IN THE MATTER OF MISSOURI VALLEY COLLEGE,
Respondent.

Docket No. 92-71-SP
Student Financial Assistance Proceeding

ORDER RE MOTION TO DISMISS WITHOUT PREJUDICE

This is an action initiated by the Office of Student Financial Assistance, United States Department of Education (OSFA) to recover $2,099,132 in Federal funds, including interest and special allowance costs, advanced to the Missouri Valley College (MVC) under the student financial assistance programs and to require MVC to purchase from various lending institutions loans in the total amount of $3,667,500. This action was proposed following an audit conducted by the Office of the Inspector General which concluded that MVC's contracts with Missouri Valley Academy and Collegiate Educational Service Group, Inc. failed to meet the eligibility requirements to participate in Title IV student financial assistance programs. OSFA determined that the educational programs provided by the Missouri Valley Academy and the Collegiate Educational Service Group, Inc. were ineligible to participate in Title IV because the programs: (1) did not meet minimum regulatory program length requirements; (2) did not lead to a certificate or degree; (3) admitted students who did not secure a high school diploma, GED, or exhibit the ability to benefit from the education offered; and (4) did not receive approval from MVC's accrediting agency.

On March 31, 1992, OSFA issued a final audit determination, advising MVC of its conclusions, supra, which was received by MVC on April 3, 1992. On May 18, 1992, and within the period specified by 34 C.F.R. § 668.113(b) (1991), MVC filed its request for review and a hearing on the record. Accordingly, jurisdiction was proper before this tribunal.

After a series of suspensions of the proceeding to pursue settlement negotiations, OSFA withdrew the March 31, 1992 final audit determination on September 22, 1992. OSFA indicated that this action was taken as a precaution "in light of the allegations and counterallegations [by MVC and the Department] involving solicitation" of a bribe by a Departmental official.

Following the withdrawal of the final audit determination, OSFA filed a motion to dismiss this proceeding without prejudice. This motion is opposed by MVC which seeks a dismissal with prejudice or alternatively, a denial of OSFA's motion.See footnote 1 1/

The basis for OSFA's motion to dismiss lies in the affidavit of Dennis C. Spellman, a MVC consultant. Mr. Spellman alleges that Ethelene R. Hughey, Chief of the Audit Review Branch, Division of Audit and Program Review and the ED official who signed the March 31, 1992 final

audit determination, attempted to solicit a bribe, presumably in return for altering the findings set forth in the final audit determination.

As a result thereof, OSFA plans to make a "fresh review" of the audit conducted by the Office of the Inspector General which would exclude any input by Department officials involved in the alleged solicitation. OSFA would also permit MVC to respond, again, to the audit findings and, thereafter, reissue its final audit determination. For the reasons set forth infra, OSFA's motion to dismiss without prejudice is denied.

Initially, OSFA argues that its withdrawal of the final audit determination moots the appeal by MVC and, therefore, the administrative law judge loses jurisdiction to hear MVC's appeal. This argument parallels the position taken by OSFA in In re Health Care Training Institute, Dkt. No. 92-42-ST, Order of ALJ Lewis, U.S. Dep't of Education (Sept. 16, 1992). There, OSFA sought to terminate Health Care from its participation in the student financial assistance programs and to impose a significant fine. Like the present case, the pertinent statute required a hearing on the record and a decision by the Secretary, where the school requested a review of the proposed action. Under the Administrative Procedure Act, this decision may be rendered by the Secretary or, if allowed by the regulations, an administrative law judge who acts on behalf of the Secretary.

OSFA argued that the designated department official within OSFA had the authority to determine the jurisdictional issue as to whether Health Care's request for a hearing on the termination action also included the fine action. The administrative law judge rejected OSFA's argument and held that only the administrative law judge or the Secretary had the authority to resolve jurisdictional issues--

> no official of the agency, other than the administrative law judge [who acts on behalf of the Secretary], may make
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> determinations regarding actions or cases before the agency that are of the nature which would be properly before the "agency" [i.e. the Secretary] where the agency does not utilize administrative law judges. Any such determinations by such officials are void as they are contrary to the Administrative Procedure Act.

Id. at 3.

