UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF THE SECRETARY

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,	)	
Petitioner,	)	HUDOHA 17-JM-0135-PF-004 OGC Case No. 15-0076-PF
v.	)	and
MARK S. SMITH, Respondent.	)	HUDOHA 18-JM-0208-PF-010 OGC Case No. 18-0026-PF

ORDER ON SECRETARIAL REVIEW

On January 13, 2025, Mark S. Smith ("Respondent") filed *Respondent's Appeal Brief Pursuant to 24 C.F.R. § 26.52 ("Appeal")* challenging the *Initial Decision and Order Granting the Government's Amended Motion for Summary Judgment* ("*Decision*") issued by Chief Administrative Law Judge J. Jeremiah Mahoney ("ALJ" or "the Court") in favor of the Petitioner ("HUD" or "the Government"), and against Respondent Mark S. Smith. Respondent participated in the Housing Assistance Program ("HAP") pursuant to Section 8 of the United States Housing Act of 1937, 42 U.S.C. § 1437f, administered through the Guam Housing and Urban Renewal Authority ("GHURA"), as a landlord, having executed HAP contracts for thirteen units in four (4) properties, known as the Smith Apartments, Marigold, Kayen Pution, and the Sunrise D Condo. The *Decision*, issued November 15, 2024, found Respondent maintained the HAP contracts and directly received five (5) HAP payments totaling $48,140 while serving as legal counsel for GHURA during the period of September 1, 2011, through December 1, 2011, and, thereafter, from August 2, 2012, through May 2, 2014, indirectly received another twenty (20) HAP payments totaling $218,296 under an arrangement involving fraudulent claims filed for the properties through another party while Respondent was still contracted as legal counsel for GHURA and had a prohibited interest as a covered individual under 24 C.F.R. § 982.161. The Court found the Respondent liable for the submission of twenty-five false claims to HUD in violation of the Program Fraud Civil Remedies Act ("PFCRA" or "the Act"),[1] 31 U.S.C. §§ 3801-3812, as implemented by 24 C.F.R. Part 28, and in its *Decision* ordered imposition of assessments totaling $532,872, and civil penalties totaling $202,500 for a total penalty of $735,372.

---

[1] HUD notes in the *Government's Response in Opposition to Mark S. Smith's Appeal Pursuant to 24 C.F.R. § 26.52* ("*Response*") that Congress recently amended the PFCRA, changing the Act's "Short Title" to the "Administrative False Claims Act" and raising the amount the government may seek in connection with a particular claim from $150,000 to $1,000,000. *See* Servicemember Quality of Life Improvement and National Defense Authorization Act for Fisal Year 2025, PL 118-159, 138 Stat 1773, 2440-43 (Dec. 23, 2024). The amendments do not affect this proceeding or its disposition. *Response* at 1 n.1.

The record of this proceeding, including the briefs filed with the ALJ and the Secretary, is now before me, as Secretarial Designee, for review. For the reasons set forth below, Respondent's *Appeal* is **DENIED** and the ALJ's *Decision* is **AFFIRMED**.

BACKGROUND

The following are the facts not in dispute and not challenged by Respondent in his Appeal. *See Appeal; Response* at 1; *Memorandum in Support of the Government's Amended Motion for Summary Judgment* ("*Memorandum*") at 3-55; *Respondent's Opposition to Government's Motion for Summary Judgement ("Opposition I")* at 2-6; *Respondent's Opposition to Government's Amended Motion for Summary Judgment* ("*Opposition II*") at 1-2; *Decision* at 3-8. From approximately May 2000 until May 2002, the Respondent served as principal legal counsel for GHURA. *Memorandum* at 8, ¶ 26; *Opposition II*, Ex. B. In June 2004, he became a landlord under the Section 8 Program. *Memorandum* at 10, ¶ 35; *Opposition I* at 3-4 (admitting his "capacity as an owner under the HAP contracts. . . .for at least six years"). As a Section 8 landlord, the Respondent was required to adhere to the terms outlined in the HAP contracts for each property. *Decision* at 3. The HAP contracts contain provisions that "mirror" 24 C.F.R. § 982.161, including a prohibition on certain conflicts of interest. *Appeal* at 5; *Decision* at 3. Paragraph 13, Part B of the HAP contracts specified that a "covered individual" was prohibited from having a direct or indirect interest in any HAP contract, benefits or payments. *Id.* A "covered individual" means a person or entity who, among other things, is any employee of the PHA, or any contractor, sub-contractor, or agent of the PHA, who formulates policy or who influences decisions with respect to the program. *See Appeal* at 4; *Decision* at 3-4, n.2 (noting the HAP contract and regulations recognize the same four classes of covered individuals), 10-11 (citing 24 C.F.R. § 982.161) (emphasis added). HAP contracts require owners to disclose any prohibited interests to the PHA and HUD and allow HUD to waive this prohibition under specific circumstances. *Id.* at 4. Additionally, if a conflict of interest arises, it is the responsibility of the owner to promptly disclose it to both the PHA and HUD. *Id.*

In March of 2011, GHURA issued a Request for Proposal ("RFP") to solicit legal services from qualified law firms or individuals. *Memorandum* at 10-11, ¶¶ 35-39; *Opposition I* at 2, Ex. A; *Opposition II,* Ex. A. The RFP described the preliminary scope of services and included a Sample Professional Services Agreement outlining additional services to be provided. *Memorandum* at 11, ¶ 39; *Opposition I* at 2-3, Ex. A; *Opposition II,* Ex. A. The sample services agreement included in the RFP provided that engaged legal counsel "agrees to disclose to GHURA any possible conflict of interest that may arise in representing GHURA's interest, and obtain a written waiver from GHURA regarding its conflict." *Opposition I* at 2-3, Ex. A; *Opposition II,* Ex. A. The Respondent responded to the RFP, and as part of the application, submitted a conflict-of-interest certification in consideration of past and current clients with interests adverse to GHURA. *Memorandum* at 11-12, ¶¶ 41-46; *Opposition I* at 3, Ex. B; *Opposition II,* Ex. B. Respondent did not disclose his status as a Section 8 landlord. *Memorandum at* 12-13, ¶¶ 49-51; *Opposition I* at 3-4, Ex. B; *Opposition II,* Ex. B. At that time,

GHURA did not systematically screen its contract applicants for Section 8 conflicts of interest. *Memorandum* at 12, ¶ 48. During his application process, Respondent met with a three-person selection panel and discussed potential conflicts of interest arising from Respondent's representation of a prior party in litigation with GHURA. Respondent contends he informed Ray Topsana on the panel that he was a Section 8 landlord. *Opposition I* at 4, Exs. C and D. HUD disputes this, *Memorandum* at 13, ¶¶ 50-51, however, this dispute is not material because none of the twenty-five HAP payments received by either Respondent or Mr. Wong at issue in HUD's *Complaints* occurred before Respondent was put on notice on July 14, 2011, that his status as a Section 8 landlord was a conflict-of-interest. *Opposition I* at 5, Ex. H; *Memorandum* at 17, ¶¶ 52-54.

