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CASE:GLS:147406-02
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MEMORANDUM FOR SUSAN E. GILBERT
CHIEF, GRANT ADMINISTRATION
WAGE & INVESTMENT,
STAKEHOLDER PARTNERSHIPS, EDUCATION &
COMMUNICATION (W&I:SPEC)

FROM: Donald M. Suica
Chief, Public Contracts and Technology Law Branch (GLS)
Internal Revenue Service

SUBJECT: Low-Income Tax Clinic Late Application Submissions [SPEC]

This is in reply to your request for guidance as to what discretion, if any, exists within the law for agency program management to waive the deadline for Low-Income Tax Clinic (LITC) applications for 2003 calendar year grants.

Conclusion:

For reasons that follow, we conclude that there is well-developed support in a long line of court decisions for "agencies to relax or modify procedural rules adopted for the orderly transaction of business when, in a given case, the ends of justice require it." American Farm Lines v. Black Ball Freight Serv., 397 U.S. 532, 539 (1970) (*the United States Supreme Court citing to, and quoting,* N.L.R.B. v. Monsanto Chemical Co., 205 F.2d 763, 764 (8th Cir. 1953); *See also* Health Systems Agency, Inc. v. Norman, 589 F.2d 486 (10th Cir. 1978); Neighborhood TV Co. v. F.C.C., 742 F.2d 629 (D.C. Cir. 1984).

Background:

I. The facts:

As to the facts of the specific situations that give rise to your question, we understand that there are two cases.

The first case involves the Association of Cultural and Social Advancement for Vietnamese, Inc., of Redwood City, California.[1] The second involves the University of Denver. In both cases, an issue is whether discretion exists to process late submissions for the continued operation of clinic activities that the Service has previously funded by making LITC grant awards.

In the first case, the Association's Board of Directors' Chairman mistakenly believed that the Service previously had approved a project plan of three years length, commencing January 1, 2001, and ending December 31, 2003, when – in fact – the Service, according to your review of Grants Office records, approved a project plan of two years length, beginning January 1, 2001, and expiring December 31, 2002. Acting on this erroneous assumption, the Association submitted on July 19, 2002, a request for the extension of a previously approved project plan when it should have submitted an application for a new project plan. The Association did not discover its mistake until after the closing date of July 1, 2002, for the Service's receipt of applications for 2003 grant awards. *See* 2003 Grant Application Package and Guidelines, Publication 3319 (Rev. 4-2002), Section III(B)(3), p. 14, as well as the letter to prospective grant applicants, dated March 20, 2002, reprinted on the inside cover of Pub. 3319 (both the Publication and the letter say that applications for 2003 calendar year grants must be received by the Service's Grants Administration Office no later than July 1, 2002; the Publication refers to the cut-off hour of 4:00 p.m. EST.)

In the second instance, involving the University of Denver, the Service's Grants Office did not receive a timely application, or extension request for the third year of a three year previously approved project plan, because the University's grants office coordinator resigned her position and her successor overlooked, or failed to understand, the importance of deadlines. This was notwithstanding "due diligence" efforts made by the tax clinic to try to impress on the University's administrative offices the importance of meeting the grant application deadline. (The source of this summary of the facts is the August 24, 2002, e-mail attachment sent to you by Professor Jerome Borison.) In his e-mail to you, Professor Borison says that, as a lawyer, he appreciates deadlines and knows that cases can be dismissed for failure to meet them. He also says, without citing to any authorities or precedents, that, "[U]nless set by statute, which

[1]Although not raised in your incoming request, we identify the Association as possibly another entity that, depending on the determination made by the Associate Chief Counsel (Procedure & Administration) in another context that is currently being reviewed by that office, may be an eligible "clinic" as that term is defined in IRC § 7526(b)(2)(B) as "described in section 501(c) and exempt from tax under 501(a) [of the Tax Code] ... ." This is the issue of whether eligible non-profits must be 501(c)(3) entities or may include, for example, a § 501(c)(4) "social welfare organization."

this is not, deadlines can be waived by the courts or agencies." Lastly, we note, for a reason that is significant in the legal analysis discussed below, that Denver University reputedly is one of the oldest, continuously operated tax clinic programs in the country. It provides the service to the greater LITC community (comprised of both academic and non-profit low-income tax clinic sponsors, as well as the Service) of a communications network in the form of an internet website list-serve, or "bulletin board," for concerns, issues, updates and exchanges of general interest to all involved.

II. The law:

The law can be summarized as consistent with Professor Borison's representation. Our reference to "the law" is to a body of judicial opinions that, in contexts similar to the concern here, have addressed the issue of what flexibility, if any, exists for Federal agencies to relax, modify or waive rules of processing applications to receive licenses, special designations, or public assistance.

The seminal case, whose progeny now includes three decades of opinions of Federal Courts of Appeals, Federal District Court decisions, and Federal administrative law opinions issued by boards of appeals within agencies that have such entities, is a 1970 decision of the U.S. Supreme Court, American Farm Lines v. Black Ball Freight Service, 397 U.S. 532.

