IN THE MATTER OF THE PUERTO RICO DEPARTMENT OF EDUCATION, et al., Applicants.

Docket Nos. 94-177-R
94-178-R
94-185-R
94-187-R
94-192-R
94-204-R
94-208-R

Recovery of Funds Proceedings

ORDER RE ACCEPTANCE OF JURISDICTION

In each of these cases, the United States Department of Education issued, prior to October 20, 1994, a preliminary departmental decision seeking to recover Federal funds purportedly accounted for improperly or misspent. One of the applicants, the Florida Department of Education, raised an issue in its application for review which challenged the appropriate standard of review under which the Administrative Law Judge examines the preliminary departmental decision and determines whether to accept jurisdiction. This challenge was based upon a statutory amendment to Section 452(a)(2) of the General Education Provisions Act (to be codified at 20 U.S.C. § 1234a(a)(2)) which was effective on October 20, 1994. This issue affected any application for review filed after October 20, 1994, which sought a review of a preliminary departmental decision issued before October 20, 1994. Accordingly, an order was issued in the cases affected which requested the views of the parties regarding this issue.

Following an Assistant Secretary's audit or review of the expenditures by a grant recipient, the Assistant Secretary may issue a preliminary departmental decision which seeks the recovery of any Federal funds determined to be improperly expended. The grant recipient may then, as is the case here, request a review of the preliminary departmental decision before the Office of Administrative Law Judges.

Upon the receipt of such a request, the Administrative Law Judge performs an initial examination of the preliminary departmental decision to determine whether it conforms to Section 452(a)(2) of the General Education Provisions Act, as amended (20 U.S.C. § 1234a(a)(2)). In the event the preliminary departmental decision fails to conform to the requirements of Section 452(a)(2), the Office of Administrative Law Judges "return[s] [it] to the Secretary for such action as the Secretary considers appropriate." General Education Provisions Act, § 452(b)(1) (20 U.S.C. § 1234a(b)(1)).

Before the amendment of October 20, 1994, the standard, as set forth by Section 452(a)(2) of the General Education Provisions Act, as amended by Section 3501(a) of the Augustus F. Hawkins-

Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, 102 Stat. 130, 351 (20 U.S.C. § 1234a(a)(2)) was that--

> the Secretary shall have the burden of stating a prima facie case for the recovery of funds. The facts to serve as the basis of the preliminary departmental decision may come from an audit report, an investigative report, a monitoring report, or other evidence.

The phrase "stating a prima facie case" required that a preliminary departmental decision "merely must provide sufficient notice to the recipient of what expenditures are being disallowed and the reasons for the disallowance." The phrase did not connote an evidentiary burden of "'establishing' or 'proving'" a prima facie case. In re State of South Dakota, Dkt. No. 91-24-R, U.S. Dep't of Education at 3 (Sec. Dec. Oct. 21, 1991).

The October 20, 1994, amendment changed Section 452(a)(2) by striking the phrase "stating a prima facie case for the recovery of funds" and inserting the phrase--

> establishing a prima facie case for the recovery of funds, including an analysis reflecting the value of the program services actually obtained in a determination of harm to the Federal interest.

Improving America's Schools Act of 1994, § 250(a)(1), Pub. L. No. 103-382, 108 Stat. 3518, 3926.

Thus, there were two fundamental changes in the initial standard required of a preliminary departmental decision. There is now an evidentiary burden associated with a preliminary departmental decision and a more exacting measure of the sustained damages required in the preliminary departmental decision.

The grant recipients argue that the Administrative Law Judge should apply the new standard, which became effective on October 20, 1994, while the Department urges that the standard in effect at the time of the issuance of the preliminary departmental decision should govern the initial review by the Administrative Law Judge.

The arguments of both parties rely almost exclusively upon dicta by the Court in the recent decision of Landgraf v. USI Film Products, 114 S. Ct. 1483 (1994) wherein the Court explored, in depth, the nuisances of retroactivity.

Initially, there is a "well-settled presumption against application of the class of new statutes that would have genuinely 'retroactive' effect." Id. at 1503. The presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact and generally coincides with legislative and public expectations. Id. at 1499, 1501. Hence, requiring clear intent of retroactivity assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits. Id. at 1501.