Later in March 2011, Respondent entered into a contract[2] to provide legal services to GHURA, which was approved by GHURA's Board of Commissioners ("BOC") on April 28, 2011. *Opposition I* at 3, Ex. B; *Memorandum* at 14, ¶ 54. Respondent began serving as legal counsel for GHURA on June 3, 2011, advising GHURA and the BOC on legal matters, representing GHURA in litigation, and reviewing contracts and leases, including those related to the Section 8 Program. *Id.* at 13, ¶¶ 52-54; *Opposition I* at 5, Exs. C, G; *Decision* at 5. Around the same time, GHURA contracted with a separate law firm as "conflicts counsel," but did not intend for its conflict counsel to handle Section 8 matters or to be used to screen Respondent from any particular Section 8 matters. *Memorandum* at 14, ¶¶ 55-56; *Opposition I,* Ex. E (000036). Respondent reviewed and revised GHURA's conflict-of-interest disclosure form used for the Section 8 program and his revisions were approved by the BOC on February 21, 2012. *Memorandum* at 15-16, ¶¶ 66-67; *Decision* at 5. Respondent's billing records showed he billed GHURA for providing legal services relating to the Section 8 Program, including research, analysis, and drafting of a memorandum regarding the Section 8 Project Voucher. *Memorandum* at 16, ¶¶ 68-69; *Decision* at 5.

On July 14, 2011, GHURA's Section 8 Administrator informed GHURA's executive management about Respondent's status as a Section 8 landlord, noting it presented a direct conflict of interest. *Memorandum* at 17, ¶ 72; *Opposition I* at 5, Ex. H; *Decision* at 5. The Executive Director advised Respondent to review HUD's handling of a previous conflict waiver request from another GHURA attorney, David Lujan.[3] *Memorandum* at 18, ¶ 75; *Opposition I* at

---

[2] The terms of the contract are consistent with those in the RFP and required Respondent, in part to: "Act as counsel to the GHURA; Prepare opinions, resolutions, and reports at the request of any member of the Board of Commissioner (BOC) or executive Director or its designee; Undertake such legal research as shall be requested by the BOC or Executive Director or its designee; Advise the Board and the Executive Director of all legal matters to which the Authority is a party or in which the Authority is legally interested; Represent the Authority in litigation concerning the affairs of the Authority; Review and/or prepare contracts, leases, bid invitations, Writ of Possession (WOP) and other documents as may be requested from time to time by the Board, Executive Director or their designee(s); Provide legal assistance and advice during any negotiations with the Authority's tenants and contractors[, and]; Attend all Board of Commissioners meetings." *Decision* at 5; *Opposition II*, Ex. A.

[3] Mr. Lujan attempted to resolve the conflict by transferring his properties to his spouse, and HUD did not consent to this approach. Eventually, Mr. Lujan represented Respondent in this matter and the related criminal proceedings before he was disqualified due to his own conflict of interest. *United States v. Smith*, CRIMINAL 17-00020 (D. Guam Nov. 10, 2021).

5, Ex. C; *Decision* at 5. In addition, Respondent was advised to seek a waiver of the conflict from HUD or transfer his properties. *Memorandum* at 18, ¶ 76; *Opposition I* at 5, Ex. C; *Decision* at 5. Instead of seeking a waiver, Respondent informed GHURA that he would transfer ownership of his properties. *Memorandum* at 18, ¶ 77; *Opposition I* at 5, Ex. C; *Decision* at 5. Between September 1, 2011, and December 1, 2011, Respondent received HAP payments totaling $48,140 from GHURA for thirteen units. *Memorandum* at 20, ¶¶ 86-91; *Opposition I* at 6, Ex. K; *Decision* at 6.

Between November 14-15, 2011, Respondent transferred ownership of the thirteen units to his close friend, Glenn Wong, executing a quitclaim deed and additional documents, such as purchase agreements, mortgages, and promissory notes, none of which were disclosed to GHURA or publicly recorded at the time of execution. *Memorandum* at 22-23, ¶¶ 97-100; *Opposition I* at 6, Ex. J; *Decision* at 6. Per a Special Power of Attorney, Mr. Wong authorized Respondent's mother, Rosita R. Owen, to operate and manage the rental properties on Mr. Wong's behalf, a role she previously fulfilled for Respondent. *Memorandum* at 23, ¶ 101; *Opposition I*, Ex. U (email from GHURA asking if "Atty Smith's mother [can] . . . be an agent for Mr. Wong?"). Ms. Owen signed multiple HAP contracts on Mr. Wong's behalf. *Memorandum* at 23, ¶ 101.

Respondent retained an undisclosed security interest in the properties, financial interest in the HAP contracts and HAP payments, had direct access to the bank account where GHURA deposited Mr. Wong's HAP payments, and Respondent's law firm continued to manage the properties as it did before they were transferred. *Memorandum* at 24-45, ¶¶ 106-211; *Decision* at 6. There was no evidence that the firm received compensation from Mr. Wong. Mr. Wong, who was listed as the owner of the properties in GHURA's system, used Respondent's law office's physical address and the email address of Respondent's legal secretary as his contact information in GHURA's system, and tenants continued to pay their portion of the rent at Respondent's office as they did before the properties were transferred, without ever interacting with Mr. Wong. *Memorandum* at 38-40, ¶¶ 165-172; *Decision* at 6.

On February 14, 2012, Respondent's legal secretary submitted new direct deposit information for the HAP payments, which led GHURA to raise concerns because the account certification listed both Respondent and Mr. Wong as owners. *Memorandum* at 25, ¶ 109; *Opposition I*, Ex Y (p. 265); *Decision* at 6. On March 26, 2012, Mr. Wong allowed Respondent to withdraw funds from the account without GHURA's knowledge. *Memorandum* at 25, ¶ 111; *Decision* at 6. Between August 2, 2012, and May 2, 2014, Mr. Wong received HAP payments totaling $218,296, which were ultimately paid to Respondent or used to settle Respondent's accounts. *Memorandum* at 43-45, ¶¶ 189-211; *Decision* at 6.

On March 27, 2012, GHURA raised concerns about the joint bank account, the use of Respondent's mother, Ms. Owen, as Mr. Wong's Power of Attorney, and the ongoing issues with HAP payments. *Memorandum* at 25-26, ¶ 112; *Opposition I*, Ex. Y (pp. 266-270). The GHURA BOC referred Respondent to Mr. Lujan's situation regarding the conflict of interest. *Memorandum* at 26, ¶ 114; *Opposition I*, Ex. U. Respondent indicated he did not own the

properties, and they had been transferred at the request of GHURA's Executive Director. *Memorandum* at 26, ¶ 114; *Opposition I*, Ex. U.

On April 12, 2012, Respondent signed a conflict-of-interest form (the same form that he had revised for the GHURA BOC) stating he had no direct or indirect interest in the Section 8 Program. *Memorandum* at 26-27, ¶¶ 115-116; *Decision* at 7, 11-12. That same day, at a GHURA BOC meeting, Respondent contended he did not decide policy or make decisions with respect to the Section 8 units at issue, so he should not be considered to have a conflict. *Memorandum* at 26-27, ¶ 116. Respondent further contended GHURA could use its conflicts counsel on conflicted matters and screen Respondent from them. *Id.* Some members of the BOC expressed their disagreement and directed Respondent one more time to consult HUD's determination with respect to Mr. Lujan's waiver request. *Id.* at 27-28, ¶¶ 117-119. Respondent was also directed to prepare a letter describing his situation so it could be sent to HUD for a conflict determination. *Id.* at 27, ¶ 119. Respondent did not provide the letter. *Id.* at 27-29, ¶¶ 121-22.