Health Care's rationale is equally applicable to a proceeding under 34 C.F.R. Subpart H concerning a final audit determination or a final program review determination. In short, the administrative law judge or the Secretary are the only individuals within the Department who may resolve jurisdictional matters regarding requests for review in audit determination proceedings. See id. As MVC had properly appealed the final audit determination, the administrative law judge is vested with jurisdiction and this matter remains under the jurisdiction of the administrative law judge until the judge resolves the action or dismisses it following a settlement.

This view is consistent with the long-standing precedent of Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), that a tribunal has the authority to determine whether it has the authority to

hear the matter before it. Further, in Butz v. Economou, 438 U.S. 478, 513 (1978), the Court recognized that "[t]here can be little doubt that the role of the administrative law judge . . . is 'functionally comparable' to that of a judge" and that "adjudication within a federal administrative agency shares . . . the characteristics of the judicial process." Accordingly, OSFA's purported withdrawal of its final audit determination has no effect on the jurisdiction here and represents an unauthorized and unlawful act.

The next matter for resolution is whether OSFA may obtain a dismissal without prejudice from the administrative law judge in order to reissue a final audit determination. This is a matter normally within the sound discretion of the tribunal. United States v. Gunc, 435 F.2d 465, 467 (8th Cir. 1970); Millsap ex rel. Millsap v. Jane Lamb Memorial Hosp., 111 F.R.D. 481, 483 (S.D. Iowa 1986); 9 **Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure** § 2364, at 161 (1971).

There are, however, several overriding factors which distinguish these administrative proceedings from judicial proceedings. Under 20 U.S.C. § 1094(b)(2) (1990), Congress provided, in effect, that the hearing shall take place not later than 150 days after the Secretary receives the institution's request for review of the final audit determination. Thus, Congress sought a quick resolution of these matters--an objective which would thwarted under OSFA's approach.

In addition, the regulations governing this proceeding also provide restrictive limitations regarding the submission of evidence. 34 C.F.R. §§ 668.116(e) and (f). The reissuance of the final audit determination would allow OSFA to circumvent the regulations by granting it another opportunity to submit evidence as well as to add other matters.See footnote 2 2/ Thus, the nature of the statutory and regulatory schemes contemplates that initial audits are final and re-audits are discouraged.

This finality of the audit rationale has been adopted by Congress for other governmental agencies. For example, the Internal Revenue Code dictates that once a deficiency letter--which is akin to a final audit or program determination--is issued to a taxpayer, further deficiency letters are restricted. 26 U.S.C. § 6212(c)(1) (1989) provides--

> [i]f the Secretary has mailed to the taxpayer a notice of deficiency . . . and the taxpayer files a petition with the Tax Court within the time prescribed in Section 6213(a), the Secretary shall have no right to determine any additional deficiency . . . .

This provision was originally adopted in 1926 and is based on the principle that--

> [f]inality is the end sought to be attained by these provisions of the bill, and the committee is convinced that to allow the reopening of the question of the tax for the year involved either by the taxpayer or by the commissioner (save in the sole case of fraud) would be highly undesirable.

S. Rep. No. 52, 69th Cong., 1st Sess. 26 (1926).

In McCue v. Commissioner, 1 T.C. 986, 987 (1943), the Tax Court interpreted this Congressional directive and stated --

[i]f later the Commissioner becomes convinced that the deficiency has been determined in too small or too large an amount or if he deems the grounds relied upon and set forth by him in his notice of deficiency erroneous or inadequate, his only remedy is to endeavor to straighten out those

matters in the proceeding before this Court.

The Tax Court ultimately held that the Commissioner had no right to mail a second notice and was not entitled to the advantages which would accrue to him if his second letter had been a statutory notice. Id. at 988. See also Stamm Int'l Corp. v. Commissioner, 84 T.C. 248, 252 (1985) (the Commissioner had no right to send the taxpayer a second notice for the same taxable year and tax liability); Harvey Coal Corp. v. Commissioner, 12 T.C. 596, 603 (1949) (same). The rationale under the tax system applies with equal force to the Federal student financial assistance programs and supports the denial of OSFA's motion to dismiss.

