

UNITED STATES OF AMERICA  
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
BOARD OF CONTRACT APPEALS  
WASHINGTON, D.C.

In the Matters of:

NELL WITT,  
LARRY A. CARTER,  
CHARLES FORBUSH,  
AGNES COWAN, and  
CHARLES HAGER,

Respondents.

HUDBCA Nos. 91-5954-D77  
91-6203-D92  
91-6204-D93  
91-6205-D94  
91-6206-D95

For the Respondents:

Vincent A. Sikora, Esq.  
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For the Government:

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**DETERMINATION BY ADMINISTRATIVE JUDGE TIMOTHY J. GRESZKO**

February 5, 1993

**Statement of the Case**

By letter dated March 19, 1991, Nell Witt was notified by Raymond A. Harris, Regional Administrator, Atlanta Regional Office, U.S. Department of Housing and Urban Development ("HUD," "Department," or "Government"), that a twelve-month Limited Denial of Participation ("LDP") was being imposed on her because she had refused to take action to recover \$12,767 in legal and travel costs which allegedly had been improperly paid for legal services rendered on behalf of the Executive Director and board members of the

Bristol Tennessee Housing Authority ("BTHA"). The letter stated that the LDP would take effect on the date of the letter and would prohibit Witt's participation in programs administered by the Assistant Secretary for Public and Indian Housing, including, but not limited to, the public housing programs. The letter concluded that cause for the imposition of an LDP existed under 24 C.F.R. §§ 24.705(a)(2) and (4). The LDP was affirmed by Harris by letter dated June 19, 1991. Witt made a timely request for a hearing on the propriety of the LDP.

By letters dated September 5, 1991, Michael B. Janis, General Deputy Assistant Secretary, U.S. Department of Housing and Urban Development, notified Larry A. Carter, Charles Forbush, Agnes Cowan, and Charles Hager (along with Witt individually as "Respondent" and collectively as "Respondents"), that HUD intended to debar them for a period of thirty months from March 19, 1991,<sup>1</sup> from further participation in primary and lower-tier covered transactions, as either participants or principals at HUD and throughout the Executive Branch of the Federal Government, including participation in any capacity in the public housing and Section 8 programs, and from participating in procurement contracts with HUD. Witt, Carter, Forbush, Cowan and Hager had all been previously subject to the imposition of an LDP by HUD, and their LDPs were subsequently affirmed.

The proposed debarments are based on allegations that Respondents: (1) violated the BTHA's Annual Contributions Contract with HUD by utilizing housing authority operating funds for expenses related to the defense of their LDPs; (2) refused to take action to recover the ineligible expenditures; (3) continued to authorize and benefit from the continued expenditure of public housing funds to pay legal expenses in connection with the LDP actions; (4) violated their individual LDP sanctions by continuing to participate in public housing programs as members of the Board of Commissioners of the BTHA, or as Executive Director in the case of Carter; and (5) conducted business with a person (Carter) who had been excluded from participating in HUD programs. The letters from the General Deputy Assistant Secretary stated that the alleged failures and violations constitute cause for debarment under 24 C.F.R. §§ 24.305(b), (c), (d), and (f). The letters also stated that Respondents were immediately suspended from participation in programs of the Department, pursuant to 24 C.F.R. § 24.405(a)(2), pending the outcome of the proposed debarment action, to protect the public interest.

Respondents made timely requests for a hearing. The LDP and debarment cases were consolidated, and a hearing was conducted in Bristol, Tennessee. This determination is based upon the consideration of the entire record in this case.

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<sup>1</sup>These debarments supersede LDPs imposed on Carter, Forbush, Cowan and Hager on March 19, 1991. See 24 C.F.R. § 24.504(a)(2).

**Findings of Fact**

1. Larry Carter, at all times relevant to this action, was the Executive Director of the BTHA. His duties were to supervise the day-to-day operations of the BTHA, to maintain the records of the BTHA, and to perform other tasks as assigned by the BTHA Board of Commissioners. Nell Witt was the Chairwoman and Chief Executive Officer of the BTHA. Charles Forbush, Agnes Cowan, and Charles Hager were Commissioners of the BTHA. The Chairwoman and Commissioners were appointed officials of the City of Bristol, Tennessee, who received no compensation for their services. Carter was a paid employee of the BTHA. The Chairwoman and Commissioners were voting members of the BTHA. Carter generally served as Secretary to the Board of Commissioners, and, as such, attended meetings of the Board and prepared the minutes of the meetings. Carter was not a voting member of the Board. Respondents were removed from their positions by the Mayor of Bristol, Tennessee, shortly after the suspensions and proposed debarments were imposed. (Tr. pp. 458, 548; Resp. Exh. 70).

2. The BTHA and HUD are parties to Consolidated Annual Contributions Contract ("ACC") No. A-3076, as amended. By the terms of that contract, HUD makes annual monetary contributions to the BTHA for the development and maintenance of public housing. Part 2 of the ACC contains the following relevant terms and conditions:

Sec. 401. General Depository Agreement and General Fund

\* \* \* \* \*

(B) All monies . . . received by or held for account of the Local Authority in connection with the Projects . . . shall constitute the "General Fund."

\* \* \* \* \*

(D) the Local Authority may withdraw monies from the General Fund only for . . . (2) the payment of Operating Expenditures, . . . (4) other purposes specified in this Contract, and (5) other purposes specifically approved by the Government.

Sec. 406. Operating Receipts and Expenditures, Reserves, and Residual Receipts.

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(B) "Operating Expenditures" with respect to each Project, shall mean all costs incurred by the Local Authority for administration, maintenance, establishment of reserves . . . and other costs and charges (including but not limited to, payments in lieu of taxes and operating improvements) . . . which are necessary for the operation of such Project in such a manner to provide decent, safe, and sanitary dwellings . . . .