A few weeks later, GHURA's Executive Director sent an email and a memorandum to GHURA's Section 8 staff advising that the BOC concluded Respondent was not a covered individual since GHURA had conflicts counsel, and Respondent had not participated in any decision-making process nor influenced any decision made by GHURA's BOC, other than providing legal opinions. *Id.* at 28-29, ¶¶ 122-23; *Opposition I*, Ex. P. However, the BOC had not drawn this conclusion and expected Respondent and the Executive Director to prepare the letter to HUD. *Memorandum* at 28-29, ¶¶ 122-23.

After learning of GHURA's potential conflict-of-interest with Respondent on September 9, 2012, three days later, HUD ordered GHURA to end any conflict "immediately" and advised GHURA it was not permitted to waive HUD's conflict of interest requirements. *Id.* at 46, ¶¶ 212-13. That same day, GHURA suspended HAP payments to Mr. Wong. *Id.* at 46, ¶ 214.

In November 2012, Respondent continued to advise the GHURA BOC on how to respond to HUD's inquiries surrounding Respondent's own conflict-of-interest issue and performed other legal work for GHURA. *Id.* at 48, ¶ 220; *Decision* at 7.

GHURA independently submitted a waiver request to HUD on April 23, 2013. *Memorandum* at 52, ¶ 237; *Opposition I*, Exs. R, S, and T. During the pendency of the waiver request, Respondent provided the Board with the property transfer documents between himself and Mr. Wong. *Memorandum at* 53, ¶ 239. Within a day of providing the transfer documents, Respondent resigned as GHURA's legal counsel. *Id.* at 53, ¶ 240.

From September 2011 to December 2011, Respondent received five HAP payments totaling $48,140. *Id.* at 20, ¶¶ 86-91. Additionally, from August 2012 to May 2014, all HAP payments made to Mr. Wong, amounting to $218,296, were transferred to Respondent or used for his financial obligations. *Id.* at 20, ¶¶ 86-91, 43-45, ¶¶ 189-211.

PROCEDURAL HISTORY

On July 17, 2017, HUD filed its first *Complaint* (docketed as 17-JM-0135-PF-004) alleging Respondent submitted five false claims through the Section 8 Program between September and December of 2011. The Government sought a total of $133,780 in civil penalties and assessments.

On February 28, 2018, HUD filed the *Government's Motion for Summary Judgement ("Motion")*. On May 12, 2018, Respondent filed a timely *Respondent's Opposition to Government's Motion for Summary Judgement ("Opposition I")*, where he was represented by Mr. Lujan. Subsequently, the parties filed a *Joint Motion for Stay of Proceedings* pending the resolution of parallel criminal proceedings in Guam.

HUD filed its second *Complaint* (docketed as 18-JM-0208-PF-010) against Respondent on June 28, 2018, before the criminal proceedings concluded, alleging additional violations of PFCRA against Respondent, Mr. Wong, and Ms. Owen for false claims submitted between August 2012 to May 2014.

On September 25, 2023, HUD was notified that the criminal proceedings were resolved, and subsequently filed a *Request for Extension of Dispositive Motion Deadline*. On February 22, 2024, the Court granted this motion and allowed the Government to amend its motion for summary judgement. The Court also granted a request to dismiss the allegations as they pertain to Respondents Wong and Owen, who are now deceased.

On March 15, 2024, HUD filed the *Government's Amended Motion for Summary Judgment ("Amended Motion")* to reflect the consolidation of cases 17-JM-0135-PF-004 and 18-JM-0208-PF-010 and additional evidence produced by the parties in the related criminal proceedings. In its *Amended Motion*, HUD stipulated that its prior Motion could be dismissed as moot. *Amended Motion* at 1. On April 3, 2024, Respondent filed an *Unopposed Motion to Continue Stay of Proceedings*. Respondent filed *Respondent's Opposition to Government's Amended Motion for Summary Judgment* ("*Opposition II*") on April 22, 2024. Respondent's *Opposition II* incorporated by reference Respondent's previous filings. Respondent noted he was now *pro se*, due to Mr. Lujan's disqualification as counsel. *Opposition II* at 2. Respondent averred that he was expecting an extension and reserved the right to supplement his brief. *Id.* at 2. However, nothing in the record suggests Respondent requested another extension after filing his second opposition brief or supplemented this brief with additional argument or evidence.

On November 15, 2024, the ALJ issued the *Decision*, granting the *Government's Amended Motion for Summary Judgment*. The Court found there was no genuine dispute as to the material facts, and the Government was entitled to judgment as a matter of law, because: (A) Respondent made or caused claims to be made to GHURA; (B) the claims submitted to GHURA were false; (C) Respondent knew or had reason to know the claims were false, fictitious, or fraudulent; and (D) Respondent is liable for twenty-five violations of PCFRA. In determining the claims submitted to GHURA were false, the Court found that (1) Respondent was a "covered individual" because he was an agent of GHURA who influenced decisions regarding GHURA's Section 8 Program; (2) the claims made for HAP payments were false, because Respondent had

an impermissible interest; and (3) the claims made for HAP payments were also supported by false statements. The Court found the Respondent liable for PFCRA violations because he made, or caused to be made, twenty-five claims for $266,436 of Section 8 Program funds that he knew or had reason to know were false, fictitious, or fraudulent. The Court ordered an assessment against the Respondent totaling $532,872, and civil penalties totaling $202,500 for a total penalty of $735,372.

On November 29, 2024, newly retained counsel for Respondent submitted a *Request to Enlarge Time* to the Secretary of HUD for an extension of time to file an appeal until February 6, 2025, pursuant to 24 C.F.R. § 26.52(a), due to counsel's existing caseload, health issues, and planned travel that coincided with the 30-day deadline for which to file the instant *Appeal*. Respondent's *Request to Enlarge Time* was timely opposed by HUD on the very same day. On November 30, 2024, Respondent filed a *Reply Brief* in support of his request. On December 6, 2024, the Secretarial Designee granted Respondent an extension of time to file the instant *Appeal* until Monday, January 13, 2025, for a total extension of twenty-six (26) days.

On January 13, 2025, Respondent timely filed his *Appeal*, which was timely opposed by HUD on February 3, 2025, in its *Response*. In his *Appeal*, Respondent raises the following points of contention, each of which are addressed below: 1) the ALJ erred by granting summary judgment because whether Respondent was a "covered individual" is a mixed question of law and fact inappropriate for disposition on summary judgment; 2) the *Decision* is inconsistent with the holding of *Universal Health Svcs., Inc. v. United States*, 576 U.S. 176 (2016); 3) Respondent was denied due process; 4) HUD's construction of 24 C.F.R. § 982.161 is not reasonable and void for vagueness; and 5) the Decision is fatally flawed for lack of support in the factual findings or recital to the record location of those findings.

STANDARD OF REVIEW

Either party may file with the Secretary an appeal within 30 days after the date that the ALJ issues an initial decision. 24 C.F.R. § 26.52(a). The Secretary or designee may affirm, modify, reduce, reverse, compromise, remand, or settle any relief granted in the initial decision. 24 C.F.R. § 26.52(k). The Secretary or designee shall consider, and include in any final determination, such factors as may be set forth in applicable statutes or regulations. *Id.* In reviewing the initial decision, the Secretary or designee shall not consider any objection that was not raised before the ALJ, unless a demonstration is made of extraordinary circumstances causing the failure to raise the objection. 24 C.F.R. § 26.52(h). The Secretary or designee shall consider only evidence contained in the record forwarded by the ALJ. However, if any party demonstrates to the satisfaction of the Secretary or designee that additional evidence not presented at the hearing is material and that there were reasonable grounds for the failure to present such evidence at the hearing, the Secretary or designee shall remand the matter to the ALJ for reconsideration in light of the additional evidence. 24 C.F.R. § 26.52(i).

