IN THE MATTER OF TEMPLE UNIVERSITY,
Respondent.

Docket No. 89-26-S
Student Financial Assistance Proceeding

DECISION

Appearances: Adelaide Ferguson, Esq. for the Respondent

Carol S. Bengle, Esq. for the Office of the General Counsel, United States Department of Education

Before: Judge Allan C. Lewis

This is an appeal by Temple University of Philadelphia, Pennsylvania (Temple) regarding one aspect of a program review determination by the Department of Education (Department) in which the Department requested reimbursement of $169,208 for the fiscal years ending June 30, 1983 through 1985.See footnote 1 1/ The Department determined that Temple's payments to its graduate assistants in the School of Communication and Theater (Scat) under the College Work-Study Program (CWS) were improper on two grounds, namely, that the graduate assistants who worked as actors and set designers were employed by the school in ineligible jobs as defined by the regulations in effect during the period in issue and that Temple maintained deficient records regarding their employment. Temple counters that the appropriate, applicable definition of an eligible job is the definition set forth in the current regulations. Under this definition, Temple asserts that the graduate assistants performed work in eligible jobs. In addition, Temple argues that, with respect to the record keeping requirement, the regulations in effect during the fiscal years in issue govern and that it has complied with these regulations. I conclude that the regulations in effect during the period in issue govern, that Temple's records comply with the record keeping requirement, and that the students were performing work in ineligible jobs. Therefore, I hold for the Department.

I. FINDINGS OF FACT

Temple is an accredited institution of higher education and a member of the Commonwealth System of Higher Education in Pennsylvania.See footnote 2 2/ As part of Temple's student aid program during the fiscal years ending June 30, 1983 through 1985, it participated in the CWS program with the Department. Its participation was effected by means of a program participation agreement with the Secretary of the Department. This agreement provided in pertinent part--

ARTICLE II. GENERAL PROVISIONS

1. a. The Institution understands and agrees that it is subject to the program statute and implementing regulations for each program in which it particip-ates. . .

b. The Institution agrees to use the funds advanced to it under each program solely for the purposes specified in, and in accordance with the provisions set forth in, the program statute . . . and the regulations which implement those statutes. The Institution further agrees to properly account for the funds it receives.

. . . .

ARTICLE VII. COLLEGE WORK-STUDY - SPECIFIC PROVISIONS

. . . .

6. The Institution agrees to award CWS employment, to the maximum extent practicable, which will complement and reinforce each recipient's educational program or career goals.

One of Temple's schools, Scat, offers majors in acting and scene design. As an integral and mandatory requirement in these majors, Scat requires that its graduates students participate in productions conducted by the Theater Department. During the graduate students' first semester of their first year, they serve as ushers or ticket takers in the productions. Thereafter, they are required to participate as set designers or as actors in the rehearsals and performances of the productions.

As part of Scat's graduate program, it offers graduate assistantships for students in financial need under the CWS program. Under this program, qualifying graduate students are paid on an hourly basis for working as an usher or ticket taker during their first semester and for working in the theater productions in set design or acting during their subsequent semesters. While these activities are required of all Scat graduate students as part of their curriculum, Temple pays only the CWS students for the set design and acting work while it pays both the CWS and non-CWS students when they serve as ushers and ticket takers.

In its books and records, the Theater Department recorded the clock time periods worked by the CWS graduate assistants in the set design and acting areas erroneously.See footnote 3 3/ It recorded the time spent on these jobs as having occurred during the day, when in fact, the rehearsals and performances actually took place in the evening.See footnote 4 4/ Thus, while the total number of hours worked by each graduate assistant in the CWS program was correctly recorded, the clock time period was incorrectly stated.See footnote 5 5/

The Department mailed its program determination letter to Temple on March 30, 1989. Thereafter, on May 16, 1989, Temple filed its timely request for a hearing on the record. 34 C.F.R. §668.113(b) (1988). Briefs were filed by the parties and an oral argument was held on February 2, 1990.

II. OPINION

The CWS program was originally authorized by Congress in 1964 and was "designed to provide basic financial assistance through part-time employment to the able but needy college student." H.R. Rep. No. 1458, 88th Cong., 2d Sess.(1964), reprinted in 1964 U.S. Code Cong. & Admin. News 2900, 2906. Subsequently, the program was extended to include not only students

from low- income families but also "students requiring assistance [who] . . . are technically [not] from low-income families." S. Rep. No. 673, 89th Cong., 1st Sess.(1965), reprinted in 1965 U.S. Code Cong. & Admin. News 4027, 4065.