The effective date of the newly revised and more stringent standard required of a preliminary departmental decision is governed by Section 3(a)(2) of the Improving America's Schools Act of 1994. It provides that "the amendments made by title II of this Act shall take effect on the date of enactment of the Act" which was October 20, 1994. This language, as was the case in Landgraf, does not suggest that it has any application to conduct that occurred at an earlier date. Id. at 1493. Thus, there is no evidence that Congress intended that the newly revised standard be applied to preliminary departmental decisions issued before October 20, 1994.

Although a statute may have been enacted after the events in question, the Court recognized that, in many instances, it is appropriate to apply such a statute. In this regard, the grant recipients assert two positions. First, they argue that "[a] law has an impermissible retroactive effect only if it 'attaches new legal consequences to events completed before its enactment.' Landgraf, 114 S.Ct. at 1499." Applicant's Br. at 3-4, In re Florida Dep't of Education. Under this standard, the grant recipients assert that changes in procedural rules do not attach new legal consequences because such changes do not affect the substantive rights of the parties. Second, they assert that changes in procedural rules also "regulate secondary rather than primary conduct" of the parties. Id. at 1502. As such, the intervening statutory modification is not considered a retroactive event at all. Therefore, they urge that the new amendment should be considered as the appropriate standard of review.

While this analysis follows Landgraf, it is not complete. The Court further amplified its view regarding procedural rules--

> [o]f course, the mere fact that a new rule is procedural does not mean that it applies to every pending case. A new rule concerning the filing of complaints would not govern an action in which the complaint had already been properly filed under the old regime, and the promulgation of a new rule of evidence would not require an appellate remand for a new trial. Our orders approving amendments to federal procedural rules reflect the common-sense notion that the applicability of such provisions ordinarily depends on the posture of the particular case. See, e.g., Order Amending Federal Rules of Criminal Procedure, 495 U.S. 969 (1990) (amendments applicable to pending cases "insofar as just and practicable"); . . . Order Amending Bankruptcy Rules and Forms, 421 U.S. 1021 (1975) (amendments applicable to pending cases "except to the extent that in the opinion of the court their application in a particular proceeding then pending would not be feasible or would work injustice"). . .

Id. at 1502 n.29.

Thus, the application of new procedural rules requires a common- sense approach which examines, inter alia, its feasibility and fairness. Of particular concern in the instant case is the Court's view regarding a complaint. Here, the Court indicated that a new procedural rule concerning the filing of complaints would not govern a complaint which had already been properly filed under the old regime. This reflects common sense because it measures the adequacy of a complaint based upon the rules in existence when it was filed.

The present matter is analogous to the situation concerning the modification of the procedural rules governing a complaint. Like a complaint, a preliminary departmental decision must satisfy certain requirements. As such, the preliminary departmental decisions in issue were written by the Department in an attempt to conform to the requirements in effect at the time of their issuance. It would be unjust to review these determinations utilizing a standard which was not in effect at the date of their issuance. Moreover, any preliminary departmental decision which was issued in a timely manner under the old standard and returned for its failure to conform to the new, revised requirements may be, on reissuance, susceptible to a claim that recovery of a portion or all of the funds sought by the Department is barred by the application of the statute of limitations. Clearly, inconsistent determinations are not appropriate based upon whether the statute of limitations affects a preliminary departmental decision. Therefore, it is opinion of this tribunal that the preliminary departmental decisions in issue will be reviewed under the requirements in effect as of the date of their issuance.

The preliminary departmental decision in each case has been reviewed and found "to provide sufficient notice to the recipient of what expenditures are being disallowed and the reasons for the disallowance." In re State of South Dakota, Dkt. No. 91-24-R, U.S. Dep't of Education at 3 (Sec. Dec. 1991). Accordingly, each preliminary departmental decision satisfies Section 452(a) of the General Education Provisions Act (20 U.S.C. § 1234a(a)(2)). Each application for review has also been reviewed. Each applications for review complies with 34 C.F.R. § 81.27 and was filed within the period allowed by that regulation.

Allan C. Lewis
Chief Administrative Law Judge

Issued: February 16, 1995
Washington, D.C.