In the Matter of Docket No. 93-116-DA

The Proposed Debarment of

BARBARA HEROLD

DECISION OF GOVERNMENTWIDE DEBARMENT

FROM FEDERAL NONPROCUREMENT TRANSACTIONS

This **DECISION** is issued by the United States Department of Education (Department) pursuant to 34 CFR § 85.314. I have jurisdiction to act in this matter by virtue of a Delegation of Authority from the Secretary to me to act as the Department's Designated Deciding Debarment and Suspension Official. The regulations, 34 CFR Part 85, and the Nonprocurement Debarment and Suspension Procedures mailed to Barbara Herold with the notice of August 26, 1992, govern this debarment.

On August 26, 1992, Barbara Herold, President of the Smith Business School of Washington, D.C. (Smith), was issued a "Notice of Proposed Governmentwide Debarment from Federal Nonprocurement Transactions" pursuant to 34 CFR § 85.312. The notice informed Ms. Herold that the proposed debarment was based upon the adverse findings of a program review conducted at Smith by the Massachusetts Higher Education Assistance Corporation (MEHAC), and on conduct imputed to her by virtue of her position as Smith's President, pursuant to 34 CFR § 85.305(b) and (d). Ms. Herold was also given notice of her right to submit information and argument in opposition to the proposed debarment.

On July 1, 1993, pursuant to Ms. Herold's request, I held a hearing on this matter in Washington, D.C. At such hearing, Ms. Herold appeared pro se while the Department's Notice Official was represented by Russell B. Wolff, Esq., of the Office of the General Counsel. At the hearing, evidence was introduced after which both Ms. Herold and Mr. Wolff presented oral argument. The hearing was recorded by a court reporter and a transcript was made. Post-hearing submissions were made by both parties. I find that nothing presented during the hearing process raises a genuine dispute as to material facts.

As stated earlier, the Department's action is based primarily on the MEHAC findings. Those findings, virtually unrebutted, include: 1) failure to make required tuition refunds to lenders holding guaranteed student loans (GSL) on behalf of students, pursuant to 34 CFR § 682.607(c)(1); 2) failure to implement adequate procedures to refund GSL funds to lenders when a student withdrew or graduated from Smith, as required by 34 CFR § 682.607; 3) failure to demonstrate administrative capability, pursuant to 34 CFR § 668.14; and 4) failure to demonstrate financial responsibility, as required by 34 CFR § 668.13. The evidence presented at the hearing established the violations enumerated above. Moreover, evidence was introduced indicating Smith's failure to bring itself into compliance since the MEHAC review. The Department argues that the violations are serious and Ms. Herold, as Smith's president, knew or had reason to know of the violations cited and, therefore, she should be debarred. During her presentation, Ms. Herold argued that she has been the owner of Smith since 1989, and many of the allegations against Smith pre-dated her ownership. She asserted that she was not a financial aid expert and relied on others for that expertise. She argued that almost all the refunds have been paid, although, in many cases, they were paid late. Since Smith was on the Pell reimbursement system, she claimed that a major reason for the late payments was that the Department had unreasonably withheld funds that had been earned by the school. In addition, a Court is holding some of their funds on an unrelated issue, which she believes should be returned. Although conceding that the offenses occurred, were serious, and could constitute cause for termination of Smith, Ms. Herold asserted that she was not responsible for the errors performed by her employees and that she was not in a position to know much of what transpired.

Based on the presentations of the parties and evidence submitted, I find that Ms. Herold knew or should have known that, during her tenure as its president, Smith was violating regulations applicable to the programs authorized under Title IV of the Higher Education Act of 1965, as amended, 20 U.S.C. § 1070 et seq. She was the owner and hands-on manager of the school, exercising absolute control over the school's operations. As such, she is fully responsible for the violations of federal student financial assistance program requirements. It is abundantly clear that these violations were significant and resulted in the loss of program funds. Consequently, I find that the Department has established by a preponderance of the evidence that Ms. Herold is subject to debarment under 34 C.F.R. § 85.305 (b) and (d). In reaching this conclusion, I have attributed to Ms. Herold only those violations at Smith which occurred during her ownership. In addition, except for the fact that Smith is closed, Smith would have been subject to termination of eligibility from participating in the Title IV programs for these violations.

