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

In the Matter of
Entercare, Inc.,
Respondent,

HUDALJ 01-061-CMP
Decided: December 31, 2002

David G. Coogan, pro se
For the Respondent

Donna Richardson Solomon, Esq.
For the Department

Before: William C. Cregar
Administrative Law Judge

INITIAL DECISION AND ORDER

On December 21, 2000, and November 16, 2001, the Secretary of the United States Department of Housing and Urban Development ("HUD" or "the Department") through the Departmental Enforcement Center filed a complaint and a subsequently amended complaint ("Amended Complaint") seeking civil money penalties of $137,500, against Entercare, Inc., ("Respondent") pursuant to Section 537 (c) of the National Housing Act, 12 U.S.C. § 1735f-15(c)(1)(B)(x), and the applicable regulations under 24 C.F.R. Part 30. The Amended Complaint charges that Respondent knowingly and materially failed timely to submit audited annual financial statements to HUD for fiscal years 1996, 1997, 1998, 1999 and 2000, as required by the governing Regulatory Agreement between HUD and Respondent.

On November 27, 2001, HUD filed a Motion for Summary Judgment. Having determined that there was no genuine issue of material fact that Respondent knowingly failed to file audited annual financial statements for the fiscal years 1996 through 2000 and that the failure to file these statements constituted a material violation of the National Housing Act and the applicable regulations, I granted the Motion, in part, during a telephone conference call held on March 21, 2002. However, I granted the Motion only as to liability, and not as to the appropriateness of the penalty. During this conference call

and in a subsequent Order dated March 25, 2002, Respondent was directed to obtain and to provide a current, objective statement of income and expenses together with a balance sheet or face imposition of the entire amount of the penalty.[1] The Department was provided an opportunity to respond to Respondent's submission. Following several delays, Respondent provided a response to the March 25, 2002, Order on July 22, 2002,[2] ("Compilation Report"). On August 12, 2002, the Department filed its response to the Compilation Report identifying various violations of HUD requirements revealed in the Compilation Report together with a Motion for Assessment of Maximum Civil Penalty. By Order dated August 28, 2002, I permitted Respondent to reply to the Department. On October 28, 2002, I held a prehearing telephone conference in which I permitted additional submissions and, with the agreement of the parties, determined that this would be the final submission and that an oral hearing would not be necessary. Following this conference call Respondent filed an undated explanation of the financial report to which the Department responded on November 4, 2002.

For the reasons set forth below, I conclude that: (1) Respondent's failure to file audited financial statements for the years 1996-2000; (2) its failure to submit financial information prepared in accordance with general accepted accounting principles ("GAAP") in its Compilation Report; and, (3) its violations of HUD requirements as disclosed in its Compilation Report, establish that the maximum penalty is warranted. Accordingly, I have ordered the imposition of the maximum civil penalty.

Findings of Fact

Having granted the Department's Motion for Summary Judgment, I have determined the facts to be as set forth in the Amended Complaint which I quote:

1. Respondent owns Parris House Assisted Living, an intermediate care facility, located in New Port Richey, Florida. The project was built and financed with the proceeds of a loan insured against default by HUD under Section 232 pursuant to § 223(f) of the National Housing Act. [Amended Complaint, ¶ 8.]

---

[1] Because the imposition of the civil penalty could effect the viability of the enterprise and the well-being of its residents, I determined that it was necessary to obtain accurate financial information before deciding whether the assessment of the $137,500 civil penalty sought by the Department, or a civil penalty in some lesser amount, outweighed its impact on the Parris House residents.

[2] The Compilation Report was prepared by certified public account, David W. Purcell. It consists of (1) a Statement of Assets, Liability, and Assets-Income Tax Basis as of March 31, 2002 and (2) a Statement of Revenues and Expenses -Income Tax Basis for the Three Months Ended March 31, 2002. These documents were prepared on an (unaudited) income tax basis and not in accordance with generally accepted accounting principles. *See infra*.

