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Office of the General Counsel

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December 24, 1991

Mr. Gerald Townley, Jr.
Associate Program Specialist
Bureau of State Financial Operations
New York State Department of Social Services
40 North Pearl Street
Albany, New York 12243-0001

Dear Mr. Townley:

This responds to your June 27, 1991 request, as supplemented on August 22, 1991, for an opinion on when federal funds that are used by New York State (NYS) to operate the Social Security Administration's (SSA) Disability Determination Program (DDP) lose their federal character and become state funds.[1] For reasons set forth below, we conclude that the federal funds are available to the state only when necessary to pay DDP obligations incurred by the state.

The NYS Department of Social Services (DSS) operates the DDP on behalf of SSA. Under the DDP, SSA reimburses the state for costs incurred in determining the eligibility of individuals for supplemental security income. Reimbursement is made when NYS draws down funds against a federal letter of credit. For example, NYS draws against the letter of credit on a biweekly basis in order to meet DDP payroll costs.

At issue here is NYS' draw down of funds to cover employee retirement contributions. On a quarterly basis, the NYS Office of the State Comptroller draws down funds in order to cover the allowable indirect fringe benefit costs related to the direct payroll costs, i.e., retirement, workmen's compensation, health and dental insurance, social security contributions, unemployment, survivors' benefits, and employee benefit funds. We understand that the bills for these benefits are paid at various times, within three days of drawdown, monthly, quarterly or annually. You advised

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[1]Title XVI of the Social Security Act, 42 U.S.C. § 1381-1385 (1982), established a national program for the purpose of providing supplemental security income to individuals who have attained age 65 or are blind or disabled. See 20 C.F.R. § 416.101 (1980).

that although employee retirement contributions are drawn down quarterly during the fiscal year, the bill for retirement contributions is actually paid annually on June 15, 14 1/2 months after the end of the state's fiscal year on April 1.

In this regard, because of this nearly 15-month time lag, the SSA disallowed $2,038,063 in DDP funding for the period April 1, 1980 through September 30, 1983. The SSA took the position that the $2,038,063 represented an applicable credit for interest earned by New York following the state's premature drawdowns. The Department of Health and Human Services' (HHS) Departmental Appeals Board (DAB) rejected the state's arguments that the SSA lacked the authority to take the disallowance and sustained the SSA's entire disallowance of $2,038,063. DAB No. 1186 (1990).

You state that the DAB decision failed to address the question of when federal monies lose their federal character after drawdown and you therefore would like our opinion on this matter. Specifically, you would like to know when federal funds that are drawn down against the letter of credit on a quarterly basis to cover allowable fringe benefit costs become state funds. You have asked that we limit our consideration to this question.

The DAB, in effect, answered this question in its October 19, 1990 reconsideration of SSA's disallowance of the $2 million in funds. DAB Docket No. 90-198. The DAB concluded that for the purposes of a cost reimbursement program, such as this, the critical point in time, regardless of when funds were actually transferred from the federal government to the state, is when the obligation that the funds were intended to cover was liquidated. Id. at 6. The DAB stated: "It is only then that the state has fulfilled the actual cash requirements of its program." Id.

As DAB noted in its reconsideration, the program regulations in effect during the period at issue provided that SSA would give NYS funds, either in advance or by reimbursement, for costs incurred by NYS in operating the program on behalf of NYS. Id. at 5. Advances by letter of credit drawdown are governed generally by Department of the Treasury regulation as follows:

> "Cash advances to a recipient organization shall be limited to the minimum amounts needed and shall be timed to be in accord only with the actual, immediate cash requirements of the recipient organization in carrying out the purpose of the approved program or project. The timing and amount of cash advances shall be as close as is

administratively feasible to the actual disbursements by the recipient organization for direct program costs and the proportionate share of any allowable indirect costs."

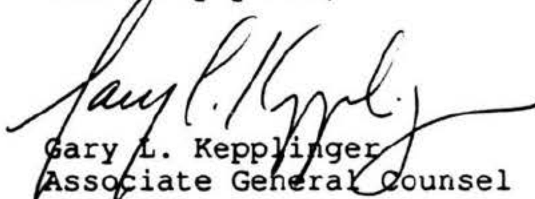
31 C.F.R. § 205.4(a) (1980).

As stated in Treasury Department Circular No. 1075 - Fourth Revision (1977), the predecessor of which established this policy,[2] the purpose is to minimize the impact of such payments on the level of the public debt and related financing costs. Treasury Financial Manual, Vol. I, Part 6, Chap. 2000.

Clearly these regulations require the exercise of discretion. As highlighted by the facts of this case, SSA must monitor and determine what time constitutes "as close as is administratively feasible to the actual disbursement." See 31 C.F.R. § 205.8 (1980). In this case, SSA concluded, and DAB concurred, that a 15 month advance is extreme. We have no basis on which to question the reasonableness of that determination, especially given that NYS has presented no evidence suggesting extenuating circumstances that might justify a need to withdraw funds 15 months in advance of the liquidation of its underlying obligation for employee retirement contributions.

We trust that you will find our views useful. If we can be of further assistance, please contact me or Ms. Amy Shimamura of my staff at .

Sincerely yours,



Gary L. Kepplinger
Associate General Counsel

[2]Departmental Circular No. 1075, May 28, 1964.