

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
Washington, D.C.

In the Matter of:

VIRGIL M. GORDON,

Respondent.

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Docket No. 12-3855-DB

DEBARRING OFFICIAL'S DETERMINATION

Introduction and Background

By Notice of Proposed Debarment dated November 01, 2011 ("Notice"), the Department of Housing and Urban Development ("HUD") notified Respondent VIRGIL M. GORDON of his proposed debarment from future participation in procurement and nonprocurement transactions as a participant or principal with HUD and throughout the Executive Branch of the Federal Government for a period of three years from the date of the final determination of this action. The Notice further advised Respondent that his proposed debarment was in accordance with the procedures set forth in 2 CFR parts 180 and 2424 and was based upon his misconduct as a Section 8 landlord. In elaborating on the charge, the Notice informed Respondent that "HUD has evidence that [he] violated Housing Assistance Program (HAP) contracts by charging rental payments and accepting additional payments that exceeded the amount approved by the housing authority." The Notice added that Respondent also "billed tenants for utility payments that are stated in the HAP contract as the owner's responsibility."

A telephonic hearing was held on May 1, 2012, before the Debarring Official's Designee, Mortimer F. Coward. Respondent was represented by Stephen A. Lund, Esq. Andrea M. Lee Esq. appeared on behalf of HUD.

Summary

I have decided, pursuant to 2 C.F.R. part 180, to debar Respondent from future participation in procurement and nonprocurement transactions as a participant or principal with HUD and throughout the Executive Branch of the Federal Government for a period of three years from the date of the final determination of this action. My decision is based on the administrative record in this matter, which includes the following information:

1. The Notice of Proposed Debarment dated January 24, 2012.
2. Brief of Virgil M. Gordon filed April 12, 2012 (including one exhibit numbered 19).¹
3. An e-mail dated May 9, 2012, from Respondent's attorney, responding to a request from the Debarring Official's Designee at the hearing for a timeline of events related to the instant matter.²
4. Documents submitted with the May 9, 2012, e-mail include, among others, an e-mail dated June 6, 2011, to Alpha Investments, LLC (Alpha) from Pat Clark, Director of Rental Assistance, Metropolitan Development and Housing Agency (MDHA), concerning the inappropriateness of Respondent's sending a gift basket to her; e-mail dated September 8, 2011, from Pat Clark to Respondent informing Respondent that a new tenant (Keithia Cooper) was advised that she could not then utilize her voucher at Respondent's property pending a decision expected by September 20, 2011; a Petition for a Writ of Supersedeas and Certiorari filed October 28, 2011, in the Chancery Court for Davidson County, Tennessee by Alpha against MDHA, seeking, *inter alia*, a reversal of MDHA's action terminating Alpha's HAP Contracts; copies of an identical letter dated September 1, 2011, sent to 15 Alpha tenants by MDHA advising the tenants of the termination of their Section 8 rental assistance effective October 31, 2011; and Findings of the Hearing Officer in the Grievance Hearing Matter of MDHA Re: Virgil M. Gordon/Alpha Investments, LLC (heard on September 15, 2011, decided September 19, 2012), upholding MDHA's action terminating all Alpha's HAP contracts.
5. An e-mail dated May 16, 2011, from Respondent to Pat Clark requesting an opportunity to meet with her to discuss the "investigation into [Alpha's] leasing practices."
6. The Government's Pre-Hearing Brief in Support of Three-Year Debarment filed March 23, 2012 (including all exhibits and attachments thereto).
7. The Government's Response to Respondent's Submission of Additional Documents.

¹ Although there is only one exhibit attached to Respondent's brief, the number "19" was assigned to the exhibit by Respondent apparently to follow sequentially with the 18 exhibits filed with the Government's Pre-Hearing Brief.

² The Debarring Official's Designee requested post-hearing submissions in an effort to have a more fully developed record. The parties filed their submissions and the record closed on June 8, 2012.

Government Counsel's Arguments

Government counsel states that Respondent identifies himself as the Chief Property Manager at Alpha and as the agent for Urban Affordable Housing Solutions, LLC, the leasing agent for Alpha's properties. On March 26, 2010, Respondent leased one of Alpha's units with the amount of \$885.00 reserved as the monthly rent ("Boyd Lease"). On that same date, Respondent entered into a HAP contract with MDHA covering the same unit. Under the HAP contract, the initial rent to the owner would be \$800.00, of which \$406.00 would be the assistance payment on behalf of the tenant. Also on March 26, 2010, Respondent sent the tenant a letter confirming that her monthly rent would be \$885.00, with the tenant's contribution being \$479.00 and the HAP payment set at \$406.00. The tenant paid the rent of \$885.00 monthly from April 2010 to March 2011, which was \$85.00 more per month than the monthly rent under the HAP contract.

