

UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

APPLICATION OF THE
STATE OF CONNECTICUT,

Applicant.

Docket No. 92-120-R

Recovery of Funds Proceeding

ACN: 01-14201

DECISION

Appearances:

Laurie A. Deane, Esq., Assistant Attorney General, Connecticut Office of the Attorney General, for the Connecticut Board of Education and Services for the Blind

Judith E. Leonard, Esq., and Sergio Kapfer, Esq., Office of the General Counsel, for the Assistant Secretary, Office of Special Education and Rehabilitative Services, and the Regional Commissioner, United States Department of Education

Before:

John F. Cook, Chief Administrative Law Judge.

I. PROCEDURAL BACKGROUND.

On September 29, 1992, a notice of preliminary departmental decision (NPDD) was given by certified mail to the State of Connecticut Board of Education and Services for the Blind (Connecticut) by the Regional Commissioner for Region I of the Rehabilitation Services Administration (RSA) within the Department of Education (Department) and by the Assistant Secretary for the Office of Special Education and Rehabilitative Services within the Department. The NPDD was received by Connecticut on September 30, 1992 (See Application for Review at 1).

Forty (40) days later, on November 9, 1992, Connecticut forwarded by Federal Express an application for review (AFR) to the Office of Administrative Law Judges (OALJ). The AFR was received by OALJ on November 10, 1992.

On November 17, 1992, the tribunal issued a Notice of Receipt of Application for Review. During the course of a telephone conference held between counsel for the parties and the administrative law judge on December 14, 1992, a jurisdictional issue was raised concerning the timeliness of Connecticut's Application for Review. On December 21, 1992, the Regional

Commissioner and the Assistant Secretary filed a Motion to Dismiss and Memorandum of Points and Authorities in Support of Motion.

II. ISSUE.

Should Connecticut's application be dismissed for lack of jurisdiction because of failure to timely file the Application for Review?

III. FINDINGS OF FACT AND OPINION.

The controlling statute in this proceeding is Part E of the General Education Provisions Act (GEPA). Section 452 (b) (1) of GEPA requires a recipient seeking review of a preliminary departmental decision (PDD) to submit an application for review within thirty (30) days of receipt of notice of the PDD. This statute states, in pertinent part:

A recipient that has received written notice of a preliminary departmental decision and that desires to have such decision reviewed by the Office [of Administrative Law Judges] shall submit to the Office an application for review not later than 30 days after receipt of notice of the preliminary departmental decision. The application shall be in the form and contain the information specified by the Office. 20 U.S.C. § 1234a(b) (1).

The requirement that an applicant must file an application for review no later than 30 days after receipt of notice of the preliminary departmental decision is also contained in the regulations at 34 C.F.R. § 81.27(b).

In Application of the Commonwealth of Puerto Rico Department of Education, Dkt. No. 89-2-R, U.S. Dep't of Education (Decision) (September 1, 1989), this tribunal held that "the submittal of the AFR later than 30 days after receipt of the PDD would deprive the OALJ of jurisdiction to conduct the proceeding." *Id.* at 4. The judge further held that "the OALJ does not have the authority to extend or waive the thirty-day filing period." *Id.* at 5. After examining federal court decisions that treated statutory filing requirements as jurisdictional and absolute when no explicit exceptions were attached thereto, the judge reiterated that "the OALJ does not have the authority to extend or waive the thirty-day filing deadline contained in Section 452(b) (1) of GEPA." *Id.* at 6. See also Danko v. Director, Office of Workers' Compensation Programs, 846 F.2d 366 (6th Cir. 1988); King v. Dole, 782 F.2d 274, 276 (D.C. Cir. 1988), cert. denied, 479 U.S. 856 (1986); Midway Industrial Contractors v. OSHRC, 616 F.2d 346, 347 (7th Cir. 1980).

Although Connecticut has not filed a response to the motion to dismiss, and thus has not raised the argument of an exception to the statute based on good cause or equitable and fairness considerations, such argument would be unavailable. The tribunal in Puerto Rico stated that: "No such good cause exception applies to the timeliness of filing an application" for review. . . . Equitable and fairness considerations are simply inapplicable under the circumstances here." Puerto Rico at 10. The tribunal there also pointed out that 34 C.F.R. § 81.27(d) mandates that: "Any requirement to return funds that is not timely appealed becomes the final decision of the Department."

In the instant case, Connecticut acknowledged in its application for review that it received its notice of the PDD on September 30, 1992. ^{1/} Therefore, Connecticut was required to file its appeal not later than October 30, 1992. On its face, the State's application for review is dated November 9, 1992, and it was received by OALJ on November 10, 1992. The Federal Express invoice indicates that the application was forwarded on November 9, 1992. Consequently, Connecticut's application for review was not timely filed. Based on the law explained supra, the tribunal does not have jurisdiction to conduct the proceeding. Accordingly, the tribunal must grant the motion to dismiss submitted by the Regional Commissioner and the Assistant Secretary.

However, as of the date of this decision, Connecticut has not filed with the tribunal a response to the Motion to Dismiss. Under 34 C.F.R. § 81.11 (d), the administrative law judge may not grant a party's written motion without the consent of the other party unless the other party has had at least 21 days from the date of service of the motion to respond. Under 34 C.F.R. § 81.11(e): "The date of service of a motion is determined by the standards for determining a filing date in § 81.12 (d)." 34 C.F.R. § 81.12(d) states, in pertinent part:

- (d) (1) The filing date for a written submission to an ALJ or the OALJ is either--
(i) The date of hand-delivery; or
(ii) The date of mailing.

The certificate of service attached to the Motion to Dismiss certified that a copy of the motion was mailed to Connecticut on December 17, 1992. Therefore, under § 81.11(e) and § 81.12(d), the date of service of the motion to dismiss was December 17, 1992. Under § 81.11, the judge may not grant the motion to dismiss without the consent of Connecticut unless the State has had at least 21 days from the date of service (December 17, 1992) to respond. This 21 day period expired after January 7, 1993. Consequently, under the regulations, the judge may now grant the motion to dismiss even though Connecticut has not submitted a response.

IV. CONCLUSIONS OF LAW.

Connecticut's application should be dismissed for lack of jurisdiction because of failure to timely file the Application for Review.

V. ORDER.

Based on the foregoing findings and conclusions, It is ORDERED, That Applicant's Application for Review is deemed to be untimely and is, hereby DISMISSED.

John F. Cook
Chief Administrative Law Judge

Issued: January 29, 1993
Washington, D.C.

1/ At the bottom of page 1, under the section entitled "Appeal Application Documentation", paragraph 2 states:

Certified letter dated September 29, 1992

Audit Control Number: 01-14201 was received in my office on September 30, 1992.

Application For Review at 1 (emphasis added).