UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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APPLICATION OF THE PUERTO RICO DEPARTMENT OF EDUCATION, Applicant.	Docket No. 97-52-R Recovery of Funds Proceeding ACN: 02-20208

Order Re Statute of Limitations Issue

This is an appeal initiated by the Puerto Rico Department of Education (PRDE) in response to a preliminary departmental decision issued by the Assistant Secretary of Elementary and Secondary Education (Assistant Secretary) which determined, in part, that PRDE misspent $1,846,718 of Chapter 1 funds during the fiscal years 1992 and 1993 when it administered the APRENDA test to non-Chapter 1 students.1/ With the consent of the Assistant Secretary, PRDE moved for partial summary judgment on the theory that the funds attributable to fiscal year 1992, i.e. $1,017,440 of this amount, are barred from recovery due to the statute of limitations. The Department filed an opposition to PRDE's motion for partial summary judgment.

20 U.S.C. § 1234a(k) (1996) bars the recovery of funds that are expended more than five years before a recipient receives a written notice of the Department's preliminary departmental decision--

> No recipient under an applicable program shall be liable to return funds which were expended in a manner not authorized by law more than 5 years before the recipient received written notice of a preliminary departmental decision.

Hence, the five year period of limitation begins with the date of expenditure and closes five years thereafter and the Department's preliminary departmental decision must be received by the recipient during the interim.

1/ Initially, the Assistant Secretary's audit determined that $2,696,348 was misspent over the fiscal years 1991, 1992, and 1993. The audit report recognized, however, that the statute of limitations precluded the recovery of the funds spent in the fiscal year 1991. Accordingly, the preliminary departmental decision sought only the recovery of $1,846,718 which was expended in the fiscal years 1992 and 1993.

There is no dispute between the parties regarding the date of expenditure of the $1,017,440. It was March 30, 1992, the date on which PRDE executed a contract with the Psychological Corporation to administer the APRENDA test. As such, the notice of preliminary departmental decision must have been received by PRDE on or before March 30, 1997, in order to include the claim for the $1,017,440.

The parties disagree, however, as to the date on which PRDE received the notice of preliminary departmental decision which sought the recovery of the $1,017,440. The Assistant Secretary maintains that PRDE received it on Wednesday, March 26, 1997, some four days prior to the end of the recovery period. PRDE argues that it was not received until Monday, March 31, 1997, which was one day beyond the recovery period.

The facts, while unusual, are not in dispute. For reasons not totally apparent, the Assistant Secretary waited until near the end of the limitation period to issue the preliminary departmental decision. The Assistant Secretary issued the preliminary departmental decision by letter dated Wednesday, March 26, 1997, and sent it by Federal Express for overnight delivery to Victor Fajardo, the Secretary of Education for PRDE. 2/

On the same day of the issuance of the preliminary departmental decision, the Assistant Secretary discovered that PRDE's office would be closed the following two days -- on Thursday for Holy Thursday and on Friday for Good Friday. In an effort to deliver the preliminary departmental decision before the expiration of the statute of limitation on Sunday, March 30, 1997, the Assistant Secretary sent a copy of the preliminary departmental decision by facsimile transmission to Mr. Porfirio Rios-Rojas, a supervisory auditor for the Department's Office of Inspector General in Puerto Rico, for delivery by hand to PRDE.

Following its receipt on Wednesday, March 26, 1997, Mr. Rios-Rojas traveled to the building which housed the office of PRDE and arrived sometime after the building was closed for the day and well after PRDE's close of business at 4:30 pm. Mr. Rios-Rojas asked the security guard to deliver an envelope containing a copy of the preliminary departmental decision to the office of Victor Fajardo, the Secretary of Education for PRDE. The security guard was not an employee of PRDE and was not authorized to accept mail or other documents on behalf of PRDE. Accordingly, the security guard did not accept the envelope. Pursuant to another request by Mr. Rios-Rojas, however, the security guard escorted Mr. Rios-Rojas to the office of Mr. Fajardo whereupon Mr. Rios-Rojas slid the envelope under the locked door. The envelope was discovered early on Monday morning, March 31, 1997, during its business hours by Mr. Fajardo's secretary.