In addition, Congress has clarified and modified in a limited degree over the years the general nature of eligible employment. For example, the employment should not result in the displacement of employed workers;See footnote 6 6/ it should, but is not required to, complement and reinforce the student's educational program or vocational goals;See footnote 7 7/ and it was expanded from the governmental and non-profit sectors to include the private sector.See footnote 8 8/

Despite the above actions by Congress, it has not set forth a statutory definition of eligible employment. During the period in issue, Section 441(4) of the Higher Education Act of 1965, Pub. L. 89-329, 79 Stat. 1219, 1266-67(to be codified at 42 U.S.C. § 2754(a)) stated that the student shall perform "part-time employment" and "such work . . . will be governed by such conditions of employment as will be appropriate and reasonable in light of such factors as type of work performed, geographical region, and proficiency of the employee." In the absence of a specific statutory definition, the Department promulgated regulations beginning in 1969 regarding the nature and scope of eligible employment.

The initial dispute between the parties is whether the current regulations or the regulations in effect during the period in issue govern regarding the nature of eligible employment. Temple argues, relying on Bradley v. Richmond School Board, 416 U.S. 696 (1974), that the current regulations govern. The Department, on the other hand, rejects this retroactive application concept and asserts that the regulations in effect during the period in issue govern. In this regard, the Department relies upon an exception to Bradley, Bennett v. New Jersey, 470 U.S. 632 (1985).See footnote 9 9/

In Bradley, 416 U.S. at 711, the Court established a broad principle that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." However, in New Jersey, the Court refused to follow Bradley and held that statutory provisions which eased the standard of compliance for federal educational grant-in-aids should not be applied retroactively. The basis, as explained by the Court, rested under a contract theory(470 U.S. at 637-38)--

Both the nature of the obligations that arose under the Title I program and Bradley itself suggest that changes in substantive requirements for federal grants should not be presumed to operate retroactively. Moreover, practical considerations related to the administration of federal grant programs imply that obligations generally should be determined by reference to the law in effect when the grants were made.

The case at hand is squarely within the facts of New Jersey. Like New Jersey, the federal grant funds from the Department were distributed pursuant to a contract type agreement which established rights and obligations of the parties. Similarly, the recipient of the funds seeks to avoid repayment for a purported misuse of the funds by virtue of a subsequent change in the law

which eases one of the conditions. Thus, the circumstances in New Jersey and the instant case are identical.See footnote 10 10/

Moreover, the rationale of New Jersey applies with equal force. With regard to the grant, Temple gave assurances that it would abide by the conditions of the grant, and, the Department, as a correlative matter in the event these assurances were not met, had a pre-existing right of recovery before the 1987 modification in the regulations. Thus, as in New Jersey, the retroactive application of modified regulations would significantly change the rights as well as the obligations of the parties. The practical considerations in New Jersey are also similar. Federal auditors must base findings on known, applicable substantive standards and Temple had no basis to believe that the propriety of its expenditures would be judged by any standard other than the standard in the regulation in effect during the period in issue.

Temple distinguishes New Jersey on the ground that it dealt with a statutory amendment, while the case at hand involves a change in a regulation. Such a distinction is meaningless. A regulation generally clarifies, amplifies, or interprets a statute. Caterpillar Tractor Co. v. United States, 589 F.2d 1040, 1043 (Ct.Cl. 1978). Here, the implementing regulations were incorporated by reference into the participation agreement between Temple and the Department. Thus, whether the underlying agreement incorporates a statute as in New Jersey or a regulation as in the case at hand, the same effect occurs in a contractual type setting, namely, it creates rights and obligations and pre-existing rights of recovery in the event certain assurances by either party are not met. Accordingly, the regulations in effect during the period in issue govern.

Under the regulations in effect during the period in issue, CWS "employment . . . may involve work-- (i) For the institution itself . . . includ[ing] work in those operations the institution typically performs directly for its students [such as] . . . in food service, cleaning, maintenance, or security." Education College Work-Study and Job Location and Development Programs, 34 C.F.R. § 675.22(a),(b)(1987). In addition, Reg. Sec. 675.23 defined an eligible job as--

(a) General. (1) A CWS eligible job is a job that an employer normally has paid other persons to do outside the CWS program.
(2) If no other person has held that job for that employer, it must be a job for which other employers would normally pay.
(b) Work for academic credit. Work that is otherwise eligible is not ineligible because it satisfies a requirement for a degree or certificate.

