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

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In the Matter of: MIRVICE BABAR, and NAJIBA BABAR, Respondents.	HUDALJ 08-074-PF August 26, 2009

ORDER ON REMAND FROM SECRETARY'S ORDER GRANTING GOVERNMENT'S PETION FOR REVIEW AND PARTIALLY REVERSING ADMINISTRAIVE LAW JUDGE'S INITIAL DECISION, AND ORDER DENYING RESPONDENTS' PETION FOR REVIEW

On June 25, 2009, Laurel Blatchford, Secretarial Designee, issued an *Order Granting Government's Petition for Review and Partially Reversing Administrative Law Judge's Initial Decision, and Order Denying Respondents' Petition for Review* (the "Secretary's Order"). The Secretary's Order affirmed the majority of this Court's findings by stating that "Respondents had the "requisite knowledge, whether imputed or actual, and were liable under PFCRA." Secretary's Order at p. 2.

With regard to the number of PFCRA claims at issue, however, the Secretary's Order, reversed this Court's finding and held, for the reasons contained in said order (attached), that "each of the 43 HAPs paid out under the 2000 HAP Contract after August 2002, constitutes a separate claim," and that "Respondents' acceptance of HCV benefits constituted a separate and implicit certification or affirmation of the continuing accuracy of the terms of the HAP Contract and adherence to program requirements, when actually, they were not eligible for the HAPs under the HAP Contract in issue." Secretary's Order at p. 2. As such, this Court is bound to issue relief consistent with that decision.

The following factors support the imposition of assessments and penalties in this case, as indicated:

(1) The number of false, fictitious, or fraudulent claims or statements.

Pursuant to the Secretary's Order, this Court holds that Respondents made, presented, or submitted 43, demands, or submissions that they knew or had reason to know were false, fictitious, or fraudulent, or included or were supported by a written statement which asserted a material fact which was false, fictitious, or fraudulent.

(2) The time period over which such claims or statements were made.

The 43 claims identified in #1, supra, were made between September 2002 and April 2003.

(3) The degree of Respondent's culpability with respect to the misconduct.

Pursuant to the Secretary's Order, this Court holds s that Respondents are mutually culpable for their conduct with regard to the 43 claims.

(4) The amount of money or the value of the property, services, or benefit falsely claimed.

Pursuant to the Secretary's Order, Respondents accepted $40,932 in Housing Assistance Payments. This includes $5,401 paid out by FCH pursuant to the HAP Contract Respondent Landlord signed on December 2, 1996, and $35,531paid out pursuant to the 2000 HAP Contract. (See id.) However, the Secretary has only alleged that Respondent Landlord is liable for those payments made after August, 2002, which total $23,603. (Compl. ¶¶ 77-83.)

(5) The value of the Government's actual loss as a result of the misconduct, including foreseeable consequential damages and the cost of investigation.

FCH wrongfully paid $40,932 in Housing Assistance Payments to Respondent Landlord. In addition, the Fairfax County Department of Housing and Community Development and HUD also expended at least $7,528.80 to investigate the extent of the wrongdoing in this matter. (FoF ¶¶ 99 and 100.) Moreover, the attorney time necessary to prepare and litigate this matter was substantial. Likewise, the expenditure resourced by the Office of Administrative Law Judges was also significant. However, an exact estimate of attorney and judicial expenditures on this matter is unavailable. The costs associated with the investigation of this matter and the subsequent litigation and trial are attributable to both Respondents.

The Secretary alleges that the Babar family's wrongful participation in the Housing Choice Voucher program denied another family the opportunity to participate in that program. (GPB 15.) This is undoubtedly correct. This loss is accounted for by including the value of the benefit falsely claimed as part of the Government's actual loss. Therefore, the Secretary's suggestion that FCH's inability to serve another family should be counted as part of the

foreseeable losses attributable to Respondents' wrongdoing in this case is rejected, as doing so would improperly increase the loss appropriately attributed to the Respondents' wrongful participation in the Housing Choice Voucher program.

