

IN THE MATTER OF ATLANTA Docket No. 91-93-SA
COLLEGE OF MEDICAL AND
DENTAL CAREERS,

Student Financial
Assistance Proceeding

Respondent.

DECISION

Appearances: Leslie H. Wiesenfelder, Esq., Kelli J. Crummer, Esq., Dow, Lohnes & Albertson for Atlanta College of Medical and Dental Careers.

Renee Brooker, Esq., Office of the General Counsel, for the Office of Student Financial Assistance Programs, United States Department of Education.

Before: John F. Cook, Chief Administrative Law Judge.

I. PROCEDURAL BACKGROUND.

A final audit determination was issued for Ethelene R. Hughey, Chief, Audit Review Branch, Division of Audit and Program Review, Office of Student Financial Assistance Programs (SFAP) [See footnote 1](#)¹ of the U.S. Department of Education (Department) by Patricia L. Dickerson on August 22, 1991, to Atlanta College of Medical and Dental Careers (ACMDC or College).

ACMDC filed a request for review on October 11, 1991. A Notice of Receipt of Request for Review and a Prehearing Order were thereafter issued.

The parties filed briefs and exhibits as well as a Joint Memorandum of Stipulations and Issues.

On September 28, 1993, ACMDC filed a motion to dismiss. SFAP filed a statement in opposition, and ACMDC filed a reply.

II. ISSUE.

Should the proceeding be dismissed on the basis that the Final Audit Determination was not issued by a "designated ED official" with the authority to issue final audit determinations subject to 34 C.F.R. Part 668, Subpart H?

III. FINDINGS OF FACT AND OPINION.

ACMDC requests that this tribunal dismiss the instant case on the ground that the August 22, 1991 Final Audit Determination (FAD) is a legal nullity. Ex. R-1. The College notes that the

FAD was signed by Patricia L. Dickerson "for" Ethelene R. Hughey. As a result, ACMDC contends that the FAD was not issued by a "designated ED official" with the authority to issue final audit determinations subject to 34 C.F.R. Part 668, Subpart H.

SFAP opposes the motion to dismiss on two primary grounds. First, SFAP notes that several similar cases, also involving the question of whether documents were signed by a "designated ED official", are currently before the Secretary of Education. SFAP requests that the tribunal wait until the Secretary rules in those cases before issuing a decision in the present case. [See footnote 2](#)² Second, SFAP claims that Victoria Edwards, the current Acting Audit Resolution Branch Chief within the Institutional Monitoring Division, has ratified the signature on the August 22, 1991, FAD of Patricia L. Dickerson for Ethelene R. Hughey, who was then the Chief of the Audit Review Branch, Division of Audit and Program Review.

For purposes of proceedings held under 34 C.F.R. Part 668, Subpart H, . 668.112 contains the following definitions:

"Designated ED official" means an official of the Education Department to whom the Secretary has delegated the responsibilities referred to in this subpart.

"Final audit determination" means the written notice of a determination issued by a designated ED official based on an audit of an institution's participation in any or all of the Title IV, HEA programs covered under this subpart.. 668.112 (1991).

The instant case is very similar to *In the Matter of Fundacion Educativa Ana G. Mendez*, Docket No. 93-54-SP, U.S. Dep't of Education (Order of Dismissal) (Sept. 1, 1993). In that case, Patricia Dickerson purported to sign a FAD for Victoria Edwards, the Acting Chief, Audit Resolution Branch, Institutional Monitoring Division. In that case, as well as in the present case, there had been no prior attempted delegation of authority from the designated ED official to the person who purported to sign on behalf of that designated ED official. [See footnote 3](#)³ In *Mendez*, the tribunal stated that "the person in that position [the designated ED official] is the only valid signatory" and that "[a]n error in who acted as the 'Designated ED official' is jurisdictional and cannot be waived." The tribunal then dismissed the case.

