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

APPLICATION OF THE

COMMONWEALTH OF VIRGINIA,

Applicant.

Docket No. 91-26-R

Recovery of Funds
Proceeding

ACN: 03-03109

DECISION

Appearances:
Susan T. Ferguson, Esq., Assistant Attorney General, Office of the Attorney General of the Common Wealth of Virginia for the Department for Rights of Virginians with Disabilities.

Sergio Kapfer, Esq., Office of the General Counsel, United States Department of Education for the Regional Commissioner, Region III, of the Rehabilitation Services Administration.

Before:
Judge John F. Cook

I. Procedural Background.

This proceeding involves an Application for Review of a Preliminary Departmental Decision (PDD) issued pursuant to Section 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 Sections 1234 and 1234a).

On March 28, 1991, the Regional Commissioner of the Rehabilitation Services Administration, Region III (Commissioner) issued a PDD in which the Commissioner disallowed $129,590 of personal service costs charged to Federal programs by the Department for Rights of Virginians with Disabilities (VDRVD). These costs related to a Client Assistance for Handicapped Individuals Program [referred to as a Client Assistance Program (CAP) by the VDRVD]. The Director of VDRVD certified that the PDD was received on April 1, 1991. It appears from the record that on April 30, 1991, the Director of VDRVD mailed an Application for Review of the PDD to the Office of Administrative Law Judges (OALJ). The Director also certified that on April 30, 1991 he mailed a copy of the Application for Review to the Commissioner.

On May 10, 1991, a Notice of Receipt of Application for Review was issued. This was followed by a Notice of Acceptance of Jurisdiction of Case and Notice of Hearing issued on May 22, 1991. This order provided for the simultaneous filing of initial briefs and exhibits and simultaneous filing of reply briefs by the parties in order to conserve the time needed to complete these steps prior to a hearing.

However the Commissioner did not wish to file his brief and exhibits simultaneously with VDRVD and, therefore on June 5, 1991, counsel for the Commissioner filed a Motion for Reconsideration of Briefing Schedule, For Order Requiring Applicant to Present Case First, and for Stay of Proceedings. In that motion counsel for the Commissioner requested that the judge. issue an order staying these proceedings until a ruling is issued on the motion.

On June 14, 1991, a telephone conference was held with counsel for the parties. As of the time of the conference a response to the motion had not yet been received from the VDRVD. Counsel for the VDRVD stated that a written response had been mailed earlier in the week, and took the position that the briefing schedule should remain as set forth in the Notice of May 22, 1991. However, in view of the need for a determination by the judge as to a matter about which both parties could not reach agreement, counsel for the VDRVD realized that a stay might be needed.

In view of the fact that the briefing schedule time limits were imminent and in view of the fact that the parties could not agree to a briefing schedule it appeared that a stay was in order The proceedings were then stayed pending a ruling on the above mentioned motions. This constituted a waiver of the requirements of section 1234a and 34 C.F.R. § 81.29(a) as to the scheduling of the submission of evidence to occur within 90 days of the receipt of the Application for Review.

VDRVD's Memorandum in Response to Department's Motion to Modify the Briefing Schedule was received on June 14, 1991, the same day that the telephone conference was held and the stay order was issued. Essentially VDRVD opposed the Commissioner's motions.

II. Opinion.

The Commissioner argues that to require simultaneous filing of briefs would not comply with 34 C.F.R. § 81.30 which states, in part, that: "[i]f the OALJ accepts jurisdiction of a case under § 81.28, the recipient shall present its case first . . . "

The Commissioner, in making his argument, also refers to 34 C.F.R. § 81.6 which defines a hearing on the record, in part, as follows:

§ 81.6 Hearing on the record.

(a) A hearing on the record is a process for the orderly presentation of evidence and arguments by the parties.
(b) Except as otherwise provided in this part or in a notice of designation under § 81.3(b), an ALJ conducts the hearing entirely on the basis of briefs and other written submissions unless-
(1) The ALJ determines, after reviewing all appropriate submissions, that an evidentiary hearing is needed to resolve a material factual issue in dispute; or

(2) The ALJ determines, after reviewing all appropriate submissions that oral argument is needed to clarify the issues in the case.

Under this regulation it is then possible that a "so-called" hearing could be conducted entirely on the basis of briefs and other written submissions. The Commissioner then argues that under 34 C.F.R. § 81.30 the recipient-applicant presents its case first by filing the first brief and other written submissions.