(6) The relationship of the civil penalties to the amount of the Government's loss.

The PFCRA's implementing regulations note that: "Because of the intangible costs of fraud, the expense of investigating fraudulent conduct, and the need for deterrence, ordinarily twice the amount of the claim as alleged by the government, and a significant civil penalty, should be imposed." 24 C.F.R. 28.40(b). As noted above, the Secretary has only alleged that Respondents are liable for $23,603 stemming from this false claim. The record also contains evidence of an additional $17,329 ($40,932 - $23,603) wrongfully paid out in this matter. In addition, the Government paid $7,528.80 to investigate this matter, and a substantial, but not calculable, sum to litigate and decide this matter. HUD is seeking a total of $236,500.00 (43 x $5,500) in civil penalties).

Known costs total $48,460.80. When the Court considers the attorney time necessary to prepare and litigate this matter and the expenditure of the Office of Administrative Law Judges it is easy to estimate the cost to the Government at over $100,000.00. This, together with the intangible costs of fraud and the need for deterrence present the need for a substantial penalty. As such, given 24. C.F.R. 28.40(b)'s guidance that a significant penalty be assessed, the Court finds that the relationship between the penalty amount and the Government's loss is reasonable.

(7) The potential or actual impact of the misconduct upon national defense, public health or safety, or public confidence in the management of Government programs and operations, including particularly the impact on the intended beneficiaries of such programs.

It is a simple mathematical certainty that the Babar family's receipt of benefits for which it did not qualify prevented the Government from extending similar assistance to a family that did qualify. Likewise, fraud or other wrongful behavior on the part of any recipient of governmental assistance undermines the public's confidence in that program. Therefore, the Court holds that Respondents' wrongful actions in this matter negatively impacted the public confidence in the management of the Housing Choice Voucher program and operations, and particularly harmed the intended beneficiaries of the program.

(8) Whether Respondent has engaged in a pattern of the same or similar misconduct.

The Government did not allege that Respondents engaged in a pattern of the same or similar misconduct, and the record does not contain any evidence of the same. (See GPB 16.)

(9) Whether Respondents attempted to conceal the misconduct.

Respondent Landlord testified that he did not report Respondent Tenant's ownership of Healy Drive to FCH because he "didn't think [his] mom being on the deed was an issue." (Tr.

170:18-19.) In light of the Court's credibility findings regarding Respondent Landlord, the Court finds that there was some attempt at concealment.

Although the Court holds that Respondent Tenant's failure to read the Deed of Trust, Credit Line Deed of Trust, and each Personal Declaration constitutes deliberate ignorance of, and reckless disregard for the veracity of her assertion, contained in each Personal Declaration, that she did not own real estate, the Court holds her testimony, that she did not actually know that she owned Healy Drive, to be credible. One cannot conceal that which one does not know.

(10) The degree to which Respondent has involved others in the misconduct or in concealing it.

The Government did not allege that Respondents engaged or involved others in the misconduct or in concealing it. The Court does observe, however, that Respondent Landlord's sister was acquainted with programmatic requirements and served as a translator for Respondent Tenant on several occasions.

(11) If the misconduct of employees or agents is imputed to Respondent, the extent to which Respondent's practices fostered or attempted to preclude the misconduct.

This factor is not applicable to this proceeding.

(12) Whether Respondent cooperated in or obstructed an investigation of the misconduct.

Respondents cooperated in the investigation of this proceeding. (FoF 99.1)

(13) Whether Respondent assisted in identifying and prosecuting other wrongdoers.

This factor is not applicable. All individuals involved in the scheme in evidence were identified in this proceeding.

(14) The complexity of the program or transaction, and the degree of Respondent's sophistication with respect to it, including the extent of Respondent's prior participation in the program or in similar transactions.

The record does not contain sufficient evidence for this Court to find that the Housing Choice Voucher program is simple or complex with respect to all participants in every case. However, there is ample evidence to make a finding regarding the complexity of the Housing Choice Voucher program with respect to Respondents at bar, and the degree of each Respondent's sophistication with respect to the program.