2. In exchange for receiving the benefits of a loan insured by HUD, David G. Coogan, President of Entercare, Inc. executed a Regulatory Agreement with the Department on May 2, 1996. [Amended Complaint, ¶ 9.]

3. In the Regulatory Agreement, Respondent agreed to certain controls over the management and operation of the Project. Paragraph 9(e) of the Regulatory Agreement requires Respondent within 60 days following the end of each fiscal year, to furnish the Secretary with a complete annual financial report based upon an examination of the books and records of mortgagor prepared in accordance with the requirements of the Secretary, certified to by a Certified Public Accountant, or other person acceptable to the Secretary. HUD Handbook 4370.2 Rev-1 Paragraph 3-3(D) states that the report shall be audited by an Independent Public Accountant who is a Certified Public Accountant or a licensed or registered public accountant having no business relationship with the mortgagor except for the performance of audit, systems work, and tax preparation.
[Amended Complaint, ¶ 10.]

4. The project's fiscal year ends on December 31, therefore, the audited financial statement is due March 1 of the following year. Consequently, the financial statements for fiscal years 1996, 1997, 1998, 1999 and 2000 were due on March 1 of the following respective fiscal year. [Amended Complaint, ¶ 11.]

5. [Respondent failed to provide the financial statements for fiscal years 1996-2000.] Respondent's failure to provide the audited financial statements to HUD for fiscal years 1996, 1997, 1998, 1999 and 2000 violated paragraph 9 (e) of the Regulatory Agreement. [Amended Complaint, ¶ 12.]

6. On June 20, 2001, HUD provided Respondent with a written notice ("Notice") that it intended to seek civil money penalties against Respondent for its failure to submit in a timely manner, the required audited financial statements for fiscal years 1998, 1999 and 2000. [Amended Complaint, ¶ 13.]

7. In response to the June 20, 2001, Notice Respondent submitted a written response to HUD on July 13, 2001. Subsequent to failed attempts to settle the matter with Respondent, HUD filed the initial Complaint with the Office of Administrative Law Judges on July 26, 2001. [Amended Complaint, ¶ 16.]

8. On September 25, 2001, HUD provided an additional written Notice as required by 24 C.F.R. § 30.70 that it intended to seek civil money penalties against Respondent for its failure to submit, in a timely manner, the required audited financial statements for fiscal years 1996 and 1997. To effectuate the second Notice, HUD requested a continuance of the discovery and hearing schedules previously ordered by the Office of Administrative Law Judges, so that it may amend the initial complaint filed in this manner, to include

additional violations pursuant to 12 U.S.C. § 1735f-15(c)(1)(B)(x). An Order granting a continuance was issued on October 2, 2001.
[Amended Complaint ¶ 14.]

9. The Notices offered Respondent an opportunity to reply in writing before HUD took further action. The Notices stated that, pursuant to 24 C.F.R. § 30.70(d), Respondent's reply was due within thirty days of Respondent's receipt of the Notice. The Notices were sent by Federal Express to David G. Coogan. [Amended Complaint, ¶ 15.]

10. After the expiration of Respondent's thirty days to respond, the Director of HUD's Departmental Enforcement Center, as the Designee of the Secretary of Housing-Federal Housing Commissioner pursuant to 24 C.F.R. § 30.85, reviewed the allegations against Respondent. The Director considered the following factors in determining whether to seek a civil money penalty and the amount of the penalty: (1) the gravity of Respondent's offense; (2) Respondent's history of prior offenses; (3) Respondent's ability to pay a penalty; (4) the injury to the public; (5) the benefits received by Respondent; (6) the extent of potential benefit to other persons; (7) the deterrence of future violations; (8) the degree of Respondent's culpability; (9) any injury to tenants; and (10) any injury to lot owners. [Amended Complaint ¶ 17.]

11. After consideration of the factors above, the Director determined that it was appropriate to seek civil money penalties against Respondent for its failure to submit the audited financial statements within 60 days of the end of fiscal years 1996, 1997, 1998, 1999 and 2000. [Amended Complaint ¶ 18.]

