United States Small Business Administration
Office of Hearings and Appeals

IN THE MATTER OF:	
G. M. Hill Engineering, Inc.,	SBA No. BDPE-496
Petitioner	Decided: June 26, 2013

RULING AND ORDER DENYING GOVERNMENT'S PETITION FOR RECONSIDERATION

On April 16, 2013, this Court issued a *Decision* finding that the U.S. Small Business Administration ("SBA," or the "Agency") had acted arbitrarily, capriciously, or contrary to law in denying Petitioner G.M. Hill Engineering, Inc.'s application for entry into the 8(a) Business Development Program ("8(a) BD) Program"). The basis for this conclusion was the SBA's failure to file a new initial determination re-assessing Petitioner's application, as ordered by a predecessor court in a September 14, 2012. *Decision and Remand Order* ("Remand Order").[1]

Per SBA regulations, either party may seek reconsideration of a final Agency decision within 20 days of the issuance of that decision. 13 C.F.R. §§ 134.227(c), 134.409(c). Accordingly, on May 6, 2013, the SBA timely filed a *Petition for Reconsideration* ("Recon Petition") alleging various factual and legal errors in the *Decision*. The Court welcomes the opportunity to address the SBA's concerns, and resolve any lingering confusion regarding the proper treatment of 8(a) BD Program appeals.

I. Procedural History

Petitioner initially sought certification as an 8(a) BD Program participant on November 4, 2010, on the grounds that its owner, Mrs. Gina Hill, had suffered social and economic disadvantage due to gender bias. The SBA issued an Initial Determination Letter on August 3, 2011, finding that Mrs. Hill's Personal Experience Statement ("Initial PES") had not shown social disadvantage by a preponderance of the evidence. The Agency therefore declined Petitioner's application. Petitioner sought reconsideration of that decision, and filed a second

[1] Prior to October 1, 2012, Administrative Law Judges at the Environmental Protection Agency were authorized to hear cases for the SBA, pursuant to an Interagency Agreement between the two agencies. At the conclusion of that agreement, the SBA entered into a similar Interagency Agreement with the U.S. Department of Housing and Urban Development and transferred those cases previously assigned to the EPA to HUD.

PES ("Recon PES') along with additional documentary evidence on September 16, 2011.

On January 3, 2012, the SBA issued a Determination upon Reconsideration ("Recon Determination Letter") that again denied Petitioner's application after concluding that Petitioner had not overcome the original defect in its application. Petitioner filed an *Appeal Petition* on February 17, 2012, seeking to overturn the SBA's decision.

On September 14, 2012, the predecessor court examined the SBA's determination letters and concluded that the Agency "made erroneous factual findings, errors of law, and failed to adequately explain in the Administrative Record the reasons underlying its determination." *Remand Order*, p. 9. The predecessor court thus ordered the Agency to file a "new initial determination" within 30 days, or approximately October 15, 2012. *G.M. Hill Eng'g, Inc.*, SBA No. BDP-442, p. 10 (2012).

On October 25, 2012, the SBA filed a Determination upon Remand ("Remand Determination Letter"), which declined Petitioner's application for the third time. Petitioner once again appealed the decision. Finally, on April 16, 2013, this Court issued its *Decision* and instructed the SBA to "afford Petitioner entry into the 8(a) BD Program within 30 days" of the date the *Decision* became final. The *Recon Petition* followed soon after.

II. Standard of Review

SBA regulations provide that the Court may grant a petition for reconsideration upon a "clear showing of an error of fact or law material to the decision." 13 C.F.R. § 134.409(c). This is a rigorous standard. *Reality Technologies, Inc.*, SBA No. BDPT-488 (2013); *Hazzard's Excavating and Trucking Co.*, SBA No. BDP-364 (2010). The party seeking reconsideration must make an argument that leaves the Court with the "definite and firm conviction that a mistake has been committed." *Easley v. Cromartie*, 532 U.S. 234, 242 (2001). A petition for reconsideration is not intended to give an unhappy litigant an additional opportunity to sway the Court. 13 C.F.R. § 134.409(c); *Bishop v. United States*, 26 C1. Ct. 281, 286 (1992); *Hazzard's*, SBA No. BDP-364; *see also Fru-Con Constr.Corp. v. United States*, 44 Fed. C1.298, 301 (1999) (a movant may not merely recapitulate the cases and arguments the court considered before rendering its original decision, or attempt a rehearing based upon the evidence previously presented). A petition for reconsideration is appropriate only in limited circumstances, such as situations where the Court has misunderstood a party, or has made a decision outside the adversarial issues presented by the parties. *Quaker Alloy Casting Co. v. Gulfco Industries, Inc.*, 123 F.R.D. 282, 288 (N.D. Ill. 1988).

