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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Department of Education -- Grant Extensions

File: B-303845

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DIGEST

1. Department of Education's 4-year extension of a 5-year grant made to an Historically Black Graduate Institution (HBGI) was improper given the plain language of the authorizing statute limiting grants to HBGIs to a period not to exceed 5 years. 20 U.S.C. § 1063b(b).
2. Department of Education's 4-year extension of a 5-year grant made to an Historically Black College and University (HBCU) amounted to an improper waiver of its regulations, which limited the duration of HBCU grant periods to 5 years. 34 C.F.R. § 608.11.

DECISION

Between July 2003 and August 2004, our Office undertook an examination of the Department of Education's (Education) management of grant programs to benefit low-income and minority serving postsecondary institutions authorized by Titles III and V of the Higher Education Act of 1965 (HEA), Pub. L. No. 89-329, 79 Stat. 1219 (Nov. 8, 1965), as amended, 20 U.S.C. § 1001 (2000). GAO, *Low-Income and Minority Serving Institutions: Department of Education Could Improve Its Monitoring and Assistance*, GAO-04-961 (Washington, D.C.: Sept. 21, 2004). During the course of that review, we became aware that, despite apparent statutory and regulatory limitations on grants to Historically Black Colleges and Universities (HBCU) and Historically Black Graduate Institutions (HBGI), Education, in some cases, had made 4-year "extensions" to the original 5-year grants awarded to those institutions.

For the reasons explained below, we conclude that these extensions were improper. Education should strictly adhere to the duration restrictions for grant periods as set up in the authorizing legislation and implementing regulations, and terminate grants improperly extended. If, at that time, Education determines that additional assistance is warranted, Education could award a new grant to that institution. In

the alternative, Education may wish to seek legislative changes that would allow for extensions to 5-year grants.

BACKGROUND

Title III, Part B of the Higher Education Act of 1965, as amended,¹ 20 U.S.C. §§ 1060–1063c, contains provisions which provide for and govern grants to HBCUs and HBGIs. Section 1063b, which specifically applies to HBGIs, provides that “[g]rants shall be made for a period not to exceed 5 years.” 20 U.S.C. § 1063b(b). The Act does not contain a similar limitation regarding grant duration for HBCUs. *See* 20 U.S.C. §§ 1060–1063, 1063a, 1063c. Education’s implementing regulations, however, provide that grants to both HBCUs and HBGIs may be awarded “for a period of up to five academic years.” 34 C.F.R. § 608.11 (HBCUs),² § 609.11(HBGIs) (2004).

In our 2004 review of Education’s management of Title III and Title V grant programs, we found that grantees commonly reported difficulties implementing their grant projects, including problems related to hiring and staffing, “construction delays, challenges implementing technology and distance learning, and state budget shortages.” GAO-04-961 at 13. As a result of these challenges, “grantees often needed additional time to complete planned activities.” *Id.* We learned that Education, in some cases, had extended grants to HBCUs and HBGIs for an additional 4 years beyond their initial five-year period, that is, gave them 4 more years in which to obligate grant funds awarded in the original 5-year grant which were not obligated at the end of the 5-year grant period. GAO-04-961 at 14, fn.7; letter from Hubert Davis, Director, Institutional Development and Undergraduate Education Service, Education, to HBCU/HBGI Presidents, Sept. 2, 2003. Given that the plain language of the authorizing legislation for HBGIs and the implementing regulations for HBCUs and HBGIs limit the duration of grants to HBCUs and HBGIs to no more than 5 years, we asked Education’s General Counsel, in October 2004, for his response to a series of questions regarding these extensions. Letter from Dayna K. Shah, Associate General Counsel, GAO, to Brian W. Jones, General Counsel, Department of Education, Oct. 25, 2004.

¹ The Higher Education Amendments of 1986, Pub. L. No. 99-498, 100 Stat. 1268 (Oct. 17, 1986); the Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, 100 Stat. 1874 (Oct. 21, 1986); and the Higher Education Technical Amendments Act of 1987, Pub. L. No. 100-50, 101 Stat. 335 (June 3, 1987).

² For reasons unclear, section 608.11 cites 20 U.S.C. § 1063b(b) as authority for this 5-year limitation on HBCU grants, although section 1063b, by its terms, applies only to HBGIs.

