

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

IN THE MATTER OF:

CHARO Community Development Corp.,

Petitioner,

SBA No. WBC-101 (PFR)

Decided: February 5, 2009

ORDER

On October 29, 2008, Petitioner CHARO Community Development Corp. (Petitioner), appealed Respondent Small Business Administration's (SBA) non-renewal of Women's Business Center (WBC) awards to Petitioner.

On December 17, 2008, I issued *Matter of CHARO Community Development Corp.*, SB A No. WBC-100 (2008) (*Charo*). In *Charo*, I found that the SBA had not specified, in regulations or procedural notices, which of the three means cited in the Small Business Act (appeal, hearing, or other administrative proceeding under the Administrative Procedure Act (APA)) should be used by a participant to challenge a WBC non-renewal. Moreover, I noted there were no rules of procedure for a participant to request a "hearing, appeal, or other administrative proceeding." I also found the SBA's notice of non-renewal inadequate in that it failed to cite which OMB Circular Petitioner was alleged to have violated.

In addition, I found that the Cooperative Agreement's Appendix B's provisions conflicted with the notice letter (and SBA counsel's arguments in response to the "appeal") in that Appendix B § 3(d) only provided Petitioner with the option of a hearing under the APA, 5 U.S.C. § 555 *et seq.* I also found there was no statutory or regulatory authority for OHA to apply the arbitrary and capricious standard of review espoused by the SB A. I then concluded that until the SB A corrects these deficiencies, it cannot continue with Petitioner's non-renewal proceeding.

On January 9, 2009, the SBA requested reconsideration of *Charo*.

I. Request for Reconsideration

The SBA first argues that it provided Petitioner with adequate notice of its right to contest the SBA's non-renewal decision as evidenced by the fact that Petitioner did file an "appeal" at the Office of Hearings and Appeals (OHA). The SB A then states that although its non-renewal letter inadvertently referenced Petitioner's right to request an "appeal," Appendix B of Petitioner's Cooperative Agreement specifically states that Petitioner may request an APA hearing at OHA. Accordingly, the SB A argues that it did specify which of the three means cited

in the Small Business Act, *i.e.*, an APA hearing, should be used by Petitioner in challenging its WBC non-renewal.

The SBA then asserts that the rules of procedure set forth in Subpart B of 13 C.F.R. Part 134 apply. In addition, the SBA argues that it notified Petitioner in the SBA's cure letter, decision letter, and the auditor's financial examinations of the specific provisions of the OMB Circulars which Petitioner had violated. In the alternative, the SBA argues that if I find there are no in-force provisions implementing 15 U.S.C. § 656(i) that permit a recipient to contest an SBA decision to suspend, terminate, or not renew a WBC award, I have no recourse but to vacate *Charo* and dismiss the instant proceeding for lack of jurisdiction.

II. Petitioner's Response to the Request for Reconsideration

On January 29, 2009, Petitioner responded to the SBA's request for reconsideration. Petitioner first states that the SBA has refused multiple attempts to mediate the dispute. Petitioner further asserts that it has supplied several documents in both its appeal and in response to the request for reconsideration demonstrating that Petitioner “has already mitigated the financial review completed by SBA in December of 2006 to the full approval of the [SBA] and was going to be paid by the [SBA].” Petitioner requests that OHA compel the SBA to comply with *Charo* and that OHA hold a hearing on the matter.

III. Discussion

The Small Business Act, 15 U.S.C. § 656(i), provides that before the SBA may refuse to renew a grant, suspend an award of a grant, or terminate a grant, it must afford a petitioner an opportunity to either appeal, have an informal hearing, or have an APA hearing. The section leaves it to the SBA to decide which review forum is to be provided.

The SBA decided to grant jurisdiction over the non-renewal of WBC awards to OHA. 13 C.F.R. § 134.102(o). Appendix B § 3(d) to Petitioner's Cooperative Agreement specifies that Petitioner is entitled to request a formal APA hearing before an administrative law judge at OHA. Thus, the SBA chose not to provide a right to an appeal to an aggrieved grantee. Subpart B of 13 C.F.R. Part 134 establishes the rules of procedures for cases where there are no specific procedures provided elsewhere in the regulations. These procedures generally comport with the Administrative Procedure Act. *See* APA § 556. Here, the SBA has not issued a regulation providing specific procedures for WBC cases. Accordingly, Subpart B of 13 C.F.R. Part 134 applies.

The SBA's inadvertent use of the term “appeal” in both its non-renewal letter and its Answer resulted in more than just semantic confusion. An appeal is a review of the record for legal error while a hearing under the APA is a *de novo* proceeding at which the party bearing the burden of going forward must prove its case by the preponderance of the evidence. APA § 556. Because Petitioner was on actual notice, however, of the hearing provision as contained in Appendix B, I find that Petitioner was not prejudiced by the “inadvertent” reference to an appeal right in the SBA's non-renewal letter.

A *de novo* hearing requires the SBA to prove by a preponderance of the evidence presented that its allegations against Petitioner are founded in fact. APA § 556; 13 C.F.R. § 134.224. Petitioner would be afforded the usual procedural rights, including discovery, and due process rights such as having the right to cross-examine SBA's witnesses at an oral hearing if there are disputed facts. Otherwise, the case would be decided *de novo* on the written record, including the evidence offered by Petitioner since the appeal was filed. Finally, the administrative law judge would issue a final decision pursuant to Appendix B § 3(d).

Appendix B's selection of an APA hearing, although not specifically provided for in an agency regulation, provides Petitioner the maximum protection allowed by the statute and thus Petitioner cannot complain of the absence of an agency regulation choosing which of the three choices in the statute must be followed. In fact, Petitioner now requests that I hold a hearing. *See supra*, Part II. Accordingly, I hold that Petitioner will have been afforded all of its due process procedural rights during the pendency of this case. Therefore, I find that Appendix B and Subpart B of 13 C.F.R. Part 134 apply in this case.

IV. Conclusion

Accordingly, the SBA's Request for Reconsideration is GRANTED. On reconsideration, I agree with both parties that Petitioner is entitled to an APA hearing. I must now decide whether the hearing should be oral or on the written record. *See* 13 C.F.R. § 134.222. It appears there is a genuine dispute as to material facts and that an oral hearing is appropriate. *Id.* However, before ordering an oral hearing, I will order the parties to prepare a stipulation of agreed and disputed facts. A telephone conference will be held to explain what I expect of the parties, establish deadlines for compliance, and answer any questions of Petitioner or Respondent.

RICHARD S. ARKOW
Administrative Law Judge