IN THE MATTER OF Academia La Danza Artes Del Hogar,
Respondent.

Docket No. 90-31-SP
Student Financial Assistance Proceeding

DECISION

Appearances: Rafael E. Torres Torres, Esq., of Ponce, Puerto Rico for the Respondent

Russell B. Wolff, 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 $467,294 in Federal funds advanced to the Academia La Danza Artes Del Hogar (Academy) under the student financial assistance programs and to require Academy to purchase from the lending institutions 13 loans in the total amount of $25,616 which were obtained by its students under the Guaranteed Student Loan Program. This action was proposed following a program review which concluded that Academy was erroneously determined to be eligible to participate in the student financial assistance programs under the Higher Education Act of 1965, as amended. Academy argues, in effect, that the actions of the Department preclude its recovery under the doctrine of estoppel. Based upon the findings of fact and conclusions of law, infra, the Department may recover $467,294 from Academy and Academy shall purchase from the lending institutions the 13 guaranteed student loans.

I. FINDINGS OF FACT

1. On November 28, 1986, Academy submitted to the Occupational/Vocational Eligibility Branch, Division of Eligibility and Certification of the U.S. Department of Education (Eligibility Branch), inter alia, a Form 1059, Request for Institutional Eligibility for Programs Under the Higher Education Act of 1965, as amended. The accompanying letter indicated that a non-profit, tax exempt certification would be submitted as soon as Academy received it. In addition, its designated accreditation status was as a public postsecondary vocational institution.See footnote 1 1/

2. On December 18, 1986, the Eligibility Branch returned Academy's application because the state license submitted with its application had expired and the tax exempt certification was not submitted. It was not returned due to its accreditation status as a public postsecondary vocational school. The Eligibility Branch required that "[t]his letter must be returned when you re-submit your application."

3. By letter dated January 27, 1987, Academy resubmitted its application and instructed the Eligibility Branch to note the amendment to item #7 which indicated that Academy was a

"proprietary" as opposed to "public" or "nonprofit" institution. Academy enclosed copies of the student enrollment agreement and current promotional literature as required by its newly designated classification.

4. By letter dated February 9, 1987, the Eligibility Branch returned Academy's application indicating "[s]ince you have changed your school's designation from Nonprofit to Proprietary, you must complete page 3 of the 1059, listing all courses and course lengths to be offered." Again, the Eligibility Branch's form letter required that "[t]his letter must be returned when you re-submit your application."

5. By letter dated March 11, 1987, Academy resubmitted its application with page 3 completed which listed the courses and their length as requested by the Department's letter of February 9, 1987.

6. On April 4, 1987, the Eligibility Branch notified Academy that--

> the Secretary of Education has determined . . . [that the institution] satisfies the definition of an eligible Vocational School (Section 435(c),HEA) as set forth in
> the . . . Higher Education Act of 1965, as amended (HEA).
> . . .
> As a result of the designation as an eligible institution, the institution is eligible to apply to participate in the following postsecondary education Federal assistance programs administered by the U.S. Department of Education
> . . . [which included the Pell Grants, SEOG, GSL, Work- Study, and DLS programs].
>
> This eligibility designation remains in effect so long as the institution continues to satisfy all relevant statutory and regulatory eligibility requirements and the enclosed Requirements for Maintaining Institutional Eligibility, which are incorporated into this Notice by this reference.
> . . . .

In the Requirements for Maintaining Institutional Eligibility, it provided--

> 1. PROGRAM PARTICIPATION REQUIREMENTS. Designation as an eligible institution of higher education . . . ; a proprietary institution . . .; or a vocational school (435(c), HEA), DOES NOT MEAN that the institution or school is automatically eligible to participate in any of the listed Federal student financial assistance programs.
> . . . .
> Specifically, in order to participate in the -
>
> - STUDENT FINANCIAL ASSISTANCE PROGRAMS authorized by Title IV of the HEA -- . . . the institution or
> school must execute a Program Participation Agreement
> in accordance with Student Assistance General
> Provisions, 34 CFR Part 668.11.

. . . .

