ADMINISTRATIVE PROCEEDING
IN THE
UNITED STATES DEPARTMENT 0F EDUCATION

IN THE MATTER OF THE

AUDIT APPEAL OF

DAKOTA WESLEYAN UNIVERSITY

DECISION

BY PAUL S. CROSS, ADMINISTRATIVE LAW JUDGE

STATEMENT OF THE CASE

For the period of July 1, 1983 through June 30, 1986, Dakota Wesleyan University (Respondent) failed to verify certain information on the applications of students applying for grants under the Pell Grant Program. Respondent brought this error to the attention of the Office of Student Financial Assistance (OSFA) of the Department of Education (ED). OSFA, then permitted Respondent to retroactively verify the applications of those Pell Grant recipients instead of immediately charging Respondent with a liability for disbursements made to those students lacking proper documentation. Respondent began to gather missing document in early 1987.

OSFA told Respondent that it would only be liable for the Pell Grant payments it made to students whose application Information (basically income tax returns) Respondent could not verify. In a written agreement executed by Respondent on July 25, 1988, Respondent specifically agreed to repay ED the amount of the Pell Grant disbursements it made to students for whom the Respondent could not provide proper verification documentation.

Respondent failed to obtain the verification documents for over a hundred students These students were collected out of a universe of "selected" students The manner of the selection of the universe is not shown but the total selected for audit is less than all Pell Grant students As a result, in a final program review determination dated February 9, 1989, OSFA requested the return of $152,120, including $129,813 representing the amount of Pell Grant awards Respondent awarded to 90 unverified students for whom income tax returns are missing. 1 However, instead of fully repaying ED, Respondent here seeks a partial reversal of the final determination. Thus, on March 23, 1989, Respondent filed this audit appeal under 34 CFR Part 668, Subpart H.

Initially this proceeding was assigned to Administrative Law Judge Walter J. Alprin who established a schedule for the filing of written evidence and argument. He is no longer available to decide this case and the matter is reassigned to me for decision.

The Title IV, HEA Program under dispute in this review is the Pell Grant Program. During the audit period, the Pell Grant Program was authorized under Title IV-A-l of the HEA, 20 U.S.C.

1070a (1985). The Pell Grant Program regulations were codified in 34 CFR Part 690 (1986). The Pell Grant Program was also subject to the provisions contained in the Student Assistance General Provisions regulations, 34 CFR Part 668.

Under the Pell Grant Program, the Secretary of Education provided grants to eligible, financially needy undergraduate students The amount of a Pell Grant is determined by strict statutory and regulatory formulae. The variables in the formulae include the student's expected family contribution, that is, the amount the student and his family are reasonably expected to contribute toward his cost of education; the student's cost of education; and the amount of money appropriated for the Pell Grant Program. 20 U.S.C. 1070a(a) (1985); 34 CFR part 690, Subpart F. (1986).

A student applies for a Pell Grant under a two-stage application process. First, he submits information to ED so that his expected family contribution can be calculated. 34 CFR 690.12. ED evaluates that information and sends the student a Student Aid Report (SAR) which includes the student's expected family contribution, called the "student aid index" under the Pell Grant Program. 34 CFR 690.13.

In the second stage, the student submits his SAR to the institution he is attending. 34 CFR 690.61. The institution can pay the student a Pell Grant only on the basis of a "valid SAR." 34 CFR 690.61. A valid SAR is one that contained accurate and complete information. 34 CFR 690.2 (1986).

In order to determine whether a SAR is valid, ED developed a "verification system" under which an institution must verify that application information for selected students is accurate and complete. See 34 CFR 690.77 (1984) and 34 CFR Part 668, Subpart E (1986). Under the verification system, the institution requests the students to provide documentation, usually Federal income tax forms, to support the information contained on the application.

