CAPLAW Legal Update
Community Action Program Legal Services, Inc.

DAB Update

Recent decisions of the HHS Departmental Appeals Board

DAB Upholds Disallowance of Head Start Costs on Nepotism Grounds

L.I. Child and Family Development Services, DAB No. 2160 (March 2008)[1]

By Petia Loukova-Ianicelli, CAPLAW

The decision of HHS's Administration for Children and Families (ACF) to disallow expenditures of Head Start funds by grantee L.I. Child and Family Development Services, Inc. (LICFD) for the salary and benefits of the CEO's sister was sustained by the DAB. The basis for this decision was the Head Start statute and regulations banning "family favoritism," as well as the grantee's own personnel policy. Although the result here is not surprising, it is surprising that the DAB accepted ACF's argument that an interpretation of the statutory provision included in a Head Start grants administration manual last published in 1986, not included in the Head Start regulations, and not referenced in the notice of grant award, is binding on grantees.

Background

LICFD hired DG as a teacher in 1983. She held various positions thereafter, including director of quality assurance, and was appointed CEO in November 2004. LICFD hired DG's sister, VH, as social service specialist in 1993 and appointed her training and research analyst on August 30, 2004. In August 2004, ACF warned LICFD management staff, including the CEO at that time and DG, that nepotism was prohibited. LICFD responded to ACF that VH, DG's sister, had been terminated. The then CEO terminated VH effective September 13, 2004.

When DG took over as CEO in November 2004, LICFD rehired DG's sister to her last-held position, retroactive to the date on which she had been laid off. DG signed off on this decision, as well as on a December 13, 2004 decision for a salary increase for her sister retroactive to November 1, 2004.

ACF Position

ACF disallowed $66,888, the amount of salary and benefits paid to VH, because her rehiring violated the Head Start Act and regulations, which prohibit "family favoritism." It also violated LICFD's own personnel policy. According to a long-standing policy published in the 1986 HHS Discretionary Grants Manual, grantees may not hire immediate family members of employees whose duties include selection, hiring, and supervision of other employees.

LICFD Position

LICFD argued that it had complied with the Head Start statute and regulations because rehiring VH did not constitute family favoritism. Furthermore, to disadvantage family members in the absence of family favoritism would constitute discrimination and LICFD's personnel policy, to which ACF had never objected, protected kinship.[2]

DAB Holding

On the Head Start Statute – The Head Start Act prohibits family favoritism, as well as the mere taint of family favoritism.[3] The Congressional intent in enacting the statute was to prevent behaviors that may appear to be inappropriate in order to ensure an objective administration of the Head Start program. The acts of the CEO: rehiring her sister, who had been laid off by the previous CEO, and approving a retroactive salary increase, are indicative of a taint of family favoritism in violation of the Act.

On the LICFD Personnel Policy – ACF's lack of objection to LICFD's personnel policy does not constitute acquiescence to the CEO's hiring of her sister. Nothing in the personnel policy alerted ACF that LICFD would find it appropriate to allow its CEO to hire an immediate family member for an administrative position. In fact, the LICFD policy prohibited such a step on its face because there would be a "direct line management relationship."[4] There was a further violation, since LICFD employed two immediate family members at the same site. LICFD acknowledged the personnel policy violation in its correspondence to ACF in stating that the CEO should not have signed off on the decision to rehire her sister or to increase her sister's salary.

On the ACF Long-Standing Policy – In 1982, as a part of the notices of proposed and final revisions to the Discretionary Grants and Administration Manual (GAM), the former Office of Human Development Services (OHDS) published an interpretation in the Federal Register that the statute applies to Head Start grants.[5] While the GAM is not a current manual that continues to be updated, it has not been rescinded or revoked either. Furthermore, in a previous decision, the DAB referenced the GAM nepotism policy in reaching a decision.[6] Finally, the LICFD's argument that the GAM nepotism provision could have been incorporated in the 1996 amendment to the Head Start Act failed because the intent of that amendment was simply to carry out the changes of the 1994 amendment, which did not address nepotism.

1 DAB decisions can be found at **www.hhs.gov/dab/browsedab.html**.

2 The LICFD policy does not bar employment on grounds of kinship, but prohibits a "direct line management relationship between two or more members of the same family." Additionally, if an employee has access to confidential information, no immediate family member or domestic partner may be employed at the same work site.

3 42 U.S.C. § 9839(a) contains the applicable Head Start provision, requiring Head Start agencies to be "free of any taint of partisan political bias or personal or family favoritism." Additionally, individual agencies are responsible for implementing policies that would carry out this statutory purpose.

4 The DAB based its finding on the presumption that all employees who are subordinate to the CEO are arguably in a direct line management relationship with the CEO, and this was especially true here as it was the CEO who had initiated the hiring and salary increase process.

5 OHDS is the predecessor agency to ACF. The applicable provision under

continued on page 9

against that employer, a Head Starts program's "educational institution" status may save the program a substantial sum of money. These savings may, in turn, be applied directly towards the services provided to Head Start children and families, or may be utilized to increase salaries of its school-year employees.