Respondent also executed a lease on July 16, 2010, with another tenant in which the monthly rent was set at \$885.00 ("Massey Lease"). On July 30, 2010, Respondent entered into a HAP contract in which the initial rent for the Massey unit was \$825.00 and the monthly housing assistance payment was \$442.00. During the period from August 2010 to April 2011, the available records show that the tenant paid a trash collection charge, notwithstanding that the HAP contract specified that the owner was responsible for providing and paying for trash collection. The net effect of this arrangement was that the total rent collected from the tenant exceeded the rent reserved in the HAP contract by \$60.00 per month.

Respondent had two meetings with MDHA officials to discuss the Massey and Boyd overcharges. Respondent indicated in the meetings he did not know that charges in excess of the rent listed in the HAP contract violated Section 8 program regulations. MDHA also sent Respondent a cease and desist letter following the first meeting. In a previous meeting with Pat Clark, one of the MDHA officials, and in the subsequent meeting, Respondent admitted that he had accepted payments above the allowable level stated in the HAP contracts. MDHA, subsequent to the cease and desist letter of May 13, 2011, sent another letter to Respondent dated May 26, 2011, advising him that all of Alpha's Section 8 HAP contracts would be terminated as of July 31, 2011. Respondent requested a hearing on the termination action.

In a later letter dated June 15, 2011, Pat Clark of MDHA advised Respondent that all Section 8 contracts would not be terminated, but that no new leases under the Section 8 program would be approved for the next 24 months. Respondent advised MDHA that he would reimburse Ms. Massey \$165.00 for the overcharges. MDHA then requested Alpha's account statements for Alpha's 18 other Section 8 tenants. Respondent initially refused to comply, questioning MDHA's authority to demand his producing all the accounts. Respondent then informed MDHA that he could not provide the information because Alpha did not maintain ledgers for tenants who did not pay their rent late. Later, during scheduled interviews with the other Section 8 tenants, MDHA discovered that three other tenants had paid rent in excess of the rent permitted under the Section 8 contract.³

³ The record shows that four tenants made additional payments in excess of the approved amounts. Consequently, MDHA would have learnt at the scheduled meetings of, at most, only two more tenants who made unauthorized payments, not three. Even this assertion may not be accurate, because, though the record is unclear here, by the time

In a letter dated August 25, 2011, MDHA informed Respondent that all Section 8 contracts with which he was associated would be terminated effective October 31, 2011, and no new Section 8 tenants would be approved for units owned or managed by Alpha and his mother. Respondent requested a grievance hearing, and in a decision entered September 19, 2011, the hearing officer upheld MDHA's decision, including Respondent's and his associated interests' exclusion from participation in the Section 8 program until November 1, 2014. The hearing officer based his decision on Respondent's failure to inform MDHA during their early meetings that there were other tenants who were overcharged and Respondent's failure to provide the ledgers requested by MDHA, which required MDHA to interview all of Alpha's other Section 8 tenants. The decision recognized that Respondent had shown proof that he had reimbursed overcharged tenants, but questioned whether there were other overcharged but unidentified tenants.

Counsel reviews the relevant regulations and concludes that Respondent is subject to the debarment regulations. Counsel observes that HAP contracts are covered contracts, and by signing HAP contracts as an agent of Alpha, Respondent became a participant in a covered contract. Respondent was also a principal because in his position as Chief Property Manager, he exercised management responsibilities with respect to the HAP contracts. See 2 C.F.R. §§ 180.180.980 and 180.985(a).

Counsel argues that Respondent's actions are cause for debarment under 2 C.F.R. § 180.800(b) because he willfully charged or accepted unauthorized payments from Section 8 tenants. Respondent's actions, according to counsel, evidence that he "willfully failed to perform in accordance with the terms of the Section 8 HAP contract, which is a public agreement or transaction." 2 C.F.R. § 180.800(b)(3). Counsel also charges that by "willfully charging and or accepting unpermitted payments for additional rent or utilities, [Respondent] also willfully violated the regulatory provisions set forth at 24 C.F.R. §§ 982.451(b)(3), (4)(ii); 982.507(a)(4); and 982.515, which are applicable to Section 8 HAP contracts."