With respect to the above regulation, the Department argues that the initial inquiry is limited by subsection (a)(1) to whether Temple compensated non-CWS individuals for performing the same job in issue. If such a job did not exist at Temple, continues the Department's argument, then the inquiry focuses under subsection (a)(2) on a second matter, namely, whether this type of job is one which an employer in the community would normally pay for its performance. Temple, on the other hand, asserts that both subsections apply concurrently, that is, it may show that paid positions of the type in issue exist within its facility or within the community.

The regulation is clear and unambiguous. A two step approach is mandated by the dependent clause in subsection (a)(2) "[i]f no other person has held that job for that employer."(emphasis

added) This dependent clause acknowledges that an initial inquiry must be made within the institution regarding the existence of the job in issue and that such inquiry resulted in a negative determination before a second inquiry may be made with respect to the existence of the practice in the outside community to compensate individuals who perform such a task.See footnote 11 11/

Applying the two step approach in the instant case, Temple had non-CWS students performing the same tasks as scene designers and actors in its theater productions that its CWS graduate assistants performed. In addition, these non-CWS students were not paid for their services, Accordingly, under Reg. Sec. 675.23(a)(1) the CWS graduate assistants were performing work in ineligible jobs for purposes of the CWS program.See footnote 12 12/

The Department also argues that Temple must refund the monies paid to the Scat graduate assistants for working as scene designers and actors in the theater productions on the ground that Temple did not comply with the record keeping requirement of 34 C.F.R. § 675.19(b)(2)(i)(1987). Reg. Sec. 675.19(b)(2)(i) requires that the institution maintain program and fiscal records that includes, inter alia, a certification signed by "an official of the institution or off-campus agency [indicating] . . . [f]or students paid on an hourly basis, a time record showing the hours each student worked."

The Department urges that the plain language of the regulation requires a certification of the actual hours worked. Thus, even though Temple's records correctly reflected the number of hours worked, they were deficient because the actual hours worked were incorrectly indicated. Temple responds that the regulation only requires records which reflect the number of hours worked and therefore, though the actual hours worked were misstated, it has nevertheless complied with the regulation.See footnote 13 13/

The Department's proposed construction is inconsistent with its regulations. The above record keeping regulation requires the institution to maintain the identical records regarding the hours worked whether the student is employed by the institution or by a governmental or private nonprofit organization under an arrangement between the institution and the off-campus organization. Where the student is employed off-campus in the CWS program, the regulations require an agreement between the institution and off-campus organization. The Department's model off-campus agreement states in pertinent part--

(3) At times agreed upon in writing, the institution will pay to the organization an amount calculated to cover the Federal share of the compensation of students employed under this agreement and paid by the organization. Under this arrangement the organization will furnish to the institution for each payroll period the following records for review and retention:
(a) Time reports indicating the total hours worked each week and containing the supervisor's certification as to the accuracy of the hours reported and of satisfactory performance on the part of the students;

34 C.F.R. § 675, Appendix B(emphasis added).

Thus, the records for off-campus employment require only reporting the total number of hours worked in order to satisfy the reporting requirement in Reg. Sec. 675.19(b)(2)(i). The regulation should not be construed differently for records regarding institutionally employed students, Accordingly, Temple's records satisfied the reporting requirement of Reg. Sec. 675.19(b)(2)(i).

CONCLUSION

For the foregoing reasons, it is concluded that the United States Department of Education is entitled to recover the sum of $169,208 from Temple University. Accordingly, IT IS ORDERED that Temple University refund this sum to the United States Department of Education forthwith.

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Allan C. Lewis
Administrative Law Judge

Issued: February 22, 1990
Washington, D.C.

Footnote: 1 1/ The program review determination also included the fiscal year ending June 30, 1986. In addition, other issues were raised in the program review determination; however, these matters have been resolved by the parties.

Footnote: 2 2/ The facts are not disputed by the parties except for one matter discussed infra.

