UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

In the Matter of

LINCOLN UNIVERSITY,

Respondent.

Docket No. 13-68-SF

Federal Student Aid Proceeding

Appearances: Kent L. Brown, Esq., and Judith Anne Willis, Esq., Jefferson City, Missouri, for Lincoln University.

Brian P. Siegel, Esq., Office of the General Counsel, U.S. Department of Education, Washington, D.C., for the Office of Federal Student Aid.

Before:Judge Ernest C. Canellos

REMAND DECISION

Lincoln University (Lincoln) is a public institution of higher education located in Jefferson City, Missouri providing a variety of postsecondary educational programs. Of note, it is recognized as one of the Historically Black Colleges and Universities listed as such under Title IV of the Higher Education Act of 1965, as amended (Title IV). In early 2009, the Office of Federal Student Aid (FSA), of the U. S. Department of Education (ED), conducted a program review at Lincoln focusing on Lincoln's compliance with the provisions of the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act), 20 U.S.C. § 1092 (f), as implemented by ED regulations at 34 C.F.R. §§ 668.41 (e) and 668.46. On December 15, 2009, FSA issued a program review report delineating ten violations of the Clery Act -- those violations were affirmed by a Final Program Review Determination (FPRD), dated February 14, 2011, and the program review was closed without further action.

Over two and a half years later, on October 25, 2013, FSA issued a Notice of Intent to Fine Lincoln $27,500.00 each for the ten Clery Act violations enumerated in the FPRD. Lincoln filed an appeal on November 13, 2013, and I was designated as the hearing official in this matter. After the parties had filed their respective briefs, on May 6, 2014, I ordered the parties to discuss two questions, i.e. does 28 U.S.C. § 2462 apply to the subject fine action and if so, how much, if any, of FSA's demand is barred by the five-year statute of limitations provisions. I presided at an evidentiary hearing on October 28, 2014, and arguments and rebuttals were submitted in writing

by December 23, 2014. Finally, I issued a Decision on March 16, 2015, wherein I found that eight of the proposed fines were untimely under 28 U.S.C. § 2462. For the two proposed fines that I determined to be timely, I found a fine for each was $10,000.[1]

FSA timely appealed my decision to the Secretary of Education, arguing that the statute of limitations does not apply or, alternatively, their action was, otherwise, timely. On April 25, 2016, the Secretary issued his decision. The Secretary found that the 28 U.S.C. § 2462 statute of limitations provision applied to FSA fine actions, however, he questioned whether the violations upon which the fines were based could have been renewed for statute of limitations purposes under the criteria laid out in *U.S. Security and Exchange Commission v. e-Smart Technologies, Inc.*, 31 F.Supp. 3d 69 (D.C.C. 2014) (*e-Smart*). The Secretary stated that an integral part of that analysis required a review of Lincoln's 2006, 2007 and 2009 ASRs; however, they were not included in the record. Consequently, the Secretary remanded this matter to me and directed that I secure copies of those ASRs, and analyze whether any of the violations had been renewed. For those violations I found were renewed, I was to determine whether FSA had properly supported the amount of those fines with a rational explanation, or in the absence of such explanation, undertake my own analysis to determine the correct amount of the fine.

On June 10, 2016, I received a motion from FSA that attached the 2006, 2007 and 2009 ASRs, and requested that I admit them into the record. Included with Lincoln's response brief, counsel filed a response to FSA's motion. Lincoln's counsel argues that since FSA had the burden of proof in this fine action, the record was closed, and they were not on any prior notice that they were defending against claims of alleged violations in the 2009 ASR, and that the alleged violations were timely by virtue of a renewal process; I should not accept and consider the additional ASRs. As to that issue, I find that since the Secretary's decision is abundantly clear, I am obliged to follow it. In essence then, the Secretary directs that I determine: (1) whether any misrepresentations enumerated in the 2006, 2007, or 2008 ASRs constituted violations of the Clery Act, as alleged in the fine notice; and (2) whether the same misrepresentations were essentially made in the 2009 ASR. Consequently, I admit the subject 2006, 2007 and 2009 ASRs into the record; and I will consider them in my determination of whether the proposed fines are barred by the Statute of Limitations and, if so, whether FSA has met its burden of proof relative to the alleged violations. In my order, dated May 2, 2016, I directed FSA to support its position relative to renewal by pointing out where in the record the evidence existed that establishes such renewal; as well as to address the Secretary's questions regarding the appropriateness of the respective fine proposals. Although FSA's brief provides a modicum of supporting argument for the amount of the fines, it makes no reference as to where in the record I could locate the evidence supporting an *e-Smart* renewal.