12. The Director determined that a civil money penalty should be imposed in the amount of $137,500 pursuant to 24 C.F.R. §30.45(b) and 12 U.S.C. §1735-15(c)(1)(B)(x) for Respondent's failure to submit the 1996, 1997, 1998, 1999 and 2000 audited financial statements for Parris House Assisted Living on or before March 1, of each respective fiscal year in violation of Paragraph 9(e) of the Regulatory Agreement.
[Amended Complaint, ¶ 19.]

Subsidiary Findings of Fact

1. HUD's Attempts to Obtain Respondent's Audited Financial Statements

Respondent has never complied with the requirement to provide HUD with audited financial statements despite numerous attempts by HUD and the HUD approved lender to elicit its compliance. Letters from the HUD Jacksonville Office to this effect were sent to Respondent on April 10, 1997, May 2, 1997, June 2, 1997, and August 5, 1997. Govt.

Exs. 5-8.[3] In a letter dated March 3, 1999, Centennial Mortgage Inc., the mortgagee holder and servicer of the Parris House mortgage note, informed HUD that it had unsuccessfully attempted to assist Respondent to submit its required 1997 audited financial statement. On April 5, 1999, the mortgagee notified HUD that it had suspended the project's reserve for replacement account until Respondent complied. Govt. Exs. 9, 10. On July 27, 1999, HUD sent Respondent a Notice of Limited Denial of Participation for failing to file financial reports for fiscal years 1997 and 1998. This HUD-imposed sanction prohibited Respondent from participating in programs administered by the Secretary of Housing-Federal Housing Commissioner for a period of one year in the region administered by the HUD Jacksonville Office. Govt. Exs. 8, 11. On October 2, 2000, HUD provided Respondent written notice that it intended to seek a civil money penalty for its failure to submit an audited financial statement for 1998. Govt. Ex. 12. Responding to the notice, Respondent sent HUD an *unaudited* financial statement for 1999. On October 16, 2000, HUD informed Respondent that unaudited financial statements were unacceptable. Govt. Ex. 14. HUD subsequently issued three notices to Respondent on December 21, 2000 (regarding the fiscal year 1998 audit), June 21, 2001 (regarding audits for the fiscal years 1998-2000) and on September 25, 2001, (regarding audits for fiscal years 1996 and 1997). Govt. Exs. 15, 17, 19.[4]

---

[3]"Govt. Ex." refers to exhibits attached to the Department's Motion For Summary Judgement dated November 26, 2001.

[4]Respondent's stated reasons for its non-compliance with the HUD requirement to provide it annual audited financial statements were supplied in Mr. Coogan's responses to HUD in a letter received by HUD on March 17, 1997 and a letter dated October 18, 2000. These are: (1) That the facility cannot afford the cost of the audits; and (2) that at the time he executed the regulatory agreement with HUD, he was unaware of the requirement.

Regarding Respondent's purported inability to pay for the audits, Mr. Coogan stated that: Parris House is a 56-bed facility, open 24 hours-a-day serving three meals to each resident and numerous medications which must be accounted for. It employs 17 employees. Its elderly residents typically pay only $1,000 per month for their residence. Approximately 10 elderly residents receive less than $700 per month. Because very few auditors are familiar with HUD audits and costs are incurred, they must become familiar with HUD auditing requirements. In addition, HUD's time limitations are so restrictive that the cost of an audit costing $7,500 can triple because auditors must put everything else aside to meet the HUD-imposed deadlines.

Regarding his claimed ignorance of the audit filing requirement, Mr. Coogan stated that while he is now "fully aware of the HUD requirement of audited HUD financials," this requirement was never mentioned at the inception of the loan by the mortgage broker or the attorneys involved. Govt. Exs. 4, 13, 16, 18.