If an institution fails to verify the application information of a student, and disburses a Pell Grant, the institution is liable for the return of that Pell Grant payment. 34 CFR 690.77(c) (2) and (h) (3) (ii) (1985) and 34 CFR 668.60 (c) (2) (ii) (1986). See also 34 CFR 690.79(a) (2) (1986).2

FACTS

Respondent failed to verify the applications of Pell Grant recipients, selected for verification, during the 1983-84, 84-85 and 85-86 award years, 3 and brought this failure to the attention of OSFA. Because this failure to verify meant that Respondent had improperly awarded Pell Grant funds to these students, OSFA permitted Respondent to attempt to retroactively verify the application information of these students so as to reduce or eliminate Respondent's liability. Respondent utilized essentially all of 1987 to obtain missing documentation.

In a final program review determination, called a final summary letter, sent to Respondent on January 5, 1988, OSFA required the Respondent to return the Pell Grant funds it disbursed to the selected students whose applications were unverified. However, OSFA and Respondent then entered into a formal agreement under which OSFA provided Respondent with more time to

obtain the verification documents, and Respondent agreed to repay ED the Pell Grant funds for those students for whom Respondent could not obtain the verification documents within the time permitted. Specifically, paragraph 2 of the Agreement provides that:

2. As to the Pell Grant validation liability identified in the Final Summary Letter of January 5, 1988, and the untaxed income statement proposed fine, the parties agree as follows:

The Department hereby grants to the university one hundred-twenty (120) days from the date this Agreement is signed by the University to provide the proper documentation for validating the students in question. The University hereby agrees to pay the liability and proposed fine for those students for whom the University cannot provide proper documentation.

The University signed the Agreement on July 25, 1988, so the 120- day deadline for obtaining the verification documents expired on November 22, 1988. Thus, Respondent had almost another year to obtain the missing records. As of January 7, 1989, Respondent had failed to obtain necessary income returns for 90 students who had received $129.813 of Pell Grant Program funds. As noted previously, the actual number of undocumented students may have been even greater.

DISCUSSION AND CONCLUSIONS

Respondent's disbursement of Pell Grant funds to the extent disallowed in the OSFA February 9, 1989 final program review determination was improper. Accordingly, Respondent must repay to ED $152,120 of Pell Grant including the $129,813 that it improperly awarded to students whose application information it failed to verify.

In the February 9, 1989 final program review determination, OSFA disallowed $152,120 of Pell Grant Program payments because in part, $129,813 in payments were made to 90 students whose applications were not verified by Respondent. In an Agreement signed by Respondent on July 25, 1988, Respondent admitted that it failed to verify certain applications of students whose applications it should have verified, and further agreed to repay ED the Pell Grant payments of students whose applications it could not verify by November 22, 1988.

One way for Respondent to prove that the $129,813 of disallowed expenditures were proper, is to submit the missing verification documents for the 90 students However, Respondent does not submit to OSFA the missing verification documents for the 90 students Moreover, in attachment A to its May 17, 1989 brief, Respondent concedes that it fails to provided the verification documents.

Respondent contends that it is not liable for the return of $l29,813 of Pell Grant Funds because (1) it tried to comply with program regulations; (2) OSFA has a policy of settling audit and program review cases for significantly less than the amount claimed; and (3) statistically, the students who initially did not provide the required verification documents, but latter supplied them, had family incomes similar to the family incomes of students who did initially provide the verification documents, and therefore, the error rate found for the nonresponding students would equal the error rate found for the responding students.

With regard to Respondent's first contention, the purpose of this proceeding is to review OSFA's determination that Respondent's violations of the Pell Grant Program regulations gave rise to a liability. Clearly, if there is only a technical violation of a rule and Pell Grant requirements are otherwise satisfied, good faith noncompliance may be a defense against liability. However, verification of Pell Grant eligibility is a vital aspect of the program. Therefore, Respondent's violation was not a mere technicality and Respondent's good faith, standing alone, is not a defense.

