

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

In the Matter of:

CAROLYN JANE GLENN SHACKELFORD,

Respondent.

HUDALJ 02-2010-DB(LDP)

Date: August 14, 2002

Tony Glenn, Esq.
For the Respondent

Clara J. Delay, Esq.
For the Government

Before: WILLIAM C. CREGAR
Administrative Law Judge

RECOMMENDED DECISION ON LIMITED DENIAL OF PARTICIPATION

This proceeding arose pursuant to 24 C.F.R. Part 24 as a result of the October 10, 2001, imposition of a Limited Denial of Participation ("LDP") for one year by the Director, Office of Public Housing, of the Department of Housing and Urban Development's ("HUD's") Alabama State Office in programs administered by the Assistant Secretary for Public and Indian Housing. On October 19, 2001, Respondent appealed the LDP and requested a hearing. The hearing was held in Birmingham, Alabama on February 12-14, 2002. Post-hearing briefs were filed on or before April 26, 2002. Accordingly, this case is ripe for decision.

Statement of the Case

Respondent Carolyn Jane Glenn Shackelford served as the Executive Director of the Hackleburg, Bear Creek, and Phil Campbell, Alabama Public Housing Authorities ("PHAs") for 15 years prior to the issuance of the LDP. The LDP effectively removed her from the position of Executive Director. HUD identified six causes for taking the action: 1) Entering into a contract for legal services without first obtaining HUD approval and failing to follow HUD procurement guidelines; 2) Submitting false payroll

information in the three housing authorities' operating budgets for fiscal years 1999-2001; 3) Disregarding HUD's repeated requests for information prior to a HUD limited management review in March 2001; 4) Failing to make a required inspection of a unit in response to a "Section 8" tenant's complaint; 5) Failing to supply HUD with information necessary to respond to a Congressional inquiry, and 6) Failing to supply information requested by HUD in June 2001.

Respondent asserts that the action is groundless, and that HUD issued the LDP in reprisal for her defaulting a contractor, Elbert Berryman - - Berryman Construction Company, Russellville, Alabama - - contrary to the wishes of the HUD Alabama State Office's Director of Facilities Management, Ed Sprayberry, and its Director of the Office of Public Housing, Mark Heaton. Having reviewed the record, I conclude that adequate evidence supports the issuance of the LDP.

Statement of Facts

1. Prior to her removal on October 10, 2001, Respondent Carolyn Jane Glenn Shackelford served 15 years as the Executive Director of three Alabama public housing authorities: Hackleburg; Bear Creek; and Phil Campbell. The three housing authorities are located in Northwestern Alabama and have a combined total of 150 public housing units and 53 "Section 8" units.¹ As the Executive Director of a public housing authority, Respondent was a "program participant." See 24 C.F.R. § 24.105.

2. The PHAs and HUD entered into Annual Contributions Contracts ("ACCs") that set forth the terms and conditions of the public housing program. Each ACC states that HUD shall administer the public housing program to provide decent, safe, and sanitary housing for eligible families and that the PHAs shall be governed by the ACC and all applicable statutes, executive orders, and regulations. PHAs are required to develop and operate each project to promote serviceability, economy, efficiency, stability, and the social well-being of the tenants. J. Ex. T.²

¹Section 8 units are privately owned rental properties subsidized by government rental assistance payments.

²Documents are identified as follows: "J. Ex." for joint exhibit (joint exhibits are both lettered and numbered); "Govt. Ex." for Government Exhibit; and, "Resp. Ex." for Respondent's Exhibit. References to the transcript pages are to "Tr." followed by page numbers. Findings of Fact referred to in the discussion section are abbreviated "F.F."

3. The October 10, 2001, LDP states six grounds for imposing the sanction:

A. You entered into a legal services contract for litigation on behalf of the Bear Creek and Hackleburg Housing Authorities on January 12, 2001, to obtain liquidated damages against Berryman Construction for failure to complete a modernization contract for projects AL09P081903-90 (Bear Creek), AL09P076904-90 (Hackleburg) and AL90P076905-93 (Hackleburg), all funded by HUD, within the contracted time. You agreed to a contingency fee of 50 percent of the net amount of any recovery after deduction and reimbursement to the Attorneys of costs and expenses. You failed to follow the procurement guidelines of both Housing Authorities. You made this contract without HUD approval, as required by regulations at 24 C.F.R. § 85.36. In addition, you failed to request approval of the litigation contract from the Assistant General Counsel, Southeast/Caribbean, as required by the HUD Litigation Handbook, HUD 1530.1, Paragraph 3-3 b (1), and (3).