Sec. 407. Operating Budgets and Control of Operating Expenditures.

(A) The term "Operating Budget" shall mean a realistic estimate of the Operating Expenditures to be incurred in connection with the prudent operation

of any project during a specified period, broken down according to classification of accounts prescribed by the Government.

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(C) Not later than one hundred fifty days nor later than ninety days before the expiration of the Fiscal Year covered by any approved operating budget for any project, the Local Authority shall submit to the Government for approval a proposed Operating Budget for the next Fiscal Year for such Project, which upon approval by the Government shall govern the operation of such Project for such Fiscal Year.

\* \* \* \* \*

(E) The Government will promptly approve each proposed Operating Budget, if the plan of operation and the amounts included therein are reasonable. Reasonableness of a proposed Operating Budget shall be determined in the light of the necessity for (1) incurring the proposed Operating Expenditures in the efficient and economical operation of the Project . . . .

\* \* \* \* \*

(H) The Local Authority shall not (1) at any time . . . incur any Operating Expenditures . . . except pursuant to and in accordance with an approved Operating Budget . . . nor (2) during any Fiscal Year or other budget period, incur . . . any Project expenditures in excess of the amounts included in approved Operating Budgets for Controlled Accounts as may be specified by the Government . . . . (Govt. Exh. 86).

3. On April 27, 1990, HUD issued an LDP to Respondent Carter, asserting as grounds for the LDP that Carter had not provided HUD with records which the Department sought relative to an investigation involving allegations that the BTHA had violated Title VI of the Civil Rights Act of 1964, and that Carter had interfered with that investigation. The LDP alleged that Carter's acts were in violation of §§ 310 and 311 of the ACC and HUD regulations at 24 C.F.R. Part 1. The effect of the sanction was to prohibit Carter from participating in HUD public housing programs under the Assistant Secretary for Public and Indian Housing for a period of one year, from April 27, 1990 through April 26, 1991. The sanction was upheld by this Board on April 5, 1991. *See Larry Carter*, HUDBCA No. 90-5301-D70 (Apr. 5, 1991).

4. On May 1, 1990, Respondent Carter filed a Complaint for Temporary Restraining Order and Temporary and Permanent Injunction against HUD and against certain HUD officials in the United States District Court for the Eastern District of Tennessee. The purpose of this legal action was to obtain injunctive relief with respect to the Carter LDP. The complaint stated, in part, that by reason of HUD's actions, Carter's employment had been unlawfully terminated by HUD. (Govt. Exh. 2).

5. On May 2, 1990, a check was issued to Carter from the BTHA general fund in the amount of \$120.00 for reimbursement for the filing fee incurred in filing the complaint in the United States District Court against HUD and certain HUD officials. (Govt. Exh. 20; Tr. p. 165).

6. On May 2, 1990, HUD sent a letter to the members of the BTHA Board of Commissioners informing them of the issuance of the LDP against Carter. The letter also stated that HUD did not have the power to remove Carter from his position as Executive Director, but failure by the Board to take action against Carter could result in future funding reductions. The letter also stated that if the Board chose to take action against Carter, the Board should consult with an attorney to assure that all state and federal requirements were met, including due process requirements for such removal. (Resp. Exh. 104).

7. On May 4, 1990, the United States Attorney filed a response to Carter's complaint in the United States District Court. The response stated, among other things, that Carter's complaint should be dismissed because Carter had failed to exhaust his administrative remedies. The response further stated that "[Carter] will suffer no immediate harm in pursuing his administrative remedies since his employment and resulting wages are not restricted by the LDP. They are controlled by the Board of the Bristol Tennessee Housing Authority." (emphasis supplied). Respondents apparently understood this representation as meaning that Carter could continue to perform his duties as Executive Director of the BTHA during the pendency of the LDP. (emphasis supplied) (Resp. Exh. 34); (Tr. p. 562).

8. On May 4, 1990, a hearing was held, and on May 7, 1990, the United States District Court entered an initial order which denied Carter's request for injunctive relief. (Resp. Exh. 32A).

9. On May 4, 1990, an article appeared in the *Bristol Herald Courier* which accurately quoted Donnie Murray, HUD counsel, as saying that:

[t]he LDP sanction prohibits the person from doing business with HUD over a 12-month period. [When] [a]sked what a sanction will mean, Murray said "it will not have much immediate impact but, long-term, it could affect their funding, what goes into their budget." (Resp. Exh. 6; Tr. pp. 309-10 ).

10. On May 5, 1990, an article appeared in the *Bristol Herald Courier* which quoted Murray as stating that:

"the sanction will not immediately affect Carter but may later affect programs." The same article also quotes Murray as stating that:

"the sanction is a ban against government participation in new contracts with the housing authority, although current programs will be paid. . . We are saying that we don't want to do business with Carter because of the fact that he won't allow us access to records we feel we have a right to. . . It is certainly a threat to his job. The Board could choose to fire Carter by going through the correct procedures. If it does not, the fact that Carter has been sanctioned will be taken into account when new programs or the budget comes up . . . Carter will be paid at least until the matter is

settled, but if the sanction stands and Carter remains director of the housing authority, HUD officials could choose not to approve his salary. (Resp. Exh. 7).

11. The newspaper articles of May 4 and 5, 1990, supported Respondents' beliefs that Carter could continue to perform his duties as BTHA Executive Director during the pendency of the LDP. (Tr. pp. 283-287; 384-88; 463-65; 562-68).

