IN THE MATTER OF Puerto Rico Technology and Beauty College,
Respondent.

Docket No. 92-73-SA
Student Financial Assistance Proceeding

DECISION

Appearances: Baltasar Corrada del Rio Esq., of Hato Rey, Puerto Rico for the Respondent

Stephen M. Kraut, Esq., of Washington, D.C.,
Office of the General Counsel, United States
Department of Education for the Office of Student
Financial Assistance

Before: Judge Allan C. Lewis

This is an action initiated by the United States Department of Education to recover $403,875 in Pell Grant funds and $65,700 in imputed interest and to order Puerto Rico Technology and Beauty College (Technology College) to pay $4,436 in salary to students hired under the College Work Study program. This action was proposed following an audit which concluded that Technology College improperly disbursed $403,875 in Pell Grant funds to Lamec Inc. following the acquisition of the Technology College's Mayaguez campus by Lamec Inc. Due to these alleged improper disbursements, the audit concluded that Technology College was also liable for interest in the amount of $65,700. Lastly, the audit concluded that approximately 30 students in the College Work Study program were not paid a total of $4,436 in salary by their employer El Nuevo Hogar and, therefore, it was the responsibility of Technology College to pay these monies to the students. Based upon the findings of fact and conclusions of law which are set forth in the opinion below, the Department may recover $403,875 in Pell Grant funds from Technology College, together with $65,700 in interest. It may not, however, require Technology College to pay the allegedly unpaid salaries due these students.See footnote 1 1/

I. OPINION

The initial issue is whether the Department may recover $403,875 in Pell Grant funds disbursed to Lamec Inc. during the period July 1, 1987 through June 30, 1988.

The Department's position is that, as of July 1, 1987, Technology College sold its Mayaguez branch campus to Lamec. Subsequently, Technology College made 18 lump sum payments of Pell Grant funds to Lamec which, in turn, disbursed these monies to the students. According to the Department, Lamec was not eligible to participate in the Pell Grant Program as it had not executed a program participation agreement and, therefore, students enrolled in educational programs provided by Lamec were not eligible to receive Pell Grant funds. Thus, the Department

concluded that the disbursements by Technology College were improper and requested the repayment thereof.

Technology College responds that, even though Technology College and Lamec signed the sale documents for the Mayaguez school, their actions and conduct subsequent to the purported transfer was that of a joint operation of the school based on NATTS refusal to recognize the transfer until a "free standing" status was authorized. Technology emphasizes that the credits, certificates or diplomas received by the students were recognized by the Puerto Rico Department of Education and, therefore, the students were not harmed academically. Thus, Technology College asserts that the Pell Grant funds were used for their intended purpose and there is no justification for restitution of these funds.

In a prior proceeding to terminate the eligibility of Technology College to participate in the student financial assistance programs, the Secretary determined that--

a "change of ownership" did occur as a direct and immediate result of the June 30, 1987 transaction [with Lamec]. The 18 transfers of [Pell Grant] program funds [by Technology College] were in violation of Title IV, HEA. OSFA was correct in levying the fines and terminating PR Tech[nology College] and Lamec's participation in Title IV, HEA programs.

In re Puerto Rico Technology and Beauty College, et.al., Dkt. Nos. 90-34-ST and 90-38-ST, U.S. Dep't of Education (Oct. 7, 1991) at 4.

Under the doctrine of issue preclusion, the findings of fact and conclusions of law by a tribunal in a prior administrative proceeding with the same party are binding on the parties in a subsequent judicial proceeding. United States v. Utah Const. Co., 384 U.S. 394, 422 (1966); see generally Commissioner v.

Sunnen, 333 U.S. 591, 598-602 (1948). The preclusive effect of the first proceeding serves to enforce repose and thereby subsequently conserve judicial resources. University of Tenn. v. Elliott, 478 U.S. 788, 798 (1986). These underlying considerations justify a similar application in administrative proceedings before an agency involving the same party and issues. Accordingly, the tribunal concludes that the June 30, 1987 sale transaction constituted a change of ownership of the Mayaguez campus from Technology College to Lamec.See footnote 2 2/ Hence, the 18 disbursements of Pell Grant funds by Technology College during fiscal 1988 represented distributions of Pell Grant funds to Lamec.

