Application of State of South Dakota,
Applicant.

Docket No. 91-24-R
Recovery of Funds Proceeding

ACN: 08-92255

DECISION

Appearances: Yolanda Gallegos, Esq., with Michael Brustein, Esq. on brief, of Washington, D.C. for the Respondent

Patricia L. Boochever, Esq. of Washington, D.C., Office of the General Counsel, United States Department of Education for the Office of the Assistant Secretary for Vocational and Adult Education

Before: Judge Allan C. Lewis

This case involves an appeal by the South Dakota Department of Education (S.D.) pursuant to Sections 451 and 452 of the General Education Provisions Act, as amended by Section 3501(a) of the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. 100-297, 102 Stat. 130 (20 U.S.C. §§ 1234 and 1234a) (hereinafter Section 1234 and 1234a). S.D. appeals a preliminary departmental decision issued by the Assistant Secretary of Vocational and Adult Education (ED) in which ED seeks repayment of $150,000 in Federal funds expended by S.D. for the fiscal year 1988 under the Carl Perkins Vocational Educational Act. On May 6, 1991, the tribunal issued an order notifying the parties that it had reviewed the preliminary departmental decision and found that it complied with 34 C.F.R. § 81.24 (1990) (hereinafter Reg. § 81.24) in that it stated a prima facie case, that is, it contained a statement of the law and the facts sufficient to sustain the conclusion drawn in the notice. Thereafter, S.D. filed a motion to strike on May 21, 1991, which in substance, was a request for the tribunal to reconsider its prior order regarding the sufficiency of the preliminary departmental decision and to return the preliminary departmental decision to ED for appropriate action.

The thrust of S.D.'s motion to strike is that the preliminary departmental decision fails to prove a prima facie case regarding one of the three asserted grounds for the recovery of the $150,000, namely that this amount was, in fact, used to pay interest on the State's construction bond. ED filed an opposition asserting that the preliminary departmental decision need only state, in effect, a cause of action rather than prove a prima facie case. Since the preliminary departmental decision adequately asserted facts sufficient to provide S.D. with notice of the ground for disallowance, S.D.'s motion to strike, according to ED, should be denied. For the reasons stated below, S.D.'s motion is granted in part, the Order of May 6, 1991 is vacated, and the preliminary departmental decision is hereby returned to ED.

OPINION

Sections 1234 and 1234a provide the statutory authority governing the recovery of funds from a recipient of a grant or cooperative agreement. Whenever the Secretary determines that a recipient of a grant must return funds because the recipient has made an expenditure that is not allowable or has failed to properly account for the funds, the Secretary shall give the recipient written notice in the form of a preliminary departmental decision and must notify the recipient of its right to have that decision reviewed by the Office of Administrative Law Judges. Section 1234a(a)(1).

Where the recipient desires to have the preliminary departmental decision reviewed, the recipient shall file an application for review with the Office of Administrative Law Judges. Section 1234a(b)(1). As expeditiously as possible thereafter, the Office of Administrative Law Judges--

shall return to the Secretary for such action as the Secretary considers appropriate any preliminary departmental decision which the Office determines does not meet the requirements of . . . [Section 1234a(a)(2)].

Where a preliminary departmental decision meets the requirements of Section 1234a(a)(2), the Administrative Law Judge initiates further proceedings and, ultimately, renders an initial decision.

The present controversy concerns the interpretation accorded Section 1234a(a)(2) which sets forth the nature of the burden borne by the Secretary in the preliminary departmental decision. It provides that--

(2) In a preliminary departmental decision, the Secretary shall have the burden of stating a prima facie case for the recovery of funds. The facts to serve as the basis of the preliminary departmental decision may come from an audit report, an investigative report, a monitoring report, or other evidence.

In addition, Reg. § 81.24(b) provides that--

(1) The notice [preliminary departmental decision] must state a prima facie case for the recovery of funds.
(2) For the purposes of this section, a prima facie case is a statement of the law and the facts that, unless rebutted, is sufficient to sustain the conclusion drawn in the notice. The facts may be set out in the notice or in a document that is identified in the notice and available to the recipient.

S.D. focuses on the phrase "burden of stating a prima facie case" and maintains that Section 1234a(a)(2) and the regulations thereunder establish an evidentiary hurdle which ED must satisfy in the preliminary departmental decision and, where ED fails to surmount this hurdle, the preliminary departmental decision must be returned to the Secretary by the Office of Administrative Law Judges. ED, on the other hand, emphasizes that the statute and regulation contain the words "state" and "statement" as opposed to "prove" or "establish" a prima facie case.

Therefore, according to ED, these provisions require only that ED give in its preliminary departmental decision notice of the facts and law upon which the decision is based.