The *e-Smart* Decision

[1] In his Decision, the Secretary agreed that the statute of limitations applies to fine actions; however, he found that

The S.E.C. filed suit in May, 2011, against e-Smart and some of its officers alleging that e-Smart violated varied U.S. securities laws; they included the fraudulent making of material misrepresentations in their 2005 and 2006 annual 10-KSB filings to the SEC. The company had filed its 2006 annual 10-KSB report in October 2007 and filed its Amended 2005 10-KSB report in March 2008. Before the District Court, two company executives, appearing *pro se,* filed a motion to dismiss the action on numerous grounds; including a 28 U.S.C. § 2862 statute of limitations violation. They argued that since they had made the same misrepresentations in previous 10-KSB filings, over five years before the suit commenced, they were immune from suit. Citing *3M Co. v. Browner,* 17 F.3d 1453 (D.C.Cir. 1994), the Court found that each time the defendants filed a new annual report, they made the same fraudulent misrepresentations anew, violated the statute anew, and exposed themselves to liability anew. Therefore, they could be sued for the 2006 and amended 2005 filings, since those filings clearly fell within the allowable statute of limitations period.

The defendants also claimed that the SEC's allegations related to the Amended 2005 report were time-barred because they appear only in an Amended Complaint, which was filed in October 2013, during the pendency of the action. However**,** the Court considered the new allegations permissible since they "relate back" to the misconduct outlined in the original Complaint, citing Fed. R. Civ. P. 15(c). The Court found both complaints contain essentially the same misrepresentations and relate to a unified scheme to defraud investors. It further found the amended complaint did not add any new counts or previously unmentioned theories of liability, nor is it based on facts different from those underlying the claim, citing *Mayle v. Felix*,545 U.S. 644 (2005). The original complaint was sufficient to notify the Defendants of the basis for liability in the amended complaint, and the new allegations were not time-barred. I note that, the annotation with the Fed Rule 15(c) cautions against action implicating the statute of limitations.

ANALYSIS

In order to comply with the Secretary's directions, I have reviewed the 2006, 2007, 2008 and 2009 ASRs. I have examined the respective elements of each ASR and I have compared each of them, especially as to how the others compare with the 2009 ASR. My review indicates that each of the ASRs is approximately 30 pages in length; and all except three pages contain, what can best be described as "boiler plate," providing general Clery Act information. Based on my examination, it appears that all the ASRs are the same in that regard. The three pages that do differ include required summaries of reported criminal offenses, arrests, and disciplinary actions. It should be noted that: the 2006 ASR lists the required information for the 2003, 2004 and 2005 years; the 2007 ASR lists information for the 2004, 2005 and 2006 years; the 2008 ASR lists information for the 2005, 2006, and 2007 years; and the 2009 ASR lists information for the 2006, 2007 and 2008 years. Since information for different years appear in more than one ASR, you would expect the figures would correspond exactly. However, that is not necessarily the case. As pertinent to the issues before me, my review of the 2009 ASR reveals that there is no

---

these offenses warranted fines in the amount of $27,500 for each violation. These fines are final, and not before me.

information contained therein that can establish that a misrepresentation, sufficient to support an *e-Smart* type of renewal for statute of limitations purposes, has occurred.

Based upon my review of the *e-Smart* decision and the record before me, I make the following observations:

(1) In *e-Smart*, the Court received a *pro se* motion to dismiss on violation of the statute of limitations provisions of 28 U.S.C. § 2462. The offenses being litigated by the court dealt with fraudulent misrepresentations that were clearly before the Court, and clearly timely.

(2) In their motion, Defendants argued that, their fraudulent filings were the same as they had made in previous filings, years before, so the statute of limitations should have run.

(3) The reasoning of the Court is clear -- merely because the defendants have committed the same violations in the past, they cannot escape punishment for any offenses that are clearly pled and timely before it, by asserting the statute of limitations has run for the earlier violation.

(4) FSA has posited the concept of a "continuing violation," as it relates to this fine action arguing, in essence, that once Lincoln made errors in their accumulations of statistics, every time the erroneous information is replicated in a new filing, a new violation of error-keeping is renewed. This would seem to conflict with the guidance from the Supreme Court in *Gabelli v. SEC*, 568 U.S. 133 (2013) (*Gabelli*).

