

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

.
In the Matter of .
CARROLL P. KISSER . HUDALJ 89-1341-DB
and .
DANIEL W. O'DONOGHUE, JR. . HUDALJ 89-1346-DB
Respondents .
.

Phillip L. Schulman, Esquire
For the Respondents

Patricia M. Black, Esquire
Dane M. Narode, Esquire
For the Department

Before: ALAN W. HEIFETZ
Chief Administrative Law Judge

DETERMINATION

Statement of the Case

By letters dated March 22 and 23, 1989, the General Deputy Assistant Secretary for Housing suspended DRG Funding Corporation ("DRG Funding") pursuant to Title 24, Code of Federal Regulations, Section 24.405, pending completion of a federal investigation and such legal proceedings as may result. The letters also suspended five business entities, including DRG Financial Corporation ("DRG Financial"), and sixteen individuals, including Carroll P. Kisser and Daniel W. O'Donoghue ("Respondents"), as affiliates of DRG funding, as that term is defined in 24 C.F.R. Section 24.105(b).

Respondents timely requested a hearing. Briefs in support of their respective positions were filed by the Government and Respondents on May 11, 1989. An oral argument was held in this matter on May 12, 1989. Upon consideration of the entire record and, at the conclusion of the argument, I made the following:

Findings of Fact

1. Respondents were suspended solely on the basis of their alleged status as affiliates of DRG Funding and not for violation of any HUD rules or regulations.

2. Respondent Carroll P. Kisser was an Executive Vice President of DRG Funding and DRG Financial. Respondent Kisser is the owner and majority stockholder of Potomac Realty Group, Inc.,

a corporation organized prior to his employment with DRG Funding. On April 24, 1989, Respondent Kisser resigned his position and employment with DRG Funding and DRG Financial. Effective April 25, 1989, Potomac Realty entered into a consulting agreement to provide services to DRG Financial.

3. Respondent Daniel W. O'Donoghue, Jr., was a Vice President of DRG Funding and DRG Financial. Respondent O'Donoghue is the owner and majority stockholder of the Daniel W. O'Donoghue, Jr. Company ("O'Donoghue"), a corporation organized

prior to his employment with DRG Funding. On April 20, 1989, Respondent O'Donoghue resigned his position and employment with DRG Funding and DRG Financial. Effective April 21, 1989, the O'Donoghue Company entered into a consulting agreement to provide services to DRG Financial.

4. Respondents are not officers, directors, employees or stockholders of DRG Funding or DRG Financial. Respondents have not been shown to exercise controlling influence over the management, policies or activities of DRG Funding or DRG Financial.

5. Respondents have not been shown to control DRG Funding or DRG Financial; DRG Funding and DRG Financial have not been shown to control Respondents; nor has it been shown that a third person controls both Respondents and DRG.

6. Respondents, through Potomac Realty and the O'Donoghue Company are independent contractors under their consulting agreements with DRG Financial. The bases for this finding are:

(i) that the right to control rests with Potomac Realty and the O'Donoghue Company, not DRG Financial, in that Respondents' companies devote their time, energy and skill in such manner as they see fit to provide the obligations required under their respective consulting agreements;

(ii) that the nature of work to be performed by Potomac Realty and the O'Donoghue Company requires the special skills of each of these consultants;

(iii) that Respondents are operating through business entities that existed prior to the Department's March 23, 1989, suspension action;

(iv) that the intent of Respondents and DRG Financial was to establish an independent contractor relationship;

(v) that the consulting agreements are non-exclusive;

(vi) that Respondents are not entitled to participate in any pension plan, stock or other similar benefits of DRG Financial and that Respondents are responsible for their own withholding, social security, federal, state and local taxes; and

(vii) that Respondents and DRG Financial have agreed to provide for mutual indemnification such that each party agrees to hold the other harmless for any claims or liabilities resulting from their acts or omissions.

Conclusions of Law

1. Pursuant to Section 24.105(b), individuals may be suspended as affiliates.

2. For an individual to be an affiliate of a suspended or debarred business concern, he or she must exercise a controlling influence over the management, policies and activities of the suspended or debarred business concern, or the debarred business concern must exercise control over the business activities of the individual, or a third party must exercise control over both the individual and the debarred business concern.

3. Officers and employees of a suspended entity cease to be affiliates of that entity once they sever their affiliation. The act of resigning one's employment and position is a method of severing affiliation for purposes of Section 24.105(b).

4. Respondents do not control DRG Funding or DRG Financial; DRG Funding and DRG Financial do not control Respondents; nor does a third person control both Respondents and DRG.

5. The performance of an individual's duties is not determinative for purposes of establishing affiliation; rather, it is the concept of control that determines who is and who is not an affiliate for purposes of Section 24.105(b).

6. Independent contractors are not affiliates merely because of their status as independent contractors as that term is defined by Section 24.105(b). Respondents are independent contractors for purposes of their consulting agreements with DRG Financial.

7. A suspension action under Title 24, Code of Federal Regulations, Part 24 is the most serious sanction available to the Department because it immediately precludes a person from participation in covered transactions, and therefore should be used only as a last resort to protect the Department and the public from irresponsible persons.

8. A suspension action under Title 24, Code of Federal Regulations, Part 24 may not be used to suspend a person on a

mere suspicion that a respondent has violated, or a "fear" that a respondent may violate at some future date, the regulations of the Department.

9. HUD must have adequate evidence to support a suspension action under Title 24, Code of Federal Regulations, Part 24, before it imposes this serious sanction. HUD may not suspend a person and thereafter seek to conduct discovery to establish adequate evidence of a violation. The Department has the means and authority to conduct investigations and audits of program participants. It must obtain such adequate evidence before it imposes a suspension action, not after that action is imposed.

ORDER

There being no basis in fact or law to conclude that Respondents are affiliates, as that term is defined by 24 C.F.R. Section 24.105(b), it is

ORDERED, that the suspensions of Respondents are hereby terminated.

ALAN W. HEIFETZ
Chief Administrative Law Judge

Dated: May 12, 1989

CERTIFICATE OF SERVICE

I hereby certify that copies of this DETERMINATION issued by ALAN W. HEIFETZ, Chief Administrative Law Judge, HUDALJ 89-1341-DB and HUDALJ 89-1346-DB, were sent to the following parties on this 18th day of May, 1989, in the manner indicated:

REGULAR MAIL:

Phillip L. Schulman
Brownstein, Zeidman and Schomer
1401 New York Avenue, N.W.
Suite 900
Washington, D.C. 20005

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Washington, D.C. 20410

Dawn Smith, Docket Clerk
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Bruce J. Weichmann, Acting Director
Participation and Compliance Division
U.S. Department of Housing
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ORDER

As a result of a pre-hearing conference held on May 4, 1989, the following provisions shall govern the future course of these proceedings:

- (1) The proceedings in HUDALJ 89-1341-DB and HUDALJ 89-1346-DB are hereby consolidated;
- (2) The sole contested issue is whether having resigned as officers and employees of DRG Funding Corporation and of DRG Financial Corporation, Respondents are nevertheless "affiliates" of DRG Funding Corporation;
- (3) The parties shall file their briefs on or before May 11, 1989;
- (4) Upon further Order, oral argument may be scheduled for May 12, 1989.

Alan W. Heifetz
Chief Administrative Law Judge
U.S. Department of Housing
and Urban Development
451 7th St., S. W., #2156
Washington, D.C. 20410

Dated: May 5, 1989

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