However, in the present case, SFAP has submitted a Declaration of Victoria Edwards. In the declaration, Ms. Edwards states, among other things, the following:

1. I am the Acting Chief of the Audit Resolution Branch of the Institutional Monitoring Division, within the U.S. Department of Education. I have been the Acting Chief since September 9, 1992.
2. In this position, I am the designated Department official authorized to issue final audit determination letters, pursuant to 34 C.F.R. Part 668, Subpart H.
3. In August 1991. the position I presently hold, including all duties and responsibilities, was filled by Ethelene Hughey. Ms. Hughey's title was Chief, of the Audit Review Branch of the Division of Audit and Program Review. The difference in our titles derives solely from

reorganization within the Department. Declaration of Victoria Edwards (emphasis added).

Thus, Ms. Edwards acknowledges that she has been the Acting Chief only since September 9, 1992, and that in August 1991, neither she nor Patricia Dickerson had the authority to sign the FAD in question. The declaration goes on to state:

Now in a position possessing the authority to have signed the August 22, 1991, final audit determination letter to the Atlanta College of Medical and Dental Careers, I have ratified Patricia L. Dickerson's action in signing said letter.

Thus, SFAP acknowledges that Ms. Dickerson was not the "designated ED official" when she signed the FAD on August 22, 1991, but claims that Victoria Edwards can ratify Patricia Dickerson's act of signing for Ethelene Hughey on August 22, 1991, more than one year before Ms. Edwards assumed her current position (which is essentially similar to the position that Ms. Hughey held in August 1991). In *In the Matter of Lincoln Technical Institute. Inc.*, Docket No. 91-38-SP, U.S. Dep't of Education (Interlocutory Decision) (Oct. 30, 1992), this tribunal cited *Franklin Sav. v. Dir. of Office of Thrift Super.*, 740 F. Supp. 1535 (D. Kan. 1990). In *Franklin*, the court stated as follows:

It is recognized that a public officer may ratify the act of another public officer. See *United States v. Heinszen & Co.*, 206 U.S. 370, 382, 27 S.Ct. 742, 745, 51 L.Ed. 1098 (1907). ("That the power of ratification as to matters within their authority may be exercised by Congress, state governments, or municipal corporations, is also elementary.") Nevertheless, for a ratification to be effective, the ratifying person or entity must have had the authority to do the underlying act both at the time of the original act and at the time of ratification. *Restatement (Second) of Agency*, . 84(2) at 213 (1957). ("an act which. when done. the purported . . . principal could not have authorized, he cannot ratify . . ."); see also *Western Nat'l Bank v. Armstrong*, 152 U.S. 346, 352, 14 S.Ct. 572, 575, 38 L.Ed. 470 (1894) ("It is scarcely necessary to say that a ratification, to be efficacious, must be made by a party who had power to do the act in the first place . . .

Franklin at 1539 (emphasis added). See also *Lincoln Technical Institute* at 10-12. [See footnote 4](#)⁴

Thus, for a ratification to be effective, the ratifying person or entity must have had the authority to do the underlying act both at the time of the original act and at the time of ratification. As stated above, Ms. Edwards acknowledges in her affidavit that in August 1991, she did not have the authority to sign the FAD in question. It follows that Ms. Edwards cannot ratify Patricia Dickerson's act of signing for Ethelene Hughey on August 22, 1991, because Ms. Edwards did not have the authority to do the underlying act (sign the FAD) on August 22, 1991. According to her affidavit, she did not have this authority until September 9, 1992.

SFAP in its statement in "Opposition to Respondent's Motion to Dismiss" has acknowledged that the FAD in this case, issued on August 22, 1991, was signed by Patricia L. Dickerson for Ethelene R. Hughey, who was then the Chief of the Audit Review Branch,

Division of Audit and Program Review, and that Ms. Dickerson signed it while Ethelene Hughey was out of the office on sick leave.