Counsel rejects Respondent's argument that 2 C.F.R. § 180.800(b)(3) is not applicable because he did not know his actions violated HUD regulations, thus "his violating conduct was not willful." Counsel argues that Respondent's protestations are not credible, because when informed by MDHA that the overcharges violated the HAP contract and the Section 8 regulations, Respondent offered to reimburse only one tenant although he had overcharged other tenants. Counsel also cites as an indictment of Respondent's credibility his refusal to provide to MDHA rent ledgers for all tenants, thereby causing MDHA to conduct interviews with some of the other tenants. Counsel acknowledges that Respondent later submitted proof of reimbursement to other tenants, but contends that "MDHA was not able to determine whether still other tenants had been overcharged because of [Respondent's] lack of cooperation."

Further, counsel argues that Respondent's assertion, that his violation of the HAP contract was not willful because of his ignorance of its requirements, is not legally valid. Counsel adds that "even if [Respondent] did not know that his acceptance of the additional payments violated the HAP contracts and the regulations, his violation is nevertheless willful."

of the scheduled meetings in August with all Alpha's tenants, MDHA, it would appear, knew that four tenants were affected by Respondent's wrongdoing.

Counsel elaborates that as “a principal and a participant, [Respondent] is charged with knowledge of the requirements of the program in which he has chosen to participate” and “a professional who signs documents without knowing their contents, and thereafter fails to perform the duties required by the documents, ‘must be considered to have acted willfully.’” Respondent’s actions, counsel states, provides cause for exclusion as a “willful violation” under 2 C.F.R. §§ 180.800(b)(1) and (b)(3) and for cause “so serious . . . that it affects [his] present responsibility.” 2 C.F.R. § 180.800(d).

Counsel also rejects Respondent’s argument that 2 C.F.R. § 180.800(d) does not apply because he “immediately rectified his violations.” Counsel also sees as factors unfavorable to Respondent’s cause, what counsel characterizes as Respondent’s alleged failure to familiarize himself with the Section 8 program requirements, his failure to cooperate with MDHA, Respondent’s past actions as casting doubt on his ability to perform a contract in the future, and his misconduct as compromising the very purpose of the Section 8 program.

Counsel reviews the aggravating and mitigating factors pursuant to 2 C.F.R. § 180.860 and determines that Respondent’s actions caused harm to some tenants to the extent they paid more rent than provided for in the HAP contract. Also, eventually all Alpha tenants were harmed because they were forced to find alternative housing when MDHA terminated all HAP contracts with Alpha because of Respondent’s misconduct. Respondent’s wrongdoing lasted over a year and involved four tenants. Counsel contends that Respondent has not taken responsibility for his actions in that he characterized them as “errors” and “mistakes,” not recognizing that his misconduct was a direct result of his failure to understand the HAP contracts he executed.

Counsel also characterizes Respondent as less than forthcoming with MDHA during its investigation of the overpayments by Alpha’s tenants and notes that Respondent did not bring his wrongdoing to the attention of any government authority. Counsel acknowledges that Respondent has reimbursed the tenants for the overcharges at issue, but observes that the MDHA hearing officials “determination raises the possibility that all tenants who made additional payments have not been identified.” Counsel concludes that Respondent’s misconduct demonstrates that he is not presently responsible and he should be debarred for three years.

In its May 22, 2012, submission, responding to Respondent’s post-hearing submission; the Government reiterates its position that Respondent be debarred for three years. Counsel argues here that Respondent’s actions in attempting to vitiate the possible consequences of his violation of the HAP contracts, including his reimbursement of overcharges to tenants, do “not have the desired mitigating effect on the need for debarment.”

Respondent’s Arguments

Respondent, through counsel, readily admits that he overcharged some tenants, thus that issue is not in dispute. Counsel argues that debarment is not warranted because Respondent has demonstrated that he is responsible based on his conduct after his wrongdoing was exposed. Counsel notes that three of the four leases at issue preexisted the HAP contracts and that the

rentals and other charges Respondent collected were consistent with the lease. Counsel also notes that Respondent complied with MDHA's cease and desist letter for all four tenants who were overcharged. Counsel asserts that it was Respondent's own investigation which revealed that it was four, not two, tenants who had been overcharged.

Counsel argues that Respondent's actions in determining how many tenants were overcharged demonstrate that he is presently responsible. Further, all tenants were made whole because Respondent reimbursed them for all the overcharges. Additionally, Respondent gave all the tenants the option not to move out but to stay for the HAP portion of the rent only, which some tenants accepted. The tenants, however, were receiving mixed messages. On the one hand, Respondent was telling them that they did not have to pay the full amount of the rent; however, MDHA was telling the tenants just the opposite.