III. Discussion

A. SBA's Insistence that it Fully Considered all of Petitioner's Claims is Fatally Undermined by its Own Omissions

SBA Counsel objects to the Court's statement that "[A]n in-depth review of the [[Remand Determination] Letter is not necessary . . . as it is evident that the SBA failed to fully comply

with the Remand Order." *G.M. Hill Eng'g, Inc.*, SBA No. BDPE-485, p. 3 (2013). SBA Counsel contends:

> Although the ALJ believes a review of the record is unnecessary logic dictates otherwise as does the standard of review. Because the ALJ did not review the Letter or apparently the Administrative Record before he issued his decision the fact that the Agency examined all of Petitioner's claims, including those it addressed in the Initial Determination Letter was ignored. SBA argues that this is an error of fact.

Recon Petition, p. 3.

Without explanation, SBA Counsel posits that the Court did not consider the Remand Determination Letter, or indeed the record, in rendering its decision. This folly is without merit. The Court's language highlights that the Remand Determination Letter's insufficiency is readily apparent, even on cursory examination. The Remand Determination Letter announced its own shortcoming in its first paragraph, stating that "this letter will address only those specific portions of your narratives which OHA determined to be inadequately addressed." The *Recon Petition's* insistence that the Remand Determination Letter included discussions of all claims — both those raised in the Initial PES and in the Recon PES — is directly at odds with this plain language. The only way to align these seemingly contradictory statements is if the "specific portions" identified in the Remand Determination Letter actually represent all of the claims. Of course, if that were the case, it then begs the question why the SBA did not simply say in the Remand Determination Letter that the SBA was reviewing all the claims, and thus avoid any confusion. Regardless, after thoroughly examining the Remand Determination Letter and the Administrative Record, the Court agreed that the Remand Determination Letter did precisely what it purported to do; it addressed only the issues specifically identified in the *Remand Order*.

The Remand Determination Letter's structure provides compelling insight into its intended scope. Tellingly, the Remand Determination Letter hews closely to the layout of the *Remand Order*. For example, when discussing the SBA's incomplete analysis and explanations of Petitioner's claims, the *Remand Order* summarized those claims in ten numbered points. The Remand Determination Letter uses the same summaries, in the same order, as guide markers for its analysis. While this is an understandable and generally commendable mechanism for the SBA to ensure it has covered each issue, the Agency here relied on the summaries at their own peril. The summaries, by their very nature, are general and do not consistently address specifics of Petitioner's claims. They are therefore poor substitutes for the PES's themselves. The SBA apparently treated the summaries as a closed universe, and discussed only those sections of the PES's that directly corresponded to the summarized claims. As a result, the SBA missed claims it likely would have recognized and responded to had it focused its attention on the PES's instead of the summaries.

For example, the fifth summary stated that "[Mrs. Hill] was not allowed to participate in company social outings to the extent that male employees were." This summary corresponds to Mrs. Hill's employment experiences at Sverdrup and RS&H. Petitioner's Recon PES claimed that Mrs. Hill's male colleagues at Sverdrup attended seminars, training courses, golf outings, and

fishing trips that Mrs. Hill was not invited to. The SBA acknowledged and discussed this aspect of the claim. However, both the Initial PES and the Recon PES also referenced a discriminatory experience Mrs. Hill suffered while employed at RS&H. The Remand Determination Letter makes no mention of this event, and indeed does not specifically identify RS&H at any point. The event in question was a company-sponsored golf outing intended to foster stronger relationships between RS&H employees and their clients. As such, it falls squarely within the "social outings" identified in the *Remand Order*. The event was not adequately discussed in the *Initial Determination Letter*, and was not discussed at all in the latter two letters. An Initial Determination must respond to every claim. Here, the SBA did not do so.

Similarly, the sixth summary stated, in its entirety, that "[a]t Haskell Company, Mr. Williams failed to adequately mentor her and yelled at her because of her gender." This is not the entirety of Petitioner's claims regarding Haskell Company. The Recon PES also alleged that Mr. Williams abruptly changed company policies to sabotage Mrs. Hill's career progression in favor of her male colleagues, gave her a significantly higher workload than her male colleagues, and often instructed her to "work through lunch while he and 'the boys' went out to a restaurant." The Recon Determination Letter improperly dismissed the claims, and the Remand Determination Letter made no mention of them at all. The fact that the remand summary did not specifically note these claims does not excuse the SBA from its obligation to discuss them.

Ultimately, the SBA's insistence that it fully considered all of Petitioner's claims is fatally undermined by the complete omission of the above-mentioned incidents. It would be more accurate to say that the Agency considered the claims specifically identified in the *Remand Order*. However, as stated in the *Decision*, the SBA was ordered to re-examine *all* the claims.[2] The *Recon Petition* insists that the Agency complied with that order. It did not. Thus, the Court's conclusion is factually accurate and not in error.

