

**United States Small Business Administration
Office of Hearings and Appeals**

IN THE MATTER OF:

Synergy Communications & Entertainment,
Inc.

Petitioner

SBA No. BDP-322

Decided: May 14, 2009

APPEARANCES

Jerome Wright, Vice-President, Synergy Communications & Entertainment, Inc.,
Fairburn, Georgia, *pro se*, for Petitioner.

Timothy C. Treanor, Esq., Sara Lipscomb, Esq., General Counsel, Small Business
Administration, Washington, D.C., for the Agency.

FINAL DECISION

ARKOW, Administrative Law Judge:

On January 26, 2009, the Respondent U.S. Small Business Administration (SBA) terminated Synergy Communications & Entertainment, Inc. (Petitioner) from the 8(a) Business Development Program (8(a) Program or the Program) because Petitioner (1) failed to maintain its eligibility for Program participation; (2) failed to make required submissions to SBA in a timely manner; and (3) materially breached the terms of its Participation Agreement. Petitioner appealed the determination on March 19, 2009.

I agree with the SBA and conclude the SBA's decision terminating Petitioner from the 8(a) Program is supported in the record, reasonable, and not arbitrary, capricious, or contrary to law.

Jurisdiction

There is jurisdiction to decide this appeal. *See* Small Business Act, § 8(a)(9)(A), (B)(ii); 13 C.F.R. § 134.102(j)(1). The appeal is timely. *See* 13 C.F.R. § 134.202(a)(1).

Issue

Whether the SBA's termination of Petitioner from the 8(a) Program is arbitrary, capricious, or contrary to law. *See* Small Business Act, § 8(a)(9)(C), 15 U.S.C. § 637(a)(9)(C);

13 C.F.R. § 134.406(b).

Facts

In September of 2000, Petitioner was approved for participation in the 8(a) Program. Administrative Record (AR), at 1175.

On May 13, 2003, the SBA requested the following information: (1) annual updates for 2001 and 2002, (2) financial statements for fiscal year ending December 31, 2002, and (3) SBA Form 1790 for three reporting periods. AR, at 1236.

On May 12, 2004, the SBA sent a “final notice” letter to Petitioner stating that it had notified Petitioner on several occasions of its inactive/delinquent status within the 8(a) Program, and the following were delinquent: (1) annual updates for program years 2001, 2002, and 2003, (2) financial statements for fiscal years 2002 and 2003, (3) SBA Form 1790, and (4) an updated CCR profile. The SBA requested Petitioner either submit the required reports or execute the voluntary early graduation agreement by May 25, 2004, or it would be terminated from the Program. AR, at 1223.

On July 14, 2005, Petitioner supplied its 2003 Annual Update, and Jerome and Amy Wright’s Personal Financial Statements as of July 13, 2005. AR, at 1212-1222.

On August 18, 2005, the SBA completed its annual review and informed Petitioner that its retention in the Program “has been recommended based on the fact that all delinquent reporting requirements are provided to this office no later than September 23, 2005.” If Petitioner failed to supply the information by that time, the SBA stated it would terminate Petitioner from the Program. The documents requested included financial statements (for 2002, 2003, and 2004), tax returns (for 2000, 2001, and 2003), an updated CCR profile, and supplying missing information on the SBA Form 1450. AR, at 1193.

On September 9, 2005, the SBA sent Petitioner the annual review update letter, which requested that Petitioner supply fifteen forms within thirty calendar days. AR, at 1185. On March 10, 2006, the SBA notified Petitioner that it had not received the requested information and if it did not receive the delinquent reports in ten days, Petitioner would be terminated from the Program. AR, at 1184.

On May 24, 2006, the SBA sent another “final notice” to Petitioner requesting financial statements (2000-2005), Petitioner’s annual update for 2005, an updated business plan, tax returns (2000, 2001, 2003, and 2004), and Petitioner’s SBA Form 1790. AR, at 1181.

On June 22, 2006¹, Petitioner submitted an unsigned personal financial statement for Amy Wright, as of November 6, 2006. AR, at 1124-1125.

¹ This appears to be a typographical error because the statement reflects finances as of November 6, 2006.