Counsel asserts that Respondent, on receipt of the cease and desist letter from MDHA, took immediate steps to cure the violation by repaying all four tenants who were improperly charged, not just the two tenants then known to MHDA. Counsel concedes, in reviewing the aggravating and mitigating factors in 2 C.F.R. § 180.600, that the affected tenants suffered harm, but it "was a technical harm . . . , there was no actual harm to the four tenants since they are in the same position they would otherwise be in but for the overcharges." Counsel also contends that to the extent some tenants chose to move, notwithstanding Alpha's offer to all the tenants to stay and pay rent only at the contribution under the HAP contract, "the cost of moving was an undertaking the tenant consciously made." Additionally, counsel, while recognizing that overcharging a tenant is not a "trivial matter," points out that only four tenants of the 23 were overcharged, thus the "proportion of tenants who were overcharged was small."

Counsel takes issue with the Government's application of the factors relating to frequency of wrongdoing and the pattern or prior history of wrongdoing. In counsel's view, the regulation "contemplates conduct that occurred prior to the conduct giving rise to the debarment hearing. To find otherwise would result in reading prior history out of the regulation." Further, counsel argues that Respondent has taken responsibility for his actions and rectified the situation as soon as he was made aware of it – "the very essence of responsibility and integrity." Counsel makes short shrift of the hearing officer's decision, noting that "the brevity of the hearing and the unsupported musings⁴ of the hearing officer suggest a hearing that was less than impartial."

According to Respondent, MDHA was telling the tenants that if they did not move out of Alpha's property, they would be removed from the program. Respondent testified that he sought the meeting with Pat Clark and other MDHA officials in late May 2011. According to Respondent, he thought his meetings with MDHA officials were cordial and that he was addressing their concerns with respect to the overcharges. At some point during one of the meetings, in attempting to explain his position, he was told by Pat Clark to "shut up." Respondent testified that he did not appreciate being humiliated in that manner.

⁴ Respondent's counsel characterizes the hearing officer's rhetorical statement that "who can be sure if there is a complete list of repayment if [Respondent] will not disclose financial documentation for each of his Section 8 properties as requested," as a "musing by the hearing officer."

Respondent asserts that he did not collect additional charges with intent to enrich himself. The leases at issue were submitted and approved by MDHA and included the provision for an increased rental payment if additional tenants occupied a unit.⁵ Respondent stated that he charged the tenants for the use of a washer and dryer that he had purchased and made available to them. MDHA later agreed that it was not a violation to rent washers and dryers to tenants. (The units were not furnished with washers and dryers at the time of their leasing.) Respondent reiterated that MDHA did not do any investigating, that it was he who made the agency aware that there were four tenants affected by his actions.

As stated by counsel, and as set forth in more detail in Respondent's Petition for Writ of Certiorari and Supersedeas and in the Timeline of Events submitted May 9, 2012, via e-mail on Respondent's behalf by his counsel, MDHA, on learning of Respondent's violations of Alpha's HAP contracts with the agency, issued the cease and desist letter of May 13, 2011. The letter identified only two tenants affected by Respondent's violations; however, Respondent reimbursed four tenants for overcharges. (In his testimony, Respondent claimed that his investigation revealed that four, not two, tenants were charged rents above the HAP-allowed maximum or paid charges also not permitted under their respective HAP contracts.) On May 26, 2011, following a phone call from Respondent to Pat Clark of MDHA in which Respondent discussed the overcharges with her; Ms. Clark terminated all Alpha's HAP contracts.

After Respondent sought an informal hearing with MDHA on its decision to terminate the HAP contracts, MDHA informed him in writing that it would not terminate the contracts. At a later meeting on June 29, 2011, with Pat Clark and the Deputy Executive Director of MDHA, Respondent, in answering his mother's question whether reimbursement had been made to the affected tenants, responded affirmatively. Respondent did not state that reimbursement had been made to four tenants and not to two as MDHA then believed. After the meeting, MDHA agreed that the HAP contracts would not be terminated, but for the next 24 months if any unit was vacated, it could not be re-leased with HAP assistance. Alpha could, however, lease other units under a HAP contract.

