UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

In the Matter of

TARLETON STATE UNIVERSITY,

Respondent.

Docket No. 09-56-SF

Federal Student Aid Proceeding

Appearances: Leslie H. Wiesenfelder, Esq., Dow Lohnes PLLC, Washington, D.C., and Antonia M. Aguilar, Esq., College Station, Texas, for Tarleton State University.

Brian P. Siegel, Esq., Office of the General Counsel, U.S. Department of Education, Washington, D.C., for Federal Student Aid.

Before: Judge Ernest C. Canellos

DECISION

Tarleton State University (Tarleton) is a public institution of higher education located in Stephenville, Texas. It is a part of the Texas A&M University System and offers a variety of programs leading to the full range of degrees up to and including doctoral degrees. Tarleton's programs are accredited by the Southern Association of Colleges and Schools Commission on Colleges, and are eligible to participate in the various federal student assistance programs that are authorized by Title IV of the Higher Education Act of 1965, as amended (Title IV). Within the U.S. Department of Education (ED), the office of Federal Student Aid (FSA) is the organization that is charged with oversight over these programs.

The instant appeal before me matriculated through an unusual circuitous route prior to being assigned to me for resolution. From April 21, 2008, to April 25, 2008, FSA reviewers from a joint Dallas and Philadelphia School Participation Team conducted an on-site program review at Tarleton focused on Tarleton's compliance with the requirements of the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act), 20 U.S.C. § 1092(f). The Clery Act is implemented by ED's regulations at 34 C.F.R. §§ 668.41 and 668.46. The Act requires that institutions participating in Title IV student aid programs publish and distribute an annual security report notifying students, employees, potential students and

employees, and ED, of statistical information regarding certain crimes reported to have occurred on campus and adjacent public areas and to provide those persons with information on the procedures for reporting such crimes. The reportable categories include: homicide (murder and manslaughter), sex offenses (forcible and non-forcible), robbery, burglary, vehicle theft, arson, drug and liquor violations, and illegal weapon violations. In addition, hate crimes must be specifically enumerated in the report.[1]

During their review on campus, the review team examined Tarleton's 2005 report and discovered that Tarleton had substantially amended its 2005 initial report, correcting some of the entries. Apparently this amendment, dated May 17, 2007, was the result of an audit that Tarleton had ordered after the publication of the campus newspaper articles but before the program review. The team interviewed students and employees, and analyzed campus police blotters and determined that even after correction, the information contained in the amended submission was still incorrect. In particular, the 2005 initial report listed 29 burglaries on campus, no forcible sex violations and no drug or liquor violations or arrests. Tarleton's revision of that report correctly added three forcible sex offenses, one robbery, 16 burglaries, and two drug violations. However, the program review team determined that even after amendment, Tarleton under-reported some violations, but also over-reported some as well.

The review team issued a program review report on February 18, 2009, in which it detailed instances where Tarleton had failed to comply with the Clery Act by not reporting a number of incidents in its crime statistics for calendar year 2005 as the Clery Act required. Tarleton responded to the program review report on April 7, 2009, acknowledging that the reports it had generated in 2005, both in the original and in the amendment, were not entirely correct. However, Tarleton asserted that it had ultimately corrected all the reporting failures and had notified the appropriate parties of the changes. The Final Program Review Determination (FPRD), issued on June 10, 2009, accepted that the errors disclosed during the program review had been resolved by Tarleton and, therefore, the findings were declared closed. However, the FPRD also announced that the report was to be forwarded to the appropriate FSA officials for consideration of possible adverse action under Subpart G, 34 C.F.R. § 668.81 *et seq.*

Subsequently, on October 6, 2009, FSA issued a Notice of Intent to Fine Tarleton $137,500.00, for the violations verified in the FPRD. The proposed fine included: $27,500.00 for each of the three forcible sex offenses that were not reported originally but were correctly reported in the amended filing; $27,500.00 for the one robbery and other offenses not reported originally but reported in the amended filing; and $27,500.00 for four burglaries and other assorted crimes that were not reported in either submission but were uncovered by the program review team. Other than delineating the violations of the Clery Act reporting by Tarleton, FSA

[1] The instant program review was precipitated by the publication on April 12, 2007, of two articles in the campus newspaper claiming that Tarleton's Clery Act submissions under-reported a number of categories of crimes. When queried by FSA on June 15, 2007, regarding the articles, Tarleton officials claimed that it was meeting all Clery Act reporting requirements, however, FSA decided to investigate the allegations further.

supports the amount of the proposed fine by stating in its Notice of Intent to Fine, "The inaccurate information . . . deprived the campus community of vital information on campus security and denied individuals the opportunity to take adequate steps to provide for their own safety and that of others." While that may well be so, the ultimate question is, does that declaration satisfy FSA's burden of proof relative to the establishment of the appropriateness of the fine it seeks?

By letter, dated October 27, 2009, Tarleton filed a written request for a hearing to contest the proposed fine. In due course, the parties submitted their respective briefs and proposed evidentiary matter. In its appeal, Tarleton does not contest the facts as alleged by FSA, however, it disputes first the legality of the fine action and second, the amount of the fine. Basically, Tarleton argues that the fine action is *per se* arbitrary and capricious and should be dismissed as an abuse of discretion. In the alternative, it requests that the fines be reduced to a total of no more than $25,500.00, arguing that this figure is more appropriate under the facts and is consistent with previous decisions of this Tribunal. Tarleton's position is capsulated in the introductory paragraph of its brief. There, it asserts that, "based on its prompt remedial actions, previous history of compliance and total cooperation during the inquiry, there is no justification for the amount of the fine."