Pursuant to 24 C.F.R. § 26.40(f), the ALJ is authorized to decide cases, in whole or in part, by summary judgment where there are no material facts in dispute. *See* 24 C.F.R. § 26.32(l). Summary judgment motions and answers thereto must strictly comply with the provisions of Rule 56 of the Federal Rules of Civil Procedures ("FRCP"). *See* 24 C.F.R. §

26.40(f)(2). Rule 56 states that summary judgment shall be granted if the moving party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *See, e.g., In re Salvador Alvarez*, HUDALJ 04-25-PF, at 4 (June 23, 2005).

The proper standard of review is a question of federal procedure and is therefore governed by federal law. *See, e.g., Rosenbloom v. Pyott*, 765 F.3d 1137, 1147 n.8 (9th Cir. 2014). "[D]ecisions by judges are traditionally divided into three categories, denominated questions of law (reviewable de novo), questions of fact (reviewable for clear error), and matters of discretion (reviewable for abuse of discretion)." *See Harman v. Apfel*, 211 F.3d 1172, 1174 (9th Cir. 2000) (quotation marks and citation omitted). Appellate bodies review the grant of summary judgment de novo *and* review the evidence in the light most favorable to the non-moving party. *See, e.g., Mulrain v. Castro*, 760 F.3d 77, 78 (D.C. Cir. 2014); *HUD v. Corey*, HUDALJ 11-M-207-FH-27, at 2, n.2 (July 16, 2012). HUD's decision to impose civil money penalties is reviewed pursuant to the Administrative Procedures Act ("APA"), 5 U.S.C. § 706, 12 U.S.C. § 1735f-15(e)(3). *Yetiv v. U.S. Dep't of Hous. and Urban Dev.*, 503 F.3d 1087, 1089 (9th Cir. 2007). Under Section 706, HUD's action must be set aside if the action was arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law or if the action failed to meet statutory, procedural, or constitutional requirements. *Id.* (internal citations and quotations omitted).

DISCUSSION

I. The ALJ Correctly Determined Respondent Was A "Covered Individual" Who Made Or Caused False Claims To Be Made To GHURA That Respondent Knew Or Had Reason To Know Were False.

As a Section 8 landlord, Respondent was required to adhere to the terms outlined in the Housing Assistance Payment (HAP) contracts for each property. The HAP contracts at issue in this case state that, by executing the contract, "the owner certifies and is responsible for ensuring that no person or entity has or will have a prohibited interest, at execution of the HAP contract, or at any time during the HAP contract terms." One such prohibited interest is that of a covered individual. Paragraph 13 of the HAP contracts provided, in part:

> 13. Conflict of Interest
>
> a. "Covered individual" means a person or entity who is a member of any of the following classes:
>
> [...]
>
> (2) Any employee of the PHA, or any contractor, sub-contractor or agent of the PHA, who formulates policy or who influences decisions with respect to the program; [emphasis added]
>
> [...]
>
> b. A covered individual may not have any direct or indirect interest in the HAP contract or in any benefits or payments under the contract (including the interest of an immediate family member of such covered individual) while such person is a covered individual or during one year thereafter.

Likewise, the regulation at Title 24, Part 982-161, Section 8 Tenant-Based Assistance: Housing Choice Voucher Program: Conflict of Interest provides:

> (a) Neither the PHA nor any of its contractors or subcontractors may enter into any contract or arrangement in connection with the HCV program in which any of the following classes of persons has any interest, direct or indirect, during tenure or for one year thereafter:
>
> [...]
>
> (2) Any employee of the PHA, or any contractor, subcontractor or agent of the PHA, who formulates policy or who influences decisions with respect to the programs[.]

In his *Appeal*, Respondent contends "[q]uestions of fact in litigation relating to intent are mixed questions of law and fact and can only be resolved at summary judgment *only if reasonable minds cannot differ* on the issue." *Appeal* at 1 (emphasis added). However, Respondent does not dispute any of the ALJ's material factual findings, *see supra,* demonstrating Respondent engaged in misconduct which clearly violated PFCRA, including, but not limited to, that Respondent was a Section 8 landlord when GHURA awarded him the contract to perform legal services; that Respondent failed to disclose this fact on his conflict-of-interest form; and, that even if Respondent was initially unaware of this conflict when he began serving as GHURA's legal counsel, he was informed of the conflict as early as July 14, 2011. Respondent does not dispute he was repeatedly told to request a waiver from HUD, which he never did. Instead, Respondent submitted five claims for HAP payments from September 1, 2011, through December 1, 2011, while he still owned thirteen units under HAP contracts. Respondent does not dispute that he transferred the interests in his thirteen units to Mr. Wong via a quitclaim deed but also executed other documents which were not disclosed to GHURA or publicly recorded at the time of execution that permitted Respondent to retain an undisclosed security in the properties and financial interest in HAP funds. For instance, Mr. Wong executed a Special Power of Attorney to Ms. Owen to manage the properties. Respondent does not dispute that after he purportedly transferred his interests to Mr. Wong, he continued to have an indirect interest in the contracts or payments, as demonstrated by his control over the bank account where the HAP payments were deposited and the use of his law firm to collect the tenants' portion of the rent and otherwise manage the properties. Respondent does not dispute that because of his indirect interest, Respondent knew or had reason to know that he and Mr. Wong were not entitled to the HAP payments made to Mr. Wong because Respondent was a covered individual. Based on these undisputed facts, Respondent knew or had reason to know that his five claims and Mr. Wong's twenty claims for HAP payments were false. Instead, Respondent contends throughout his Appeal that the ALJ incorrectly determined Respondent was a covered individual.

Respondent's bald assertion that "Respondent has disputed nearly every material factual assertion relied upon by HUD and the ALJ who appears to wholesale adopt the misguided content of HUD that such facts are not disputed," is without merit, and insufficient to raise a genuine issue of disputed fact. *Id.* at 2; *see* Fed. R. Civ. P. 56(c)(1) ("A party asserting that a fact

cannot be or is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record . . . or showing that the materials cited do not establish the absence or presence of a genuine dispute..."). Respondent's failure to offer facts disputing the material facts relied upon by the ALJ and HUD, prevents him from establishing the presence of a genuine dispute.

Similarly, Respondent's claim regarding the ambiguousness of 24 C.F.R. § 982.161 is unfounded. The regulation determinative of Respondent's status as a "covered individual," explicitly provides the circumstances dictating when an individual must be considered a covered individual and Respondent has failed to point to particular language that creates any ambiguity in determining when an individual should be considered a "covered individual" under the plain language of the regulation. *See* 24 C.F.R. § 982.161. As noted by the Respondent and the ALJ, the language of the HAP contracts mirrors the language of the regulation. *Appeal* at 5; *Decision* at 3, fn.2. Like the regulation, the contract language is unequivocal, and the Respondent has not effectively shown otherwise.