In November 2004, Education's General Counsel responded that the 5-year limitation applies only to "the initial term of the grant at the time of award," and that the subsequent extension of a grant is not barred by the governing provisions. Letter from Brian W. Jones, General Counsel, Department of Education, to Dayna K. Shah, Associate General Counsel, GAO, November 29, 2004 (Jones Letter). Moreover, the General Counsel pointed out that the implementing regulations for HBCU and HBGI grants, 34 C.F.R. §§ 608.3(a)(2) and 609.3(a)(2), respectively, incorporate 34 C.F.R. § 75.261, which permits extension of the grant award period under certain circumstances. *Id.*

ANALYSIS

The issues presented are: (1) whether Education has authority to make 4-year extensions to 5-year grants to HBGIs; and (2) whether the 4-year extensions to 5-year grants to HBCUs are permissible.

Extensions to HBGI Grants

The statute at issue with respect to the HBGI grants reads, in relevant part, as follows: "Grants shall be made for a period not to exceed 5 years." 20 U.S.C. § 1063b(b).

The starting point for interpreting a statute is the plain meaning of the statutory language. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). If the statute is unambiguous, the literal language of the statute controls. *Webb v. Hodel*, 878 F.2d 1252, 1255 (10th Cir. 1989). The plain meaning of section 1063b(b) is that grants can be made for any period up to, but for no more than, five years; there is no ambiguity. We have consistently interpreted legislative language "not to exceed" as establishing a maximum limitation. *See, e.g.*, 64 Comp. Gen. 263, 264 (1985) (an appropriation of "not to exceed \$15,000" "is susceptible of but one meaning which is that [the agency] may not expend more than \$15,000"). Moreover, our review of the legislative history of section 1063b(b) provides no basis to believe that anything other than the phrase's plain meaning was intended. H.R. Rep. No. 99-383, at 1, 20-23 (1986), H.R. Conf. Rep. No. 99-861, at 361-368 (1986), and H.R. Rep. No. 104-504, at 1-5 (1996). "Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion." *Caminetti v. United States*, 242 U.S. 470, 485 (1917). The plain meaning of the statute is that Education may award grants to HBGIs for a period no greater than 5 years.

Education argues that the 5-year limitation applies only to the initial grant, and that it may thereafter make extensions since there is no express prohibition of extensions in the statute. Jones Letter. As a general proposition, an agency's interpretation of a statute it is charged with administering is entitled to deference. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 843-44 (1984). This deference, however, is not without limits, as the agency's interpretation must be

reasonable and based on a permissible construction of the statute. *Id.* at 843. Education's view that, essentially, it can infer authority to extend grants from the absence of an express prohibition in the statute, is not a permissible construction, for "[i]t is indeed well established that the absence of a statutory prohibition cannot be the source of agency authority." *FAG Italia S.p.A. v. United States*, 291 F.3d 806, 816 (Fed. Cir. 2002). In *Railway Labor Executives' Ass'n v. National Mediation Board*, 29 F.3d 655 (D.C. Cir. 1994), the court explained the reasoning behind this rule: "Were courts to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well." *Id.* at 671. We therefore cannot accept Education's interpretation of the statute to permit the extensions.

Education also argues that the implementing regulation found at 34 C.F.R. § 609.3(a)(2), which incorporates 34 C.F.R. §§ 75.261(a) and (c), provides for the extension of grants. Section 75.261(a) provides grantees a one-time extension "for a period up to twelve months," without Education's approval, but only if certain additional requirements are met, including "ED regulations ... , statutes or the conditions of an award do not prohibit the extension." On its face, a 4-year extension cannot be justified by this provision; the regulation permits only a 1-year extension. In any case, at issue here are 5-year HBGI grants, and any extension to a 5-year HBGI grant would violate the statutory 5-year limitation on HBGI grants at 20 U.S.C. § 1063b(b), hence not meeting the requirements of section 75.261(a) that an extension is permitted only if there is no statute that prohibits the extension.³

Section 75.261(c) provides the terms under which Education may grant an extension when agency approval is required. However, one of the requirements is that "[t]he extension does not violate any statute or regulations;" Again, since extensions beyond an aggregate 5 years (base term plus any extensions) violate the 5-year statutory limitation at 20 U.S.C. § 1063b(b), the extensions cannot be justified by 34 C.F.R. § 75.261(c). Since the statute limits the duration of HBGI grants to 5 years, Education, in extending the grants by 4 years, essentially has created 9-year grants, and therefore exceeded its authority.