On January 10, 2007, Petitioner submitted an annual update for the program year starting on October 1, 2005 and ending September 30, 2006. AR, at 1146-1153. Petitioner also submitted unsigned personal financial statements for Jerome Wright, dated October 22, 2006. AR, at 1154-1159.

On January 26, 2007, the SBA sent a “final notice” requesting financial statements for 2004 and 2005, an annual update for 2006, SBA Form 1790, and compliance with the SBA’s October 31, 2006 letter. AR, at 1134.

On November 6, 2007, Petitioner submitted an unsigned annual update for the program year starting on October 1, 2006, and ending September 30, 2007. AR, at 1117-1123. Petitioner also submitted an unsigned personal financial statement for Jerome Wright, as of November 6, 2007. AR, at 1126-1127.

On November 9, 2007, the SBA requested Petitioner provide its annual update for the program year ending September 30, 2007, and financial statements for fiscal year 2006. SBA again warned that the failure to provide the documents would result in Petitioner’s termination. AR, at 1111. That same day, the SBA e-mailed Petitioner requesting that the documents be signed and dated. AR, at 1114.

On December 1, 2007, Petitioner supplied Jerome and Amy Wright’s 2006 federal and state joint tax returns (AR, at 1077-1086) and Petitioner’s federal and state corporate tax returns for 2006. AR, at 1087-1100.

On April 24, 2008, Petitioner supplied Amy Wright’s 2006 signed personal financial statement. AR, at 1066-1071.

On October 10, 2008, the SBA notified Petitioner of its intent to terminate Petitioner from the Program because, among other things, Petitioner failed to submit annual review update information as requested by SBA on September 13 and November 9, 2007. The requested documents included a business plan update, personal financial statements, corporate and individual tax returns, and certifications relating to Program eligibility. AR, at 1018-1021.

On January 26, 2009, SBA terminated Petitioner from the 8(a) Program because Petitioner (1) failed to maintain its eligibility for Program participation; (2) failed to make required submissions to SBA in a timely manner; and (3) materially breached the terms of its Participation Agreement. Specifically, Petitioner failed to provide 2007 individual tax returns, Forms 4506-T, financial statements for 2006, and 2006 W-2 forms. In addition, Petitioner’s CCR registration expired on April 6, 2008, and the firm was administratively dissolved in 2008, according to the Georgia Secretary of State. AR, at 1005-1006.

Petitioner’s Appeal

On March 19, 2009, Petitioner filed its appeal. Petitioner blames its termination on an SBA Business Specialist, who Petitioner accuses of retaliating against Petitioner for writing a complaint letter to the Georgia District Director about the Business Specialist’s lack of

professionalism. Petitioner also claims that, on December 31, 2008, it supplied its 2007 tax return, Form 4506-T, 2006 financial statements, and 2006 W-2 forms. Petitioner also asserts that it has updated its CCR profile and is awaiting a response from the Georgia Secretary of State regarding registration renewal.

SBA's Response

On May 4, 2009, the SBA filed its response and the administrative record, arguing the SBA's termination of Petitioner was reasonable and in accordance with the law. The SBA maintains that Petitioner's own account of its compliance with filing requirements shows that Petitioner repeatedly failed to supply required information in a timely manner. For example, Petitioner admits that its registration with the Georgia Secretary of State had lapsed and that it supplied its 2006 W-2 form on December 31, 2008. The SBA also cites various warnings it sent to Petitioner (from July 1, 2003 to July 21, 2008) about its failure to comply with reporting requirements. The SBA also asserts that Petitioner was not allowed to participate in the SBA mentor-protégé program because of its failure to comply with reporting obligations.

Finally, the SBA maintains that Petitioner's termination was not the result of the Business Specialist's animus towards Petitioner, but the unanimous recommendation of SBA's reviewing officials (including the Georgia Assistant District Director, Georgia District Director, and District Counsel) based on Petitioner's disregard for the SBA's reporting requirements.

Discussion

A.

