UNITED STATES DEPARTMENT OF EDUCATION

THE SECRETARY

Appeal of the	)	
	)	Docket No. 89-8-R
MARTY INDIAN SCHOOL (SD)	)	Audit Control No. 08-72116
	)	
	)	

DECISION OF THE SECRETARY

The Marty Indian School of South Dakota (Marty) has petitioned for review of the May 8, 1990, Initial Decision (ID) of Administrative Law Judge Daniel Shell (ALJ) in the above-cited matter. I have reviewed the decision, briefs and accompanying documents submitted by the parties, and the record in its entirety. Before proceeding to the merits of the underlying matter, some note must be made regarding the procedural aspects of this appeal.

Marty received its copy of the ALJ's ID on May 14, 1990. Under our regulations, specifically pursuant to 34 CFR 81.32 (a) and (b), and by notice to Marty by memoranda dated May 9, 1990, from Dan R. De Lacy, Director, Office of Hearings and Appeals, U.S. Department of Education, "(i)f a party wishes to obtain the Secretary's review of the initial decision of an ALJ, the party files a petition for review with the Office of Administrative Law Judges (within 30 days of its receipt), which sends the petition to the Secretary."

On June 11, 1990, the U.S. Department of Education received Marty's Petition for Review. Because Marty failed to mail this petition to the Office of Administrative Law Judges (OALJ), as provided in our regulations, applicant Marty's petition was not received by that body until June 26, 1990. As demonstrated by counsel for the Assistant Secretary for Elementary and Secondary Education (Assistant Secretary) and for the Director, Cost Determination Branch, Grants and Contracts Service (GCS), U.S. Department of Education, in his June 25, 1990, response, the OALJ did not receive Marty's appeal within the 30 day period provided under 34 CFR 81.32.

In its reply to the above, Marty responds to this lateness by stating that--

> the Assistant Secretary and GCS argue that 34 CFR 81.32 (a) (b) is jurisdictional. The Assistant Secretary and GCS provide no support or authority for this statement. The application was filed within the thirty (30) days of its receipt and all parties were notified of the identity of the decision of which the review is sought and a statement of the reasons asserted by Marty for setting aside the decision of the ALJ.

I do not see any argument in the Assistant Secretary's/GCS' brief that this requirement is "jurisdictional." It is, however, a procedural mechanism which safeguards the efficiency of the processing of such appeals. In this case, the parties were not notified of either the identity of the decision of which review was sought, or of the reasons asserted by Marty for setting aside the ALJ's decision until the petition was received by the OALJ. Generally, the Secretary does not consider appeals which are objected to by a late party's opposition without some showing of "good cause." Although none has been demonstrated here, I will go further and state that even though Marty's petition for review was untimely, I still cannot find for petitioner.

The ALJ correctly found that Marty was unable to produce any evidence to rebut the Department of Education's prima facie case established by the final determination letter of March 30, 1989. ID at 3. That letter reflected the auditors' finding that $9,598 in funds received under the Indian Education Act were spent without any supporting documentation to confirm that they were spent for proper purposes. In the absence of any other proof or indication that the money was properly expended, I would have to agree with the ALJ. Marty's sole claim, offered without any substantiation in the record, however, is that the disallowed funds arose out of "embezzlement of funds which constitutes an intervening superceding cause, thereby relieving Marty from liability." Petition for Review at 3. I disagree.

Before receiving Indian Education Act funds, Marty agreed that they would be spent properly. It is well settled that funds spent contrary to the requirements governing their use must be returned to the government. This has been repeatedly addressed by the Supreme Court. See generally Bennett v. Kentucky, 470 U.S. 656, 663 (1985); Bell v. New Jersey, 461 U.S. 773, 791 (1983). Moreover, since they were not so spent, their return is required for violation of the "substantive requirement[s] concerning the use of [such] funds." Bennett v. Kentucky, at 673, n.5.

Marty's argument that embezzled funds need not be repaid is without foundation. By implication, Marty's reasoning would have a grantee repay funds unintentionally misspent, but free from liability for funds intentionally diverted. Moreover, under these particular facts, holding the school responsible for the conduct

of its official(s) is reasonable since the school's lack of supporting documents to confirm the propriety of the $9,598 was the direct result of Marty's poor accounting practices. The decision of the ALJ below seems supported by substantial evidence and in accord with the appropriate legal standards.

The only other issue raised regards a May 4, 1990, "Stipulation for Withdrawal of Application for Review of Program Determination" (Stipulation) submitted by Marty after failed settlement negotiations. ID at 2. This Stipulation was accompanied by a request to the OALJ to cancel the scheduled May 7, 1990, hearing. Marty contends that the ALJ misconstrued its request to cancel the hearing in order to implement the Stipulation to be a request for a continuance of the hearing to a later date. In view of the contents of the Stipulation, the request, and in consideration of the course of this matter as it was before the ALJ at that date, I do not find the ALJ's determination that no "good cause" had been shown and his subsequent decision to proceed to be unwarranted.

Finally, Marty requests that the matter be remanded to the OALJ in order to implement the Stipulation of the parties. Counsel for the Assistant Secretary and for GCS argues that there is no longer an agreement to implement. Paragraph one of the Stipulation states "(o)n or before May 15, 1990 Marty will submit to the Office of the Administrative Law Judge a Motion to Withdraw the Application for Review if [sic.] filed in Docket No. 89-8-R." To date, there has been no Motion to Withdraw. Therefore, neither the Assistant Secretary, nor GCS considers the May 4, 1990, Stipulation to have any effect. Response to Petition at 9.

Moreover, as demonstrated by counsel for the Assistant Secretary and GCS, since paragraph four of the Stipulation acknowledged the Department of Education's right to seek recovery of the $9,598, the "only practical effect that its implementation would have would be to condition Marty's withdrawal of the application for review on a Department's response to an independent accountant's report on the School's current fiscal procedures." Id, n.9. Since such a response may be pursued independently from these proceedings without the necessity of a remand, I decline to remand the matter to the ALJ.

In sum, although untimely by virtue of its misrouting, I find no basis in Marty's appeal for allowing the disallowed costs, nor for remanding the matter to the ALJ.

This decision signed this 12th day of July, 1990.

Lauro F. Cavazos

Washington, DC