(5) In addition to its normal burden of proof in a fine proceeding, FSA must establish that the violations were renewed under *e-Smart*; recognizing that the statute of limitations applies and the date runs from the date of accrual of the alleged violation.

STATUTE OF LIMITATIONS

> 28 U.S.C. § 2462. Time for commencing proceedings
> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued . . ..

REMANDED FINES

- Failure to maintain documentation supporting crime statistics for 2006, 2007, and 2008.
- Incorrect reporting of crimes on the crime logs for the same 2006, 2007 and 2008 years.
- Failure to distribute its Annual Security Report (ASR) for calendar years 2006 and 2007.
- Failure to maintain a crime log until 2009.
- Failure to provide a victim of a sexual assault with the outcome of the campus disciplinary proceedings addressing the assault in January 2007.
- Failure to provide a victim of a sexual assault with the outcome of the campus disciplinary proceeding addressing the assault in the fall of 2008.
- Failure to define the campus geographic boundary in 2006, 2007 and 2008 ASRs.

- Failure to prove requests for statistics from local police in years 2006 and 2007.

DISCUSSION

The law regarding FSA's fines against Title IV participating schools is now abundantly clear in so far as the statute of limitations is concerned. The Secretary found that 28 U.S.C. § 2642 applies to FSA's proposed fines, including fines for violations of the Clery Act. Further, the Supreme Court has announced in *Gabelli* that in federal enforcement of fines proceedings, this statute of limitations provision begins to run from the date of occurrence or "date of first accrual" of the respective offense and not when the offense is discovered. Further, a federal court in *e-Smart,* held that each time an institution repeats the same misrepresentation in a subsequent annual filing; it renews the violation and subjects itself to punishment, starting anew for statute of limitations purposes; in effect, committing a new, actionable violation.

Of course, since a fine constitutes a deprivation of a protected property interest, the concept of due process is fully applicable. Consistent therewith, notice of any proposed action must be clear so that the accused knows what it is charged with so they are able to protect their interest. *See, Mullane v. Hanover Trust Co.*, 339 U.S. 306 (1950). *See also, Goldberg v. Kelly*, 397 U.S. 254 (1970). The notice provisions also apply in administrative enforcement procedures. *See, Golden Grain Macaroni Co. v. Fed. Trade Comm.*, 472 F.2d 882 (9th Cir. Dec. 20, 1972).

In analyzing the *e-Smart* decision relative to the current proceeding, as directed by the Secretary, one important distinction is readily apparent. In the current proceeding, although FSA argues that there is such, there is no amended complaint, whereas in *e-Smart*, the Court found there was a timely amended complaint, consistent with the requirements of Rule 15 of the Federal Rules of Civil Procedure. Rule 15 provides that, "a party may amend its pleading only with the opposing party's written consent or the court's leave." Although Rule 15 applies to federal courts, and not necessarily to administrative tribunals, because this fine procedure involves the core question discussed in *e-Smart*, I believe it is probative herein. In addition, relation back has been held to be improper when the amendment ". . . asserts a new ground for relief supported by facts that are different in both time and type from those in the original pleading set forth." *See, Mayle v. Felix*, 545 U.S. 644, 650 (2005).

A first step in analyzing any fine proceeding is to establish a cut-off date for actions to be considered timely. Consequently, I found since FSA's fine proposal is dated October 25, 2013, and this is the earliest established date for the initiation of the formal fine procedure, any complained of action that occurred earlier than five years prior to that date is, absent renewal, barred by the 28 U.S.C. § 2462 statute of limitations. The date of accrual, as provided in the statute has been defined by the U. S. Supreme Court as the date when the cause of action comes into existence as a claim and not when discovered. *Gabelli v. SEC, supra.* Some of FSA's allegations reflect claims of error or inadequacies associated with the reporting of Lincoln's ASRs; ASRs are filed as of October 1 of the reporting year. With that as a background, I note

that FSA notified Lincoln in its Fine Notice that it was proposing to fine it for violations that are clearly identified and separated by dates of violation. Since those dates are included in the notice themselves, I must utilize those specified times in my decision on the applicability of the statute of limitations. Of special significance, in my Initial Decision, I found that the two fines that were alleged as based on the 2009 ASR were timely. However, I note that the 2009 ASR was not mentioned in any of the fine allegations currently before me. Lincoln continues to argue, that because of the manner that FSA chose to allege the violations now before me, it had received no formal notice that it had to defend against those allegations as violations of the 2009 ASR.