12. On May 8, 1990, the Board of Commissioners of the BTHA met and voted to join Carter in his Federal lawsuit. The Board voted to utilize BTHA funds to reimburse Carter for any legal expenses that he incurred for the defense of his LDP. (Govt. Exh. 3).

13. On May 16, 1990, Carter filed an amended complaint in the United States District Court. The amended complaint added Respondents Witt, Hager, Cowan, and Forbush, in their capacity as members of the BTHA Board of Commissioners, as plaintiffs to the lawsuit. (Resp. Exh. 31).

14. On June 1, 1990, HUD issued LDPs to Respondents Forbush, Cowan, Witt, and Hager, asserting as grounds for the sanctions that they had acted improperly by impeding a Departmental investigation which was being conducted under Title VI of the Civil Rights Act. The effect of the sanctions was to prohibit them from participating in programs administered by the HUD Assistant Secretary for Public and Indian Housing, including but not limited to the public housing program, for a period of one year, from June 1, 1990 through May 31, 1991. The sanctions were upheld by this Board on April 22, 1991. See *Nell Witt, Charles Hager, Charles Forbush, and Agnes Cowan*, HUDBCA Nos. 90-5321-D82, 90-5322-D83, 90-5323-D84, 90-5324-D85 (Apr. 22, 1991).

15. By letter dated July 11, 1990, addressed to the Honorable John Gaines, Mayor, City of Bristol, Tennessee, Raymond A. Harris, HUD Regional Administrator, Atlanta Regional Office, informed Gaines, in relevant part, that:

This is in response to Frank Clifton's letters of June 7, and July 6, 1990, in which an outline of the parameters of the LDP issued to the members of the Board of Commissioners of the Bristol Tennessee Housing Authority and additional information concerning HUD's charges was requested. An LDP goes into effect immediately upon issuance and prevents the individual from participating in HUD public housing activities. However, the intent of the LDP is not to be punitive against the individual, but to protect the HUD program. HUD also has no desire to jeopardize the employees of the Housing Authority, the tenants, or other third parties.

Therefore, the members of the Board of Commissioners of the Housing Authority may not participate in HUD programs administered by the Assistant Secretary for Public and Indian Housing. However, during the period of time that may be reasonably required to effect removal of the Commissioners, they may continue to take such actions (and only such actions) as may be necessary to assure

that tenants and housing authority employees continue to receive the compensation and benefits to which they are entitled and to maintain the housing authority projects as decent, safe and sanitary. No additional or affirmative action such as a board resolution affecting the housing authority should take place other than to comply with the above requirements.

Attached is a copy of the LDP, which itemizes the charges against the Board members. There will be no further charges provided. The Tennessee statute provides for the removal of the Commissioners within fifteen (15) days after receipt of the charges. . . . [S]ince you were chosen as the new Mayor on July 3, 1990. . . we are expecting action by you on this issue by July 18, 1990.

It is most important that you and the City Council appreciate the gravity of this situation. The Department views the violations of the provisions of the Annual Contributions Contract (ACC) and Title VI of the Civil Rights Act of 1964 by the Board of Commissioners in a most compelling context. We will not be delayed or deterred from arriving at a timely resolution of this situation. Should the City delay in resolving this problem, the Department will find the Housing Authority to be in substantial default, the commissioners will be subject to suspension and we will seek immediate control over all assets of the Housing Authority and the Administration of all activities of the Housing Authority including the Section 8 program. As Mr. Carter was previously informed, it is important that the person providing legal advice to the City in this matter not underestimate the extent of the Department's authority in resolving violations of this magnitude by the Housing Authority Executive Director and Board of Commissioners. (Govt. Exh. 75; Resp. Exh. 96).

Gaines was surprised by the letter, because it appeared, in his opinion, to permit the housing authority to operate normally notwithstanding the imposition of the LDP sanctions. (Tr. p. 345).

16. On June 11, 1990, Carter was issued a check for \$397.04 from the BTHA general fund for reimbursement of the cost for a trip to Atlanta to attend a meeting at HUD related to his LDP and to meet with Turner Network Television regarding satellite programs. (Govt. Exh. 20).

17. By letter dated July 11, 1990, Carter forwarded to the HUD Knoxville Office an unsigned copy of the BTHA's Operating Budget for fiscal year 1991. The letter stated that because of uncertainty with respect to the HUD sanctions, the housing authority attorney had advised the Board to delay approval of its operating budget. (Resp. Exh. 124).

18. On July 16, 1990, the BTHA paid a bill from Richard W. Pectol & Associates, P.C., a law firm, which included \$7,122.00 charged in legal fees and expenses related to "HUD." An audit review determined that these legal services related to the LDP charges. The bill also charged \$369.00 for travel by an attorney in the firm to a conference at which

Carter's LDP was discussed. The expenses were paid with funds from the BTHA general fund account. (Govt. Exh. 20; Tr. p. 165).

19. On July 19, 1990, HUD filed in the United States District Court a Motion to Dismiss, or, in the alternative, Motion for Summary Judgement. The United States Attorney filed a memorandum in support of that motion which stated, among other things, that:

Plaintiffs are not suffering irreparable injury due to HUD's sanctions. All plaintiffs continue to hold their positions and HUD has told Mr. Carter that he can continue to be paid until such time as he can be removed in accordance with the due process requirements under Tennessee law. As none of the sanctioned individuals are employed by HUD, HUD does not have the ability to remove them from their positions.

The motion filed by the U.S. Attorney also quoted the Harris letter dated July 11, 1990, which stated that the commissioners "may continue to take such actions (and only such actions) as may be necessary to assure the tenants and the housing authority employees continue to receive the compensation and benefits to which they are entitled and to maintain the housing authority projects as decent, safe, and sanitary." The United States District Court denied the request for injunctive relief on August 6, 1990, and stayed further action on November 15, 1990 "pending the outcome of the administrative proceedings and further order of this Court." (Govt. Exh. 4; Resp. Exhs. 31, 32B).