Respondent contends that whether he was a covered individual is a mixed question of law and fact that can only be resolved on summary judgment "if reasonable minds cannot differ on the issue." *Appeal* at 1. A mixed question of law and fact arises when the historical facts are established, the rule of law is undisputed, and the issue is whether the facts satisfy the legal rule. *See, e.g., In re Cherrett*, 873 F.3d 1060, 1066 (9th Cir. 2017). When a mixed question of law and fact is presented, the standard of review turns on whether factual matters (reviewed for clear error) or legal matters (reviewed de novo) predominate. *See U.S. Bank N.A. ex rel. CWCaptial Asset Mgmt. LLC v. Vill. at Lakeridge, LLC,* 138 S. Ct. 960, 967 (2018). In *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183 (2021), the Supreme Court explained that a reviewing court should break a mixed question of law and fact into "its separate factual and legal parts, reviewing each according to the appropriate legal standard. But when a question can be reduced no further, ... 'the standard of review for a mixed question all depends – on whether answering it entails primarily legal or factual work.'" *Id.* at 1199-1200 (quoting *Vill. at Lakeridge*, 138 S. Ct. at 967) (holding the "fair use" question was a mixed question of law and fact, and the ultimate question of whether the facts showed a "fair use" is a legal question for judges to decide de novo).

The ALJ's findings of fact are reviewed under the clearly erroneous standard. *See* Fed. R. Civ. P. 52(a)(6); *United States v Mercado-Moreno*, 869 F.3d 942, 959 (9th Cir. 2017). Review under the clearly erroneous standard is significantly deferential, requiring a "definite and firm conviction that a mistake has been committed." *See Easley v. Cromartie*, 532 U.S. 234, 242 (2001); *United States v. Walter-Eze*, 869 F.3d 891, 912 (9th Cir. 2017). If the ALJ's account of the evidence is plausible in light of the entire record, it may not be reversed on appeal, even if the appellate body would have weighed the evidence differently. *See Husain v. Olympic Airways*, 316 F.3d 829, 835 (9th Cir. 2002), *aff'd*, 540 U.S. 644 (2004); *see also United States v. McCarty*, 648 F.3d 820, 824 (9th Cir. 2011), *as amended* (Sept. 9, 2011). Here, the ALJ reviewed extensive evidence, including copies of Respondent's HAP contracts; email communications between HUD, GHURA, and Respondent; trial transcripts from the criminal proceedings; bank statements from Respondent and Mr. Wong; and various court records. *Decision* at 8. The ALJ also reviewed at least one legal memorandum from Respondent to GHURA's Deputy Director, providing legal advice regarding the Section 8 Program and the

consequences for not following its requirements.[4] *Id.* at 9 n.8. The ALJ determined the evidence supported the factual proposition that Respondent was a covered individual, who knew or had reason to know of the alleged conflict of interest as a covered individual, and who submitted false claims or caused false claims to be submitted in violation of PFCRA. Respondent does not contend that any of the ALJ's factual findings are clear error or identify particular flaws in the regulatory language that would account for any defect in the ALJ's application of the undisputed material facts to the clear regulatory requirements. Instead, as explained below, even in a light most favorable to the Respondent, I find no clear error with the ALJ's factual findings or ambiguity in the relevant law or the ALJ's application of the material facts to the law; there is support for the ALJ's factual findings in the record and legal determinations in case law.

In his *Appeal*, Respondent contends the ALJ erred by finding Respondent, as an attorney for GHURA, was an agent of GHURA who influenced decisions with respect to the Section 8 Program, and therefore a covered individual under 24 C.F.R. § 982.161(a)(2). Respondent identifies no particular facts nor cites any case law in support of his contention that he was not an agent as determined by the ALJ, *see Decision* at 11, but merely a contractor[5] whose role was limited by GHURA so that he could not formulate policy or influence decisions with respect to the Section 8 Program. Instead, Respondent relies on various opinions by PIH Director Jesse Wu[6] and HUD staff attorney Hugh Lutz. The ALJ considered these opinions and found that they "omit important analysis." *Decision* at 15. For example, while Mr. Lutz opined in 2013 that while Respondent "could be considered a 'contractor,'" he also opined that if Respondent's mother were still managing the units, it would be a conflict of interest. *Id.*[7]

---

[4] Respondent denied he prepared legal opinions regarding the Section 8 Program and cited to an email stating that GHURA did not have in their records any legal opinions from Respondent regarding the Section 8 Program or conflict of interest issues. *Opposition II* at 2; *Decision* at 9, n. 8. However, document productions related to the criminal proceeding against Respondent revealed at least one such legal memorandum. Special deference is paid to a trial court's credibility findings. *See Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985); *Earp v. Davis*, 881 F.3d 1135, 1145 (9th Cir. 2018).

[5] HUD agrees Respondent was a contractor and it agrees with the Court's finding that Respondent was an agent. *Response* at 3, n.4. The conflict-of-interest provision applies to both a "contractor" or "agent" who "formulates policy or influences decisions" with respect to the Section 8 Program. 24 C.F.R. § 981.161(a)(2).

[6] The ALJ made no specific findings about the opinions of Mr. Wu. HUD disputes this statement was written by Mr. Wu, crediting it to an unnamed HUD regional counsel. *Response* at 9, n.16. HUD contends the district court in the criminal proceedings excluded this argument in limine. *Id.* at 9, n.14. In his first brief opposing summary judgment, Respondent alleged that he was "racially discriminated by HUD" where Mr. Wu opined that "in an island community like Guam, 'word of mouth' is not just a figure of speech but a way of life. If a conflict waiver is granted in this instance, the message that will be circulated around Guam is that this type of conflict has been accepted by HUD, and therefore, others who may have similar conflicts will be encouraged to continue this type of practice." *Opposition I* at 31. Respondent abandoned this contention in his second brief opposing summary judgment. *See generally Opposition II.* In his Appeal, Respondent contends that Mr. Wu's views are "racially offensive" without more. *Appeal* at 3. Respondent's assertions about racial discrimination are conclusory statements, and neither the ALJ nor I are required to accept them as true. *See, e.g., Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.").

[7] In 2018, Mr. Lutz submitted a declaration clarifying that at the time of his 2013 opinion, he did not know the scope of Respondent's role as legal counsel. *Decision* at 15.

Instead, the ALJ determined Respondent was an agent of GHURA. *Id.* at 11. The determination that Respondent was an agent is one of law, and accordingly, reviewed de novo. Respondent cites no caselaw in his *Appeal* to contest well-established Supreme Court and Ninth Circuit precedent relied upon by the ALJ that generally, a lawyer is his client's agent. *See Kay v. Ehrler*, 499 U.S. 432, 435-36 (1991); *In re Perle*, 725 F.3d 1023, 1027 (9th Cir. 2013). There are two elements to determining the existence of an agency relationship. First, an agent is someone acting on the principal's behalf and subject to the principal's control. *United States v. Bonds*, 608 F.3d 495, 506 (9th Cir. 2010) (analyzing the circumstances under which an independent contractor may be considered an agent). Second, "both the principal and the agent must manifest assent to the principal's right to control the agent." *Id.*

The ALJ found that the undisputed facts supported the first element, that Respondent acted on GHURA's behalf and was subject to GHURA's control. *Decision* at 11. First, the terms of GHURA's Attorney-Client Fee Agreement ("Agreement") with Respondent expressly gave Respondent power of attorney to execute all documents "connected with claims for the prosecution of which [Respondent] is retained . . . that [GHURA] would properly execute. *Id.* Second, the RFP and Agreement included various terms and conditions evidencing GHURA's intent that Respondent was to act subject to its control, which was also evidenced by the GHURA BOC directing Respondent's work after he became GHURA's legal counsel. *Id.* The ALJ also found that the undisputed facts satisfied the requirements of the second element to determining agency relationship, that Respondent "undoubtedly manifested his consent to act as GHURA's agent" when he submitted his proposal in response to GHURA's RFP and signing the Agreement with GHURA. *Id.* As noted by the ALJ, the Supreme Court and the Ninth Circuit have both found that the lawyer-client relationship is an agency relationship. *See Kay*, 499 U.S. at 435-36; *In re Perle*, 725 F.3d at 1027. Respondent cites no caselaw in his *Appeal* to contest this well-established Supreme Court and Ninth Circuit precedent that generally, a lawyer is his client's agent. Even when reviewed in the light most favorable to Respondent, the party opposing summary judgment, there are no genuine issues of material fact that Respondent and GHURA entered into an agency relationship and therefore, as an agent, Respondent was a covered individual pursuant to 24 C.F.R. § 982.161(a)(2) provided he formulated policy or influenced decisions.

