

UNITED STATES DEPARTMENT OF EDUCATION  
WASHINGTON, DC. 20202

APPLICATION FOR REVIEW OF  
THE PENNSYLVANIA STATE DEPARTMENT  
OF EDUCATION,

Applicant.

Docket No. 92-65-R

Recovery of Funds  
Proceeding

ACN: 03-93212

Appearances:

Jeffrey F. Champagne, Esq. of Harrisburg, Pa, for the Pennsylvania State Department of Education.

Office of General Counsel in Washington, D.C. for the U.S. Department of Education.

Before:

Judge Daniel R. Shell

**DECISION**

**Background**

Applicant, the Pennsylvania State Department of Education (**PDE**), received the U.S. Department of Education's (**Education**) preliminary departmental determination letter (**PDD**) on April 7, 1992. 1 The PDD, dated March 31, 1992, identified the total disallowed costs of \$375,000. That total corresponds to four individual findings as follows: No. 59 for \$116,073; No. 61 for \$142,469; No. 72 for \$115,203, and No. 76 for \$1,262. Under Section 452(b)(1) of the General Education Provisions Act (**GEPA**), as amended by Section 3501 of the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvements Amendments of 1988, Pub. L. 100-297, 102 Stat. 130 [20 U.S.C. Section 1234a(b)(1)], the applicant has 30 days from its receipt of the PDD to file its Application for Review (**AFR**) with the Office of Administrative Law Judges (**OALJ**), U. S. Department of Education. PDE appealed all four findings; it stated its position on each finding in a 3-page discussion of the related facts and issues. PDE filed its AFR containing 30 pages by facsimile transmission (fax) with the OALJ on May 6, 1992. 2 PDE did not attach a complete copy of the PDD with its AFR, instead it attached only page 3 of the PDD. 3 A notation on the fax cover sheet stated "the written certified copy will be in the mail today."

After a three week period delay, the written hard copy was forwarded on May 28, 1992, by Federal Express. [4](#) The Docket Clerk, under the direction of the Chief Judge of the OALJ, stamped the copy as received by the Office of Administrative Law Judges on May 29, 1992. [5](#)

### Issue

The issue to be resolved concerns whether PDE met the jurisdictional requirement of timely filing of its AFR? Under 34 C.F.R. 81.27(b), a recipient of a PDD shall file an application for review not later than 30 actual days after the date it receives the notice of a disallowance decision. In PDE's case, the PDD was received on April 7, 1992. The 30 day period expired on Thursday, May 7, 1992. Therefore, the filing deadline had to be met by that date. The specific question to be resolved is whether PDE met the 30 day filing requirement by the facsimile transmission of its AFR to OALJ on May 6, 1992?

### Discussion

Resolution of the timeliness of filing issue will require a multi-step approach. Consideration will be given to the GEPA regulations, case direction and the federal rules.

#### **I.**

The GEPA implementing regulation on filing requirements is found at 34 C.F.R. 81.12. Under 81.12(a), it states:

Any written submission to an ALJ or the OALJ under this part must be filed by hand-delivery or by mail. (emphasis added). 81.12 (d)(1) further defines the filing date for a written submission to the OALJ as either--

- (i) The date of hand-delivery; or
- (ii) The date of mailing.

Under the GEPA statute and its implementing regulations, definitive filing provisions require that any written submission to the OALJ must be filed by hand-delivery or by mail. The determination of the timeliness of a filing must, therefore, consider both the date and the method of delivery of the AFR. Applying the above, the GEPA rules are to accept only those filings which qualify by mail or by hand-delivery. Does submission of a faxed document violate the method of delivery GEPA requirements mail or hand-delivery? Does a faxed transmission constitute either hand-delivery or mail service?

The rules shown above make no mention of delivery by fax. Facsimile transmission is not delivery by hand nor is it delivery by United States mail. In providing for filing by facsimile transmission, deference is to be given to any rules permitting or disallowing faxed submissions. A statutory basis for the OALJ to establish rules to allow facsimile transmissions filings exists in 20 U.S.C.A. 1234a(b)(1), which, in part, states:

"The application shall be in the form and contain the information specified by the Office [of Administrative Law Judges]."

