



UNITED STATES DEPARTMENT OF EDUCATION
THE SECRETARY

In the Matter of

National Training, Inc.,

Respondent

Docket No. 93-98-SA
Student Financial Assistance
Proceeding

DECISION OF THE SECRETARY

This matter comes before the Secretary on appeal by the United States Department of Education (Department), Office of Student Financial Assistance Programs (SFAP) of the Initial Decision issued by the administrative law judge (ALJ) on December 15, 1993. In his decision, the ALJ ordered: (1) that the instant final audit determination (FAD) appeal involving SFAP and the respondent, National Training, Inc. (National), ". . . should be dismissed with prejudice. . . .;" (2) that the decision dismissing a final program review determination (FPRD) appeal involving the aforementioned parties was ". . . void and without effect. . . .;" and (3) that the dismissed FPRD appeal took ". . . precedence over the instant [FAD] proceeding." The ALJ Decision (ALJ Dec.) at 1 and 3.

In making his determination, the ALJ found that the subject matter of this FAD proceeding was duplicative of the above-noted FPRD proceeding wherein National appealed SFAP's findings and repayment order.¹ *Id.* at 3. Moreover, the ALJ found that National was neither given notice of SFAP's attempt to terminate the earlier FPRD proceeding, nor extended an opportunity to contest its actual termination. *Id.* at 1. Furthermore, the ALJ opined that the oral evidentiary provisions of the Administrative Procedure Act (APA),² as referenced to in the pre-July 23, 1992, sections of the Higher Education Act of 1965 (HEA),³ as amended, were applicable to the earlier FPRD proceeding. *Id.* at 2-3. The ALJ then concluded that National could, pending the Secretary's approval, avail itself of these sections.⁴ *Id.*

¹ See Docket No. 92-93-SA.

² See 5 U.S.C. §§ 556, 557.

³ See Sections 487 (b) and (c) of HEA.

⁴ The ALJ asserted that the APA's oral evidentiary provisions referred to in the pre-July 23, 1992, HEA sections provided the tribunal with the necessary means by which to resolve this dispute fairly. See ALJ Dec. at 2.

SFAP filed a timely appeal and National, a timely opposition to appeal, on January 14 and February 17, 1994, respectively. SFAP asks the Secretary to reverse the ALJ's decision and reinstate the instant FAD proceeding. Conversely, National requests that the Secretary affirm the decision of the ALJ. For the reasons outlined below, I reverse the ALJ's decision and impose the appropriate sanctions as prescribed below.

BACKGROUND AND PROCEDURAL HISTORY

On June 8, 1992, SFAP issued the FPRD to National. See Appeal of SFAP (SFAP Brief) at 3. In the FPRD, SFAP charged National, a for-profit trade school, with offering a home study/residential truck driver and heavy equipment operator training course that did not satisfy the requisite clock hours needed to comply with Title IV of the HEA (Title IV or HEA). See Response of National to the Appeal Brief of SFAP (National Brief) at 3. SFAP asserted that National improperly disbursed \$56.5 million in Title IV funds to various students through the foregoing course, and SFAP sought to recoup that amount in the FPRD. See id. at 3.

On July 21, 1992, National timely appealed the FPRD. See id. National was prepared to institute a Title IV administrative review hearing under the APA's standards.⁵ See id. at 15. Significantly, the APA provisions permit the introduction of oral evidence and specifically, the cross-examination of witnesses. See ALJ Dec. at 2.