Respondent also contends that he is not a covered individual because he lacked the requisite authority or ability to influence or formulate policy. *Appeal* at 5. Respondent contends that GHURA did not rely on his advice for the Section 8 Program and, furthermore, GHURA did not have any authority to formulate or influence policy, which is the domain of the HUD Secretary and Department heads. While the ALJ found that Respondent raised a genuine dispute as to the nature and scope of his contribution to influencing or formulating policies related to the Section 8 Program, the ALJ found these disputed facts were not material to the Court's determination of whether Respondent was a covered individual because "Respondent did in fact influence decisions related to the Section 8 Program." *Decision* at 9. The ALJ found that as legal counsel to GHURA, Respondent proposed revisions to the conflict-of-interest disclosure form applicable to the Section 8 Program, which were adopted and implemented by GHURA, Respondent prepared a legal memorandum for GHURA's former deputy director addressing consequences to GHURA for any failures to comply with HUD requirements, including Section 8 requirements, and even billed GHURA for legal services related to GHURA's handling of

Respondent's own conflict issues. Further, Respondent lobbied the GHURA BOC on his own behalf, claiming that he should not be viewed as having an impermissible conflict, which the ALJ found was "the most worrisome example of Respondent influencing GHURA's Section 8 Program decisions" because as a result of Respondent's communications on his own behalf, the Executive Director of GHURA incorrectly informed GHURA's Section 8 staff that Respondent did not have a conflict of interest, and resulted in the release of HAP payments to Mr. Wong that had been withheld pending the resolution of Respondent's conflict. *Id.* at 12. A "covered individual is [a]ny . . . agent of the PHA, who formulates policy or who influences decisions with respect to the programs. 24 C.F.R. § 982.161(a)(2) (emphasis added). Even reviewing the evidence in the light most favorable to Respondent, I agree with the ALJ that Respondent's dispute that he lacked the requisite authority or ability to influence or formulate policy is not material because the evidence in the record clearly shows the Respondent influenced decisions with respect to GHURA's Section 8 Program. For these reasons, I have determined the ALJ properly found Respondent was a "covered individual" who is liable for PFCRA violations because he knew or had reason to know the claims triggering payment were false, fictitious, or fraudulent.

II. The ALJ's Decision Is Not Inconsistent With The Holding of *Universal Health Services, Inc. v. United States*, 579 U.S. 176 (2016).

Respondent contends the ALJ failed to consider *Universal Health Services, Inc. v. United States*, 579 U.S. 176 (2016), a False Claims Act ("FCA") case for the proposition that "if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material." *Appeal* at 8. Respondent further contends the ALJ failed to address that, despite HUD's knowledge of the conflict of interest, HUD continued to pay the HAP claims of Mr. Wong. HUD contends Respondent has no evidence that HUD approved payments to Respondent and Mr. Wong with knowledge that Respondent was not in compliance with the conflict-of-interest provision and further contends Respondent imputed GHURA's knowledge of Respondent's noncompliance to HUD, when "[e]ven GHURA never had *full* knowledge of Smith's interests in the relevant properties, contracts, and payments." *Response* at 10, n. 20 (emphasis in original). While the Supreme Court acknowledged that a misrepresentation about compliance with a statutory, regulatory, or contractual requirement must be material to the Government's payment decision in order to be actionable under the FCA, the Supreme Court also held that "at least in certain circumstances, the implied false certification theory can be a basis for liability" under the FCA. *Universal Health Services, Inc*, 579 U.S. at 181. The Supreme Court further held that FCA liability "for failing to disclose violations of legal requirements does not turn upon whether those requirements were expressly designated as conditions of payment...What matters is not the label the Government attaches to a requirement, but whether the defendant knowingly violated a requirement that the defendant knows is material to the Government's payment decision." *Id.*

As acknowledged by Respondent in his first opposition brief, the PFCRA's liability provisions are similar to the liability provisions of the FCA, with one major exception – PFCRA extends to false statements even in the absence of any claim. *Opposition I* at 20. Therefore, HUD's knowledge of whether certain requirements were violated when HAP payments were

made is immaterial. PFCRA places liability on a person for the submission of a claim that is supported by a written statement, which asserts a material fact which is false, fictitious, or fraudulent. 24 C.F.R. § 28.10(b). As HUD points out, "no proof of specific intent to defraud is required" as an element of a PFCRA violation. *Response* at 7 (citing 31 U.S.C. § 3801(a)(5)). Respondent does not dispute the ALJ's findings that on April 12, 2012, he signed a conflict-of-interest form stating he had no direct or indirect interest in the Section 8 Program on the same day that he was confronted by the GHURA BOC about his transactions with Mr. Wong and was ordered to review HUD's determination with respect to Mr. Lujan. *Id.* at 11-12. Respondent's certification on the conflict-of-interest form was false and supported the claims paid to Mr. Wong identified as Counts 1-20 in 18-JM-0208-PF-010. The ALJ's findings that Respondent made false statements in writing on his conflict-of-interest form, and that Respondent knowingly made these false statements, which were material to GHURA's decision to reinstate Mr. Wong's HAP payments, is not inconsistent with the holding in *Universal Health Services, Inc*, 579 U.S. 176.

III. Respondent Was Not Denied Due Process.

Respondent contends that he was denied due process due to the loss of Mr. Lujan as his counsel, which caused him to prepare his second opposition brief *pro se*, and retention of his current counsel, who contends that he could not adequately prepare for this *Appeal* due to the voluminous record and unspecified health and caseload issues, despite being given a 26-day extension to file this *Appeal*.[8] *See Appeal* at 9-10. As HUD acknowledges, Respondent has a right to be represented by counsel in these proceedings, *see* 24 C.F.R. § 26.36(b)(1), but that right does not deprive the ALJ of the authority to "[r]egulate the course of the hearing." *Response* at 11 (citing 24 C.F.R. § 26.32(h)).

Pursuant to 24 C.F.R. § 26.40(f), the ALJ is authorized to decide cases, in whole or in part, by summary judgment where there are no material facts in dispute. *See* 24 C.F.R. § 26.32(l). The Court followed FCRP 56 and caselaw interpreting it in setting forth a standard to grant summary judgment. *See* 24 C.F.R. § 26.40(f)(2); *see also, e.g., In re Salvador Alvarez*, HUDALJ 04-25-PF, at 4 (June 23, 2005). The Court carefully considered all factual issues and related contentions raised by the Parties in the record and found no material facts genuinely in dispute. *Decision* at 9.