In discussing this order of proof the Commissioner's counsel cites the statute and regulation relating to the recipient's burden of proof, 1 however such counsel fails to recognize the import of the various steps which must take place in the proceeding before reaching the hearing stage of a case. In doing so, counsel ignores the import of the initial burden of proof which the Commissioner bears. Actually that counsel has set forth an erroneous statement as to the statute in that at page 6 of the motion the following comment appears: "In these administrative proceedings, Congress has established a presumption that the disallowance decision issued by the Department is valid and has placed on the recipient the burden of disproving the validity of the Department's disallowance decision."

The first part of this statement is diametrically opposed to Section 1234a(a) (2) which provides:

(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. The amount of funds to be recovered shall be determined on the basis of section 1234b of this title.

A similar provision is contained in the regulations. 2 Consequently there is no presumption as to the validity of the disallowance decision but to the contrary the law has set forth a burden that it state a prima facie case for the recovery of funds.

In the case of Application of State of South Dakota, Docket No. 91-24-R, U.S. Dep't of Education (August 16, 1991) the judge discussed the terms burden and prima facie as follows:

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 presentation. It is evident that the statute in issue is ambiguous and, accordingly it is appropriate to examine the legislative history of guidance in its interpretation. Alacare Home Health Service, Inc. v. Sullivan, 891 F.2d 850, 856 (11th Cir. 1990).

. . . 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. The significant difference between these amendments and current law are as follows:

. . . .

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, 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. 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.

. . .

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." (footnotes omitted) (emphasis added).

Section 451(f) (1) of the General Education Provisions Act as amended by the Hawkins-Stafford Amendments of 1988 Section 1234(f)(l) and its legislative history provide that GEPA cases are APA proceedings. 3

The provision of Section 1234a(a) (2) as to the Secretary's burden of stating a prima facie case in the PDD is in line with the APA provisions in that the Secretary is the proponent of the PDD. The controlling section of the APA concerning this is set forth at § 556(d) which states, in part: "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof." The legislative history of the APA suggests that the term "burden of proof" was intended to denote the "burden of going forward." Thus the Senate report states, in part: "That the proponent of a rule or order has the burden of proof means not only that the party initiating the proceeding has the general burden of coming forward with a prima facie case but that other parties, who are proponents of some different result, also for that purpose have a burden to maintain." S. Rep. No. 752, 79th Cong., 1st Sess. 22 (1945),reprinted in S. Doc. 248, 79th Cong., 2d Sess. 208, 270 (1946). 4

The burden of proof which the recipient-applicant bears under Section 1234a(b) (3) and 34 C.F.R. § 81.30 is the ultimate burden of persuasion. 5

The case of State of Maine v. United States Dep't of Labor, 669 F.2d 827 (1st Cir. 1982), illustrates these two different types of burdens of proof as divided between the two different parties to the proceeding. That proceeding involved a final decisio decision of the Secretary of the Department of Labor that "maintenance of effort" provisions of the Comprehensive Employment and Training Act had been violated by the recipient Office of Maine CETA (OMC), by operation of one of its school districts. The recipient, OMC, sought review of that determination.

Therein, the Court recognized the Department of Labor as the "proponent" in the case for purposes of 5 U.S.C. § 556(d) definitions, and therefore responsible for the burden of production in the case. The Court at n.5 recited its conclusion to wit: "There appears to be no question that the 'proponent' in this case is the Department of Labor and that its 'order' is the final determination by the Grant Officer." 6

The Court then stated at 830: "A party will have satisfied his burden of production if the evidence presented is sufficient to enable a reasonable person to draw from it the inference sought to be established."

The Court then went on to state that once the Department's burden of production was met, the burden was on (the recipient) OMC to prove compliance with the Act. Its allocation of the burden of proof (persuasion) was proper in light of a regulation placing the burden on the party requesting a hearing. The Court stated that the burden of persuasion in a proceeding arising under the CETA Act is set forth at 20 C.F.R. § 676.90(b) (1979) and provides: "Burden of Proof. The party requesting the hearing shall have the burden of establishing the facts and the entitlement to the relief requested." Relying on this regulation, the Administrative Law Judge correctly assigned the burden of persuasion to recipient OMC. 7

Therefore, in the present case the Commissioner has the burden of going forward to establish a prima facie case for the recovery of funds under Section 1234a(a)(2) and 34 C.F.R. § 81.24(b). Once the Commissioner establishes a prima facie case the burden of proof shifts and the recipient-applicant has the ultimate burden of persuasion to demonstrate that it should not be required to return the amount of funds for which recovery is sought in the PDD. Section 1234a(b)(3) and 34 C.F.R. § 81.30.

