

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

In the Matter of:

RUTH WATERS,

Respondent.

HUDALJ 95-5068-DB (LDP)
Decided: April 3, 1996

Ruth Waters, *pro se*

Franklin W. Allen, Esquire
For the Department

Before: Thomas C. Heinz
Administrative Law Judge

INITIAL DETERMINATION

Statement of the Case

This proceeding arose pursuant to 24 C.F.R. § 24.700 *et seq.* as a result of action taken by the Director, Office of Public Housing, U.S. Department of Housing and Urban Development ("the Department" or "HUD"), on June 12, 1995, imposing upon Respondent and all of her affiliates a twelve-month Limited Denial of Participation ("LDP") in all housing programs administered by the Assistant Secretary for Public and Indian Housing throughout the jurisdiction of the Department's office in Jacksonville, Florida.

After an informal conference and affirmation of the LDP by the Jacksonville HUD Office, Respondent appealed and requested a hearing (*see* 24 C.F.R. § 24.713). At the close of the hearing in Jacksonville, Florida, on October 24 and 25, 1995, the parties were directed to file briefs. All briefs have been filed, and the matter is now ripe for decision.

Findings of Fact

1. Respondent has 21 years' experience administering grants and 17 years' experience as an accountant following the award of a degree in accounting. Stipulation ("Stip.") 1 and 2.

2. Early in 1994, HUD learned that the Jacksonville Public Housing Tenant Advisory Council ("TAC") had hired Respondent as Executive Administrator Stip. 3.

3. TAC had been approved earlier by HUD to administer nine Hope I Planning grants awarded to the tenant councils of nine housing projects in Jacksonville, Florida. Stip. 4.

4. Prompted by complaints from residents of the housing projects and the failure of TAC to submit required reports, on November 23, 1994, HUD sent TAC a notice of "Preliminary Determination and Default" regarding the administration of the nine Hope I grants. Stip. 10; TR. 32-33; GX. 10.¹

5. On December 16, 1994, Reuben Padgett (Resident Initiatives Coordinator for HUD's Jacksonville, Florida, office) and Elaine Clark (Chief, Operations Division-Public and Indian Housing in the Jacksonville, Florida, office) visited the TAC office to review grant disbursement and administration progress. During their visit, Mr. Padgett and Ms. Clark did not find a general ledger, a system to show unexpended Hope I grant funds, or a record-keeping system to reconcile expenditure of Hope I grant funds. At the close of their visit, Mr. Padgett and Ms. Clark took the few available records back to the HUD office for review. Stip. 6-9.²

6. On December 23, 1994, TAC was officially notified that due to serious deficiencies with the administration of the Hope I grants, HUD was officially declaring TAC in default of the terms of the Hope I grant agreements. Stip. 11.

¹The following abbreviations are used in this decision: "TR." refers to the hearing transcript; "GX." and "RX." refer, respectively, to the Government's and the Respondent's exhibits.

²The parties stipulated that this visit occurred in mid-November, but the testimony at hearing shows that it occurred on December 16, 1994.

7. At about the same time, the HUD Office of Inspector General was asked to review the nine Hope I grant programs administered by TAC to determine whether fraud and abuse could be found and whether a criminal investigation should be conducted. Stip. 12.

8. Upon completion of a limited review of the Hope I grant programs under TAC's administration, HUD's Office of Inspector General concluded, among other things, that TAC had made ineligible payments to TAC board members, used grant funds to pay ineligible expenses of other activities under its administration, made payments of \$92,933 for various purposes without adequate supporting documentation, purchased furniture costing more than \$60,000 without consolidating purchases and soliciting bids, and failed to keep books and records according to HUD requirements. In particular, TAC "did not maintain a general ledger, did not make comparisons of budgeted verses [*sic*] actual expenditures, did not maintain complete or accurate check registers, did not maintain proper supporting documents, and improperly signed blank checks." GX. 18. The Office of Inspector General did not recommend any specific remedial action. Stip. 13.

