

Docket No.
90-2-SA



UNITED STATES DEPARTMENT OF EDUCATION

THE SECRETARY

In the Matter of)
)
)
 PLATT JUNIOR COLLEGE,)
)
)
 Petitioner)

Audit Proceeding on
Appeal

Audit Control No. 07-61450

DECISION OF THE SECRETARY

Platt Junior College (Petitioner) has appealed the Initial Decision (ID) of the Administrative Law Judge (ALJ) in the above captioned audit. Petitioner's appeal was filed pursuant to 20 U.S.C. 1094(b) and 34 C.F.R. 668.119. In the Initial Decision of July 28, 1989, ALJ Walter J. Alprin determined that the U.S. Department of Education's (ED) final audit determination is not subject to the defenses of waiver, statute of limitations, accord and satisfaction, laches, and is supportable in whole.

While the Secretary concurs with the ALJ's findings of fact and application of law as to the defense of waiver and the exclusion of the Earle affidavit, he questions certain aspects of the findings found at Part III ("Discussion," ID, pp. 5-7). Therefore, as ALJ Alprin is no longer available to ED on loan from the Office of Personnel Management, I REMAND the case to the Office of Hearings and Appeals (OHA) for assignment to an ALJ with the Office of Administrative Law Judges (OALJ) for reconsideration with the following instructions. It is anticipated that the record below will provide the information needed to make the determination requested in this remand. However, this in no way precludes the ALJ from conducting further proceedings on remand if the ALJ should deem such proceedings to be necessary.

On REMAND, the Secretary orders that the ALJ consider the following:

- (i) The ALJ determined that the Statute of Limitations set forth at 28 U.S.C. 2415 is inapplicable to such audit claims. If 28 U.S.C. 2415 does not apply to the claim at hand, what, if any, Statute of Limitations is applicable? Moreover, what is the effect and application of such a provision, if any, on the requested sum in light of the five year record-keeping requirement at 34 C.F.R. 682.610(d) and other applicable regulations?

(ii) The ALJ found laches to be inapplicable in this matter. The Secretary recognizes that, traditionally, the application of laches against the government has not been favored. See, e.g., Costello v. United States, 365 U.S. 265 (1961). In more recent case law, however, the principle that Federal, State, and local governments may be estopped or subjected to the defense of laches is increasingly clear in several forums. See, e.g. S.E.R., Jobs for Progress, Inc. v. United States, 759 F.2d 1 (F. Cir. 1985); Lane v. United States, 639 F.2d 758, 761, 226 Ct. Cl. 303 (1981).

The basic rule now appears to be that laches may be available in certain areas. The ALJ below applied the basic test for laches cited in Costello at 282 and found the presence of (1) a lack of diligence by the party against whom the defense is asserted ["(i)n this matter ED did not pursue its claim diligently."], and (2) prejudice to the party asserting the defense [". . . reconstruction would have become impossible by reason of ED's inexcusable delay, to Petitioner's prejudice. I find this argument convincing and it is so found."].

Without analysis, however, the ALJ automatically adopted the case of U.S. v. Arrow Transportation Company, 658 F.2d 392, 394 (5th Cir., 1981) [". . . so long as ED was acting 'to enforce a public right or to protect the public interest' its action is not subject to the defense of laches."]. Moreover, this case was adopted without reason, despite his reference to SER, Jobs for Progress in the discussion regarding the Statute of Limitations (ID at p. 5). Therefore, in view of the ALJ's finding regarding the Statute of Limitations, and in light of the five year record-keeping requirement, I instruct the ALJ to consider whether laches may be applicable and, if so, whether it is merited here.

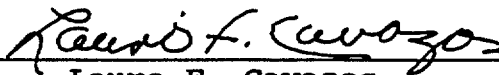
(iii) Referring to ED's claim for \$35,000, the ALJ below noted that "it is arguable that the estimated sum demanded is arbitrary, rather than 'reasonable'." (ID at p. 6) I instruct the ALJ to consider whether the claim, as devised and presented by ED, meets the mandates of procedural due process.

(iv) What effect, if any, did the payment made on or about August 9, 1978, for the non-GSL/FISL overallowances noted in

ED's letter of May 12, 1978, have upon the current claim for additional overallowances in light of the five year record-keeping provision found at 20 C.F.R. 682.610(d)?

This matter is, therefore, REMANDED to the OHA for assignment and consideration on the points noted above.

This ORDER is dated and signed this 19th of January, 1990.

A handwritten signature in cursive script, reading "Lauro F. Cavazos", is written over a horizontal line.

Lauro F. Cavazos

Washington, DC