

APPLICATION OF MAINE DEPARTMENT OF EDUCATION  
Applicant.

Docket No. 90-74-R  
Recovery of Funds Proceeding

ACN: 01-83140

DECISION

Appearances: Jeffrey Frankel, Esq. for the Maine Department of Education

Jeffrey B. Rosen, Esq. for the Office of the General Counsel, United States Department of Education

Before: Judge Allan C. Lewis

This is an appeal by the Maine Department of Education (Maine) regarding a preliminary departmental decision issued on August 30, 1990, jointly by the Offices of the Assistant Secretary for Special Education and Rehabilitation (OSER), the Assistant Secretary for Vocational and Adult Education, and the Assistant Secretary for Elementary and Secondary Education. In the preliminary departmental decision, OSER requested reimbursement of \$40,438 for the fiscal year ending June 30, 1986. On October 12, 1990, the tribunal issued a show cause order to Maine requiring a response as to why its application for review should not be dismissed for its failure to file the application within the period prescribed by law and for its failure to attach a copy of the preliminary departmental decision to its application as required by 34 C.F.R. § 81.27(c) (1989). For the reasons stated below, the tribunal concludes that the application for review was not filed within the period prescribed by law and, therefore, the application for review is dismissed.

I. FINDINGS OF FACT

On August 30, 1990, OSER issued by certified mail, return receipt requested, a preliminary departmental decision in which it demanded Maine to reimburse the U.S. Department of Education the amount of \$40,438 for the fiscal year ending June 30, 1986, on the alleged ground that these funds were unaccounted for by the Maine Department of Education and Cultural Services. [See footnote 1 1/](#)

The preliminary departmental decision was received by Maine in its mail room on September 7, 1990. The secretary responsible for routing the mail within the department did not enter the item on the computerized correspondence logging system until September 13, 1990, and, at that time, forwarded the letter within the department.

The record is unclear as to what happened to the original of the preliminary departmental decision, but in any event, the Director of Finance received a photocopy copy of the preliminary

departmental decision on August 30, 1990. His photocopy did not reveal the August 30, 1990, issue date on the original preliminary departmental decision. The document used to produce his photocopy had the issue date covered by the certified mail tag which had been originally attached to the outside of the envelope in which the preliminary departmental decision was mailed to Maine.

In calculating the due date to file the application for review, the Director of Finance relied upon the earlier of the two visible date stamps on his photocopy, namely the September 14, 1990 date stamp. He assumed that the September 14, 1990 date was the date of the issuance of the preliminary departmental decision and that the later date, September 17, 1990, was the date that Maine received the determination. Accordingly, the Director of Finance determined the last day to file an application for review was October 12, 1990. Therefore, on October 11, 1990, he sent the application for review to the Office of the Administrative Law Judges by first class mail and also faxed a copy of the application for review to that office on the same day.

## II. OPINION

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 (to be codified at 20 U.S.C. § 1234a(b)(1)) provides the period prescribed by law within which an application for review shall be filed 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]. [See footnote 2 2/](#)

Absent ambiguous language, jurisdictional statutes are strictly construed. *Danko v. United States Dep't 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). Here, the plain language of the statute is clear regarding the period in which to file an application for review. *In re Puerto Rico Dep't of Education*, Dkt. No. 89-2-R, U.S. Dep't of Education (Sep. 1, 1989).

In the instant case, Maine received the notice of the preliminary departmental decision on September 7, 1990. As a result, the 30 day period ended October 8, 1990. Since this day was a Federal holiday, the last date for filing an application for review was the next business day or October 9, 1990. 34 C.F.R. § 81.12(d)(2). Inasmuch as Maine filed its application for review two days later on October 11, 1990, its application for review was not filed within the period prescribed by law.

Maine argues that the 30 day appeal period should be relaxed in light of the extenuating circumstances in this case, i.e. its Director of Finance purportedly acted reasonably and responsibly in filing the application for review in light of the earlier of two visible date stamps on his photocopy which, if it was the applicable date stamp, would have resulted in a timely filing of the application for review. Excusable neglect, such as a good faith error by counsel for the litigant in calculating the due date for filing an appeal, does not validate an otherwise

untimely petition for review. *Midway Industrial Contractors v. OSHRC*, 616 F.2d 346 (7th Cir. 1980). Accordingly, this argument must be rejected.

Lastly, Maine seeks to return the preliminary departmental decision to OSER under 34 C.F.R. § 81.28(b)(1), or in the alternative, to amend its application for review. In essence, it requests permission to raise a statute of limitation's defense that OSER is barred from recovering a portion of the amount in issue. It also seeks to add a defense that the recovery of the amount sought is out of proportion to the Federal interest impinged. Since the tribunal has no jurisdiction in this matter, it is powerless to consider Maine's requests. *Accord King v. Commissioner*, 88 T.C. 1042, 1050 (1987). [See footnote 3 3/](#) Accordingly, its requests are denied.

#### CONCLUSION AND ORDER

For the foregoing reasons, it is concluded that Maine's application for review was not filed within the period prescribed by law and, accordingly, it is **HEREBY ORDERED** that the application for review is dismissed.

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Allan C. Lewis  
Administrative Law Judge

Issued: November 27, 1990  
Washington, D.C.

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*[Footnote: 1](#) 1/ The facts in this case which are necessary to the resolution of the issue herein are not in dispute.*

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*[Footnote: 2](#) 2/ 34 C.F.R. § 81.27(b) provides, in a like manner, that "[a] recipient shall file an application for review not later than 30 days after the date it receives the notice of a disallowance decision."*

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*[Footnote: 3](#) 3/ OSER also argues that Maine's failure to include a copy of OSER's preliminary departmental determination with its application for review constitutes a jurisdictional deficiency. In light of the above decision, the tribunal leaves the resolution of this issue for another case.*