Nothing in the record suggests that Respondent Landlord previously participated in the Housing Choice Voucher program or was party to any similar transactions. Nonetheless, he accepted Housing Assistance Payments for nearly ten years. (See FoF 19 and 98.) He is also a

police officer, and so has a sophisticated understanding of the importance of complying with the law. (See FoF 6.) The requirements of the Housing Choice Voucher program that he violated are clearly set forth in the 2000 HAP contract. Therefore, the Court holds that the Housing Choice Voucher program requirements ignored by Respondent Landlord are not complex, and that Respondent Landlord understood his duty to disclose to FCH that Respondent Tenant was an owner of Healy Drive.

Nothing in the record suggests that Respondent Tenant actively sought to participate in the Housing Choice Voucher program. Likewise, nothing in the record suggests that she was ever provided access to a full description of her duties as a program beneficiary. Because Respondent Tenant does not read English, Housing Choice Voucher program requirements are not accessible to her, accept via translation. This does not obviate Respondent Tenant's responsibility, however, to familiarize herself with the programs requirements, especially after lengthy participation.

(15) Whether Respondent has been found, in any criminal, civil, or administrative proceeding, to have engaged in similar misconduct or to have dealt dishonestly with the Government of the United States or of a State, directly or indirectly.

The record does not contain any evidence relevant to this factor.

(16) The need to deter Respondent and others from engaging in the same or similar misconduct.

At trial, Danielle Bastarache, Director of the Office of Housing Voucher Programs for HUD, testified that the Housing Choice Voucher program is the largest program at HUD, and the largest housing subsidy program in the nation. (FoF 2.) The Secretary contends that "a high penalty in this egregious case would have substantial deterrent value." (GPB 19.)

(17) Respondent's ability to pay.

The regulations implementing PFCRA define "ability to pay" as including "Respondent's resources available both presently and prospectively." The evidence in the record shows that Respondent Landlord earns approximately $50,000 per year as a police officer. (FoF 2.) Nothing in the record suggests that his employment will end in the foreseeable future. Therefore, the Court concludes that Respondent Landlord has the ability to pay a substantial penalty and assessments.

There is evidence in the record to show that Respondent Tenant receives "benefits," but nothing in the record indicates the amount of these benefits, or that Respondent Tenant receives any additional income. Therefore, the Court holds that Respondent Tenant has only limited ability to pay a penalty. However, the Court also notes that ability to pay is not the only factor that must be considered in a PFCRA proceeding, and does not preclude imposition of a penalty even in the absence of ability to pay.

The Secretary alleges that the value of Healy Drive should be attributed to Respondent

Landlord and Respondent Tenant, notwithstanding the fact that they no longer own the house, because, the Secretary alleges, the transfer is voidable as a fraudulent conveyance. (GPB 19-20.) The transfer cannot be voided by this Court, and nothing in the record indicates that the potential sale price of Healy Drive would exceed the mortgage debt already attached to that property. The Secretary has not submitted a valuation of the property. The information provided is, at best, speculative. Therefore, the Court declines to consider the value of Healy Drive in calculating either Respondent's ability to pay, as the Secretary has not demonstrated what that value would be.

(18) Any other factors that in any given case may mitigate or aggravate the seriousness of the false claim or statement.

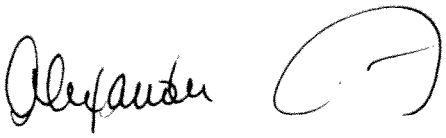
No other factors are relevant to this proceeding.

IT IS HEREBY ORDERED:

1. Respondents are jointly and severally liable for $283,706.00 ($236,500.00 in Civil Penalties and $47,206 in Assessments). This sum is immediately due and payable to pay to the Secretary of HUD without further proceedings

2. Respondent Tenant is liable for making and submitting six statements that she knew or had reason to know asserted a material fact which was false. Despite Respondent Tenant's lack of financial means, a civil penalty is appropriate in this case as a means of deterring Respondent Tenant and others similarly situated from failing to take due care with regard to the representations they make as recipients of government

assistance. However, in light of Respondent Tenant's financial situation, the Court concludes that deterrence may be achieved without the imposition of the maximum civil penalties for each statement, and concludes that a penalty of $3000 per statement is appropriate in this case. Accordingly, Respondent Tenant shall pay to the Secretary of HUD civil penalties of $18,000, which are immediately due and payable without further proceedings. [This relief is carried over from the Court's previous Order.]