In July 2011, as phrased by counsel in the Petition, Pat Clark "continued to pursue Alpha",⁶ requesting the account ledgers for Alpha's Section 8 tenants.⁷ Ms. Clark then met with Alpha's tenants and learned that two additional tenants had made payments not permitted under the HAP contract. During an August 16, 2011, meeting with Pat Clark and another MDHA official, Ms. Clark stated that she felt deceived by Respondent because he had failed to inform her that four, not two, tenants had made improper payments. On August 25, 2011, in a change of mind, MDHA informed Respondent that it was terminating all of Alpha's HAP contracts as of October 31, 2011, based on the fact that more than two tenants had made improper payments and Alpha's failure to disclose this information. Alpha requested a hearing the same day. On

⁵ Respondent notes in his brief that the lease agreements signed by the two tenants who were overcharged provide that "any change in the occupancy of leased premises "may be subject to an adjustment in the amount of rent." Brief of Virgil M. Gordon at 2.

⁶ Petition, ¶ 13.

⁷ Counsel acknowledges that Respondent was reluctant to provide the information requested by MDHA, but did provide it. Counsel observes, however, that the "fact that Alpha did not have what MDHA wanted [i.e., additional information regarding Alpha's other Section 8 tenants] is not the same as obstructing an investigation."

September 1, 2011, prior to the hearing scheduled for September 15, 2011, Ms. Clark informed all Alpha's tenants that their lease with Alpha would terminate October 31, 2011. Ms. Clark also informed all tenants that they had to apply for recertification by September 14, 2011, or risk losing their eligibility for Section 8 assistance.

According to the sworn Petition, on September 15, 2011, when Respondent arrived for the hearing, he was informed that MDHA had already made its position known to the hearing officer and that the hearing officer "had to be somewhere in 20 minutes and that Alpha should be quick in its presentation."⁸ On September 19, 2011, the hearing officer issued his decision upholding the termination of Alpha's HAP contracts based on (1) Alpha's failure to disclose that four, not two, tenants had been overcharged and (2) Alpha's failure to produce the records requested by MDHA.

Counsel states that in an effort to stay MDHA's action terminating all Alpha's HAP contracts, Respondent applied on October 28, 2011, for the writ of supersedeas, which was issued on November 7, 2011. Counsel adds that he was in talks with MDHA and MDHA's attorney during this time in an effort to resolve the matter. The appeal of MDHA's actions was later abandoned when Alpha and other related entities filed for bankruptcy.

Counsel concludes that Respondent's actions to rectify his mistakes and his taking responsibility for them after receiving MDHA's cease and desist letter show that Respondent is a person of integrity and should not be debarred.

Findings of Fact

1. At all relevant times, Respondent was the property manager of Alpha, a company that owned and rented real estate.
2. Respondent leased property to several individuals, including four tenants whose leases gave rise to the instant matter.
3. Each of the four leases was covered by a HAP contract signed by Respondent with MDHA, the local housing authority.
4. Each of the contracts listed the initial rent to Alpha along with the Section 8 housing assistance payment payable by MDHA on behalf of the tenant and the tenant's contribution to the monthly rent.
5. Respondent signed leases at different times in 2010 with the four tenants referenced here, which provided for a monthly rental payment in excess of the amount permitted in the respective HAP contracts or for payment by the tenant of an impermissible charge under the HAP contract.
6. Three of the leases were entered into by Respondent with the affected tenants before Respondent executed the HAP contracts.
7. The excess rental payments or unauthorized charges were collected from the four tenants for a period of several months to over a year.

⁸ Id. at ¶ 18.

8. In two instances, the lease provided for a monthly rent of \$885.00 while the HAP contract specified that the initial rent could not exceed \$800.00 and \$825.00, respectively. With respect to one of the tenants, there was an impermissible trash collection charge, also.
9. After MDHA became aware of Respondent's improper charges regarding two tenants, MDHA held two meetings with Respondent to discuss the unauthorized charges.
10. At the meetings, Respondent acknowledged he had collected the improper payments, but asserted that he did not know the over-payments violated the HAP contract.
11. Respondent initially reimbursed one tenant who had been overcharged.
12. Respondent later determined that a total of four tenants had been overcharged.
13. Respondent did not disclose to MDHA officials in their meetings he had determined that four tenants had been overcharged.
14. MDHA issued Respondent a cease and desist letter dated May 13, 2011. The letter demanded that Respondent cease all demands for collection of charges in violation of the HAP contract, and repay the two tenants the amounts improperly collected by Respondent.
15. Respondent reimbursed all four tenants after Respondent determined they had been overcharged.
16. MDHA followed its May 13, 2011, letter with another letter dated May 26, 2011, informing Respondent that all of Alpha's Section 8 tenants would be terminated as of July 31, 2011.
17. In a letter dated May 29, 2011, Respondent requested a hearing on MDHA's proposed termination action.
18. MDHA, in a letter dated June 15, 2011, from Pat Clark, informed Respondent that the 19 units under lease could continue to receive Section 8 subsidy, but if a tenant moved out the unit would not be leased for 24 months. Additionally, no units in properties managed by Alpha would be leased for the next 24 months.
19. MDHA requested that Respondent provide rent ledgers for the other 18 tenants.
20. Respondent initially refused to honor MDHA's request, arguing that it should be made on a case-by-case basis, and that Alpha did not maintain individual ledgers for each tenant unless a tenant paid late or had other charges.
21. MDHA informed Respondent in a letter dated August 25, 2011, that a determination had been made to terminate all contracts associated with Respondent and his related entities.
22. Respondent offered Alpha's tenants the opportunity to stay in their unit and pay a rental limited to their HAP contract contribution only.
23. Respondent formally requested a hearing on MDHA's termination action in a letter to MDHA officials dated August 29, 2011.
24. MDHA's notice of September 1, 2011, to Alpha's tenants informing them of the termination of their rental assistance effective October 31, 2011, preceded a hearing set for September 15, 2011.
25. In a decision dated September 19, 2011, following the hearing on September 15, 2011, the hearing officer affirmed MDHA's termination action.