20. By memorandum dated July 24, 1990, Gaines informed Witt, Hager, Cowan Forbush and HUD that he would conduct a hearing on August 6, 1990, to consider whether the commissioners should be removed from office under Tennessee law. The hearing was held and on September 13, 1990, and subsequent to that hearing, Gaines made a formal determination that he would not remove the commissioners from office. His determination states, in relevant part, that:

Under all of the circumstances, I believe it would be improvident for me to consider removal of the Commissioners at a time when the underlying legal issues are pending in administrative proceedings within HUD and in the federal court in Greenville. Accordingly, at this time I will defer making any decision in this matter until such time as the proceedings in HUD and the federal court have been exhausted. (Resp. Exh. 80).

21. By letter dated July 24, 1990, Raymond C. Buday, Jr., HUD Regional Counsel, Atlanta, wrote to Vincent Sikora, the BTHA attorney, seeking information with respect to legal fees paid by the BTHA. The letter sought information to enable Buday to determine whether funds originating with the Federal government were being used to prosecute lawsuits against the Government. (Govt. Exh. 13).



22. Richard B. Barnwell, Manager, HUD Knoxville Office, informed Carter by letter dated August 3, 1990, which was addressed to Carter, that:

You have been advised through correspondence from the Atlanta Regional Office, that the sanctioned individuals can take actions absolutely necessary to ensure the decent, safe, and sanitary character of the housing development operated by the Authority. Based on that advice, it is requested that the Board approve the proposed Operating Budget for the fiscal year ending September 30, 1991. An original and two copies of the budget should be signed and submitted to reach this Office as soon as possible.

If a Budget Revision for fiscal year ending September 30, 1991, is needed, that revision must be received by the Field Office no later than September 1, 1990.

If you have questions, contact Ann Arrington at (615) 549-9405. (Govt. Exh. 76).

23. Carter replied to the Barnwell letter by letter dated August 14, 1990, requesting clarification of what was "absolutely necessary to ensure the decent, safe, and sanitary character of the housing development operated by the Authority." Barnwell replied by letter dated October 12, 1990, addressed to Witt, which stated, among other things, that the Board could take only those actions necessary to maintain the housing project in decent, safe and sanitary condition, and that Carter was not to participate in the public housing program in any capacity. Although this letter indicates on its face that a courtesy copy was sent to Carter, there is no evidence in this record that Carter or any other commissioner received a copy. (Govt. Exhs; 77, 78).

24. On various dates during the pendency of the LDPs, Carter took a number of actions on behalf of the BTHA in matters involving the Department's public housing program. These actions included the submission of a budget, signing contracts and notices to tenants, correspondence with HUD, travel to housing-related educational programs, and numerous other activities. (Govt. Exhs. 42, 44, 59, 63, 65, 71, 88).

25. On various dates during the pendency of the LDPs, the BTHA Board of Commissioners met and took actions in matters involving the Department's public housing program. These actions included the signing of checks, approval of travel, discussing issues and voting on matters related to the public housing program, and other similar activities. (Govt. Exhs. 37, 38, 39, 40, 43, 74; Tr. pp. 165, 244).

26. On August 27, 1990, Carter wrote a letter to Buday, in response to Buday's letter of July 24, 1990. Carter stated that, in his opinion, the housing authority had properly expended funds to defend its rights and that the funds had not been used to pay for individual lawsuits. (Govt. Exh. 14).

27. Buday responded to Carter's August 27, 1990 letter by letter dated September 20, 1990. The letter stated that "Housing Authority funds may not be used to defend your, or any commissioner's, LDP action. The LDPs are personal to the individuals and are not obligations of the Housing Authority. Any Housing Authority funds that have been expended on any of the LDP actions must be immediately reimbursed to the Housing Authority." (emphasis in original). The letter requested documentation showing that housing authority funds had not been used to defend the LDP actions or to bring a lawsuit against HUD, or if housing authority funds had been so expended, that they had been reimbursed to the housing authority. (Govt. Exh. 15).

28. On September 13, 1990, William McClister, Director-Housing Management Division of HUD's Knoxville Office wrote a letter to Carter concerning the BTHA budget. Information was requested concerning the prorations between Section 8 and public housing and whether the Section 8 program would be operating within the income available for administrative costs. This letter was written in response to a BTHA operating budget submitted by the Authority for Fiscal Year 1991. Among the expenditures contained in that budget was \$50,000 dedicated to "Legal Expense." Though not detailed in the operating budget itself, Carter did inform Sidney McBee, Chief-Assisted Housing Management Branch of the HUD Knoxville Office, of the various matters which were contemplated by the Authority to be covered in that category, by letter dated August 22, 1990. (Resp. Exh. 83). In that letter, Carter informed McBee that one of the legal matters involving BTHA was "[d]efending against sanctions issued by HUD." The September 13 letter from McClister to Carter contained no actual or proposed modifications to the legal expenses portion of the operating budget. Apart from modifications to specific items such as dwelling rentals and administrative salaries, the operating budget was approved as submitted. (Resp. Exh. 79).

29. On September 28, 1990, a check was issued from the BTHA general fund to Richard W. Pectol & Associates, P.C. for \$8,125.39 out of a billing for \$16,902.21 for services rendered between August 1, 1990 and September 20, 1990. Of that billing, \$9,706.00 was for "HUD." This was subsequently determined by audit to be costs related to the LDPs. The remaining amount of the LDP costs was an account payable. (Govt. Exhs. 20, 90; Tr. p. 165).

