

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: Puerto Rico Department of the Family DATE: March 31, 2010
 the Family
 Docket No. A-07-78
 Decision No. 2312

DECISION

The Puerto Rico Department of the Family (Puerto Rico) appealed a determination by the Administration for Children and Families (ACF), dated February 20, 2007. ACF determined that Puerto Rico is subject to a financial penalty that would reduce its funding for the Temporary Assistance for Needy Families (TANF) program under title IV-A of the Social Security Act (Act). ACF found that Puerto Rico failed to expend, during federal fiscal year (FY) 2005, non-federal funds to replace a prior penalty reduction in its TANF grant, as required. ACF had imposed the prior penalty for Puerto Rico's earlier failure to meet performance standards in the operation of its Child Support Enforcement program under title IV-D of the Act, and the Board sustained that determination in Puerto Rico Dept. of the Family, DAB No. 1993 (2005).

The amount of the penalty in this appeal is \$1,890,966, comprising 2% of Puerto Rico's adjusted TANF grant for FY 2005, plus \$592,365, the penalty amount that Puerto Rico failed to replace with non-federal funds.

This case was stayed at Puerto Rico's request pending its appeals, in federal district court and then the court of appeals, of the Board's decision upholding the prior penalty. On December 7, 2009, the U.S. Court of Appeals for the First Circuit affirmed the Board's decision. Admin. for Child Support of the Dep't of the Family for the Commonwealth of Puerto Rico v. DHHS, 588 F.3d 740 (1st Cir. 2009). After the court issued its decision, the Board lifted the stay and ordered Puerto Rico to show cause why the Board should not issue a decision in this

appeal based on the Board's previous decision in DAB No. 1993 and the court decisions affirming it.

After being granted a further stay to respond to the Board's order, Puerto Rico submitted a response on March 25, 2010. For the reasons stated below, we uphold ACF's determination.

Discussion

The prior penalty was a 1% reduction in Puerto Rico's TANF funding for FY 2001 that ACF imposed for Puerto Rico's failure to demonstrate with reliable data that, for FYs 2001 and 2002, its title IV-D child support enforcement program met performance standards for establishing the paternity of minor children born out of wedlock. ACF determined that the required data on paternity establishment Puerto Rico submitted for FY 2001 did not meet the standard in the regulation for data reliability, and that Puerto Rico's performance at establishing paternity for FY 2002 was below the required minimum and had not increased over the previous year's performance by the amount needed to avoid a penalty. See Act § 409(a)(8)(A); 45 C.F.R. §§ 305.40(a)(1), 305.61. ACF advised Puerto Rico that as a result of this penalty, Puerto Rico was required to expend additional funds of its own in FY 2005 to replace the reduction due to the penalty. See 45 C.F.R. § 262.1(c)(2).

Puerto Rico in this appeal does not deny that it failed to timely expend additional non-federal funds to replace the prior penalty reduction in its TANF grant. Section 409(a)(12) of the Act and regulations at 45 C.F.R. §§ 262.1(e) and 262.1(a)(12) required that Puerto Rico, in the year its funding was reduced, expend additional funds of its own to replace the funding reduction, or be subject to an additional penalty.* Nor does Puerto Rico dispute that the amount of the penalty was determined consistent with the Act. See Act § 409(a)(12) (penalty to consist of the prior penalty reduction plus not more than 2% of adjusted TANF grant). Instead, Puerto Rico originally based this appeal on its position that the prior penalty was improper, and that Puerto Rico was thus not required either to pay that penalty or to expend additional non-federal funds to replace the penalty reduction of its TANF funding. In DAB No. 1993, however, the Board had already rejected Puerto

* These requirements apply to states; Puerto Rico is considered a state under the TANF and child support enforcement programs at titles IV-A and IV-D. 45 C.F.R. §§ 260.30, 301.1.

Rico's arguments against the prior penalty and sustained ACF's determination imposing that penalty, and the federal courts have now affirmed the Board's decision.

In response to the Board's order, Puerto Rico fails to allege any dispute with the facts ACF asserts in imposing this new penalty. Indeed, Puerto Rico now concedes the "indisputable facts" of "violations of the [TANF] program guidelines." Response at 1. Citing fiscal problems, Puerto Rico requests either a reduction of the amount of the penalty or, "[i]n the eventuality that the penalty is sustained . . . a reasonable repayment plan" Id. at 2.

Puerto Rico's requests that the penalty be reduced or that it be permitted a payment plan do not provide a basis for reversing ACF's determination. As the Board stated in another appeal of a TANF penalty, the financial hardship imposed by the penalty is not relevant to the Board's consideration of any appeal of a penalty or disallowance, where it is not included as a factor for consideration in the applicable statute or regulations. Indiana Family and Social Services Administration, DAB No. 2001, at 25 (2005), aff'd, Alabama Dep't of Human Resources, et al. v. U.S. Dep't of Health & Human Servs., 478 F.Supp.2d 85 (D.D.C. 2007).

As the Board noted in Indiana, the applicable statute and regulation impose the requirement that states spend their own funds to compensate for funding reductions due to penalties under section 409(a). Id., citing Act § 409(a)(12), 45 C.F.R. § 262.1(e). Otherwise, the burden of the penalty would be borne by TANF beneficiaries, not the state that failed to meet applicable requirements. To ensure that the state then spends its own funds to make up for the loss of federal funding and to maintain program levels, the statute and regulations provide for an additional penalty for a state that fails to do so. See 64 Fed. Reg. 17,720, 17,851 (Apr. 12, 1999). These provisions established clear conditions on the amount of TANF funding to which Puerto Rico is entitled.

The applicable statute and regulations also provide that a state may "appeal [ACF's] decision to take a penalty," and that the Board determines "whether to uphold an adverse action or any portion of such action," meaning, in this case, "the imposition of a penalty under section 409 of the Act." 45 C.F.R. § 262.7; Act § 410(a),(b). The statute and regulations do not authorize the Board to forgive a properly imposed penalty on the basis of hardship, or to determine the manner in which the penalty is collected. The Board is bound by all applicable laws and

regulations and does not have the power to grant the relief Puerto Rico seeks. Indiana at 25, citing 45 C.F.R. § 16.14, made applicable to appeals of section 409 penalties by 45 C.F.R. § 262.7(e).

Conclusion

For the reasons stated above or incorporated by reference, we uphold ACF's determination imposing a penalty on Puerto Rico of \$1,890,966 for failure to expend non-federal funds during FY 2005 to replace the prior penalty reduction in its TANF grant.

_____/s/_____
Leslie A. Sussan

_____/s/_____
Constance B. Tobias

_____/s/_____
Judith A. Ballard
Presiding Board Member