In essence, throughout this procedure, FSA claims that since ASRs report crime statistics for three previous years, then any violation of the Clery Act, alleged to have occurred in a year covered by an ASR, and outside the statute of limitations, is brought forward and engrafted on the ASR regardless of when the alleged offense actually occurred. Although it seems clear that the *e-Smart* decision would require a correlative misrepresentation, FSA's position seems to be that renewal occurs for any violation that occurs in the three-year coverage of the ASR, regardless of whether it is specifically mentioned or not in the ASR. It needs to be recognized there is a problem when action is taken for violations other than those for which the Respondent was given notice. In that context, I will address each of the remanded fines.

In the first remanded fine, FSA seeks a fine of $27,500 for "Lincoln's failure to maintain and provide documentation to support the crime statistics reported by the institution," for 2006, 2007 and 2008 calendar years. As indicated above, there is no mention of the 2009 ASR -- the gravamen of the violation is a record-keeping failure. I have reviewed the record and find that on June 15, 2010, upon request from FSA, Lincoln provided a revised 2009 ASR with revised crime statistics for calendar years 2006 through 2008. ED Ex. 1, p. 3, 4. This amended ASR corrected errors in the previously submitted ASR. Given this evidence that is included in the record, and by applying the *e-Smart* concept, as directed by the Secretary, I find that this violation is renewed, actionable and I AFFIRM FSA's action. This is so, considering the established burdens of proof allocable to FSA, coupled with the notice requirements, discussed previously.

In the second remanded fine, FSA seeks a fine of $27,500 for "Lincoln's incorrect reporting on the crime logs," in 2006, 2007 and 2008. Once again, this is a record-keeping violation and there is no mention, at all, of the 2009 ASR. However, based upon the same review as above, I find that the same result as in the previous fine applies. The amended ASR Lincoln provided on June 15, 2010, revised 2006, 2007 and 2008 crime statistics, and evidenced Lincoln's prior errors in reporting. Therefore, I find that this violation has been timely renewed through the application of renewal, as enunciated in *e-Smart.* FSA's fine action is AFFIRMED.

In the third remanded fine, FSA sought a fine of $27,500 for Lincoln's failure to distribute its 2006 and 2007 ASRs. However, FSA's brief informed me that FSA would no longer pursue this fine. Considering FSA's position relative to the other proposed fines, counsel makes no attempt, either factually or legally, to distinguish this fine from all the others.

Regardless, based on counsel's affirmation, this fine is Dismissed.

In the fourth remanded fine, FSA seeks a fine of $27,500, alleging "Lincoln's failure to maintain a crime log until calendar year to 2009. By this explicit allegation, FSA notifies Lincoln that this fine is limited to occurrences prior to 2009 and, inferentially the crime log was acceptable in 2009. Significantly, it appears that this fine action involves the same subject area as that in the second proposed fine. Upon review, it seems clear that either they should be subsumed, or they are incongruent and both cannot stand. Lincoln can't be accused of not having a crime log and, at the same time, be accused of having an erroneous one. In either case, the law generally abhors overzealous charging, such as by the crafting of a multiplicity of charges; in essence creating two offenses out of one for the purpose of enhancing punishment. Further, in applying the established burden of proof in conjunction with my review of the 2009 ASR, I do not find any mention of, and therefore, no misrepresentation of the type to support *e-Smart* renewal. Therefore, this fine is Dismissed.

In the fifth and sixth remanded fines, FSA alleges failures to notify two victims of sexual assaults with the results of any campus disciplinary proceedings. These are specific allegations of failure to do a required act, beginning with these assaults in 2007 and 2008. Although FSA Counsel argues that since there is no time specified as to when the notice must be accomplished, the statute of limitations doesn't start to run until such notice is provided. I believe the Supreme Court's decision in *Gabelli, supra*, would dictate otherwise. In addition, in my review of the record and 2009 ASR, I find no evidence of any misrepresentation which could possibly support *e-Smart* renewal. Therefore, these fines are Dismissed.

In the seventh remanded fine, FSA alleges Lincoln's failure to properly define the campus geographic boundaries for the 2006, 2007 and 2008 ASR reports -- apparently, there was no such violation in the 2009 ASR, since none is alleged. Also, FSA conceded such in its brief. In my review, I find no evidence of misrepresentation of the type to support renewal of this violation under *e-Smart.* Therefore, this fine is Dismissed.

