UNITED STATES DEPARTMENT OF EDUCATION

THE SECRETARY

In the Matter of ELECTRONIC COLLEGE AND COMPUTER PROGRAMMING, Respondent	Docket No. 91-7-ST Student Financial Assistance Proceeding

DECISION OF THE SECRETARY

This appeal was initiated by the Office of Student Financial Assistance (OSFA) from a decision of Administrative Law Judge Daniel R. Shell, dated April 10, 1992. In its brief, OSFA requests review of two issues --

I. Whether the Secretary has the statutory authority to suspend, terminate, or limit an institution's eligibility to participate in Title IV, HEA programs, and also fine the institution based upon the same program violations.

II. Whether an agreement to "enter into good faith settlement negotiations" aimed at resolving outstanding issues between Electronic College and Computer Programming (ECCP) and OSFA precludes continuation of an action to terminate and fine the institution.

In its reply, ECCP raises a related argument challenging the Department's regulatory authority to suspend, terminate, or limit an institution's eligibility to participate in Title IV, HEA programs, and also fine the institution based upon the same program violations. The issues of statutory and regulatory authority are discussed together.

DISCUSSION

I. Termination and Fine as Alternate or Complimentary Sanctions.

The resolution of whether the Secretary has statutory authority to suspend, terminate, or limit an institution's eligibility to participate in Title IV, HEA programs, and also fine the institution based upon the same program violations, depends on the interpretation given the word "or" in the following statutory language --

> (1) Notwithstanding any other provisions of this subchapter and part C of subchapter I of chapter 34 of title 42, the Secretary is authorized to prescribe such regulations as may be necessary to provide for --
> ....
>
> (D) the limitation, suspension, or termination of the eligibility for any program under this subchapter and part C of subchapter I of chapter 34 of title 42 of any otherwise eligible institution, or the imposition of a civil penalty under subparagraph (2)(B)...[1]

The established interpretation of the statute by the Department has been to consider "or" to have both a conjunctive and disjunctive connotation -- that is to say the established interpretation has been to construe "or" as meaning "and/or." Indeed, OSFA's brief lists a long line of administrative decisions authored by other ALJs, many approved by the Secretary, which have sought to both terminate and fine an institution for program violations.[2]

However, in his decision Judge Shell held --

> It is found that the proper interpretation of the sanctions is in the disjunctive. Either a termination, limitation, or suspension or a fine can be imposed but not both. The sanctions of termination or fine are determined to be alternative sanctions and, as such, they are mutually exclusive. Education's citation of administrative case law precedent to show the past practice of terminating and fining institutions and the Secretary's affirmance of that practice is not controlling on this issue and no deference is given them.[3]

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1 20 U.S.C. § 1094 (c).

2 OSFA Brief, page 10-11.

3 Initial Decision, page 49.

Judge Shell bases his holding upon several cases that hold that "or" should be given a disjunctive connotation unless such a construction would render the provision repugnant. Judge Shell reasoned that "... any claim of rendering a provision repugnant by construing "or" in an alternative sense seems insupportable and in disregard of its regular usage."[4]

However, the cases cited by Judge Shell must be balanced with the equal number of cases that have been more lenient in looking beyond a rigid definition of sentence connectors.[5] Even the United States Supreme Court has been accused of giving inconsistent instructions on when to look beyond the plain meaning of "or" and "and."[6] In this case, it is appropriate to "look to the provisions of the whole law, and to its object and policy."[7]

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[4] Id. at 47-48.

[5] E.g. "In the construction of statutes, it is the duty of the court to ascertain the clear intention of the legislature. In order to do this, courts are often compelled to construe 'or' as meaning 'and,' and again 'and' as meaning 'or.' U.S. v. Fisk, 3 Wall. 445, 448, 70 U.S. 445, 447, 18 L.Ed. 243, 244 (1865). "... the word 'or' is often used as a careless substitute for the word 'and' ... [t]hat trouble with the word has been with us for a long time ...". DeSylva v. Ballentine, 351 U.S. 570, __, 76 S.Ct. 974, 976, rehearing denied 352 U.S. 859, rehearing denied 362 U.S. 907 (1956), (citing U.S. v. Fisk, supra). "But the word 'and' is not a word with a single meaning, for chameleonlike, it takes its color from its surroundings." Peacock v. Lubbock Compress Company, 252 F2d. 892, 893 cert. denied 356 U.S. 973, 78 S. Ct. 1136 (1958).

> In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy [citations omitted]. Our objective in a case such as this is to ascertain the congressional intent and give effect to the legislative will.

Philbrook v. Glodgett, 421 U.S. 707, 713, 95 S.Ct. 1893, 1898, 44 L.Ed. 2d. 525 (1975).

[6] Bruce v. First Fed. Sav. & Loan Ass'n of Conroe, 837 F2d. 712 (5th Cir. 1988).

[7] Philbrook, supra at 713.

Terminations, suspensions, and limitations serve the non-punitive purpose of protecting students and the government from future harm, while fines are punishment for past conduct. Only by reading the statute to construe fines as being available in addition to limitations, suspensions, and terminations can Congress' intent be achieved. It would be illogical for Congress to provide that the Department could punish an institution only if the Department were willing to forego taking action to protect the public from present or future harm.

In its brief, ECCP also argues that OSFA lacks regulatory authority to levy a civil penalty and pursue termination at the same time. ECCP points out that the relevant regulations which formerly contained an explicit reference to multiple options, has been revised to new language that is not explicit.[8] ECCP attempts to bolster this argument by citing language in the current regulations where a sanction is explicitly authorized while OSFA is pursuing a complimentary sanction.[9] ECCP argues that, "If, as OSFA claims, multiple sanctions can be sought, why would the regulations go out of their way to explicitly state the conditions under which it could be done?"[10]

It is implicitly clear by reading the regulations in context, that the sanctions of an emergency action, fine proceedings, suspension proceedings, and limitation or termination proceedings are complimentary processes.[11] Rather than being exceptions to the rule of single sanctions as ECCP argues, the explicit references to complimentary sanctions are due process safeguards on OSFA's general authority --

> (f) An emergency action may not exceed 30 days unless the Secretary initiates a limitation, suspension, or termination proceeding ...[12]
>
> (2) The suspension may not exceed 60 days unless --
> ...
>
> (ii) The designated department official begins a limitation or termination proceeding ...[13]

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8 ECCP Brief, at 21-23.

9 Id., citing 34 C.F.R. § 668.85 (2)(ii).

10 Id., at 23.

11 See 34 C.F.R. § 668.83 - § 668.86.

12 34 C.F.R. § 668.83 (f).

13 34 C.F.R. § 668.85 (2).

Read in context these exceptions help prove the rule -- that the Secretary has the regulatory authority to fashion a response appropriate to an individual institution's violations under Title IV, HEA programs from the complimentary sanctions established by statute.

II. Agreement to Enter into "Good Faith" Negotiations.

At the hearing before Judge Shell, one of OSFA's arguments for pursuing a termination and fine of ECCP was the institution's misappropriation of Pell Grant funds. In support of this argument, OSFA introduced agreements ECCP had entered into with OSFA to make restitution for its receipt of excess Pell Grant funds. In his decision, Judge Shell found that the agreements were "bilateral contracts," with the promises of each party serving as consideration for the promises of the other.[14]

The issue presented on appeal revolves around Judge Shell's interpretation of the following passage from the December 21, 1990, agreement between the parties --

> ECCP agrees that this agreement does not waive, compromise, restrict or, settle:
>
> (b) any presently pending or future administrative fine, limitation, suspension, termination or emergency action taken by Education. (emphasis added [by Judge Shell]).
>
> (c) Notwithstanding the foregoing, ECCP and Education shall, given this repayment agreement and the pending intent of the Department to fine and terminate ECCP's eligibility to participate in Title IV, HEA programs, enter into good faith settlement negotiations, as anticipated by 34 C.F.R. 668.87(a)(2), aimed at resolving the underlying issues recited in the letter sent to ECCP by Education's Office of Student Financial Assistance on November 30, 1990, such letter which is incorporated here by reference. (emphasis added [by Judge Shell]).[15]

Judge Shell reasoned as follows --

> Education did pledge in paragraph 16(c) of the December 21, 1990 agreement to enter into good faith negotiations to resolve the excess funds issue. In consideration of such a pledge, one must ask if Education

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[14] Id. at 28-30, citing Black's Law Dictionary, (5th Ed. 1979) at 148.