3. PERIOD OF ELIGIBILITY. The institution's or school's status as an eligible institution remains in effect so long as it continues to satisfy all the relevant statutory and regulatory requirements for institutional eligibility. Thus the institution loses its status as an eligible institution or program ON THE DATE THAT IT FAILS TO SATISFY ANY OF THE REQUIRED ELEMENTS on which ts [sic] status as an eligible institution was based, such as its accreditation or its legal authority to provide a program of postsecondary education in the State in which it is located.

7. By letter dated July 31, 1987, the Eligibility Branch notified Academy that its request for certification to participate in selected programs of student financial assistance was approved by this office and that appropriate operations areas within these programs will forward a funding authorization and/or identification number and other necessary informational manuals.

8. By letter dated August 11, 1987, the Financial Management Section of Division of Program Operations notified Academy that, according to the Eligibility Branch, the school has met the necessary requirements for eligibility to participate in the GSL program and, therefore, the school was assigned a specific code number for all transactions.

9. By letter dated May 2, 1988, the Eligibility Branch wrote Academy that--

[a]s the result of a review of your school's eligibility records, we have determined that your school is not now nor has it ever been an eligible institution to participate in financial assistance programs administered by the U.S. Department of Education.

You initially submitted your eligibility application in December 1986. In item #7 on the ED Form 1059, you indicated the school's control as that of "Nonprofit". As a part of the application documentation, you submitted a Certificate of Accreditation from the Puerto Rico Department of Public Instruction, a recognized State agency for the approval of public postsecondary vocational education.

On December 18, 1986, we requested that you provide evidence from the Internal Revenue Service that your school is tax exempt under Section 501(c)(3) of the Internal Revenue Code. Your letter of January 17, 1987, advised us that you had amended your application to designate your school as a "proprietary" institution of higher education. Proprietary institutions must be accredited by one of the private nationally recognized accrediting agencies. (see the enclosed listing)

Your institution must obtain accreditation by an appropriate private recognized accrediting agency within the next six (6) months. Should you fail to do so, your school will be removed from the list of eligible institutions effective October 31, 1988.

10. The above action by the Eligibility Branch permitted Academy to continue to draw upon, and to disburse to its students, funds under the student financial assistance programs. While a public or nonprofit postsecondary vocational institution is permitted to receive funds while obtaining accreditation, this procedure is clearly prohibited by statute for proprietary, vocational schools.

11. By letter dated May 17, 1988, Academy notified the Eligibility Branch as follows:

Please be advised that the Academy is looking forward to contact any of those [private accrediting] agencies [on the list furnished by Eligibility] to see its availability to perform the accredition.

. . . .

We would like your assistance and orientation in respect to the dateline within which the Academy should obtain accreditation. Although you say in your letter [of May 2,

1988] that the Academy has six months to comply with the requisite; the period is shorter. We do not know, at this time, if it will be possible for any private accreditation agency to conduct its investigation and make the final recommendation within that time period.

Our concern is that, if the Academy does not provide the evidence of accreditation then, it will be removed from the list of eligible institutions as of October 31, 1988.

We want to assure your agency that, by all possible means, the Academy will try to get the accreditation because its eligibility is of the essence for the continuation of business.

As a matter of fact, the Academy welcomes any accreditation process and it will be willing to provide your Department with any evidence of the affirmative action taken towards that direction. We would like to know if there is any possibility of a time extension to the dateline previously stated in the event the accreditation process has begun, but is not finished by that time.

12. By letter dated June 14, 1988, the Eligibility Branch sent Academy a list of recognized accrediting agencies and suggested that Academy pursue accreditation. In addition, the Eligibility Branch indicated that "[i]f the accreditation process is not completed or near completion as of October 15, 1988, we suggest that you contact us at that time to pursue the possibility of the Department granting the institution an extension."

13. By letter dated September 27, 1988, Academy wrote the Eligibility Branch that it was in the process of accreditation with the National Association of Trade and Technical Schools (NATTS); that it was in the accreditation roster for February 1989; and that it requested an extension of the dateline beyond the October 15, 1988, until the accreditation is effective. Academy also provided the Eligibility Branch with its telephone number in case Eligibility needed "some other information."