30. Also on September 28, 1990, a check was issued from the BTHA general fund to Richard W. Pectol and Associates, P.C. for \$14,656.04 of which \$1,836.00 was for "HUD." This was subsequently identified by audit as charges for legal services related to the LDPs. (Govt. Exh. 20; Tr. p. 165).

31. On October 1, 1990, Raymond A. Harris, Regional Administrator, HUD Atlanta Regional Office requested an audit from Kathryn Kuhl-Inclan, HUD Regional Inspector General for Audit, concerning the use of housing authority funds to defend LDP sanctions and to bring a lawsuit in the Federal District Court against HUD. (Govt. Exh. 19).

32. On October 4, 1990, Carter responded to Buday's letter of September 20, 1990. In his letter to Buday, Carter stated that "inasmuch as this is the first time we have been notified that Housing Authority funds cannot be used to defend against an LDP we are requesting a copy of any legal authority you have which would substantiate the Department's position." (Govt. Exh. 16; Tr. p. 614).

33. On October 9, 1990, the BTHA held a regular meeting, which was attended by Respondents Witt, Hager, and Cowan. Vincent Sikora, attorney to the BTHA and a member of the firm Richard W. Pectol & Associates, P.C., also attended the meeting and recommended that the Board of Commissioners adopt a resolution to provide legal representation to appeal HUD sanctions against Respondents. The resolution provided as follows:

WHEREAS Larry Carter, Nell Witt, Charles Hager, Charles Forbush and Agnes Cowan have received limited denials of participation (LDP) by HUD;

WHEREAS the actions of Larry Carter, Nell Witt, Charles Hager, Charles Forbush and Agnes Cowan, allegedly forming the basis for the HUD sanction appear to have been within the scope of each individual's office and employment with the Housing Authority;

WHEREAS each individual has appealed the sanctions, needs legal representation, and requested the Housing Authority's support;

WHEREAS there is clear legal authority that an employer is bound to indemnify its employees for all loss and injury sustained by the employee while discharging the duties of his employment;

THEREFORE, unless and until HUD shows clear and convincing legal authority to support its opposition, the Housing Authority shall provide legal representation to appeal the HUD sanctions against Larry Carter, Nell Witt, Charles Hager, Charles Forbush and Agnes Cowan.

Upon a motion made and seconded by Commissioners Cowan and Hager, the Board of Commissioners voted unanimously to adopt the resolution. (Govt. Exh. 38)

34. Buday wrote a letter to Carter dated October 18, 1990, and reiterated the Department's position that funds originating with HUD may not be used to defend against personal LDPs because the fees at issue had neither been approved in a budget submission nor approved by the HUD Regional Counsel, as required under the HUD Litigation Handbook 1530.1, Chapter 3. The letter also stated that the fees were not allowable under OMB Circular No. A-87, which is specifically applicable to the use of funds by local governments pursuant to 24 C.F.R. § 85.22. The letter stated that the individuals who have used monies originating with HUD to defend their personal LDPs must immediately

reimburse the housing authority for any funds so expended, and that if the housing authority has other funds and chooses to expend those funds to defend the LDP action, HUD would have no basis for objection. A courtesy copy of this letter was furnished to the Sikora, Witt, and Gaines. (Govt. Exh. 17).

35. Barnwell wrote a letter to Witt dated October 29, 1990, which stated that it was the position of the HUD Knoxville Office that no housing authority monies may be used to defend personal LDPs that have been brought against the BTHA Executive Director and the members of the Board of Commissioners. The letter further stated that use of BTHA operating funds for this purpose would constitute a violation of the ACC. (Govt. Exh. 84).

36. On November 7, 1990, Kuhl-Inclan issued her Review of Legal and Travel Costs of the BTHA ("audit report"). The audit report, which was sent to Carter, contains a finding that \$12,767.00 of BTHA funds had been used for ineligible expenditures. The audit report recommended that the BTHA record the \$12,767 as ineligible costs and that the BTHA recover the ineligible costs from the Executive Director and Board members who specifically benefitted from these improper expenditures. (Govt. Exh. 20).

37. On November 23, 1990, Harris sent a letter to Witt, enclosing the audit report, and instructing her to record the \$12,767 identified in the audit report as ineligible costs and to recover the ineligible costs from the Executive Director and/or Board members. The letter required a response within thirty days. A copy of the letter was sent to the individual Board members and to Sikora as the BTHA attorney. (Govt. Exh. 21).

38. On January 10, 1991, when no response was forthcoming from the BTHA with respect to Harris' November 23, 1990 letter, Harris sent a second letter to Witt requiring a response no later than January 18, 1991. A copy of that letter was sent to the Executive Director, Gaines, the individual Board members, and Sikora. (Govt. Exh. 22).

39. On January 17, 1991, Carter responded to the Harris letter of January 10, indicating that the expenses at issue had been recorded as ineligible expenditures. With regard to reimbursement of these funds, Carter stated that the BTHA had contacted the HUD Knoxville office and was awaiting consideration and a response from that office. (Govt. Exh. 23).

40. On February 8, 1991, Harris wrote to Witt, enclosing a copy of Carter's January 17, 1991 letter. Harris informed her that any response to the audit of the BTHA must be directed to him. Harris also stated that contrary to the assertions in Carter's January 17, 1991 letter, the HUD Knoxville office had not received anything from the BTHA concerning the audit. The letter again requested that the \$12,767 be reimbursed to the BTHA by those who authorized or benefitted from the expenditures. Harris also stated that if verification of the reimbursement is not received by February 19, 1991, he would initiate appropriate sanctions, including a recommendation for debarment from all federal programs. A copy of this letter was sent to Carter and Sikora. (Govt. Exh. 24).

