IN THE MATTER OF CAREERCOM COLLEGE OF BUSINESS, Respondent.

Docket No. 94-159-SP
Student Financial Assistance Proceeding

DECISION

Appearances: Jonathon C. Glass, Esq., Dow, Lohnes & Albertson, of Washington, D.C., for CareerCom College of Business.

Steven Z. Finley, Esq., Office of the General Counsel, for the Office of Student Financial Assistance Programs, United States Department of Education.

Before: Judge Richard F. O'Hair

CareerCom College of Business (CareerCom) participates in the various student financial assistance programs authorized under Title IV of the Higher Education Act of 1965, as amended (HEA). 20 U.S.C. § 1070 *et seq.* and 42 U.S.C. § 2751 *et seq.* These programs are administered by the Office of Student Financial Assistance Programs (SFAP), U.S. Department of Education (ED). On July 26, 1994, SFAP issued a Final Program Review Determination (FPRD) for CareerCom. The findings in the FPRD are based on the program review report for the 1990-91 and 1991-92 award years. CareerCom filed a request for review on September 12, 1994. Both parties have filed submissions to this tribunal in response to the Order Governing Proceedings.

SFAP contends that CareerCom must refund to ED and to lenders all Title IV funds disbursed by the school during the 1990-91, 1991-92, and 1992-93 award years on the bases that 1) CareerCom did not respond to the FPRD, and 2) the institution failed to provide to ED a closeout audit after the school closed in February 1993. Additionally, SFAP argues that CareerCom's bankruptcy proceeding currently pending before the U.S. Bankruptcy Court for the Middle District of Pennsylvania does not affect SFAP's right to establish a liability against CareerCom for its alleged violations of the Title IV statutes and regulations.

In its response, CareerCom admits that it failed to submit a closeout audit, but asserts that the FPRD violates the automatic stay provisions of 11 U.S.C. § 362(a) that became effective when the school filed for bankruptcy. Furthermore, CareerCom claims that because the school has closed, this proceeding is moot under the Secretary's holding in *In the Matter of Bliss College*, Dkt. No. 93-15-ST, U.S. Dep't of Educ. (Decision of the Secretary) (Feb. 23, 1994).

When CareerCom closed in February 1993, it failed to submit a closeout audit. In *In the Matter of National Broadcasting School*, Dkt. No. 94-98-SP, U.S. Dep't of Educ. (Dec. 12, 1994) (citing *In the Matter of Macomb Community College*, Dkt. No. 91-80-SP, U.S. Dep't of Educ. (May 5, 1993)), I held that when an institution that participates in the Title IV programs fails to

submit a closeout audit after it closes, it becomes liable for all Title IV funds disbursed since the last audit. The FPRD in *National Broadcasting School*, as in the present case, also alleged that the school had not responded to the program review. In both cases, however, the school's failure to submit the closeout audit required by 34 C.F.R. § 668.26See footnote 1 *1* was sufficient to establish the liability. As a result, CareerCom is liable for all Title IV funds disbursed during the 1990-91, 1991-92, and 1992-93 award years.

Despite CareerCom's assertions to the contrary, this proceeding is not barred by the automatic stay provisions of 11 U.S.C. § 362(a). In *In the Matter of MTA School*, Dkt. No. 92- 92-SP, U.S. Dep't of Educ. (June 30, 1994), I held that 11 U.S.C. § 362(b)(4) provides an exemption from the automatic stay for governmental units that are attempting to enforce their police or regulatory powers. I also discussed *Board of Governors of the Federal Reserve System v. MCorp Financial, Inc.*, 502 U.S. 32 (1991), wherein the Supreme Court refused to apply the automatic stay provisions to ongoing, nonfinal, administrative proceedings by the Board of Governors that were initiated to determine whether the defendant corporation had violated specific statutory and regulatory provisions. Finally, I noted that prior decisions of this tribunal, relying on § 362(b)(4), had held that the automatic stay provision does not apply to ED's efforts to determine whether an educational institution is financially liable for purported violations of the statutes and regulations governing the Title IV programs. See *In the Matter of First School for Careers*, Dkt. No. 89-60-S, U.S. Dep't of Educ. (Jan. 29, 1990). As a result, I concluded that ED was exempt from the automatic stay under § 362(b)(4) and thus was free to pursue administrative proceedings in furtherance of its police and regulatory powers to determine whether the institution had violated statutory and regulatory provisions governing the proper administration of Title IV programs. *MTA* at 2-3.

That analysis is equally applicable to the instant case. I note, however, that § 362 was amended in 1990, subsequent to the decision in *First School for Careers,* by the addition of § 362(b)(16), which carves out a specific exemption from the automatic stay provision for actions by ED regarding the eligibility of the debtor to participate in programs authorized under the HEA, otherwise referred to as termination actions. It can be argued that since Congress specifically exempted termination actions, the fact that audit and program review actions were not addressed in the 1990 amendment implies that they are subject to the automatic stay provisions. Nonetheless, the better argument supports the proposition that audit and program review actions were always exempt from the automatic stay provisions. In support of this interpretation, I note, first, that the Supreme Court's refusal in *MCorp Financial* to apply the automatic stay to certain administrative proceedings was rendered after the 1990 amendment.