9. When Respondent began her employment as Executive Administrator with TAC, she signed a contract on February 7, 1994, that described her duties, in part, as follows:

The specific duties to be performed by Executive Administrator under this Agreement include, but are not limited to, the following:

- (a) Implementing the policies and procedures of the Board of Directors, as embodied in corporate directives, the bylaws of the Corporation, and the HOPE I and CDBG guidelines.
- (b) Reporting to the Board of Directors all actions taken under all grants or other programs.
- (c) Planning, administering, and coordinating the fiscal management of all grant programs and complying with monthly HUD reporting requirements.
- (d) Attending all HOPE I meetings and compiling monthly reports.
- (e) Maintaining program discipline under HOPE I, CDBG, HUD, and City of Jacksonville guidelines.
- (f) Providing the Corporation with appropriate technical and consulting assistance in enhancing program effectiveness, expanding program opportunities, and achieving program goals.
- (g) Developing additional funding sources to enhance programs for resident

leaders, assisting in writing additional grant applications, and advising the Corporation with respect to changes in the grant rules and regulations and other applicable changes as reflected in the Federal Register.

* * *

9. Compliance with Laws. The Corporation is contracting with Executive Administrator for the provision of Services as set forth herein and Executive Administrator agrees to comply with all laws, ordinances, rules, and regulations of any governmental agency or any other agency pertinent to or in connection with Executive Administrator's performance of the Services.

10. Respondent told the auditor from HUD's Office of Inspector General that she was responsible for the maintenance of books and records at TAC. TR. 171. She also admitted that TAC had not submitted reports to HUD as often as required. TR. 225-26.

Subsidiary Findings and Discussion

An LDP is a type of debarment. The purpose of all debarments imposed by agencies of the Federal government, including debarments, suspensions, and LDP's imposed by HUD, is to protect the public interest by precluding persons who are not "responsible" from conducting business with the federal government. 24 C.F.R. section 24.115(a). *See also Agan v. Pierce*, 576 F. Supp. 257, 261 (N.D. Ga. 1983); *Stanko Packing Co., Inc. v. Bergland*, 489 F. Supp. 947, 948-49 (D.D.C. 1980). The debarment process is not intended to punish; rather, it is designed to protect governmental interests not safeguarded by other laws. *Joseph Constr. Co. v. Veterans Admin.*, 595 F. Supp. 448, 452 (N.D. Ill. 1984). In other words, the purpose of debarment is remedial, not punitive. *See* 24 C.F.R. § 24.115.

In the context of debarment proceedings, "responsibility" is a term of art that encompasses integrity, honesty, and the general ability to conduct business lawfully. *See* 24 C.F.R. § 24.305; *Gonzales v. Freeman*, 334 F.2d 570, 573 & n.4, 576-77 (D.C. Cir. 1964). Determining "responsibility" requires an assessment of the current risk that the government will be injured in the future by doing business with a respondent. *See Shane Meat Co., Inc. v. U.S. Dep't of Defense*, 800 F.2d 334, 338 (3d Cir. 1986). That assessment may be based on past acts. *See Agan*, 576 F. Supp. 257; *Delta Rocky Mountain Petroleum, Inc. v. U.S. Dep't of Defense*, 726 F. Supp. 278 (D.Colo. 1989).

While Respondent acknowledges that TAC experienced significant problems during her tenure as Executive Administrator, she argues that she should not be held responsible for those problems because she was only an employee, and that she is "unjustly being singled out for punishment" Brief, p. 13. She contends that the President and

the Treasurer of the Board of Directors caused the deficiencies cited by HUD's Office of the Inspector General. She also argues that she is not a participant or principal within the meaning of the regulations, that HUD failed to provide her with appropriate guidance, and that HUD did not comply with proper procedure before issuing the LDP. Respondent's arguments have no merit.

Section 24.105(m) of the regulations (24 C.F.R. § 24.105(m)) defines "Participant" as follows:

Any person who submits a proposal for, enters into, or reasonably may be expected to enter into a covered transaction. This term also includes any person who acts on behalf of or is authorized to commit a participant in a covered transaction as an agent or representative of another participant.

As a recipient and disbursing officer of federal grant funds, TAC was a principal in covered transactions. *See* 24 C.F.R. § 24.110(a)(1)(i) and (ii). By virtue of her employment contract with TAC, Respondent was authorized to commit TAC in covered transactions and to prepare grant proposals. Hence Respondent is a participant as well. She is also a principal, defined in 24 C.F.R. § 24.105(p) as follows:

Officer, director, owner partner, key employee, or other person within a participant with primary management or supervisory responsibilities; or a person who has a critical influence on or substantive control over a covered transaction, whether or not employed by the participant. Persons who have a critical influence on or substantive control over a covered transaction are:

* * *

(8) Recipients under HUD assistance agreements;

* * *

(13) Accountants ... and others in a business relationship with participants in connection with a covered transaction under a HUD program;

* * *

(22) Employees or agents of any of the above.

Respondent is therefore clearly a "principal" subject to an LDP.

