

IN THE MATTER OF Docket No. 94-35-SP

NASSAU SCHOOL,
Student Financial Respondent. Assistance Proceeding

DECISION

Appearances: David H. Larry, Esq., and Gregory P. Schaffer, Esq., of Manatt, Phelps & Phillips, Washington, D.C., for the Respondent.

S. Dawn Robinson, Esq., Office of the General Counsel, U.S. Department of Education, Washington, D.C., for the Office of Student Financial Assistance Programs.

Before: Thomas W. Reilly, Administrative Law Judge

BACKGROUND

This is an appeal under Subpart H of 34 C.F.R. Part 668 contesting a Final Program Review Determination (FPRD) issued on November 6, 1992, by the Region II Office of Student Financial Assistance Programs (SFAP), U.S. Department of Education (ED or the Department). The FPRD [See footnote 1 1/](#) ordered the return of \$3,172,785 which represented all of the funds disbursed to the Nassau School for Medical and Dental Assistants (Nassau or the school) under Title IV of the Higher Education Act of 1965 ("Title IV funds") in the 1990-91 and 1991-92 award years, and included costs and estimated default losses under the Stafford Loan program. The basis for the demand for reimbursement was the school's failure to perform a required file review and failure to submit a required close-out audit when the school closed. Nassau School

closed on February 28, 1992. [See footnote 2 2/](#) The reason given by Nassau for failure to have the close-out audit performed was lack of financial resources at the time.

While the Department's regulations require close-out audits covering all Title IV funds received by a school, 34 C.F.R. 668.25(a)(2)(II), the FPRD asserts liabilities only for the last two award years of Nassau's operation. Insofar as the merits of the dispute are concerned, SFAP simplified this proceeding by concentrating on Nassau's failure to account for funds received only for the last two award years (failure to provide a close-out audit). Therefore, other sources of liability specified in the FPRD are not included in this review. The parties have agreed: (a) that Nassau has not (to this date) filed the required close-out audit and (b) that the sole issue here (should the merits be reached) is the impact of Nassau's failure to perform the required audit (i.e., whether SFAP can demand return of the full amount of Title IV funds disbursed in those two award years based solely on failure to provide the close-out audit required by regulation).

However, before reaching the merits of the FPRD dispute and the SFAP demand for reimbursement for the full amount of Title IV SFA funds disbursed during the two subject award years, a serious preliminary jurisdictional question must be resolved -- the question of whether Respondent's appeal was timely filed.

DISCUSSION

This is a companion case to Metropolitan Career Institute (MCI), Docket No. 94-6-SP, U.S. Dept. of Education (April 12, 1995) for which the Initial Decision was issued recently by the same Judge reviewing the instant case. The appeal in that MCI proceeding was timely filed. Otherwise, the two proceedings are virtually identical in that both schools are among the seven owned and operated by North American Training Services, Inc. (NATS), the parent company, or one of its subsidiaries. All seven were closed by NATS in the period August 1991 - June 1992 and all seven failed to produce a close-out audit as required by the regulations. In both the MCI and Nassau cases the defenses are the same, the corporate officials dealt with and communicated with by SFAP are the same, and the defending Respondents' law firms are the same. The only important difference is that the appeal in MCI was timely filed, while in the Nassau case it appears that it was not.

Had the present appeal been timely filed, in view of the identity of the defenses on the merits, undoubtedly this Judge's decision on the merits would be the same on all the issues (i.e., adverse to the school's appeal).

In both cases, the Respondent argued that the action ordered in the FPRD should be held to be "moot" because the school made a "commitment" (June 14, 1994) to conduct the required full close-out audit sought by SFAP, asserting that at some time in the future (within a year after June 14, 1994) the close-out audit would be conducted on each of the seven closed schools. (See discussion on that in MCI decision, at 2.)

In both cases, the Respondent argued that the Administrative Procedure Act (APA) and General Education Provisions Act (GEPA) required "notice and comment" before such action could be taken. (Rejected; see discussion on that point in MCI decision, at 2-3.)

