

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

IN THE MATTER OF ELECTRONIC COLLEGE AND COMPUTER PROGRAMMING,

Respondent

Docket No. 91-7-ST

Student Financial Assistance Proceeding

Appearances:

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Before:

Judge Daniel R. Shell

**DECISION**

This decision is the result of a second remand order (**Remand II**) issued January 19, 1993, in the matter of Electronic College and Computer Programming (**ECCP**) by the former Secretary of the United States Department of Education. [1](#) The Secretary issued three directives in Remand II:

1. Consideration of the propriety of imposing a fine on ECCP as an additional administrative sanction based upon the ALJ's findings in his Initial Decision;
2. the rendering of a finding on whether ECCP misused Pell Grant funds, and
3. consideration of the appropriateness of a termination and/or fine in light of the ALJ's finding on any misuse of Pell Grant funds and the ALJ's previous finding of untimely filed audits. [2](#)

The tribunal will address the Secretary's directives by first rendering a finding on whether ECCP misused Pell Grant funds and, subsequently, discussing the propriety of imposing a fine on ECCP. Finally, the tribunal will consider the appropriateness of imposing a termination on ECCP as an additional administrative sanction in light of the findings of this decision.

**1. The rendering of a finding whether ECCP misused Pell Grant funds**

## I. Preliminary matters

Before directly addressing the issue of whether ECCP misused Pell Grant funds, three preliminary matters must be discussed: 1) the Secretary's reference in Remand II to the administrative law judge's "misunderstanding" of the Secretary's directive made in Remand I; 2) an administrative law judge's responsibility in adjudication, and 3) the Secretary's unspecific use of the term "[t]his issue" in the third paragraph of page 1 in Remand II.

First, in Remand I, the Secretary held that this case should be remanded to the administrative law judge for "the rendering of a finding on ECCP's misappropriation of Pell Grant funds, and consideration of a termination and/or fine in light of this finding . . ." [3](#). In light of the clear wording in this tribunal's Initial Decision that no misappropriation occurred, contrasted with the language of the holding in Remand I, the use and placement of the word "misappropriation" clearly indicates that, in the Secretary's opinion, such a misappropriation of Pell Grant funds had transpired. Furthermore, the decision drafted by the Secretary underscores this conclusion by labelling this "misappropriation" as a Finding. [4](#)

In Remand II, however, the Secretary indicated that "the ALJ misunderstood" the order of Remand I. The secretary stated: "This case had been remanded to the ALJ to render a factual finding concerning the **potential misuse** of Pell Grant funds by Electronic College and Computer Programming (ECCP)." (emphasis added) [5](#) However, Remand I made no reference to "potential misuse" of Pell Grant funds. Consequently, the tribunal interprets Remand II as a modification of the Secretary's decision in Remand I that ordered the administrative law judge to render a factual finding that ECCP misappropriated Pell Grant funds. Therefore, Remand II now directs this tribunal to determine **whether** ECCP misappropriated Pell Grant funds.

Second, an administrative law judge's responsibility in rendering findings encompasses neither the duty nor the privilege of asserting arguments on behalf of himself. Even though the Initial Decision clearly states that the parties entered into a bilateral contract which forbade OSFA from prosecuting a claim for the misuse of Pell Grant Funds, the Secretary in Remand II states: "In his decision on remand, the ALJ continues to argue that the agreements between the parties were to "resolve all issues." [6](#) (emphasis added). The Secretary in Remand II grossly misunderstood the Initial Decision and the nature of the administrative law judge's responsibility.

An administrative law judge does not assert arguments on behalf of himself or a party. The Initial Decision found that the parties had conducted good faith negotiations AND those negotiations were consummated in a valid contract which resolved all of the issues in dispute. This clearly is a finding, not an argument.

Finally, the Secretary in Remand II at 1 states: "**This issue** was resolved by the Decision of the Secretary and is not subject to further debate." [7](#) The Secretary's reference to "This issue" . is ambiguous. Namely, neither the sentence which contains the phrase "This issue," nor the context in which the phrase is used, clarifies which issue had been resolved by the Secretary.

Moreover, the sentence preceding the phrase "[t]his issue" does not add clarification. That sentence refers to the Initial Decision's finding that all issues were resolved by the settlement

agreements. [8](#) Unfortunately, the Secretary does not identify in either Remand I or in Remand II precisely what his decision on this tribunal's finding is. Therefore, due to the ambiguous language in Remand II, the Secretary's directive, that "[t]his issue was resolved by the . . . Secretary," cannot be given its due deference.

