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

In the Matter of: HECTOR J. GARCIA, Respondent.	HUDALJ 90-1531-DB

Hector J. Garcia, *pro se*

William V. Cerbone, Jr., Esquire
For the Government

Before: Robert A. Andretta
Administrative Law Judge

INITIAL DETERMINATION

Jurisdiction and Procedure

This proceeding arose as a result of action taken by the Department of Housing and Urban Development ("the Department" or "HUD") to suspend Respondent, Hector J. Garcia, pending the outcome of an investigation being conducted by the Government, and any legal, debarment or Program Fraud Civil Remedies Act proceedings which may ensue, from participating in any primary or lower-tier covered transactions either as a participant or a principal at HUD and throughout the Executive Branch of the federal government and from entering into any procurement contract with HUD. Such a suspension is authorized by the regulations of the Department that are codified at Title 24 , Code of Federal

Regulations, Part 24 ("24 CFR 24"), and jurisdiction is obtained thereby and through 24 CFR 26. Notice of the suspension was sent to the Respondent on August 9, 1990, and on August 15, 1990, he filed a timely request for a hearing on the matter.

The Department's action was based upon allegations regarding Respondent's actions during the period January 1, 1989 through July 15, 1990, while he was a direct endorsement underwriter working for the San Antonio, Texas, firm of MISCorp. Inc. He dealt in matters involving the origination of mortgage loans and was responsible for ensuring compliance with all applicable HUD rules, regulations and requirements, including the coordination of all phases of underwriting, review of all appraisal reports,
compliance inspections and credit analyses and the quality of all decisions relating to the acceptability of the appraisals, inspections, the buyers' ability to repay the mortgage and the overall acceptability of the loan for HUD insurance. HUD Handbook 4000.4 Rev.-1, Single Family Direct Endorsement Program, Chap. 2, para. 2-4 B requires these responsibilities to be performed with due diligence and in a prudent manner.

In accordance with my Notice Of Hearing And Order of August 31, 1990, the Government filed its Complaint on October 1, 1990, and the Respondent filed his Answer on October 10, 1990. In its Complaint, the Government stated that it had received information that Respondent is alleged to have solicited, required and accepted payments of various sums of money, totalling approximately $29,000, from real estate agents as a condition of and inducement for his agreement to underwrite certain mortgage loans and approve and directly endorse the loans for FHA insurance. These payments are alleged to have been separate from and in addition to fees or compensation to MISCorp for services rendered in connection with the transactions which may have been paid in conformity with generally accepted practices of prudent and honest lenders. The payments were also alleged to have been made in addition to and separate from Respondent's own salary and other compensation, such as commissions, paid to him by MISCorp.

The Government further alleged in its Complaint that, as a result of the above-stated allegations, the Office of Inspector General ("OIG") and the Federal Bureau of Investigation ("FBI") are engaged in a joint investigation into the activities of the Respondent and others. The purpose of the investigation is to determine whether the Respondent and the others have engaged in conduct which constitutes material violations of any relevant statute, regulatory provision or program

requirement, or other violation of any law, regulation or agreement, civil or criminal. Based upon the results of a HUD monitoring review, the allegations of misconduct, and the pending investigation, the respondent was suspended under the provisions of 24 CFR 24.405(a)(1), which permits suspension pending the outcome of the investigation and any legal, debarment, or Program Fraud Civil Remedies Act proceedings which may ensue, upon "adequate" evidence "to suspect the commission of an offense listed in [24 CFR] 24.305(a)." In his Answer, Respondent made a bare denial of the allegations contained in the Complaint.

A hearing in this matter was conducted on January 8, 1991, in San Antonio, Texas. The Government presented oral testimony, and exhibits were admitted into evidence in support of its Complaint. At the conclusion of the Government's case, the Respondent made an opening statement, but presented no witnesses or exhibits in support of his appeal, and declined to testify on his own behalf under oath. In accordance with an oral Order at the end of the hearing, the Respondent and the Government filed their post-hearing briefs on February 22 and February 26, 1991, respectively. Respondent's brief included documents that were not submitted in the hearing as exhibits. On March 5, 1990, the Government filed its Motion To Strike Respondent's Post-Hearing Brief, Or In The Alternative, Government's Reply Brief. Respondent did not respond to the Government's motion, and it was ruled upon on April 5, 1991. The Motion To Strike was denied, and the Alternative Reply Brief was admitted into the record. Thus, this case became ripe for determination on the last-named date.