In both cases, Respondent argued that 34 C.F.R. 668.25 provides no authority to SFAP to demand "pay-it-all-back" refunds because that would amount to a "fine," "sanction" or "penalty" that can be heard only as part of a Subpart G proceeding, wherein Respondents have greater procedural protections than under Subpart H, and wherein the maximum "fine" would be only \$25,000 (rather than the \$3,172,785 demanded here and \$17,423,964 in MCI).

In both cases, Respondent argued that ED has the burden of proof and that ED cannot sustain this burden because it needs the documents in the missing close-out audit to do so. (See 34 C.F.R. 668.116(d) which places the burden of proof squarely on the Respondent to prove "that expenditures questioned or disallowed were proper, and that the institution complied with program requirements.")[See footnote 3 3/](#)

For a fuller discussion of all the above issues, see the MCI decision, which is hereby incorporated by reference to the extent that identical Nassau issues exist.

In the present proceeding, Nassau argues that the appeal was timely filed because "Nassau did not receive the Final Program Review Determination until shortly after December 14, 1993" when a copy was sent to Debra Valdez of NATS "at Ms. Valdez's request." The FPRD was dated and mailed November 6, 1992, by certified mail, return receipt requested. (ED-10, ED-11.) It was returned to ED by the Post Office, marked "Refused." An institution must file its request for review "no later than 45 days from the date it receives the final audit determination or final program review determination." 34 C.F.R. 668.113(b).

Nassau argues that service on NATS (Nassau's parent corporation) was not service upon Nassau, the institution that is the subject of the FPRD. But all dealings by the Department involving Nassau at that time were with NATS officials and all communications were to the NATS address (MacDonell Roehm, President and Chief Executive Officer, NATS) or to the address of Technical Career Institutes, another of the NATS schools (c/of: Debra Valdez, NATS "Corporate Director of Financial Aid" who was handling close-out arrangements for Nassau). Both NATS and Nassau School often had the same mailing address: "120 West 30th Street, New York, New York 10001." (Cf., Resp.Exs. 2, 3B, 3C, 3D; Exs. ED-2, ED-3, ED-5, ED-6, ED-7, ED-8, ED-9, ED-10, and letterheads therein.)

To put the claim of alleged earlier non-receipt into some perspective, a review of events as they took place (and the people involved) might be helpful.

On December 3, 1991, ED notified Nassau School that it planned to conduct a program review beginning December 16th. The program review of Nassau's Title IV compliance was conducted December 17- 20, 1991. During the review, ED became aware that Nassau intended to close. ED reminded Nassau of their closed school requirements under 34 C.F.R. 668.25 by letter of December 24, 1991. (The first letter, 12/3/91, was addressed to Mr. Stieglitz, president of Nassau School, ED-1; the second letter, 12/24/91, went to Mr. Roehm, NATS president, ED-2.)

The December 24th letter to Mr. Roehm requested a response in 30 days, but there was no reply. ED thereafter sent a follow-up letter to Mr. Roehm (NATS) on February 24, 1992, reminding him of the December 24th closed-school letter and the lack of a reply (ED-3). Nassau School closed February 28, 1992.

On March 6, 1992, ED issued a Program Review Report to Nassau (this time addressed to Mr. Stieglitz, President of Nassau School), requesting that Nassau respond within 30 days (ED-4).

On April 29, 1992, ED sent Mr. Roehm (NATS) another letter (ED- 5), again requesting a response to the December 24, 1991 closed- school letter. This letter warned that a failure of Nassau to submit the required information within one week "may force this office to assess liabilities for the 1990-91 award year."

On April 30, 1992, ED sent another letter (ED-6) to Mr. Roehm (NATS) noting that the Department had not yet received a response to the March 6th Program Review Report on Nassau School.

On May 8, 1992, on a Nassau School letterhead, Debra Valdez "Corporate Director of Financial Aid" (for the NATS corporation) replied to ED that NATS "is under contract" to "assure an orderly close-out" of Nassau's Title IV matters. She said that "(i)ndependent auditors have been engaged to perform final audits

for the period from the last audited program year to the date of closing." But she did not specify who the auditors were nor supply a letter of engagement, as required by the Regulations (ED-7). 34 C.F.R. 668.25(a)(3)(ii).