In sum, the preliminary matters are: 1) Remand II modifies the Secretary's decision in Remand I that the tribunal find that ECCP misappropriated Pell Grant funds and now directs the tribunal to render a factual finding whether ECCP misappropriated Pell Grant funds, 2) an administrative law judge's responsibility in rendering findings encompasses neither the duty nor the privilege of asserting arguments on behalf of himself or a party in the proceedings, and 3) due to the ambiguous language in Remand II, the Secretary's determination that "[t]his issue was resolved by the . . . Secretary" cannot be given its due deference .

## II. Body of the Issue

The Secretary and this tribunal recognized that a valid contract exists between ECCP and OSFA. Moreover, the Initial Decision of this tribunal recognized that the settlement agreements "identified ECCP's liability" and provided sufficient evidence that Education had agreed to forebear the prosecution of its claim for misuse of Pell Grant funds. The Secretary, however, determined that there was no substantial evidence in the record to support the tribunal's finding that the parties agreed to resolve all outstanding issues in dispute and that the pending termination and fine action alone was insufficient evidence of OSFA's breach of the terms of the settlement agreements. [9](#) According to Remand I, "[t]he Initial Decision is void of any finding that OSFA did not negotiate in good faith following its agreement to do so." [10](#) The Secretary's finding misses the point.

To begin with, the linchpin of the Initial Decision is that an enforceable agreement existed. It would be palpably indefensible to argue that ECCP paid \$638,521 to the Department of Education in exchange for the opportunity to "bargain in good faith to resolve outstanding issues." [11](#) Undoubtedly, ECCP paid \$638,521 to the Department of Education in fulfillment of its obligation under an existing and valid contract.

In addition, the Initial Decision considered the provisions found in the agreements and determined that the issue regarding the misuse of Pell Grant funds (or use of excess Pell Grant funds) was resolved by the agreements. A settlement agreement was executed on December 21, 1990, to satisfy the repayment to Education of \$638,520, plus interest, for funds improperly expended by ECCP in award year 1988-89. [12](#) The relevant provision of the December 1990 agreement is paragraph 16 that provides:

ECCP agrees that this Agreement does not waive, compromise, restrict or, settle:

(b) any presently pending or future administrative fine, limitation, suspension, termination or emergency action taken by Education.

(c) Notwithstanding the foregoing, ECCP and Education shall, given this repayment agreement and the pending intent of the Department to fine and terminate ECCP's eligibility to participate in

Title IV, HEA programs, enter into good faith settlement negotiations, as anticipated by 34 C.F.R. § 668.87 (a) (2), aimed at resolving the underlying issues recited in the letter sent to ECCP by Education's Office of Student Financial Assistance on November 30, 1990, on November 30, 1990 such letter which is incorporated here by reference. [13](#) (emphasis added).

In the Initial Decision, the tribunal held that the "[s]ettlement agreements **identified ECCP's liability** and set forth repayment terms." [14](#) (emphasis added). The tribunal determined that all of the liability which resulted from the misuse of Pell Grant funds had been repaid and Education's recoupment of the full amount of ECCP's liability "constitute [d] settlement of any claims for payment of the \$638,521, plus interest, arising from Education's final audit review determination." [15](#) (emphasis added) .

Furthermore, this tribunal held, in its Initial Decision, that the very fact that OSFA was before the tribunal attempting to litigate whether ECCP misused Pell Grant funds was ipso facto evidence that OSFA was breaching the terms of the settlement agreements. One of the issues resolved by the settlement agreements was whether ECCP received excess Pell Grant funds from Education. It did. As a result, ECCP paid the excess funds back. Significantly, Remand I determined that "'the settlement agreements resolved issues then in dispute and saved ECCP the expense of litigating the full range of issues . . . . [T]his is sufficient consideration to support the formation of the contract between ECCP and OSFA." [16](#)

As this tribunal recognized in its Initial Decision, the common law abhors the rescission of valid contracts. Given the fact that both this tribunal and the Secretary agree that a valid contract existed, the due course is to enforce the contract

by denying OSFA's attempt to avoid the provisions of paragraph 16 of the December 1990 agreement. [17](#) OSFA has relied solely upon the settlement agreements in its attempt to prove that ECCP misused Pell Grant funds and because the settlement agreements cannot be used as evidence to support OSFA's allegation, the tribunal has no evidence before it that ECCP misused Pell Grant funds. Consequently, the tribunal is constrained from finding that ECCP misused or misappropriated Pell Grant funds during the fiscal years at issue.

