

UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

APPLICATION OF OGLALA LAKOTA COLLEGE,

Docket No. 90-57-R

Applicant.

Recovery of Funds Proceeding

ACN:08-01050

DECISION

Appearances:

Lawrence E. Long, Esq. for the Applicant, Oglala Lakota College.

Daphna Crotty, Esq. for the Office of Student Financial Assistance (OSFA)

Jaime Fernandez, Esq. for the Office of Management, Grants and Contracts Service, (OM).

Before:

Judge John F. Cook

I. Procedural Background:

On June 29, 1990, a final program determination was issued and sent to Oglala Lakota College (Oglala) in Kyle, South Dakota. It contained determinations of the Office of Student Financial Assistance (OSFA) and the Office of Management by its Grants and Contracts Service (OM). The program determination pertaining to the Audit Review Branch of OSFA was signed by Ethelene Hughey and consists of Enclosure 2. The determination pertaining to the Grants and Contracts Service was signed by Richard Mueller and is contained in Enclosure 1.

Oglala received the program determination on July 6, 1990. Oglala faxed a copy of its request for review 1 on August 22, 1990. This was faxed to the Office of General Counsel (OGC), rather than to the Office of Administrative Law Judges (OALJ). While the fax transmittal sheet listed the recipient to be the OALJ, it was faxed to another office number (OGC) as listed at (202) 401-3769. When OGC received the faxed document, the attorney to which it was assigned believed it to be a courtesy copy and he did not forward it to the OALJ until September 10, 1990.

The undersigned issued a Notice of Receipt for Request for Hearing on September 14, 1990, and directed the applicant (Oglala) to the appeal instructions which were set forth on page 5 of Enclosure 2 of the June 29, 1990, program determination.

Following filing of notices of appearances for the parties, a Motion for Denial of Request for Hearing Due to Lack of Jurisdiction was filed by counsel for OSFA and OM. On November 19, 1990, Oglala's Response to Government's Motion to Dismiss was filed. Thereafter, counsel for OSFA and OM filed their Reply.

II. Applicable Law

The authorizing statute governing this proceeding is the Higher Education Act of 1965 (HEA).

As relates to the OSFA portion of the program determination, Enclosure 2, 20 U.S.C. § 1094 and § 3474(a) give the Secretary authority to prescribe implementing regulations for formal administrative review of findings under Title IV, HEA programs, and they are set forth at 34 C.F.R. Part 663, Subpart H. Specifically, § 668.113(b) provides the time period within which a request for review must be taken. It provides:

The institution shall file its request for review and any records or materials admissible under the terms of § 668.116(e) and (f) of this subpart, no later than 45 days from the date it receives the final audit determination or final program review determination.

Moreover, the manner in which to request review of a final program or audit determination is set forth in § 668.113(a) as follows:

An institution seeking the Secretary's review of a final audit determination or a final program review determination shall file a written request for review with the designated ED official issuing the final audit determination or final program review determination (emphasis added).

Oglala, however, has apparently pursued its request for review, as to both portions of the final program determination, under the General Education Provisions Act (GEPA) Part E statutory provisions. 2 Section 452(b)(1) of GEPA, as set forth at § 1234a(b)(1) (1988), contains the specific language which addresses a recipient's (applicant's) filing requirement and the implementing regulations in 34 C.F.R. Part 81, specifically § 81.27 (b), are identical in terms of providing for a 30 day time period in which to file.

34 C.F.R. § 81.27(b) provides:

(b)A recipient shall file an application for review not later than 30 days after the date it receives the notice of a disallowance decision.

While examining the GEPA language and the regulatory provisions, it is important to note the scope of GEPA and what applicable programs come under it. Section 460(2), 20 U.S.C. § 1234i(2), specifically provides that "the term 'applicable program' excludes programs authorized by the Higher Education Act of 1965...." (emphasis added). Likewise, Section 81.2(a) of the GEPA appeal regulations specifically excludes HEA program appeals from coverage .

III. Issues

Does the OALJ have jurisdiction to conduct this proceeding?

A. Does the failure to file a request for review of a final program review determination concerning Title IV, HEA Programs, within the time limit set forth in the statute and regulations deprive the OALJ of jurisdiction to conduct this proceeding?

B. Did Oglala file its request for review as to a final program review determination concerning Title IV, HEA Programs, within the 45 days requirement of 20 U.S.C. § 1094(b) and 34 C.F.R. § 668.113(b)?