On May 20, 1992, ED again wrote to Mr. Roehm (NATS), and again requested a response to the Nassau Program Review. (ED-8.) ED's letter warned that if Nassau did not respond by May 29, 1992, ED would have no alternative but to assess liabilities based on those found in the Program Review.

On May 28, 1992, ED replied to Ms. Valdez's May 8th letter by a letter to Mr. Roehm (NATS), informing him that Nassau had failed to respond to several issues set forth in the closed-school letter of December 24, 1991, and the letter repeated the closed- school responsibilities of the Nassau School. The letter also repeated the warning that if compliance was not demonstrated by June 10, 1992, "we will have no alternative but to assess liabilities for the last full year the school was in operation."

On June 8, 1992, an attorney for Nassau and the other six NATS closed schools sent a letter to ED in Washington, D.C. (Division of Audit & Program Review, Office of Postsecondary Education), proposing that ED "formally close" all matters relating to Nassau and the six other NATS school, asserting that if the Department pursued claims against the NATS schools "the filing of bankruptcy petitions would result in their extinguishment, since the government is at best a general unsecured creditor."(Resp.Ex.3A.) The penultimate paragraph stated:

Accordingly, we propose that all of the pending matters be formally closed, that proceedings respecting those matters now in adjudication be suspended, and that no further work be required on matters that have not yet reached the final determination phase. Indeed, given the fact that the corporate entities comprising the closed schools lack material resources, these entities are incapable of expending any further effort in this regard.

On November 6, 1992, ED issued the subject FPRD for Nassau (ED- 10). The FPRD noted that Nassau had not supplied any response to the Program Review Report, and had not supplied the required financial performance reports nor close-out audits required of a closed school. Accordingly, the FPRD set forth liabilities approximately equal to the Department's cost of Nassau's participation in the Title IV SFA programs during award years 1990-91 and 1991-92. (ED-10-3, -4, & App.B.)

ED mailed the Nassau FPRD to Mr. Roehm (NATS president) by certified mail, return receipt requested (ED-10, ED-11).

However, NATS "refused" [See footnote 4 4/](#) delivery of the envelope containing the FPRD, which envelope clearly bore the printed return name and address of the U.S. Department of Education, Office of Student Financial Assistance, Region II, New York City, with whom NATS and Nassau had been dealing all along regarding the Nassau School closing and audits. The address used for the FPRD was the one most often used throughout the correspondence between ED and Nassau/NATS in the matters relating to the Nassau School, and Mr. Roehm was the single individual most often communicated with in matters relating to the Nassau School. (In the latter stages, another NATS corporate official, Debra Valdez, became a regular contact with ED over Nassau School matters.)

Over a year after the issuance of the FPRD on November 6, 1992, Debra Valdez, NATS' corporate director of financial aid, initiated contact with ED and requested a copy of the Nassau FPRD (December 14, 1993, Resp.Ex.1). It was thereafter Ms. Valdez and NATS president Mr. Roehm who read the FPRD and executed affidavits about it for use in this proceeding. Throughout the documents in the record it has been only Ms. Valdez and Mr. Roehm who have acknowledged being representatives of Nassau for purposes of this proceeding and the initial close-out negotiations.

A careful review of the correspondence related to the above chronology of events makes it crystal clear that NATS was an appropriate addressee for the FPRD and other correspondence relating to the Nassau School, and the argument that something addressed to the NATS president "should have been" more properly addressed to Nassau is disingenuous, at best.

The Respondent had 45 days from November 8, 1992, to file its appeal from the FPRD (allowing two days for mail beginning and ending in Manhattan, New York City). Instead, the appeal request was mailed on January 28, 1994. This appears to have been a transparent tactical evasion to gain much more time (over a full year more) for NATS, the parent corporation, and the Nassau School before having to come to grips with the demands of the

FPRD. Any more tolerant view of appeal time limits [See footnote 5 5/](#) would open the door to schools (facing adverse FPRD's) to extend indefinitely their appeal time by the simple expedient of refusing to accept any mail from the U.S. Department of Education.

There is no question, under all the circumstances of the prior contacts, prior correspondence and negotiations, and the persons involved, that it was entirely appropriate for the FPRD to have been addressed to the NATS president's office. [See footnote 6 6/](#) The Respondent's Briefs offer not the slightest suggestion as to what other person such a document should have been sent.