B. For fiscal years 1999, 2000, and 2001, you provided operating budgets for Hackleburg, Phil Campbell, and Bear Creek. The operating budgets reflect the salaries approved by the Boards of Commission for each employee. However, payroll records for fiscal year ending March 31, 2001, reflect that an employee was paid a rate of \$29,988 for that year in spite of the fact that the budget approved a salary of \$40,416 for this employee. As the Executive Director, it is your responsibility to affirm that all information on the Schedule of Positions and Salaries (HUD Form 52566) is true and accurate. Your information on HUD Form 52566 that the employee was paid an amount higher than the actually received is a false claim, subject to prosecution.

C. As the Executive Director of the Housing Authority you have shown total disregard for the Department's repeated requests for information, in violation of Section 15 (B), Part A, Consolidated Annual Contributions Contract. Specifically:

HUD repeatedly attempted to notify you by leaving multiple messages on your work and home phones and on your fax machine that our office would be conducting a limited management review beginning on March 27, 2001. You did not respond. Finally, the night prior to the review, HUD called the Chairman of the Board of the Hackleburg Housing Authority, Danny Baker, who advised HUD that you would be at the office and to proceed with the review the next day. When the HUD employees arrived, you were not present for the review nor had you made arrangements for the files to be accessible for review, as required by the ACC. Some of the files were in locked cabinets and, therefore, inaccessible. Consequently, the Chairman of the Hackleburg Housing Authority, Mr. Baker, authorized the hiring of a locksmith firm. Even at that, not all file cabinets could be unlocked in order to give HUD access to the files. Upon your return to the Housing Authority on March 30, 2001, you filed a

police report in which you asserted that employees of HUD “broke into Housing Authority files.”

Your failure to have the files available and accessible in your absence and your filing of a police report as a result of your own failures, reflects unwillingness on your part to comply with Section 15 (C) of the Annual Contributions Contract between HUD and the Housing Authority (ACC) which states:

The United States Government, including HUD and the Comptroller General, and its duly authorized representatives, shall have full and free access to all HA offices and facilities, and to all books, documents, and records of the HA relevant to the administration of the projects under this ACC, including the right to audit and make copies.

D. On May 7, HUD representatives spoke with you by phone concerning complaints made to this office by ██████ Gravitt, a Section 8 tenant who had complained about the physical condition of her unit, including that she had raw sewage outside near her unit. During this phone call, two HUD employees requested that you make an inspection to determine whether the unit met housing quality standards. In response to the phone call, on the same day, you sent HUD a fax stating that you had contacted the owner of the unit and that he agreed to release Ms. Gravitt from her lease. You did not make the inspection. In a letter dated May 10, HUD reiterated our request that you provide a unit inspection report and a copy of the lease. Such an inspection is required by 24 C.F.R. 982.404 (a) (2) which specifies that the housing authority take “prompt and vigorous action to enforce the owner’s obligations.” HUD Public Housing Handbook, 7420.7, Paragraph 5-8c(i) requires an inspection in response to a tenant or landlord complaint. We requested that information again in another letter dated May 24, 2001. To date, you have failed to provide those documents.

E. On May 9, 2001, this office sent you a Congressional inquiry concerning the failure to provide assistance to an applicant for housing. HUD requested a written response. You submitted a fax on May 7, 2001, with handwritten notes that failed to address the concerns of the Congressman’s constituent. We wrote to you again on May 10, again requesting a written response, and again on May 24 in the same letter referenced in [d] above. To date, you have failed to respond to our requests for information.

F. During your review on June 6-7, we requested certain information that should have been readily available according to the Housing Authority of Hackleburg’s personnel policy; however, the information was not available when requested, nor could you provide it. Specifically:

You failed to provide the personnel records of the former maintenance

employees who quit during the past 6 months;

You did not provide copies of employee performance reviews;

You did not provide a leave record for [REDACTED] Knight, an administrative employee;

Further, you could not provide Board minutes adopting the Budget for the fiscal year ended March 31, 2001. As Secretary of the Board, it is your responsibility to take minutes of all board meetings, which should be bound and available for public inspection.