C. Does the OALJ have jurisdiction under GEPA to conduct a proceeding relating to a Title III, HEA program?

On June 29, 1990, a final program determination was jointly issued by the OSFA and OM (Grants and Contracts Service) and sent to Oglala. Amongst other things it demanded that Oglala refund \$11,564 of Title III, HEA funds and \$18,987 of Title IV, HEA fund funds. On July 6, 1990, the program determination was received by Oglala and it concedes this receipt date as accurate. Oglala then faxed a copy of its request for review on August 22, 1990, to the Office of General Counsel at the U.S. Department of Education. While the transmittal sheet carried a listing of the OALJ as recipient, it was the OGC fax number which was used and the OGC office was the only recipient of that material on that date. The attorney to which it was assigned believed it to be a courtesy copy and did not forward it to the OALJ until September 10, 1990. Thus, September 10, 1990, is the actual filing date with the OALJ.

On September 14, 1990, this tribunal issued an order acknowledging receipt of Oglala's request for review. On October 3, 1990, counsel for OSFA, who had not yet filed an appearance in this proceeding, filed a letter stating objections why Oglala's application should not be accepted by the OALJ. The undersigned acknowledged receipt of that letter and instructed the sender to copy Oglala with that correspondence. Following that exchange of letters, on October 23, 1990, counsel for OSFA and OM filed a Motion for Denial of Request for Hearing Due to Lack of Jurisdiction.

Oglala filed a reply on November 19, 1990, entitled Response to Government's Motion to Dismiss. Oglala argued in its Response that an exchange of correspondence between the Department and itself, identified as Oglala's Exhibits "A" and "B," should be treated as a preliminary departmental decision pursuant to 20 U.S.C. § 1234a(a) and its Exhibit "C" should be treated as a timely request for review.

OGC filed a Reply on November 30, 1990, and argued the inapplicability of the GEPA provisions and implementing regulations thereunder to appeals of HEA program determinations, the OALJ's lack of jurisdiction to hear audit or program findings under Title III of the HEA, and the untimely filing by Oglala under either HEA or GEPA established time frames.

V. Opinion

Section 487(b) of the Higher Education Act of 1965 (HEA), as amended, Pub. L. 99-498, 100 Stat. 1489 (20 U.S.C. § 1094(b)(1)), provides the period required to appeal a final program review determination as--

not later than 45 days after receipt of notification of the final audit or program review determination.

Alternatively, Section 452(b)(1) of the General Education Provisions Act, as amended by Section 3501 of the Hawkins-Stafford Elementary and Secondary School Improvements Amendments of 1988, Pub. L. 100-297, 102 Stat. 351 (20 U.S.C. § 1234a (b) (1)), provides the period required to contest a preliminary departmental decision as--

not later than 30 days after receipt of notice of the preliminary departmental decision. The application shall be in the form and contain the information specified by the Office (of Administrative Law Judges).

Absent ambiguous language, jurisdictional statutes are strictly construed. Danko v. Director, O.W.C.P., U.S. Department of Labor, 846 F. 2d 366, 369 (6th Cir. 1988); King v. Dole, 782 F.2d 274 (D.C. Cir. 1986), cert. denied, 479 U.S. 856 (1986). Prior decisions of the OALJ have established that the plain language of the statute here is clear regarding the period within which to file an application for review and that the failure to comply with the time limits results in a lack of jurisdiction in the OALJ to conduct a proceeding. Application of the Puerto Rico Department of Education, Docket No. 89-2-R, U.S. Department of Education (Sept. 1, 1989), Application of Maine Department of Education, Docket No. 90-74-R, U.S. Department of Education (Nov. 27, 1990), and In re Oglala Lakota College, Docket No. 90- 58-R, U.S. Department of Education (Dec. 14, 1990).

According to the facts presented by the parties, the program determination was received by Oglala on July 6, 1990. As a result, the 45-day period for calculating the appeal time under HEA provisions ended on August 20, 1990, and the appeal period for GEPA-type proceedings ended on August 6, 1990. In either case, the September 10, 1990, filing date exceeded those deadlines and by the time Oglala's request for review was actually filed with the OALJ, 66 days had elapsed from the receipt date. Even the August 22, 1990, date that a fax copy was received by OGC exceeded the deadlines.

Under either the HEA or GEPA appeal provisions, the time for filing a request for review is strictly construed. However, only the HEA provision on filing is applicable to this proceeding since the definition of "applicable program" under the GEPA provisions excludes programs authorized by the Higher Education Act of 1965 (HEA). 20 U.S.C. § 1234i(2) and 34 C.F.R. § 81.2(a). Moreover, neither the GEPA Part E section nor the HEA Section 487(b) review procedures apply to audits arising under HEA Title III programs [Enclosure I]. Under the circumstances, Oglala's reliance on the GEPA provisions to bring its request for review is misplaced. Thus, Oglala's assertions that its Exhibits "A" and "B" should be construed as final payment demands by the Department, although clearly marked Draft and clearly lacking an Appeal Rights section, or to treat its Exhibit "C" as a request for review, filed within the prescribed GEPA time period, are not well founded.

Since the GEPA provisions have been shown to be inapplicable to this proceeding, oglala has no basis upon which to invoke the GEPA statute of limitations and mitigating circumstances defenses herein.

