



UNITED STATES DEPARTMENT OF EDUCATION

THE SECRETARY

In the matter of

TREND COLLEGES, INC.

Docket No. 90-56-ST

Student Financial
Assistance Proceeding

AMENDED
DECISION OF THE SECRETARY
ON MOTION TO RECONSIDER

On November 7, 1991, counsel for Trend Colleges, Inc. (Trend) filed a Motion to Reconsider the Secretary's Decision issued in this cause on October 25, 1991. The Secretary's Decision held that Trend's appeal brief should be excluded from the record of this appeal because it had not been timely filed. In its Motion, Trend asks the Secretary to consider its appeal brief, and address the substantive issues of the appeal.

On June 17, 1991, Trend filed its notice of appeal from the Decision of the Administrative Law Judge. On June 18, 1991, the Secretary directed Trend to submit its brief in "15 days" of the receipt of the briefing schedule. Subsequently, Trend moved for, and was verbally granted, an enlargement of the briefing schedule, until August 26, 1991. The Department of Education, Office of Hearings and Appeals (OHA) maintains a 4:30 pm filing deadline, which is consistent with its close of business. On August 26, 1991, at 5:45 pm, Trend sent a facsimile of its appeal brief to OHA. On August 27, 1991, Trend hand delivered the original appeal brief to OHA.

In its motion, Trend argues that its appeal brief should be considered because it was filed on the "day" it was due. Trend's argument relies on the common connotation of the word "day" indicating a unit of time, ending at midnight. See, 86 C.J.S. Time § 12.

It has been the long-standing policy of OHA to adhere to a business day, with a 4:30 pm filing deadline consistent with its close of business. This policy was affirmed in the Secretary's Order barring the appeal of the U.S. Department of Education, Office of Student Financial Assistance, in Community College of Philadelphia, Audit Control No. 03-30031. The Secretary's

Decision in Philadelphia is consistent with the fact that the word "day" may also be used to connote a period of time other than twenty-four hours --

...the word "day" may be employed to denote some other period than twenty-four hours, and, if it is used to indicate a shorter period, any substantial portion of a day may constitute a "day," and thus a "day" may be defined as meaning those hours, or the daily recurring period, allotted by usage or law for work, as, an eight-hour day.

86 C.J.S. Time § 12, p. 847.

In Philadelphia, the Secretary found that OHA's 4:30 pm filing deadline served the public interest by requiring both the Office of the General Counsel and the private litigant to abide by the same rules --

If we had such a special depository [to accept filing after the close of business], one would be forced to question for whom it was designed. It would not benefit the public, as the building denies entrance to non-employees after business hours. Moreover, the vast majority of cases before the units within OHA and appealed to the Secretary come from locales far from the Capitol Beltway. Surely such a special receptacle would not be in the public's best interests as its representatives generally utilize a postal service or couriers.

Philadelphia, at 2.

Trend's motion may be read to argue that the development of facsimile technology has negated the rationale of Philadelphia. Arguably, litigants throughout the Nation could file documents by facsimile transmission at any time prior to midnight on the date of the filing deadline without prejudicing other litigants. Each litigant would have equal access to the "special depository" referenced in Philadelphia. However, I must also take notice of the limitations of the current technology. Documents received by facsimile may be blurred, incomplete, or not received at all.

In balancing the above considerations, I find that the public interest is no longer served by OHA's 4:30 pm filing deadline. I therefore hold that a party is given until midnight of the date due to file its pleading. I further find that a facsimile transmission received in OHA, prior to the filing deadline, is a valid method of filing, provided a hard copy of the pleading is received by OHA within a reasonable time. (Prior to the close of OHA's next business day, unless good cause is shown.)

For the above reasons, I vacate the original Decision of the Secretary in this cause. I accept the appeal brief of Trend as properly filed, and will proceed to address the substantive issues of this appeal.