**In conclusion**, this tribunal again states the finding of the Initial Decision that, with the evidence presented, ECCP did not misuse or misappropriate Pell Grant funds. [18](#) As the Initial Decision makes plain, Education is precluded from establishing a violation of 34 C.F.R. § 690.81(c) because the settlement agreements executed by ECCP and Education have the effect of barring this tribunal from reconsidering issues foreclosed and resolved by the existence of a valid contract. [19](#) Accordingly, the tribunal holds now, as it held in its Initial Decision, that the "excess funds violations were resolved by the settlement agreements." [20](#) Consequently, the tribunal finds that ECCP did not misuse or misappropriate Pell Grant funds during the fiscal year at issue in this case.

## **2. The propriety of imposing a fine on ECCP as an additional administrative sanction.**

In the Initial Decision, ECCP was "ordered to be placed under a limitation for a two year probationary period." [21](#) No fine was imposed because the "aim of achieving a balance between

protective and punitive measures" could be best accomplished by imposing a sanction which reflects the "past history of the school" and the gravity of the regulatory violation proven by OSFA. [22](#)

Notwithstanding the extensive analysis in the Initial Decision which set out the balance test used by this tribunal in determining the most appropriate sanction in this case, Remand II ordered the tribunal to revisit the issue of whether it would be proper to impose a fine on ECCP "based upon the . . . findings in [the] Initial Decision." [23](#) Remand II characterizes the tribunal's decision on Remand I as a misunderstanding of the Secretary's decision in Remand I. Remand II persists that the "ALJ has . . . failed to adequately express his rationale relating to the propriety of imposing a fine on ECCP as an additional administrative sanction." [24](#)

The short answer to the former Secretary's observation is that a fine would be improper for the same reasons identified in this tribunal's Initial Decision. [25](#) Indeed, the finding to place ECCP on a limitation is based on the unique facts of this case and stands independent from the holding in Remand I that the sanctions of termination and fine are not mutually exclusive. This tribunal held in its Initial Decision that:

Considering the alleged violations cited in the notice, it is concluded that Education has not presented sufficient facts to establish a violation of 34 C.F.R. § 690.81(c). Nor has Education been able to support the allegation that ECCP was using an unapproved calculation of student attendance in violation of 34 C.F.R. § 690.75. The only issue resolved against ECCP has been its March 29, 1991, late filing of its biennial audits. ECCP's assertion that the late filing is a lesser infraction than the non-submission of the audits is a point well taken. The evidence of record shows this was the first time ECCP filed its audits late. [26](#)

Not only is the record replete with un rebutted evidence of mitigating circumstances as to why ECCP was late in filing its biennial audits for award years 1987-88 and 1988-89 but, there are several additional reasons why the imposition of a fine as an additional administrative sanction is improper here. Namely, (1) the only violation proven in this case is ECCP's failure to file timely biennial audits, (2) the evidence in the record that the instances covered by this action were the first time ECCP filed untimely audits, and (3) ECCP's willingness to take immediate corrective action to improve its fiscal operations.

Alternatives to imposing a termination or fine are explicitly provided by the availability of limitation (probation) [27](#) or suspension. As this tribunal noted in its Initial Decision:

By placing a school under limitations, it allows continued but monitored operations. It is the least disruptive course. It does not deprive the school or the students of continuing with the process of education. [28](#)

It is the determination of this tribunal that the most appropriate sanction reflect a two fold function: First, to protect the interest of all parties - Education, the school and the students. Second, to reflect the fact that ECCP violated 34 C.F.R. § 668.23 in failing to file timely audits. Accordingly, the ORDER at page 54 of the INITIAL DECISION that imposes a limitation on ECCP is an appropriate sanction in this case and indeed, is reasonable in light of the facts of this

case. Therefore, consistent with sound reason, the additional imposition of a fine is not warranted.

### **3. The appropriateness of a termination and/or fine in light of this tribunal's findings**

Finally, the Secretary orders the tribunal to consider the appropriateness of a termination and/or fine in light of the tribunal's findings on this second remand. This issue was addressed, *supra*. As noted, the tribunal finds that ECCP did not misuse Pell Grant funds, but failed to file timely biennial audits during the period cited by OSFA. [29](#) Consequently, the tribunal has determined that it is improper and inappropriate to impose a fine and/or termination on ECCP for failure to file timely audits. Accordingly, a limitation is **ORDERED** for the reasons recognized *supra* and noted on pages 53 and 54 of the Initial Decision of April 10, 1992.