An institution may disburse Pell Grant funds only to an eligible student. 34 C.F.R. § 690.75(a) (1987). An eligible student is an individual who is enrolled in an eligible program in an eligible institution that has entered into a program participation agreement with the Department. 20 U.S.C. §§ 1091 and 1094; 34 C.F.R. §§ 690.4 and 690.5. Here, the lump sum disbursements by Technology College were made to Lamec, an entity offering educational programs, and were not made to students of Technology College. Therefore, the disbursements were contrary to the regulations and improper. As such, Technology College is liable for the overpayments of Pell Grant funds. 34 C.F.R. § 690.79(a)(2) (1991).

The second issue is whether Technology College is liable for interest in the amount of $65,700. Interest is charged, according to the Department, on Pell Grant funds that "an institution improperly expends for purposes which the institution knew or should have known were unallowable." This policy is set forth in Appendix 6 to the Department's "Audit Resolution System Handbook." Appendix 6 is entitled "Departmental Policy on Recovery of Interest in the Audit Resolution Process" and provides--

> The Department will seek to recover imputed interest when recipients . . . use Federal funds for purposes which the recipient knew or should have known were erroneous, undocumented or unallowable. In all these cases, interest

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> may be charged from the date of the violation or erroneous claim.

Inasmuch as Appendix 6 was added to the handbook in July 1988, approximately one month after the close of the fiscal year in which the monies were improperly disbursed, Technology College asserts that the Department had no authority to impose an interest charge in the instant case. The Department responds that the Federal Government is entitled to imputed or prejudgment interest as an essential element of damages or restitution from a private party under the federal common law. It relies primarily upon West Virginia v. United States, 479 U.S. 305 (1987).

West Virginia amply supports the Department's position and citing Royal Indemnity Co. v. United States, 313 U.S. 289, 295-97 (1941) states that--

> the longstanding rule [is] that parties owing debts to the Federal Government must pay prejudgment interest where the underlying claim is a contractual obligation to pay money.

Id. at 310.

In addition, the Court noted that--

> [p]rejudgment interest serves to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress. See Comment, Prejudgment Interest: Survey and Suggestion, 77 N.W.U.L.Rev. 192 (1982).

Id. at 311 n.2.

Thus, the Department possessed the right to demand the payment of interest well before the declaration in Appendix 6 was added in July 1988. It may also demand interest as of the date of wrongful disbursement.

It is apparently the Department's policy, however, to demand the payment of interest only under the circumstance in which the recipient used Federal funds for purposes which the recipient knew or should have known were erroneous or unallowable.

Technology College asserts that it had no knowledge or reason to believe that its arrangement with Lamec constituted a change in ownership thereby creating an unauthorized use of Pell Grant funds by it. It argues further that this question remained unclear until the Secretary's decision of October 7, 1991.

The Department disputes Technology College's characterization of the facts and law and urges, moreover, that Technology College

should have known that the disbursements were improper since it stipulated in the prior termination and fine proceedings that--

> [o]n July 1, 1987, PR Tech[nology College] and Lamec should have known that Lamec was not eligible to participate in the Title IV, HEA Programs, and that students enrolled in Lamec were not eligible to receive Pell Grants or any other Title IV, HEA Program assistance. Jt. Ex. 1, para. 33.

Initially, the Department's reliance upon the stipulation in the termination and fine proceedings is misplaced. This is not a stipulation executed by the parties in this case. As such, the admissibility of this prior stipulation is governed by 34 C.F.R. § 668.116(f) (1991) which requires that evidence must be admissible and timely submitted to the administrative law judge in order to be considered. Here, the stipulation falls within category (v) of 34 C.F.R. § 668.116(e) which pertains to "[o]ther ED records and materials" and must be submitted to the administrative law judge "no later than 30 days after the institution's filing of its request for review." The stipulation was not submitted within this time period and, therefore, it is excluded from the record.

Technology College applied to the Department for Pell Grant funds numerous times during fiscal 1988 and, following the receipt thereof, made 18 transfers of Pell Grant funds to Lamec pursuant to paragraph 3 C of the sale agreement which provided that Technology College--

> will permit . . . [Lamec] to use its federal permits and licenses to collect all the federal grants of the enrolled students or those enrolled in the future, during all the time that be necessary, while the already started process to transfer the licenses and permits of collection of grants under the name of LAMEC, INC. is concluded.