J. Ex. A.

4. In 1990, HUD provided the Bear Creek and Hackleburg Housing authorities with funds for the emergency modernization of wastewater treatment facilities. The funding was provided under the Emergency Modernization Program under which the funds were to have been expended within one year. However, HUD gave the authorities two sequential one-year extensions (until 1993) to complete the work. In 1996, following an evaluation of obligated and expended funds, HUD discovered that, despite the extensions, these funds had not been expended. HUD assisted the PHAs to “reprogram” the funds for other modernization purposes. In 1998, a contract was awarded but the successful bidder was released. In 1999, four contracts were awarded to the Berryman Construction Company. Two of the contracts were for Hackleburg’s conversion of a unit apartment to handicap accessibility (\$28,000) and another for roofs, kitchen cabinets, and floor tile (\$65,000). One of the contracts provided for comprehensive modernization of six units of public housing at a Bear Creek project (\$110,000) and the fourth contract provided for new roofs and porches at a Phil Campbell project (\$55,000). Tr. pp. 88-89, 407-08, 411-12.

5. Berryman Construction Company did not complete the projects required under the four contracts awarded to it. By letter dated November 28, 2000, Ronald G. Cannon, a registered architect employed by the PHAs to review and recommend a course of action concerning Berryman’s lack of progress, recommended that the Hackleburg and Bear Creek contracts with Berryman Construction be terminated and that the contractor be defaulted. He attached a Field Report dated June 21, 2000, listing numerous tasks to be completed, and noted that the contract completion dates had been extended for, respectively, 366 days for project AL09P081903-98³ and 438 days for projects AL09P076904-90 and AL09P076905-93. J. Ex. 1.

³Evidently, AL09P081903-98 is the same project as that identified as AL09P081903-90 in the LDP Notice. This may have been a typographical error.

6. On December 15, 2000, Mr. Berryman visited the Alabama HUD office during the office Christmas party. Mr. Sprayberry was called out of the party to meet with Mr. Berryman who had arrived without prior notice. Mr. Berryman complained to Mr. Sprayberry that he was having difficulty getting change orders approved, getting paid, and that inspections were not coordinated. Mr. Sprayberry told Mr. Berryman that he would speak to the Executive Director to get her side of the story. After learning of this conversation, Mr. Heaton asked Mr. Sprayberry to meet with Ms. Shackelford and Mr. Cannon and to check out the quality of the construction and to determine whether the projects could be “hurried along.”⁴ Tr. pp. 26-27, 415-16.

7. On January 12, 2001, Respondent executed a “Contingency Legal Representation Agreement” (“Contingency Agreement”) with the law firm of Campbell, Waller, McCallum & Loper, L.L.C. The agreement provided that the Bear Creek and Hackleburg PHAs agree to pay the law firm a contingency fee of 50% of “the net amount of any recovery for Clients after deduction and reimbursement to Attorneys of costs and expenses.” J. Ex. B.

8. On January 12, 2001, HUD received a “faxed” copy of a letter sent to Mr. Berryman and his bonding company, Western Surety Company, dated January 9, 2001, from Brian W. Warwick of the law firm of Campbell, Waller, McCallum & Loper, L.L.C. The letter states that Berryman Construction was in default on its contracts with Bear Creek and Hackleburg due to “excessive delay, inferior workmanship, and deviation from job specifications.” Berryman’s right to proceed on these contracts was revoked pursuant to Section 32 of the General Conditions. The letter also claims \$273,600 in liquidated damages at a rate of \$200 per day per contract for each day beyond the completion date. J. Ex. Q.

9. Respondent executed the Contingency Agreement without informing either the HUD Alabama State Office or HUD’s Assistant General Counsel, Southeast/Caribbean and obtaining their approval. Indeed, she did so without obtaining prior approval of the

⁴Contractor complaints were not unusual. Mr Heaton stated: “[W]e’re accustomed to contractors coming into our office. They’ve got all types of tales and excuses and stories. So we know better than to take them at face value. And typically, when something happens like that and we see there is a problem, we usually feel like that we can resolve those type problems without going to extensive actions.” Tr. p. 27.