### **ORDER**

The **ORDER** at page 54 of the **INITIAL DECISION** is the appropriate sanction in this case. Therefore, the **ORDER** of the **INITIAL DECISION** is incorporated into this decision and made a part of this **DECISION ON REMAND**. So **ORDERED**.

Daniel R. Shell  
Administrative Law Judge

Issued: February 16, 1993  
Washington, D.C.

### **SERVICE**

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1 An earlier remand order (Remand I) was also issued by the former Secretary on July 10, 1992, subsequent to the Initial Decision of April 10, 1992.

2 In Remand I, the Secretary issued two directives both of which were substantially the same as the directives issued in Remand II. In Remand I, he ordered:

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 consideration of a termination and/or fine in light of this finding and the untimely filed audits.

According to the Secretary, Remand II was issued because this tribunal's decision issued as a result of Remand I "indicates that the ALJ misunderstood . . . the substance of the agreement [sic] between the parties [and] the Secretary's direction to the ALJ on remand." Although the Initial Decision of this tribunal set out a substantial and detailed analysis of the agreements in issue, this opinion will restate the major points of that analysis below.

3 Remand I at 8.

4 In Webster's misappropriation is defined as: "1. a. To appropriate wrongly . . . , b. to appropriate dishonestly for one's use . . . ; 2. To use illegally . . . ." at 757.

5 Remand II at 1.

6 Remand II at 1.

7 The paragraph from which the sentence quoted from Remand II is excerpted provides, in pertinent part:

The evidence cited by the ALJ in his April 10, 1992, decision only supported a finding that the parties had agreed to bargain in good faith to resolve outstanding issues. In his decision on remand, the ALJ continues to argue that the agreements between the parties were to "resolve all issues." This issue was resolved by the Secretary and is not subject to further debate. (emphasis added) .

[8](#) Id. at 1. In Remand I at page 7, the Secretary found: 1) "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."; 2) "[I]t was ECCP's obligation to come forward with proof of the breach [of the contract.]"; 3) "ECCP bore the obligation of coming forward with evidence of a breach, and they failed to do so." Remand I at 7, 8.

[9](#) Remand I at 7. The Secretary held in the alternative that ECCP's saving "the expense of litigating the full range of issues. . . is sufficient consideration to support the formation of a contract between ECCP and OSFA." Remand I at 7. Although due deference is given to an agency's determination about matters within that agency's entrusted area of expertise, no such deference is accorded an agency's determination on matters peripheral to or completely outside of that agency's specialization. See e.g., *Ford Motor Co. v. Milhollin*, 444 U.S. 555 (1980). Accordingly, the Secretary's holding as to what amounts to sufficient consideration for a contract is not binding on this tribunal. Indeed, the Secretary's position is untenable. The Secretary finds a valid contract because ECCP has saved the expense of litigating the underlying issues of the settlement agreements. Yet, under his analysis, the agreement would be void for want of consideration because ECCP has neither avoided the expense of this proceeding nor received any other benefit of its bargain.

[10](#) Id. at 7.

[11](#) Nonetheless, this is what the Secretary contends in Remand II at 1.

[12](#) Id. at 4. Signatories of the agreement were Chris Burgos, President of ECCP; Molly Hockman for OSFA; and James L. Sturdivant, Loans and Accounts Receivable for Financial Management Services. See Initial Decision at 4n.15. See also Initial Decision at 9-10 for a discussion of the other two settlement agreements that were entered into by ECCP and OSFA. As noted in the Initial Decision, those agreements do not alter the analysis of the December 1990 agreement.

[13](#) Initial Decision at 6; ECCP Ex. 7; Ed. Ex. P at para. 16.

[14](#) Id. at 28.

[15](#) The Initial Decision states: "[t]he 'settlement' agreements signed by ECCP and Education on June 1, 1990, December 21, 1990, and February 14, 1991, are all bilateral contracts. As such, basic contract law states that the parties to such contracts are bound to fulfill reciprocal obligations and to adhere to the terms of their agreement." As of March 28, 1991, ECCP repaid all but \$78,933 of the \$638,520 identified in the agreement as due. Prior to the hearing in this case, Education granted ECCP an \$82,000 offset. Consequently, ECCP fulfilled its obligation under the agreements and Education recovered all excess Pell Grant funds drawn down by ECCP. See paragraph 18 of the December 21, 1990, settlement agreement; Ed. Ex. P at P-1; Initial Decision at 5-6.

