United States Small Business Administration
Office of Hearings and Appeals

IN THE MATTER OF:	
Women's Venture Fund	SBA No. WBC-103
Petitioner	Decided: March 23, 2009

APPEARANCES

Kevin R. Harber, Esq., Office of General Counsel, Small Business Administration, Washington, D.C., for the Agency.

Henry L. Solano, Esq., Dewey & LeBoeuf LLP, New York, New York, for Petitioner.

ORDER DENYING REQUEST FOR RECONSIDERATION

ARKOW, Administrative Law Judge:

I.

On March 6, 2009, the Small Business Administration (SBA) requested reconsideration of *Matter of Women's Venture Fund,* SBA No. WBC-102 (2009) (*Women's Venture*), which was a final Agency decision lifting the SBA's suspension of Women's Business Center (WBC) awards to Petitioner Women's Venture Fund (Petitioner).

On March 11, 2009, Petitioner opposed the request because it was untimely filed.[1]

A party requesting reconsideration of an SBA Office of Hearings and Appeals (OHA) initial or final decision must serve the petition for reconsideration within 20 days after service of the written decision. 13 C.F.R. § 134.227(c). OHA served the SBA with *Women's Venture* on February 5, 2009; the deadline for filing a petition for reconsideration was February 25, 2009. SBA counsel untimely filed the request on March 6, 2009, nine (9) days past the deadline. Accordingly, the SBA's request for reconsideration must be denied because it is untimely.

[1] Petitioner also argued that the SBA's time to file a request for review by the SBA Administrator has lapsed under 13 C.F.R. § 134.228. Because *Women's Venture* was a final decision, and not an initial decision, a request for review would be improper even if timely filed. *See* 13 C.F.R. § 134.228(a).

In addition, the SBA has not met the regulatory standard for a petition for reconsideration because the SBA has neither alleged nor made a "clear showing of an error of fact or law material to the decision." 13 C.F.R. § 134.227(c).

On March 13, 2009, SBA counsel appropriately conceded its request for reconsideration is untimely. Counsel now suggests that I, sua sponte, reconsider *Women's Venture* because 15 U.S.C. § 656(g)(1) and (2)(B)(ii)(I) are in conflict with Appendix B, SBA's agreement with Petitioner, and the statute must take precedence over Appendix B.

A sua sponte reconsideration is made without prompting or suggestion. *See* BLACK'S LAW DICTIONARY 1437 (7th ed. 1999). Here, counsel, by suggesting I reconsider, is attempting to do indirectly what he cannot do directly because of the 20-day time limit. If permitted, the 20-day time limit would be meaningless. Accordingly, I will not reconsider "sua sponte."[2]

II.

Generally, if a request for reconsideration is denied because counsel's filing was untimely, it is unnecessary to discuss the merits of the request. In some cases, however, it is necessary to address the merits, even though merely dicta, to avoid giving the impression that there may be some merit to counsel's contentions. Here, there is no merit to SBA counsel's contentions.

III.

Counsel's contentions address the interpretation of Appendix B. SBA counsel acknowledges that its drafting of Appendix B procedures for termination, suspension, and non-renewal of WBC awards (1) are "considerably less than optimal," Request at 2, (2) "could in no way be considered a model of clarity," *id*., and (3) contain a "lamentable lack of clarity," Request at 4. Contrary to counsel's assertions, however, the language in Appendix B is in plain English and perfectly clear.

Counsel's contention appears to be that, despite Appendix B's plain and indisputable meaning, the SBA did not mean what it said in Appendix B. Further, counsel states that the SBA has "revised [its] procedures" and is "modifying all current WBC awards to incorporate these new procedures" and is wresting jurisdiction from the Office of Hearings and Appeals, presumably in future cases. Although this statement is irrelevant and immaterial to the issues in this case, the statement does affirm my conclusion that it is the SBA's failure to realize the consequences of Appendix B, not the meaning of the present language in Appendix B, that put the SBA in its current predicament.