Upon review of the record, I find the Respondent has not identified any meaningful deprivation of due process or impingement upon any right of Respondent due to the grant of summary judgment in favor of HUD. *See T.S. v. Indep. Sch. Dist. No. 54*, 265 F.3d 1090, 1093 (10th Cir. 2001) (for a claim based on deprivation of a due process hearing and/or other procedures to be cognizable, it must be linked with a consequent loss of substantive benefits). An essential principle of due process is that a deprivation of life, liberty, or property "be

---

[8] Although it was not necessary for meeting due process requirements, HUD contends in December 2023, Respondent's current counsel negotiated a potential settlement in this matter on Respondent's behalf, where HUD shared all pending motions and pleadings, and noted that the criminal trial transcripts were also available to Respondent's counsel at that time. *Response* at 11. HUD also copied Respondent's current counsel when HUD filed the *Amended Motion* on March 15, 2024, even though Respondent's current counsel had yet to enter an appearance. *Id.* Further, HUD contends Respondent's current counsel represented Mr. Wong in the criminal case until Mr. Wong passed away in 2021. *Id.* at 11, n. 21.

preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co,* 339 U.S. 306, 313 (1950). There is no due process violation without a concurrent deprivation of some substantive right. *See Cleveland Board of Educ. v. Loudermill*, 470 U.S. 532 (1985). The Due Process Clause does not require a hearing prior to an order granting summary judgment. *See Chrysler Credit Corp. v. Cathey*, 977 F.2d 447, 448-49 (8th Cir. 1992) (finding that district court did not violate the Due Process Clause by deciding case without a hearing because "when there is no material factual dispute, there is no hearing requirement"); *accord Mathews v. Eldridge*, 424 U.S. 319 (1976) (holding that the initial termination of disability benefits without a hearing did not violate due process) (cited with approval by Respondent, *Appeal* at 10). "[A]n opportunity to submit briefs and supporting affidavits satisfies the parties' right to be heard." *Chrysler Credit Corp*, 977 F.2d at 449. Here, Respondent had such an opportunity and took advantage of that opportunity by opposing the *Government's Motion for Summary Judgment* and the *Government's Amended Motion for Summary Judgment*. Respondent noted in his second opposition brief that he was *pro se* and reserved the right to supplement his brief, but the record does not reflect that he did so or ever moved for additional time after he filed his second opposition brief. *Response* at 12. The record also reflects that Respondent, an attorney, vigorously defended himself in these proceedings and in the related criminal proceedings. Therefore, Respondent's right to be heard was satisfied.

IV. The Conflict-of-Interest Regulation Is Not Vague And The ALJ's Independent Interpretation Of It Was Reasonable.

Respondent contends that the conflict-of-interest regulation at 24 C.F.R. § 982.161 is ambiguous and void for vagueness, and that the ALJ was not required to defer to HUD interpretation of the regulation pursuant to *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024). *Appeal* at 11-12. *Loper Bright Enterprises*, together with its companion case, *Relentless, Inc. v. Dep't of Commerce*, overruled the principle of *Chevron* deference established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which had directed courts to defer to an agency's reasonable interpretation of an ambiguity in a law the agency enforces. Respondent's reliance on *Loper* is misplaced. Neither HUD nor the Court invoked *Chevron* deference. *Decision* at 12-13; *Response* at 14. The purpose of Respondent's appeal of the ALJ's decision to the Secretary is to obtain a final decision *by the Agency* in a matter involving the law enforced by the Agency. The review here is to determine whether the ALJ properly applied the standards for summary judgment, *see supra,* when granting the Department's amended motion for summary judgment. As fully discussed, *supra*, the ALJ's determination that no material facts are in dispute is supported by the record.

The plain language of 24 C.F.R. § 982.161(a)(2) defines a covered individual as "[a]ny employee of the PHA, or any contractor, subcontractor or agent of the PHA, who formulates policy or who influences decisions with respect to the programs." Vagueness is a "high bar" that does not protect the "deliberately ignorant." *Response* at 14-15 (citing *Boyce Motor Lines v. U.S.*, 342 U.S. 337, 340 (1952)). The record demonstrates that in July 2011, Respondent was fully informed of GHURA's and HUD's interpretation of 24 C.F.R. § 982.161(a)(2) when GHURA directed Respondent to review Mr. Lujan's request for a waiver from HUD. *Memorandum* at 18, ¶ 75; *Decision* at 5. The record also demonstrates the ALJ did not rely on the opinions of HUD staff attorneys about whether Respondent was a covered individual, finding that these opinions "omit important analysis," *Decision* at 15, but instead exercised his

independent judgement in assessing the pertinent facts presented by the parties and interpreting the conflict-of-interest regulation. The ALJ did not rely on HUD's or Respondent's opinion that Respondent was a "contractor" under 24 C.F.R. § 982.161(a)(2) but instead determined Respondent was an "agent" based on particular facts in the record clearly demonstrating Respondent's attorney-client relationship with GHURA. *Decision* at 11. The ALJ found Respondent's contention over whether the facts demonstrate he could formulate policy or influence decisions with respect to the Section 8 Program were not material for purposes of determining Respondent was a "covered individual" because facts in the record show Respondent influenced decisions with respect to the Section 8 Program. *Id.* at 11-12. For these reasons, I find the language of 24 C.F.R. § 982.161 is unambiguous and the ALJ's interpretation and analysis were reasonable and supported by the record.

V. The ALJ Supported His Decision With Facts of Record.

Respondent contends that "[c]ourts have held that the failure of a trial court to support its decision with facts of record and recite the location from which the facts are found is an abuse of discretion." *Appeal* at 13 (emphasis added). In support of this contention, Respondent cites two Wisconsin divorce actions from the 1980s: *Thorpe v. Thorpe*, 108 Wis.2d 189, 197-98, 321 N.W. 2d 237, 242 (1980), and *Peerenboom v. Peerenboom*, 147 Wis. 2d 547, 553 (Wis. Ct. App. 1988). Not only are these Wisconsin state cases not controlling, but Respondent's reliance on these cases is misplaced, as neither of these cases held that a court is required to recite the location from which the facts are found. *See Peerenboom*, 147 Wis. 2d at 553 ("Failure of the trial court to support its decision with facts of record is an abuse of discretion."); *Thorpe*, 108 Wis.2d at 197-98 (same). As fully described above, the ALJ supported his findings with facts of record, such as copies of Respondent's HAP contracts; email communications between HUD, GHURA, and Respondent; trial transcripts from the criminal proceedings; bank statements from Respondent and Mr. Wong; various court records, and a legal memorandum prepared by Respondent. *Decision* at 8, 9 n.8. In fact, both cases relied upon by Respondent support the proposition that the ALJ sufficiently supported his findings with facts of record and his *Decision* should be affirmed by the Secretarial Designee. *See Peerenboom*, 147 Wis. 2d at 551 ("A discretionary decision is upheld if the trial court gives rational reasons for its decisions.") (internal citation omitted); *Thorpe*, 108 Wis.2d at 195, 321 N.W.2d at 240 ("A discretionary determination, to be sustained, must demonstrably be made and based on the facts appearing in the record and in reliance on the appropriate and applicable law.") (internal citations and quotations omitted). For these reasons, I find the ALJ properly supported his findings with facts from the record.

