

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

IN THE MATTER OF ELECTRONIC COLLEGE AND COMPUTER PROGRAMMING

Respondent.

Docket No. 91-7-ST

Appearances:

J. Andrew Usera, Esq., of Washington, D.C., Marta Quinones, Esq., Arturo Diaz Angueira, Esq., San Juan, Puerto Rico for Electronic College & Computer Programming

Russell B. Wolff, Esq., of Washington, D.C., Office of the General Counsel, United States Department of Education

Richard W. Markus, Esq., of San Juan, Puerto Rico, for the Association of Accredited Post-Secondary Institutions of Puerto Rico, Intervenor

Before :

Judge Daniel R. Shell

DECISION

This decision is the result of a remand order issued July 10, 1992, by the Secretary of the United States Department of Education. The Secretary issued two directives in his decision: This case is remanded to Judge Shell for the following action --

1. His consideration of the propriety of imposing a fine on ECCP as an additional administrative sanction.
2. The rendering of a finding on ECCP's misappropriation of Pell Grant funds, and the consideration of a termination and/or fine in light of this finding and the untimely filed audits.

First, the Secretary found that applicable sanctions available to the Secretary include both an action for termination, limitation, or suspension, and/or a fine. The Secretary in his decision on remand at 4 stated:

Terminations, suspensions, and limitations serve the non-punitive purpose of protecting students and the government from future harm, while fines are punishment for past conduct. Only by reading the statute to construe fines as being available in addition to limitations, suspensions, and terminations can Congress' intent be achieved. It would be illogical for Congress to provide that the Department could punish an institution only if the Department were willing to forego taking action to protect the public from present or future harm.

As a result of this holding, the Secretary remanded the case to the undersigned for action on "[h]is consideration of the Propriety of imposing a fine as an additional administrative remedy." [1](#) The initial decision found termination, limitation, or suspension, or fine as sanctions to be mutually exclusive. The Secretary concluded otherwise. Therefore, regard for the imposition of both sanctions is to be considered. After the second issue related to the settlement agreements is presented, the consideration of the imposition of both penalties will be treated.

Second, both the initial decision and the remand decision recognize the contractual nature of the settlement agreements. The Secretary has acknowledged in his remand decision that the initial decision found the settlement agreements to be bilateral contracts with promises of each party serving as consideration for the promises of the other. [2](#) As the Secretary recognizes, the settlement agreements executed on June 1, 1990, December 21, 1990, and February 14, 1991 generated consideration and contractual obligations. The Secretary at 7 of his decision found: "Clearly, the settlement agreements resolved issues then in dispute, and saved ECCP the expense of litigating the full range of issues. I hold that this is sufficient consideration to support the formation of a contract between ECCP and OSFA."

The Secretary further stated: "The Initial Decision is void of any finding that OSFA did not negotiate in good faith following its agreement to do so. The void becomes more apparent when consideration is given to that fact that it was ECCP's obligation to come forward with proof of the breach - . . . in a breach of contract action, the burden is on the plaintiff to prove all elements of the action . . . ECCP bore the obligation of coming forward with evidence establishing a breach, and they failed to do so." [3](#)

The initial decision found that Education, in attempting to resolve all issues in dispute, included Education's forbearance to bring further legal action based upon the facts in dispute. The initial decision stated: "The repayment agreements are significant, too, because they close matters and withdraw them from further action." [4](#) ECCP stipulated to the excess funds drawdown in 1988-89 award year in the belief that all issues were resolved in the agreements.

The facts are clear. The initial decision recognized the breach of the agreements caused by Education's continued pursuit of the termination/fine action which is the subject matter of the hearing, initial decision, and now the remand by the Secretary. Education's continued efforts to terminate and fine ECCP are contrary to the agreement to resolve all issues. The initial decision found: "Education has no justification in resurrecting these claims to support its pending termination and fine action." [5](#) The initial decision did not require ECCP to present any evidence of a breach of the agreements because the pending termination and fine action alone was considered sufficient evidence of Education's breach of the terms of the settlement agreements .

After finding that ECCP bore the obligation of establishing a breach of the contract, the Secretary in his remand decision, however, found no evidence of a contractual breach administratively shown or specifically proven by ECCP. The admissions are the essence of the Secretarial finding and are now used by Education as proof of ECCP's misappropriation of Pell Grant funds. After the Secretary concluded that ECCP misappropriated Pell Grant funds, he remanded the action to the undersigned "for a finding on ECCP's misappropriation of Pell Grant funds" The language of the remand order directs a finding that ECCP misappropriated Pell

Grant funds. [6](#) Therefore, based upon the findings and direction of the Secretary, it is concluded that ECCP misappropriated Pell Grant funds.

Next, the Secretary remands for consideration the propriety of imposing a fine on ECCP as an additional administrative sanction for the rendering of an affirmative finding of ECCP's misappropriation of Pell Grant funds and the previous finding in the initial decision against ECCP for untimely filed audits.

ORDER

After careful consideration of all of the facts, evidence, and mitigating circumstances presented in the record, it is found that the **ORDER** at page 54 of the **INITIAL DECISION** is appropriate. Therefore, the **ORDER** of the **INITIAL DECISION** is incorporated into this decision and made a part in this **DECISION ON REMAND**. So **ORDERED**.

Daniel R. Shell
Administrative Law Judge

Issued: July 21, 1992
Washington, D.C.

[1](#) Id. At 8.

[2](#) Id. At 5.

[3](#) Id. 7-8.

[4](#) Initial Decision at 29.

[5](#) Initial Decision at 30. Had ECCP not complied with the repayment agreement, a cause of action would have arisen against ECCP for its breach of contract. ECCP did not, however, breach the contract for failure of payment or for failure for any other reason .

[6](#) Id. at 8.