The issue is whether PRDE "received [the] written notice of a preliminary departmental

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2/ Due to the two legal holidays in Puerto Rico and the weekend, this letter was not received by PRDE until Monday, March 31, 1997.

decision" under 20 U.S.C. § 1234a(k) when it was slipped under the door of the office of the recipient state agency after business hours by an employee of the Department. Both parties agree that the statutory phrase "received written notice of a preliminary departmental decision" is amplified by 34 C.F.R. § 81.34(a) (1996) which provides that--

> [t]he official sends the notice [of the preliminary departmental decision] by certified mail, return receipt requested, or other means that ensure proof of receipt.

In the view of the Assistant Secretary, receipt of the notice is satisfied by a departmental employee slipping the notice under the locked door of PRDE after its business hours as this method of delivery constitutes an "other means [of sending the notice] that ensure[s] proof of receipt" under 34 C.F.R. § 81.34(a). This method ensures proof of receipt because the department's employee performed the act of slipping the notice under the door. Moreover, the Assistant Secretary argues that hand delivery to an individual representing PRDE is not required because the statute of limitation provision only requires receipt by "the recipient," not a representative of the recipient. Here, the recipient is a legal entity and the notice was slipped under the door of its office and, therefore, receipt occurred.

PRDE argues that the notice must be "received" as required by 20 U.S.C. § 1234a(k), which means that PRDE must have actual knowledge of the delivery to its office and must have taken possession and control of the notice. While it concedes that hand delivery may be a proper, alternative method of delivery under 34 C.F.R. § 81.34(a), it asserts that hand delivery was ineffective in the instant case because the notice was not delivered to an individual who represented PRDE. Hence, receipt was not accomplished until the morning of Monday, March 31, 1977, when the secretary of Mr. Fajardo opened the office, discovered the notice on the floor of the office, and then exercised possession and control over the notice.

Initially, Congress employed the phrase "received [the] written notice" in 20 U.S.C. § 1234a(k). The term "received" connotes the "tak[ing] into possession and control; accept[ing] custody of; or collect[ing]." Black's Law Dictionary 1268 (6th ed. 1990); cf. Capital City Excavating Co., Inc. v. Donovan, 679 F.2d 105, 110 (6th Cir. 1982) (the period to file a notice of contest of a citation and notice of penalty began upon the "receipt" of the document under 19 U.S.C. § 659(a) and occurred "when the citation and notice of penalty was delivered to the corporation by the statutory means and delivery was accepted by an agent of the corporation possessing authority to do so."); Bell v. Brown, 557 F.2d 849, 852 (D.C. Cir. 1977) (noting that "the 'receipt of notice' and not its mailing, is expressly made the event inaugurating the 30-day period," where the statue provides that an employee must file a civil action "[w]ithin thirty days of receipt of notice of final [administrative] action taken"). Hence, under the plain meaning of the statute, receipt of the notice does not occur until PRDE accepts the notice and takes possession thereof.

The Assistant Secretary argues, in effect, that possession of the notice -- it was slipped under the locked door of PRDE after its business hours -- constitutes receipt by PRDE. This view, however, ignores that PRDE is a legal fiction and, as a legal fiction, is incapable of acting on its

own behalf. A legal entity conducts its business through individuals who are its employees and authorized agents. As such, receipt of the notice occurs when an employee or other authorized agent of the recipient organization accepts the notice and takes possession thereof. In re Puerto Rico Dep't of Education, Dkt. No. 89-2-R, U.S. Dep't of Education (Fin.Dec. Sept. 1, 1989) (recognizing that a mail room employee acts on behalf of the recipient when he receives the notice of preliminary departmental decision and signs the certified mail return receipt).