41. By letter dated February 13, 1991, Sikora sent a claim to Barnwell which included the amounts at issue in this case; the claim was based on the legal theory that the BTHA was bound to indemnify Respondents for expenses related to their official acts. (Govt. Exh. 25).

42. On February 25, 1991, Harris responded to the BTHA's February 13, 1991 letter to Barnwell. Harris stated that he interpreted the BTHA's letter as a refusal by the BTHA to carry out his instruction to obtain reimbursement for the \$12,767 of ineligible expenditures. Harris also stated that he would proceed with such actions as may be necessary to obtain resolution of the findings and recommendations of the audit report. Respondents were furnished courtesy copies of this letter. (Govt. Exh. 26).

43. On July 9, 1991, Sikora rendered a legal opinion that Hager was entitled, under Tennessee law, to be reimbursed by the BTHA for certain legal fees related to his legal action against the Mayor of Bristol for reinstatement. That opinion indicated, *inter alia*, that under Tennessee law, a nonprofit corporation may pay a director's reasonable expenses in a legal proceeding in which he is a party because of his status as a director, if he conducted himself in good faith and reasonably believed his conduct was, at least, not opposed to the corporation's best interests. The conclusion in that opinion stated that due to a limitation of time, no opinion could be reached on the applicability of federal law or on an interpretation of the provisions of any contract or funding arrangement with HUD. That opinion also concluded that the BTHA may reimburse Hager's legal fees from non-HUD funds, if the Board believed that Hager acted in good faith, not in opposition to BTHA's best interest, and in fulfillment of his duties. (Resp. Exh. 46).

44. James E. Kinkead, a certified public accountant, has served as the BTHA's independent auditor since 1988. By agreement of the parties, Kinkead was deposed and his deposition entered into this record. Kinkead informed Carter by letter dated November 19, 1990 that the only "HUD-originated" funds received by the BTHA are public housing program funds and Section 8 program funds. In an audit report dated August 22, 1991, for the period ended September 30, 1990, Kinkead did not take exception to the BTHA's expenditure of the legal expenses at issue. Kinkead did not know at the time he performed the audit that the LDPs had been upheld by the HUD Board of Contract Appeals. Kinkead stated that the source of the funds at issue could not be determined, because several types of funds had been commingled in the BTHA general fund. In response to questioning, Kinkead stated that, in his opinion, costs resulting from a failure to comply with federal, state or local law would not be allowable. Kinkead was also familiar with the general rule that federal funds may not be used to bring suits against the federal government. (Deposition of James E. Kinkead dated February 24, 1992; Resp. Exhs. 39, 110, 112).

Discussion

Respondents Witt, Hager, Forbush and Cowan are "participants" and "principals" as those terms are defined in the Department's regulations, by virtue of their positions on the BTHA Board of Commissioners. 24 C.F.R. §§ 24.105(m) and (p). Respondent Carter is a "participant" because he was authorized to act on behalf of BTHA as its Executive Director. 24 C.F.R. § 24.105(m).

Applicable regulations provide that debarment may be imposed for:

(b) [v]iolation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program;

\* \* \* \* \*

(d) [a]ny other cause of so serious or compelling a nature that it affects the present responsibility of a person; or

\* \* \* \* \*

(f) material violation of a statutory provision or program requirement applicable to a public 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. 24 C.F.R. §§ 24.305(b), (d) and (f).

Applicable regulations further provide that an LDP may be imposed for:

(2) [i]rregularities in a participant's or contractor's past performance in a HUD program; or

\* \* \* \* \*

(4) [f]ailure to honor contractual obligations or to proceed in accordance with contract specifications or HUD regulations. 24 C.F.R. §§ 24.705(a)(2) and (4).

The Government bears the burden of demonstrating by a preponderance of the evidence that cause for debarment exists, and by adequate evidence that cause for suspension and an LDP exists. However, existence of a cause for debarment, suspension or LDP does not automatically require imposition of an administrative sanction. In gauging whether or not to sanction a person, all pertinent information must be assessed, including the seriousness of the alleged acts or omissions, and any mitigating circumstances. 24 C.F.R. §§ 24.115(d), 24.314(a) and 24.320(a). The Respondents bear the burden of proving the existence of mitigating circumstances. 24 C.F.R. § 24.313(b)(4).

Underlying the Government's authority not to do business with a person is the requirement that agencies only do business with "responsible" persons and entities.

24 C.F.R. § 24.115. The term "responsible," as used in the context of LDP, suspension and debarment, is a term of art which includes not only the ability to perform a contract satisfactorily, but the honesty and integrity of the participant as well. 48 Comp. Gen. 769 (1969). The test for whether a debarment or LDP is warranted is present responsibility, although a lack of present responsibility may be inferred from past acts. *Schlesinger v. Gates*, 249 F.2d 111 (D.C. Cir. 1957); *Stanko Packing Co. v. Bergland*, 489 F.Supp. 947, 949 (D.D.C. 1980). Debarments and LDPs shall be used only to protect the public interest and not for purposes of punishment. 24 C.F.R. § 24.115(b).

The Government asserts that the debarments of Respondents Carter, Hager, Forbush and Cowan are justified because: (1) Respondents violated the terms of their individual LDPs by participating in various capacities in the public housing program after the LDPs were imposed; and, (2) after HUD made the determination that BTHA funds could not be used to defend the LDP actions, they refused to reimburse the BTHA for these expenditures. With respect to Respondent Witt, the Government asserts that an LDP sanction is warranted because Witt refused to take action to recover the expenses at issue.

