

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of:

STUART GLASHOW
SOUTHERN STODD, INC.

Respondents.

HUDALJ 92-1834-DB(S)

RECONSIDERATION OF INITIAL DETERMINATION AND ORDER

On May 13, 1992, an Initial Determination and Order dismissing Respondent's appeal and request for hearing was issued in this proceeding because Respondent appeared to have abandoned prosecution of his case by repeatedly failing to file pleadings and documents as ordered. On May 14, 1992, counsel for Respondent requested a telephone conference to discuss the Initial Determination and Order. During that conference, counsel for Respondent was given an opportunity to file a petition for reconsideration. On May 15, 1992, Respondent filed a "Motion to Reconsider Initial Determination and Order of May 13, 1992." The Government opposes the motion, but it will be granted.

On March 16, 1992, in an Order issued in the Limited Denial of Participation proceeding (HUDALJ 92-1768-DB(LDP)) against Respondent that preceded the instant case, Respondent was ordered to file an Answer to the Government's Complaint in the instant case no later than April 14, 1992. Pursuant to request by Respondent, the due date was postponed to April 25, 1992. The March 16, 1992, Order also directed Respondent to send the Government no later than May 5, 1992, copies of documents to be introduced at hearing on behalf of Respondent and a list of witnesses to be called at hearing, together with summaries of their expected testimony. At the same time, Respondent was ordered to file with the Chief Docket Clerk on or before May 5, 1992, a witness list with summaries of expected testimony and a list of documents to be introduced at hearing but not the documents themselves.

On May 11, 1992, the Government filed a motion to dismiss Respondent's appeal and request for hearing on the ground that Respondent had abandoned prosecution of his case. On the same day an Order was issued requiring Respondent to respond to the Government's motion via facsimile machine no later than the close of business May 12, 1992. In that Order Respondent was warned that failure to comply with the Order would constitute consent to the Government's motion. On May 13, 1992, I issued an Initial Determination and Order dismissing the appeal based on findings that Respondent had not complied with the Order of May 11, 1992, as well as previous Orders to file an Answer, exchange witness lists and exhibits with the Government, and file witness and exhibit lists with the Chief Docket Clerk.

In his motion for reconsideration, counsel for Respondent denies that he had abandoned prosecution of the case, but he confesses that due to a misinterpretation of the March 16, 1992, Order he failed to send witness and exhibit lists to the Government and to the Chief Docket Clerk as ordered.

The motion for reconsideration also alleges that Respondent's Answer was sent by facsimile machine to this office at 11:33 a.m. on April 25, 1992. Exhibit 1 to the motion consists of an affidavit from Eileen M. Gunipero, Legal Assistant, who states, *inter alia*:

I also have personal belief that the Answer to the Government's Complaint was sent to the Office of the Administrative Law Judge on Saturday, April 25, at 11:33 a.m.

Ms. Gunipero does not state that she herself transmitted the Answer by facsimile machine or that she saw someone else do so. Nor does she state the basis for her personal belief. Presumably she formed her belief on the basis of the material in Exhibit 2 of the motion. Exhibit 2 appears to be a log listing facsimile machine transmissions and receipts for the firm of Strada & Fusaro, of which counsel for Respondent is a member. The log includes a heading titled, "Remote Terminal Identification." Under that heading for April 25, at 11:33 a.m. appears the entry, "HUD ADMIN LAW JUDGES." However, the corresponding facsimile machine log for Saturday, April 25, 1992, automatically generated by the facsimile machine in this office, has no entries for that day. In other words, nothing was received by facsimile machine in this office on April 25, 1992. There is no explanation in the record for the contradictory facsimile machine logs. In any event, according to the rules of practice governing this proceeding, "A document is considered timely filed if post-marked on or before the date due or delivered to the appropriate person by close of business on the date due." 24 C.F.R. Sec. 26.14 (a). Inasmuch as the Answer was not delivered or postmarked on or before April 25, 1992, Respondent failed to comply with the Order directing him to file an Answer to the Government's Complaint on or before April 25, 1992.

Respondent's Answer eventually was received in this office through the U.S. mail on May 11, 1992, under cover of a letter dated May 6, 1992. According to counsel for the Government, the Answer was mailed only after a prompting telephone call from Government counsel to Respondent's counsel on May 5, 1992. Respondent has not explained why the Answer was not served upon the Government and the Chief Docket Clerk by mail at the same time the Answer was allegedly sent by facsimile machine to this office on April 25, 1992.