Alexander Fernández
Administrative Law Judge

Notice of Appeal Rights. The appeal procedure is set forth in detail in 24 C.F.R. § 26.52 (2009). This order may be appealed to the Secretary of HUD by either party within 30 days after the date of this decision. The Secretary (or designee) may extend this 30-day period for good cause. If the Secretary (or designee) does not act upon the appeal within 90 days of its service (30 days for cases brought under the Program Fraud Civil Remedies Act), this decision becomes final.

Service of Appeal. Any appeal must be served upon the Secretary by mail, facsimile, or electronic means at the following:

U.S. Department of Housing and Urban Development
Attention: Secretarial Review Clerk
1250 Maryland Ave, S.W., Portals Bldg., Suite 200
Washington, DC 20024
Facsimile: (202) 708-3498
Scanned electronic document: secretarialreview@hud.gov

Copies of Appeal. Copies of any appeal should also be served on the opposing party(s), and on the HUD Office of Administrative Law Judges.

United States of America
Department of Housing and Urban Development
Office of the Secretary

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OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of:	)	
MIRVICE BABAR,	)	
And	)	**HUDALJ: 08-074-PF**
NAJIBA BABAR,	)	
Respondents.	)	

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ORDER GRANTING GOVERNMENT'S PETITION FOR REVIEW AND PARTIALLY REVERSING ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION AND ORDER DENYING RESPONDENTS' PETITION FOR REVIEW

On April 27, 2009, Administrative Law Judge ("ALJ") Alexander Fernández issued an Initial Decision and Order Granting, In Part, and Denying In Part, the Government's Request for Relief, finding that the Respondents violated the Program Fraud Civil Remedies Act of 1986 ("PFCRA"), 31 U.S.C. §§ 3801-3812, and its implementing regulations at 24 C.F.R. Part 28. The ALJ found that Respondent Landlord (Mirvice Babar) knowingly submitted false claims and statements in violation of PFCRA to qualify for benefits and receive payments pursuant to a Housing Assistance Payments

contract ('the HAP Contract") under HUD's Housing Choice Voucher ("HCV") Program. The ALJ also held that Respondent Tenant (Najiba Babar, Respondent Landlord's Mother), by deliberately ignoring or recklessly disregarding the content of her six Personal Declarations, filed to get Housing Assistance Payments (HAPs), knew or had reason to know that the contents of each of her six Personal Declarations, which included the assertion that she did not own real estate, were false.

Respondents and the Government each filed a Petition for Review dated May 27, 2009, and supporting briefs.[1] The Government and the Respondents filed Opposition Briefs to each other's Petition for Review on June 17, 2009. For the reasons set forth below, the Secretary grants the Government's Petition for Review and denies the Respondents' Petition for Review.

The Secretary hereby AFFIRMS the ALJ's findings determining that Respondents had the requisite knowledge, whether imputed or actual, and were liable under PFCRA. As to the number of claims, the ALJ found that, because all of the HAPs at issue in this case were paid pursuant to a single HAP Contract, this case involves a single claim, not 43 claims as alleged by Government Counsel. The Secretary disagrees and hereby REVERSES this finding.