Findings of Fact

HUD is a Federal Executive Department of the United States Government established pursuant to 42 U.S.C. Section 3531. The Department seeks to realize the goal of a decent home and suitable living conditions for every American family. In fulfilling this goal, the Department administers Federal Housing Administration ("FHA") programs of mortgage insurance under the National Housing Act, 12 U.S.C. Section 1701, *et seq*. HUD has authority, among other things, to insure eligible mortgages submitted to HUD and to issue commitments for insuring such mortgages upon such terms as the Secretary of HUD may prescribe.

In carrying out its mandate, HUD is required to conduct business only with responsible principals and participants. Pursuant to 24 CFR 24, HUD is authorized

to exclude or to disqualify participants and principals who have demonstrated a lack of responsibility from participating in Departmental programs. Respondent is an individual who, at all times relevant to this case, was employed as a direct endorsement underwriter for MISCorp. Inc., a HUD-approved direct endorsement lender located in San Antonio, Texas. As such, Respondent is a participant and a principal as those terms are defined by the regulations that are codified at 24 CFR 24.105(m) and (p).

The Department called five witnesses to testify at the hearing. They were a HUD monitor who participated in the monitoring review of MISCorp, a Special Agent with HUD's Office of Inspector General ("OIG") Criminal Investigation Division, two former employees of MISCorp, and the president of MISCorp. The Respondent did not rebut any of the witnesses' testimony and did not present any witnesses of his own. The following is a summary of relevant portions of the unrebutted testimony of the Government's witnesses.

The Direct Endorsement Single-Family Program enables an approved lender to underwrite and approve loans for FHA insurance without the specific approval and consent of HUD FHA personnel. (T 16-17).[1] The Direct Endorsement Underwriter is the key individual in the program who is responsible for approving loans for insurance and certifying that the loans meet FHA eligibility requirements. (T 17). The Underwriter is also responsible for ensuring that the lender has met the applicable rules and regulations for the program. *Id.*

Two HUD Field Representatives were assigned to perform a monitoring review of MISCorp as a result of a request for such a review by HUD's San Antonio Office based upon MISCorp's unusually high default rate, which was six times greater than the local average. *Id.* The review was conducted in July, 1990, and consisted of an initial interview with MISCorp's president, a review of the files of the approximately 30 defaulted loans, and telephone interviews of each of the defaulting borrowers. (T 18-21). The review revealed that the loans had numerous regulatory discrepancies, such as failure to ensure that borrowers made the required down payments, false letters indicating a down payment as a gift from

[1] Capital letter T stands for the transcript of the hearing, and the numbers refer to the transcript pages. The Secretary's exhibits are cited with a capital letter S and an exhibit number, and the Respondent's exhibits are cited with a capital R and an exhibit number. In some cases, a page number may follow an exhibit number and the word "at."

a relative, failure to perform face-to-face interviews of the borrowers, and false form HUD-1 Settlement Statements. (T 22). The review also revealed that the seller on most of these loans was one William Pearson and that they were underwritten by the Respondent, Hector Garcia. (T 23).

During the review, MISCOrp's president informed the HUD investigators that Teresa Nino, a MISCorp employee, had stated that Pearson claimed to her that he had paid $27,000 over the course of a year to Garcia for underwriting the loans. (T 30-32, 34; S 3-5). She also stated that David Alvarado, a MISCorp loan officer, told her that Pearson had claimed to him that he had to pay $29,000 to Garcia. *Id.* She also testified to this at the hearing, and added that Pearson had asked her to keep him posted about the investigation because he did not want to "go to the big house." (T 57-58, 62, 67). Alvarado also told the investigators that he had talked directly with Pearson and that Pearson stated to him that Pearson and one Joe Barron had paid $29,000 to Garcia and that he had at least one cancelled check to prove it. (T 36-37; S 6). Alvarado also testified to these facts at the hearing and identified the written statement that he signed. (T 78-82, 89; S 1, 6). As a result of this information, Respondent was suspended and the matter was referred to the OIG. (T 39-40; S 7).