Lamec was obviously using Technology College to obtain Federal funds which it was not entitled to receive and Technology College knowingly participated in this diversion of Federal funds--funds which could only be distributed by Technology College to eligible students participating in an eligible program within its school. Under these circumstances, Technology knew or should have known that its transfers of Federal Pell Grant funds to Lamec violated a fundamental aspect of the Pell Grant Program. Inasmuch as Technology College does not dispute the amount of interest, it is held that the imposition of interest in the amount of $65,700 is proper.

The last issue is whether Technology College must pay a total of $4,436 among approximately 30 students who were hired under the College Work Study program and were allegedly not paid the 20 percent non-Federal share of their salary by their off-campus

employer El Nuevo Hogar. There is no dispute that the students were paid the remaining 80 percent of their wages by Technology College.

On brief, the Department maintains that--

El Nuevo Hogar reportedly paid the students in cash for the non-federal share of the students' compensation, and submitted forms to PR Tech on which the students appeared to have signed receipts for those cash payments. However, when the OIG auditors interviewed student workers, those students indicated that El Nuevo Hogar never paid them their non- federal share. Moreover, they indicated that they thought they were signing a receipt for the check they received from PR Tech, which represented the federal share of their compensation.

Whether the approximately 30 students were paid the 20 percent non-Federal share of their wages by El Nuevo Hogar is a question of fact to be resolved by the administrative law judge based upon the evidence adduced by the parties.

The Department's evidence consists of a report by an ED/OIG auditor in which he represents that he interviewed five students over the phone and relates what these students told him.

In contrast, Technology College relies upon the 26 biweekly forms prepared by El Nuevo Hogar and sent to the finance officer of Technology College. In these forms, the president of El Nuevo Hogar certifies as follows:

[t]his is to certify that the following students of the Institution . . . have received their pay for the work/study program equalling 20 percent.

ED Ex. G-2 at A-3.

In each form, there were 3 columns. The first column had the handwritten name of each student, the second column had the handwritten dollar amount of his or her salary which reflected 20 percent of his or her salary, and the third column had the signatures of each student. These forms were forwarded to Technology College. Sometimes before, on, or shortly after the date on the form Technology College issued checks to these students. The amounts of the checks represented 80 percent of his or her salary. This procedure was followed biweekly and approximately 30 students signed these forms during the fiscal year in issue.

The purported statements by the students to the ED/OIG auditor were oral. They were not in writing or sworn statements made under penalty of perjury. As noted above, the dollar amount on

each form for each student reflected 20 percent of the student's salary--an amount which was significantly less than the amount of the check issued by Technology College. Therefore, even with the above deficiencies, it is even more difficult to accept a representation that the students thought they were signing a receipt for the checks from PR Tech which were for amounts far in excess of the amounts actually included next to their names. Given these circumstances, the weight accorded the purported statements of these five individuals is minimal.

In comparison, the certification forms were signed by each of the approximately 30 students employed by El Nuevo Hogar and reflect that each student received 20 percent of his or her salary from El Nuevo Hogar. These forms were prepared biweekly and sent to Technology College. While not technically business records, they are closely akin to such records and are viewed as highly reliable under the circumstances herein.

Under 34 C.F.R. § 668.116(d), Technology College has the burden of proof in this matter. Based on the evidence, Technology College has clearly met this burden. Accordingly, the Department's request that Technology College be ordered to pay $4,436 among approximately 30 students is denied.See footnote 3 3/

II. ORDER

On the basis of the foregoing findings of fact and conclusions of law, and the proceedings herein, it is hereby--

ORDERED, that Technology College immediately and in the manner provided by law pay the United States Department of Education the sum of $403,875, plus interest in the amount of $65,700.

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Allan C. Lewis
Administrative Law Judge

Issued: August 31, 1992
Washington, D.C.

Footnote: 1 *1/ This matter is resolved without an oral argument since the positions of the parties and the issues are clear. 34 C.F.R. § 668.116(g)(1). An evidentiary hearing is not permitted under 34 C.F.R. § 668.116(b).*

Footnote: 2 *2/ It should be noted that the administrative decision by the Secretary of Education is presently on appeal by Technology College before the United States District Court for the District of Puerto Rico in Civil Nos. 91-2380, 91-2437 and 92-1215. The Federal District Court recently remanded the matter to the Secretary of Education for action on a matter unrelated to the issues pertinent herein. Thus, the Federal District Court has not passed on the merits of the Secretary's decision and it appears unlikely to do so within the near future.*

Footnote: 3 *3/ The findings of fact and conclusions of law proposed by the parties have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the grounds that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision herein.*