B. The SBA Ignored at Least Half of the Predecessor Court's Remand Order

SBA Counsel next argues that the analysis contained in the Remand Determination Letter was "exactly what the ALJ requested" in the *Remand Order*. Recon Petition, p. 5. In support of this conclusion, the *Recon Petition* attempts to summarize the various points of error identified in the *Remand Order*. This argument forms the core of the SBA's request for reconsideration. Accordingly, it is appropriate to quote the *Recon Petition* in some detail: It states:

> The Remand Order specifically states that because SBA failed to address four incidents and failed to provide sufficient reasoning for discrediting ten other contentions, the ALJ was unable to assess the reasonableness of SBA's determination. . . . **Because** SBA **has not fully evaluated Petitioner's evidence and explained its reasons for declining Petitioner's application, the Administrative Record is insufficiently complete, and it is appropriate to remand the case for further consideration**. In other words, OHA remanded the case to SBA to provide an analysis for those claims in the record not previously

[2] The *Decision* emphasized that the SBA was to issue a new "initial" determination, and stated that such a determination "addresses each of the applicant's relevant claims. . . ."

> address so that they may be 'ripe' for consideration. By OHA order SBA was **required to complete the record** by evaluating all of Petitioner's evidence and explaining what was not addressed originally, and with *all* the evidence to make a new initial determination. That is exactly what SBA accomplished. . . . SBA addressed the examples that were not fully explained in the original determination letters, with the purpose of completing the record, consistent with the Remand Order. It defies logic and OHA precedent to expect the Agency to redo the analysis of those claims that were deemed to be handled sufficiently.

Recon Petition, p. 5 (italics in original, bold added).

The argument betrays a fundamental misunderstanding of the *Remand Order*. That misunderstanding is the probable source of the SBA's current confusion. The bolded language quoted above encapsulates SBA Counsel's argument by highlighting the *two* errors SBA believes the *Remand Order* found in the Recon Determination Letter: (1) failure to consider all the evidence; and, (2) failure to provide full explanations for the Agency's conclusions.[3] If the *Remand Order* had in fact only found those *two* errors, the *Recon Petition* would stand on firmer ground. As the SBA notes, nothing in 13 C.F.R. § 134.406(e)(1) requires the Agency to revisit previously analyzed claims. The regulation only requires the Agency to "fill in the blanks" in the Administrative Record. Whether the SBA did so correctly in this case is, at best, debatable.

Critically, however, the *Remand Order* identified *four* errors, not two. In addition to the errors under 13 C.F.R. § 134.406(e)(1), the court also concluded that the SBA committed two clear mistakes of law that required remand under13 C.F.R. § 134.406(e)(2). The *Recon Petition* never acknowledges these additional errors.[4] Specifically, the *Remand Order* found:

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[3] Both of these errors are proper grounds for remand under 13 C.F.R. § 134.406(e)(1), which states:

> The Administrative Law Judge may remand a case to the Director ... for further consideration if he or she determines that, due to the absence in the written administrative record of the reasons upon which the determination was based, the administrative record is insufficiently complete to decide whether the determination is arbitrary, capricious, or contrary to law. In the event of such a remand, the Judge will **not require the SBA to supplement the administrative record other than to supply the reason or reasons for the determination**. . . .

13 C.F.R. § 134.406(e)(1) (emphasis added).

[4] This omission is worrisome because the SBA was undoubtedly aware of the mistake of law grounds for remand. It was expressly noted on pages 1, 5, 8, and 9 of the *Remand Order*. More importantly, the Remand Determination Letter itself states that the "*third and final issue* presented on appeal related to whether SBA discredited several of your experiences for legally invalid reasons." (Emphasis added.). The Remand Determination Letter then devotes its

> Because SBA incorrectly faulted Petitioner for including new evidence in its Application for Reconsideration and erroneously evaluated evidence in isolation to see if particular pieces of evidence demonstrated chronic and substantial social disadvantage instead of evaluating all the evidence as a whole, it made **two mistakes** of **law**. This case should be remanded **so that the correct standard can be applied**.

Remand Order, p. 8 (emphasis added).

The SBA's argument that it provided the analysis necessary to complete the Administrative Record speaks only to the errors under Section 134.406(e)(1). This has no bearing on errors under Section 134.406(e)(2). The two regulations — and the SBA's obligations with respect to them — are distinctly different. Section 134.406(e)(1) identifies specific weaknesses in the treatment of specific claims. These errors are generally discrete, and thus easily remedied. The regulation therefore allows the Agency to correct them piecemeal. Evidence that was omitted can be considered; deficient explanations can be expanded. The overall analysis, however, remains undisturbed. To borrow computer parlance, an error under Section 134.406(e)(1) is a localized bug. It does not threaten the entire system.