34 C.F.R. § 81.34(a) establishes the standard under which the receipt of a notice may be effected and clearly incorporates the plain meaning of the term receipt. It provides that the departmental official sends the notice by certified mail, return receipt requested. Under this method, the notice must be delivered by the post office employee to the representative of the recipient who, in turn, signs an acknowledgment of receipt on the return receipt.3/ Certified mail may not be slipped under the door or just left in an unoccupied or occupied office by a post office employee. A receipt must be signed before the post office employee can transfer possession of the certified letter to the addressee. Domestic Mail Manual 52, D0 42, § 1.7b. (July 1, 1997).4/ Thus, in the context of certified mail, receipt means delivery of the notice to a representative of the recipient and a signed acknowledgment by the addressee.

Delivery by hand under a locked door after business hours is not an alternative method of delivery permitted by the general phrase of 34 C.F.R. § 81.34(a) that the official may send "the notice by . . . other means that ensure proof of receipt." First, such a construction is not permitted under the doctrine of ejusdem generis, one of the cannons of statutory construction. When a general phrase follows the enumeration of words of a particular and specific meaning, the doctrine of ejusdem generis mandates that the construction of the more general phrase is limited to a manner consistent with the preceding, more specific words or objects. Here, the specific phrase provides for the certified mail method of delivery under which delivery is made to a representative of the addressee and an acknowledgment of receipt is obtained and forwarded to the sender. Thus, an acceptable, alternative method under the more general phrase must include these same or equivalent characteristics. In the instant case, the Assistant Secretary's method of delivery lacks both aspects. First, there was no delivery of the notice to a representative of PRDE. Second, while the Department's employee could swear that he slipped the notice under the door, he cannot swear that he delivered it to a representative of PRDE. As such, the Assistant Secretary's approach is not a proper, alternative method under 34 C.F.R. § 81.34(a).

Lastly, the Assistant Secretary's approach is incompatible with a second function served by 34

3/ The return receipt is a post card which bears the address of the sending official.

4/ In the event the addressee is not present to receive the mailed item, then the post office employee leaves a notice that the item may be obtained at the post office or the addressee may request redelivery. Postal Operations Manual 7, § 812.25 (Aug. 1, 1996).

C.F.R. § 81.34(a). This regulation is employed to ascertain not only the date of receipt of the notice of preliminary departmental decision for purposes of the statute of limitation, but also the beginning date for the 60-day period during which a recipient may request the Office of Administrative Law Judges to review the findings by the Assistant Secretary in the preliminary departmental decision--

> [a] recipient that has received written notice of a preliminary departmental decision and that desires to have such reviewed by the Office shall submit to the Office an application for review not later than 60 days after receipt of notice of the preliminary departmental decision.

20 U.S.C. § 1234a(b)(1) (1996); 34 C.F.R. § 81.37(b) (1996).5/

As part of its application for review, a recipient must "certify[ ] the date . . . [it] received the notice of" the preliminary departmental decision. 34 C.F.R. § 81.37(d) (1996). Thus, the statutory and regulatory scheme envisions the delivery of the notice to a representative of the recipient so that the recipient can certify, in turn, the date of receipt of the notice in its application for review.

Under the Assistant Secretary's approach, a recipient, such as PRDE, cannot certify the date of its receipt of the preliminary departmental decision because none of its employees has any actual knowledge of its delivery. It is beyond comprehension that the Secretary contemplated an alternative method of delivery, such as that urged by the Assistant Secretary, under which a recipient of a notice must engage in a full scale investigation outside its organization in order to ascertain the date of its acceptance of the notice. Obviously, the certified mail method of delivery ensures that the recipient has knowledge of the actual date of its receipt and any other acceptable, alternative method under the regulation would do the same.

The Assistant Secretary raises In re Trend Colleges, Inc., Dkt No. 90-56-ST, U.S. Dept. of Education (Sec.Dec. Nov. 27, 1991) and the rules of several courts of appeals for the proposition that facsimile transmissions to an adjudicatory tribunal are a valid method of filing appeals or submissions and, therefore, actual receipt of the notice of preliminary departmental decision by a representative of PRDE was not necessary. Trend and the court rules are readily distinguishable.