Under these circumstances since the Commissioner must bear the first burden of establishing a prima facie case in the PDD, .then it is appropriate at the following stage of the proceeding, after jurisdiction of a case is accepted, that the recipient-applicant should proceed next since, if a prima facie case has been established by the Commissioner, the burden of proof has thereby shifted to the recipient-applicant.

Therefore, since under 34 C.F.R. § 81.6, the hearing may take place entirely on the basis of briefs and other written submissions, it follows that if the Commissioner has in fact established a

prima facie case on his PDD, the first brief and other written submissions would be filed by the recipient- applicant.

Reconsideration of Issue as to Whether the PDD Establishes a Prima Facie Case

As a result of the inquiry created by the Motion of the Commissioner for Reconsideration of the Briefing Schedule, an additional study of the PDD has been made in connection with the preparation of a determination as to the motion.

In this case the Notice of Acceptance of Jurisdiction was issued on May 22, 1991. However in light of the determination in State of California Department of Education v. Bennett, 849 F.2d 1227, 1233 (9th Cir. 1988), it is considered that reconsideration of the acceptance of jurisdiction can be made at this time despite the provision of Section 1234a(b) (1) and 34 C.F.R. § 81.28(b) in view of the circumstances that surround the entire subject matter of the motions now before me.

The issue then is whether the PDD establishes a prima facie case for the recovery of funds in the amount of $129,590.00. Under 34 C.F.R. § 81.24(b)(2) prima facie case is defined as "a statement of the law and the facts that, unless rebutted, is sufficient to sustain the conclusions drawn in the notice [of disallowance decision)." It goes on to provide that: "The facts may be set out in the notice or in a document that is identified in the notice and available to the recipient."

Upon reconsideration it is determined that the PDD in this proceeding does not establish a prima facie case.

This case involves an audit by the Virginia Auditor of Public Accounts which was issued by the Office of the Inspector General of the U.S. Department of Education on August 22, 1990. The Commissioner disallowed $129,590 in salaries and wages charged by VDRVD to the CAP program.

The auditors found that the VDRVD does not have procedures to ensure that the allocation of personal service costs charged to Federal programs is consistent with the actual time spent benefitting those cost objectives. Also they found that personnel costs normally recovered as indirect costs or allocated through an approved cost allocation plan were charged directly to Federal programs. The auditors then stated that they were unable to determine what adjustment, if any, would be necessary to properly allocate payroll costs charged to Federal programs.

The auditors found that some VDRVD employees whose salaries were charged to more than one program or cost objective were not required to submit time sheets. Others submitted time sheets which were inadequate to identify the actual allocation of an employees time among Federal grants or other cost objectives. Also VDRVD did not have procedures to document a comparison of each individual's actual time allocation to the percentage originally allocated and charged to the Federal programs.

In the PDD it was stated that the Commissioner sustained the auditor's finding that VDRVD did not have contemporaneous time distribution records for the employees in question and that the

absence of appropriate time distribution records for those employees prevented VDRVD from establishing that it properly allocated the salaries and wages of those employees whose salaries and wages have been questioned.

However the PDD did not establish who these employees were or the amounts of money attributable to each employee or what category each happened to be in. Yet in the PDD it appears that the auditors had possession of such facts since it spoke in terms of "those employees whose salaries and wages have been questioned." Also the PDD has not established facts as to what, if any, information was available as to time and attendance of "those employees whose salaries and wages have been questioned." There are generalizations and conclusions set forth in the PDD as to categories of employees and the total amount of disallowed personal service costs, without any underlying factual support.

As stated above, 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 notices." Also at 32A C.J.S. Evidence ? 1016 (1964) it is stated that: "[A] prima facie case is made when the party having the burden of proof has produced evidence sufficient to support a finding and adjudication for him of the issue in litigation."

It is clear that the facts set forth in the PDD do not measure up to the cited norms.

The PDD however does contain a reference to "Audit Report Page 6, 10, and 14. This tribunal has no knowledge as to whether the missing facts could have been supplied by the referenced Audit Report pages. If so, a copy of those excerpts from the Audit Report should have been filed with the administrative law judge within some reasonable time after the Application for Review was served upon the Commissioner.

This procedure is provided for in the regulations. 34 C.F.R. § 81.24(b)(2), which contains the definition of a prima facie case, also states: "The facts may be set out in the notice or in a document that is identified in the notice and available to the recipient." This part of the definition of a prima facie case makes it clear that more factual information than that contained in the PDD, as filed in this case, is contemplated to satisfy the prima facie case requirements. And it may well be that the missing Audit Report pages could have completed the prima facie case.

