IN THE MATTER OF HEALTH CARE TRAINING INSTITUTE,
Respondent.

Docket No. 92-42-ST
Student Financial Assistance Proceeding

ORDER RE JURISDICTION AND SCOPE OF APPEAL

This is an action initiated by the Office of Student Financial Assistance, United States Department of Education (OSFA) to terminate the eligibility of Health Care Training Institute (Health Care) to participate in student financial assistance programs authorized by Title IV of the Higher Education Act of 1965 (HEA), as amended 20 U.S.C. § 1070 et seq. Further, OSFA levied fines against Health Care in the amount of $831,000 under 20 U.S.C. § 1094(c)(2)(B) (1991) and 34 C.F.R. § 668.84 for the same purported violations of Title IV of the HEA.

Under 20 U.S.C. §§ 1094(c)(1)(D) and (c)(2)(B)(i), Congress provided a hearing on the record for any institution where the Secretary seeks to terminate the institution's eligibility to participate in the student financial assistance programs for violations of the programs and/or to impose a civil penalty for violations of the programs.

In the present proceeding, the parties agree that the administrative law judge may determine whether Health Care should be terminated from its eligibility to participate in the student financial assistance programs. They disagree, however, whether the administrative law judge has the authority to determine whether the scope of Health Care's March 25, 1992 request for a hearing encompasses the proposed fines by OSFA and, if such authority exists, whether the request for a hearing includes the proposed fines.

With respect to the authority issue, Health Care asserts that the administrative law judge has the authority to determine jurisdictional issues such as whether its March 25, 1992 request for a hearing encompasses the proposed fines.

OSFA counters that, under the "framework" of 34 C.F.R. § 668.84, the administrative law judge lacks the authority to resolve this issue. OSFA asserts that it, through its designated department

official,See footnote 1 1/ has the authority to resolve this jurisdictional issue regarding the breadth of the hearing request and other jurisdictional issues such as the timeliness of an institution's request for a hearing.

According to OSFA, 34 C.F.R. § 668.84 provides that an institution's request for review shall be received by the designated department official (OSFA) and that the designated department official sets the time and place for the hearing. These two duties impart, in its view, the authority to decide jurisdictional issues since a determination on a jurisdictional matter adverse to the institution by the designated department official will not require this official to refer the matter

over to an administrative law judge for a decision on the merits. In other words, "since [t]he the ALJ's authority is created by the designated department official's referral [and] [i]f there is no referral by OSFA, there is no authority in the ALJ" to resolve jurisdictional issues. Where, as here, the March 25, 1992 request for a hearing was referred over to an Administrative Law Judge, OSFA contends that its referral letter was limited to the termination action and did not include the fine action. Therefore, the administrative law judge, in OSFA's view, does not have the authority to decide whether the scope of the March 25, 1992 request for a hearing includes the fine aspect.

Under 20 U.S.C. §§ 1094(c)(1)(D) and (c)(2)(B)(i) (1988), Congress provided that the Secretary may terminate the eligibility of an institution and impose a civil penalty for violations of the HEA provisions determined "after notice and opportunity for a hearing on the record." A hearing on the record may be presided over by the "agency." 5 U.S.C. § 556(b)(1). In the context of the Department of Education, it is the Secretary who is the agency and, therefore, resolves all issues including jurisdictional issues such as the issue raised herein regarding the scope of Health Care's request for a hearing. 20 U.S.C. § 3471(a).

In lieu of a hearing before the "agency," the Administrative Procedure Act authorizes only an administrative law judge to conduct the hearing and render a decision. 5 U.S.C. §§ 556(b) and 557(b).See footnote 2 2/ Thus, no official of the agency, other than an

administrative law judge, may make determinations regarding actions or cases before the agency that are of the nature which would be properly before the "agency" where the agency does not utilize administrative law judges. Any such determinations by such officials are void as they are contrary to the Administrative Procedure Act.

In the context of the Department of Education, the Secretary promulgated regulations to provide for a hearing on the record before an administrative law judge for fine and termination proceedings. 34 C.F.R. § 668, Subpart G. Thus, by virtue of the Administrative Procedure Act and 34 C.F.R. § 668 Subpart G, the administrative law judge is the only authorized individual within the Department to resolve jurisdictional matters regarding requests for a hearing on the record in fine and termination proceedings.

