IN THE MATTER OF STAUTZENBERGER COLLEGE
Respondent.

Docket No. 90-102-SA
Student Financial Assistance Proceeding

DECISION

Appearances: Stanley A. Freeman, Esq. of Washington, D.C. for the Respondent

Steven Z. Finley, 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 a proceeding initiated by the United States Department of Education (ED) to collect $88,829 of imputed interest allegedly owed by Stautzenberger College (Stautzenberger) due to the maintenance of excess cash balances of Federal funds during the period April 1, 1987, to December 31, 1988. It was based on a final audit determination issued on September 28, 1990, by the Chief, Audit Review Branch, Division of Audit and Program Review. On February 13, 1991, Stautzenberger filed a motion to vacate the final audit determination on the ground that the final audit determination was not issued by the appropriate ED official as required by 34 C.F.R. § 668.112 (1990). ED filed its response on February 22, 1991, and Stautzenberger submitted its reply on February 28, 1991. Based upon the discussion, infra, Stautzenberger's motion to vacate is granted.

I. OPINION

On September 28, 1990, the Chief, Audit Review Branch, Division of Audit and Program Review issued a final audit determination which demanded that Stautzenberger pay ED $88,829 of imputed interest allegedly owed by the college due to its maintenance of excess cash balances of Federal funds during the period April 1, 1987, to December 31, 1988.

Under 34 C.F.R. § 668.112, a final audit determination is a notice issued by a designated ED official--

"[f]inal audit determination" means the written notice of a determination issued by a designated ED official based on an audit of an institution's participation in any or all of the Title IV, HEA programs covered under this subpart.

The designated ED official who issues a final audit determination is--

an official of the Education Department to whom the Secretary has delegated the responsibilities referred to in this subpart [i.e. subpart H].

34 C.F.R. § 668.112.

Where an agency of the government fails to scrupulously observe its established rules, regulations, or procedures, its action cannot stand and will be struck down. United States v. Heffner, 420 F.2d 809, 811 (4th Cir. 1969)(citing United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954)). Thus, the questions for resolution are whether, and if so, to what office, the Secretary has delegated the responsibility to issue a final audit determination dealing with the matter of imputed interest.
Based primarily on Appendix 6, DEPARTMENTAL POLICY ON RECOVERY OF INTEREST IN THE AUDIT RESOLUTION PROCESS of the Audit Resolution System Handbook, Stautzenberger argues that the Secretary apparently delegated these responsibilities to the official in charge of the Financial Management Service which is in the chain of command which reports to the Secretary through the Controller and the Deputy Under Secretary for Management. Under ED's view, it asserts that the Secretary delegated the responsibility for the issuance of the final audit determination to the Chief of the Audit Review Branch within the Division of Audit and Program Review which ultimately reports to the Secretary through the Director of the Student Financial Assistance Programs, the Deputy Assistant Secretary for Student Financial Assistance, and the Assistant Secretary for Postsecondary Education. As support for its position, ED relies upon the position description for the Chief of the Audit Review Branch and the Administrative Communications System Departmental Directive A:MIS:1-103, dated 12/18/87, and approved by the Deputy Under Secretary for Management.

As noted above, both parties rely upon internal ED documents in asserting their respective positions. Before addressing the merits of their contentions, it is appropriate to consider whether the various documents relied upon by the parties are admissible in evidence and, therefore, may be considered by the administrative law judge in resolving the present controversy.

In proceedings under 34 C.F.R. Subpart H, the administrative law judge is significantly restricted with respect to the type of evidence which may be considered in rendering a decision. 34 C.F.R. § 668.116(f) provides that--

(f) The administrative law judge shall accept only evidence that is both admissible and timely under the terms of paragraph (e) of this section, and relevant and material to the appeal.

Of the five categories within 34 C.F.R. § 668.116(e)(1)(i) through (v), the documents submitted by the parties are included within category (v) which encompasses--

(v) Other ED records and materials if the records and materials were provided to the administrative law judge no later than 30 days after the institution's filing of its request for review.[See footnote 1 1/]

Since Stautzenberger filed its request for review on December 12, 1990, the period for submission of timely documents under 34 C.F.R. § 668.116(e)(1)(v) expired on January 11, 1991. Stautzenberger submitted its documents on February 13, 1991--approximately 30 days late. ED submitted its documents on February 21, 1991--approximately 40 days late. Hence, the documents proffered by both parties were not submitted within the period prescribed by 34

C.F.R. § 668.116(e)(1)(v) and therefore are not admissible as evidence under 34 C.F.R. § 668.116(f). Accordingly, these documents are excluded from the record.See footnote 2 2/

While Stautzenberger bears the ultimate burden of persuasion to establish the facts under 34 C.F.R. § 668.116(d), ED, as the proponent of the order, bears the burden of production to establish a prima facie case, that is, it must present evidence sufficient to establish to a reasonable person that the Secretary delegated the responsibilities under 34 C.F.R. § 668.112 to issue the final audit determination to the Chief of the Audit Review Branch. State of Me. v. United States Dep't of Labor, 669 F.2d 827, 829 (1st Cir. 1982); Environmental Defense Fund, Inc. v. EPA, 548 F.2d 998 (D.C. Cir. 1976); Old Ben Coal Corp. v. Interior Bd. of Mine Operations Appeals, 523 F.2d 25, 39 (7th Cir. 1975); In re Kentucky Polytechnic Institute, Dkt. No. 89-56-S, U.S. Dep't of Education (Apr. 27, 1990)(order).