The terms burden and prima facie are expressions associated with the weighing of evidence. State of Me. v. United States Dept. of Labor, 669 F.2d 827, 829 (1st Cir. 1982); White v. Abrams, 495 F.2d 724, 729 (9th Cir. 1974); E. Cleary, McCormick on Evidence at § 336 (3rd Ed. 1984). At the same time, the terms state or statement may be associated with the concept of notice. However, the latter terms may also be used in an evidentiary context, as for example, one may prove or state a prima facie case. This is especially true where, as here, the regulations contemplate a proceeding in which undisputed and, occasionally, disputed matters may be resolved in a paper-type statement presentation. It is evident that the statute in issue is ambiguous and, accordingly, it is appropriate to examine the legislative history for guidance in its interpretation. Alacare Home Health Services, Inc. v. Sullivan, 891 F.2d 850, 856 (11th Cir. 1990).

In this case, both parties focus on the same legislative history of Sections 1234 and 1234a. In 1988, Congress amended the General Education Provisions Act with the intent of--

> reforming the Department of Education's audit and appeal process. . . . The Committee intends to create an effective, economical, and equitable process for the review of audit findings by the Department and for appeals of those findings by auditees. It is the Committee's view that the amendments strike the necessary balance between giving auditees the means to defend themselves against adverse audit findings and retaining the Department's ability to recover misspent funds and ensure overall program accountability.
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> The significant difference between these amendments and current law are as follows:
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> . . . .
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> Prima Facie Case.--The Secretary is required to establish a prima facie case for the recovery of funds in the preliminary departmental determination (PDD). This provision is intended to ensure that the Department provide the auditee with fair notice of both the facts and the law upon which the decision to recover funds is based. This requirement imposes a clearer standard on the Department for the notice to the recipient in the preliminary departmental determination than currently exists. Once the Department establishes a prima facie case the burden of proof shifts from the Department to the recipient. (emphasis added)

H.R. Rep. No. 95, 100th Cong., 1st Sess. 92-93 (1987). See also H.R. Conf. Rep. No. 567, 100th Cong., 2d Sess. 390, reprinted in 1988 U.S. Code Cong. & Admin. News 259, 330.

Since Congress indicated that the establishment of a prima facie case will shift the burden of going forward,See footnote 1 1/ it is clear that Congress envisioned that the preliminary departmental decision must satisfy an evidentiary burden and failing that, that it must be returned to the Secretary by the Office of Administrative Law Judges.See footnote 2 2/ In adopting such a standard, Congress imposed a standard greater than whether the preliminary departmental decision states a cause of action or gives notice. It established an evidentiary standard. Thus, the interpretation urged by ED, i.e. to provide notice only, is specifically rejected by the above legislative history.

In addition, the construction advocated by S.D. is consistent with the scheme adopted by the regulations. Once a prima facie case is established, as determined by the Administrative Law Judge, the burden of going forward shifts from ED to the recipient and therefore it is appropriate at this stage that, as provided in Reg. § 81.30, "the recipient shall present its case first."

While the recipient goes first regulation is consistent with the evidentiary interpretation urged by S.D., it also presents ED with an insurmountable obstacle to its notice argument. In its brief, ED recognizes, pursuant to 5 U.S.C. § 556(d), that it, as the proponent of the order, has the burden of going forward unless it is "otherwise provided by statute."See footnote 3 3/ Bosma v. United States, 754 F.2d 804, 810 (9th Cir. 1984); NLRB v. Transportation Management Corp., 462 U.S. 393, 403 n.7 (1983). In order for ED's notice interpretation to be consistent with the recipient goes first requirement in Reg. § 81.30, there must be statutory authority which requires the recipient to go first (and therefore ED falls within the exception to the general rule in 5 U.S.C. § 556(d)) or ED must admit that the recipient goes first regulation is invalid (because it requires, contrary to the general rule of 5 U.S.C. § 556(d), the wrong party (S.D.) to present its case first).

ED argues that Congress shifted the burden of going forward by virtue of Section 1234a(b)(3) which provides that--

(3) In any proceeding before the Office under this section, the burden shall be upon the recipient to demonstrate that it should not be required to return the amount of funds for which recovery is sought in the preliminary departmental decision under subsection (a).

This section addresses, however, which party bears the ultimate burden of establishing the facts. Thus, it assigns to the recipient the burden of persuasion which is the other component of the burden of proof. Hence, this section has not altered the fact that ED has the burden of going forward. Such a conclusion is also supported by the legislative history which, as noted above, explicitly reflects that the burden of going forward resides with ED initially and, therefore, Section 1234a(b)(3) addresses, obviously, only the burden of persuasion. It is also consistent with the interpretation accorded similar provisions in other statutes or regulations. E.g. State of Me., 669 F.2d at 829; Old Ben Coal Corp. v. Interior Bd. of Mine Operations Appeals, 523 F.2d 25, 39-40 (7th Cir. 1975). Accordingly, ED's position lacks merit.

The remaining matter for resolution is whether the preliminary departmental decision establishes a prima facie case for disallowance of the $150,000 on the ground that it was used to pay interest on the State's construction bond. Initially, the enclosure accompanying the preliminary departmental decision and signed by Ms. Betsy Brand, the Assistant Secretary for the Office of Vocational and Adult Education, sets forth in detail and by citation that, as a matter of law, interest payments are not an allowable expenditure. The crux of the present controversy is whether the $150,000 was paid as interest or as principal on the bond which is a mixed question of law and fact and whether it was paid with Federal funds which is a question of fact.