26. The hearing officer cited Respondent's failure to inform MDHA of "other tenants that had been overcharged" during an "early meeting with MDHA officials,"⁹ and his refusal "to provide the documentation requested" by MDHA as the basis for upholding MDHA's sanctions. The hearing officer recognized that Respondent did "submit proof that he reimbursed tenants for overpayments." See Gov't Ex. 18, Findings of the Hearing Officer at 2.

Conclusions

Based on the above Findings of Fact, I have made the following conclusions:

1. Respondent is subject to the debarment regulations because, as the chief property of Alpha, a real estate company, he "has been, is, or may reasonably be expected to be, a participant or principal in a covered transaction." 2 C.F.R. § 180.130.
2. Respondent was a "participant," defined as "any person who submits a proposal for or who enters into a covered transaction, including an agent or representative of a participant." 2 C.F.R. § 180.980.
3. A "covered transaction is a nonprocurement or procurement transaction that is subject to the prohibitions of this part." See 2 C.F.R. 180.200.
4. Respondent also was a "principal" as he was a person "within a participant with management or supervisory responsibilities related to a covered transaction." 2 C.F.R. § 180.995.
5. Respondent's actions in charging and collecting payments from four tenants in excess of, or not authorized by, the HAP contract violated the contract and HUD regulations.
6. Respondent's professed ignorance of the terms of the HAP contract and HUD regulations does not absolve him of responsibility for his wrongdoing.
7. Respondent executed the HAP contracts at issue here and is, therefore, charged with knowledge of the contract's terms.
8. Respondent's conduct resulted in actual harm to the four tenants who over several months made unauthorized payments or were charged in excess of the maximum allowed under the HAP contract.
9. I do not hold Respondent directly responsible for the "harm" suffered by all the tenants, which was occasioned by, and was the consequence of, the choice made by MDHA, that is, MDHA determined that all Alpha's contracts would be terminated. MDHA, as the record shows, had a choice of penalties that it could have imposed, and, in fact, initially did impose a lesser penalty on Alpha. See MDHA's letter of May 13, 2011 (Gov't Ex. 12) (demanding that Respondent cease collecting amounts that conflict with the HAP contract, refund all unallowable payments, or face termination of all HAP contracts). See also MDHA's letter of May 26, 2011 (Gov't Ex. 14) (advising Respondent that, as a result of his misconduct, "all contracts for the families listed on the attached [no attachment is in the record] will be terminated as of

⁹ Neither the parties' filings nor the hearing officer's decision, which holds Respondent at fault for not disclosing at an "early meeting" that four tenants had been overcharged, established when Respondent actually determined that "other tenants had been overcharged." The determination would have been helpful in concluding how egregious, or not, was Respondent's delay, if that's what it was, in making the disclosure at issue.

July 31, 2011” and that the “prohibition of participating on [sic] the MDHA rental assistance program will be in effect until August 1, 2012). *See also* MHDA’s letter of June 15, 2011, to Respondent (“it has been determined that the 19 families currently under contract will not be terminated. **This action is being taken as an effort to not place undue hardship on the families currently under lease**” (Emphasis added). *Compare* Section 10 of the HAP Contract, “Owner’s Breach of HAP Contract,” that sets forth various options available to the PHA to punish an owner for breach of the HAP Contract.¹⁰

