



UNITED STATES DEPARTMENT OF EDUCATION

THE SECRETARY

Application of

THE COMMONWEALTH OF VIRGINIA

Docket No. 91-26-R

Recovery of Funds Proceeding

ACN: 03-03109

DECISION OF THE SECRETARY

This matter arises on an appeal to the Secretary by the Regional Commissioner of the Philadelphia Regional Office of the Rehabilitation Services Administration (RSA) of the September 6, 1991, Decision by Administrative Law Judge John F. Cook (ALJ). This case concerns a written notice of a preliminary departmental decision (PDD) issued by RSA on March 28, 1991, and received by the Department for Rights of Virginians with Disabilities, Commonwealth of Virginia (Virginia).

The ALJ's Decision held that RSA was required by section 452(a)(2) of the General Education Provisions Act (GEPA) to "establish" with evidence a prima facie case for the recovery of funds in the written notice of the PDD. The ALJ found that RSA failed to provide such an evidentiary base in the notice of the PDD and dismissed the proceeding.

This exact issue was thoroughly addressed in the recent Decision of the Secretary in The State of South Dakota, Docket No. 91-24-R, dated October 21, 1991. After an exhaustive examination of the statute, its legislative history, the pleadings of the parties, cited case law, and the applicable regulations, I concluded that the relevant statutory clause, section 452(a)(2) of GEPA, only requires a "statement of the law and the facts that, unless rebutted, is sufficient to sustain the conclusion drawn in the notice." South Dakota, at 3, citing 34 C.F.R. § 81.24(b)(2).

In South Dakota, I held that PDDs are intended to serve a notice, rather than an evidentiary, function in recovery of funds proceedings. The PDD should set forth a statement of the law and the facts that form the basis for a determination that funds have been spent improperly. As a result, the notice will provide sufficient information to allow the recipient to identify the disallowed expenditures, and respond to disputed issues of law and fact.

I have reviewed the pleadings in this case, and have found no reason to change my interpretation of the requirements of section 452(a)(2) of GEPA. The reference to a "prima facie" case in section 452(a)(2) of GEPA is properly understood as a reference to the sufficiency of the notice to be provided, not as a requirement of evidentiary proof at such a preliminary stage of the proceedings.

For the reasons stated therein, I hereby reaffirm the Decision of the Secretary in South Dakota. Consequently, I hold that the ALJ erred in holding that section 452(a)(2) of GEPA required RSA to establish with evidence a prima facie case in the written notice of the PDD in this case.

The remaining issue to be addressed in this appeal is whether the PDD issued by RSA on March 28, 1991, to Virginia, stated a prima facie case for the recovery of funds that meets the requirements of 34 C.F.R. § 81.24.

The PDD issued by RSA demanded recovery of \$129,590 of fiscal year 1988 funds provided to Virginia under the client assistance program (CAP) authorized by section 112 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 701-796i. The PDD stated that the amount demanded was the "maximum potential overstatement of charges to Federal programs." Indeed, the \$129,590 sum equals the total wages and salaries charged to the CAP grant by Virginia. RSA was unable to be more specific because of Virginia's failure to keep appropriate time distribution records for employees whose salaries were charged in whole or in part to the CAP grant in violation of the requirements of the cost principles expressed in 34 C.F.R. Part 74. PDD, Enclosure No. 1. The PDD states that Virginia has failed to justify any of its expenditures for wages and salaries charged to the CAP grant.

A grant recipient's failure to keep necessary records, is anticipated by the regulations interpreting section 452(a)(2) of GEPA:

(3) A statement that the recipient failed to maintain records required by law or failed to allow an authorized representative of the Secretary access to those records constitutes a prima facie case for the recovery of the funds affected.

(i) If the recipient failed to maintain records, the statement must briefly describe the types of records that were not maintained and identify the recordkeeping requirement that was violated.

34 C.F.R. § 81.24(3)(i).

The PDD clearly satisfies the requirements of the regulation. The specific statements by RSA that Virginia failed to maintain the documentation necessary to justify its expenditures of CAP grant funds, unless rebutted by Virginia, are sufficient to sustain the conclusions drawn in the PDD. Unless Virginia can justify its expenditures for wages and salaries charged to the CAP grant, Virginia should be held liable for the repayment of the Federal funds affected. Therefore, RSA has "stated" a prima facie case as contemplated by 452(a)(2) of GEPA.

In review of this type of proceeding, it is important to remember that this is not a criminal, or even a tortious action. Rather, a recovery of funds proceeding involves an agreement between two or more parties who have joined together to accomplish specific goals. The U.S. Department of Education has agreed to provide funding in exchange for an accounting of how the funds are spent. This does not mean that a grant recipient is "guilty until proven innocent" as alleged in Virginia's Response to Petition for Review, page 13. This does mean that a grant recipient is accountable for the proper expenditures of Federal funds.

Conclusion:

For the above reasons, I hold that section 452(a)(2) of GEPA requires a statement of the law and the facts that, unless rebutted, are sufficient to sustain the conclusion drawn in the PDD, and that the PDD issued by RSA to Virginia on March 28, 1991, meets this standard.

I therefore order this cause remanded to the ALJ for further proceedings consistent with this Decision.

This Decision is signed this 4 day of November, 1991.


Lamar Alexander

Washington, DC

SERVICE LIST

Office of Hearings and Appeals
U.S. Department of Education
490 L'Enfant Plaza, SW
Suite 2100
Washington, DC 20219-3644

Ms. Susan T. Ferguson, Esq.
Assistant Attorney General
Office of the Attorney General
Antitrust and Consumer Litigation Section
101 North Eighth Street
Richmond, Virginia 23219

Mr. Sergio Kapfer, Esq.
Office of the General Counsel
U.S. Department of Education
400 Maryland Avenue, SW
Room 4083, FOB-6
Washington, DC 20202-2110

Mr. Thomas Carter
Office of the Inspector General
U.S. Department of Education
330 C Street, SW
Room 4200, MES
Washington, DC 20202

Mr. Ralph N. Pacinelli
Regional Commissioner for
Rehabilitation Services, Region III
U.S. Department of Education
3535 Market Street
Room 16120
Philadelphia, Pennsylvania 19104

Ms. Nancy Hogle, Chief
Loans and Accounts Receivable Branch
Financial Management Service
U.S. Department of Education
400 Maryland Avenue, SW
Room 3097, FOB-6
Washington, DC 20202-4722