Extensions to HBCU Grants

While the grant authorizing legislation, 20 U.S.C. §§ 1060–1063c, contains no restriction on grant duration with respect to grants to HBCUs, Education's

³ In the November 29, 2004, response, Education's General Counsel also refers to a grant extension provision at 34 C.F.R. § 74.25(e)(2)(i). However, like section 75.261(a), this provision too is limited to 12 months and could not justify 4-year extensions.

implementing regulations for grants to HBCUs, 34 C.F.R. part 608, contain the following limitation: “The Secretary may award a grant under this part for a period of up to five academic years.” 34 C.F.R. § 608.11.

To determine the effect of this regulation upon the agency’s grantmaking discretion, we look to the Administrative Procedure Act (APA), 5 U.S.C. §§ 551–706, which generally governs agency rulemaking and adjudications. The APA section on rulemaking, section 553, draws a distinction between substantive rules, also called legislative rules, and “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.” 5 U.S.C. § 553(b)(A), (d); *Chrysler Corp. v. Brown*, 441 U.S. 281, 302–03, 313–14 (1979). Substantive, or legislative, rules must be published in the *Federal Register* for notice and comment under 5 U.S.C. § 553(b), (d), and when duly promulgated in that manner, they are “binding,” or have the “force and effect of law.” *Chrysler Corp.*, 441 U.S. at 302–03, n.31; *Appalachian Power Co. v. Environmental Protection Agency*, 208 F.3d 1015, 1020 (D.C. Cir. 2000). An agency is bound by its own legislative regulations and may not waive them.⁴ *National Family Planning and Reproductive Health Ass’n, Inc. v. Sullivan*, 979 F.2d 227, 234 (D.C. Cir. 1992); *Tyler v. U.S. Dept. of Labor*, 752 F. Supp. 32, 37 (D. Me. 1990); B-243283.2, Sept. 27, 1991. In contrast, the publication and comment requirements do not apply to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice, and they do not have the force and effect of law. 5 U.S.C. § 553(b)(A), (d); *Gossett v. Barnhart*, 374 F. Supp. 2d 505, 510 n. 7 (E.D. Tex. 2005).

In *Troy Corp. v. Browner*, 120 F.3d 277 (D.C. Cir. 1997), the D.C. Circuit Court of Appeals defined a legislative rule as “one that (1) ‘supplements’ a statute; (2) ‘effect[s] a change in existing law or policy’; or (3) ‘grant[s] rights, impose[s] obligations, or produce[s] other significant effects on private interests.’” *Id.* at 287 (citation omitted). In *National Family Planning and Reproductive Health Ass’n v.*

⁴ Under the APA, regulations governing “public property, loans, grants, benefits, or contracts” are ordinarily exempt from the notice and comment requirements for legislative rulemaking. 5 U.S.C. § 553(a)(2). However, Education (by its predecessor, the Department of Health, Education and Welfare) waived this exemption in 1971, *see* 36 Fed. Reg. 2532 (Feb. 5, 1971), subjecting the agency to the notice and comment requirements of 5 U.S.C. § 553 for substantive regulations regarding any of the above named matters, including grants. *See Mission Group Kansas, Inc. v. Riley*, 146 F.3d 775, 782, fn. 7 (10th Cir. 1998). In 1994, Congress statutorily waived application of the exemption for Education grant regulations, except for regulations “(1) that govern the first grant competition under a new or substantially revised program authority as determined by the Secretary; or (2) where the Secretary determines that the requirements of this subsection will cause extreme hardship to the intended beneficiaries of the program affected by such regulations.” Pub. L. No. 103-382, § 247, 108 Stat. 3923, *codified at* 20 U.S.C. § 1232(d).