While the above principles are persuasive, it is appropriate to address, nevertheless, the approach within the judicial system regarding a motion to dismiss without prejudice. Courts generally grant voluntary dismissals where the only prejudice that the opponent to the motion would endure is that which results from a subsequent lawsuit. Paulucci v. City of Duluth, 826 F.2d 780, 782 (8th Cir. 1987). However, courts have articulated factors to be considered in deciding the motion: (1) the defendant's effort and the expense involved in preparing for trial; (2) excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action; (3) insufficient explanation of the need to take a dismissal; (4) the fact that a motion for summary judgment has been filed by the defendant; (5) emotional or psychological trauma associated with the experience of defending another lawsuit; and (6) the prejudice resulting from uncertainty over title to land. Id. at 783; Ferguson v. Eakle, 492 F.2d 26, 29 (3d Cir. 1974); Pace v. Southern Express Co., 409 F.2d 331, 334 (7th Cir. 1969).

MVC alleges excessive delay in the resolution of this matter-- approximately four years have elapsed since the initiation of the audit by the Office of Inspector General. MVC also notes that the adverse publicity caused its enrollment to decline. Lastly, MVC cites the considerable time and expense incurred in the past regarding this matter and seeks to avoid a repetition of these items. OSFA, on the other hand, counterattacks and blames MVC for the delays and urges that a withdrawal of this action is "most protective of the rights of the College" and "the integrity of the program." In the end, however, OSFA recognizes that "the merit of the [improper] allegations is irrelevant" to the resolution of the liability in question. Under these circumstances, justice would be better served by continuing with the present proceeding.

OSFA maintains that the Order Re Dismissal in In re Lincoln Technical Institute, Dkt. No. 90-99-SA, Order of ALJ Lewis, U.S. Dep't of Education (1991) mandates that a withdrawal of the final audit determination removes the jurisdiction of the

administrative law judge and, therefore, the administrative law judge must dismiss this proceeding without prejudice. In Lincoln, OSFA sought to substitute a reissued program determination in the original proceeding. The request was denied and the action was dismissed. In dismissing the proceeding, the order provided in pertinent part that--

> the regulations governing the proceedings in this case are drafted in such a manner that the best approach in dealing with the reissuance of the program determination is to dismiss the present case and permit the . . . [institution] to institute new proceedings in the event it chooses this course of action.

OSFA misconstrues the rationale of Lincoln. The original final audit determination was issued by an individual within the Department who was not a designated department official as required by 34 C.F.R. § 668.112. Therefore, the original final audit determination was not valid and it was appropriate to dismiss the action. See In re Lincoln Technical Institute, Inc., Dkt. No. 91-38-SP, U.S. Dep't of Education (October 30, 1992) at 6-13. In contrast, the final audit determination in the present proceeding was issued by an appropriate official. Hence, the order in Lincoln offers no support for OSFA's position.

For the foregoing reasons, OSFA's motion to dismiss without prejudice is denied. The remaining matter is whether to dismiss this matter with prejudice as requested by MVC or to continue the present proceeding.

MVC urges that the proceeding be dismissed with prejudice. "Dismissal with prejudice is a complete adjudication of the issues presented by the pleadings and is a bar to a further action between the parties." Schwarz v. Folloder, 767 F.2d 125, 129 (5th Cir. 1985) (quoting Smoot v. Fox, 340 F.2d 301, 303 (6th Cir. 1964) (further citations omitted)). The gravity of this sanction is evident in that it forever bars resolution on the merits. "The sanction of dismissal [with prejudice] is the most severe sanction that a court may apply, and its use must be tempered by a careful exercise of judicial discretion." Durham v. Florida East Coast Ry., 385 F.2d 366, 368 (5th Cir. 1967) (further citation omitted).

As noted supra, the withdrawal of the March 31, 1992 final audit determination was a meaningless act. Given the amount of the proposed liability and the desire by the parties to resolve this

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matter, it is appropriate to proceed in this case rather than dismiss it with prejudice.

Accordingly, it is HEREBY ORDERED that OSFA's motion to dismiss the proceedings without prejudice is denied. A briefing schedule will be issued forthwith.

Allan C. Lewis
Administrative Law Judge

Issued: November 13, 1992
Washington, D.C.

Footnote: 1 1/ Counsel for MVC requested an oral argument in this matter. The views of the parties are well expressed in their submissions. Therefore, an oral argument was not necessary to resolve this matter.

Footnote: 2 2/ For instance, OSFA would have the opportunity to excise those portions of the final audit determination tainted by the allegations of impropriety which may deprive MVC of its opportunity to rebut OSFA's findings. This may or may not be of consequence here. What is significant regarding MVC's potential liability is the audit conducted by the Office of Inspector General, not the review conducted by Ms. Hughey within the Office of Postsecondary Education.