In that decision, Justice Douglas, expressing the view of five of nine members of the court, held that the Interstate Commerce Commission (ICC) properly relaxed its procedural rules by reopening a proceeding to remedy a deficiency in the record before the commencement of a pending judicial review of the merits of the ICC's initial determination that the issuance of a temporary authority to American Farm Lines to move commodities over "irregular routes" conformed sufficiently with ICC regulatory requirements that were intended to promote or infuse competition in the transportation industry. The commodities included explosives moving under a government bill of lading with an accompanying Department of Defense statement in support of the "immediate and urgent need" to transport the material over land because air transport was prohibitively expensive. Notwithstanding this exigency that may have effected the holding, the decision of the majority clearly staked out the issue that has continued to be subsequently debated in law review articles, *see, e.g.:* "Regulatory Estoppel: When Agencies Break Their Own 'Laws'," 64 Texas Law Review 1 (August, 1985); "New Wine For a New Bottle: Judicial Review In the Regulatory State," 72 Virginia Law Review 399 (March, 1986). That issue is whether Federal agencies must "require strict compliance with ... [their] own rules." *See* 397 U.S. 532, at 537.

In reaching its holding, the Supreme Court cited to an earlier opinion of the Eighth Circuit for the proposition that, as a general principle,

> It is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of

> business before it when in a given case the ends of justice require it. The action ... in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party.

397 U.S. 532, at 539 (citing to NLRB v. Monsanto Chemical Co., 205 F.2d 763, at 764).

The issue of whether a federal agency has discretion to accept a late application, in the context of federal block grants to state agencies, notwithstanding the publishing in the Federal Register of a specific date filing dateline – where that deadline was not a statutory requirement and was established as a procedural rule for the "orderly transaction of business before it" – is the issue squarely addressed in Health Systems Agency of Oklahoma, Inc., v. Norman, 589 F.2d 486 (10th Cir. 1978). Citing to the American Farm Lines and Monsanto Chemical Co. decisions as support for the general principle that there is agency discretion to relax or modify procedural rules, and noting that the Federal Register published deadline was "a wholly arbitrary one, administratively chosen to insure that applications would be received in sufficient time for ... [the Department of Health, Education, and Welfare (HEW)] to review ... and make designations before ... [the date certain that HEW was statutorily directed to have completed the designation process," the U.S. Court of Appeals for the Tenth Circuit held:

> The fact that the deadline was published in the Federal Register does not alter the applicability of the general principle of discretion.

In dicta, the Court also said that an "analogy to the rule applicable to late public bids [in the context of Federal procurements, or acquisitions, where maximizing competition in selecting sources of supplies and services has a statutory basis] is

> ... not persuasive. Indeed that analogy makes just the opposite point. The federal bidding procedures are governed by an express rule restricting the exercise of the authority that otherwise would exist to accept and consider late bids .... There is no comparable relinquishment of discretion in this case."

589 F.2d 486, at 490. The Court determined that the deadline was "procedural," and determined that it was not "jurisdictional." The Court agreed with the government's acknowledgment that "the authority to extend a deadline is primarily a matter for agency determination in the public interest." Finally, the Court went so far as to set aside HEW's assertion that only the Secretary or his subordinate who published the deadline in the Federal Register had the discretion to grant an extension to the deadline, saying that this was tantamount to an abuse of agency discretion:

> It was an abuse of discretion to ignore the legitimate governmental interests in facilitating comparative analysis among applicants and in

> relieving applicants who had spent months in preparation of their applications from an "unduly rigid" adherence to the deadline.

589 F.2d 486, at 492. A fact noted as making this conclusion compelling was "the late filing was merely technical and acceptance for review would have engendered no delay to ... [the agency's] review timetable or other administrative inconvenience." We note this because it may apply as well in the LITC situation.[2]

Neighborhood T.V. Co., Inc., v. FCC, 742 F.2d 629 (D.C. Cir. 1984), is an opinion of the U.S. Court of Appeals for the D.C. Circuit which rejected a claim that the Federal

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[2]We also note, however, that in a discussion of whether injunctive relief is an available remedy, the Court referred to injunctive relief generally not being available to "disappointed bidders" or "simple grant applicants." 589 F.2d 486, at 493. There follows a discussion that distinguishes HEW's designation of a nonprofit corporation as a local advisory body that, once selected, receives annual grants to finance or partially finance its operations from a simple grantee that seeks "money to facilitate research or other private purposes of their own." We believe that it is unnecessary to pursue a consideration of this distinction with respect to the issue being currently raised. We mention it, however, as a caution that it could be cited in support of an argument that Health Systems is inapplicable to LITC grants, which historically have been categorized in other General Legal Services' opinions as discretionary grants in contrast to entitlements. If this issue were reached, we believe that it would be possible to assert that the statutorily authorized function of low-income tax clinics to operate "programs to inform individuals for whom English is a second language about their rights and responsibilities," IRC § 7526(b)(A)(ii)(II), is an expenditure of federal funds for the public purpose of tax compliance as well as the private purposes of LITC grant recipients and those whom they, in turn, assist.