In any event, following the *Montgomery County* decision it seems clear that a significant number of Pennsylvania Head Start programs which were formerly not considered to be "educational institutions" by the UC board will now fit into the new definition of educational institution articulated by the court.[12] As a result, the employees of those Head Start programs, who have formerly been able to collect UC benefits during breaks, should expect to find themselves ineligible for benefits when they file this summer. Those Head Start programs most likely to fit within this new definition of "educational institution" include "direct-grantee" or "stand-alone" agencies whose primary focus involves providing educational services. Although not directly addressed in the *Montgomery County* holding, Community Action Agencies (CAAs) offering Head Start may also be affected by this decision. A key issue will be the nature and degree of the CAA's overall focus on education. While the *Montgomery County* case opens the door for the argument that a Community Action Group-run Head Start program focusing primarily on academic instruction may qualify as an "educational institution," those Community Action Groups whose focus as a whole is primarily related to non-academic social services may be able to distinguish themselves from the employer in the *Montgomery County* case and thereby avoid the "educational institution" designation.[13]

Jason Dalton is the attorney who argued the Montgomery County *case before the Pennsylvania Commonwealth Court and is an Associate Attorney at the Law Offices of Ronald V. McGuckin and Associates. Ronald V. McGuckin and Associates has been providing legal services for members of the Child Care Industry for over 25 years. You can learn more about Ronald V. McGuckin and Associates online at* **www.childproviderlaw.com**

1 *Montgomery County Head Start v. Unemployment Compensation Board of Review*, 938 A.2d 1137 (Pa. Cmwlth. 2007) *(Montgomery County)*.

2 43 P.S. §802.1 (2007).

3 Unemployment Insurance Program Letter (UIPL) #40-79 (August 13, 1979).

4 Unemployment Insurance Program Letter (UIPL) #41-97, 62 Fed. Reg. 60, 104-01 (November 6, 1997).

5 *Montgomery County*.

6 A "Community Action Group" is typically an umbrella corporation which runs a number of social service programs which may include a Head Start program. On the other hand, the term "direct grantee" is used by the court in *Montgomery County* to refer to a corporation whose primary function is the operation of a Head Start program. These agencies are also referred to in the Head Start community as "stand-alone" Head Start programs.

7 Specifically, the court cited *Easter Seal Society for Handicapped Children and Adults of Philadelphia, Bucks, Chester, Delaware and Montgomery Counties v. Unemployment Compensation Board of Review*, 720 A.2d 217 (Pa. Cmwlth. 1998).

8 *Employment Comm'n v. Child, Inc.*, 738 S.W.2d 56 (TX 1987).

9 *Industrial Comm'n v. Board of County Commissioners*, 690 P.2d 839 (CO 1984).

10 *In re Huntley*, 255 S.E.2d 574 (NC 1979).

11 *Simpson v. Iowa Department of Job Service*, 327 N.W.2d 775 (Iowa 1982).

12 This is especially evident since many of the factors articulated by the *Montgomery County* court as relevant in reaching the conclusion that the employer *does* qualify as an "educational institution" are present in all federally-funded Head Start programs.

13 The Pennsylvania UC Board recently issued a decision distinguishing a Community Action Group-run Head Start from the facts in the *Montgomery County* case and holding that the Community Action Group at issue did not qualify as an "educational institution." Appeal No. B-08-09-H-1078 (Issued April 17, 2008). The Board relied on the facts that in that case, unlike in *Montgomery County*, the employer did not wish to be considered an "educational institution" and therefore did not object to the teachers receiving unemployment compensation over the summer, and that because the employer conceded that it was a Community Action Agency, the UIPL's guidance on not classifying "Community Action Groups" as "educational institutions" would be followed.

DAB Nepotism *continued from page 7*

the section "Conflict of Interest or Nepotism" in the GAM "[prohibits] 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"; sisters were included in the definition of immediate family.

6 *Utica Head Start Children and Families, Inc.*, DAB No. 1749 (September, 2000) holding that "Utica failed to conduct its program in a manner free of family favoritism as required by the Head Start Act, regulations and policies" because it permitted the employment of the daughter of the executive director as the fiscal director.

DAB Funds *continued from page 6*

include the Grant A carryover funds on the Grant B FSR. The DAB did not accept two later prepared FSRs by the grantee in attempts to correct the alleged accounting error because they were not dated, signed, or certified, whereas the first one had been. It also rejected an opinion letter by the grantee's auditor claiming the revision to be accurate, since the letter neither explained how it reached the decision nor attached supporting documentation. The DAB did not accept a position memo issued by the chief financial officer of the grantee due to the fact that it failed to discuss the erroneous accounting of the initial FSR report, but instead focused on arguing that there was no over-expenditure of federal money and "there were sufficient federal dollars remaining in the PMS [Payment Management System] to operate all federal awards." The DAB also failed to accept the grantee's argument regarding the accounting error because it was inconsistent with the original explanation of the over-expenditure given by the CFO at the time the FSR was initially submitted.

1 DAB decisions can be found online at **www.hhs.gov/dab/decisions**.

2 45 C.F.R. §1309.10 contains the requirements for purchase, construction, and major renovation of facilities with Head Start funds.

3 45 C.F.R. §74.71 spells out the steps that a grantee must follow once the budgetary period has ended, among which are submission of an expenditure report within 90 days of the end of the budgetary period and paying off the "obligations." Obligations are "amounts of orders placed, contracts and grants awarded, services received and similar transactions during a given period that require payment by the recipient during the same or a future period." 45 C.F.R. §74.2.

4 2 C.F.R. Part 230, Att. A (formerly known as OMB Circular A-122) 4 outlines the basic principles in determining whether an expenditure is allowable under a federal grant.

5 45 C.F.R. §74.21 requires grantees to have a financial management system and establishes among other things that all funds must be accounted for.