Respondent also asserts in his motion to reconsider that a response to the May 11, 1992, Order was sent to this office via facsimile machine at 2:53 p.m. on May 12, 1992. At the time the Initial Decision and Order was issued on May 13, 1992, the record contained no such response. Receipt of Respondent's motion to reconsider prompted an investigation which revealed that this office had received a transmission from an unidentified facsimile machine at 12:54 p.m. on May 12, 1992, but the nature of that transmission could not be determined. A few days ago, Respondent's May 12 response to the May 11 Order finally came to light; it had been inadvertently misfiled.

Although the record now shows that on May 12, 1992, Respondent indeed sent a response to the May 11 Order, that response did not comply with the May 11 Order. Counsel for Respondent wrote:

Dear Judge Heinz:

Receipt of your May 11, 1992 order is acknowledged. I cannot comply with same for the reasons contained in the attached motion. In the event that the Court is inclined to deny this motion, I would respectfully request that the Court take judicial notice of the previous submission of lists and documents filed in HUDALJ 92-1765 (LDP).

The Government's May 11 motion argued that Respondent's appeal should be dismissed because he had abandoned prosecution of his case. The May 11 Order directed Respondent to respond to that motion. On May 12 counsel stated that he could not comply with the Order. But three days later in his May 15 motion to reconsider, counsel addressed the May 13 finding that he had abandoned prosecution of the case. Therefore, it was not that counsel was *unable* on May 12 to comply with the May 11 Order; rather, he *chose* not to do so. Nevertheless, on the strength of the discovery that Respondent indeed responded to the May 11, 1992, Order, it appears that Respondent had not abandoned prosecution of his case, contrary to the finding in the May 13 Initial Determination and Order. Accordingly, Respondent's motion to reconsider will be granted.

RESPONDENT'S MOTION FOR AN ENLARGEMENT OF TIME FOR HEARING

A motion was attached to the May 11 statement from counsel for Respondent. That motion requested an enlargement of time for the hearing until October 1992, based on allegations that Respondent's medical condition precluded him from effectively assisting counsel in the litigation of the case. Appended to the motion is a signed note purportedly from Haym V. Setton, M.D., dated May 11, 1992, that states:

Mr. Stuart Glashow suffers from c[REDACTED] a[REDACTED] d[REDACTED],
[REDACTED] and has been under a lot of
stress. He is advised to avoid any additional stress and any
proceedings should be postponed for several months. Mr.
Stuart Glashow has to take it easy for the next few months, in
order to help in controlling his [REDACTED] and his c[REDACTED] a[REDACTED]
d[REDACTED].

Counsel for the Government asserts that one Alex Trembicki observed Respondent Glashow participate in a negotiation session on May 15, 1992, concerning related civil litigation, and that Respondent Glashow reportedly appeared able to assist his counsel in that matter at that time. However, this unsworn hearsay report is insufficient to rebut Respondent Glashow's claim of incapacitating ill health. The motion to enlarge the time for oral hearing will be granted.

ORDER

1. The Initial Determination and Order of May 13, 1992, is reconsidered and withdrawn.

2. Respondent's motion to enlarge the time for oral hearing is granted. Respondent may file a motion for oral hearing no earlier than October 1, 1992.

3. If Respondent moves for oral hearing, the motion must be accompanied by an affidavit subject to penalties for perjury from the person who claims to have transmitted Respondent's Answer to the Government's Complaint by facsimile machine to the Office of Administrative Law Judges on April 25, 1992. The affiant must affirmatively state that he or she personally operated the facsimile machine.

4. If Respondent moves for oral hearing, the motion must be accompanied by an affidavit from Respondent Glashow's treating physician, dated no earlier than October 1, 1992, subject to penalties for perjury, and stating:

a. Respondent Glashow's medical diagnosis as of May 11, 1992, and the signs and symptoms supporting that diagnosis;

b. Respondent Glashow's medical diagnosis as of the date of the affidavit, and the signs and symptoms supporting that diagnosis;

c. That in the opinion of the treating physician, the stress of a legal trial in the middle of May 1992 would have jeopardized the health of Respondent Glashow. The basis for that opinion must be given; and

d. That in the opinion of the treating physician, as of the date of the affidavit, Respondent Glashow's medical condition has improved since May 11, 1992, to the point that he may safely participate in a legal trial without running an undue risk to his health. The treating physician shall specify the changes in the signs and symptoms of his patient that support the opinion.

5. Failure to comply with this Order in any respect whatever shall provide cause to deny the request for hearing and dismiss Respondent's appeal. Inasmuch as Counsel for Respondent has repeatedly failed to comply with orders issued in this case, he is reminded that the rules of practice authorize issuance of an unfavorable determination against any party failing to comply with an order of a hearing officer. See 24 C.F.R. Sec. 26.3.

6. Respondent Glashow and his affiliate remain suspended pending final resolution of this matter.



THOMAS C. HEINZ
Administrative Law Judge

Dated: June 25, 1992