For the reasons discussed *infra*, I do not credit Respondent's explanation of his failure to submit an audited financial statement to HUD. To the extent that Respondent's claim is based upon financial inability, Mr. Coogan did not avail himself of numerous opportunities to provide credible evidence of Respondent's actual financial condition. I therefore cannot conclude that an audit would have been prohibitively expensive. His claim of ignorance of the provision is refuted by his signature on the Regulatory Agreement, consisting of only six pages, which in paragraph 9(e) sets forth this requirement. His claimed ignorance is also a "red herring" because he failed to submit audited reports after HUD informed him that they were required.

2. Respondent's Current Financial Condition

The July 22, 2002, Compilation Report was not prepared in accordance with generally accepted accounting practices ("GAAP").[5] It begins with the following disclaimer:

> The financial statements have been prepared on the accounting basis used by the company for income tax purposes, which is the comprehensive basis of accounting other than generally accepted accounting principles.
>
> Management has elected to omit substantially all of the disclosures ordinarily included in the financial statements prepared on income tax basis of accounting. *If the omitted disclosures were included in the financial statements, they might influence the user's conclusions about the company's assets, liabilities, revenues, and expenses. Accordingly, these financial statements are not designed for those who are not informed about such matters.* (emphasis added).

In addition, the Compilation Report and the record reflect that: (1) Advances were made to employees in violation of paragraph 6(b) of the Regulatory Agreement; (2) loans in the amount of $40,979 were made to shareholders in violation of paragraphs 6(b) and 6(e) of the Regulatory Agreement; (3) Respondent obtained two mortgages in the amounts of $150,000 and $40,000 without HUD approval in violation of paragraph 6(a) of the Regulatory Agreement; and (4) cash from project funds was used pay expenses not reasonably related to the operation of the project in violation of paragraph 6(b)(e) and HUD Handbook 4566.2 Ch. 3. Compilation Report, Govt. Ex. 2; Follow Up Review of Financial Compilation for Entercare Inc., and Entercare, Inc., dba Parris House Assisted Living Facility, attached to Government's November 4, 2002, Review of Respondent's Answers and Explanations to the Financial Compilation Report and Motion for Assessment of Maximum Civil Money Penalties.

In its Response to Government's Motion for Assessment of Maximum Civil Penalties, Mr. Coogan states:

> Employee advances will continue to be a part of Parris House Life. If my long-term weekend 11-7 aide says, "Dave, my water pump is shot and I need $100 against next weeks pay?" my answer is usually, "yes." When an aide says, "My two-year-old has strep and the pharmacy wants $125 for Augmentin, can I borrow it until pay day, my answer is usually, "yes." I'm sorry that the regulation is completely out of sync with reality and these monies are borrowed against hours already worked.

---

[5] A HUD regulation requires financial reports to be prepared in accordance with GAAP. 24 C.F.R. § 5.801(b)(1)

Mr. Coogan further states that he supplied his HUD field representative with a 1999 "Compilation" in which he informed HUD of the existence of the two mortgages. He notes that none of the mortgages are in default, that Parris House services 25 indigent clients, and that there is currently a prospective buyer for the property, but that it would take at least six months to work out a HUD assumption of the mortgage.

Discussion

The requirement for mortgagors periodically to provide HUD with accurate and verifiable financial information arises out of the necessity of protecting the public fisc.

> The requirements of the Secretary for financial reports and supporting data submitted after 1992 were set forth in HUD's Handbook for Financial Operations and Accounting Procedures for Insured. *See* Chapter 3, HUD's Handbook 4370.2 Rev -1 (5/92). The requirements included the provision that the financial statement be audited by an Independent Public Accountant ("IPA"). The stated purpose for the audit was to have the IPA render a professional opinion on the reliability of the financial statement as an accurate reflection of the project's condition and performance.*U.S. Department of Housing and Urban Development v. Crestwood Terrace Partnership*, HUD-ALJ 00-002-CMP, January 30, 2001

Respondent's officers had constructive and actual knowledge of the specific requirements that financial statements be filed within sixty (60) days following the end of each fiscal year. The requirement is expressly provided in the Regulatory Agreement. In addition, HUD repeatedly informed Respondent of the audit requirement beginning with its letter of April 10, 1997. Thus, Respondent's officers knew or should have known that the financial statements be certified to by an independent public accountant or other person acceptable to the Secretary of HUD.