On July 23, 1992, the Department implemented amendments to sections 487(b) and (c) of the HEA which repealed the "on the record" provisions of the Title IV administrative review hearing regulations. See SFAP Brief at 11. This in effect eliminated the option of pursuing an administrative review hearing under APA oral evidentiary guidelines. See id. at 11. On August 28, 1992, the Department's Institutional Monitoring Division (IMD) sent a letter to the Department's Office of Hearings and Appeals (OHA) wherein it requested that the FPRD be withdrawn. See id. at 3. In the August 28th letter, IMD requested that National's FPRD appeal be returned. See National Brief at 5. This letter was not initially forwarded to National. See id. at 5. On October 19, 1992, the Department issued a statement in the Federal Register whereby it interpreted the above HEA amendments to mean, in pertinent part, that they applied to those proceedings which were pending as of the July 23rd effective date and, as of that date, had yet to commence oral hearings. See SFAP Brief at 12-13.

On November 17, 1992, SFAP sent a letter to National's counsel informing counsel that the FPRD appeal had been recalled for further review of the documentation National

⁵ This type of hearing was commonly referred to as "on the record" under sections 487(b) and (c) of the HEA.

submitted in support of its appeal and thus, that appeal was withdrawn from OHA. See National Brief at 5. On February 23, 1993, Administrative Law Judge Clerman (Judge Clerman) ordered that SFAP's FPRD be dismissed without prejudice, because SFAP's August 28th and November 17th letters indicated SFAP's intent to withdraw the FPRD. See id. at 5; Dismissal Order of Judge Clerman, dated February 23, 1993, at 1. According to the record, neither party appealed Judge Clerman's dismissal order within the time allotted under 34 C.F.R. § 668.119(a).

On July 20, 1993, SFAP issued the aforementioned FAD. SFAP alleged the same violations against National that were set forth in the FPRD, with the exception of contending that National's data (gathered in anticipation of substantiating its FPRD appeal) raised questions. See SFAP Brief at 1; National Brief at 5-6; and ALJ Dec. at 1. In the FAD, SFAP asserted that National improperly disbursed approximately \$50 million in Title IV funds for the same home study/residential course and, consequently, was liable for that amount.⁶ See SFAP Brief at 1.

On August 31, 1993, National timely appealed the FAD, and on November 23, 1993, filed a "Motion for Formal Adjudication" in which it requested, among other things, that the FAD appeal be conducted under the procedures set forth in the pre-July 23, 1992, portions of 34 C.F.R. § 668, Subpart H. See SFAP Brief at 3-4. On December 15, 1993, the ALJ issued his decision wherein he overturned the dismissal order of Judge Clerman, and reinstated National's FPRD appeal. The ALJ found that the pre-July 23, 1992, sections of the HEA which invoked the APA's oral evidentiary provisions were applicable to that appeal. See ALJ Dec. at 3.

On appeal, SFAP raises the following issues:

- 1) whether the ALJ's decision should be reversed because he had no authority to void the decision of Judge Clerman and reinstate a previously dismissed FPRD appeal;
- 2) whether the ALJ's decision should be reversed because he had no authority to reverse a Department final decision dismissing the FPRD appeal;
- 3) whether the APA's oral evidentiary provisions incorporated in sections 487 (b) and (c) of the HEA prior to the July 23, 1992, amendments would have applied to the FPRD appeal had it not been dismissed; and

⁶ The approximate \$5 million difference between the FPRD repayment order and that of the FAD is attributed to National's refund of the foregoing amount during the interim between the two aforementioned administrative review proceedings. See National Brief at 6, n4.

4) whether the provisions of the APA, when properly invoked, require oral evidentiary hearings, and specifically, the cross-examination of witnesses. See SFAP Brief at passim.

DISCUSSION

SFAP argues that the ALJ's decision to nullify Judge Clerman's February 23, 1993, dismissal order was the equivalent of reversing that order. See SFAP Brief at 8. SFAP contends that an ALJ may neither reverse the decisions of his or her fellow judges, nor may an ALJ reverse a Department final decision.⁷ See id. at 8-9. Further, SFAP argues that Judge Clerman was authorized under 34 C.F.R. § 668.117 to regulate the ultimate course of the FPRD proceeding as he saw fit. See id. at 7, n2.