That is not the case with errors under 134.406(e)(2).[5] An erroneous application of law does not confine itself to just one claim. No amount of additional explanation can correct it. Like a pervasive virus, it infects and corrupts every claim it touches. If the error affects only a specific type of claim, then only that type of claim must be reconsidered. However, if the error is fundamental to the entire analysis, then the entire analysis crashes.

This case illustrates both possible 134.406(e)(2) scenarios. The SBA rejected many of Petitioner's claims because they were raised for the first time in the Recon PES and Petitioner did not explain why they had not been raised earlier. The *Remand Order* noted that SBA regulations expressly allow applicants to raise new claims on reconsideration. *See* 13 C.F.R. § 124.205. The SBA erred in disregarding those claims, and was therefore required to return to the Recon PES and examine every new claim found therein. By comparison, the second error of law — incorrect application of the "chronic and substantial" test — applied to much more than just the claims raised in the Recon PES. This was an all-encompassing error; the SBA rejected "every piece of evidence." Accordingly, the Agency had to re-assess every piece of evidence under the proper legal standard.[6]

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final two substantive paragraphs to this issue. The *Recon Petition's* insistence that there were only two grounds for remand is therefore grossly — and possibly deliberately — inaccurate.

[5] Depending on the circumstances, of course, a mistake of fact may be more discrete than errors under § 134.406(e)(1), and so may not require the same depth of treatment as a mistake of law.

[6] The SBA should be familiar with the ramifications of this specific legal error. The faulty application of the "chronic and substantial test has come up in several prior cases, and has warranted remand in each such case. No precedent case has suggested that this error could be resolved on a claim-by-claim basis. Indeed, several cases have stated the opposite

The SBA failed to carry out this analysis. Surprisingly. SBA Counsel contends in the *Recon Petition* that it "defies logic to suggest that the agency is required to re-review those claims that were deemed to be adequately addressed." Recon Petition, p. 6. The argument mistakenly assumes that *any* of the claims were adequately addressed and falls under the weight of its own internal logical fallacy. In truth, none of the claims were properly addressed because they were all tainted by one or both errors of law.

The remand and subsequent decision in *StrategyGen Co.*, provides a helpful comparison. *See StrategyGen Co*., SBA No. BDP-427 (2012) (the Remand Order, issued February 24, 2012); *StrategyGen Co.*, SBA No. BDP-460 (2012) (the Decision, issued December 28, 2012). The *Recon Petition* uses this case to highlight the Court's allegedly inconsistent treatment of remanded decisions. It contends that the *StrategyGen* Remand Order used 'exactly the same language of the Remand Order in the instant case" and that "the facts in *StrategyGen* are similar to the facts in the instant case in that the Agency issued a decision, was not to have addressed all the claims, and the determination was remanded for a new initial determination to address those claims not previously addressed."

In the *StrategyGen* Remand Order, a predecessor court individually examined each claim, considered the Agency's treatment of each claim, and determined whether the record relating to each claim was sufficiently complete to allow proper review. In three of the six claims, the court found that the SB A had either failed to consider all the evidence, failed to adequately address significant evidence, or made conclusory assessments. For each of these three claims, the Remand Order expressly stated that there was "an absence in the written administrative record," or that the "administrative record is not sufficiently complete," thus warranting remand. When assessing the other three claims, the Remand Order was similarly unambiguous, stating that "the administrative record is sufficiently complete." After considering all six claims, the court remanded the case "for further consideration and a new initial determination." The SBA complied with that Remand Order by issuing a completely new Determination Letter that addressed all six of the claims, not just the three that had been found deficient. The Determination Letter also stated that the Agency had "reviewed the evidence presented by you in your original application."

StrategyGen is easily distinguishable from the case at bar. In *StrategyGen*. the Agency was required to file a new initial determination even though the identified errors could

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position. *StrategyGen Co.*, the only case Agency Counsel cites in its *Recon Petition*, speaks directly to this issue. After noting the misapplied legal standard, the Court in that Decision held that the "analytical error pervades the SBA's entire determination, thereby *rendering the entire decision unreasonable." StrategyGen Co.*, SBA No. BDPE-460 (2012) (emphasis added). Similarly, in *D.K. Environmental*, the Court stated that "SBA applies this faulty standard throughout its Determination Letters. Accordingly, the *entire decision must be remanded* to allow the Agency to apply the proper analytical framework." *D.K. Environmental*, SBA No. BDPE-481 (2013) (emphasis added). *See also Gearhart Constr. Services*, SBA No. BDPE-473 (2013); *McMahon Builders, Inc.*, SBA No. BDPE-461 (2013); *Boblits Services, LLC*, SBA No. BDPE-480 (2013); *Black Horse Group*, LLC, SBA No. BDPE-468 (2013).

theoretically be resolved piecemeal. In response, it submitted a determination that addressed all the claims, and informed the applicant that it had done so. There was no question that the Agency complied with the Remand Order in that case. Here, the Agency was ordered to file a new initial determination in part because its errors of law mandated a re-examination of all the claims, in totality. The Remand Determination Letter specifically announced that it was not re-examining all the claims. In sum, the SBA in *StrategyGen* did what it did not technically "need" to do.[7] By comparison, it did not do what it was ordered to do here. It is therefore no surprise that the Court's treatment of the two cases differed.

