



UNITED STATES DEPARTMENT OF EDUCATION

THE SECRETARY

Application of

THE STATE OF SOUTH DAKOTA

Docket No 91-24-R

Recovery of Funds Proceeding

ANC: 08-92255

DECISION OF THE SECRETARY

Background

This matter comes before me on appeal by the Assistant Secretary for Vocational and Adult Education (OVAE) from an August 16, 1991 Decision and Order of Dismissal by Administrative Law Judge, Allan C. Lewis (ALJ). OVAE requests that I issue a Decision that: (1) finds that the ALJ improperly interpreted section 452(a)(2) of the General Education Provisions Act (GEPA) in determining what constitutes "stating" a prima facie case; (2) finds that the preliminary departmental decision (PDD) giving rise to this Recovery of Funds Proceeding met the prima facie case requirement; and (3) sets aside the ALJ's Decision and remands this case to the ALJ for further proceedings.

This case concerns a PDD issued by OVAE and received by the State of South Dakota (South Dakota) on April 1, 1991. The second finding of the PDD demanded recovery of \$150,000 of fiscal year 1988 funds provided to South Dakota under the Carl D. Perkins Vocational Education Act (Perkins Act). The PDD listed three separate and independent reasons why the funds were alleged to have been improperly expended: (1) that they were used to pay interest; (2) that they were used without approval; and (3) that they supplanted State funds.

South Dakota submitted an application for review of the PDD pursuant to 34 C.F.R. § 81.27 on April 22, 1991. On May 6, 1991, the ALJ issued a Notice of Acceptance of Jurisdiction of the appeal, in which he stated that the PDD had "been reviewed and found to state a prima facie case within 34 C.F.R. 81.24, that is, the written notice of disallowance decision contains a 'statement of the law and facts that ... is sufficient to sustain the conclusion drawn in the notice.'" The ALJ also found South Dakota's Application for Review to be adequate, and accepted jurisdiction of the appeal.

On May 21, 1991, South Dakota submitted a Motion to Strike the Assistant Secretary's Assertion that Questioned Funds were Used to Pay Unallowed Interest. In its Memorandum in Support of the Motion, South Dakota claimed that OVAE had "not met the burden of proving a prima facie case that South Dakota spent Federal funds to pay interest." South Dakota argued that the evidentiary proof of a prima facie case had to be contained in the PDD under section 452(a)(2) of GEPA. On June 10, 1991, OVAE submitted a response to South Dakota's Motion to Strike. OVAE argued that the PDD had met the applicable legal requirement under section 452(a)(2), which provides that "in a [PDD], the Secretary shall have the burden of stating a prima facie case for the recovery of funds." 20 U.S.C. § 1234a(a)(2).

After further written submissions by both parties and oral argument, the ALJ issued a Decision and Order of Dismissal (Decision) on August 16, 1991, vacating his May 6, 1991, Order accepting jurisdiction of the case, returning the entire PDD to OVAE, and dismissing the matter without prejudice. In his Decision, the ALJ concluded that section 452(a)(2) of GEPA requires that OVAE establish a prima facie case as an evidentiary matter in the PDD. The ALJ then concluded that the PDD at issue was inadequate because the finding that \$150,000 was used for interest payments "represents a conclusion without any underlying factual support." Decision at 7.

Issues Raised

There are three issues in this appeal. First is the question of what is the prima facie standard under section 452(a)(2) of GEPA. The second issue is whether the PDD in this case meets that standard. The final issue is whether, in any event, the ALJ's return of the entire PDD to OVAE was appropriate.

Findings

After reviewing all the submissions of the parties referred to above, the ALJ's Decision, and the statutes, regulations and legislative history referred to in these documents, I have concluded that the ALJ's determination that OVAE must establish a prima facie case as an evidentiary matter in the PDD is contrary to GEPA and the applicable regulations.

The statutory requirement in section 452(a)(2) of GEPA, 20 U.S.C. §1234a(a)(2), states that:

In a preliminary departmental decision, the Secretary shall have the burden of stating a prima facie case for the recovery of funds. (Emphasis added).

There is a significant and material difference between "stating" a prima facie case and "establishing" or "proving" one. I find nothing in section 452(a)(2) which would indicate or imply that the Secretary is required to establish or prove a prima facie case in the PDD as an evidentiary matter. To the contrary, I find that the language of section 452(a)(2) of GEPA, which requires the Secretary to "state" a prima facie case, is clear and unambiguous.

The requirement to "state" a prima facie case is consistent not only with the clear and common usage of the word "state," but also with the overall notice function of section 452(a). Although the 1988 amendments to GEPA (section 3501(a) of the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. 100-297) made many changes in the audit appeal process, many aspects of the appeal process and section 452 remain the same, including the general scheme of the use of the PDD to serve a notice, rather than an evidentiary, function. The requirement of the amended section 452(a)(2) that OVAE "shall have the burden of stating a prima facie case for the recovery of funds" does not alter the long-accepted interpretation that OVAE in the PDD merely must provide sufficient notice to the recipient of what expenditures are being disallowed and the reasons for the disallowance (including citation of the relevant legal authority). I find nothing in the language of section 452(a)(2) which creates an evidentiary burden on OVAE.

