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The Honorable Chuck Douglas House of Representatives

Dear Mr. Douglas:

This is in response to your letter dated August 13, 1990, in which you requested our comments on concerns expressed by Ms. Michelle E. Sweet, Director, New Hampshire Small Business Development Center at University of New Hampshire, regarding the funding of the Economic Development Administration's (EDA) University Center program. The university is one of the grant recipients under the program. Specifically, Ms. Sweet questions whether EDA is legally authorized to carry out a "graduation" policy, by which EDA seeks to gradually phase out and eventually terminate New Hampshire University's University Center program funding.

We have received similar requests from other members of Congress concerning other universities that have been informed by EDA of funding termination. We have reviewed the issues raised by these requests and have obtained information from EDA concerning the legal basis for its "graduation" policy. Although the matter is not free from doubt we have concluded that EDA was legally precluded from carrying out its graduation policy during fiscal years 1989 and 1990, under EDA's fiscal year appropriations acts for those 2 years. /1/

Background

The University Center Program was established under the authority of section 301(a) of the Public Works and Economic Development Act of 1965, Pub. L. No. 89-136, as amended, 42 U.S.C. Sec. 3151(a). Under the program, EDA provides selected colleges and universities with federal funds to set up "University Centers," which are responsible for assisting in the economic development of distressed areas. EDA enters into these grant agreements on an annual, rather than multi-year, basis.

In a February 11, 1987, Federal Register Notice, EDA announced "policy changes it intends to institute for basic university center grant awards." 52 Fed. Reg. 4370 (1987). The stated purpose of the Notice was to inform University Center grantees and potential applicants of the "proposed policy changes." Id. The Notice stated that "[t]he changes would go into effect in fiscal year 1988 if Congress makes funds available for the University Center Program beyond fiscal year 1987." Id. The Notice went on to spell out the details of the graduation policy EDA intended to institute. /2/ On September 30, 1987, Congress enacted Pub. L. No. 100- 120, which continued EDA appropriations from October 1, 1987,

to November 10, 1987. /3/

During the first quarter of fiscal year 1988, EDA wrote to the chairmen of the Senate Appropriations Committee and the House Appropriations Subcommittee on Commerce. The letter to Chairman Neal Smith of the House Appropriations Subcommittee, dated December 11, 1987, advised the Chairman that, "EDA is proceeding to implement the policy of phasing out support to University Centers . . . ." According to EDA, the same information was provided to Chairman John Stennis of the Senate Appropriations Committee. In point of fact, no support was "phased out" during this quarter.

Also, during this quarter, on December 22, 1987, the Conference Committee, reporting on EDA's final fiscal year 1988 appropriations, stated:

"EDA is directed to defer until FY 1989 the implementation of the proposal to graduate institutions from the University Center program to provide the opportunity for the Appropriations Committee to review the policy." (Emphasis added.)Joint Explanatory Statement of the Committee of the Conference accompanying Conference Report 100-498, on H.J.395, for fiscal year 1988 appropriations, December 22, 1987,p. 477.

In a Federal Register Notice, dated January 19, 1988, EDA appeared to reject the directive of the Conference Committee. The Notice announced EDA's policies and application procedures for funds available in FY 1988. 53 Fed. Reg. 1444 (1988). EDA stated:

"EDA's policy is to provide basic support of $100,000, annually, for five years and $50,000, annually, for the sixth and seventh years. No basic funds are provided after the seventh year of EDA support." Id. at 1448. (Emphasis added.)

In the spring of 1988, however, EDA advised University Centers that the commencement of funding cuts was being deferred until fiscal year 1989. In point of fact, no support had been "phased out" in the spring quarter, and none was to be phased out during fiscal year 1988.

For both fiscal year 1989 and fiscal year 1990, Congress included the following language in the appropriations acts for EDA's assistance programs:

"[T]he Secretary of Commerce or his designees shall not promulgate or enforce any rule, regulation or grant agreement provision affecting programs authorized by the Public Works and Development Act of 1965, as amended, unless such rule, regulation, or provision is either required by statute or expressed as the explicit intent of the Congress or is in substantial conformity with those rules, regulations, and provisions in effect prior to December 22, 1987."

Pub. L. No. 199-459, 102 Stat. 2187-88, Sept. 30, 1988; Pub. L. No. 101- 162, 103 Stat. 989, Nov. 21, 1989.

Despite this restrictive language, EDA commenced implementation of its graduation policy in fiscal year 1989.