In addition to the authority above, the ALJ's authority in Section 81.5(a), permits the AIZ to regulate the course of the proceedings and the conduct of the parties to ensure a fair, expeditious, and economical resolution of the case. The judge may exercise the discretion to allow a fax transmission by special rule. The authority to permit a facsimile transmission filing could be granted if OALJ chose to do so. The OALJ has created no rules, nor do rules exist under the statute or regulations which specifically allow filing by fax. In summary, the departmental rules require the filing to be either by hand delivery or by mail. Facsimile transmission is neither of the two methods of delivery authorized by statute, regulation, or OALJ rule.

## II.

The decision In the Matter of the Commonwealth of Puerto Rico, Docket No. 89-2-R, found there to be an absolute requirement to meet the time limit to establish jurisdiction with the OALJ. [6](#) The Commonwealth of Puerto Rico's AFR was signed and mailed three days after the expiration of the 30-day period. The judge found the AFR to be untimely and dismissed the proceeding. There the judge held:

Compliance with the statutory time limit set forth under Section 452(b)(1) of GEPA [the General Education Provisions Act], 20 U.S.C. 1234(b)(1)(1988), and the applicable regulations at 34 C.F.R. 81.27(b), is an absolute requirement which the Applicant failed to meet. Applicant's untimely filing of its application for review has deprived the OALJ of jurisdiction to hear the proceeding.

The Commonwealth of Puerto Rico, supra, decision did not discuss the method of filing since all transactions in that case were conducted by mail and clearly untimely. The only issue was the date of the filing. There was no need to inquire into the method of delivery. A recent non-GEPA Education case, however, did deal with the issue of meeting filing deadlines by fax. In the Matter of Trend Colleges, Inc, Docket No. 90-56-ST, Amended Decision of the Secretary on Motion to Reconsider, (November 27, 1991), at p. 2, the Secretary held: "[A] facsimile transmission received in OHA, prior to the filing deadline, is a valid method of filing, provided a hard copy of the pleading is received by OHA within a reasonable time...." [7](#) The filing of a faxed appeal brief was held sufficient to meet the filing deadline for a brief.

A most important element distinguishes the Trend case from the matter before this tribunal. The instant case considers the use of facsimile transmission of an AFR for the establishment of jurisdiction in OALJ. After jurisdiction was established, Trend considered the use of fax for the deadline filing of a brief.

Next, the Trend case is an Office of Student Financial Assistance case, not a GEPA case. There are two categories of student loan proceedings: 1) Subpart G, fines, limitations and terminations and 2) Subpart H-audits and program reviews. Education speaks, at times, in different languages for its separate programs. The student loan proceedings are different from the GEPA cases in terms of what can be considered acceptable filings. The filing requirements set forth in 34 C.F.R.

81.27(b) and 81.12(a), therefore, are not applicable to Trend. The applicable jurisdictional filing provision in termination proceedings like Trend appears in 34 C.F.R. 668.86 (b) (1) (iii). That section notes only the designated departmental official's receipt date of the request for hearing. Unlike the GEPA cases, there is no reference to method of delivery. However, in student audit and program review proceedings, there is a definitive filing requirement found at 34 C.F.R. § 668.122(c) which states that the determination of filing, receipt, or submission dates shall be based on either the date of hand-delivery or the date of receipt indicated on the original U.S. Postal Service return receipt. The time of receipt is the critical matter in the student proceedings. The student rules and the GEPA rules are not interchangeable. [8](#)

In Salley v. Board of Governors, UNC, 136 F.R.D. 417 (1991), a federal court addressed whether a faxed document satisfied the filing requirements for the service of discovery requests under the Federal Rule of Civil Procedure 5 (b). [9](#) The Middle District of North Carolina addressed this question and determined that a fax could not be considered either a form of mailing or of personal delivery. The court referred to Rule 5(b): "Service is to be accomplished by delivering a copy to the attorney or by mailing it to the attorney at the attorney's last known address or, if no address is known, by leaving it with the clerk of court." The Court drew pertinent distinctions in types of service and noted that service by mail is complete upon mailing (even if it is not received).[10](#) The Court explained why facsimile transmission does not qualify for either, service by mail or hand-delivery:

A fax transmission may not be deemed service by mail. Because of the above noted special provisions which apply to service by mail, the courts require strict and exacting compliance with Rule 5(b) for service by mail. Rivera v. M/T Fossarina, 840 F.2d 152, 155 (1st Cir. 1988). The Court sees no basis to stretch the definition of mail in Rule 5(b) to include fax transmissions.