[16](#) Remand I at 7. This tribunal recognized the admission of ECCP's liability for the misuse of Pell Grant funds, but found: "On the misuse of Pell Grant funds/excess funds, no violation of 34



C.F.R. § 690.81(c) has been established since the issue has been fully resolved by the settlement agreements executed by the parties and the repayment of the funds specified."

17 Id. at 46. Later, the Initial Decision states:

ECCP has correctly asserted that the Settlement Agreements were negotiated and executed in good faith and with the intent to resolve any claims arising from the stipulated liabilities. Education has no justification in resurrecting these claims to support its pending termination and fine action. The parties conducted arms length negotiation, all facts were fully contemplated, and there is no cause to set aside the terms of a valid contract. Education agreed to forebear the prosecution of the claim which was the subject matter of this agreement. The law presumes that the parties entered a legally valid agreement. **To find otherwise is a failure to recognize the validity of the contracts (settlement agreements) entered into June 1, 1990, December 21, 1990, and February 14, 1991.** (Emphasis added.) Because the excess fund violations were resolved by settlement agreements, no finding of fact is required here and there is no reason to inquire into the specifics which led to the parties' settlement agreements .

18 ECCP Initial Decision at 46, Finding 2. In the Initial Decision, the misuse of Pell Grant funds/excess funds issue is discussed in two parts: 1) Excess funds for 1983-84, 1984-85, 1988-69; 2) Placement on a cash reimbursement method of fiscal monitoring. Concerning the issue of the cash reimbursement, the initial decision found that the issue had neither a regulatory basis for a violation nor had the school been given sufficient notification of the alleged violation in Education's notice of termination and fine. Therefore, the initial decision found no merit in Education's allegation of misuse of Pell Grant funds based upon the school's placement on the cash reimbursement method of fiscal monitoring. See, Initial Decision at 31-32.

19 It is a well settled basic principle of contracts that "any dispute which can be the subject of an action or a suit may be the basis of a compromise, and its settlement will afford a consideration therefor. . . Williston on Contracts, § 135 B, Forbearance to Litigate; Initial Decision at 29-30. As this tribunal recognized in its Initial Decision:

Repayment agreements between the parties represent a way the parties have found to resolve the violations without adjudicating the matters or bringing them before an ALJ for a decision.

Initial Decision at 29.

20 Id.

21 Initial Decision at 54.

22 Id. at 52, 54.

23 Remand II at 3. The Secretary may have concluded that the tribunal had not considered the appropriateness of imposing a fine upon ECCP based on this tribunal's determination that the proper interpretation of 20 U.S.C. § 1094 (c) (1) (D) is "in the disjunctive. Either a termination, limitation, or suspension or a fine can be imposed but not both." Initial Decision at 49.

In Remand I, the Secretary reversed this tribunal's determination and held that Education has the statutory and regulatory authority to impose **both** a termination, limitation, or suspension **and** a fine on institutions in cases which justify harsh penalties. Although the Secretary's determination is now the "law" of the Department of Education, the Secretary, in Remand I and Remand II, misunderstood the rationale supporting this tribunal's decision not to impose a fine against ECCP. As noted infra, this tribunal's finding that it would be inappropriate and improper to impose a fine on ECCP in this case, stands independent from the finding that 20 U.S.C. § 1094(c) (1) (D) should be interpreted in the disjunctive.

[24](#) Remand II at 2.

[25](#) In more than **six** pages of the Initial Decision, at pages 49-54, those reasons are enumerated and substantiated. Notwithstanding the fact that the Secretary, in Remand I, held that he has the regulatory authority to suspend, terminate, or limit an institution's eligibility to participate in Title IV, HEA programs **as well as** to fine the institution based upon the same program violations, it is the finding of this tribunal that it would be improper and unacceptable to fine ECCP and limit its eligibility based on. only one proven program violation, to wit - ECCP failed to file a timely biennial audit.

[26](#) Initial Decision at 49. ECCP did not file its required biennial audits until March 29, 1991. The audits were originally due on March 30, 1990. See Initial Decision at 3 & n.7.

[27](#) See 34 C.F.R. § 668.86.

[28](#) Initial Decision at 53.

[29](#) There were other matters at issue in this case but they were not made part of Remand I or Remand II. Consequently, the tribunal has not revisited those issues in this opinion.