IN THE MATTER OF PHILADELPHIA TRAINING CENTER AND AFFILIATES, Respondent.

Docket No. 94-12-EA
Emergency Action Proceeding

DECISION

On January 5, 1994, the Office of Student Financial Assistance Programs, U.S. Department of Education (ED), imposed an emergency action against the Philadelphia Training Center and Affiliates (PTC) of West Conshohocken, Pennsylvania, in accordance with 20 U.S.C. § 1094(c)(1)(G) and 34 CFR § 668.83. PTC requested an opportunity to show cause why the emergency action is unwarranted.

Pursuant to the Delegation of Authority from the Secretary authorizing me to conduct proceedings and issue final decisions in circumstances where educational institutions request an opportunity to show cause why an emergency action is unwarranted, I conducted a hearing in Washington, D.C., on January 12-14, 1994. At the hearing, PTC was represented by Stanley R. Wolfe, Esq., and Joel M. Sweet, Esq., of Berger and Montague, P.C., Philadelphia, Pennsylvania, while ED was represented by Steven Z. Finley, Esq., and James O'Neill, Esq., from the Office of the General Counsel, ED, Washington, D.C. Witnesses testified under oath, documentary evidence was submitted, and counsel argued regarding the merits of the case at bar. The proceeding was recorded by a court reporter and a transcript was made and provided to both parties. Prior to the issuance of this written decision, on January 21, 1994, I issued a Decision and Order by which I disapproved and set aside the emergency action. This decision confirms that action.

ED's contention throughout this case has been that this emergency action is appropriate due to PTC's four alleged violations of Title IV, Higher Education Act of 1965, as amended (HEA). First, ED alleges that PTC violated the prohibitions established in a prior

emergency action, dated December 29, 1993, by continuing to process student loans after that date. Second, PTC is alleged to have violated ED's financial responsibility regulations; ED further claims that the schools under PTC's control are on the "brink of precipitous closure." Third, PTC is alleged to have drawn-down Pell Grant funds prior to its being entitled to such funds. Finally, ED alleges that the owners of PTC, Rimona and Richard Friedberg, violated the terms of ED's nonprocurement suspension regulations, to which they were subject. In essence, ED alleges that the totality of these violations of program regulations clearly shows that PTC does not properly administer the Title IV Programs, and has violated its fiduciary duties. See 34 C.F.R. § 668.82.

In its first allegation, ED argues that PTC was in violation of the December 29, 1993 Emergency Action for failing to advise the Chicago campus of the operational prohibitions mandated by the emergency action and for the processing of student loans on January 3 and 4, 1994. See 34 C.F.R. § 668.83(d)(1). To establish this charge, ED showed that some checks were, in fact, indorsed after the imposition of the emergency action. PTC admitted that some checks were

indorsed on January 3, but demonstrated that no checks were indorsed on January 4. Moreover, upon advice of counsel, the checks which were indorsed were not cashed but were set aside for safekeeping. As a threshold matter, I question whether the mere indorsement of checks under the circumstances enumerated above would constitute a violation of 34 C.F.R. § 668.83 (d)(1).

At the hearing, I questioned ED's handling of this issue. On December 30, 1993, the last business day of the year, counsel for PTC met with ED officials and received notice of the Emergency Action. Discussions ensued which included notice that PTC had appealed their revocation of licensure and that, by operation of state law, the state revocation would be stayed pending the outcome of the appeal; as a result, the revocation could not form the basis of an emergency action. Counsel supplied ED with evidence of such appeal by facsimile transmission that same day. Sometime during January 3, the first business day of the new year, the checks referred to above were indorsed, but subsequently set aside pending the emergency action.

By definition, an emergency action necessitates immediacy. ED claims that PTC was in violation because it did not diligently notify its branch campuses of the emergency action. But, under the undisputed chronology of events described at the hearing, it is difficult to find lack of diligence on the part of PTC. Rather, if lack of diligence is the applicable standard, one must ponder ED's own efforts. PTC received notice of the emergency action on December 30 and is being held accountable for actions on January 3, the next business day thereafter. However, it is clear that prior to the time of the claimed violation, ED was sufficiently on notice that the basis for its emergency action was no longer existent. Despite this fact, ED did nothing to withdraw the action until January 5, claiming that it was awaiting confirmation of the appellate docket number so it could verify the documentation provided by PTC's counsel. Given the immediate and telling effect of these facts, I announced that I would not consider this charge in my decision on the enforceability of this emergency action.

