UNITED STATES OF AMERICA

before the

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

In the Matter of:	:	
HUGH F. BARRINGTON,	:	Docket No. 81-803-DB
Appellant	:	

Elliott S. Hall, Esquire
Hall, Andary & Bilicki, P.C.
2440 Buhl Building
Detroit, Michigan 48226

Joan J. Saloschin, Esquire
Office of General Counsel
U.S. Department of Housing
and Urban Development
Washington, D.C. 20410

INITIAL DETERMINATION

Statement of the Case

By letter dated August 5, 1981, the Assistant Secretary for Housing notified Appellant that the Department of Housing and Urban Development (HUD) proposed to debar him, Renaissance Constructors, Inc., and other affiliates for three years because of an alleged submission of false statements to HUD in connection with the Jeffries Homes Project (MICH 1-7). The letter stated that "Before the proposed determination is made, you are entitled to an opportunity to be heard and to be represented by counsel in accordance with 24 C.F.R. 24.7 if you so request within ten days from receipt of this notice." The letter also advised that, pending final determination of this matter, Appellant and his affiliates were temporarily suspended from HUD programs. The letter noted that Appellant had been suspended since December 17, 1979. 1/

On September 11, 1981, the Assistant Secretary issued a final determination, which cited Appellant's failure to "... request a

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1/ The present record does not include the notice of prior suspension. However, the Government's Motion to Dismiss for Untimely Filing (infra) states that this suspension was based upon the same cause as the proposed debarment.

hearing within the ten-day period specified in the notice; therefore, I assume that an opportunity to be heard is not desired." Accordingly, the Assistant Secretary debarred Appellant from HUD programs through December 16, 1982. 2/

By letter to the Assistant Secretary dated November 17, 1981, and received by that office on November 19, 1981, Appellant requested "a rehearing regarding this matter scheduled as quickly as possible." By memorandum dated November 24, 1981, and received by the HUD Board of Contract Appeals on November 25, 1981, the Office of the Assistant Secretary forwarded Appellant's letter to Administrative Judge Jean S. Cooper. The form memorandum, signed by the Director, Participation and Compliance Division, states in part:

> Please take notice that the above named party has made a timely request to the Assistant Secretary for a hearing in the above captioned matter. The docket of cases for hearings indicates it is your sequential turn for an assignment as an impartial and independent Hearing Officer. By authority delegated to me by the Under Secretary pursuant to 24 CFR 24.5(f) you are hereby forwarded this case as the independent Hearing Officer appointed to hear the same.
>
> * * *
>
> I am sending a copy of this notice to the party to inform him/her of your appointment and that your independent office will contact him soon to establish a mutually agreeable date for you to receive the issues and evidence in this matter.

Because of scheduling reasons, the request for a hearing was subsequently internally transferred to this Hearing Officer. By Order dated December 14, 1981, the parties were directed to file written statements of position regarding whether a hearing could be granted in this matter in view of the ten day time period specified in 24 C.F.R. §24.7.

On December 29, 1981, the Government filed a Motion to Dismiss for Untimely Filing. On January 11, 1982, the Appellant filed an Answer thereto.

Discussion

This matter comes before me as a request for a hearing on a final determination of debarment. Hearing Officers under 24 C.F.R. Part 24 are only authorized to review final determinations six months after their issuance, pursuant to the reinstatement

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2/ This is the equivalent of a three-year debarment, giving Appellant credit for his prior suspension.

provisions of §24.11. 3/ In this regard, §24.7, which sets forth requirements for de novo hearings, limits entitlement to such hearings to "Any contractor or grantee that has been notified of a proposed action ..." (subsection (b), emphasis added). Since the final determination in this case is dated less than six months ago, I am compelled to dismiss this appeal for lack of jurisdiction unless I find that the final determination was improperly issued, or that it was subsequently rescinded by the Assistant Secretary.

§24.7(b) explains the circumstances under which an Assistant Secretary may issue a final determination as follows:

> Hearing - (1) Request for hearing. Any contractor or grantee that has been notified of a proposed action is entitled to request an opportunity to be heard and to be represented by counsel. A hearing request shall be made in writing addressed to the official proposing the action. If at the end of such 10 day period, no request has been received, it may be assumed that an opportunity to be heard is not desired and such official may proceed to make a final determination and so notify the interested party.

The "10 day period" refers to the requirement, set forth in §24.7(a)(3), that the notice of proposed debarment advise that the affected party "will be accorded an opportunity for a hearing if he so requests within 10 days from his receipt of notice ..." As noted supra, in this case the Assistant Secretary's letter dated August 5, 1981 specifically notified Appellant of the ten day limitation.