Nonetheless, to the extent that there may be any uncertainty or ambiguity about the meaning of this statute, the regulations implementing this section make it more than clear exactly what OVAE's burden is in the PDD. 34 C.F.R. § 81.24 (b)(2), which implements section 452(a)(2) of GEPA, explains that:

a prima facie case is a statement of the law and the facts that, unless rebutted, is sufficient to sustain the conclusion drawn in the notice. (Emphasis added).

Although the ALJ recognized this regulation in his Decision, he failed to consider its clear and unambiguous language, which specifically defines a prima facie case as a "statement of the law and the facts." As stated by the Secretary in The Matter of Gulf Coast Trades Center:

Unless I implement a revision to a regulation, I expect that my regulations, drafted as they are and not inconsistent with the mandates of the APA, be followed as written. Only in this way may these proceedings be carried out in a uniform manner which will meet the dictates of Congress and due process.

Gulf Coast Trades Center, at 5, Docket No. 89-16-S, dated October 19, 1990.

Although this statement was made in reference to a Student Financial Assistance Proceeding that employed a different regulation, that regulation had a similar provision to the one in 34 C.F.R. §81.5(b), which governs this case and which provides that an "ALJ is bound by all applicable statutes and regulations and may neither waive them nor rule them invalid." There is no basis in the Decision to justify ignoring the clear definition in 34 C.F.R. §81.24(b)(2) of what constitutes a prima facie case.

Based upon the clarity of the statute itself, and, in addition, the clarity of the regulation, the rules of statutory construction would dictate that it is unnecessary to examine the legislative history of this provision. Nevertheless, I have reviewed the appropriate legislative history provided in the Decision and by the parties. I find the ALJ's reliance on the legislative history unpersuasive. The use of the word "establish" in the House Report (H.R. Rep. No. 100-95, 100th Cong., 1st Sess. 93 (1987)), is not compelling justification for ignoring the clear language of the statute, especially in light of evidence of a specific change in the statutory language from "establish" to "state" in the original version of the bill.

I find similarly unpersuasive the ALJ's reliance on the Administrative Procedures Act (APA) and the cases decided under it. The ALJ erred in concluding that the burden of proof provision in 5 U.S.C. §556(d) applies to GEPA recovery of funds proceedings. By its own terms section 556(d) applies only "[e]xcept as otherwise provided by statute." Because GEPA has a unique statutory scheme that governs the adequacy of a PDD (20 U.S.C. §1234a(a)(2)) and the burden of proof in recovery of funds proceedings (20 U.S.C. §1234a(b)(3)), section 556(d) clearly does not apply.

In addition, I am convinced that the imposition of an evidentiary requirement to establish a prima facie case at the PDD stage would significantly and adversely alter the process of recovery of funds proceedings. Such a requirement would create substantial and unnecessary burdens on both the Department officials to produce voluminous documentation which they may not have in their possession and for which there is no demonstrated need at this preliminary stage, and on the ALJ to consider this excess documentation as part of the administrative record. Moreover, because the regulations at 34 C.F.R. §81.16 specifically provide for discovery, the recipient is not hampered in any way from obtaining any necessary relevant information or evidence at a later stage in the proceedings.

In conclusion, I find that the statutory requirement that OVAE has the burden to "state" a prima facie case is clear from the face of the statute. I find further that the regulation at 34 C.F.R. §81.24(b)(2) provides a clear and unambiguous definition of a prima facie case, that is, that OVAE must provide only a statement of the law and the facts. The ALJ's Decision that the Secretary has an evidentiary burden to establish a prima facie case in the PDD is without foundation and erroneous.

Consequently, the ALJ erred by applying an incorrect legal standard for what constitutes a prima facie case. Furthermore, it is clear that the PDD is adequate under the correct standard. The statement in the PDD that the Perkins Act funds were used to pay interest and the citation to the regulation that was violated satisfies the prima facie case requirement. This statement provides sufficient notice and information for South Dakota to rebut OVAE's claim.

Finally, although I find that the PDD does state a prima facie case on the interest issue, even if it did not, the return of the entire PDD to OVAE would not be the appropriate remedy. South Dakota challenged only one basis for the disallowance of the \$150,000, the other two rationale for the disallowance were not challenged and clearly meet the prima facie case requirement. Accordingly, the appropriate remedy for failure to state a prima facie case on the interest finding would have been to return only that portion of the PDD. The remainder of the PDD would have remained in effect.

For all these reasons, I hereby (1) set aside and vacate the ALJ's Decision, and (2) remand this matter to the ALJ for further proceedings consistent with this Decision.

This Decision is signed this 21st day of October, 1991.


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