Respondent's second contention is that OSFA has a policy of settling final audit and program review determination actions for significantly less than the amount claimed. Respondent points to one instance where this may have happened. I assume that it did. However, settlement actions in other cases are not binding on DE in this proceeding. The facts may well be different or perhaps there were special circumstances. An agency cannot have a policy for "Monday" and a different one for "Tuesday," but I find no abuse of DE discretion in failing to settle with respondent. It may be that a DE policy of easy settlement does exist for selected respondents. However, OSFA represents that in the one case cited for by Respondent for that contention, the Roxbury Community College case, Roxbury agreed to pay ED $l,961,291. OSFA thus argues that Respondent's attempt to establish OSFA "policy,." on the basis of a newspaper article at that, is erroneous.

In my opinion, it would be an abuse of discretion on my part to conclude that the Roxbury case determines the liability of Respondent in the instant proceeding. In order to do go I would have to have all of the facts surrounding the Roxbury case and, as well, other DE cases. Such a huge undertaking is not warranted by the facts of record because of Respondent's agreement to recompense DE and because the actual abuse of DE procedures may be even greater than demonstrated by evidence concerning selected students Moreover, Respondent did receive the benefit of a partial settlement in that it was granted a lengthy grace period to obtain missing records and as a result was able to materially reduce its liability.

Finally, Respondent's third contention must be rejected. Respondent argues that by the use of available Federal income tax returns, expert statistical evidence proves that the non- available income tax returns would be virtually identical to those that were provided. Statistical evidence of probability could be accepted as proof of Respondent's liability if in fact the statistical study is meritorious. In this regard, Respondent contends that it is reasonable to expect that the students that did not provide their Federal income tax returns would have the same relatively minor error rate on their applications as the students that did provide their returns. Respondent notes that those who were late in providing returns had about the same income as those who were timely. However, the students that provided their Federal income tax returns to Respondents, whether timely or late, obviously felt that they had little or nothing to hide. It simply is reasonable to believe that the students who failed, after repeated requests, to provide their Federal income tax returns did in fact have something to hide and that is the reason why they did not provide their returns. Respondent argues that the students were assured that they were facing no liability by providing tax returns, but fails to show that the students accepted such an assurance. In short, I believe the factual predicate for Respondent's exculpatory statistical projection is flawed and as a consequence I am unable to accept Respondent's statistical study as probative of reduced liability. I conclude that Respondent owes all of the money claimed to be due by OSFA for the

reason that students were paid Pell Grant funds without proper documentation and there is an insufficient basis for excusing the lack of proper documentation.

FINDING AND ORDER

I affirm finding number 1 of the February 9, 1989 final program review determination. The appeal of Respondent is denied.

By Paul S. Cross, Administrative Law Judge, on this 5th day of October 1989.

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1 Respondent does not seek review of the other findings in the February 9, 1989 final program review determination and questions only the $129,813 assessment.

2 Section 690.79(a)(2) provided that:

The institution is liable for any overpayment if the overpayment occurred because the institution failed to follow the procedures set forth in this Part. The institution shall restore those funds to its Pell Grant account even if it cannot collect the overpayment from the student.

3 After an extensive and extended effort to collect documents, in the 1983-84 award year 19 of 65, students still lack documentation; in the 1984-85 award year 28 of 52 students still lack documentation, and in the 1985-86 award year 57 of 168 students still lack documentation. Of these 14 involve minor document discrepancies which are not in dispute. There are 90 files still with no income tax returns. As can be seen, the percentages of the students still with improper documentations are much higher in the 1984-85 and 1985-86 award years than in the 1983-84 award year. It thus, appears that the Respondents' inability to obtain necessary records is not basically a product of the date of the students' receipt of the Pell Grant funds, that is, remoteness in time does not appear to have influenced greatly the ability of the Respondent to obtain records. It also should be noted that not all Pell Grant students were chosen for audit. The manner of selection is not explained but the possibility exists that if all Pell Grant students had been audited, the instances of improper documentation would be more numerous. Stated different, Respondent plainly was not enforcing the Pell Grant recordkeeping requirements and the actual number of students who failed to provide documentation may be higher than shown.