NATS bald assertion that receipt by NATS did not constitute receipt by Nassau is simply not credible under the circumstances here. Indeed, it was NATS corporate official Debra Valdez who finally requested to be sent another copy of the FPRD over a year later. Beyond this, "refusal" to retain a clearly marked U.S. Department of Education envelope is tantamount to receipt followed by immediate rejection, but "receipt" nevertheless. NATS and Nassau both were keenly aware

that the next document from ED would be the FPRD, as they already had received an adverse Program Review Report followed by multiple ED requests for reply.

A fiduciary cannot simply ignore mail from his principal to avoid accounting for funds from the principal, nor to extend appeal time limits for a document questioning the fiduciary's use of the principal's funds.

FINDINGS AND CONCLUSIONS

After due consideration of the entire record and the briefs of the parties, I find and conclude that the Respondent Nassau School failed to file its request for appeal of the FPRD within the 45 days allowed by Regulation, 34 C.F.R. 668.113(b).

I find that the Respondent did, in fact, "receive" the FPRD on or about November 8, 1992, but when tendered the document by the U.S. Post Office, with the clearly marked U.S. Department of Education return address, the Respondent chose to refuse the envelope and not to retain possession of it. Therefore, the Respondent is charged with knowledge of the contents as if it had been accepted in the ordinary, customary and usual course of business, and cannot evade operation of the regulatory time limits for appeal by rejection of a document it knew, or should have known, was on its way.

Accordingly, the Respondent's request for appeal is hereby ORDERED DISMISSED for being filed out of time, and the Respondent is left in the same position as it was when first issued an adverse Final Program Review Determination assessing it with liabilities of \$3,172,785 to be reimbursed to the U.S. Department of Education, and as if Respondent had never filed an appeal.

Thomas W. Reilly
Administrative Law Judge
Issued: April 17, 1995.
Washington, D.C.

S E R V I C E L I S T

A copy of the attached INITIAL DECISION was mailed by Certified Mail -- Return Receipt Requested on this 17th day of April, 1995, to the following:

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[Footnote: 1](#) 1/ For FPRD, see ED-10 & Resp. Ex.2. ED's exhibits are appended to its Opening Brief (ED-1 thru ED-14); Respondent's exhibits are attached to Nassau's January 28, 1994 Request For Review (Resp.Ex.1 thru Resp.Ex.6).

[Footnote: 2](#) 2/ The parent corporation of Nassau School is North American Training Services, Inc. (NATS). Nassau was just one of seven schools closed by NATS between August 1991 and June 1992 (Resp. Opening Brief, at 5). Officials of NATS conducted most of the contacts and correspondence with ED officials relating to Nassau.

[Footnote: 3](#)

[Footnote: 4](#) 3/ "Refused" was marked on the envelope by the Post Office, not "unknown at this address," "undeliverable," "wrong address," or any other such comment.

[Footnote: 5](#) 5/ For an ED proceeding wherein an attempted appeal was dismissed for being filed just ten days late, see *Application of the State of Connecticut*, Docket No. 92-120- R, U.S. Dept.of Education (Jan. 29,1993), affirmed by the Secretary (March 17, 1993). Also cited in that decision was *Application of the Commonwealth of Puerto Rico Dept. of Education*, Docket No.89-2-R, U.S. Dept. of Education (Sept.1, 1989), which pointed out, after examining Federal Court decisions that treated statutory filing requirements as jurisdictional and absolute when they contain no explicit exceptions, that the Administrative Law Judge has no authority to extend or waive such a filing deadline. See also *Danko v. Director, Office of Workers' Compensation Programs*, 846 F.2d 366 (6th Cir. 1988); *King v. Dole*, 782 F.2d 274, 276 (D.C.Cir. 1988), cert.denied, 479 U.S. 856 (1986); *Midway Industrial Contractors v. OSHRC*, 616 F.2d 346, 347 (7th Cir. 1980).

[Footnote: 6](#) 6/ Note that throughout the exhibits, the address most often used for both Mr. Roehm, NATS president, and Debra Valdez, NATS corporate official using a Nassau School letterhead (ED-7), was "120 W. 30th Street, New York, NY 10001," the same address to which the FPRD was sent.