The authority to issue a final determination after the ten day period has run necessarily presumes that the affected party has received the prior notice of proposed debarment. In this regard, although §24.7(a)(3) states that "notice shall be considered to have been received by the addressee if the notice is properly mailed to the last known address of such addressee," basic due process considerations may require that the section's ten day period be tolled if the party can make a good faith showing that no notice was actually received. Cf. Transco Security, Inc. of Ohio v. Freeman, 639 F.2d 318, 321 (6th Cir. 1981), cert. denied -- U.S. -- (October 5, 1981); Gonzales v. Freeman, 334 F.2d 570 (D.C. Cir. 1964).

3/ §24.11(a) provides that "Six months after the date of the final determination, any contractor or grantee against whom an administrative sanction has been invoked may in writing request reinstatement by the official who invoked the administrative sanction." Subsection (b) states that "... Where the party has been suspended or debarred, however, the reinstatement proceeding shall be conducted by a Hearing Officer appointed in accordance with §24.5(f). ..."

With its Motion to Dismiss, the Government has submitted copies of two registered mail return receipts as proof that Appellant received both the letter of initial suspension dated December 17, 1979 (Exhibit 1) and that proposing debarment dated August 4, 1981 (Exhibit 2). However, by affidavit submitted in support of his Answer to the Motion, Appellant states that the letter proposing debarment "did not come to my attention until almost October and a timely response was then made requesting a hearing ..."

Government Exhibit 2 shows that the letter proposing debarment was delivered to Appellant's address on August 10, 1981 and was signed for by an "H. Barrington." The signature appears to be in the same handwriting as the person who accepted delivery of the initial suspension letter on December 28, 1979, who then signed as "H F Barrington" (Government Exhibit 1). Since Appellant admits to having personally signed for the suspension letter (Answer to Motion, paragraph 2), presumably he also personally signed for the letter proposing debarment. Oddly, the signature on Appellant's affidavit is markedly different from these prior signatures.

Even assuming that Appellant did not personally sign for the letter proposing debarment, his affidavit does not state good cause for tolling the time limitation in this case. Appellant does not explain why a registered letter from the Federal Government received in his household on August 10th was not forwarded to him immediately, except for the vague assertion that it "did not come to my attention until almost October." Consistent with this assertion, Appellant simply may have decided not to look at his letter before then. However, this clearly was his responsibility. Moreover, and in any event, Appellant did not send a letter to the Assistant Secretary requesting a hearing until November 17, 1981, more than a month and a half after his acknowledged personal knowledge of the letter's contents.

Under these facts, no good cause exists for tolling the time limitation under §24.7. Accordingly, Appellant forfeited his opportunity for a hearing on the proposed debarment, and the Assistant Secretary was authorized to issue a final determination under §24.7(b). 4/

4/ §24.7 (a)(3) and (b) are consistent with due process requirements. Due process only requires that an agency afford the opportunity for a hearing, which may be waived by the affected party. Adamo Wrecking v. HUD, 414 F.Supp. 877 (D.D.C. 1976).

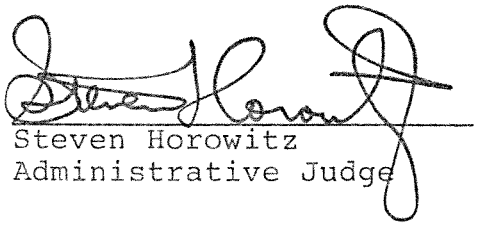
Finally, the Assistant Secretary has not shown any intention to rescind the final determination in this case. 5/ In this regard, the memorandum from the Office of the Assistant Secretary referring this matter to a Hearing Officer did not constitute a rescission. The purpose of that form memorandum was merely to effect a procedural transfer of this case. Moreover, Government Counsel, in filing the present Motion to Dismiss, is presumed to have acted on the Assistant Secretary's behalf.

Since the final determination was already issued when the request for a hearing was made, Appellant's request, in effect, was for reinstatement under §24.11. As discussed, this request is premature.

CONCLUSION AND ORDER

This matter is dismissed for lack of jurisdiction.

ORDERED this 25th day of January, 1982.



Steven Horowitz
Administrative Judge

5/ He would implicitly be authorized to do so under §24.7(a), which provides that "If at the end of such 10 day period, no request [for a hearing] has been received, it may be assumed that an opportunity to be heard is not desired, and [the proposing] official may proceed to make a final determination and so notify the interested party." (Emphasis added.) The word "may," under basic rules of construction, is generally considered to imply discretion in the absence of evidence to the contrary. Natural Resources Defense Council, Inc. v. Costle, 568 F.2d 1369, 1375 (D.C. Cir. 1977); United States v. Cook, 432 F.2d 1093, 1098 (7th Cir. 1970); Person v. Peterson, 296 N.W. 2d 537, 538 (S.D. 1980). Thus, while the proposing official may, as a matter of discretion, issue a final determination after the ten day period has run, he is not required to do so, and presumably may rescind it when the assumption that a hearing has been waived is no longer valid.