Sullivan, 979 F.2d at 237, the court explained that a substantive or legislative rule is “one that does more than simply clarify or explain a regulatory term, or confirm a regulatory requirement, or maintain a consistent agency policy.” Explained still another way, “[i]nterpretive rules state what the administrative officer thinks the statute or regulation means, while legislative rules ‘affect individual rights and obligations,’ and create law.” *Davidson v. Glickman*, 169 F.3d 996, 999 (5th Cir. 1999) (citation omitted).

Applying these principles, we conclude that 34 C.F.R. § 608.11 is a legislative rule, and as such, is binding on the agency. It imposes a 5-year limitation on the term of grants awarded under the program which does not exist in the authorizing statute; in the words of the standard defined in *Troy*, it “supplements” the statute. Furthermore, section 608.11, as well as all the regulations found at 34 C.F.R. §§ 608 and 609, was promulgated through notice and comment rulemaking procedures after the HBCU and HBGI programs were created in 1986. *See* 52 Fed. Reg. 22,274–22,281 (June 10, 1987) and 52 Fed. Reg. 30,536–30,543 (Aug. 14, 1987). The June 10, 1987, Notice of Proposed Rulemaking states:

“The Secretary proposes regulations to govern the [HBCU] Program and the [HBGI] Program. The regulations are needed to implement these two new programs, each of which is authorized under Part B of Title III of the Higher Education Act of 1965 (HEA) as amended by the Higher Education Act Amendments of 1986, Pub. L. 99-498.”

52 Fed. Reg. 22,274. Subsequently, on August 14, 1987, the “Final regulations” were published, again stating the agency’s purpose as the implementation of the HBGI and HBCU programs, along with an explanation of the comments received and the agency’s ultimate decisions after considering the comments. *See* 52 Fed. Reg. 30536. The agency’s actions suggest that officials intended the regulations to have legislative effect. Moreover, the fact that Education published section 608.11 in the Code of Federal Regulations, which includes only regulations with legal effect, 44 U.S.C. § 1510(a), is also indicative that the agency intended the regulation to be binding. *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538–39 (D.C. Cir. 1986).

Having determined that the regulation here is binding on Education, we turn to the interpretation of its language. “To interpret a regulation we must look at its plain language and consider the terms in accordance with their common meaning.” *Lockheed Corp. v. Widnall*, 113 F.3d 1225, 1227 (Fed. Cir. 1997). The plain language of the regulation authorizes the agency to award grants for periods of up to five

academic years.⁵ We conclude, therefore, that Education can award grants to HBCUs for periods no longer than 5 academic years. The 4-year extensions to 5-year grants certainly have the effect of creating grants of periods longer than 5 years, and therefore are improper.

CONCLUSION

We conclude that: (1) the 4-year extensions made to 5-year grants to HBGIs were improper, since the plain language of the authorizing statute specifies that grants to HBGIs are not to exceed 5 years; and (2) the 4-year extensions made to 5-year grants to HBCUs were improper since Education's binding regulations limit those grants to 5 years. Adherence to the existing framework for grantmaking, as laid out in the statute and implementing regulations, provides structure and consistency, which in turn promotes the goals of proper administration and accounting, as well as fairness to all grant applicants. Education therefore should strictly adhere to the duration restrictions for grant periods and terminate grants improperly extended.

To the extent that Education determines at that time that additional assistance is warranted, Education could award a new grant to that institution. A new grant, of course, would constitute a new obligation of Education that would be chargeable to appropriations current at the time Education awards the new grant. B-289801, Dec. 30, 2002. Education will need to recover from grantees any amounts from a terminated grant that the grantee had not obligated as of the end of the 5-year grant period, and credit those amounts to the Education appropriation from which Education had made the initial grant award. If that appropriation were a fiscal year appropriation, those amounts are no longer available to Education, and they must be deposited into the proper expired appropriation. In the alternative, Education may wish to seek legislative changes that would allow for extensions to 5-year grants.

/signed/

Anthony H. Gamboa
General Counsel

⁵ In addition, our review of the Notice of Proposed Rulemaking, 52 Fed. Reg. 22,274–22,281 (Jun. 10, 1987), and the Final Rule, 52 Fed. Reg. 30,536–30,543 (Aug. 14, 1987), for this regulation when it was first promulgated in 1987, revealed no contrary intent.