination to terminate the grant. As discussed below, we conclude that none of the Municipality's legal arguments have merit and that ACF is

entitled to judgment in its favor as a matter of law.

A. The Municipality's argument regarding substantial compliance has no merit.

As we stated above, a single uncorrected deficiency is sufficient to warrant termination of funding. Here, the Municipality does not dispute ACF's finding that it had an uncorrected deficiency within the meaning of section 1304.3(a)(6)(i) consisting of noncompliance with the standards for financial management systems in 45 C.F.R. § 92.20(b)(3).³ The Municipality nevertheless challenges the termination on the ground that it "substantially complied" with the requirements of section 92.20(b)(3). 10/17/08 Appeal at 3. In light of the undisputed fact that the Municipality was delinquent in making contributions to the retirement fund for the quarter just ending (the first quarter of 2008), we see no basis for finding that the Municipality substantially complied with the requirement in section 92.20(b)(3) to maintain "[e]ffective control and accountability" for all grant cash. In any event, the Municipality is incorrect as a matter of law that there is no basis for termination where a grantee substantially complies with the applicable requirements. Although the Municipality did not flesh out its argument, we surmise that it may be predicated on the language of section 1304.3(a)(6)(i) stating that a deficiency within the meaning of that section must involve a "failure to perform substantially" the requirements related to Program Design and Management or to one of the two other areas listed there. As ACF points out, the Board has previously rejected the argument that a grantee's substantial performance of such requirements is sufficient to correct a deficiency and avoid termination. See ACF Br. at 27 (citing DOP Consolidated Human Services Agency, DAB No. 1689 (1999)). In Philadelphia Housing Authority, the Board stated, in part, as follows:

³ ACF asserts that noncompliance with 45 C.F.R. § 92.20(b)(3) constitutes a failure to perform substantially the requirements related to Program Design and Management in 45 C.F.R. §§ 1304.50(g)(2) and 1304.51(i)(2). See ACF Br. at 19-21. Section 1304.50(g)(2) states that "[g]rant . . . agencies must ensure that appropriate internal controls are established and implemented to safeguard Federal funds. . . ." Section 1304.51(i)(2) states that "[g]rantees must establish and implement procedures for the ongoing monitoring of their . . . Early Head Start and Head Start operations . . . to ensure that these operations effectively implement Federal regulations." The Municipality does not dispute ACF's assertion, and we find it consistent with a reasonable reading of the regulations.

While the definition of a deficiency sets forth substantial performance as the applicable standard for an initial finding of a deficiency in the listed areas, that definition does not address the standard for correction of an identified deficiency in any area that is set forth as a basis for termination. Specifically, the provision at 45 C.F.R. § 1304.60(f) that requires correction of identified deficiencies does not incorporate a substantial performance standard; nor is there any mention of substantial performance in the termination provision for failure to timely correct deficiencies at 45 C.F.R. § 1303.14(b)(4). Furthermore, ACF explained a reasonable basis for the interpretation that correction requires full compliance; to permit grantees to only partially correct a deficiency to avoid termination would effectively result in grantees never fully complying with Head Start requirements

DAB No. 1977, at 10-11 (emphasis added); accord, The Council of the Southern Mountains, DAB No. 2006 (2005); DOP Consolidated Human Services Agency. Thus, the Municipality would have had to fully correct its noncompliance with section 92.20(b)(3) by the time of the follow-up review in order to avoid termination.

In its reply brief, the Municipality acknowledges that it did not fully correct its noncompliance and does not argue that the interpretation of the Head Start regulations in the decisions cited is wrong. Reply dated 12/22/08, at 4-5 (unnumbered) (stating that “[o]nly two deficiencies need correction” and that “substantial compliance may not be a part of the ACF’s termination regulations”). Thus, accepting the Municipality’s factual assertions as true and drawing all possible inferences in Municipality’s favor, it is not possible to find that it had corrected all deficiencies now at issue. Accordingly, we conclude that the Municipality’s substantial compliance argument does not provide a basis for reversing ACF’s determination to terminate the grant.