The Department did not respond in writing to this letter. In the meantime, the Eligibility Branch contacted NATTS on November 1, 1988, and was apprised informally that Academy's application process had been deferred due to its failure to satisfy certain standards and that full accreditation was not expected until six to nine months after the deficiencies were corrected.

The next relevant correspondence by the Department occurred on March 8, 1990--more than two years later--in which Academy was informed by the Chief, Liaison Section I, Program Financing

Branch that the Department's program personnel had requested that funds not be released to Academy and that this request was being implemented.

14. Academy kept the Department informed of its progress during the accrediting process with NATTS:

a. By letter dated December 7, 1988, Academy submitted to the Eligibility Branch a Form 1059 in which it indicated that the institution was changing from proprietary to corporation and that it was undergoing the accreditation process with NATTS. (Ultimately, on or about May 17, 1989, Academy and John Haines on behalf of the Secretary of Education executed a revised program participation agreement.)

b. On March 16, 1989, NATTS accepted Academy's application for accreditation indicating--

[y]our initial application materials as well as the resubmitted information appears to be in substantial compliance with accreditation standards . . .

. . . .

Since one of your chief executive officers attended

the . . . workshop on September 22-23, 1988, the next step in the accreditation process is for the school to prepare a Self-Evaluation Report.

c. By letter dated April 9, 1989, Academy advised the Eligibility Branch that NATTS had accepted its application for accreditation and that the school was beginning the self-evaluation. Thereafter, it remained for NATTS to complete the accreditation process.

d. By letter dated April 9, 1990, Academy informed the Eligibility Branch that an accreditation team will be visiting the school in May 1990. Although Academy expected the results of accreditation by July 1990, it requested additional time, up to December 1990, in order to give NATTS the opportunity to complete the accreditation. Academy also explained that the delay in accreditation was not due to its fault, rather NATTS had amended its rules which required previously performed work to be changed. Lastly, Academy sought clarification regarding the freezing of funds by the Department.

e. NATTS visited the school in May 1990. Thereafter, on October 17, 1990, it denied Academy its accreditation. Academy appealed this denial to NATTS' appeals panel. Subsequently, on December 20, 1990, NATTS' appeals panel upheld the denial.

15. On January 2, 1989, the Director of the Division of Eligibility and Certification prepared a memorandum to the Chief,

Program Financing Branch, Financial Management Service which requested that the authority of Academy to draw Federal funds be withheld. This request was not forwarded or was received and misplaced by, or was rejected by the Financial Management Service because the authorization was not withdrawn.See footnote 2 2/

Approximately one year later, on January 26, 1990, another request to withhold authority to draw funds was made by the Director of the Division of Eligibility and Certification to the Chief of the Program Financing Branch.

Federal funds were withheld from Academy by the Financing Branch on January 25, 1990, and continued thereafter.

16. Academy received the following Federal funds:

Period	Amount
up to 5/2/88	$ 18,901
5/2/88 to 1/2/89	170,799
1/3/89 to 1/1/90	277,594
Total	$ 467,294

17. In a final program review dated April 29, 1990, the Chief of Institutional Review Branch, Division of Field Operations, Student Financial Assistance advised Academy that it was never eligible to participate in the financial assistance programs and therefore requested repayment of all Federal funds received by it, i.e. $467,294. In addition, the notice demanded that any loans obtained by students under the GSL programs must be repurchased from the lending institution(s) by Academy. The notice also indicated that Academy was entitled to a hearing on the record.

18. On June 7, 1990, Academy appealed the final program review determination and, thereafter, this matter was referred to the Office of Hearings and Appeals.

II. OPINION

In order to participate in the student financial assistance programs, an educational institution must be an eligible institution. Section 487(a) of the Higher Education Act of 1965, as amended by Section 407(a) of the Higher Education Amendments of 1986, Pub. L. 99-498, 100 Stat. 1268, 1488-89 (20 U.S.C. § 1094(a)(1988)). Under the student loan insurance program, an eligible institution may be, inter alia, an institution of higher education or a vocational school. Section 435(a) of the HEA of 1965, as amended by Section 402(a) of the HEA of 1986, 100 Stat. 1268, 1408-09, (20 U.S.C. § 1085(a)(1988)).