National contends that the ALJ's decision to void the force and effect of Judge Clerman's decision "did justice to these entire proceedings." See National Brief at 8. Convinced that departmental regulations are silent on these particular matters, National analogizes that ALJs, like their civil counterparts, may in their discretion correct the adjudicatory errors of their fellow ALJs. See id. at 9-10. National's November 23, 1993, Motion for Formal Adjudication, which was akin to a pleading submitted by similarly situated civil litigants, sought, among other things, relief from the alleged erroneous order of Judge Clerman. See id. at 10, n8. National implies that the ALJ favorably responded to its motion through his December 15, 1993, decision when he resolved the purported inequities associated with Judge Clerman's dismissal order and the circumstances thereunder (e.g., National's lack of notice of SFAP's intent to withdraw the FPRD). See id. at 10-11, n8, and 29.

National further asserts that an ALJ may rectify the mistakes of other ALJs, like Judge Clerman, pursuant to 34 C.F.R. § 668.117(a). See id. at 10. By directing my attention to an underscored passage of the foregoing regulation, National contends that the ALJ was authorized to act as he did for the sake of a fair and impartial hearing. See id.

Finally, National argues that departmental regulations are silent as to the voluntary dismissal of administrative proceedings. See id. at 11. Consequently, National contends that the analogous Federal Rules of Civil Procedure (Fed. R. Civ. P.) are applicable to this

⁷ The ALJ stated that his reasons for nullifying Judge Clerman's dismissal order were, in part, based upon the fact that National was neither given timely notice of SFAP's intention to withdraw the FPRD, nor extended an opportunity to respond to SFAP's intentions. See ALJ Dec. at 1.

matter.⁸ See id. According to National, Fed. R. Civ. P., in pertinent part, requires the party seeking to dismiss its legal action to notify the opposing party of its intentions, and thereafter, proceed with the formalities of obtaining a court order to that affect. See id. at 11-12. National argues that none of the foregoing acts occurred. See id. at 12.

Despite the arguments of both parties, the ALJ is prohibited from either waiving or invalidating applicable statutes and regulations.⁹ See 34 C.F.R. § 668.117(d)(1) and (2). On February 23, 1993, Judge Clerman dismissed SFAP's FPRD without prejudice. The record indicates that neither party appealed this decision within the 30 days allotted under 34 C.F.R. § 668.119(a). Accordingly, Judge Clerman's decision became a final decision of the Department in March of 1993, pursuant to 34 C.F.R. § 668.121(b). Section 668.121(b) states, in relevant part, that:

. . . [i]n the event that the initial decision of the hearing official is not appealed within [30 days of either parties' receipt of the initial decision],¹⁰ the initial decision automatically becomes the final decision of the Department.

Thus, the ALJ improperly waived and/or invalidated the finality provisions of 34 C.F.R. § 668.121(b) when he nullified Judge Clerman's FPRD dismissal order which, at the time of the ALJ's decision, was a final decision of the Department. Accordingly, Judge Clerman's dismissal order must be reinstated as a final decision of the Department.¹¹

ORDER

I hereby order the following:

- (1) the ALJ's initial decision in Docket No. 93-98-SA shall be reversed;

⁸ National cites Fed. R. Civ. P. 41(a)(2).

⁹ As discussed in greater detail, the applicable regulation waived and/or invalidated in this particular instance was 34 C.F.R. § 668.121(b).


¹⁰ See 34 C.F.R. § 668.119(a).

¹¹ The above discussion eliminates the need to consider the other issues raised by the parties in their respective briefs.

(2) Judge Clerman's decision dismissing the FPRD (i.e., Docket No. 92-93-SA) shall be reinstated as a Department final decision; and

(3) the FAD proceeding involving SFAP and National, which was initiated on July 20, 1993, shall be reinstated and remanded to OHA for full and formal adjudication under the appropriate departmental regulations.

So ordered this 8th day of September, 1994.


Richard W. Riley

Washington, D.C.

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