UNITED STATES DEPARTMENT OF EDUCATION

THE SECRETARY

In the Matter of

INSTITUTE OF MULTIPLE TECHNOLOGY,

Respondent

Docket No. 92-26-ST
Student Financial Assistance Proceeding

Decision of the Secretary

This matter comes before the Secretary on appeal by the Institute of Multiple Technology (IMT) of the decision issued by Chief Administrative Law Judge John F. Cook (Judge Cook) on November 26, 1993. In his decision, Judge Cook ordered that the eligibility of IMT to continue participation in student financial assistance programs under Title IV of the Higher Education Act of 1965, as amended (Title IV), be terminated. Decision (Dec.) at 36. Judge Cook further ordered that IMT pay to the U.S. Department of Education (Department), a fine of $10,000. Id. In making these determinations, Judge Cook found that: (1) IMT violated 34 C.F.R. §§ 668.23(c)(4) and 690.84(b) (1990) when it failed to submit by April 16, 1991, an audit of its student financial assistance programs for the award years 1987-88, 1988-89, and 1989-90; (2) that IMT committed a second violation of § 668.23(c)(4) (1991) when it failed to submit by February 1, 1992, an audit of its student financial assistance programs for the award years 1987-88, 1988-89, 1989-90, and 1990-91; (3) that based on such violations, IMT failed to meet the standards of conduct required of a fiduciary by § 668.82(c); (4) that such violations warrant termination from participation in Title IV programs and, finally, that: (5) given the institution's termination and other mitigating factors, a reduced fine of $10,000 is an appropriate sanction. Dec. at 24-27. IMT timely filed its appeal to Judge Cook's decision on December 20, 1993. The Department's Office of Student Financial Assistance Programs (SFAP) timely opposed IMT's appeal on January 21, 1994. SFAP asks the Secretary to uphold Judge Cook's Decision.

DISCUSSION

IMT does not dispute that it persistently failed timely to submit its audits as statutorily required. It argues, however, that the Secretary has discretion to impose a lessor sanction than termination and that given the mitigating factors recognized by Judge Cook, the Secretary should exercise such option. IMT Br. at 5-7.

While the Secretary clearly has the discretion to reverse the termination decision, IMT's "mitigating" factors do not warrant such action. Indeed, IMT's reliance on Judge Cook's mitigation consideration may be misplaced. As IMT well knows, when deciding on the appropriateness and/or the size of a fine, an administrative law judge or hearing official must, by law, consider "the gravity of the institution's violations, or failure to carry out the relevant statute regulation or agreement; the gravity of any misrepresentation, and the size of the institution." Dec. at 26. See also 34 C.F.R. § 668.92. In considering the gravity of the institution's violations, "the tribunal must take into account any potential mitigating factors." Id. at 29. Thus, while this tribunal will not attempt to predict what Judge Cook would have done had he not been so compelled by statute, the fact of the matter is that he was required to conduct an analysis of mitigating factors in this case in his consideration of a fine. Under these circumstances, this tribunal is reluctant to attach as much weight to the fact of this consideration as IMT would like, and is particularly unpersuaded that such factors should be considered to "significantly reduce the severity of the violation of IMT's late audit filing." IMT Br. at 5 (emphasis added).

Moreover, the facts offered in mitigation are simply not sufficiently persuasive in and of themselves. For example, one of the arguments IMT makes is that it had trouble with its accounting service. However, SFAP had given IMT several opportunities over extended periods of time to hire a competent accountant, or whatever it needed to do, to comply with Federal regulations. Moreover, the fact that it did not hire a competent accounting service is not the type of circumstance "beyond the institution's control" that is contemplated by Federal regulations. IMT Br. at 4-5. See also 56 Fed. Reg. 36694 (July 31, 1991).

Nor is the fact that IMT was in the process of bankruptcy proceedings while attempting to complete its biennial audits a reasonable explanation of its failures. This particularly rings true given the number of filing extensions IMT was granted. In fact, one might argue that some of the same financial information necessary to complete the audit already would have been completed in preparation for bankruptcy.

Moreover, it is a little disingenuous for IMT to argue that it ought not be punished for the Department's imposition of a program review. The Department is and was perfectly within its rights -- indeed, within its requirements -- to conduct such review. The fact that the timing of such review happened to coincide with IMT's responsibility to complete its required audits in a circumstance where IT had been given several extensions to complete such work, can hardly, rightly, be considered the fault or responsibility of the Department.

It is also worth noting that one of the cases on which IMT substantially relies, Hartford Modern School of Welding, Docket No. 90-42-ST (January 31, 1991), undermines its argument. IMT argues that the severe penalty of termination should only be imposed in more egregious factual circumstances. IMT Br. at 6. IMT argues that Hartford represents such a case because there, the institution never filed its audit reports while here IMT eventually did. But, Hartford also represents the case of numerous violations -- a factual circumstance that is

similar to IMT's. In this case, IMT twice violated 34 C.F.R. § 668.23(c)(4) (failure to submit audits on two separate occasions), as well as, 34 C.F.R. § 668.82(c) (failure to meet standards of conduct required of a fiduciary). Thus, this tribunal is not persuaded that Hartford is significantly distinguishable from the instant case to warrant its consideration as the type of case whose facts are so egregious as to warrant termination there, but not here.

Finally, with regard to the fine imposed by Judge Cook, I agree with Judge Cook's analysis, *with the exception of his consideration of SFAP's procedural posturing in this case.* Without the benefit of closer examination of or actual experience with the procedural back and forth below, and in light of SFAP's exception to the ALJ characterizations, see SFAP Br. at 7, fn. 3, this tribunal feels constrained neither to accept or reject such analysis.

Accordingly, and with exception and distinctions as noted above, the decision of Judge Cook is affirmed.

So ordered this18th day of April, 1994.

Richard W. Riley

Washington, D.C.

SERVICE LIST

Office of Hearings and Appeals
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202-3644

Ron Lipton
Acting Director, Compliance and Enforcement Division
Office of Student Financial Assistance Programs
U.S. Department of Education
Room 3919, ROB-3
7th & D Streets, S.W.
Washington, D.C. 20202

Edmund J. Trepacz, II
Office of the General Counsel
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202-2110

Leigh Manasevit, Esq.
Kristin Hazlitt, Esq.
Brustein & Manasevit
3105 South Street, N.W.
Washington, D.C. 20007