Such a view is fully consistent with the regulations under 34 C.F.R. § 668 Subpart G. The regulations do not assign the resolution of jurisdictional or other issues to the designated department official. Sections 668.84(b)(1)(iii) and 668.86(b)(1)(iii) of 34 C.F.R. provide that the notice of fine and termination proceedings inform the institution that its request for a hearing must be submitted to the designated department official. This requirement serves two functions. First, it performs a ministerial function as it is necessary to designate some official to receive the request. Such a task, however, does not, and cannot as explained above, confer authority to pass upon jurisdictional issues. Second, this regulation permits OSFA to revisit its proposed termination or fine action for settlement purposes prior to procuring the services of an administrative law judge. Thus, this regulation offers no support for OSFA's position.

Sections 668.84(b)(3) and 668.86(b)(3) of 34 C.F.R. provide that the designated department official sets the date and place for the hearing in the fine and termination proceedings. Like the

receipt of notice regulation, the time and place regulation does not suggest that the litigant, OSFA, has the authority to resolve jurisdictional issues. At the time of promulgation, the Secretary feared, apparently, that an out-of-house administrative law judge may not accede to OSFA's position regarding the time and place of the hearing and thereby increase the Department's

costs of litigation.See footnote 3 3/ Thus, OSFA's conclusion, based upon these two regulations, represents a torturous and unsupported result.

OSFA cites In re Oglala Lakota College, Dkt. No. 90-57-R, U.S. Dep't of Education (Jan. 15, 1991)See footnote 4 4/ for the proposition that the Office of Administrative Law Judges did not have jurisdiction to consider the matter of a late filed appeal under the General Education Provisions Act. It then disputes whether the administrative law judge had the authority to consider the matter in the first place and argues that--

the institution filed its request for review directly with [the] OALJ, not the designated department official, in violation of the appropriate regulations. Had the application been sent to the designated department official, as required by the regulations, OSFA submits the matter never would have been before OALJ.

OSFA misinterprets Oglala Lakota. It is a final decision of the Secretary and follows the 200-year judicial precedent established by Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) that a tribunal has the authority to determine whether it has the authority to hear the matter before it. E.g., United States v. Van Cauwenberghe, 934 F.2d 1048, 1059 (9th Cir. 1991) (citing United States v. United Mine Workers, 330 U.S. 258, 292 n.57 (1947); Stoll v. Gottlieb, 305 U.S. 165, 171-72 (1938)). In Butz v. Economou, 438 U.S. 478, 513 (1978), the Court recognized that "[t]here can be little doubt that the role of the . . . administrative law judge . . . is 'functionally comparable' to that of a judge" and that "adjudication within a federal administrative agency shares . . . the characteristics of the judicial process." Thus, Oglala Lakota was correctly decided and the judicial precedent in which the tribunal decides the scope of its authority applies with equal force in administrative proceedings.

As jurisdiction has been established, the remaining issue is whether the scope of the appeal submitted by Health Care encompasses the fine imposed upon the institution.

OSFA maintains that its letter of March 20, 1992, gave Health

Care notice that it was initiating two separate and distinct proceedings--a termination proceeding and a fine proceeding in the amount of $831,000. Further, it asserts that Health Care's request for review of March 25, 1992, was limited solely to the termination proceeding and, therefore, this proceeding does not include an appeal of the $831,000 fine.

OSFA's March 20, 1992 letter charged Health Care with four program violations.See footnote 5 5/ These four purported violations formed the basis for the proposed termination of its eligibility to participate in the student financial assistance programs in Part I of the letter. Two of the

purported violations also formed the basis for the proposed fine in the amount of $831,000 in Part II.

It is unclear from OSFA's notice whether OSFA initiated a unitary proceeding with two penalties (i.e. termination and fine) which required the institution to submit one request for a hearing or whether OSFA initiated two separate proceedings (i.e. a termination and a fine proceeding), each of which was independent of the other, carried its own penalty, and required a separate request for a hearing. The letter does not specify that the termination and fine actions were to be treated in a separate and distinct manner. Moreover, the fine aspect in the letter began with the statement that "OSFA intends to fine HCTI $831,000 based on the violations set forth in Part I [the termination aspect] of this letter" which suggests that the process is unitary with two types of penalties and that the appeal of the termination necessarily incorporates the appeal of the fine. The letter is also not sufficiently clear in explaining that an appeal of the termination aspect alone would result in the nonappeal of the fine aspect.

It is well established that a policy of liberal construction governs the interpretation of pleadings as well as notices of appeal. E.g., Johnson v. Reagan, 524 F.2d 1123, 1125 (9th Cir. 1975); Trust Co. Bank v. U.S. Gypsum Co, 950 F.2d 1144, 1148 n.6 (5th Cir. 1992).