The Government argues that debarments are warranted because each Respondent knowingly participated in BTHA activities in various capacities, and that this participation violated the terms of the 1990 LDPs. The terms of those LDPs prohibited each Respondent from participating in HUD's public housing programs. Carter's LDP was in effect from April 27, 1990 to April 26, 1991, and the LDPs imposed on all other Respondents were in effect from June 1, 1990 to May 30, 1991. The Department asserts that, during the period that Carter's LDP was in effect, Carter signed lease certifications and notices to tenants, met with public housing applicants, participated in BTHA Board of Commissioners Meetings, submitted the BTHA operating budget to HUD for approval, and attended a housing conference in New Orleans, Louisiana using BTHA funds. The Government also asserts that Respondents Forbush, Cowan and Hager voted at BTHA Board of Commissioners meetings, voted to reimburse Hager for attorneys' fees incurred in litigation against the City of Bristol, and approved travel for Carter to attend the conference in New Orleans.

Respondents argue that their collective understanding of the scope of the LDP sanctions was formed in part by the representations of various high-level Government officials, including HUD counsel, the Assistant United States Attorney, and the HUD Atlanta Regional Administrator. Respondents further argue that based on these representations, they reasonably believed that the acts which they performed during the period of the LDPs were permissible. I agree with Respondents' position on this issue.

Shortly after he was notified of the LDP, Carter filed suit in the United States District Court to enjoin the Department from enforcing the LDP. Guy Blackwell, U.S. Attorney for the Eastern District of Tennessee, filed a response on behalf of the United States, in which he stated that Carter was not in danger of suffering immediate harm since, "his employment and resulting wages [were] not restricted by the LDP." Carter testified that, during the course of his litigation in federal court, Blackwell stated in open court that, "[the LDP]



would have no effect on [his] job or [his] salary." Carter reasonably interpreted Blackwell's statements to mean that he could continue in his role as Executive Director of BTHA, until he was removed from office, without violating the terms of the LDP. Carter was not removed from office until September, 1991. Carter's interpretation of the impact of the LDP was also supported by the statements which HUD counsel and the U.S. attorney made to the *Bristol Herald Courier*, which inaccurately and incompletely characterize the impact of the LDPs. Carter's interpretation was also bolstered by the fact that various HUD officials continued to communicate directly with him on matters involving HUD's public housing program during the term of his LDP. Under the totality of the unusual circumstances of this case, I find that Carter and the other Respondents reasonably believed that Carter could continue to perform the duties of BTHA Executive Director during the pendency of his LDP. I further find that Carter's continued performance of these duties was not a knowing and willful violation of his LDP, and does not establish a lack of present responsibility.

With respect to the remaining Respondents, the Government asserts that they acted beyond the scope of their authority, in contravention of the LDPs. I disagree with this assertion. HUD Regional Administrator Harris' letter of July 11, 1990 to the Mayor of Bristol, greatly diminished the scope of the LDPs to the extent that it states that Respondents were allowed to take such action as was necessary to ensure that BTHA housing was maintained as "decent, safe and sanitary," and that Respondents were allowed to "continue to take such actions as may [have been] necessary to assure the tenants . . . continue to receive the compensation and benefits to which they [were entitled]." This letter sets no discernible limitations on their actions, because all operating expenditures under the ACC, by definition, must be necessary for the provision of decent, safe, and sanitary dwellings. *See* ACC Section 406(B). The letter also authorized Respondents wide latitude to take any action necessary to provide the benefits to which BTHA tenants were entitled. Moreover, the letter permitted Respondents to participate in HUD programs "during the period of time that may be reasonably required to effect [their] removal." As Respondents were not removed from office until September, 1991, it follows that their participation in HUD programs prior to September, 1991 was proper. For the foregoing reasons, I find that Respondents' participation in HUD programs as BTHA Commissioners during the pendency of their LDPs does not establish a lack of present responsibility.

The Government next argues that the sanctions imposed on Respondents are warranted for refusing to either repay or seek recoupment of expenses paid by the BTHA for expenses related to the defense of Respondents' LDPs and for other legal actions taken by Respondents against the Department. The Government does not argue that cause for debarment exists because Respondents authorized payment of the expenses at issue, but the Government narrowly focuses on the fact that Respondents refused to seek the recovery of these expenses after issuance of an audit report which found these expenditures to be "ineligible."

Respondents contend that they were not required to seek recoupment of these expenses because: (1) Respondents' legal actions involved matters within the scope of their office and employment with the BTHA; (2) the BTHA is required to indemnify its employees



for all loss and injury sustained by its employees while discharging the duties of their employment; and (3) the expenses were authorized by HUD in approved operating budgets. Respondents also take the position that payment of these expenses was proper because the funds were not "HUD-originated." For the reasons set forth below, I do not find Respondents' position persuasive.

Section 990.112 of Title 24, Code of Federal Regulations, incorporates by reference Office of Management and Budget ("OMB") Circular No. A-87, which provides explicitly that "[c]osts resulting from violations of or a failure to comply with federal, state, local laws and regulations are unallowable." The 1990 LDPs were upheld upon a finding that Respondents violated Departmental regulations at 24 C.F.R. § 1.6 concerning HUD access to housing authority books and records. *See Larry Carter*, HUDBCA No. 90-5301-D70 (Apr. 5, 1991); *Nell Witt, Charles Hager, Charles Forbush, and Agnes Cowan*, HUDBCA Nos. 90-5321-D82, 90-5322-D83, 90-5323-D84, 90-5324-D85 (Apr. 22, 1991). The expenses at issue were paid, in large part, from the BTHA general fund, which is the account into which all HUD-originated funds are deposited. Considering that fact, a presumption is raised that the expenses at issue were partially paid with HUD-originated funds, because of the commingling of HUD-originated funds in that account. The burden of persuasion shifts to Respondents to demonstrate otherwise. There is no evidence in this record that the BTHA separately accounted for any of the HUD-originated funds that had been deposited into the general fund. In the absence of such evidence, I conclude that the expenses at issue were in fact partially paid with HUD-originated funds, that these expenses arose from a failure to comply with HUD regulations, and that payment was in violation of 24 C.F.R. § 990.112 and OMB Circular No. A-87. *See Oakland Board of Commissioners v. U.S. Department of Labor*, 853 F.2d 439 (6th Cir. 1988).