The Notice Official argues that the proper standard to apply in a debarment case is that officials in responsible positions, like Ms. Herold here, are subject to debarment when violations occur at schools under their control which are sufficiently serious so as to constitute causes for termination of the school's eligibility. I note, however, that 34 C.F.R. § 85.325(b)(2), which is cited by the Department as a basis for attributing the wrongdoing at Smith to Ms. Herold, provides that the fraudulent, criminal, or other seriously improper conduct of the participant (Smith) may be imputed to any officer (Ms. Herold), who participated in, knew of, or had reason to know of that conduct. In contrast, I note that 34 C.F.R. § 668.86 (a), which governs termination of eligibility of institutions, provides that the eligibility of an institution to participate in Title IV programs may be terminated for the violation of any Title IV provision.

A comparison of the bases for debarment with the bases for terminating the participation of an institution in any Title IV program reveals that the tests for each are dramatically different, i.e. "fraudulent, serious, or other seriously improper conduct," as opposed to a violation of any provision of Title IV. As such, I cannot agree with the position of the Notice Official as to the degree of culpability necessary to debar an individual. The proper standard to be applied is that the conduct of an individual sufficient to constitute grounds for debarment must be fraudulent, criminal, or other similarly serious, improper conduct.

The debarment of an individual has extremely serious consequences. The individual is precluded from initiating, conducting, or otherwise participating in any covered transaction under the nonprocurement programs and activities of any Federal agency, and is not eligible to receive any Federal financial and nonfinancial assistance or benefits from any Federal agency under nonprocurement programs and activities. Also, such individual may not act on behalf of any person in connection with any covered transaction.

As stated in 34 CFR § 85.115, the policy of the Federal Government is to conduct business only with responsible persons. It seems clear that in order to support the governmentwide debarment from federal nonprocurement transactions of an individual, a greater degree of personal culpability than what the Notice Official argues is appropriate must be shown. Merely establishing the violation of program regulations which could constitute the violation of the fiduciary status conferred upon Title IV participants and thereby lead to termination of eligibility is not sufficient.

Applying the correct standard, my review of the facts and circumstances in this case reveals the seriousness of the violations and the degree of personal wrongdoing envisioned by the debarment process has been established. Ms. Herold was directly responsible for the violation of statutory and regulatory provisions dealing with her responsibility to account for federal funds. This clearly and adversely affects her present responsibility to participate in federal programs. See generally Sellers v. Kemp, 749 F.Supp. 1001 (W.D.Mo. 1990). I note as significant that the failure to pay refunds in the Title IV Program can now lead to criminal penalties. 20 U.S.C. § 1097(a).

In light of the foregoing, I find that the Department has met its burden of proof and persuasion that the debarment of Ms. Herold is warranted. Under the provisions of 34 C.F.R. § 85.320, the period of debarment is to be commensurate with the seriousness of the cause(s) of debarment, generally not to exceed three years. Based upon the circumstances here, I have determined that the period of debarment shall be three years.

I order that Barbara Herold be DEBARRED from initiating, conducting, or otherwise participating in any covered transaction under the nonprocurement programs and activities of any Federal agency, and is ineligible to receive Federal financial and nonfinancial assistance or benefits from any Federal agency under nonprocurement programs and

activities. She may not act as a principle, as defined in 34 C.F.R. § 85.105(p), on behalf of any person in connection with a covered transaction. This debarment is effective for all covered transactions unless an agency head or authorized designee grants an exception for a particular transaction in accordance with 34 C.F.R. § 85.215.

ERNEST C. CANELLOS,
Deciding Debarment and
Suspension Official

Dated: January 5, 1994