The procedures for fining an eligible institution are enumerated in 34 C.F.R. Subpart G. In accordance with 34 C.F.R. § 668.84 (a) (1), the Secretary is authorized to impose a fine of up to $27,500.00 for each violation of a statutory or regulatory provision applicable to Title IV. In any such fine proceeding, 34 C.F.R. § 668.88 (c) (2) provides that FSA has the burden of persuasion. When considering the appropriate fine, 34 C.F.R. § 668.92 instructs that the gravity of the violation must be considered. In the present case, since both parties agree to the facts enumerated above, I have determined that there is no need to hold an evidentiary hearing -- my responsibility is, therefore, to determine the appropriate fine to impose.

There is discretion in determining the amount of a fine within the authorized maximum permissible punishment. However, to be considered an appropriate action, fines like any other pecuniary action must be assessed only after giving due consideration to the seriousness of the violation as well as to the degree of culpability of the violator. Increments of that analysis include: the injurious effect of the violation on others, the intent or lack thereof of the perpetrator, and the possible deterrent and the rehabilitative effects of the punishment. Historically, the maximum permissible punishment has been reserved only for those most aggravating examples of the violation being sanctioned. Here, no such analysis is apparent -- if it were carried out, it is not described or reported by FSA. In fact the only indication of any consideration of the amount of the fine is a reference to the maximum fine allowable ($27,500.00 per violation), the application of that maximum to three failures to originally report forcible sexual offenses, and the maximum fine for a few other failures to originally report a few offenses, and a maximum fine for the failure to report those few offenses uncovered by the program review team. The over reporting of crimes is not referenced at all relative to the extent of the fine.

Although there is a recognizably wide discretion in the assessment of a fine, that discretion must be tempered by reason. Judicial review of such fine action must assure fairness and appropriateness applying the classic balancing of the established mitigating and aggravating factors. As to the mitigating factors, I have considered: there was no evidence of a fraudulent intent by anyone associated with the erroneous submission -- in fact, there is some evidence that the errors were precipitated by a misunderstanding of the reporting requirements by the campus police; there was no evidence of previous violations of the reporting requirements; Tarleton attempted to correct its erroneous submission immediately after being informed of the violations through the campus newspaper and before the program review; and clearly there were no federal funds put in jeopardy by virtue of the violation. On the other hand, although not an intentional violation, the improper reporting does have potential serious consequences. Finally, it seems quite apparent that similar errors in the Clery Act reporting will not recur in the future by virtue of the corrective measures that Tarleton has implemented.

Another aspect of this fine action that is implicated is what is the maximum permissible fine in this case? By that I mean, without a clear understanding of what the maximum is and what FSA believed it to be, how can I assess the appropriateness of the recommended fine? What is the reference point to which I can apply the balancing test of the mitigating and aggravating factors mentioned above? One corollary to the rules regarding punishment is that you may not have unreasonable multiplicity of charges so as to enhance the authorized punishment. This issue is raised because of the method FSA chose to lump together certain erroneous reporting, while at the same time, chose to separate out other reporting during the same time period and in the same report. Arguably, since the alleged violation is the improper filing of a single report, the maximum permissible fine should be $27,500.00. Does the fact that the report is wrong in a number of ways allow for the maximum fine to be $27,500.00 multiplied by the number of incorrect entries? Or, do the multiple errors allow for the imposition of a fine on the higher side of the punishment for a single violation? To put the question in context, what would have been the maximum permissible fine had Tarleton not filed a Clery Act report at all? Further, even though I recognize that other additional punishments could be assessed, what would the maximum permissible fine have been if it were established that Tarleton had failed to submit its Clery Act report, intentionally?

Here, FSA chose to select out three offenses, not originally reported, but reported correctly in an amendment, and propose a total fine of $82,500.00. Next, it took the remainder of the offenses not reported originally but correctly amended, and proposed a fine of $27,500.00. Finally, it proposed another fine of $27,500.00 for the offenses Tarleton had reported only after discovery by the review team. If all this amounts to only one violation, the maximum fine is $27,500.00. On balance, I find that FSA has failed to satisfy its burden of persuasion that $137,500.00 is an appropriate fine under the circumstances. Since the facts are not in dispute and based on the entire record before me, I find appropriate only $27,500.00 of the proposed fine.

ORDER

On the basis of the foregoing, it is ORDERED that Tarleton State University pay to the United State Department of Education a fine of $27,500.00 for its admitted failure to comply with the reporting requirements of the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act.

_____

Ernest C. Canellos
Chief Judge

Dated: September 23, 2010

SERVICE

A copy of the attached document was sent by certified mail, return receipt requested, to the following:

Leslie H. Wiesenfelder, Esq.
Dow Lohnes PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036-6802

Antonia M. Aguilar, Esq.
Office of the General Counsel
The Texas A&M University System
A&M System Building, Suite 2079
200 Technology Way
College Station, Texas 77845-3424

Brian Siegel, Esq.
Office of the General Counsel
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202-2110