10. Respondent, as found by the hearing officer, did reimburse all four tenants who had been overcharged. It is, therefore, arguable that the proximate cause of the harm suffered by all Alpha’s tenants was less Respondent’s overcharging of four tenants than of Alpha’s choice of penalty. This observation does not exonerate Respondent, but mitigates the effect of “actual harm” as an aggravating factor to be considered in determining a fair disposition of this matter.
11. I have considered also Respondent’s initial refusal to provide the ledgers requested by MDHA. MDHA acted well within its authority to request Alpha’s books. *See* Section 11 of the HAP contract – (a) “The owner must provide any information pertinent to the HAP contract that the PHA or HUD may reasonably require.” I find that MDHA’s request was reasonable.
12. The MDHA, however, was requesting information that Respondent did not maintain, or did not maintain in the form MHDA expected. As Respondent explained, Alpha kept ledgers only for those tenants who paid late or made other payments under their lease, i.e., payments not authorized by the HAP contract. Consequently, whether, as Respondent suggested, MDHA’s request was too overbroad is not an issue here as is Respondent’s ability to comply with MDHA’s request. In short, because Alpha did not keep ledgers for all 23 tenants, Respondent, no matter how compliant he would have wanted to be, would not have been able to satisfy MDHA’s request.
13. The fact, though of lesser importance, that MDHA could find no other violations after interviewing nearly all Alpha’s tenants is instructive here, too. It reinforces the view that records were kept only as stated by Respondent.
14. It is clear also that Respondent’s strained relationship with MDHA by the time of MDHA’s request, especially with one of MDHA’s senior officials, influenced his early recalcitrance. That is regrettable, but I credit Respondent with quickly overcoming his reluctance to satisfy MDHA’s request and furnishing such information as Alpha retained. *See* Gov’t Ex. 16, recording the e-mail traffic between Pat Clark of MDHA and Respondent with respect to MDHA’s request for the ledgers.

¹⁰ The escalation in MDHA’s penalties between May 2011 and August 2011, when the final penalty was imposed, appears to coincide with the deterioration in the parties’ relationship. The only additional information that MDHA would have received, thus presumably providing justification for the enhanced penalties, was the revelation that four tenants had been overcharged, by which time Respondent already had reimbursed the affected tenants. The second escalating penalty, however, was imposed even though, at that time, MDHA still believed that only two tenants had been overcharged. Moreover, the final penalty imposed was based on Respondent’s lack of cooperation in providing documents requested by MDHA, and failure voluntarily to provide information that four tenants, not two or one, had been overcharged. The Government does not allege and there is no evidence in the record that Respondent was specifically asked by MDHA official in their meetings whether there were other tenants who had been overcharged. Respondent’s duty voluntarily to disclose information was not raised as an issue for resolution in this proceeding.

15. I credit also Respondent's testimony that he, not MDHA, first determined from an investigation that four tenants were affected by his wrongdoing. This conclusion is supported by MDHA's apparent pique that (a) Respondent did not disclose his finding at the meetings with MDHA and (b) that Respondent already had reimbursed the four tenants before MDHA knew that four tenants were affected.
16. In summary, it is not open to question that Respondent is guilty of overcharging four tenants in violation of the HAP contract, and, though to a large degree of lesser significance, of failure immediately to be forthcoming in his meetings with MDHA officials in disclosing that it was not two but four tenants who had been overcharged.¹¹
17. Reduced to its gravamen, the issue for resolution is whether, notwithstanding the mitigating factors discussed herein, do Respondent's actions warrant debarment.
18. The Government argues that Respondent should be debarred because his actions were "willful," citing 2 C.F.R. §§ 180.800(b)(1) and (3) and (d) and case law in support of its position. This is a close case that requires careful consideration of the language in each of the cited sections and their fair application to the facts in this case.
19. Respondent charged rents not authorized under the HAP contract because he believed, as he testified, that the amounts collected were in accordance with the lease, as they were. Thus, his actions here were intentional. He also testified that he was ignorant of the provisions of the HAP contract that effectively override the owner's right to charge the rent listed in a lease if the amount is in excess of the HAP contract rent.
20. I find that these actions rise to the level of "willfulness" contemplated in the regulations.
21. The Government cites the following cases in support of its position. *In the Matter of Eatl Coleman*, HUDALJ 94-000-3-DB (February 3, 1995); *In the Matter of Jimmi Dallas*, HUDBCA No. 91-5922-D64 (January 27, 1992); *In the Matter of Patti Gobin*, Docket No. 97-7124-DB (June 15, 1998); *In the Matter of Arjuna Hakim*, Docket No. 05-3222-DB, 04-3163-DB(S) (January 12, 2005); *In the Matter of Seb Passanesi*, HUDALJ 92-1835-DB (December 16, 1992); *In the Matter of Benjamin Roscoe*, HUDALJ 93-2007-DB (June 26, 1995); and *In the Matter of Richard Duane Widler*, HUDALJ 92-1766-DB (June 18, 1992).
22. The central theme in each of the cited cases is that the respondents demonstrated a willfulness and intent in their offensive conduct – the same elements evident in the present case.