For example, Appendix B § 1(c) clearly states that "[t]he period of suspension will begin on the date of the final Agency decision affirming the intent to suspend the Cooperative Agreement and will last no longer than 6 months." Appendix B § 3(d) also states that "OHA's

[2] I need not decide whether the 20-day time limit also applies to a sua sponte reconsideration under 13 C.F.R. § 134.227(c).

decision on the merits is the final agency decision and not subject to any further review or appeal within the Administration." Counsel incorrectly characterizes this language, which SBA drafted, as my holding and later asserts that I have "wave[d] a wand and declare[d] by fiat that 'what was formerly done has now been undone.'" Request at 6. In fact, I am simply applying the plain language of Appendix B in finding that the SBA cannot initiate suspension until OHA issues the final Agency decision. The fact that SBA counsel now objects to the effect of applying SBA's own clear language in Appendix B does not amount to a clear showing of an error of fact or law material to the decision.

IV.

Counsel also erroneously concludes that my decision divests the SBA with the power to suspend WBC awards. SBA can suspend such awards but only after it complies with its own procedures that are in Appendix B. Appendix B provides that a suspension is effective after a final Agency decision. If a WBC does not contest SBA's proposed suspension at OHA, the SBA's decision to suspend becomes the final Agency decision and it becomes effective at that point. If the WBC contests the suspension, Appendix B provides the WBC with a hearing under the Administrative Procedure Act (5 U.S.C. § 551), not an appeal or review of the SBA's suspension decision. After the hearing and an OHA decision, the SBA's decision is either upheld and the suspension becomes effective, or the suspension is lifted. Thus, it is incorrect for counsel to conclude that SBA can only recommend to OHA that a WBC be suspended.

Here, however, the SBA ignored Petitioner's rights by failing to abide by its own agreement by suspending Petitioner before the benefit of a hearing. Thus, the suspension was void *ab initio*. Because the suspension is contrary to Appendix B, it must be lifted. This does not detract from the authority of those who administer the WBC program. Lest there be no misunderstanding, counsel is wrong in asserting that OHA usurped the authority of the SBA. The SBA has the power to suspend a WBC award but, by its own language, only after a final Agency decision. OHA has the obligation to determine if SBA followed its own rules in suspending and, if so, conduct an APA hearing to permit the SBA to prove its case before the suspension can be upheld.

V.

Counsel continues to argue that I should have applied an appellate standard of review. Counsel argues that OHA does not have the power to lift a suspension, and instead OHA should "focus upon the matter of whether or not an SBA action or decision is consistent with the law and supported by the facts." Request at 5. It has already been decided that the clear language of Appendix B requires a hearing. In fact, in a similar WBC case, SBA counsel conceded the point when he stated that the word "appeal" in the SBA's decision letter was a poor choice and it really meant a hearing, consistent with the clear language of Appendix B. *See Matter of CHARO Community Development Corp.*, SBA No. WBC-101, at 1-2 (2009).

Counsel's urging of an appellate standard of review is at conflict with counsel's concession that a hearing is required under Appendix B. Again, counsel is confusing the difference between a hearing and an appeal. Appeals have a standard of review, such as

whether the SBA acted arbitrarily or capriciously, hearings do not. Hearings require the party bearing the burden of going forward to prove its case. Based on the evidence at a hearing, the case is decided de novo on the merits.

Counsel argues, "[i]n every other instance, OHA's role is limited to reviewing the decisions and actions of Agency officials in order to ascertain whether they withstand scrutiny under the appropriate standard of legal review." Request at 4 (emphasis added). This blanket statement is incorrect. In fact, in the 8(a) program, suspension hearings are the norm. *See* 13 C.F.R. § 124.305(c).

OHA's role at the SBA includes both appeals and hearings. It is undeniable that Appendix B requires a hearing, not an appeal. Accordingly, counsel's argument that OHA only reviews Agency actions is off-base and without merit.

VI.

For these reasons, counsel's arguments are not only untimely filed but are without merit.

The SBA's Request for Reconsideration is DENIED.

The suggestion that I reconsider sua sponte is also DENIED.

RICHARD S. ARKOW
Administrative Law Judge