In its appeal brief, Trend requested one of two forms of relief. The Secretary is asked to either dismiss this cause due to a second termination action pending against Trend (Docket No. 91-49-ST), or to modify the ALJ's Decision to allow Trend to demonstrate financial responsibility in a way other than the \$500,000 letter of credit ordered by the Administrative Law Judge (ALJ). I will address the second avenue of relief first.

In its second request for relief, Trend alleges that the ALJ erred by determining that he did not have the authority to impose limitations proposed by Trend, in lieu of termination. This is an inaccurate representation of the record. When the ALJ found that the letter of credit was appropriate, he held that it was unnecessary to consider other sanctions in lieu of the letter of credit. ALJ's Decision, at 23. I agree.

Trend also represents that the ALJ found that "Trend's financial situation was favorable and that it had turned the corner on the financial difficulties which resulted in the letter of credit request in the first place." Trend's Appeal Brief, at 6-7. This statement again inaccurately represents the record. After discussing Trend's financial situation in great detail, the ALJ found --

...it is apparent that ED's demand for a letter of credit in the amount of \$500,000 is reasonable. Trend's financial condition is precarious and its financial survival is a day-to-day struggle. Unfortunately, its prospects for the future cannot alter its present financial condition and the risks associated therewith--the basis upon which this decision must be grounded.

ALJ's Decision, at 26.

In its appeal brief, Trend also requests that the Secretary on his own authority modify the ALJ's Decision and impose the requested limitations in lieu of the letter of credit. In support of its request, Trend makes numerous factual assertions regarding its current financial status. The Secretary reminds Trend that neither party may introduce new evidence on appeal. 34 C.F.R. § 668.90 (d)(4).

The Secretary does not desire to substitute his judgement for that of the ALJ. I therefore affirm the ALJ's order that Trend demonstrate its financial responsibility by submitting to the Department of Education a letter of credit in the amount of

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\$500,000, and that failure to comply will result in Trend's termination from the student financial assistance programs under Title IV, of the Higher Education Act of 1965, as amended (HEA programs).

However, final resolution of this case also requires consideration of Trend's request that this cause be dismissed because a second action has been filed by OSFA, impeding Trend's ability to secure the demanded letter of credit.

Clearly, dismissal of this action is not the appropriate remedy. This action determined Trend's financial responsibility to continue participation in HEA programs. The second action relates to Trend's present refund and credit balance liabilities. Both issues must be addressed to fully resolve the continuing dispute between Trend and OSFA. Yet, the Secretary recognizes that the unusual bifurcated nature of these actions may indeed impede on Trend's ability to secure a letter of credit.

These same considerations were before the ALJ when he issued his initial Decision demanding the letter of credit. At that time an emergency action was pending against Trend. In his Decision, the ALJ found that a 40-day period was necessary to allow OSFA to revisit the emergency action notice to determine whether it will modify the notice so that it would not constitute an impediment to Trend securing a letter of credit.

Further, I take notice of the joint motion filed by Trend and OSFA in the Docket No. 91-49-ST requesting a continuance until December 3, 1991, to exchange information and discuss settlement. This motion has been granted by the ALJ.

For the above reasons I affirm the ALJ's Decision, but delay enforcement. Trend shall have 10 days from the date it receives the ALJ's Decision in Docket No. 91-49-ST to secure the \$500,000 letter of credit, or be terminated from HEA programs by this Decision.

So ordered this 27 day of November, 1991.


Lamar Alexander

Washington, DC

SERVICE LIST

Office of Hearings and Appeals
U.S. Department of Education
490 L'Enfant Plaza, SW
Suite 2100
Washington, DC 20219-3644

Mr. Thomas Hylden, Esq.
Baker & Hostetler
Washington Square, Suite 1100
1050 Connecticut Avenue, NW
Washington, DC 20036

Ms. Frances C. Moran, Esq.
Office of the General Counsel
U.S. Department of Education
Room 4091, FOB-6
400 Maryland Avenue, SW
Washington, DC 20202-2110

Ms. Molly Hockman
Director, Audit and Program Review
Office of Student Financial Assistance
U.S. Department of Education
Room 3923, ROB-3
7th and D Streets, SW
Washington, DC 20202-5254