Likewise, I do not find the approval of legal expenses in the BTHA Operating Budget to constitute a defense to this action. Under both the ACC and applicable HUD regulations, the BTHA is required annually to submit an operating budget to HUD, subject to HUD approval. *See* ACC § 407; 24 C.F.R. § 990.112. As a general rule, the BTHA may only make operating expenditures pursuant to and in accordance with an approved operating budget. ACC § 407(H). Although the expenses at issue were incurred, in large part, in FY 1990, Respondents argue that they obtained budget approval for these expenses in FY 1991. This defense is not persuasive because such approval, if any, was timely withdrawn by Barnwell's letter to Witt of October 29, 1991. Moreover, the approval of legal expenses as a category of expense in a housing authority operating budget cannot be reasonably interpreted to constitute approval of expenses which are not allowable under published HUD regulations. The publication of the cited regulation put Respondents on notice of the fact that the expenses at issue were not allowable. *See* 24 C.F.R. § 990.112; 44 C.F.R. § 1507; *New England Tank Industries of New Hampshire Inc.*, ASBCA No. 26474, 88-1 BCA ¶ 20,395 citing *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947) and other cases. For the foregoing reasons, I conclude that the expenses at issue were not incurred pursuant to an approved budget, and that payment of these expenses, accordingly, violated section 407(H) of the ACC.

While there is evidence that Respondents' actions were based at least in part upon legal advice that payment was proper, I do not find Respondents' reliance on this advice substantially mitigating for several reasons. First, the legal advice in evidence was general in nature, was based on state law, and did not express an opinion on federal law. The fact that the BTHA may be legally required under state law to bear these expenses does not establish, *ipso facto*, that the expenses could be paid from the BTHA general fund, which included federal funds. Second, there is no evidence that Respondent's were advised that it was proper to pay these expenses from the BTHA general fund. Third, the legal opinion provided Witt by Buday in his letter dated October 18, 1990, was definitive, in that it outlined the budget approval requirements of the ACC, and the cost limitations set forth in OMB Circular No. A-87. Upon receiving that letter, and in accordance with the Board's resolution of October 9, 1990, Respondents had a number of reasonable options available to them. Respondents could have accepted the Department's position on this issue. Respondents also could have sought a definitive legal opinion from Sikora that addressed federal law and the ACC. Respondents also could have familiarized themselves with the authorities cited in Buday's letters and made an independent determination of their rights under the ACC and federal law. It also appears that Respondent's could have obtained a more definitive opinion from their independent auditor, who when fully apprised of the underlying facts, also expressed the opinion that the legal expenses were of questionable allowability. There is no evidence which would indicate that Respondents made any substantial efforts to resolve this issue. It appears on this record that Respondents were willing to follow very general advice, in the face of very specific and conflicting advice from Buday and other high-level HUD officials, and that they failed to take HUD's protestations seriously.

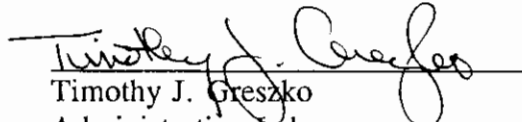
Assuming, *arguendo*, that Respondents reasonably relied on Sikora's legal advice, this reliance became unreasonable after January 17, 1991, the date upon which Carter informed Harris in writing that the expenses at issue had been recorded as ineligible expenditures. Once the expenditures had been recorded as ineligible in the BTHA's books, Respondents were duty bound from that date forward, as custodians and trustees of the funds, to take whatever steps were necessary to assure that any ineligible funds were returned to the BTHA. There is no evidence in this record that any funds were returned to the BTHA, and the failure to return ineligible funds constitutes a breach of that trust. This failure to act upon the audit recommendations for an inordinate period of time supports the need for the imposition of an LDP under 24 C.F.R. §§ 24.705(a)(2) and (a)(4), and justifies the imposition of debarment under 24 C.F.R. §§ 24.305(b)(1) and (f).

A debarment sanction must be for a period commensurate with the seriousness of the cause and generally should not exceed three years. 24 C.F.R. § 24.320(a)(1). While I have found that Respondents' actions on behalf of the BTHA during the pendency of their 1990 LDPs do not establish a lack of present responsibility, the failure to return the funds at issue to the BTHA is indeed serious, because it involves the diversion of funds from more appropriate uses under the housing program of the BTHA, and because Respondents did not sufficiently heed numerous warnings from HUD. Respondents appear to have been

motivated primarily from feelings of anger and mistrust, as opposed to careful and considered judgement. This extended lapse of considered judgement in a matter involving housing authority funds, in the absence of more substantial mitigation, demonstrates a lack of present responsibility and establishes cause for the imposition of lengthy sanctions.

### Conclusion

For the foregoing reasons, I conclude that the imposition of the LDP upon Nell Witt was proper, and that Larry Carter, Charles Forbush, Agnes Cowan and Charles Hager shall be debarred from this date up to and including September 19, 1993.

  
Timothy J. Greszko  
Administrative Judge