Discussion

The issue we address is whether, in view of the restrictions contained in the fiscal-year 1989 and fiscal year 1990 appropriations acts, EDA was authorized to

implement the "graduation" policy during the two fiscal years. EDA argues that the policy was in effect prior to December 22, 1987, and therefore, that the restrictive statutory language has no application to this policy.

Specifically, EDA claims that, in accordance with its February 11, 1987, Federal Register Notice, the graduation policy went into effect on October 1, 1987, the hate on which Congress made funds available for the University Center program beyond fiscal year 1987. If EDA is correct in claiming that the graduation policy went into effect on that date, then the restrictions included in the appropriations acts would not apply. The restrictions, quoted above, apply to the graduation policy only if EDA first promulgated or enforced it after December 22, 1987. /4/

Thus, the issue whether EDA was authorized to implement the graduation policy turns on whether the policy was in effect before December 22, 1987, as EDA claims. To resolve this issue, we look to the language of the February 11, 1987, Federal Register Notice and other relevant events and circumstances.

As noted above, EDA maintains that its current action of phasing out University Center funding does not constitute establishment of a new policy, but only implements a policy already in effect. In EDA's view, when Congress made funds available for the University Center program, beginning October 1, 1987, the new graduation policy, as previously announced on February 11, 1987, automatically went into effect. Accordingly, EDA argues, the graduation policy was in effect well before December 22, 1987, the cut-off date specified in the later appropriations acts.

In support for its position, EDA points to the February 10, 1987, letter the agency sent to all affected universities informing them that "EDA intends to make the [graduation policy] concept a reality," if Congress made funds available beyond fiscal year 1987. Further, EDA points to the letters it sent to the chairmen of the Senate Appropriations Committee and the House Appropriations Subcommittee on Commerce, informing them that "EDA is proceeding to implement the [graduation] policy . . . ." The letter to Chairman Smith of the House Appropriations Subcommittee was dated December 11, 1987, 11 days before the December 22, 1987, cut-off date specified in the appropriations acts. Thus, even though the Conference Committee, in its December 22, 1987, directive to EDA to defer implementation of the graduation policy, referred to it as a "proposal," EDA argues that, through these letters, the members of the Committee were aware that EDA was already "proceeding to implement" the policy.

We are not persuaded that the graduation policy was in effect prior to December 22, 1987, the cut-off date specified in the appropriations acts.

The Federal Register Notice of February 11, 1987, appears to constitute only an expression of the agency's intention to institute the new policy at a later date. The Notice referred to "policy changes [EDA] intends to institute." Further the Notice characterized these policy changes as "proposed." This language appears to contemplate further action by EDA before the "proposed" graduation policy was to go into effect.

EDA relies heavily in support of its position on the statement in its February 1987 Notice that "[t]he changes would go into effect in fiscal year 1988 if Congress makes funds available for the University Center Program beyond fiscal year 1987." EDA claims that, pursuant to this statement, when Congress made

funds available for the program, beginning October 1, 1987, the new graduation policy went into effect, immediately and automatically, without the necessity for any further action by EDA.

However, the Notice does not provide that the policy will go into effect immediately and automatically upon the appropriation of funds. Rather, that result must be inferred from the somewhat equivocal sentence: "The changes would go into effect in FY 1988 . . . if Congress makes funds available . . . beyond FY 1987." (Emphasis added.)

In our view, an equally plausible reading of the February 1987 Notice is that EDA was announcing only that it planned to put the policy into effect some time in fiscal year 1988, in the event Congress appropriated the funds beyond fiscal year 1987. This reading is supported by EDA's characterization of the policy as "proposed," by the agency's further characterization of the policy changes as ones it "intends to institute," and by the agency's stating the necessary condition to putting the policy into effect--"if Congress makes funds available"-without stating when in 1988 the policy would take effect.

Also, whatever the relative merits of these textual arguments, apparently Congress read the February 1987 Notice to mean that further action by EDA was contemplated before the graduation policy would go into effect. As late as December 22, 1987, Congress viewed the policy as only a proposal not yet in effect. /5/ The Conference Committee Report of that date, directing EDA to defer implementation of the graduation policy until fiscal year 1989, referred to the policy as a "proposal."

Indeed, we believe that a fair inference that the policy was not then in effect can be drawn from the pattern of EDA's conduct--through inaction as well as action--following issuance of the Conference Committee Report on December 22, 1987.