Under Reg. § 81.24(b)(2), a prima facie case requires the establishment "of the law and the facts that, unless rebutted, is sufficient to sustain the conclusion drawn in the notice." In this regard, the applicable standard requires that the evidence be "sufficient to establish to a reasonable

person" the matter in controversy. In re Stautzenberger College, Dkt. No. 90-102-SA, U.S. Dep't of Education (Final Dec. 1991), at 4; State of Me., 669 F.2d at 830.

ED's evidence is limited to an enclosure with the preliminary departmental decision signed by the Assistant Secretary for the Office of Vocational and Adult Education which states--

> [i]n further discussions with the auditors, they stated that the $150,000 of FY 1988 Perkins Act funds was used to pay interest on the State's construction bond.

In order to ascertain whether the payment constitutes a payment of interest or principal, it is essential that the circumstances surrounding the payment be disclosed such as the terms of the underlying agreement, the treatment accorded the payment by the payor in its books and records, the treatment accorded the payment by the payee, or other facts which might bear on the resolution of this matter. Here, ED's evidence represents a conclusion without any underlying factual support. Moreover, this evidence is in the form of a hearsay statement at least once and most likely twice removed from the source which lessens, in this instance, whatever probative value it might have. Under these circumstances, ED has failed to establish a prima facie case.See footnote 4 4/

Accordingly, it is HEREBY ORDERED that the Order of May 6, 1991, is vacated, that the preliminary departmental decision is returned to the Assistant Secretary of Vocational and Adult Education for such action as the Assistant Secretary considers appropriate, and that this matter is dismissed without prejudice.See footnote 5 5/

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Allan C. Lewis
Administrative Law Judge

Issued: August 16, 1991
Washington, D.C.

SERVICE

On August 16, 1991, a copy of the attached decision was sent to the following:

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Footnote: 1 *1/ The burden of proof is composed of two components--the burden of going forward or production and the burden of persuasion. The former may shift between the parties depending upon the weight and timing of the evidence presented and the latter resolves the nature of the dispute where the evidence is in equipoise. Abilene Sheet Metal, Inc. v. NLRB, 619 F.2d 332, 339 (5th Cir. 1980).*

Footnote: 2 *2/ At oral argument, ED asserted that Congress altered the proposed language in the bill from "to establish a prima facie case" to "to state a prima facie case" and therefore, the last sentence quoted above in H.R. Rep. No. 95, which articulated an evidentiary standard under which the preliminary departmental decision is measured, must be disregarded. ED proffered, however, no citations or copies of the bills to support its contention. The provisions creating the Office of Administrative Law Judges and pertinent herein were added to H.R. 5 while the bill was under consideration by the House Committee on Education and Labor. The bill as reported out of this committee had the identical language concerning the prima facie requirement as that which was ultimately enacted into law. H.R. 5, 100th Cong., 1st Sess., at 451. Thus, there were no changes in the pertinent language as suggested by ED in the bill as introduced in the House of Representatives, as reported out of the House Committee, or as passed by the House. Hence, this argument lacks merit.*

Footnote: 3 *3/ At oral argument, ED raised for the first time an assertion that this proceeding is not a proceeding under the Administrative Procedure Act, 5 U.S.C. §§ 554, 556, and 557 and therefore Section 556(d) is not applicable. This view is contrary to Section 451(f)(1) of the General Education Provisions Act as amended by the Hawkins-Stafford Amendments of 1988 (20*

U.S.C. § 1234(f)(1)) and its legislative history which provide explicitly that this is an APA proceeding--

1. Section 451--Office of Administrative Law Judges

Administrative Law Judges.--The amendments replace the Education Appeals Board with administrative law judges (ALJs) and provide for proceeding in accordance with the Administrative Procedure Act (APA). The amendments require that regulations promulgated by the Secretary afford the parties the hearing rights established in the APA.

H.R. Rep. No. 95, 100th Cong., 1st Sess. 92 (1987).

Footnote: 4 *4/ In view of this determination, it is not necessary to address the dispute between the parties as to whether Section 1234(e) allows the Administrative Law Judge to consider the affidavit of the auditor in charge which was submitted by S.D. in resolving whether the preliminary departmental decision establishes a prima facie case.*

Footnote: 5 *5/ Regarding cases in the future, the Office of the General Counsel is requested to have its clients, the various Assistant Secretaries who function as the authorized Departmental officials for purposes of Reg. § 81.27(b), forward a copy of any document identified in the notice of disallowance decision as required by Reg. § 81.27(b). In order for these documents to be considered in determining whether a prima facie case exists, these documents shall be forwarded to the Office of the Administrative Law Judges within 10 days following the earlier of--the receipt of a copy of the application for review sent by the recipient or the receipt of a notice or letter from the Office of Administrative Law Judges indicating that an application for review has been received by that office.*