VI. The ALJ Correctly Imposed Maximum Assessments and Penalties.

PFCRA, enacted in 1986, allows administrative agencies a mechanism to pursue false or fraudulent claims for benefits or payments with remedies imposing civil liability against persons who make, submit, or present false, fictitious or fraudulent claims to the agency. *See* 31 U.S.C. § 3802. The purpose of PFCRA is to address small-dollar cases of fraud against the government. H.R. Rep. No. 99-1012 at 258. These fraud cases not only cause monetary loss to the agency but "erodes public confidence in the administration of these programs." *Id.*

The regulation implementing the PFCRA recommends that "[b]ecause 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). However, the Court should impose an appropriate amount of penalties and assessments based on its consideration of evidence in support of one or more of the following factors:

> (1) The number of false, fictitious, or fraudulent claims or statements;
> (2) The time period over which such claims or statements were made;
> (3) The degree of the respondent's culpability with respect to the misconduct;
> (4) The amount of money or the value of the property, services, or benefit falsely claimed;
> (5) The value of the Government's actual loss as a result of the misconduct, including foreseeable consequential damages and the cost of investigation;
> (6) The relationship of the civil penalties to the amount of the Government's loss;
> (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;
> (8) Whether the respondent has engaged in a pattern of the same or similar misconduct;
> (9) Whether the respondent attempted to conceal the misconduct;
> (10) The degree to which the respondent has involved others in the misconduct or in concealing it;
> (11) If the misconduct of employees or agents is imputed to the respondent, the extent to which the respondent's practices fostered or attempted to preclude the misconduct;
> (12) Whether the respondent cooperated in or obstructed an investigation of the misconduct;
> (13) Whether the respondent assisted in identifying and prosecuting other wrongdoers;
> (14) The complexity of the program or transaction, and the degree of the respondent's sophistication with respect to it, including the extent of the respondent's prior participation in the program or in similar transactions;
> (15) Whether the 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;
> (16) The need to deter the respondent and others from engaging in the same or similar misconduct; and
> (17) The respondent's ability to pay, and
> (18) Any other factors that in any given case may mitigate or aggravate the seriousness of the false claim or statement.

Id. Any mitigating or aggravating circumstances must be considered and stated in the opinion. *Id.*

Respondent contends that due to the disqualification of Mr. Lujan and need to retain his current counsel, he was denied due process in that he was unable to present evidence

demonstrating his inability to pay the assessments and penalties in this case or demonstrate other mitigating factors. *Appeal* at 10. "Ability to pay is determined based on an assessment of the respondent's resources available both presently and prospectively from which the Department could ultimately recover the total award, which may be predicted based on historical evidence." 24 C.F.R. § 28.5. It is generally a respondent's burden to demonstrate inability to pay as a mitigating factor. *See HUD v. Blackmon-Brace*, HUDOHA 15-AF-0117-PF-019, at 8 (Aug. 20, 2018). Respondent was represented by Mr. Lujan when he filed his first brief opposing summary judgment, and nowhere in that brief did Respondent contend that he was unable to pay the assessments and penalties or present evidence of inability to pay or any other mitigating circumstances. *See generally Opposition I.* Although Respondent was *pro se* when he filed his second brief opposing summary judgment, Respondent is an attorney. Nowhere in his second brief does he raise an inability to pay or present evidence of inability to pay or other mitigating circumstances. *See generally Opposition II.* Respondent reserved the right to supplement his brief. *Id.* at 2. However, nothing in the record suggests that he did so between April 22, 2024, when he filed his second opposition brief, and November 15, 2024, when the ALJ issued his *Decision*. Even in his *Appeal*, Respondent offers no evidence of inability to pay and only makes conclusory statements that "HUD has suffered no loss." *Appeal* at 10. Respondent has had multiple opportunities to present evidence of an inability to pay and did not do so. Absent any evidence of an inability to pay, such a claim is purely speculative.

I find the ALJ did not abuse his discretion when he ordered that Respondent was liable for the maximum amount of civil penalties. The ALJ specifically found that Respondent engaged in a pattern of misconduct (factor 8), that as an attorney for GHURA before he became a Section 8 landlord, he was familiar with the requirements of HAP contracts and conflicts-of-interest in general (factor 14), that he was culpable for making the twenty-five (25) false claims (factor 3), that he attempted to conceal the misconduct and involved his legal staff and others in the misconduct (factors 9, 10, and 11), and that he did not assist with the identification or prosecution of others involved in misconduct (factor 13), or cooperate in the investigation of his own misconduct (factor 12), all of which are aggravating factors. The ALJ considered Respondent's actions resulted in $266,436 of Section 8 Program funds being falsely claimed by and paid to Respondent (factor 4). The ALJ also found the publicity of Respondent's misconduct, to include the criminal proceedings against him, potentially caused a negative impact on the public's confidence in HUD's and GHURA's abilities to manage the Section 8 Program and prevent fraud in its programs (factor 7), and the need to deter similar misconduct was significant (factor 16), both of which are aggravating factors.

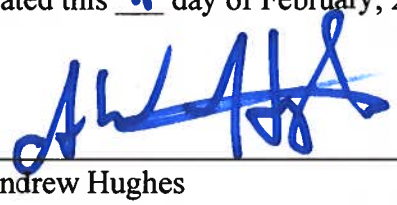
While the ALJ acknowledged that the Government did not provide the costs it incurred (factor 5), the ALJ noted that Respondent did not dispute the Government's contention that the investigation of Smith "consumed hundreds, if not thousands, of federal man-hours by dozens of individuals" across several agencies. *Decision* at 18. The ALJ found that imposition of maximum assessments and penalties would still be insufficient to fully reimburse the United States' costs of the investigation (factor 6), another aggravating factor, and Respondent's conclusory statements in his *Appeal* that "HUD has suffered no loss" are insufficient to rebut the ALJ's findings that the maximum civil penalties would not be sufficient to fully reimburse the Government. The only mitigating factor that the ALJ found, as acknowledged by Respondent in his *Appeal*, is that Respondent's false claims do not appear to have negatively impacted his

tenants, because Section 8 subsidies were still paid on their behalf (factor 7). *See Decision* at 18; *Appeal* at 10. Due to the overwhelming presence of aggravating factors, as opposed to just one mitigating factor, the ALJ's decision to impose maximum assessments and penalties for the twenty-five (25) false claims was well supported by the facts in the record and not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Thus, I find the ALJ properly imposed maximum assessments and penalties.

CONCLUSION

Upon review of the entire record of this proceeding, as well as applicable statutes and regulations, the Appeal is **DENIED** for reasons set forth above. Pursuant to 24 C.F.R. § 26.26, the ALJ's November 15, 2024, Ruling on Summary Judgment and Initial Decision is **AFFIRMED**.

Dated this 11 day of February, 2025



Andrew Hughes
Secretarial Designee

CERTIFICATE OF SERVICE

I hereby certify on February 11, 2025, the Secretarial Review Order, issued by Andrew Hughes, Secretarial Designee, in HUDOHA 17-JM-0135-PF-004, OGC Case No. 15-0076-PF and HUDOHA 18-JM-0208-PF-010, OGC Case No. 18-0026-PF, was served on the following parties in the manner indicated:

_____
Jessica Y. Wimberly
Secretarial Review Clerk

VIA EMAIL

Office of Hearring and Appeals
409 3rd Street SW, Suite 201
Washington, DC, 20024
Alj.alj@hud.gov

Tammie M. Parshall, Paralegal Specialist
1250 Maryland Avenue, SW, Suite 200
Washington, DC, 20024
tammie.m.parshall@hud.gov

Mark S. Smith, Esq.
Respondent
[redacted]
acruz.smithlawoffice@gmail.com

Curtis Van de Veld
Retained Counsel for Respondent Smith
curtis@vandeveld.attorney

William M. Doolittle, Esq.
Philip A. Kesaris, Esq.
Government Counsel
U.S. Department of Housing and Urban Development
1250 Maryland Avenue, SW, Suite 200
Washington, EC, 200024
William.m.doolittle@hud.gov
Philip.a.kesaris@hud.gov