

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

In Re: Oglala Lakota College

Docket No. 90-58-R

Recovery of Funds Proceeding

ACN:08-01051

DECISION ON JURISDICTION

This matter comes before the tribunal for consideration on the sole issue of the tribunal's authority to exercise jurisdiction over the school's application for review. Oglala Lakota College (**Oglala**) filed an appeal of the June 29, 1990, preliminary departmental decision issued jointly by the United States Department of Education (**Education**), Chief of the Grants and Contracts Service and the Chief of the Audit Review Branch, Office of Student Financial Assistance, Office of Post-secondary Education. 1 Education's decision disallowed \$11,593 of Oglala's expenditures.

On October 30, 1990, an Order was issued staying the briefing schedule; Oglala was given until November 15, 1990, to respond to the Motion to Dismiss filed by Education. The substance of the Motion is that Oglala's petition for review was not timely filed, therefore, no jurisdiction exists for the case to be heard. Education enumerates additional reasons for finding that no jurisdiction vests in the Office of Administrative Law Judges (OALJ). For the reasons stated below, it is found that the application for review was not filed within the period prescribed by law; therefore, this tribunal must dismiss the matter as it has no jurisdiction.

Findings of Fact

On June 29, 1990, Education issued by certified mail a preliminary departmental decision. Due to unexplained expenditure variances from ledger reports, it demanded that Oglala refund \$4,330.99 of Indian Education funds and \$7,262.22 of Minority Institutions Science Program funds.

The preliminary departmental decision was received by Oglala on July 6, 1990. 2 Oglala concedes this date, as well as the date upon which it filed its request for review -- August 22, 1990. Oglala faxed its request for review, not to the OALJ as required, but to the Office of the General Counsel (OGC). When OGC received the faxed document, he believed it to be a courtesy copy and he did not forward it to the OALJ until September 10, 1990.

On September 27, 1990, this tribunal issued an order setting forth a schedule of dates for the parties' submissions. Education filed a Motion to Dismiss Oglala's application for review based upon the school's untimely filing of their appeal. Oglala responded by stating that their appeal had been perfected by prior correspondence between Education and Oglala

Oglala argues that the exchange of correspondence between Education and its Attachments, identified as Oglala Exhibits "A", "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.

Statement Of The Law

Section 452(b)(1) of the General Education Provisions Act, as amended by Section 3501 of the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvements Amendments of 1988, Pub. L. 100-297, 102 Stat. 130 [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. United States Dep't of Labor, 846 F.2d 366, 369 (6th Cir. 1986); 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 in which to file an application for review. In re Puerto Rico Dep't of Education, Docket No. 89-2-R, U.S. Dept. of Education (Sep. 1, 1989) and In re Maine Dept. of Education, Docket No. 90-74-R, U.S. Dept of Education (Nov. 27, 1990).

Discussion

A review of Exhibits "A" and "B" shows that they are not final letters demanding payment by oglala or delineating the appeal rights which oglala could pursue if it disagrees with any alleged liabilities. The Exhibits "A" and "B" are really Draft Enclosures attached to a telefax transmittal sheet. The transmittal sheet for "A" carries the notation:

Attached is our Draft on our determinations regarding Findings 1-6 under ACN: 08-01050. Please review & send us your letter affirming your intent to refund \$11,664. This letter must be signed by the authorized official of Oglala Lakota College.

The transmittal sheet for "B" only reflects the ACN number in its notation section. Each document is clearly labeled Draft in bold letters in the upper right hand corner of the first page.

Other indications that documents "A" and "B" were mere drafts is evidenced by the fact -- they were not signed, they were not dated, they were not addressed to a particular addressee, and they contained blanks in the narrative under the liability paragraphs. Moreover, these Versions do not contain a section on formal Appeal Rights which is found in all final determinations. The typical formalities of a final determination as represented in the Department's letter of June 29, 1990 are clearly missing from the draft versions.

Next, Oglala argues that document "C" should be treated as its appeal filed within the prescribed 30-day time period (20 U.S.C. § 1234a). Its argument must fail. There cannot be a timely appeal without first having an appealable demand letter which I find here to be clearly absent. Furthermore, a review of "C" shows that it is only a request for additional time (until July 31, 1990) for Oglala to review and respond to the draft findings.

Oglala received the notice of the preliminary departmental decision on July 6, 1990. As a result, the 30-day period ended on August 5, 1990. Since this day was a Sunday, the last date for filing an application for review was the next business day or August 6, 1990. 34 C.F.R. 81.12(d)(2). Even accepting the misdirected filing in the Office of the General Counsel on the 22nd of August, 1990, as the earliest date of receipt by the Office of Administrative Judges, Oglala's application for review was not filed within the period prescribed by law. In fact, by the time Oglala's application was actually filed with the OALJ, 66 days had elapsed from the receipt date.

Finally, Education raises other reasons to support its motion to dismiss. Education contends that an application for review was never filed with the OALJ since Oglala never mailed or hand delivered one directly to the OALJ as required under the filing requirements of 34 C.F.R. 61.12. Also, Education claims that the OALJ has no subject matter jurisdiction over Finding No. 4 because it involves a program under the Higher Education Act of 1965 (HEA). Since the OALJ has no jurisdiction in this matter due to Oglala's untimely filing, there is no need to further consider the issue of lack of jurisdiction on any other basis.

CONCLUSION AND ORDER

For the foregoing reasons, it is concluded that Oglala's application for review was not filed within the period prescribed by law. Accordingly, it is HEREBY ORDERED that the application for review is dismissed for Oglala's failure to establish jurisdiction by the timely filing of its application for review.

Daniel R. Shell
Administrative Law Judge

Issued: December 14, 1990
Washington, D.C.

SERVICE LIST

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

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1 Reference to the preliminary departmental decision throughout this opinion adopts the statutory language under 20 U.S.C. 1234a, yet the parties in their motions use other terms such as final program determination letter and the disallowance decision to characterize the same thing. The terms are being used interchangeably.

2 Education received a return receipt of that date: