



UNITED STATES DEPARTMENT OF EDUCATION

THE SECRETARY

In the Matter of
International Career
Institute

Docket No. 92-144-SP

Student Financial
Assistance Proceeding

Decision of the Secretary

This matter comes before the Secretary on appeal, by the U.S. Department of Education, Office of Student Financial Assistance Programs (SFAP), of an "Order of Dismissal" issued by Judge Ernest C. Canellos (Hearing Official) dated December 1, 1993. In his Order of Dismissal, the Hearing Official determined that the final program review determination letter (FPRD) was not issued "by a designated ED official" as required by 34 C.F.R. § 668.112. In making this determination, the Hearing Official found that because the FPRD was signed by an ED employee who was subordinate to the designated ED official, the signing of the FPRD by the subordinate employee amounted to an improper attempted redelegation of authority precluded by Subsection (IX) (F) of the U.S. Education Department Departmental Directive A:GEN:1-104, Delegations of Authority, dated August 15, 1989.¹ The Hearing Official dismissed the case because the signature on the FPRD "constitute[d] a jurisdictional failure."

DISCUSSION

On appeal, SFAP moves the Secretary to adopt a decision reversing the Order issued by the Hearing Official and remanding this case for further proceedings.

Prior to responding to the relief requested by SFAP, the issue regarding whether this appeal is properly before the Secretary must be addressed.

Under 34 C.F.R. § 668.119, any party may file a timely appeal of the initial decision of the Hearing Official. An initial decision states and explains whether the written notice of determination issued by the designated ED official was

¹Departmental Directive A:GEN:1-105 was renumbered A:GEN:1-104 on May 22, 1991 by Department of Education Transmittal Sheet 91-20, Pen and Ink Changes.

supportable, in whole or in part.² In the case at hand, the Hearing Official determined that the FPRD was not supportable, ab initio, because of a procedural defect in the issuance of the FPRD. Although the Hearing Official's decision did not adjudicate the underlying merits of the case, the Secretary holds that the Hearing Official's decision is appealable, and thus properly before the Secretary.

By this determination, the Secretary does not intend to expand the universe of cases currently appealable to the Secretary under the regulations. Instead, this decision recognizes SFAP's position that overwhelming policy considerations support the necessity for the Secretary to review the Hearing Official's decision in this case; those considerations include, the compelling likelihood that the delegation of authority issue in the case at hand will continue to resurface, absent some direction from the Secretary, because senior officials in the Department are likely to continue to need to rely upon their subordinates to act in their stead while they are out of the office as well as because of the existence of six other appeals currently before the Secretary involving ostensibly the same issue as in the case at bar.

Turning to the issue at hand, according to the Hearing Official, "[r]egardless of whether a designation or temporary assignment of duties [is] being attempted," permitting a subordinate employee to sign a written notice of determination is, "in essence, an attempted redelegation of authority which was specifically precluded by the reservation against further delegation in the original Delegation." The Secretary cannot agree.

Posing the issue in this case as a question of whether an attempted redelegation of authority has occurred puts the Hearing Official in the unusual position of assuming what is, in fact, at issue; namely, whether a designated ED official issued the FPRD. It is no answer to say, as the Hearing Official has in this case, that a departmental directive governing delegations of authority precludes a subordinate employee from being deemed the proper signatory to a FPRD since the subordinate employee is not a designated ED official.

To begin with, the departmental directive governing delegations of authority has no application to determining whether the signatory to the FPRD acted properly in signing the FPRD for the Chief of the Institutional Review Branch. Although it is clear that the authority to issue FPRDs has been

²See 34 C.F.R. § 668.118(b). See also, 34 C.F.R. § 668.90.

redelegated to the Chief of the Institutional Review Branch and that that official is precluded from further redelegating his or her authority, the permissibility of redelegations of authority is irrelevant, here, because the record shows that no redelegation of authority was either attempted or achieved by the Chief of the Institutional Review Branch.

Under Departmental Directive A:GEN:1-104, a document containing a delegation of authority must, *inter alia*, clearly state that a delegation of authority is being undertaken and must also be certified by the Departmental Delegations Control Officer (DDCO).³ In the record of the case at hand, there is no document, certified by the DDCO, which purports to be a clear statement of delegation of authority. To the contrary, the record contains a document signed by Robert J. McKiernan, the Chief of the Institutional Review Branch, which states:

From Tuesday, October 20 to Friday, October 23, Bill Swift will be Acting Branch Chief while I am on leave.⁴

Undoubtedly, Robert J. McKiernan's memorandum was intended to do what it clearly states; namely, to designate a subordinate individual to serve in the stead of the Chief of the Institutional Review Branch during a specified period of the person's absence from the office. Not surprisingly, the efficient operation of the Department requires that senior officials have the ability to designate subordinate employees to temporarily fill their positions while they are away from their offices.

More important, there is no basis in the record to conclude that anyone other than Robert J. McKiernan made the actual decision to issue the FPRD. Significantly, the act of issuing an FPRD encompasses a range of decision making which includes, for example, the Chief of the Institutional Review Branch's evaluation of the results of a program compliance review of Respondent's participation in Title IV, HEA programs. Nothing in 34 C.F.R. § 668.112 would support the notion that the signature on the FPRD, itself, would suffice to meet the requirement or should become the determining factor that a written notice of

³See A:GEN:1-104(V)(A); A:GEN:1-104(VI)(D)(5) and (X). Significantly, the delegation of authority which delegates to the Chief, Institutional Review Branch the authority to issue FPRDs is both a clear statement of delegation of authority and certified by the DDCO. See SFAP Appeal Br. Ex. 2.

⁴See SFAP Appeal Br. Ex. 1.

determination is issued by a designated ED official.⁵ Indeed, according to the evidence in the record, the facts are simply that a subordinate employee fulfilled a ministerial duty by signing an FPRD after being authorized to do so by his immediate supervisor. Notably, Robert J. Mckiernan's name appears on the signature page of the FPRD with the signatory signing his name "William Swift for" the Chief of the Institutional Review Branch. Consequently, the facts in this case support one result; that the FPRD was issued by a designated ED official.

The signatory to the FPRD, William Swift, acted properly in signing the FPRD for the Chief of the Institutional Review Branch because he was the individual designated by the Chief of the Institutional Review Branch to serve in that person's absence. Therefore, the FPRD was properly issued. Accordingly, the Secretary HEREBY REVERSES the Hearing Official's decision, reinstates the FPRD, and REMANDS this case to the Hearing Official for further proceedings.

So ordered this 16th day of February, 1994.


Richard W. Riley

Washington, DC

⁵To the extent that In the Matter of Fundacion Educativa Ana G. Mendez, Dkt. No. 93-54-SP, U.S. Dept. of Education (Decision of the Hearing Official September 1, 1993) is inconsistent with this opinion, it is HEREBY REVERSED.