The SBA determination must be sustained unless a review of the written administrative record demonstrates that the SBA's determination, that Petitioner should be terminated from the 8(a) Program, is arbitrary, capricious, or contrary to law. *See* 13 C.F.R. § 134.406(a), (b). My review of the case is narrow and does not permit me to substitute my own judgment for that of the SBA. Here, I must examine whether the SBA correctly applied its laws and regulations to the facts in deciding to terminate Petitioner. Then, I must determine that the SBA made a clear error of judgment in its decision before I may find the SBA acted arbitrarily, capriciously, or contrary to law. *See Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

A clear error of judgment may be found if the SBA fails to properly apply the law and regulations to the facts of the case. The SBA must articulate a reasonable explanation for its action, including a rational connection between the facts found and its determination. *See id.* As long as the SBA determination is reasonable, it must be upheld on appeal. 13 C.F.R. § 134.406(b).

B.

The SBA may terminate an 8(a) Program participant prior to completion of its program term for good cause. 13 C.F.R. § 124.303(a). The SBA alleges that it has good cause to

terminate Petitioner because it (1) failed to maintain its eligibility for Program participation; (2) failed to make required submissions to SBA in a timely manner; and (3) materially breached the terms of its Participation Agreement.

The SBA's termination will be sustained on appeal if the administrative record establishes the SBA reasonably determined there is good cause to terminate the participant on at least one of the grounds alleged, as long as that ground is not arbitrary, capricious, or contrary to law. *Matter of Blind Detective Agency*, SBA No. BDP-163, at 8 (2001).

The SBA has an affirmative responsibility to enforce the regulations governing the 8(a) Program. These regulations are designed to ensure that only eligible business concerns are admitted into and remain in the Program. This ensures that public funds are administered as intended by the Small Business Act, that is, only small businesses owned, controlled, and managed by socially and economically disadvantaged individuals receive the benefits of the Program. This requires the SBA to rigorously and reasonably enforce 8(a) Program requirements. Failure to do so would be a breach of the public trust.

Likewise, as recipients of the benefits of the 8(a) Program, participants must timely comply with the SBA's regulations. This is necessary so the SBA can carry out its responsibility to protect the public's interest.

C.

The record shows the SBA's numerous attempts to provide formal and informal opportunities for Petitioner to satisfy its submission requirements. *See Facts, supra*. Yet Petitioner failed to timely respond to these requests. *Id.*

Petitioner blames its termination on an SBA Business Specialist, who Petitioner accuses of retaliating against Petitioner for writing a complaint letter to the Georgia District Director about the Business Specialist's lack of professionalism. Regardless of whether an SBA employee retaliated against Petitioner, Petitioner is still responsible for meeting Program requirements. It did not. Whether there was retaliation is beyond the purview of this appeal (and indeed, it appears the Business Specialist was more than lenient in providing Petitioner multiple opportunities to supply the reports), and does not change or excuse the fact that Petitioner repeatedly failed to comply with 8(a) Program requirements. This warrants termination. Petitioner may pursue a retaliation claim through appropriate means.

Because Petitioner did not timely respond to the SBA's requests, the SBA could not determine whether Petitioner remained eligible for the 8(a) Program. In order for an 8(a) Program participant to remain in the Program, it must continue to meet all 8(a) eligibility requirements. 13 C.F.R. § 124.112(a). Participants must annually submit to the SBA certain documents. 13 C.F.R. §§ 124.112(b), 124.403. Petitioner failed to comply with this requirement. The repeated failures to reply in this case amount to a pattern of failure to make required submissions or responses to the SBA in a timely manner, which is a ground for termination. 13 C.F.R. § 124.303(a)(7). Thus, the SBA acted reasonably in terminating

Petitioner from the 8(a) Program.

Accordingly, I agree with the SBA and conclude the SBA's decision to terminate Petitioner from the 8(a) Program is supported in the record, reasonable, and not arbitrary, capricious, or contrary to law.

Conclusion

Respondent Small Business Administration's decision to terminate Petitioner from the 8(a) BD Program IS NOT ARBITRARY, CAPRICIOUS, OR CONTRARY TO LAW. *See* 15 U.S.C. § 637(a)(9)(C); 13 C.F.R. § 134.406(b).

Subject to 13 C.F.R. § 134.409(c), this is the final decision of the Small Business Administration. *See* 15 U.S.C. § 637(a)(9)(D); 13 C.F.R. § 134.409(a).

RICHARD S. ARKOW
Administrative Law Judge