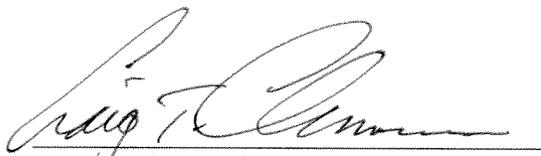
¹¹ The record is murky here, but the Government has not alleged or proved that MDHA in the meetings specifically asked Respondent whether there were other tenants impacted by his wrongdoing. Respondent asserts that Respondent's mother, who was present at one of the meetings with Pat Clark, asked Respondent whether the tenants were reimbursed. In any event, the issue of Respondent's duty to disclose information voluntarily, or not to disclose information unless specifically asked, as noted above, was not addressed.

23. In Respondent's favor, I have considered Respondent's willingness to cooperate and accept full responsibility for his wrongdoing and the fact that as soon as Respondent's violations were brought to his attention, he initiated action to correct them and make the four tenants whole. In this regard, I also considered favorably as a mitigating factor, Respondent's overtures to Alpha's affected tenants to reduce for a period their rental payment by the HAP portion of the rent. The fact that Respondent's efforts were thwarted by MDHA's decision should not detract from their intended palliative effect.
24. The *Passanesi* decision held that "[c]onduct is 'willful' when 'the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow'" and "[w]illful behavior must be distinguished from 'mere mistake resulting from inexperience, excitement or confusion, and . . . mere thoughtlessness or inadvertence, or simple inattention.'"
25. Respondent's actions, in violation of the HAP contracts, were clearly of an "unreasonable character in disregard of a known or obvious risk." *Passanesi* also held that "a debarment cannot stand simply and solely on evidence sufficient to establish cause for debarment. Debarment is discretionary. It is therefore necessary to consider what the evidence shows about the seriousness of Respondent's conduct, as well as any evidence in mitigation."
26. The evidence, viewed as a whole, including the mitigating factors addressed above, establishes that Respondent's actions were willful and intentional and of such a serious nature as to warrant debarment. See 2 C.F.R. §§ 180.800(b)(1) and (3).
27. I also find persuasive the Government's argument that Respondent's actions compromised the integrity of the Section 8 program, thus Respondent should be debarred under 2 C.F.R. § 180.800(d).
28. Respondent's actions, based on his past acts discussed here, show that he is not presently responsible. See 2 C.F.R. § 180.125(c). See also *In the Matter of Robert K. Joyce*, HUDBCA No. 90-1423-DB, November 1, 1990 ("present lack of responsibility may be based on past acts") and *In the Matter of Philip D. Winn*, HUDBCA No. 95-G-108, Docket No. 95-5015-DB, June 9, 1995 ("a lack of present responsibility may be inferred from past acts").
29. I find that the Government has "establish[ed] the cause for debarment by a preponderance of the evidence." See 2 C.F.R. § 800.850(a).
30. HUD has a responsibility to protect the public interest and take appropriate measures against participants whose actions may affect the integrity of its programs.

Determination

Based on the foregoing, including the Findings of Fact, Conclusions, and the administrative record, I have determined, in accordance with 2 C.F.R. §§ 180.870(b)(2)(i) through (b)(2)(iv) to debar Respondent VIRGIL GORDON for a period of three years from the date of this Determination. Respondent's "debarment is effective for covered transactions and contracts that are subject to the Federal Acquisition Regulation (48 CFR chapter 1), throughout the executive branch of the Federal Government unless an agency head or an authorized designee grants an exception."

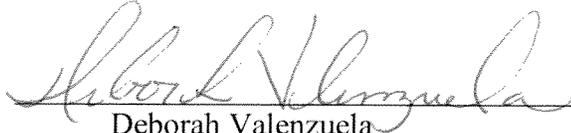
Dated: 7/25/12



Craig T. Clemmensen
Debarring Official
Departmental Enforcement Center

CERTIFICATE OF SERVICE

I hereby certify that on this 25TH day of July 2012, a true copy of the DEBARRING OFFICIAL'S DETERMINATION was served in the manner indicated.



Deborah Valenzuela
Debarment Docket Clerk
Departmental Enforcement Center

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