A "claim" under PFCRA includes any "request, demand, or submission" made upon a recipient of money from a federal executive department if the United States provided any portion of the money requested or demanded by the claimant. 31 U.S.C. § 3801(a)(1) and (3). Any person who "makes, presents, submits" or causes to be made, presented, or submitted, a claim that the person "knows or has reason to know" is "false, fictitious or fraudulent," or that the person knows or has reason to know includes or is supported by any written statement which asserts a material fact which is false, fictitious, or fraudulent is liable for making a false claim. 31 U.S.C. § 3802(a)(1)(A)

The Secretary finds that each of the 43 HAPs paid out under the 2000 HAP Contract after August 2002, constitutes a separate claim because Respondent Landlord was contractually obligated to inform FCH that his certification that "the family does not own or have any interest in the contract unit" was inaccurate. All HCV payments are made in reliance upon the written certifications, which are continuing in nature, contained in the HAP Contracts. Thus, Respondents' acceptance of HCV benefits constituted a separate and implicit certification or affirmation of the continuing accuracy of the terms and certifications of the HAP Contract and adherence to program requirements, when, actually, they were not eligible for the HAPs under the HAP Contract in issue. To put it another way, the certification to the FCH is a condition precedent to FCH making any payments under the HAP Contract. Thus, eligibility for each HAP is conditioned upon the ongoing certifications contained in the HAP Contract.

The ALJ characterized the HAP Contract as "a unitary request or demand for Housing Assistance Payments...." Contrary to the ALJ, the Secretary finds that the HAP Contract at issue is not a claim, but, rather, each monthly payment predicated upon Respondent Landlord's continuing implicit certifications is a claim. This analysis is consistent with the PFCRA's legislative history, which identifies individual payments made pursuant to a contract, rather than the contract itself, as actionable under the PFCRA. *See* Senate Report No. 99-212 (S. 1134), page 25.[2] In this case,

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[1] The Government's Motion for Leave to Exceed Page Limit for Government's Brief in Support of Request for Secretarial Review of Initial Decision is hereby granted.

[2] "Related claims which are not submitted together, such as a series of claims for progress payments under the

Respondents knew that they were not entitled to the HAP funds because of Respondent Tenant's ownership interests in the subsidized property and, notwithstanding this, Respondents continued the misrepresentation that they were eligible for the HAPs by receiving and retaining the HAP money.

The False Claims Act jurisprudence, which is applicable to PFCRA,[3] clearly provides that, in false claims proceedings, the focus must be upon the number of fraudulent acts, and not merely upon the contract providing for the receipt of funds. For example, in U.S. v. Bornstein, 423 U.S. 303, 311 (1976), the Supreme Court warned that an automatic measure of the number of FCA violations based upon the number of contracts at issue:

> would ignore the plain language of the statute. . . . The language of the statute focuses on false claims. . . . To equate the number of forfeitures with the number of contracts would ... result almost always [in subcontractor cases] in but a single forfeiture, no matter how many fraudulent acts the subcontractor might have committed. This result would not only be at odds with the statutory language; it would also defeat the statutory purpose. Such a limitation would ... convert "'the Act's forfeiture provision into little more than a $2,000 license for subcontractor fraud.'"

Similarly, the ALJ's construction of the HAP Contract and all payments made in accordance with that Contract as a single, unitary claim, creates, as in Bornstein, *supra*, the license to commit fraud about which the Supreme Court cautioned.

Upon review of the entire record in this proceeding, for the reasons set forth above, pursuant to 24 C.F.R. § 26.52(k), the ALJ's Order is partially AFFIRMED and partially REVERSED. With respect to the partial reversal, the case is hereby remanded to the Administrative Law Judge to enter an order, with or without a hearing, for relief consistent with this decision, within sixty days following the date of this decision.

IT IS SO ORDERED.

Dated this 25 day of June, 2009

Laurel Blatchford
Secretarial Designee

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same contract, would be considered separately for both jurisdictional cap and penalty purposes." *See also*, HUD v. Turner, HUDALJ 92-1832-PF at 6 (December 30, 1992), where the ALJ found that HCV payments constituted "claims" under PFCRA.

[3] *See* HUD v. Saunier, HUDALJ 007-004-PF (May 31, 2007). *See also* Program Fraud Civil Remedies Act of 1985, Senate Report No. 99-212 (S.1134), Committee on Governmental Affairs (December 9, 1985), at page 10.