5/ In footnote 7 of its brief, the Assistant Secretary notes that PRDE submitted its application for review to the Office of Administrative Law Judges on May 27, 1991, and that, under the Assistant Secretary's interpretation, the 60-day period for filing an application began on March 26 and ended on May 25, 1997. As such, under the Assistant Secretary's theory, PRDE's application for review was not filed within the 60-day period. Although the Assistant Secretary indicated an intent to file, in the future, a motion to dismiss PRDE's application, no such motion has been filed. The Assistant Secretary's approach in this matter is rather puzzling since jurisdiction is a matter which cannot be waived by the parties.

While it is true that several clerks of Federal appellate courts do not have to be present to receive a facsimile transmission, each clerk possesses under the local rules, however, total control over whether and when a facsimile transmission can be used. Transmissions are allowed only after the clerk has determined there is an emergency-type circumstance and has given his permission to utilize the facsimile transmission. E.g. Fourth Circuit Loc. R. 25(b)(1). Thus, the clerk of court can make appropriate arrangements to receive a transmission as has the Office of Hearings and Appeals of the U.S. Department of Education.

The judicial decisions cited by the Assistant Secretary are unpersuasive and not particularly relevant. In Shaw v. United States, 622 F.2d 520 (Ct.Cl. 1980), the court found constructive delivery of a notice to terminate the employee's employment occurred after the agency tried numerous and varied means to deliver the notice to an employee who was evading the notice. Here, PRDE closed its offices on Thursday and Friday due to two legal holidays, not to evade the Assistant Secretary's notice. Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 92-93 (1990) addressed a different issue, i.e. whether the receipt of an EEOC right-to-sue letter by an employee of the attorney representing the plaintiff could be imputed to the plaintiff. In Fuentes-Argueta v. Immigration and Naturalization Service, 101 F.3d 867, 871-72 (2nd Cir. 1996), the court dealt with an unrelated issue concerning the legal effect of a notice of hearing sent by certified mail to the alien's last known address which was returned unclaimed.

In a similar fashion, the Assistant Secretary's reliance upon Greenwood v. State of New York, Office of Mental Health, 842 F.2d 636, 639 (2nd Cir. 1988) is misplaced. There, the court held that a complaint was "filed" within the period of the statute of limitation when it was placed in the night depository box maintained by the Clerk of Court even though a local rule deemed it as filed on the following business day. Our case involves a statutory and regulatory scheme in which the terms "received" and "filed" are used in different provisions and accorded different meanings.6/ As the Seventh Circuit recognized in Central States Pension Fund v. Ditello, 974 F.2d 887 (7th Cir. 1992), "received" under 29 C.F.R. § 2641.2(c) was not to be equated with the terms "filed" or "served" used elsewhere in the regulations as the U.S. Labor Department regulators made a purposeful decision that some deadlines should be determined by the date of mailing or filing and others should be determined by the date a document is received. A similar determination is mandated in this case.

6/ For example, written submissions to an Administrative Law Judge or the Office of Administrative Law Judges are "filed" under 34 C.F.R. § 81.12(a) which is defined by subparagraph (d)(1) as the date of hand-delivery, the date of mailing, or the date of facsimile transmission. Similarly, a party may "file" a petition for review of an adverse initial decision with the Secretary under 34 C.F.R. § 81.42(a) which is defined by subparagraph (g)(1) as the date of hand-delivery, the date of mailing, or the date of facsimile transmission.

For the foregoing reasons, the motion for partial summary judgment filed by Puerto Rico Department of Education is granted and, accordingly, the amount in controversy is reduced to $829,278.

Allan C. Lewis
Chief Administrative Law Judge

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Washington, D.C.

SERVICE

On October 15, 1997, a copy of the attached document was sent to the following:

Michael Brustein, Esq.
Leigh M. Manasevit, Esq.
Christine Plagata-Neubauer, Esq.
Brustein & Manasevit
3105 South Street, N.W.
Washington, D.C. 20007

Kay Rigling, Esq.
Office of the General Counsel
United States Department of Education
600 Indpendence Avenue, S.W.
FOB-10B, Room 5442
Washington, D.C. 20202-2110