B. The Municipality’s equitable arguments are unavailing.

The Municipality asserts that its remaining uncorrected deficiency--its failure to make contributions to its retirement fund for the first quarter of 2008--resulted from a longstanding operating deficit that the Municipality was taking measures to correct. According to the Municipality, when a new municipal administration “began in office in January 2005, it inherited a budget deficit that reached the historical amount of \$7,261,639. Through very difficult decisions taken over the last three years

. . . , the Municipality of Santa Isabel has been able to obtain substantial reductions in its operational budget, and move forward to further cut the deficit" to \$3,278,031. 10/17/08 Appeal at 5; see also 12/22/08 Reply at 2 (unnumbered). Furthermore, according to the Municipality, "Santa Isabel is one of the poorest places under the U.S. flag." 12/22/08 Reply at 4 (unnumbered). The Municipality continues: "One would imagine that ACF would take note of this fact and reward the progress made under dire conditions" instead of terminating the grant. Id.

The financial circumstances asserted by the Municipality are unfortunate but not relevant here. The Board is bound by applicable laws and regulations, including the general administrative requirements in 45 C.F.R. Part 92 that were applicable to the Municipality's Head Start grant. 45 C.F.R. § 16.14. Thus, the Board has no authority to waive a disallowance based on equitable principles. See, e.g., Arlington Community Action Program, Inc., DAB No. 2141, at 4 (2008) (citing Bedford Stuyvesant Restoration Corp., DAB No. 1404, at 20 (1993) (the Board is "empowered to resolve legal and factual disputes" and "cannot provide equitable relief"). The Municipality's assertions regarding its financial circumstances are, therefore, not a basis for reversing ACF's determination to terminate the Municipality's grant.

The Municipality also asserts that ACF's "untimely deposit of program funds into Municipal accounts . . . put further stress [on] the Municipality's finances, as it had to borrow money to cover payroll and other administrative expenses." 12/22/08 Reply at 2 (unnumbered). The Municipality argues in effect that termination is unwarranted because ACF exacerbated the financial situation that led to its failure to make contributions to the retirement fund. Id. at 2-3 (unnumbered). It is unclear whether the Municipality is merely complaining that, as a high risk grantee, it was required to request reimbursement from ACF for expenses incurred for its Head Start grant instead of drawing down funds from a letter of credit as expenses were incurred. Even if the Municipality is alleging that such reimbursement was unduly delayed, however, this appears to be another equitable argument which we reject for the reasons already stated. Moreover, the Municipality can hardly blame any delay on ACF since there would have been no delay if the Municipality had avoided high risk status in the first instance.

The Municipality also questions why the Municipality has been "single[d] out" since other grantees have "received deficiency

notices" but have "been treated with . . . understandable leniency." 12/22/08 Reply at 4 (unnumbered). It is unclear whether the Municipality is alleging that ACF permitted other grantees with deficiencies that were uncorrected at the time of a follow-up review to continue operating their Head Start programs. Even if this is its allegation, however, the Board has previously stated that "allegations of disparate treatment, even if true, do not prohibit an agency of this Department from exercising its responsibility to enforce statutory requirements[.]" National Behavioral Center, Inc., DAB No. 1760, at 4 (2001), citing Edison Medical Laboratories, Inc., DAB No. 1713 (1999), aff'd, Edison Medical Lab. v. Thompson, 250 F.3d 735 (3rd Cir. 2001); and Rural Day Care Association of Northeastern North Carolina, DAB No. 1489. Thus, the Municipality's allegations of disparate treatment, even if true, cannot suffice to bar termination of the Municipality's grant pursuant to statutory (and regulatory) provisions requiring termination where a review discloses a failure to meet the performance standards that is not subsequently corrected.

Conclusion

For the reasons stated above, we conclude that there is no need for an "oral hearing" in this case and uphold the determination by ACF to terminate the Municipality's grant for a Head Start and Early Head Start program.

/s/
Leslie A. Sussan

/s/
Constance B. Tobias

/s/
Sheila Ann Hegy
Presiding Board Member