Communications Commission (FCC) had failed to "follow its own rules" by applying a proposed rule prior to adoption of a final rule pertaining to processes to obtain licenses for low frequency television broadcasting bans. In so doing it relied on the general principle that agencies have discretion to relax or modify procedural rules, citing to the precedents of the above discussed decisions (American Farm Lines, Monsanto Chemical, and Health Systems).

In so doing, the Court characterized these decisions in support of the proposition that,

> Where ... the rule governs information that the agency requires before it will consider a filing by one it regulates, courts have been especially apt to allow agencies much leeway in granting waivers to their own rules.

742 F.2d 629, at 635.

Thus, it appears that in the judicial review of agency actions more leeway may be afforded to agencies in the granting of waivers than in the strict enforcement of procedural rules.

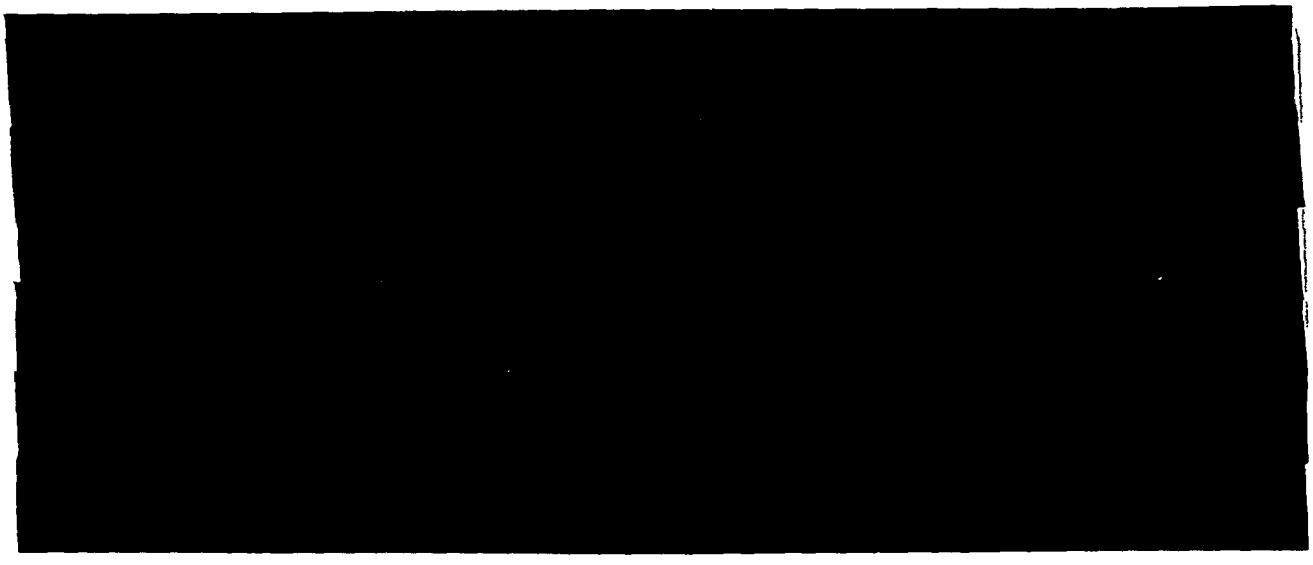
As to the difference between "procedural rules" and "substantive rules," Neighborhood T.V. acknowledges that, "Courts have not had an easy time deciding whether particular agency rules were "procedural" or "substantive." 742 F.2d 629, at 637.

Shedding light on the difference between procedural and substantive rules is the consideration of whether the rule is statutorily imposed. The Service's authority to make LITC grants does not include a provision that directs grant applications to be filed by a date certain, or that even requires an application process or competition in selection determinations. There are, however, statutory criteria:

> In determining whether to make a grant ..., the Secretary shall consider –
>
> > (A) the numbers of taxpayers who will be served by the clinic, including the number of taxpayers in the geographical area for whom English is a second language;
> >
> > (B) the existence of other low-income taxpayer clinics serving the same population;
> >
> > (C) the quality of the program offered by the low-income taxpayer clinic including the qualifications of its administrators and qualified representatives and its record, if any, in providing service to low-income taxpayers; and
> >
> > (D) alternative funding sources available to the clinic, including amounts received from other grants and

contributions, and the endowment and resources of the institution sponsoring the clinic.

IRC § 7526(c)(4).



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If you or others have any questions in general about this opinion, you should contact Dave Ingold on my staff, in the Public Contracts and Technology Law Branch of General Legal Services, by telephoning 202 283-7952.

cc: Nachman CC:P&A(APJP)
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