In arguing that this case and *StrategyGen* are analytically analogous, the SBA misses the critical difference between the two cases: there was no error of law identified in the *StrategyGen Remand Order*. Those errors pertained only to insufficiencies in the administrative record, under § 134.406(e)(1). As such, each deficiency could be independently resolved on a claim-by-claim basis. And yet, the Remand Determination Letter in that case included each claim, even those that had been expressly identified as sufficiently addressed. It was not a particularly taxing endeavor. As the Court noted at the time, the Agency "merely weaves the additional analysis into the body of the Initial Determination Letter."

Even assuming the errors of law did not already mandate a complete re-analysis in the case at bar, the SBA could easily have utilized the same time-saving technique it used in *StrategyGen*. The factual recitation of any claims addressed in the Initial or Recon Determination Letters could have been imported into the Remand Determination Letter with a few strokes of the keyboard. Then, after these claims had been joined with the newly analyzed claims, all that would have been necessary to resolve the errors of law would be a discussion of why the claims, in totality, did not constitute chronic and substantial social disadvantage. The task could reasonably be accomplished in just a few paragraphs. The result would be a single document that identifies, analyzes, and resolves all of Petitioner's claims. In other words, it would be an initial determination. The SBA followed this approach in *StrategyGen*, and the document was accepted without incident.[8] For reasons it does not share with the Court, the

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[7] The Agency did not "need" to provide a new initial determination in StrategyGen only in the sense that errors under § 134.406(e)(1) can be resolved by supplementing the record. However, the Remand Order in that case still required a new initial determination, so the SBA still "needed" to comply with that order or file a timely objection to it. The Agency chose to comply.

[8] The *Recon Petition* complains that "[0]n the one hand OHA is ordering the remanding a matter [sic] because we repeated claims already deemed to be satisfactorily addressed and on the other hand SBA is being remanded because it did the opposite." It is unclear which "hand" refers to this case and which refers to *StrategyGen*. However, if the SBA contends that *StrategyGen* was remanded for repeating claims (or not repeating them, depending on the hand), the argument is nonsensical. The *StrategyGen* Decision never criticized the Agency for repeating the sufficiently addressed claims, much less remanded the case on those grounds. In a footnote, the Decision expressed disappointment that the newly addressed claims were "generally no more than one or two sentences" inserted into the relevant portions of the previous determination letter. The new analysis itself was largely culled directly from the Agency's Response to the

Agency took a different approach here. Being that the SBA did less in this case than it did in *StrategyGen*, its claim that it "did exactly what the ALJ requested" is inaccurate.[9]

C. The Court's Sole Purpose is to Ensure that the SBA's Conclusion is not Arbitrary, Capricious, or Contrary to Law

Next, the SBA contends that the *Decision* is erroneous as a matter of law "because it does not address the eligibility of the Petitioner for 8(a) BD certification." The argument is meritless. As the *Recon Petition* itself accurately explains, "[W]hen an applicant to the program appeals the determination to [the Court], the review is not a *de novo* review but one that determines whether or not the rationale behind the decision is reasonable." Accordingly, it is the SBA's job to determine an applicant's eligibility. The Court's sole purpose is to ensure that the SBA's conclusion is not arbitrary, capricious, or contrary to law. No statute or regulation authorizes the Court to step into the SBA's shoes and decide unilaterally that Petitioner is eligible to enter the Program. To the contrary, it is well-established that a reviewing court cannot replace an agency's reasoned decision with its own, even if the agency's decision differs from the one the court would have reached had it considered the case *de novo*. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *Southern Aire Contracting, Inc*., SBA No. BDP-453, p. 1 (2012); *NAMO, LLC*, SBA No BDP-458, p. 6 (2012); *Ace Technical, LLC*, SBA No. SDBA-178, p. 3 (2008). By faulting the Court for not deciding the eligibility question, the *Recon Petition* alleges that the Court erred by failing to do what it is not authorized to do. To be clear, the Court ordered Petitioner's entry into the 8(a) BD Program not because it felt Petitioner "deserved" to be certified, but because the SBA's decision not to certify Petitioner was improper. The outcome of the eligibility determination is inconsequential to the Court's review. Only the process matters and the SBA's process in this case was faulty.

