IN THE MATTER OF CAREER DEVELOPMENT INSTITUTES,
Respondent.

Docket No. 93-8-O
Student Financial Assistance Show Cause Proceeding

DECISION

On January 28, 1993, the Office of Student Financial Assistance of the Department of Education (ED) imposed a termination action against Career Development Institutes (CDI). This action was taken pursuant to a limitation agreement (LA) entered into between ED and CDI. The LA provided that if ED sought to terminate the agreement, CDI would be entitled to a show cause hearing before a Department official. In response to the notice of termination, C-I requested an opportunity to show cause why the termination was not appropriate.

Pursuant to the February 2, 1993 Delegation of Authority to conduct a show cause hearing and issue a final decision in this case, I commenced a hearing in Washington, D.C., on February 3, 1993. At this hearing, CPI was represented by Richard Fulton, Esq., of White, Verville, Fulton and Saner, while Ed was represented by Steven Finley, Esq., of the office of General Counsel. The proceeding was transcribed by a court reporter. Supplemental briefs were filed by troth parties on February 17,1993.

During the evidentiary portion of the hearing, CDI made two requests which I labelled a Motion for Appropriate Relief and a Motion for Extended Hearing Rights.

At Issue in the Motion for Appropriate Relief was whether ED had erred in terminating the eligibility of CDI under the authority of a waiver provision contained within the LA prior to the completion of the show cause precedures established within the agreement, Counsel for ED argued that the language contained within the waiver provision could be construed so as to permit a show cause proceeding to take place either before or after the imposition of the termination Counsel for CDI argued that the waiver clause was clear and unambiguous, permitting such action to only take place after a show cause hearing, and, therefore, the termination action was untimely.

With regard to the Motion for Appropriate Relief, I found that the instant dispute was governed by contract law and the rules of waiver. The wording of a waiver clause must be clear and unambiguous. Here, the language used was boiler plate. Despite evidence that the agreement, as a whole, was subject to bargaining by both parties, it is a standard construct of contract interpretation that in matters of unclear or ambiguous phrasing, such clauses should be construed against the drafting party, here, the Department.

Regardless, a plain reading of the waiver clause indicates that a hearing should take place prior to termination. This interpretation was also supported by general departmental practice, excepting emergency actions, to provide a hearing prior to the implementation of an action. The inclusion of a provision that such a show cause hearing must be requested within 15 days also indicated that expedition prior to action is aconsideration. Moreover, it is axiomatic that the law

does not favor waiver of due process rights. Therefore, in light of the above, I found that the Department's action was taken prematurely and I ordered the Department to reinstate CDI's eligibility until the completion of the show cause proceeding. This order was issued from the bench on February 4, 1993, and was effective immediately.

As to the Motion for Expanded Hearing Rights, CDI argued that it was entitled to a hearing on the merits of the actions the Department alleges constituted a breach of the limitation agreement. I found that CPI effectively waived its rights to demand a full hearing as envisioned in the limitation, suspension and termination proceedings of 20 USC § 1094 and 34 C.F.R. Part 668. Further, I found that some hearing was necessary to secure the due process rights of CDI . Therefore , I ordered both parties to submit briefs, to me and to opposing counsel by February 16, 1993. Briefs were timely submitted and were considered by me in reaching this decision.

A threshold question in weather the Limitation Agreement (LA) and Escrow Agreement (EA), which was executed by the parties contemporaneously with the LA, are binding agreements. I find that they are, each standing independently and representing the intent of the parties. The LA explicitly provides for a waiver of the full hearing rights as provided in 20 U.S.C. § 1094 and 34 C.F.R. Part 668, and substitutes a show cause proceeding if a claim is made that CDI materially violated the LA. As the Deciding Official, this matter is within my jurisdiction, is properly before me, and my decision constitutes final agency action. (See paragraph 13 of the LA).

In accordance with paragraph 12 of the LA, when interpreting CDI's compliance with the LA, the concept of "substantial compliance" in to be applied. As such, if errors are discovered, C. D. I. will not be in default if such violations are unintentional, few in number and promptly corrected.

As to the substantive issue before me, ED alleges that CDI materially breached paragraph l.g. of the EA which required COT to give, within 10 days, the Escrow Agent a list of each currently enrolled student, as well as a list of the refunds due. Such refunds due were labelled as "Transition Refunds." The CDI apparently interpreted that to mean, or stated that their interpretation was, that they would report those refunds that they knew about by the 10th day. Subsequently discovered refunds - discovered in the sense that they were notified by their school campuses, but were still existing at the time the escrow arrangement was entered into - would not be counted and not forwarded. Rather, they would be carried on the books of the schools and paid directly by CDI.

I find CDI's interpretation to be totally without merit. It appears clear to me that the cited provision required a listing of all the refunds due at the time. The school acknowledged that they did not report all those refunds. I, therefore, find there is a breach of the agreements.

I next turn to whether the breach, as enumerated above , constitutes a material breach as defined in paragraph 12 of the LA. upon examination of the facts in this case, I find the following: First, there is no evidence that this was an intentional violation on the part of CDI; intentional in the sense of wrongdoing. CDI claims not to have had an intent to violate the agreement and I find no evidence to the contrary. My finding is bolstered by the fact that CDI did report the refunds due to its auditor (who, coincidentally, was the Escrow Agent) and the refunds did appear on the

books of CDI as a payable. Therefore, I find no wrongful intent on the part of CDI. Second, regarding the number of the violations, although broken into its component parts there are a number of refunds that are misreported - in essence it is a singular act of failure to report and not a case of numerous" instances of failing to report. Third, the LA provides that if a problem is rectified upon notice it would not equate to a mater$al breach. I note that immediately upon being told that their interpretation was wrong, CDI inquired of the Department how the problem could be corrected. They were told to contact one Ms. Sedicum, whom they could not reach. In the time intervening thereafter, they could not obtain information as to what to do. I also note that CDI claims, without rebuttal, that they had constantly informed the Department that they were anxious to comply with all aspects of the agreements and would do anything the Department asked them to do and sought advice on how to properly implement the agreements.

Finally, I note that the LA also provides for a standard of substantial performance, and I find that standard has been met here.

In view of the foregoing, noting that a breach, per se, occurred, I find that the breach is not a material breach as such term is contemplated in the agreements. As a consequence, this breach will not support an action to terminate or otherwise modify the agreement.

Ernest C. Canellos

Washington, D. C .

March 2, 1993