One difference between an institution of higher education and a vocational school is that the former must be a public or other nonprofit institution, while the latter may not be a public or other nonprofit institution, i.e. it must be a proprietary institution. Section 435(b) and (c) of the HEA of 1965, as amended by Section 402(a) of the HEA of 1986, 100 Stat. 1268, 1409-10 (20 U.S.C. § 1085(b) and (c)).

To qualify under either category, the institution shall be "accredited by a nationally recognized accrediting agency or association" approved by the Secretary.See footnote 3 3/ Id. However, there are distinct, separate groups of accrediting agencies and associations under each category.

Thus, there is a group which accredits the institutions of higher education and a different group which accredits the vocational schools.See footnote 4 4/

In the instant case, Academy applied to the Eligibility Branch for a determination that it was an eligible institution. Under the Department's procedure, there is an initial determination whether the institution is an eligible institution for the student financial assistance programs. Upon a favorable determination, the Department and the institution may then execute a program participation agreement which permits the institution to participate in the specified student financial assistance programs.

Academy applied for eligibility in November 1986 as a nonprofit organization under the institution of higher education category for purposes of the student loan insurance program. Though the Eligibility Branch accepted, apparently, Academy's accredited status by an agency recognized for accrediting institutions of higher education, its application was rejected in December 1986 on the grounds that Academy had not submitted a tax exempt certificate and that its state license had expired.

Approximately one month later, Academy reapplied. This time, it sought eligibility under a different classification in the student loan insurance program, i.e. as a vocational school, since it represented that it was a proprietary organization. This classification required, however, accreditation by an agency or association of a different type. The Eligibility Branch reviewed the application and acknowledged Academy's change in classification status. However, it returned the application in February 1987. The application was not returned on the basis that an accreditation was required by a different agency or association. Rather, it was returned because certain information regarding its courses, which was required under this new classification, was omitted from its application.

In March 1987, Academy resubmitted its application with this additional information. The Eligibility Branch then erroneously approved Academy as an "eligible Vocational School (Section 435(c),HEA)." OSFA Brief Ex. 7. The approval was erroneous in that Academy's accreditation was by an agency or association from the wrong group of accreditors. Following its approval, Academy and the Department executed a program participation agreement. Monies were distributed to Academy under the Pell Grant program and student loans were insured under the student loan insurance program.

Initially, it is clear that the Eligibility Branch was grossly negligent in its determination that Academy satisfied the criteria as a vocational school and, therefore, constituted an eligible institution for purposes of participating in the student financial assistance programs. Thus, the question for resolution is whether, under these circumstances, the Department may now recover the funds which were received by Academy under a mistaken impression by it that it was qualified to participate in the student financial assistance programs.

Unfortunately for Academy, the law is clear that the Department may recover the funds. It is well established that "anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384 (1947).

Moreover, in absence of specific statutory authority, government officials may not ignore statutory requirements. M-R- S Manufacturing Co. v. United States, 492 F.2d 835 (Ct.Cl. 1974). Hence, when a government agent goes beyond the ambit of his authority, the government is not bound. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384 (1947).

In the instant case, the Chief of the Occupational/Vocational Eligibility Branch, Division of Eligibility and Certification had no authority to grant Academy the status as an eligible institution unless that institution satisfied the statutory requirements. Similarly, absent qualification under the eligibility statutory requirements, the Department had no authority to execute a program participation agreement with Academy. Academy was not an eligible institution as a vocational school because it was not accredited by an agency recognized by the Department of Education for accrediting vocational schools. Hence, the favorable determination by the Eligibility Branch was patently in error and, therefore, the Department had no authority to execute the program participation agreement or to disburse funds pursuant thereto. Thus, under the general principle of Merrill, the Department may recover the funds in issue.