D. The ALJ's Decision is the Final Decision of the Administration and Shall be Binding upon the Administration and Those Within its Employ

Finally, the SBA argues that the Court "does not have the authority to Order the SBA to certify a business into the 8(a) BD program," if the SBA designee believes the applicant to be ineligible. The SBA's lone support for this theory is 15 U.S.C. § 637(a)(8), which states that the Associate Administrator for Business Development ("AA/BD") is responsible for certifying an applicant's eligibility into the 8(a) BD Program. The Agency interprets this provision to mean

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Appeal Petition. However, the Decision specifically stated that even this minimalist treatment "complies with the letter of the law." Additionally, the Court's concern was directed at the half-hearted analysis of the new claims, not to the wholesale reproduction of the previously addressed claims.

[9] The SBA also expressed some confusion with its obligations after the *StrategyGen* Remand Order was issued. However, rather than file a deficient Remand Determination Letter, the Agency sought clarification from the court. That court's response thus provided clear instructions as to what kind of document the Agency was expected to produce. The SBA sought no such clarification here.

that "only the AA/BD may certify a firm," and thus the Court may not overrule his eligibility determination. As a result, Agency Counsel implies, if the Court finds an Agency determination to be arbitrary, the Court can do no more than remand the determination for further consideration. Petitioner describes this theory as "arrogant" and "blatantly inaccurate," and argues that once an Agency determination has been found to be arbitrary, capricious, or contrary to law, it "logically follows" that the Court can order the applicant's admission into the 8(a) BD Program. The SBA's argument is half-right. The Court does not have the authority to certify an applicant *itself*, but it does have the authority to order the AA/BD to do so.[10]

This is true because the Court — and the Court alone — is authorized to issue the Agency's final decision in an 8(a) appeal. The U.S. Supreme Court has held that, as a general matter, "two conditions must be satisfied for agency action to be final: First, the action must mark the consummation of the agency's decision-making process ... and second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal quotations omitted) (cited in *Reliable Automatic Sprinkle Co., Inc.. v. Consumer Product Safety Comm.*, 324 F.3d 726, 731 (D.C. Cir. 2003); *see also Role Models Am.. Inc. v. White*, 317 F.3d 327, 331-32 (D.C. Cir. 2003) (agency action is considered "final" if it imposes an obligation, denies a right, or fixes some legal relationship).

An examination of the underlying statute here confirms the extent of the Court's authority. Faced with public misgivings about the lack of due process in 8(a) Program appeals. Congress passed the Business Opportunity Development Reform Act of 1988 (the "'BOD Reform Act"). The BOD Reform Act amended the Small Business Act by mandating that the SBA provide "an opportunity for a hearing *on the records* in accordance with chapter 5 of title 5." 15 U.S.C. § 637(a)(9)(A) (emphasis added). The "on the record" language is a universally recognized indication that any hearing brought under that section is to be heard by an Administrative Law Judge pursuant to the APA. *See* 5 U.S.C. § 554(a). Congress thus established that this Court is the proper entity to hear and decide 8(a) Program appeal cases.

Section 637(a)(9) goes on to state:

> A decision rendered pursuant to this paragraph shall be the **final decision** of the Administration and shall be binding upon the Administration **and those within its employ**.

15 U.S.C. § 637(a)(9)(D) (emphases added).

There are four points to be gleaned from this statute: (1) the hearing must be presided over by an ALJ; (2) the ALJ must render a decision; (3) that decision is the Agency's final word

[10] The Court also ordered the petitioner's entry into the 8(a) BD Program in *StrategyGen*, using language identical to the order issued here. The SBA raised no issue with the Court's authority to do so in that case, making it somewhat curious that the Agency objects so strenuously here.

on the matter; and (4) the SBA and all its employees are bound by that decision. The SBA runs afoul of the third and fourth points by contending that the AA/BD can refuse to certify an 8(a) BD Program applicant if he disagrees with the Court's conclusion. The practical effect of this theory would mean the AA/BD is not bound by the ALJ's ruling, and in fact has the final word, not the Court. A decision that can be ignored at will by the Agency cannot properly be called a "final" decision. The SBA's theory is therefore inconsistent with 15 U.S.C. § 637(a)(9)(D).

The *Recon Petition* makes no attempt to reconcile its interpretation of Section 637(a)(8) with the clear language of Section 637(a)(9)(D). Indeed, even its discussion of Section 637(a)(8) is incomplete. SBA Counsel is correct that the AA/BD is the individual charged to make the eligibility determination. However, the SBA's conclusion that the AA/BD therefore holds absolute decisional autonomy is refuted in the very sentence SBA Counsel relies upon. That sentence reads, in its entirety:

> All other determinations made pursuant to paragraphs (4), (5), (6), and (7) shall be made by the [AA/BD] **under the supervision of, and responsible to, the Administrator**.