The Court also determines that fax transmissions do not constitute a form of personal delivery under Rule 5(b). The fax transmission of documents is similar to, but not the same as, personal delivery.

When a document is personally delivered, a person can verify and certify that an intact and complete copy was left in the attorney's office. With a fax transmission, the person sending the document can only certify that he or she attempted to, and apparently did, transmit the document electronically over telephone lines to the other office. That person cannot certify that the copy was in fact received in that office.

The Court went on to raise problems with determining time of service over holidays and beyond regular office hours. It said:

For these reasons and unresolved questions, the Court finds that fax transmissions are not a form of delivery as that term is used in Rule 5(b). Therefore, the Court determines that fax transmissions do not constitute either service by delivery or service by mail as those terms are used in Rule 5(b). [11](#)

### III.

Do the Federal Rules address the question? While proceedings at the administrative level are not governed by the Federal Rules, the Rules are an important reference and a guide for procedural issues. In addition, since the federal rules on filing and service have been recently amended (1991), a look at actual court practice at the federal level in the geographically relevant Circuits is meaningful to determine how the courts are implementing the changes.

A review of those rules is appropriate for guidance. Rule 5 of the Federal Rules of Civil Procedure, discusses "Service and Filing of Pleadings and Other Papers." Section 5(e) "Filing with the Court Defined," effective December 1, 1991, covers the matter of filing by facsimile transmission. It states:

Papers may be filed by facsimile transmission if permitted by rules of the district court, provided that the rules are authorized by and consistent with standards established by the Judicial Conference of the United States. (emphasis added).

The annotated discussion of the 1991 Amendment as it pertains to subsection 5(e) states:

The enforcement of these rules and of the local rules is a role for a judicial officer. A clerk may of course advise a party or counsel that a particular instrument is not in proper form, and may be directed to so inform the court.

In neither the federal district court for the District of Columbia where the case arises or the federal district court in the Middle District of Pennsylvania (Harrisburg) where the PDE offices are located is faxed transmissions for filing an accepted practice. [12](#) The Federal Rules for the District of Columbia Circuit, as discussed below, do track the language of the Amended Rules of Civil Procedure for Rule 5(e) and show that filing by fax may be permitted. Specifically, the Federal Rules of Appellate Procedure for the District of Columbia Circuit in Rule 25 on Filing and service, provides:

A court of appeals may, by local rule, permit papers to be filed by facsimile or other electronic means, provided such means are authorized by and consistent with standards established by the Judicial Conference of the United States. [13](#)

Under an explanatory distinction to the Notes of Advisory Committee on Appellate Rules, a further qualification to authorizing filing by facsimile or other electronic means is, however, furnished:

The amendment permits, but does not require, courts of appeals to adopt local rules that allow filing of papers by electronic means. However, courts of appeals cannot adopt such local rules until the Judicial Conference of the United States authorizes filing by facsimile or other electronic means. (D.C. Rules Annotated, Fed. Rules of Appellate Procedure, at p.452- 53.)

Whether the Judicial Conference has formally or informally authorized such means of filing is unclear. At the time of this writing, research did not reveal approval. [14](#) While the Federal Rules of Civil Procedure may permit filing by facsimile, it appears to be unsettled in what constitutes permissible filings from Circuit to Circuit. [15](#) Even those courts which allow the restrictive use

of faxing may still require the immediate transmission of a hard copy of the document, for receipt by the next business day. Due to inconsistencies of federal courts in what they will or will not do in their actual day-to-day practice, the only conclusion which can be drawn is that filing by fax should be the exception - not the rule. The geographically relevant districts in this case simply do not permit such filings in the accepted course of doing business. In summary, the recent amendment to the federal rule does permit the use of facsimile filings, but the use is limited. The rules of circuit practice, furthermore, are mixed and incomplete at this time.

### **Conclusion**

First, this tribunal finds that the regulations governing the filing of an application for review require filing by either hand delivery or mail service. Facsimile transmission of documents is not within the defined methods of filing. No special rules have been created which permit facsimile transmission of the filings before OALJ.