The second basis for the emergency action is PTC's alleged violations of ED's financial responsibility requirements, violation of which could pose an imminent danger of loss of federal funds and of PTC's ability to provide the education for which its students have paid. ED presented evidence that, for the year ending December 31, 1992, PTC's ratio of current assets to current liabilities was 1-to-2.1. ED's standard of financial responsibility requires a 1-to-1 current ratio. This figure represented a deteriorating financial condition when compared to the previous year. Due to the timing of the emergency action, the current ratio for 1993 was unavailable. In addition, PTC's net worth was negative $5.4 million at the end of 1992. ED presented some evidence to the effect that the net worth as of December 17, 1993, was slightly better at negative $4.6 million.

PTC offered its own financial figures, taking into account the effect of the owners' bankruptcy and other factors. PTC claimed that these figures were more current and representative of its financial condition at the end of 1993. In addition, they claimed there was an improving financial condition with an operating net profit for 1993.

Both parties painted a different picture of PTC's financial condition at the time of the initiation of the emergency action. Clearly, there is a dispute of fact as to such financial condition; however, resolution of such dispute is outside the purview of my jurisdiction. Suffice it to say, I find that

ED had reliable information upon which they could conclude that PTC was in violation of the financial responsibility requirements. In light of the evidence presented and in view of PTC's argument, however, I cannot find that the likelihood of loss of federal funds outweighs the importance of following the due process procedures for limitation, suspension or termination contained in 34 C.F.R. Part 668, Subpart G.

The third allegation is that PTC claimed Pell Grant funds significantly in advance of its justification for such funds and that it used these funds for its own purposes. The sole evidence relied upon by ED for this claim is a brief letter, dated December 1, 1993, from William Leach, Vice-President of Financial Aid, to Dr. Ed Stranix, former CEO of PTC, stating:

> Upon assuming responsibilities as Vice President of financial aid [on November 22, 1993] . . . I became aware that PELL Grant funds were accelerated in the amount of 1.2 million dollars. . . . In assuming my new responsibilities, I am in no way accepting responsibility for any transfer of funds or any of these over expenditures of Title IV funds as of the date of this memo.

Ron Lipton, ED's Designated Department Official for emergency actions, testified that this letter was taken at face value and not verified by ED; no other evidence was available to support the allegation. PTC witnesses testified that they did not accelerate Pell draw-downs. Moreover, they testified that since the schools are on a Pell Grant reimbursement system whereby the school only receives Pell Grant funds after ED verifies that the school has earned the funds, there is no risk of loss. Hence, PTC asserts that this allegation cannot support an emergency action.

I find that a self-serving letter from a new employee to his boss disavowing responsibility for some prior and generally unidentified draw-down, without any further corroboration, is insufficient to constitute a reasonable basis for believing a violation of the Title IV regulations occurred. At best, this allegation, which if substantiated could constitute a serious violation, seems to have been levied prematurely.

As to the fourth allegation, there was uncontroverted evidence that Rimona Friedberg received a Notice of Governmentwide Suspension and Proposed Governmentwide Debarment from Federal nonprocurement transactions, effective November 27, 1992. ED took this action pursuant to 34 C.F.R. § 85.411 and 34 C.F.R. § 305(a)(1), based on Mrs. Friedberg's conviction in the U. S. District Court for the Eastern District of Pennsylvania, for tax fraud. That same day, ED notified Richard Friedberg that he was suspended from Federal nonprocurement transactions because of his indictment for similar offenses. Subsequently, on May 28, 1993, Richard Friedberg was likewise convicted. There was no evidence presented that ED pursued a debarment action against either individual. I have reviewed the debarment regulations, specifically 34 C.F.R. § 85.115 and 34 C.F.R. § 85.305, and I question why debarment action was not acted upon. Since ED has stated that one of the basic premises underpinning its case in this emergency action is that the Friedbergs are not the type of people who should be involved in the Title IV programs, ED's failure to pursue debarment actions is clearly inexplicable.