However this was never filed as required by 34 C.F.R. § 81.27(b) which 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. Upon receipt of a copy of the filed material, the authorized Departmental official who made the disallowance de decision provides the ALJ with a copy of any document identified in the notice under § 81.24(b)(2).

In this case the Director of the VDRVD filed a certification that on April 30, 1991, he mailed a copy of the Application for Review to the Regional Commissioner. Therefore within some reasonable time after April 1991 the Commissioner had a requirement to file with the judge a copy of any document identified in the PDD which was available to the recipient and which set forth facts which were to be part of the prima facie case.

No copy of the referenced part of the Audit Report was ever filed with this tribunal by either the Commissioner or his counsel. Counsel for the Commissioner has commented at page 8 of the instant motion that "VDRVD uniquely possesses knowledge of the facts and legal position(s) on which it may choose to rely in the audit appeal . . . ." However the issue as to the sufficiency of the PDD must be determined upon the basis of the PDD as filed with the OALJ.

Therefore, upon reconsideration it is determined that the PDD in this proceeding does not state or establish a prima facie case for the recovery of funds.

34 C.F.R. § 81.28 provides that the administrative law judge determines whether the notice of a PDD meets the requirements of 34 C.F.R. § 81.24. If it does not meet those requirements the judge returns the notice of PDD to the authorized Departmental official who made the PDD and gives the official the reasons why the notice does not meet the requirements of 34 C.F.R. § 81.24. The judge is also required to inform the recipient of his decision by certified mail, return receipt requested. The regulation also provides that the authorized Departmental official may modify and reissue a notice of a PDD that a judge returns .

ORDER

Based on the foregoing findings and conclusions, IT IS ORDERED:

l. That the Notice of Acceptance of Jurisdiction of Case and Notice of Hearing dated May 22, 1991, is VACATED.

2. That this proceeding be DISMISSED, without prejudice; and

3. That the attached Preliminary Departmental Decision, as filed in this case, be returned to the authorized Departmental official who made the decision for such action as that official considers appropriate.

John F. Cook
Administrative Law Judge

Issued: September 6, 1991
Washington, D.C.

SERVICE

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

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1 Section 1234a(b) (3) provides, in part, that 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. . ."

34 C.F.R. § 81.30 provides, in part:

[T]he recipient . . . shall have the burden of proving that the recipient is not required to return the amount of funds that the disallowance decision requires to be returned because--

(a) An expenditure identified in the disallowance decision as unallowable was allowable;

(b) The recipient discharged its obligation to account properly for the funds;

(c) The amount required to be returned does not meet the standards for proportionality in § 81.22;

(d) The amount required to be returned includes an amount attributable to mitigating circumstances under the standards in § 81.23; or

(e) The amount required to be returned includes an amount expended in a manner not authorized by law more than five years before the recipient received the notice of the disallowance decision.

2 34 C.F.R. § 81.24(b) provides as follows:

(b) (1) The notice must state a prima facie case for the recovery of funds.
(2) For the purpose 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.
(3) A statement that the recipient failed to maintain records required by law or failed to allow an authorized representative of the Secretary access to those records constitutes a prima facie case for the recovery of the funds affected.
(i) If the recipient failed to maintain records, the statement must briefly describe the types of records that were not maintained and identify the recordkeeping requirement that was violated.
(ii) If the recipient failed to allow access to records, the statement must briefly describe the recipient's actions that constituted the failure and identify the access requirement that was violated.

3 l. 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).

4 [A] prima facie case is made when the party having the burden of proof has produced evidence sufficient to support a finding and adjudication for him of the issue in litigation.

A prima facie case is . . . one in which the evidence in favor of a proposition is sufficient to support a finding in its favor, if all the evidence to the contrary be disregarded . . . .

32A C.J.S. Evidence § 1016 (1964).

5 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).

6 Counsel for the Commissioner at page 9-10 of the instant motion erroneously refers to the recipient-applicant in this case as the "proponent."

7 See also Hess & Clark. Division of Rhodia, Inc. v. Food and Drug Admin., 495 F.2d 975, 984 (D.C. Cir. 1974). Environmental Defense Fund. Inc. v. E.P.A., 548 F.2d 998 (D.C. Cir. 1976); Old Ben Coal Corp. v. Interior Board of Mine Operations Appeals, 523 F.2d 25, 36 (7th Cir. 1975).