As a result of the failure to ensure that minimum investments were made, both the loans and the borrowers were ineligible for FHA insurance. (T 41, 45). These loans were typically the ones that were defaulted, and HUD was required to pay the amount remaining after foreclosure. *Id*. Again, to avoid such costs in the program, HUD relies upon the integrity of the lender, and the key individual for the lender is the underwriter. The underwriter for MISCorp was the respondent. (T 46-47). According to the investigators, MISCorp's was the biggest lender problem they had seen "in a long time". (T 47). On cross examination, one of the investigators acknowledged that both the San Antonio Development Authority ("SADA") program and HUD's Repossessed Properties program allowed for down payments as low as $200 and $100, respectively. (T 49-50). However, he made it clear that only two of the more than 30 loans reviewed were SADA loans and that none were HUD-repossessed properties. (T 49, 51-53).

After the HUD review and the revelations about kickback payments to Garcia, the president of MISCorp conducted his own review of approximately 100 MISCorp files, including the files reviewed by the HUD investigators. (T 105). He

discovered that the loans approved for Allied Realty buyers, where Barron and Pearson were associated, had a greater incidence of "exceptions or forgiving underwriting in the area of credit" and "a concentration of irregularities" greater than in other loans. (T 106-107). He further stated that if the underwriting used on the other loans had been used on the Pearson and Barron loans, many of them would have been disapproved. (T 107). He also indicated that the delinquency rate on the Barron and Pearson loans was much higher than on other loans. (T 108). Finally, he stated that Garcia was paid a straight salary, so the number of loans he underwrote would have no impact on his income. (T 107).

Discussion

This case involves a suspension action based upon serious allegations of criminal misconduct which precipitated a joint OIG and FBI investigation which was continuing as of the date of the hearing. Regarding the action of suspension, the regulation that is codified at 24 CFR 24.400 states, in pertinent part, that:

> (b) Suspension is a serious action to be imposed only when:
>
> (1) There exists adequate evidence of one or more of the causes set out in Sec. 24.405, and
>
> (2) Immediate action is necessary to protect the public interest.

Under 24 CFR 24.405(a), a suspension may be imposed upon adequate evidence:

> (1) To suspect the commission of an offense listed in Sec. 24.305(a); or
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> (2) That cause for debarment under Sec. 24.305 may exist.

Thus, the standard of proof required of the Department to establish cause for a suspension is "adequate evidence." 24 CFR 24.313(b)(3). HUD regulations define adequate evidence as "information sufficient to support the reasonable belief

that a particular act or omission has occurred." 24 CFR 24.105(a). This standard has been held to be analogous to the standard required to establish probable cause prior to the issuance of an arrest or search warrant. *Transco Security, Inc. v. Freeman*, 639 F.2d 318, 324 (6th Cir. 1981); *Horne Bros. Inc. v. Laird*, 463 F.2d 1268, 1271 (D.C. Cir. 1972).

Under the standard for suspensions, cause for suspension is established by the evidence under both Subsections (a)(1) and (a)(2) of Section 24.405. The offenses listed under Section 24.305 (a) include, in pertinent part:

> (1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;
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> * * * * *
>
> (3) Commission of ... bribery, falsification ... of record, making false statements ...; or
>
> (4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a person.

The unrebutted allegations of kickback payments, together with the evidence that loans submitted by the alleged payor of those kickbacks were improperly underwritten and insured in violation of HUD/FHA program requirements, constitute adequate evidence to suspect the commission of one or more of the above offenses that are causes for debarment.

In addition, causes for debarment listed under the regulation codified at 24 CFR 24.305 include, in pertinent part:

> (b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program ...;
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> * * * * *

> (d) Any other cause of so serious or compelling a nature that it affects the present responsibility of a person.
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> * * * * *
>
> (f) ... [M]aterial violation of a statutory or regulatory provision or program requirement applicable to a public agreement or transaction including applications for grants, financial assistance, insurance or guarantees, or to the performance of requirements under a grant, assistance award or conditional or final commitment to insure or guarantee.