Finally, there is not one, but two bases for finding oglala's request for review of the Title IV, HEA final program determination defective for jurisdictional purposes. Not only was the request for review untimely under the HEA provision at 34 C.F.R. § 668.113(b), which deprives the OALJ of jurisdiction, but it also was not filed with the proper designated ED official and, therefore, did not meet the requirements of § 668.113(a) as well. However, no further consideration of multiple jurisdictional defects is necessary here because the defect is not a matter of severity or degree. The case law above shows jurisdictional filing requirements to be absolute and that the OALJ therefore has no jurisdiction to conduct this proceeding. [3](#)

VI. Conclusions of Law

As relates to the final program determination concerning Title IV, HEA Programs, compliance with the statutory filing time limit set forth under Section 487(b), 20 U.S.C. § 1094(b), and the applicable regulations at 34 C.F.R. § 668.113(b), is an absolute requirement which Oglala failed to meet. Oglala's untimely filing of its request for review has deprived the OALJ of jurisdiction to hear the proceeding.

The statutory time limit set forth in the GEPA provisions and implementing regulations are inapplicable to this proceeding since the definition of "applicable program" excludes programs authorized by the Higher Education Act of 1965 (HEA). In any event, neither the GEPA Part E nor the HEA § 487(b) appeal procedures apply to audits arising under HEA Title III programs, therefore, the OALJ has no subject matter jurisdiction over Finding #5 [Enclosure 1 to the final program determination].

Oglala's failure to satisfy the absolute requirement of a timely filing, not only deprives the OALJ of any authority to hear the proceeding but also precludes it from reaching any of the meritorious defenses which Oglala might otherwise raise.

VII. Order

Based on the foregoing findings and conclusions of law, it is ORDERED that:

Oglala's request for review is hereby DISMISSED due to the lack of jurisdiction.

John F. Cook
Administrative Law Judge

Dated: January 25, 1991
Washington, D.C.

NOTICE

20 U.S.C. § 1234a(e) provides that:

(e) Parties to the proceeding shall have 30 days to file a petition for review of a decision of the administrative law judges with the Office of the Secretary . 34 C.F.R. § 81.32 provides that:

§ 81.32 Petition for review of an initial decision.

- (a) If a party wishes to obtain the Secretary's review of the initial decision of an ALJ [Administrative Law Judge], the party files a petition for review with the OALJ [Office of Administrative Law Judges], which sends the petition to the Secretary.
- (b) A party shall file a petition for review not later than 30 days after the date it receives the initial decision. The party shall file its petition by hand delivery or by overnight or express mail.
- (c) If a party files a petition for review, the party shall serve a copy of the petition on the other party on the filing date by hand-delivery or by overnight or express mail.
- (d) A petition for review must contain
 - (1) The identity of the initial decision of which review is sought; and
 - (2) A statement of the reasons asserted by the party for affirming the initial decision, modifying it, or setting it side in whole or in part.
- (e) (1) A party may respond to a petition for review by filing a statement of its views on the issues raised in the petition with the OALJ not later than 15 days after the date it receives the petition. The OALJ sends the statement to the Secretary.
- (2) A party shall serve a copy of its statement of views on the other party on the filing date by hand- delivery or by overnight or express mail.

34 C.F.R. § 81.34 provides that:

§ 81.34 Final decision of the Department

- (a) The ALJ's initial decision becomes the final decision of the Department 60 days after the recipient receives the ALJ's decision unless the Secretary modifies, sets aside, or remands the decision during the 60-day period.
- (b) If the Secretary modifies or sets aside the ALJ's initial decision, the Secretary's decision becomes the final decision of the Department on the date the recipient receives the secretary's decision.

SERVICE LIST

A copy of the attached document was sent to the following:

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1 Reference to the request for review throughout this opinion adopts the statutory language under 20 U.S.C. § 1094(b), yet Oglala in its pleadings uses other terms such as "request for hearing" and "appeal" to characterize the same thing. The terms are being used interchangeably

2 The first portion contained in Enclosure 1 of the final program determination relates to a Title III, HEA Strengthening Program Grant, [Grants and Contracts Service]; the second portion contained in Enclosure 2 of the determination relates to a Title IV, HEA Program Grant [OSFA].

3 Actually that part of this proceeding relating to the Title IV, HEA Programs, (Enclosure 2 - \$18,987) has now become moot since OSFA's Division of Audit and Program Review has notified Applicant that it is reducing Its claim for \$18 ,987 to zero, due to information and documentation submitted to OSFA by the Applicant, subject to future audit verification of the Applicant's compliance with the program requirements at issue. As relates to the other portion of this proceeding, whether Oglala can pursue some other avenue for review of the determination as to the Title III, HEA Strengthening Program Grant [Enclosure 1] is not and cannot be considered in this proceeding .