



UNITED STATES DEPARTMENT OF EDUCATION

THE SECRETARY

In the Matter of
**Puerto Rico Technology
and Beauty College,
and Lamec, Inc.**

Docket No. 90-34-ST

Docket No. 90-38-ST

Student Financial
Assistance Proceeding

Decision of the Secretary on Remand

This matter comes before the Secretary on remand from the U.S. District Court for the District of Puerto Rico for an articulated justification of the \$450,000 fine imposed on Lamec, Inc. (Lamec) by the Secretary's decision issued October 7, 1991.

Section 487(c)(2)(B) of the Higher Education Act of 1965, as amended (HEA), 20 U.S.C. § 1094(c)(2)(B), gives the Secretary authority to fine an institution up to a maximum of \$25,000 for each violation of an applicable statute or regulation. In determining the size of the fine, the Secretary is required to consider the gravity of the violation and the size of the institution subject to the fine.

In the original Decision of the Secretary issued October 7, 1991, the Secretary intended only to reinstate the fine established by OSFA -- and did not conduct an independent analysis of the appropriateness of the amount of the fine. The Secretary welcomes the opportunity to correct this oversight.

On remand, the Office of Student Financial Assistance (OSFA) has moved the Secretary to adopt a draft decision holding both Lamec and co-respondent Puerto Rico Technology and Beauty College (PR Tech) liable for fines of \$25,000 for each of the 18 unlawful transfers of Pell Grant funds between the institutions. In support of its motion, OSFA argues that the institutions' conduct was so egregious, that regardless of their size, the maximum fine is warranted for each of the 18 violations.

Lamec had requested an extension of time until January 15, 1993, to appear through new counsel and file a response to OSFA's motion. Given Lamec's failure to appear through new counsel and the lapse of the date requested, this motion is now moot.

Although only the issue of Lamec's fine was remanded by the District Court, the Secretary recognized the intertwined nature of the underlying facts of these cases and allowed PR Tech to file a response on remand. In its response, PR Tech argues that a fine can not be imposed upon it because the record does not contain any evidence as to the size of PR Tech as an institution. Without evidence of this element, PR Tech argues that the Secretary is incapable of balancing the statutory criteria set forth in HEA § 487(c)(2)(B).

Discussion

PR Tech's argument is valid. Although the relative size of both the respondent institutions might be assumed from the purchase price of the Mayaguez campus and the level of participation in Title IV, HEA programs, there is insufficient evidence in the record to accurately assess the actual size of the institutions for purposes of establishing an appropriate fine.

However, this finding is not fatal to OSFA's motion. For purposes of this decision, the Secretary will assume the assessment most favorable to the respondents -- that both PR Tech and Lamec are small institutions and that their size should be considered as a mitigating factor in establishing the appropriate level of fine.

The evidence relating to the second element to be considered -- the gravity of the violation -- is well established in the record. As found in the original Decision of the Secretary, respondents clearly breached the fiduciary duty created by 34 C.F.R. § 668.82.

Because institutions act as fiduciaries when participating in the Pell Grant program, they are permitted to draw down program funds based solely upon their request for such funds. An institution's requests must be based on their need for those funds to pay Pell Grant awards to their students.

PR Tech and Lamec took advantage of this payment system and failed to fulfill their fiduciary obligations when on 18 occasions PR Tech requested Pell Grant program funds, not to pay PR Tech students, but to transfer the funds to Lamec, an ineligible institution. Lamec is equally culpable for acceptance of these monies.

In the initial decision the ALJ found that there was no evidence that the funds in question were "misappropriated, misused, or otherwise misapplied."¹ The Secretary can not agree with this statement. The funds in fact were misappropriated, misused, and misapplied when on 18 occasions they were knowingly transferred to an ineligible institution. It is logical to conclude that the owners of Lamec experienced personal financial gain when the profits realized from the transfers were used to pay down the indebtedness incurred by the purchase of the Mayaguez facility.

PR Tech and Lamec compounded their culpability by misrepresenting the facts relating to the sale of the Mayaguez facility when confronted by auditors from the Office of Inspector General. The Secretary considers the violations committed by the respondents to be very serious. The seriousness of the violations committed by the respondents is mitigated only slightly by the fact that services were provided to students by Lamec in exchange for the illicit payments.

Conclusion

In applying the criteria of HEA § 487(c)(2)(B) to the case at hand, the Secretary holds that the seriousness of the violation requires both institutions be fined for each of the 18 illicit transfers. Based upon the seriousness of the violation, the appropriate fine per violation should be \$20,000. This is reduced from the maximum fine because services were in fact delivered to students. Based upon the assumed size of the institutions, the fine is further reduced to \$10,000 per violation.

The Secretary hereby holds that based upon the criteria of HEA § 487(c)(2)(B) and the facts of this case, the appropriate fine for Lamec is \$180,000 and the appropriate fine for PR Tech is \$180,000.

So ordered this 11th day of June, 1993.


Richard W. Riley

Washington, DC

¹ ALJ Decision at 19.