HUD relies upon the mortgage lender to properly perform its underwriting functions in determining the credit worthiness and financial responsibility of the borrower. The lender's certifications indicate to HUD/FHA that its employees have noted the beneficial as well as the detrimental aspects of the proposed borrower and have taken steps to verify the information. Based upon the submission of an application certified by the lender, HUD/FHA presumes that the lender has determined that the risk is acceptable. Thus, HUD relies on the integrity and honesty of the lender in avoiding fraudulent or otherwise risky transactions.

The key to ensuring the lender's success in this regard is its underwriter. As HUD/FHA depends upon the lender, the lender must depend upon its underwriter. In this case, however, the evidence suggests that Respondent, rather than helping his employer to avoid fraud or undue risk, may well have been the perpetrator of the fraud. Respondent's alleged actions show a disregard for HUD regulations and a lack of business integrity and honesty. Under the circumstances, there is adequate evidence that one or more causes for debarment may exist and, thus, adequate cause for suspension.

The suspension action in this case was taken pursuant to both 24.405(1) and (2) and was based, in part, on the statements of two former co-workers of the

Respondent that Pearson had informed them that he and Barron had paid Respondent over $29,000 in exchange for his approval of certain loans for FHA insurance. These allegations were corroborated by the results of the monitoring review, which disclosed numerous irregularities in the Pearson and Barron loans. Moreover, the testimony of witnesses Nino and Alvarado concerning their conversations with Pearson was credible and unrebutted. There was no testimony or other evidence to show that they had lied or had a motive for lying. On the contrary, the evidence of record supports the inference that they had a good relationship with the Respondent during their employment at MISCorp. The only credible explanation for why Pearson revealed his payments to Garcia was that he wanted to avoid criminal prosecution for having made the kickback payments to Garcia and hoped to preserve a lucrative business with MISCorp. The testimony of Nino and Alvarado was further corroborated by that of MISCorp's president, who discovered that the default rate on the Barron and Pearson loans was much higher than on other loans and that Respondent made unjustified concessions on the Pearson loans.

The Department claims that immediate action to suspend the Respondent was necessary to protect the public interest, and in support of its action, cites 24 CFR 24.115(a), which provides that "to protect the public interest, it is the policy of the federal government to conduct business only with responsible persons." "Responsibility" is a term of art used in government contract law. It encompasses the projected business risk of a person doing business with the government. This includes that person's integrity and ability to perform. The primary test for debarment, and even more for suspension, is present responsibility. A finding of present lack of responsibility can be based upon past acts. *Schlesinger v. Gates*, 249 F.2d 111 (D.C. Cir. 1957); *Roemer v. Hoffman*, 419 F. Supp. 130 (D.D.C. 1976). Debarment or suspension is also justified on the basis of its deterrent effect on those who would do business with the government.[2] I agree that the suspension was necessary in this case to protect the public interest.

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[2] *In The Matter Of William P. Scruggs*, (HUDALJ 90-1459-DB, decided April 1, 1991); *In The Matter Of Washington Butler*, (HUDALJ 90-1466-DB-(LDP), decided December 3, 1990).

In his post-hearing brief, the Respondent denies the receipt of kickback payments from Pearson and Barron and argues that his current financial difficulties contradict the Government's allegations against him. He submits documentation to show that he has approximately $40,000 worth of personal debts for which creditors are seeking payment. This has no probative value for the Respondent at all. In fact, Respondent's debts demonstrate a past lavish lifestyle suggesting greater income at an earlier date. Respondent's defense is simply not useful to his case.

Conclusion and Order

Upon consideration of the need to protect the public interest, I conclude and determine that good cause exists to suspend Respondent from doing business with the government pending the outcome of the investigation and any further legal action which may be taken as described in the first paragraph of this determination. Accordingly, the suspension of Hector J. Garcia is affirmed, and it is hereby

So **ORDERED**.

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Robert A. Andretta
Administrative Law Judge

Dated: April 10, 1991.

CERTIFICATION OF SERVICE

I hereby certify that copies of this INITIAL DETERMINATION AND ORDER issued by ROBERT A. ANDRETTA, Administrative Law Judge, HUDALJ 90-1531-DB, were sent to the following parties on this 10th day of April, 1991, in the manner indicated:

_____
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