

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

In the Matter of:

BENJAMIN B. WEITZ
COMMUNITY HOUSING AND
RESEARCH CORPORATION

Respondents

HUDALJ 94-0009-DB

Entered: June 3, 1994

INITIAL DETERMINATION OF AFFILIATION

At a pre-hearing conference held on May 31, 1994, Community Housing and Research Corporation ("CHRC") and the Government agreed that because no material facts remained in dispute, the legal issue whether CHRC is the affiliate of Respondent Benjamin B. Weitz ("Respondent") would be resolved upon the submission of written briefs and documentary evidence. CHRC and the Government filed their submissions on June 1, 1994.¹

HUD regulations provide that a debarment action "may include any affiliate of the participant that is specifically named and given notice of the proposed debarment and an opportunity to respond. . . ." 24 C.F.R. § 24.325(a)(2). In defining the term "affiliate," the regulations provide:

Persons² are affiliates of each another if, directly or indirectly, either one controls or has the power to control the other, *or*, a third person controls or has the power to control both. Indicia of control include, but are not limited to: interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the suspension or debarment of a person which has the same or similar management, ownership, or principal employees as the suspended, debarred, ineligible, or voluntarily excluded person.

¹CHRC incorporated into its submission the arguments previously made in its April 15, 1994, Motion for Summary Judgment and its April 29, 1994, Reply in support of the Motion. Having determined that material issues of fact existed as to the issue of control at the time, I denied CHRC's Motion on May 2, 1994.

²The term "person" includes "[a]ny individual, corporation, partnership, association, unit of government or legal entity, however organized. . . ." 24 C.F.R. § 24.105(n).

Id. at § 24.105(b)(emphasis in original).

The facts to which the parties have stipulated are as follows: (1) Respondent was a founder of CHRC; (2) Respondent is a 26% shareholder of CHRC, and as such, is the largest minority shareholder; (3) Respondent is the President of CHRC; (4) CHRC's sole function is asset management, and Respondent performs the daily functions associated with that activity; and (5) Respondent uses CHRC letterhead in corresponding with the government. The legal issue to be resolved is, whether given these facts, Respondent, directly or indirectly, controls or has the power to control CHRC.³

Neither Respondent's stock ownership nor his use of CHRC letterhead demonstrates the requisite control upon which to base a finding of affiliation. Although he is the largest minority shareholder, the remaining shares are relatively evenly divided among several other shareholders, and Respondent has no control over the exercise of voting power by those shareholders. See Exhibit B to Government's Brief; Exhibits 1 and 2 to CHRC's Memorandum of Law (Affidavits of Herbert Cohen, M.D. and Benjamin B. Weitz). The mere use of CHRC letterhead for official purposes is consistent with his position as President. To the extent that he used letterhead for "personal" purposes, such use is irrelevant to his actual relationship to the corporation.

However, a presumption of control may arise from one's title as an officer of a closely held corporation. See *Caiola v. Carroll*, 851 F.2d 395, 401 (D.C.Cir. 1988). Although the presumption "must yield to the evidence of the particular case," *id.*, the record does not contain sufficient evidence to rebut the presumption that as President of CHRC, Respondent controls it.

As the President of CHRC, Respondent performs the day-to-day activities of CHRC. He is the officer who acts on behalf of the corporation between meetings of the shareholders or the Board of Directors. In his position as President, Respondent is neither a figurehead nor an amanuensis. CHRC has no employees and Respondent is the only individual who has been identified as having responsibility for the daily activities of the corporation. See Exhibit 2 to CHRC's Memorandum of Law (Affidavit of Benjamin B. Weitz). The By-Laws vest in him the "general and active management of the business and operations of the corporation." Exhibit 3 to CHRC's Memorandum of Law (CHRC By-Laws, Art. V, § 6). Moreover, he has been granted broad powers to affect securities or partnership interests held by CHRC. He has:

³In addition to being President of CHRC, Respondent is the managing general partner of the limited partnerships that own the projects which are at issue in this case. CHRC from time to time has been a creditor of four of the projects. See Answer to Amended Complaint at ¶¶ 3, 5. While interlocking management or ownership are indicia of control under 24 C.F.R. § 24.105(b), for some reason the Government has failed to assert such facts as a basis for a finding of affiliation.

full power and authority on behalf of [CHRC] to attend and to act and to vote at any meeting of security holders of other corporations in which [CHRC] may hold securities, or at any meeting of the members or partners of any partnership or joint venture in which [CHRC] may be a member, partner, or in the management of which [CHRC] may, in any capacity, be entitled to participate.

Id. (CHRC By-Laws, Art. VIII, § 10).

That CHRC's shareholders and Directors have met with some frequency and have taken certain actions pursuant to resolutions does not militate against a finding that Respondent controls CHRC between those meetings. See Exhibits 1 and 2 to CHRC Memorandum of Law (Affidavits of Herbert Cohen, M.D. and Benjamin B. Weitz). The same is true as to the fact that certain corporate powers are vested solely in the Board, because others are not. See Exhibit 3 to CHRC's Memorandum of Law (CHRC By-Laws, Art. VIII, §§ 1, 2 (dividends), § 5 (loans), § 8 (fiscal year)). Neither the shareholders nor the Board exercises control of CHRC to the exclusion of Mr. Weitz, acting in his capacity as President. Moreover, the "quantum of proof necessary to determine the existence or rebut the inference of control of a corporation varies with the particular purpose of the law involved." See 12B William M. Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 5762 (perm. ed. rev. vol. 1984). The indicia of control, enumerated in HUD's regulations, are not intended merely to define the question of ultimate corporate control. The definition of affiliate in § 24.105(b) is broadly written in order to effectuate the fundamental purpose of debarment law, *i.e.*, the protection of the government from doing business with nonresponsible persons. See 24 C.F.R. § 24.115(a). That broad definition is necessary to prevent a nonresponsible person from doing indirectly, through an entity over which he exercises sufficient authority, that which he is prohibited from doing directly. While supreme corporate authority is always held by the stockholders and directors, those who act and exercise the functions of management and control include not only the shareholders and directors, but also the officers of the corporation, such as the president, who are responsible for management of the ordinary business affairs of the corporation. See 5 William M. Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* §§ 2096, 2102 (perm. ed. rev. vol. 1987). Although as President of CHRC, Respondent can be removed at any time by a majority of the Board of Directors (Exhibit 3 to CHRC's Memorandum of Law (CHRC By-Laws, Art. V, § 5)), until his removal or, for that matter, his resignation, he may continue to exercise the full force and effect of his power and authority.

Accordingly, I conclude that Community Housing and Research Corporation is an affiliate of Respondent Benjamin B. Weitz.

/s/

ALAN W. HEIFETZ
Chief Administrative Law Judge