The Merrill decision is not, however, absolute. As the Eleventh Circuit explained in Deltona Corp. v. Alexander, 682 F.2d 888, 891 (1982)--

> Although never overruled, the apparently absolute holding of Merrill that the federal government could never be estopped by the conduct of its agents has eroded in the face of later Supreme Court precedents which state that an open issue exists whether estoppel lies against the government if a party proves "affirmative misconduct" on the part of a government agent. See Schweiker v. Hansen, 450 U.S. 785, 101 S.Ct. 1468, 1470-71, 67 L.Ed.2d 685 (1981); INS v. Hibi, 414 U.S. 5, 8-9, 94 S.Ct. 19, 21-22, 38 L.Ed2d 7 (1973); Montana v. Kennedy, 366 U.S. 308, 314-15, 81 S.Ct. 1336, 1340-41, 6 L.Ed.2d 313 (1961).*4*

4. The Ninth Circuit has adopted the "affirmative misconduct" exception, see Lavin v. Marsh, 644 F.2d 1378 (9th Cir. 1981), but neither the former Fifth nor Eleventh Circuits has addressed the issue.

Other courts, including the former Fifth Circuit, have suggested that the government is subject to estoppel when it acts in a proprietary manner, but not when it exercises its sovereign powers for the benefit of the public. See Air-Sea Brokers, Inc. v. United States, 596 F.2d 1008, 1011 (C.C.P.A. 1979); United States v. Florida, 482 F.2d 205, 209 (5th Cir. 1973); United States v. Georgia Pacific Co., 421 F.2d 92, 100-101 (9th Cir. 1970).

Sovereign functions of the government concern "unique governmental functions for the benefit of the whole public," whereas "proprietary governmental functions include essentially commercial transactions involving the purchase or sale of goods and services and other activities for the commercial benefit of a particular government agency." Federal Deposit Ins. Corp. v. Harrison, 735 F.2d 408, 411 (11th Cir. 1984). In this context, the award of student loans, according to the Fifth Circuit in Hicks v. Harris, 606 F.2d 65 (1979), is a characteristic sovereign-type activity. Under this view, the present proceeding to collect funds disbursed improperly under the student financial assistance programs constitutes a sovereign-type activity. Accordingly, the application of estoppel in the instant case is clearly inappropriate.

The doctrine of estoppel is also applied against the government by some courts where there has been affirmative misconduct by the government. Under this approach, there are two additional elements which must be satisfied beyond the traditional elements of estoppel. According to Watkins v. U.S. Army, 875 F.2d 699, 707 (9th Cir. 1989), the party must--

> establish 'affirmative misconduct going beyond mere negligence'; even then, 'estoppel will only apply where the government's wrongful act will cause a serious injustice, and the public's interest will not suffer undue damage by imposition of the liability.' Wagner v. Director, Federal Emergency Management Agency, 847 F.2d 515, 519 (9th Cir. 1988) (quoting Morgan v. Heckler, 779 F.2d 544, 545 (9th Cir. 1985)). [footnote omitted.]

Affirmative misconduct is based on the particular facts and circumstances in each case. It is clearly shown where the official's action is "a deliberate lie" or reflects "a pattern of false promises." Id. at 707-08. However, the Court held recently, in Office of Personnel Management v. Richmond, 110 S.Ct. 2465 (1990), that affirmative misconduct was not applicable in a context analogous to the instant case.

In Richmond, the Court reviewed a decision by a divided court of appeals which held that affirmative misconduct estoppel precluded the government from denying disability annuity payments to a claimant where that individual twice sought, received, and relied upon erroneous advice from Navy personnel regarding the maximum statutory level of earnings he could maintain without losing his disability annuity. The legal advice by Naval personnel, both oral and written, did not reflect a change in the law made four years previously. In the view of the Federal Circuit, these actions constituted affirmative misconduct by the Navy personnel and the Federal Circuit ordered that the claimant was entitled to his disability annuity.