Footnote: 3 3/ It is unclear whether the Theater Department also recorded erroneously the hours worked by the CWS graduate assistants who performed work as ushers and ticket takers. Presumably, under the Department's position, the Theater Department recorded these hours correctly because it did not challenge the CWS payments made to these students under its record keeping argument infra.

Footnote: 4 4/ Temple has extensive CWS programs in its other schools. During the period in issue, its CWS programs disbursed over $6 million. All programs except the Theater Department's program were processed through one assistant director of financial aid. These programs did not suffer from the same deficiencies as in the instant case. In these other programs, Temple maintained correct clock time records and did not employ students in jobs in which other students were not paid.

Footnote: 5 5/ The Department challenges, in its initial brief to a degree and to a greater extent in its reply brief, Temple's assertion that every penny paid by it during the grant period was paid to a student who worked the requisite hours to earn the payment. As explained below, the Department's position is without merit and not supported by its own records. In the HIGHLIGHTS OF AUDIT RESULTS portion of the audit report, the Department found(at 4) that all "of [the] CWS funds were disbursed to graduate students who were performing ineligible jobs." Thus, there is no question that the monies were disbursed. Subsequently in the same audit report at 7, the Department indicated--

ED OIG OI had already established that the Theater Department was in the practice of recording the hours spent on these jobs as having occurred during the day, when the rehearsals and performances actually took place in the evening. . . . Because this practice was already disclosed by OI, Temple's practice pertaining to recording work hours was not reviewed by us. Thus, the Department confirmed to its satisfaction that the CWS graduate assistants had, in fact, worked the number of hours for which they were paid.

Footnote: 6 6/ Section 441 of the Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219, 1249-51.

Footnote: 7 7/ Section 434 of the Education Amendments of 1980, Pub. L. No. 96-374, 94 Stat. 1367, 1435.

Footnote: 8 8/ Section 403(a) of the Higher Education Amendments of 1981, Pub. L. No. 99-498, 100 Stat. 1268, 1429-37.

Footnote: 9 9/ With regard to the issue concerning the nature of the records Temple was required to maintain, Temple urges that the current regulations do not apply in spite of Bradley on the theory that it could not have foreseen the new requirements implemented by the current regulations and therefore the regulations in effect during the period in issue should govern.

The Department takes the consistent position that the regulations in effect during the period in issue govern also the nature of the record keeping requirements.

Footnote: 10 10/ In Temple's view, the current regulations, which were effective January 15, 1988, eliminated the previous distinction between paid and non- paid jobs vis-a-vis their eligibility for CWS programs and therefore the distinction no longer exists. 34 C.F.R. §§ 675.20-675.21, 52 Fed. Reg. 45738, 45770-78. In light of the conclusion that the regulations in effect during the period in issue govern, it is not necessary to address this contention.

Footnote: 11 11/ The two step approach was originally adopted in the regulations in 1971 in 45 C.F.R. § 175.2(p). Miscellaneous Amendments to Part 175, 36 Fed. Reg. 13,687-88.

Footnote: 12 12/ Temple also argues that the two step interpretation represents a strict, technical construction which is contrary to the purpose of the statute and grossly unfair to Temple. It frustrates the purpose of the statute in this instance, according to Temple, since the funds were paid to eligible, financially needy graduate students and the type of work performed by the graduate assistants was consistent with Section 434 of the Education Amendments of 1980, Pub. L. 96- 374, 94 Stat. 1367, 1434-35(to be codified at 42 U.S.C. § 2753 (b)(7)) which states that to the "extent practicable . . . [employment should] compliment and reinforce the educational program or vocational goals of each student."

In many respects, Temple's argument is directed toward challenging the validity of the regulation, a matter customarily beyond the jurisdiction of an administrative law judge. 34 C.F.R. § 668.117(d). In any event, Temple's argument misses the point. The CWS program is not a scholarship program or a gift program for the financially needy for taking a course or participating in a school event which may have an educational or vocational benefit. Rather, it is a target program to compensate students in exchange for performing actual jobs. H.R. Rep. No.

1458, supra p. 4; S. Rep. No. 673, supra p. 4. One indicator of whether an activity constitutes a job within the institution is whether non-CWS students or other individuals are paid to perform the same task.

Footnote: 13 13/ The apparent explanation for the record keeping error in the Theater Department is that a well intentioned clerk, acting on his own initiative, felt that the actual times when the work was performed would not look appropriate on a payroll form because the work hours were performed after the normal business day.