Thus it has been established that the Chief of the Audit Review Branch, who was the designated ED official," did not sign the FAD. In this case no effort was even attempted by the "designated ED official" to redelegate her authority to Ms. Dickerson. Even if this had been attempted it would have been for naught.[See footnote 5](#)⁵

Following the rulings in Mendez that "the person in that position [the designated ED official] is the only valid signatory" and that "[a]n error in who acted as the 'Designated ED official' is jurisdictional and cannot be waived", the tribunal finds that the FAD in the instant case was not issued by a "designated ED official" with the authority to issue final audit determinations subject to 34 C.F.R. Part 668, Subpart H. Accordingly, the Respondent's Motion to Dismiss will be granted and the proceeding dismissed without prejudice.

IV. CONCLUSIONS OF LAW.

The case should be dismissed without prejudice on the basis that the Final Audit Determination was not issued by a "designated ED official" with the authority to issue final audit determinations subject to 34 C.F.R. Part 668, Subpart H.

V. DETERMINATIONS AS TO THE PROPOSED FINDINGS OF PACT AND CONCLUSIONS OF LAW.

SFAP and ACMDC have filed briefs which, in part, contained proposed findings and conclusions of law. Such briefs, insofar as they can be considered to have contained proposed findings and conclusions have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the grounds that they are in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

VI. ORDER.

Based on the foregoing findings and conclusions, IT IS ORDERED, That the Respondent's Motion To Dismiss is GRANTED and the proceeding is DISMISSED without prejudice.

John F. Cook
Administrative Law Judge

Issued: December 30, 1993
Washington, D.C.

[Footnote: 1](#) ¹ SFAP was formerly known as the Office of Student Financial Assistance (OSFA).

[Footnote: 2](#) ² Because of variations in fact situations it is difficult to be sure that a ruling in one case will fully apply to another. Therefore a ruling in this case should not be delayed.

[Footnote: 3](#) ³ The present case is also quite similar to several other cases, except that in those cases, the designated ED official had previously purported to delegate his or her authority to the person who signed the FAD or other document. In all of these cases, the tribunal held that such delegation was ineffective because the original delegation to the designated ED official prohibited further redelegation. Furthermore, in all of these cases, the tribunal dismissed the case without prejudice. See *In the Matter of Long Beach College of Business*, Docket No. 92-132SP, U.S. Dep't of Education (Order of Dismissal) (November 30, 1993); *In the Matter of Southeastern University*, Docket No. 9361-SA, U.S. Dep't of Education (Order of Dismissal) (October 22, 1993); *In the Matter of International Career Institute*, Docket No. 92-144-SP, U.S. Dep't of Education (Order of Dismissal) (December 1, 1993); *In the Matter of Chauffeur's Training School*, Docket No. 92-113-SP, U.S. Dep't of Education (Order of Dismissal) (December 3, 1993); *In the Matter of Cincinnati Metropolitan College*, Docket No. 93-22-ST, U.S. Dep't of Education (Decision and Order on Motion to Dismiss) (August 16, 1993).

[Footnote: 4](#) ⁴ In *Lincoln Technical Institute*, the tribunal found that the ratification was effective because "the Acting Assistant Secretary that ratified the prior actions of the Chief of the Audit Review Branch had the power to do the act at the time of the original action . . ." *Lincoln at 11*. Such is not the case here.

[Footnote: 5](#) ⁵ In the *Southeastern University* case Judge Canellos stated at pages 2 - 3:

*The position of the "Designated ED official" is not merely a titular one. The incumbent of that position personally possesses the discretionary powers of the Secretary, as directly delegated to him or her from the Secretary with the lone restriction that those powers may not be redelegated by the delegatee to yet another, third party. The Supreme Court has spoken on the issue of the importance of the role of a decisionmaker in the administrative process. See *Morgan v. United States*, 298 U.S. 468 (1936) and its progeny. [See footnote 1/1](#) See also, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U. S. 402 (1971) . It is also abundantly clear that one of the most important roles of the judicial official is to enhance the integrity of the administrative process.*

[Footnote: 1/](#) ^{1/} *Morgan v. United States*, 304 U.S. 1 (1938), *United States v. Morgan*, 307 U.S. 183 (1939), *United States v. Morgan*, 313 U. S. 409 (1941) .