In the eighth remanded fine, FSA alleges Lincoln's failure to provide proof of requesting crime statistics from local law enforcement agencies during 2006 and 2007. This is again an allegation of failure to do specific acts, in 2006 and 2007, and not a claim of misrepresentation. Also, it is noteworthy that in the third proposed fine, FSA chose not to pursue the fine for a failure to do something in so far as the 2006 and 2007 ASRs is concerned, yet continues to pursue this fine without any further explanation. For reasons similar to those above, I find there is no evidence of misrepresentation in the 2009 ASR that could lead to a renewal. Therefore, this fine is Dismissed.

In review then; for any remanded offense that FSA cannot establish was renewed under an *e-Smart* analysis, the Statute of Limitations has run. Separately, considering the concept of due process as it relates to renewal through the 2009 ASR filing, I find that such 2009 ASR is

never mentioned by FSA as to these remaining fine actions prior to this remand and, as indicated above, there is no reference to these in the 2009 ASR, as well. In the original fine action, FSA did not then, apparently, believe that the other violations, those that have been remanded to me, had involvement with the 2009 ASR; otherwise, it would have been alleged as such. Now FSA's position has changed and it now seeks first to implicate then apply the 2009 ASR without a formal amendment of the charges.

I note that in accordance with the procedures for fining eligible educational institutions, 34 C.F.R. § 668.84 (a) (1), the Secretary is authorized to impose a fine of up to $27,500.00 for each violation of a statutory or regulatory provision applicable to Title IV. In any such proceeding, 34 C.F.R. § 668.88 (c) (2) provides that FSA has the burden of proof -- this includes the burden of production as well as the burden of persuasion. Further, when considering an appropriate fine, 34 C.F.R. § 668.92 (a) instructs that the designated department official, hearing official and the Secretary, determine the amount of a fine by taking into account both the gravity of the violations as well as the size of the institution. Since a fine is a punishment that results in the deprivation of a protected property interest, the concept of due process of law applies.

FSA argues that each of the proposed fine actions should each be punished by a fine of $27,500.00. Lincoln argues that the maximum fine is not supported as to those violations, claiming that "[T]here must be some relationship between the conduct and the fine and merely imposing the maximum penalty in every case is not permissible under the statute." Without doubt, the governmental authority imposing a fine has discretion in determining the amount of the fine so long as it is within the authorized maximum permissible punishment. However, just as clear, to be considered an appropriate action upon review, fines like any other pecuniary action can be affirmed only after giving due consideration to the seriousness of the violation as well as the degree of culpability of the violator. That analysis must take into consideration the injurious effect of the violation on others; the intent or lack thereof of the perpetrator; and the possible deterrent effect punishment might have.

My review of the record in this proceeding indicates that the two proposed fines that I have approved entail repeated and long term violations of the basic requirements of the Clery Act, i.e. correctly informing students, parents, faculty and employees, of the crime statistics of the University. In fact, I agree with FSA, that the maximum permissible fine, $27,500 per violation, recognizes the seriousness of the violations because, without correct information, students, parents and employees are unable to make informed decisions relative to the safety of the campus community. I have considered that in its defense, Lincoln has argued, in effect, that surely not every violation of Title IV can be classified as the most serious; therefore, the automatic imposition of the maximum permissible fine in every case is surely inappropriate. I agree; however, as noted above, the specifics in this case do support the call for the imposition of maximum fines.

FINDINGS

Consistent with my determinations above, I find that all the proposed fines that were not renewed under the *e-Smart* criteria are, time-barred under provisions of 28 U.S.C. §2462. Those fines are disapproved and are, hereby, DISMISSED. The first and second proposed fines are APPROVED.

ORDER

As a consequence, I ORDER that Lincoln University pay a fine of $55,000.00, to the United States Department of Education, for the fines I approved herein.

_____

Ernest C. Canellos
Chief Judge

Dated: September 13, 2016

SERVICE

A copy of the attached document was sent by certified U.S. mail, return receipt requested, to the following:

Kent L. Brown, Esq.
Judith Anne Willis, Esq.
621 East McCarthy, Suite C
Jefferson City, Missouri 65101-3499
FAX: (573) 635-7675

Brian P. Siegel, Esq.
Office of the General Counsel
U.S. Department of Education
400 Maryland Avenue, S.W., Room 6E109
Washington, D.C. 20202-2110
FAX: (202) 401-9533