Here, Health Care's request for a hearing dated March 25, 1992,
stated in pertinent part--

This is to serve as the request by Health Care . . . for a hearing on the record before an administrative law judge under the provisions of 34 CFR §668.86 and 668.88, to contest the termination action proposed in Molly Hockman's

letter to the institution dated March 20, 1992.

The regulations are not clear as to whether an institution which has received notice of the Department's intention to terminate has the option of both submitting written material and requesting a hearing on the record, or must choose one or the other. However, unless the Department withdraws its intent to terminate letter, HCTI requests a hearing on the record. (emphasis added to last sentence.)

It is apparent from the request for a hearing that Health Care treated OSFA's notice as a unitary proceeding as it sought the withdrawal of the intent to terminate letter. While such a view is erroneous as a matter of law, the request reflects, nonetheless, an intent to include the fine aspect. In addition, Health Care's request placed OSFA on notice that Health Care was contesting the four purported program violations. Such action implies that Health Care was contesting the fine aspect as well as the termination aspect since these purported program violations are the basis for both of the proceedings. This is a reasonable inference since the magnitude of the fine would have the same effect on Health Care as a termination--it would cause Health Care to cease its participation in the student financial assistance programs.See footnote 6 6/

The inclusion of the fine aspect with the termination aspect in this proceeding is consistent with the Secretary's function in overseeing and policing the student financial assistance programs. A

hearing on the record which includes both aspects will result in a determination of the facts and law by or on behalf of the Secretary regarding the purported program violations and reflect the Secretary's conclusion regarding the sanctions, if any, which are appropriate under the circumstances in this case. The exclusion of the fine aspect would render moot, for all practical purposes, any decision by or on behalf of the Secretary regarding the termination aspect since a fine of this magnitude would, in all likelihood, bankrupt the institution or cause it to fail the financial responsibility standards imposed by the Secretary. Thus, the inclusion of the fine aspect will enable the Secretary to arrive at a fair and just determination in all matters affecting the institution.See footnote 7 7/

Accordingly, it is HEREBY ORDERED that this tribunal has the authority to determine the extent of its jurisdiction and the scope of the request for a hearing on the record by Health Care encompasses the fine assessed against the institution.

Allan C. Lewis
Administrative Law Judge

Issued: September 16, 1992
Washington, D.C.

Footnote: 1 1/ Until a recent reorganization, the designated department official was the Director of the Division of Audit and Program Review. As of August 12, 1992, the relevant duties of the Director pertinent herein were assumed by a newly created position, the Director of Compliance and Enforcement Division. Delegation Doc. EPS/EPSP/181.

Footnote: 2 2/ This decision becomes the decision of the agency unless

there is an appeal and, if appealed, the "agency has all the powers which it would have in making the initial decision." 5 U.S.C. § 557(b).

Footnote: 3 3/ As a matter of practice during the last three years in which the Department had in-house administrative law judges, a subordinate of the designated department official requested, with few exceptions, at the time of the assignment of the case, that the administrative law judge set the date and place of the hearing at the mutual convenience of the parties.

Footnote: 4 4/ This initial decision became the final decision of the Secretary on April 15, 1991.

Footnote: 5 5/ The purported violations were a failure to administer properly its ability-to-benefit test, an excessive cohort default rate without diligently implementing Appendix D, a failure to provide exit counseling, and a failure to meet standards required of a fiduciary.

Footnote: 6 6/ The parties dispute various purported oral statements made during an April 6, 1992 conversation between an employee within OSFA and counsel for Health Care regarding

the adequacy or inadequacy of Health Care's request for a hearing of March 25, 1992. In general and as followed here, the adequacy of the written request is determined by the document.

Footnote: 7 *7/ In many instances in which institutions have contested the amount of the fine proposed by OSFA, the final decisions by the Secretary have significantly reduced the amount of the fine. E.g., In re Southern Inst. of Business and Technology, Dkt. No. 90-62-ST (Fin. Dec. May 28, 1991) (a $65,000 proposed fine was reduced to an imposed fine of $30,000); In re Katie's Sch. of Beauty Culture & Barbering, Dkt. No. 90-68-ST (Fin. Dec. April 22, 1991) (the $175,000 proposed fine was reduced to a fine imposed of $3,000); In re Hartford Modern Sch. of Welding, Dkt. No. 90-42-ST (Fin. Dec. Feb. 25, 1991) (the $300,000 proposed fine was reduced to a $105,000 fine).*