[15] Initial Decision at 6, (citing the December 21, 1990, Agreement between ECCP and OSFA).

> has carried through on that promise since it has not altered or delayed pursuit of those sanctions despite ECCP's repayment of the amounts in issue, which totalled over $638,000. In fact, if Education can use the substance of the agreement as proof of a violation in this termination and fine action, it appears that ECCP really gained nothing by the Agreement except the opportunity to repay the six-figure sum claimed for 1988-89.
>
> ECCP has correctly asserted that the Settlement Agreements were negotiated and executed in good faith and with the intent to resolve any claims arising from the stipulated liabilities. Education has no justification in resurrecting these claims to support its pending termination and fine action. The parties conducted arms length negotiation, all facts were fully contemplated, and there is no cause to set aside the terms of a valid contract. Education agreed to forbear the prosecution of the claim which was the subject matter of this agreement. The law presumes that the parties entered a legally valid contract. To find otherwise is a failure to recognize the validity of the contracts (settlement agreements) entered into on June 1, 1990, December 21, 1990, and February 14, 1991. Because the excess fund violations were resolved by settlement agreements, no finding of fact is required here and there is no reason to inquire into the specifics which led to the parties' settlement agreements. Here, there is no evidence or reason to set aside these three agreements.
>
> This tribunal is satisfied that the excess funds issue was fully resolved by the parties and leaves no factual dispute to be determined and no reason to make findings on any factual or legal dispute concerning excess funds for the 1988-89, 1984-85, 1983-84 award years.[16]

Although the arguments are intertwined, I understand the above passage to be either a finding that the settlement agreement failed for lack of consideration, or a finding that OSFA breached the terms of the settlement agreement. Whichever rationale was intended, I disagree.

In his Initial Decision, Judge Shell overlooked ample consideration to support the contract established by the settlement agreements --

> While the notice, program reviews, briefs and testimony give varying accounts of what sum was due, a sum certain was reduced to a series of agreements. ...

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[16] Id. at 30-31.

> Repayment agreements between parties represent a way the parties have found to resolve the violations without adjudicating the matters or bringing them before an ALJ for a decision. The repayment agreements are significant, too, because they close matters and withdraw them from further action...[17]

Clearly, the settlement agreements resolved issues then in dispute, and saved ECCP the expense of litigating the full range of issues. I hold that this is sufficient consideration to support the formation of a contract between ECCP and OSFA.

The argument that OSFA breached its contractual duty to negotiate in good faith is equally unconvincing. Good faith negotiation does not preclude the parties failing to reach an agreement. Good faith bargaining only requires the "earnest efforts of both sides to resolve a controversy."[18] For example --

> An agreement to negotiate, even if recognized, does not bind a party to surrender his right to decide not to enter into another contract with the other party. (citation omitted.)[19]

> Good faith bargaining does not mean a right to a new lease or even a right of first refusal and, certainly, there can be other considerations than the rental alone. However, it does mean a give and take, a discussion of problems, real or perceived, and their potential solutions. It means an honest attempt on both sides to reach an accord.[20]

The Initial Decision is void of any finding that OSFA did not negotiate in good faith following its agreement to do so. The void becomes more apparent when consideration is given to the fact that it was ECCP's obligation to come forward with proof of the breach --

> ... in a breach of contract action, the burden is on plaintiff to prove all elements of the action.[21]

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17 Id. at 28-29.

18 N.L.R.B. v. Decorel Corporation, 397 F2d. 488, 493 (1968).

19 Knight v. Sharif, 875 F2d. 516, 525 (5th Cir. 1989).

20 In Re: Grey Line of Boston, 62 BR 811, 816 (1986).

21 Redwood Center v. Riggs Nat. Bank, 737 F.Supp 671 (D.D.C. 1990).

ECCP bore the obligation of coming forward with evidence establishing a breach, and they failed to do so.

HOLDING

This case is remanded to Judge Shell for the following action --

1. His consideration of the propriety of imposing a fine on ECCP as an additional administrative sanction.

2. The rendering of a finding on ECCP's misappropriation of Pell Grant funds, and consideration of a termination and/or fine in light of this finding and the untimely filed audits.

So ordered this 10th day of July, 1992.

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