Under 12 U.S.C. §1735f-15(c)(1)(B)(x), a civil money penalty may be imposed upon any liable party, for:

> the knowing and material failure to furnish the Secretary, by the expiration of the 60-day period beginning on the 1st day after the completion of each fiscal year, with a complete annual financial report based upon an examination of the books and records of the mortgagor prepared and certified to by an independent public accountant or a certified public accountant and certified to by an officer of the mortgagor, unless the Secretary has approved an extension of the 60-day period in writing.

The Department seeks the maximum civil money penalty for each of the violations alleged. It seeks $27,500 for each of five violations for a total of $137,500. Noting that the Compilation Report establishes several violations of the Regulatory

Agreement and HUD Handbook requirements, the Department argues that Respondent's unauthorized encumbrances of the property and unauthorized distributions from project funds, and employee advances, when combined with its evident unwillingness to cease these practices warrant the maximum civil penalty. In essence, Respondent asserts that the HUD regulations are unnecessary, unduly burdensome, and must be ignored in order to maintain the operation of Parris House.

HUD regulation 24 C.F.R. § 30.80 requires consideration of eight factors and such other matters as justice may require (including the impact on tenants) to determine the appropriateness and amount of a civil money penalty. They are: the gravity of the offense; history of prior offenses; ability to pay the penalty; injury to the public; benefits received; potential benefit to others; deterrence of future violations; and degree of culpability. I have also considered the potential impact of this heavy fine on project tenants.

Gravity of the Offense

Timely, audited financial statements are necessary to protect the HUD insurance fund. Risks to the fund can arise from unauthorized distributions and misuse of project funds by HUD insured mortgagors. Abuses can lead to significant loss to the taxpayers in the event of defaults. Audits also help to assure the financial health of the project, thereby protecting tenants from defaults and unnecessary rent increases. *See*, HUD Handbook 4370.2 Rev -1 (5/92), Chapter 1 paragraph 1-4. Govt. Ex.1. An audit provides an independent, professional opinion on the reliability of the financial statement submitted as an accurate reflection of the project's condition and performance. Despite repeated warnings, Respondent failed to submit the required audits for five consecutive years. Respondent was sanctioned with a Limited Denial of Participation. Despite the repeated warnings and the sanction, Respondent adamantly persists in its refusal to submit accurate information about its financial health.

History of Prior Offenses

Respondent was sanctioned with a Limited Denial of Participation on July 27, 1999 for its failure to submit two required annual audit reports.

Ability to Pay a Penalty

Respondent has the burden to establish that it lacks the ability to pay the civil money penalty in the amount sought by the Government. *Crestwood*, supra at 6. Respondent has failed to meet its burden. Despite having been provided an opportunity to provide a complete statement of its present financial health, it has not done so. The Compilation Report not only was not prepared in accordance with GAAP, the standard required by HUD; it is incomplete. It could also be inaccurate and misleading. The

auditor's disclaimer states that not all financial information was disclosed. He states: "If the omitted disclosures were included in the financial statements, they might influence the user's conclusions about the company's assets, liabilities, revenues, and expenses. Accordingly, these financial statements are not designed for those who are not informed about such matters." Because this tribunal is "not informed about such matters," it cannot rely upon the Compilation Report to assess Respondent's ability to pay a penalty. There is no other source of reliable financial information.

Injury to the Public

Consideration of the factor of injury to the public involves an assessment of the harm caused to the integrity of HUD's programs, and HUD's enforcement and litigation costs. *In the Matter of Associate Trust Financial Services, HUDALJ 96-008-CMP*, September 15, 1997 at 9, and *American Rental*; American Rental Management Company, et al. (HUDALJ 99-01-CMP, May 26, 2000.) at 14, 17-18.