Moreover, subsequent decisions by other federal courts have carefully analyzed the difference between actions by federal administrative agencies to enforce their police or regulatory powers, including actions to determine the liabilities associated with regulatory violations, which are exempt, and actions by those agencies to enforce a money judgment, which are not exempt.

The bankruptcy court in *In re Western States Drywall, Inc. v. Diversified Turnkey Construction Co.*, 150 B.R. 774 (Bankr. D. Idaho 1993), held that the automatic stay did not preclude the Department of Labor, through administrative proceedings, from determining the debtor's liabilities for back wages. The court cautioned, however, that the automatic stay would

preclude issuance of an order to enforce any resulting monetary judgment. The court cited *Eddleman v. U.S. Dep't of Labor*, 923 F.2d 782 (10th Cir. 1991) and *In re Quinta Contractors, Inc.*, 34 B.R. 129 (Bankr. M.D. Pa. 1983) in support of the following proposition:

Section 362(b)(5) exempts from the automatic stay the enforcement of judgments obtained by a governmental unit in enforcement of the governmental unit's police or regulatory power, with the sole exception of enforcement of a monetary judgment. The Ninth Circuit has held the entry of a money judgment by a governmental unit is not prohibited by this provision.

Western States Drywall at 775-776. The court, citing *N.L.R.B. v. Continental Hagen Corp.*, 932 F.2d 828, 834 (9th Cir. 1991), went on to distinguish between an agency's right to enter a money judgment, which is not barred by the automatic stay, and the agency's ability to seek to enforce that money judgment, which **is** barred by the automatic stay. As a result, the court concluded that the Department of Labor was free in its administrative proceedings to determine the debtor's liabilities for back wages, but that it could not seek enforcement of that order except through the bankruptcy court.

Based upon these precedents, I find that ED is free in these administrative proceedings to determine CareerCom's liabilities for its failure to respond to the program review and its failure to submit a closeout audit. If, however, ED seeks to enforce any liabilities that may arise as a result of final agency action, it will be limited by the authorities cited above.

I also disagree with CareerCom's assertion that this proceeding is moot. In its request for review dated September 12, 1994, CareerCom cited the Secretary's decision in *In the Matter of Bliss College*, Dkt. No. 93-15-ST, U.S. Dep't of Educ. (Decision of the Secretary) (Feb. 23, 1994), for the proposition that once a school has closed, SFAP may no longer pursue administrative remedies against that school. Subsequent to CareerCom's request for review, however, the Secretary substantially narrowed the scope of *Bliss*. In *In the Matter of Fischer Technical Institute*, Dkt. No. 92-141-ST, U.S. Dep't of Educ. (Decision of the Secretary) (Jan. 27, 1995), the Secretary described his decision in *Bliss* as narrow and based on very specific factual circumstances, stating that "I very obviously did not intend for the Bliss decision to stand for the proposition that any time a school closes, pending actions against it become moot." *Fischer* at 2. Therefore, the fact that CareerCom closed in February 1993 does not render this administrative proceeding moot.

I find CareerCom's other arguments similarly unpersuasive. CareerCom cites *United Talmudical Academy*, ACN 02-35327/28, 02-41164/65, and 02-51000/01, U.S. Dep't of Educ. (1987), for the proposition that recordkeeping violations by a school cannot give rise to liabilities. That decision, which was rendered by the now defunct Education Appeal Board, has been superseded by more recent decisions, such as *National Broadcasting School* and *Macomb Community College*, discussed above. CareerCom's arguments that SFAP cannot recover all Title IV funds disbursed on the basis that such recovery can occur only in a proceeding under 34 C.F.R. Part 668, Subpart G, and that ED has effectively promulgated a regulation without notice and comment by calling it a policy, were squarely rejected in *In the Matter of Phillips College of Atlanta*, Dkt. No. 91-96-SA, U.S. Dep't of Educ. (Feb. 28, 1994), at 13-14.

For these reasons, I affirm the FPRD.

ORDER

Based on the foregoing, it is hereby--

ORDERED, that CareerCom is liable to the U.S. Department of Education for all Pell Grant, Supplemental Educational Opportunity Grant (SEOG), College Work-Study (CWS), and Perkins loan funds disbursed by the institution during the 1990-91, 1991-92, and 1992-93 award years, totaling $3,485,616. It is further ORDERED, that CareerCom is liable to the current holders of Federal Stafford and SLS/PLUS loans in the amount of $5,218,601 disbursed during these years.

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Judge Richard F. O'Hair

Issued: May 4, 1995
Washington, D.C.

S E R V I C E

A copy of the attached initial decision was sent by **CERTIFIED MAIL, RETURN RECEIPT REQUESTED** to the following:

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Footnote: 1 *1 The former 34 C.F.R. § 668.25 was redesignated § 668.26. 59 Fed. Reg. 22,441, 34,964 (1994).*