Respondent attempts to evade responsibility for TAC's deficiencies by pointing the finger at other people. That defense is unavailing. Her employment contract expressly obligated her to maintain TAC's books and records, yet she failed to create and maintain

even the most basic of records--a general ledger. On several occasions between December 1994 and the hearing in October 1995, Respondent claimed that a general ledger could be constructed from readily available raw data, but she never prepared one. Even if she had belatedly put one together, the failure of an accountant with years of experience to keep and maintain a general ledger reflecting business activity *as it occurs* clearly manifests serious irresponsibility. This failure alone constitutes cause for issuance of an LDP as an "irregularit[y] in a participant's or contractor's past performance in a HUD program." 24 C.F.R. § 24.705(a)(2).

Respondent's complaint that HUD did not give her proper guidance likewise falls far short of the mark. No responsible accountant needs to be told elementary rules of the accounting profession: proper financial management of any enterprise requires maintenance of a general ledger (with supporting invoices for every expenditure) as well as a budgetary ledger comparing actual expenditures with budgeted expenditures. Furthermore, the record shows that Respondent was aware of many of TAC's deficiencies long before HUD discovered how serious the problems were upon visiting TAC's business office on December 16. *See* RX. 9, 10. Respondent was under a fiduciary duty to administer federal funds properly. If, as Respondent claims, the President and the Treasurer of TAC's Board actively interfered with her attempts to administer the grants properly, a responsible person in her place would have sought help from the source of those funds--from HUD--when it became clear that she could not fulfill her duty acting alone. However, Respondent did not voluntarily report to HUD the interference that she maintains she suffered at the hands of members of the Board, nor did she solicit HUD's aid to help remove that interference. Those failures indicate a lack of responsibility in a person trusted with fiduciary duties to manage federal funds.

Although the record shows that a major share of the responsibility for TAC's problems lies with the President and the Treasurer of TAC's Board of Directors, that fact does not absolve Respondent of the responsibility she bore as grant administrator under the terms of her employment contract. Her attempt to shift the entire blame to others in itself precludes a finding of present responsibility.

Respondent complains that HUD's Preliminary Notice of Default of November 23, 1994, failed to spell out required corrective actions as dictated by the Hope I grant agreements, and hence she cannot be sanctioned for alleged failures to comply with grant requirements. That complaint has no merit, because even if we assume for purposes of argument that HUD failed to comply fully with the notice requirements in the grants, such failure would not preclude issuance of an LDP against Respondent. The LDP may be sustained in this case not on the basis of putative violations of the grants by Respondent, but rather because Respondent violated her employment contract with TAC and the bookkeeping requirements of OMB Cir. A-110, attachment F, made applicable to her work

by the employment contract. These violations created an "irregularity" in her performance in a HUD program. TR. 167.³ Furthermore, Respondent does not have standing to claim a defense under color of the grant agreements because she was not a grantee; that is, she was not a party to those agreements.

Finally, Respondent has not been unjustly singled out for punishment. HUD issued LDPs against all members of the Board.⁴ They were withdrawn later as to everyone except the President, the Treasurer, and Respondent. TR. 260-62. In any event, as noted above, an LDP is not imposed for punishment purposes; rather, it is a remedial action designed to protect the public from persons shown to lack present responsibility. In the instant case, Respondent's failure to acknowledge the responsibilities imposed upon her by her employment contract in itself demonstrates a lack of present responsibility. She has not shown that the period of the LDP should be reduced from the full one-year period authorized by law. 24 C.F.R. § 24.710(a)(3).

Upon careful consideration of the record, I conclude that HUD's Director, Office of Public Housing, Jacksonville, Florida, exercised sound discretion in the best interests of the Government when he issued the LDP against Respondent and her affiliates on June 12, 1995.

* * *

The Government has moved to exclude from consideration Respondent's post-hearing brief because it was untimely filed and Respondent's exhibits because Respondent failed to furnish the Government with copies as directed by the court. The Government also requests imposition of a sanction because Respondent failed to comply with the Government's discovery requests. Although the grounds for the Government's motions appear well-founded, the Government has suffered no prejudice as a result of Respondent's failures to comply with the court's rulings and with the rules of practice governing this proceeding. Accordingly, the motions are ORDERED denied.

³Respondent's violation of her employment contract also gave cause for issuance of the LDP under 24 C.F.R. § 24.705(a)(4): "Failure to honor contractual obligations"

⁴The Treasurer was initially overlooked by mistake but later sanctioned.

/s/

THOMAS C. HEINZ
Administrative Law Judge