Second, the ruling In the Matter of the Commonwealth of Puerto Rico is dispositive of the OALJ's jurisdiction. The AFR must be hand delivered or mailed within the 30-day filing requirement. Transmission by faxing does not, however, fall under the definition of mailing or hand-delivery. The fact that the PDE submitted a fax within the 30-day filing period, as received on May 6, 1992, was insufficient to toll the running of that period. In fact, the original/hard copy of the application was not posted until May 28, 1990, which was well after the expiration of the filing period which ended May 7, 1992, and well beyond a reasonable time, as contemplated by the Secretary in Trend. The lack of an expedient follow-up in this case compounds the PDE's misplaced reliance on meeting a filing deadline by faxed submission. The facts of the present case clearly illustrate the unreliable nature of the fax.

As the court discussed in Salley v. Board of Governors, *supra*, the questioned reliability of a faxed transmission is one which prevents it from being equated as hand-delivery. In any kind of service, the issue of reliability has a central place. Handdelivery or personal service has certain inherent safeguards which is unlike a transmission by fax. There are many practical deficiencies in the use of faxed transmissions which impact on overall reliability. For instance, faxed transmissions sometimes arrive unclear, blurred, and incomplete. The quality of the document may be a basic source of unreliability. Faxed documents may not be timely transmitted because of blocked access on the sending or receiving lines or may be lodged in a machine's memory function beyond a filing deadline. Overdemand may lead to blocked access by the receiving office. Receipt of a partially complete fax presents an inconclusive filing. Interpretations of what, if any, consideration should be given to the partial filing merely muddles the procedural record. The receiving office may be opened wide to criticism for insufficient faxing capabilities, poorly serviced machines, and a whole host of related problems. Hand-delivery is not as problematic and with the immediate and personal receipt of any documents such problems of incompleteness and blurred quality can be determined at the moment of delivery and corrected contemporaneously. Reliability is a very real concern in meeting filing requirements.

Third, the rationale of the Federal Rules leads us back to the applicability of the GEPA rules. While the 1991 amendment to Federal Rule of Civil Procedure 5(e) permits the limited use of filing by facsimile transmission, such filing is an exception to the normal and accepted method of

filing documents with the court. Furthermore, the federal circuits have not uniformly adopted rules implementing the amendment to the federal rule. Likewise, neither the departmental rules nor OALJ rules permit filing by facsimile transmission in administrative hearing before the OALJ.

For all of these reasons, PDE's use of a facsimile transmission of the AFR on May 6, 1992, was not sufficient to be considered a timely filing. In addition, the hard copy filing on May 28, 1992, was outside the 30 day period for filing. Therefore, the OALJ has no jurisdiction to review the matter based on the May 28, 1992, late filing. PDE did not satisfy the requirements of the proper method of service as applies under the GEPA rules. Applicant's AFR must therefore be dismissed as untimely filed.

### **ORDER**

Due to the Pennsylvania State Department of Education's failure to timely file its AFR with the Office of Administrative Law Judges and establish jurisdiction for the review of this matter, it is, therefore, ordered that the matter be dismissed with prejudice. So Ordered.

Daniel R. Shell  
Administrative Law Judge

Issued: Jun 25, 1992

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1 The letter was designated the program determination letter yet it describes the monetary determinations in the enclosures thereto as "preliminary departmental decisions." Inasmuch as

the language of the Code refers to preliminary departmental decision, any further reference will be to the receipt of the PDD.

2 The terms facsimile transmission and fax are used interchangeably.

3 Under 81.27(c), the contents of an AFR are specified and an applicant is required, inter alia, to submit a copy of the disallowance decision of which review is sought. The PDD in this matter is a 5-page document. PDE submitted only page 3 in both its faxed transmission and the hard copy which followed three weeks later. While PDE's failure to submit a complete copy of the PDD was a defect, it is not fatal nor the central issue in the case.