Initially, the Court sought to dispel the notion that affirmative misconduct estoppel was a realistic, viable exception to the principle that the government is not bound by the unauthorized acts of its officials--

> [o]ur own opinions have continued to mention the possibility, in the course of rejecting estoppel arguments, that some type of "affirmative misconduct" might give rise to estoppel against the Government. . . .
>
> . . . .
>
> In sum, courts of appeals have taken our statements as an invitation to search for an appropriate case in which to apply estoppel against the Government, yet we have reversed every finding of estoppel that we have reviewed. Indeed, no less than three of our most recent decisions in this area have been summary reversals of decisions upholding estoppel claims.
>
> Id. at 2470.

Thus, the circumstances under which affirmative misconduct estoppel applies in the Court's view remain elusive--"[w]e leave for another day whether an estoppel claim could ever succeed against the Government." Id. at 2471.

The Court then held that affirmative misconduct estoppel may not apply to a claim for money from the Federal Treasury where the payment thereof reflects a "direct contravention of the federal statute." Such an action constitutes a violation of the Appropriations Clause of the Constitution. In short, claims "may be paid out only through an appropriation by law; in other words, the payment of money from the Treasury must be authorized by law." Id. at 2471. Therefore, the Court denied the claimant his disability annuity as it was not authorized by law.

In the instant case, the proposed recovery of funds which were disbursed by the government contrary to law is not unlike the Court's denial of a claim for money against the government in Richmond. In both situations, the government seeks to follow the law, that is, to deny claims which are contrary to the law or to recover amounts disbursed contrary to the law. Thus, a corollary to the holding in Richmond is that, absent a statute of limitations or other similar problems, the recovery of funds disbursed by the government contrary to law is not precluded by the concept of affirmative misconduct estoppel. Accordingly, it is inappropriate to apply the concept in the instant case.

III. ORDER

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

ORDERED, that Academy immediately and in the manner provided by law pay the United States Department of Education a sum of $467,294; and it is further

ORDERED that Academy immediately and in the manner provided by law pay off the loan balances in the total amount of $25,616 or such lesser amount as may be due for the 13 guaranteed student loans.

.....
Allan C. Lewis
Administrative Law Judge

Issued: May 19, 1992
Washington, D.C.

SERVICE

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On May 19, 1992, a copy of the attached initial decision was sent by certified mail, return receipt requested to the following:

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Footnote: 1 1/ To the extent that proposed findings of fact or conclusions of law by a party has not been adopted in this decision, they are rejected as being inaccurate or unnecessary to the disposition of this case.

Footnote: 2 2/ There is a dispute between the parties whether Academy through its chief executive officer, Ms. Rivera, was telephonically informed on December 23, 1988, by Ms. Thomas of the Eligibility Branch that the Department had decided to deny Academy further funds. While the evidence suggests that a conversation took place, it also reflects that the Department had not finalized its position regarding the availability of funds since, apparently, the Eligibility Branch may only request that the authorization be withdrawn. OSFA Exs. 13, 14.

Footnote: 3 3/ The Secretary publishes a list of these accrediting organizations which he determines to be reliable authorities as to the quality of training offered. Section 435(b) and (c) of the HEA of 1965, as amended by Section 402(a) of the HEA of 1986, 100 Stat. 1268, 1409-10 (20 U.S.C. § 1085(b) and (c)).

Footnote: 4 4/ The situation is similar under the Pell grant program. Under this program, an eligible institution includes an institution of higher education which may be, inter alia, a postsecondary vocational institution or a proprietary institution of higher education. Sections 487(a) and 481(a) of the HEA of 1965, as amended by Section 407(a) of the HEA of 1986, Pub. L. 99-498, 100 Stat. 1268, 1476 and 1488-89 (20 U.S.C. § 1094(a)(1988)). The former institution is public or nonprofit in nature and the latter institution is proprietary in nature. In addition, each type of institution is accredited by a different group of accrediting agencies and associations. Sections 481(b) and (c) and 801 of the HEA of 1965, as amended by Section 407(a) of the HEA of 1986, Pub. L. 99-498, 100 Stat. 1268, 1476 and 1488-89 (20 U.S.C. §§ 1088(b) and (c) and 1141(a)).