Respondent has damaged the integrity of HUD programs. Its failure to provide a reliable and verifiable picture of its financial condition places the HUD insurance fund at risk. Without reliable information, HUD is unable to accurately assess the viability of the Parris House project. Even the information Respondent did provide in the Compilation Report establishes that it has procured additional mortgages, made unauthorized loans to shareholders and employees, and made payments out of project funds without HUD approval.

In addition, Respondent's actions have resulted in the expenditure of public funds. Employees of the HUD Jacksonville Office expended time attempting to obtain Respondent's compliance. This time included the drafting of letters and as well as a Notice of Limited Denial of Participation. HUD's Office of General Counsel and its Office of Enforcement have also spent time preparing and litigating this case.

Benefits Received

Because Respondent has failed to provide audited financial statements, HUD has been unable to prevent the acquisition of additional debt and loans to employees and shareholders. Because the Compilation Report is not a complete disclosure of Respondent's financial condition, there may be more unfavorable information that we do not know. We can safely assume that Respondent benefitted from these transactions or Respondent would not have engaged in them. By its failure to comply with HUD requirements, Respondent was also saved the costs of obtaining audited financial statements.

Potential Benefits to Others

Respondent states that it will continue to make loans to employees without seeking HUD approval. Its shareholders potentially will continue to benefit from loans not approved by HUD.

Deterrence

The goal of deterrence of Respondent and other similarly situated entities will be served by the imposition of the maximum civil penalty. Respondent has demonstrated that it never intended to comply with its contractual obligations as set forth in the Regulatory Agreement. Even after having been provided an opportunity to provide an accurate, verifiable picture of its financial condition, Respondent declined to do so. Respondent has demonstrated that it is incorrigible.

Degree of Culpability

Not having acted as an agent or at the behest of another entity, Respondent is solely at fault for its failure to file audited financial statements. Its assertion that it could not afford to comply with this requirement is somewhat dubious in view of the fact that it made unauthorized loans. Had Respondent put its money to proper use, more money might have been available to the project, including the hiring of a certified public accountant. In addition, "[t]his argument could be made by any mortgagor; however, mortgagors cannot be allowed to pick and choose the provisions of an Agreement or regulatory requirement with which they will or will not comply." *Crestwood*, supra at 8.

Injury to Tenants

Regrettably, the imposition of the maximum civil penalty may adversely affect indigent tenants by putting Respondent out of business. However, without an audit based upon a complete disclosure, I am unable to assess the impact a $137,000 fine will have on Respondent's operations. Because Respondent's financial condition is opaque, and its misconduct is blatant and ongoing, I have reluctantly concluded that the protection of the public fisc outweighs the potential adverse effect on the project's tenants. Anything less would provide Respondent, not with a sanction for its blatant failure to make its finances available to public scrutiny, but with an imprimatur.

Conclusion and Order

Respondent knowingly and materially violated 12 U.S.C. §1735-15(c)(1)(B)(x) and 24 C.F.R. §30.45(b) and its Regulatory Agreement with HUD by failing to furnish HUD, in a timely manner, with audited financial reports for fiscal years 1996, 1997, 1998, 1999, and 2000. After consideration of appropriate factors, HUD issued the Notice and later, the

Complaint seeking an order imposing civil money penalties of $137,500. See 24 C.F.R. §30.80; 30.85. Pursuant to 24 C.F.R. §30.90, 26.37 and 26.39, it is

ORDERED, that

(1) Respondent shall pay to the Secretary of HUD a civil money penalty of $137,500, which is immediately due and payable by Respondent without further proceedings, and

(2) In accordance with 24 C.F.R. § 25.50(a) this order may be appealed to the Secretary of HUD by either party within 30 days after the date this decision was issued. The Secretary of designee may extend this 30-day period for good cause. If the Secretary of designee does not act upon the petition for review within 30 days of its service, then this decision shall become final.

/s/

WILLIAM C. CREGAR
Administrative Law Judge