4 The Federal Express receipt shows the PDE sent the hard copy on May 28, 1992.

5 After a Staff Assistant in OHA, aware of the tardy copy, contacted the PDE, the hard copy was forwarded.

6 In Commonwealth of Puerto Rico, the issue of waiver of the 30 day filing requirement was considered in terms of equity and fairness considerations. It was held, however, that such considerations were inapplicable under the circumstances of the case. The decision explained at page 10:

The statute provides that the application for review must be filed "not later than 30 days after receipt" (Section 452(b)(1) of GEPA), and there is no allowance for exceptions. Clearly, where permitted under the OALJ regulations extensions of timetables "for good cause" are recognized. The judge has the ability to waive the 90 day requirement for setting a hearing for good cause under Section 452(c). No such good cause exception applies to the timeliness of filing an application for review. To ask the judge to recognize one is tantamount to asking for a waiver of the statute and regulations which the judge clearly cannot do. Equitable and fairness considerations are simply inapplicable under the circumstances here.

7 The phrase within a reasonable time was qualified in the decision as being prior to the close of OHA's next business day, unless good cause is shown.

8 Allowing for speculation, it appears that under Trend, a party could meet a filing deadline by a facsimile transmission without violating any particular filing requirements in receipt, provided a hard copy of the document is received by close of next business day. The form of filing is not the critical element; the actual meeting of the receipt date is the critical requirement.

9 The Salley decision was issued on April 22, 1991, prior to the December 1, 1991 Amendment to the Federal Rule 5(e) discussed below.

10 One additional distinction the Court made was to differentiate between fax transmissions and "electronic mail" or "E" mail. The latter it noted pertains to messages sent by one party to another party through telecommunications between computers or terminals such as a computer service message board or box accessed by computer and modem. It commented that such messages are not the same as fax transmissions. Nevertheless, the question of use of "electronic



mail" or "E" mail was not in issue in the case before the Court. This distinction makes clear that fax transmissions and "electronic mail" are not comparable for any filing purposes.

11 The Court commented that the Court of Appeals for the Fourth Circuit permits filings to be accomplished by fax. It notes a limitation to that practice, however, in that fax filings may not be directly sent to the Clerk except in emergency situations when advance permission has been obtained. See I.O.P. 25.2, U.S. Court of Appeals for the Fourth Circuit. Clearly, with such a limitation, the use of fax transmissions in a forum that permits them is severely restricted. It does not carry much weight towards any argument that the Federal Courts, on the whole, permit or welcome such filings despite the age of advanced technology in which we live. Salley v. Board of Governors, University of N.C., supra, p.420.

12 Upon Review of the Third Circuit Rules and Procedures for comparison purposes and any applicability to the pending case, as that is the Pennsylvania Department of Education's location, there was nothing found on the Circuit's approval of local rules whereby filing by faxed documents was permitted. Additionally, phone contacts with the Clerk's Office for the Middle District of Pennsylvania gave the following clarification. According to Mr. Frank Johns, Deputy in Charge of Clerk's Office, M.D.P.A., the Third Circuit has not approved the use of faxing for filing purposes. The District Courts are prohibited from receipt of documents by fax unless the local rules (Circuit) has approved that practice. Local rules must conform to the Circuit practice. There may be the occasional exception as in the case of multi-panel Judge cases where faxing is done because of the logistics. [Information per phone consultation with Mr. Johns on June 11, 1991.]

Another contact at the Third Circuit Court level confirmed that the Circuit has not substantively amended its rules to allow for receipt of documents by fax. The lack of a specific filing requirements rule in their Rules Nos. 1-30 was briefly discussed as well. There has been no amendment to the rules which conforms practice with the Federal Rules of Civil Procedure in Rule 5(e), effective Dec. 1991. [Information per phone contact with Third Circuit Court of Appeals Legal Coordinator, Mr. Baldus, of Philadelphia, Pa, on June 15, 1991.]

13 See the explanatory section to Rule 25(a) on Filing, as amended on December 1, 1991.

14 When in doubt, there is always actual court practice to check for instruction on the matter. Thus, the practice of the Court of Appeals for the District of Columbia Circuit is for the Clerk's Office to accept faxed documents to meet filing deadlines but to require a Federal Express hard copy of the document by the next business day. Otherwise, the filing could be rejected. The only authority to follow here is the apparent permissibility of the Courts of Appeals, as a result of the December 1, 1991 Filing Amendment to permit papers to be filed by facsimile or other electronic means.

15 Consider the disparity in practice when the District of Columbia Circuit says it permits filing by fax -- the D.C. Court of Appeals says it does, however, the District Court says it does not.