15 U.S.C. § 637(a)(8) (emphasis added).

The SBA's interpretation fails to give effect to the second half of the sentence.[11] By doing so it misses a critical point: the AA/BD remains at all times subordinate to the SBA Administrator. If the Administrator orders the AA/BD to certify an applicant, the AA/BD is powerless to refuse. It is no different if the order comes from the Court, speaking with the full authority of the Administrator.[12] In fact, because 15 U.S.C. § 637(a)(9)(A) specifically mandates that an ALJ — not the Administrator — conduct the hearing, the ALJ is the *only* entity vested with authority to issue final decisions in these cases. As Petitioner suggests, the power to issue final decisions contains the inherent power to issue orders mandating execution of those decisions. *See, e.g., Martin v. Yellow Freight System, Inc.*, 795 F. Supp. 461,469 (S.D.N.Y. 1992) ("We do not feel that it is unreasonable or unanticipated that an ALJ, vested with the authority of the Secretary of Labor, would issue an order . . . after a full hearing on the merits of the dispute."); *see also Hawpe Brothers Painting & Drywall, Inc.*, SBA No. 398 (1992) (expressly granting the petitioner's entry into the 8(a) BD Program after SBA failed to respond to

[11] The "Rule to Avoid Surplusage," a classic canon of legislative interpretation, teaches that every word in a statute should be given effect, if possible. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979).

[12] When faced with a similar argument, an ALJ for the U.S. Department of Health and Human Services opined that "[A]t the level of the administrative hearing, the administrative law judge is 'the Secretary.'" *Narinder Saini. M.D. v. Inspector General*, 1992 WL 685251, n.8 (H.H.S. 1992) (Docket No. C-425): *see also Howard Schrieberstein v. Inspector General*, 1998 WL 193089, *7 (H.H.S. 1998) (Docket No. C-97-117) (HHS Secretary delegated her full authority to the ALJ to hold hearings, thereby authorizing the ALJ to perform all duties the Secretary would perform if she were holding the hearings herself).

Appeal Petition).

An examination of the Agency's own regulatory history further undermines SBA Counsel's theory. At one point, the AA/BD[13] did have final authority over 8(a) appeals. Prior to May 1979, appeals hearings were conducted by an "examiner," not an ALJ. 44 Fed. Reg. 4957,4961 (Jan. 24, 1979) (codified at 13 C.F.R. § 101.10-18).[14] The examiner issued an initial decision, which would become a final Agency decision 30 days after issuance, unless a party filed a petition for review. If such a petition was timely filed, the examiner's decision was reviewed by the AA/BD, whose ruling upon review then became the final Agency decision. *Id.* at 4962 (codified at 13 C.F.R. § 101.10-21(c)).

On May 29, 1979, the Agency amended its regulations relating to 8(a) appeals. In place of an examiner, the regulations now mandated that "[A] 11 hearings in adjudicative proceedings shall be presided over by an ALJ" and that "the initial decision . . . shall be made and filed by the ALJ who presided therein." 44 Fed. Reg. 30,666, 30,668 (May 29,1979) (codified at 13 C.F.R. § 124.10-12); 30,670 (codified at 13 C.F.R. § 124.10-17(c)). The ALJ did not, however, have any more authority than the examiner. The ALJ's initial decision only became final if no party sought review during the 30-day window. The AA/BD remained tasked with conducting the review and issuing the final decision. *Id.* at 30,670 (codified at 13 C.F.R. § 124.10-20(c)).

In 1989, the SBA further amended its regulations to implement the BOD Reform Act. As one of the necessary changes, the Agency reversed the roles of the ALJ and the AA/BD, thereby bringing its regulations into compliance with 15 U.S.C. § 637(a)(9)(D). 54 Fed. Reg. 34,692, 34,724-25 (Aug. 21, 1989) (codified at 13 C.F.R. § 124.206). Under the newly updated regulations, the AA/BD's eligibility determination became a final Agency decision 30 days after issuance unless the applicant appealed the decision. In proposing the new rules, the SBA explicitly noted:

> Section 409 [of the Reform Act] . . . amends the usual scheme of APA hearings by requiring that the ALJ's decision be "the final decision of the Administration." Generally, APA hearings call for an ALJ to conduct a fact-finding hearing and to make a recommended decision to the Agency program official. That official would then be responsible for making the final Agency decision on the matter.