First, EDA did nothing to disabuse Congress of its supposed misapprehension, evident from the Conference Committee Report, that the graduation policy was not yet in effect on that date. As late as the dates on which the appropriations acts for fiscal years 1989 and 1990 were passed-September 30, 1988, and November 21, 1989, respectively-Congress continued to believe that EDA's graduation policy had not been in effect on December 22, 1987. Both appropriations acts restricted EDA's authority to issue or enforce rules not in effect before that date, when the Conference Committee, in issuing its directive to EDA, referred to the graduation policy as a "proposal."

Second, although EDA claims that, because Congress made funds available on October 1, 1987, the graduation policy automatically went into effect on that date, the agency took no contemporaneous action to reduce or terminate grants. Between the date on which funds were made available and January 19, 1988, when EDA announced in its Federal Register Notice that the graduation policy "is" in effect, EDA did not commence to cut any funds. Indeed, during the spring of 1988, EDA informed all affected University Center grantees that it had decided to defer until fiscal year 1989 the commencement of funding cuts. Thus, EDA appeared to have responded affirmatively to the Conference Committee's directive to defer implementation of the "proposed" policy until fiscal year 1989. /6/

Third, after October 1, 1987, EDA took action which is inconsistent with EDA's claim that on that date, when Congress made funds available to EDA, the

graduation policy automatically went into effect without further EDA action. In the January 19, 1988, Federal Register Notice, EDA, for the first time, used the present tense in discussing the new policy. 53 Fed. Reg. 1444. This Notice, as contrasted with the February 1987 Notice, was unambiguous in meaning and required no inferences to determine when the policy goes into effect. Unlike the February 1987 Notice, it did not use phrases such as "intends to institute." Nor did it any longer characterize the policy changes as "proposed." Rather, it stated: "EDA's policy is . . . .'' EDA's publication of the January 1988 Notice, is consistent with the understanding that its February 1987 Notice announced only a "proposed" rule.

In our view, the January 19, 1988, Notice was the first occasion on which EDA could reasonably maintain that the graduation policy was "in effect." Establishing such a policy appears to us to have been the primary purpose of issuing the January 1988 Notice. /7/ However, this occurred after the December 22, 1987, cut-off date provided in the appropriations acts. Therefore, we conclude that under the restrictive language of those appropriations acts, EDA was without authority to implement the graduation policy after the date of passage of the fiscal year 1989 appropriations acts, when the restriction first was enacted by Congress.

We hope the foregoing is helpful. In accordance with our usual procedures, this opinion will be available to the public 30 days from its date.

Sincerely yours,

Milton J. Socolar Comptroller General of the United States

1. Congress has included a new restriction in the recently enacted appropriations act for fiscal year 1991 which reads as follows:

"[T]he Economic Development Administration shall not implement the funding policy for the university center program as stated in the Federal Register Notice of May 24, 1990 to reduce the grant of each university center from the Fiscal Year 1990 level.

H.R. 5021, 101st Cong., 2d Sess; printed in 136 Cong. Rec. at H 10870 (1990). The Federal Register Notice of May 24, 1990, among other things, restates the graduation policy. 55 Fed Reg. 21486, 21493-94.

2. On February 10, 1987, one day before publication of its Federal Register Notice, EDA sent letters to the presidents of all affected universities, informing them that, "if Congress makes funds available for the University Center Program beyond fiscal year (FY) 1987, EDA intends to make the ['graduation' policy] concept a reality."

3. On November 10, 1987, Congress passed Pub. L. No. 100162, continuing EDA's funding to December 16, 1987.

4. The restrictions apply only to any "rule, regulation, or grant agreement provision." EDA implicitly concedes that its graduation policy is a rule, within the meaning of the appropriations acts.

5. The letter of December 11, 1987, to Chairman Neal Smith of the House Appropriations Subcommittee, stated only that "EDA is proceeding to implement

the policy." It did not state that the policy was already in effect and that funding cuts were being implemented.

6. As EDA states, the Conference Committee report language restricting the use of appropriated funds, although in fact honored, was not binding. See, e.g., 55 Comp.Gen. 307 (1975).

7. EDA characterizes the January 1988 Notice describing the graduation policy as only a restatement of the policy changes previously announced in its February 1987 Notice. However, the January 1988 Notice did not purport merely to constitute a restatement of a policy already in effect. It did not even refer to the "proposed" policy which, EDA announced in the February 1987 Notice, it "intends to institute." In fact, although EDA, in its January 1988 Notice, did refer to at least one other previous Federal Register Notice having to do with the University Center program, it did not mention the February 1987 Notice at all. 53 Fed. Reg. 1444.