ED argues, however, that the limitations imposed by the suspension action were extended beyond the normal 60-day period by an agreement between the Friedbergs and ED, which

agreement constitutes a voluntary exclusion. ED's only evidence of this extension was letters from the Friedbergs, dated January 13, 1993, stating that they were not participating in financial aid at PTC, but that they would continue as owners and would carry out certain detailed functions. ED interprets these letters to indicate that the Friedbergs agreed to continue to comply with the terms of the suspension, thereby constituting a voluntary exclusion. I disagree that the evidence supports such an interpretation. In particular, I find it significant that ED never responded to or acknowledged these letters, yet argues that there was an enforceable agreement between ED and the Friedbergs. See generally, 34 C.F.R. § 85.315 and C:GPA1-105, Nonprocurement Debarment and Suspension, dated 9/25/91, Article X.

The letters from the Friedbergs constitute, at best, an offer to comply with self-imposed limitations in dealing with the schools and to note a shift in their roles within the corporation. My review of the correspondence reveals that the offered limitations fall far short of a true suspension. Furthermore, there was no evidence presented that the Friedbergs breached even these limitations in any material way. As a consequence, I find that this allegation fails as an underlying basis for an emergency action.

34 C.F.R. § 668.83(c) provides that an emergency action is appropriate if: (1) there is reliable information that an institution is violating the provisions of Title IV of the HEA; (2) immediate action is necessary to prevent the misuse of federal funds, and (3) the likelihood of loss outweighs the importance of adherence to the procedures for limitation, suspension and termination actions.

Upon my review of the evidence, and in consideration of respective arguments of counsel, I find that the three-prong test for the imposition of an emergency action, enumerated in 34 C.F.R. § 668.83, are not established and that PTC has met its burden. As discussed above, three of the allegations are not supportable by credible evidence. As to the fourth, there is evidence that PTC is not in compliance with ED's financial responsibility criteria. On the facts of this case, however, I cannot conclude that the risk of loss is such as to outweigh the importance of adhering to the procedures for termination actions. I base this determination on: (1) the conflicting evidence concerning PTC's financial condition; (2) such condition has existed for a number of years with ED taking no action to terminate PTC's participation in the Title IV Programs; and (3) financial records indicating that PTC's operations are currently profitable. On these facts, it is clearly inequitable to take the extraordinary measure of emergency action with its extremely detrimental effects, without resolution of the dispute as to PTC's financial condition.

Finally, PTC argued that ED was engaged in a conspiracy to force PTC to close so as to prevent it from pursuing its appeal to the United States District Court in Philadelphia, Pennsylvania. That case involves PTC's appeal of its cohort default rate, and apparently, has progressed further in the judicial process than any other appeal of its type. PTC proffered no direct evidence as to such conspiracy. It argued, however, that the very nature of ED's actions offer no other explanation except that ED wished to reduce its exposure in PTC's District Court appeal. Although I agree that some of ED's actions could be described as aggressive, some of its allegations unsupported, and that some might ponder the motivation of the ED officials who were involved, I find no direct evidence of the conspiracy claimed by PTC.

In summary, I find that PTC has met its burden of showing why the emergency action is unwarranted. My determination that an emergency action is not appropriate, however, should not be interpreted as an indication of my opinion that no adverse action is appropriate in this case; that question is beyond the scope of my jurisdiction. ED has raised issues which could constitute the basis for the potential termination, limitation or suspension of PTC from participation in Title IV programs, however, the efficacy of such action is best resolved by a trier-of-fact assigned to hear a termination proceeding and is outside my purview.

Consequently, I hereby confirm that I **DISAPPROVE and SET ASIDE** the emergency action.

Judge Ernest C. Canellos

Dated: January 27, 1994
Washington, D.C.