54 Fed. Reg. 12,054, 12,060 (proposed March 23, 1989).

The ALJ's role in the 8(a) appeal process thus evolved from nonexistent in 1979 to all-important in 1989. This evolution was expressly mandated by Congress, and that body has not

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[13] SBA regulations routinely used the term "Associate Administrator for Minority Small Business and Capital Ownership Development ("AAMSB-COD') or some variation thereof. The AAMSB-COD and the AA/BD are, for purposes of this discussion, one and the same. The Court uses the term AA/BD because that is the term used by the Agency in the *Recon Petition*.

[14] Today, almost all SBA regulations relating to the 8(a) Program appeals process, including those referenced here, are contained in 13 C.F.R. Part 134.

seen fit to disturb this order of authority in the subsequent 24 years. As it is clear that Congress specifically intended to take final decisional authority out of the AA/BD's hands and give it to the ALJ, SBA Counsel's assertion that the AA/BD's determination trumps the Court's authority is without basis.

Moreover, the SBA's theory is unworkable, as it would catastrophically unbalance the hearing process itself. Under the theory, the Court has only two options: (1) affirm the Agency's determination, or; (2) find the determination to be arbitrary and remand it for further consideration. There is no dispute that an affirmance is a final Agency action. A remand, on the other hand, cannot be considered "final" because it does not determine either parties' rights or obligations and does not define the parties' legal relationship. The SBA's theory therefore only allows for a final decision when that decision supports the SBA's determination. This is patently unreasonable. By creating a system where its victory is the only possible conclusion, the SBA essentially dictates to the Court what the outcome must be. Congress specifically authorized the Court to determine the outcome, not the SBA.[15] After examining the entirety of the Administrative Record, the Court ruled that the Agency's decision was arbitrary, capricious, or contrary to law. The Agency therefore has no grounds to deny Petitioner's application. The AA/BD, being an SBA employee, must comply with that decision.

The flaw in the SBA's argument becomes more apparent when considered in a practical context. If applied, the theory could potentially leave an applicant forever at the mercy of an obstinate or careless SBA. In the present case, for example, the Agency has already considered and rejected Petitioner's application three times.[16] Petitioner has spent more than two years and untold sums of money contesting that arbitrary decision. The SBA suggests that, as a reward for its tenacity, Petitioner must submit to at least one more round of examination, with no guarantee that further examination would finally resolve the matter. Were the SBA to commit fresh errors while re-assessing the application, Petitioner's only recourse would be to either abandon its goal of joining the Program or start the entire appeals process once again, thereby investing more time, money, and energy into the process. Even if Petitioner were to succeed in a new appeal, the only relief the SBA's theory would allow would be yet another remand. And the wheel would spin ever on. Such a scenario would truly defy logic. It must therefore be rejected. If the Court is to affect actual justice, it must be able to say "enough is enough."

Finally, Petitioner astutely observes that, if a party fails to comply with an order, the Court may take "any other action that is appropriate to further the administration of justice" pursuant to its sanction authority under 13 C.F.R. §§ 134.219(a)(1), 134.219(b)(5). This is classic "catchall" language, and offers the Court prodigious latitude to craft a remedy that best serves

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[15] The finality of the Court's decision is echoed in SBA's own regulations as well. *See* 13 C.F.R. §§ 124.206(b), 124.206(d); 13 C.F.R. § 134.227(b)(2); 13 C.F.R. § 134.409(a). The Agency could attempt to revise its regulations to strip the Court of its authority. Such an endeavor would be doomed to failure here, however, because this authority emanates directly from the organic statute. It can therefore only be changed by an act of Congress.

[16] The Initial Determination Letter, the Recon Determination Letter, and the Remand Determination Letter.

the interest of justice. Ordering Petitioner's entry into the 8(a) BD Program via the sanction authority would be appropriate in this case, as the Agency did not file a new initial determination as ordered. However, the Court is generally extremely reluctant to rely on the sanction mechanism to dispose of a conflict, and will rarely use such authority without prior warning. *See NAMO, LLC*, SBA No. BDP-458. Regardless, the breadth of the sanction authority further illustrates the weakness of the SBA's argument. Under the Agency's theory, the Court would possess less power under its general authority than it does under its sanction authority. This cannot be the case.

IV. Conclusion

The SBA's *Recon Petition* contends that the *Decision* "strays from the standard of review and contains material errors of fact and law." As such, the Agency argues that the *Decision* should be reconsidered. As discussed above, the argument must fail. The Agency's position rests almost entirely on its faulty understanding of the task set before it in the *Remand Order*, its strained interpretation of one precedential case, and its flawed reading of the controlling statute. The Court cannot arrive at a firm conviction that a mistake has been made based on empty argument. As the SBA has not shown clear, material error in the *Decision*, the request for reconsideration is **DENIED**.

ALEXANDER FERNÁNDEZ
Administrative Law Judge