Based on the admissible evidence, there is no evidence that indicates whether, and if so, to what position within the Department, the Secretary delegated the authority to issue the final audit determination in issue. Accordingly, ED has failed to meet its burden of production to establish that the Secretary delegated this authority through his officials to the Chief of the Audit and Review Branch. Therefore, the final audit determination must be vacated.See footnote 3 3/

While it may appear that the result in this case is harsh, ED has no real complaint. First, establishing that a final audit determination was issued by the proper official is simply one of the aspects known in advance as a prerequisite to prove a prima facie case. Second, ED was given notice by Stautzenberger in its request for appeal submitted to ED on November 16, 1990 that Stautzenberger was questioning whether the final audit determination was correctly issued. Therefore, ED had ample opportunity to submit its evidence in a timely fashion as required by 34 C.F.R. § 668.116(e)(1)(v). Third, ED promulgated the regulations which restrict admissible evidence based on its type and timeliness of submission. It has the power, should it elect to do so, to amend its regulations to alleviate this problem.

II. ORDER

On the basis of the foregoing, it is HEREBY ORDERED that the final audit determination issued on September 28, 1990, to Stautzenberger College is declared null and void.

....
Allan C. Lewis
Administrative Law Judge

Issued: March 11, 1991
Washington, D.C.

Footnote: 1 *1/ The other categories are ED audit reports and work papers, institutional audit work papers and materials if submitted to ED no later than the date by which it was required to file its request for review, ED program review reports and work papers, and institutional records*

and other materials so long as they were provided to ED no later than the date the institution was required to file its request for review. 34 C.F.R. § 668.116(e)(1)(i)-(iv).

Footnote: 2 *2/ With respect to Stautzenberger, this includes Exhibits 2, 3, and 4 attached to its motion to vacate. Exhibit 1 is the final audit determination which is already part of the record. Exhibit 2 is the Audit Resolution System Handbook with appendixes 1 through 7. Exhibit 3 is a November 13, 1990, Freedom of Information Act request seeking all documentation by which the Secretary delegated 34 C.F.R. Subpart H responsibilities as the designated ED official to the Chief, Audit Review Branch. Exhibit 4 is ED's response to the Freedom of Information Act request, dated December 5, 1990, in the form of two attachments dealing with the delegation of authority to resolve minor findings arising in audits of state and local governments.*

With respect to ED, the documents excluded are Exhibits 1 and 2 attached to its response in opposition to Stautzenberger's motion to vacate the final audit determination. Exhibit 1 is the position description for the "Supervisory SFA Audit Review Officer," which apparently is also referred to as the Chief of the Audit Review Branch. Exhibit 2 is the Administrative Communications System Departmental Directive A:MIS:1-103, dated 12/18/87. The exclusion also includes the Administrative Communications System Departmental Directive A:GEN:1-105 which sets forth policy and procedures governing delegations and redelegations of authority. This document was submitted after the parties' submissions by ED under a request for judicial notice filed on March 5, 1991. While there is a provision for the tribunal to take judicial notice within 34 C.F.R. Subpart G, i.e. 34 C.F.R. § 668.90(a)(4), there is no counterpart within Subpart H--the subpart pertinent to the resolution of the matter at hand. Though the tribunal may base findings of fact on matters given official notice (34 C.F.R. § 668.118(c)), this provision does not apply to adjudicative facts that are crucial to the central factual controversy which must, of course, be proven through traditional evidentiary methods. Dayco v. FTC, 362 F.2d 180 (6th Cir. 1966). Accordingly, ED's motion to take judicial notice filed on March 5, 1991, is denied. In addition, the document was not submitted within the period prescribed by 34 C.F.R. § 668.116(e)(1)(v) and therefore is not admissible as evidence under 34 C.F.R. § 668.116(f).

Footnote: 3 *3/ The above result is consistent with 34 C.F.R. § 668.117(d) which explicitly provides that "the administrative law judge is bound by all applicable statutes and regulations . . . and may not . . . [w]aive applicable statutes and regulations" and the Secretary's admonition in In re Gulf Coast Trades Center, Dkt. No. 89-16-S, U.S. Dep't of Education (Oct. 19, 1990) at 5 that--*

Unless I implement a revision to a regulation, I expect that my regulations, drafted as they are and not inconsistent with the mandates of the APA, be followed as written. Only in this way may these proceedings be carried out in a uniform manner which will meet the dictates of Congress and due process.