According to Mr. Sprayberry, the Bear Creek contract was 94 % complete, the handicap contract at Hackleburg was 92 % complete, and the roofing and kitchen contract at Hackleburg was 79% complete. Tr. p. 435.

Hackleburg Board of Commissioners.⁵ The cursory minutes⁶ of a January 20, 2001, Board meeting reflect a discussion of a default notice and a lawsuit against Berryman Construction, but not whether a vote was taken by the Board to ratify their Executive Director's execution of the Contingency Agreement. Govt. Ex. 5-2; Tr. pp. 287-90; 623-25.

10. The fiscal year 1999, 2000, and 2001, operating budgets for Hackleburg, Phil Campbell, and Bear Creek state the salaries approved by the Boards of Commission for each employee. Payroll records for the fiscal year ("FY") ending March 31, 2001, reflect that an employee, ██████ Engle, was actually paid \$█████ in FY 1999, \$█████ in FY 2000, and \$█████ in FY 2001, despite the fact that the fiscal year operating budgets (HUD Form 52586) show that the "present salary rate" for Mr. Engle for those years, was, respectively, \$█████, \$█████ and \$█████. Respondent signed each of the HUD forms 52586, thereby certifying that the information was, to the best of her knowledge, true and accurate. J. Exs. E, U, NN; Tr. pp. 152-53.

11. On January 19, 2001, Holly Poteet, a HUD public housing revitalization specialist, telephoned Respondent requesting her to provide certain financial information prior to HUD's pending visit on January 22, 2001. The planned visit resulted from the Berryman Construction default situation. HUD needed to ascertain the quality and quantity of the modernization work done by Berryman Construction and to review vacancy data to determine to what extent liquidated damages could be recoverable from Berryman Construction or its surety.⁷ During the visit, the HUD employees concluded that the work was incomplete and, to some extent, unacceptable. Respondent told the HUD employees that Hackleburg Vacancy Control Reports for the years 1998 and 1999 were unavailable because they were in storage. Other documents requested by Ms. Poteet were also unavailable, i.e., financial records on PHA vacancies, current waiting lists, and applications. By letter dated January 26, 2001, Mr. Heaton informed Respondent⁸ and the

⁵The record does not reflect whether or not the Bear Creek Board was notified and formally approved the Contingency Agreement.

⁶As Executive Director Respondent was the Secretary at Board meetings and took the minutes. Minutes of three Board meetings are included in the record. These minutes fail to provide sufficient information as to what took place at the meetings or what, if any actions, were approved or disapproved by the Board. See Govt. Ex. 5.

⁷The amount of liquidated damages depends on the vacancy rate which, in turn, depends on the number of units that are actually habitable and available for occupancy. Units being modernized or that are uninhabitable must be accounted for and subtracted from the rental inventory since they cannot be rented. Ms. Poteet sought these documents in order to obtain this data.

⁸The letter was sent to the Chairman of the Hackleburg Housing Authority, Respondent was sent a copy.

Hackleburg Board that housing authorities may not initiate litigation without written HUD approval and that failure to provide requested documentation to HUD during on-site visits violated the ACC. The letter also specifically identified and requested the Vacancy Control Report from April 1, 1997 to March 31, 2000, and additionally requested an "Applications Report," and "New Admissions Report." Respondent and the PHA Boards were requested to respond within seven days. Respondent did not reply to Mr. Heaton's January 26, 2001, letter. The requested documents were eventually made available to HUD during a February 9, 2001, on-site visit. J. Exs. J, K; Tr. p. 103.

12. In a letter to Mr. Sprayberry dated March 2, 2001, five employees of the Hackleburg Housing Authority complained about Respondent's employment practices. The letter asserts, *inter alia*, that the employees were unable to access the answering machine to respond to emergency requests for maintenance work, that Respondent delayed acting on Section 8 and other rental applications, that she delayed issuing paychecks past the date the employees were to be paid, and that she was verbally abusive towards employees. On March 11, 2001, HUD received a faxed copy of an unsigned letter from one of the employees also complaining of poor management and abusive practices. HUD viewed these complaints as sufficiently serious to warrant another visit to the housing authorities. J. Exs. R, S; Tr. p. 421.

13. HUD employee, Mary Hutchenson, unsuccessfully attempted to contact Respondent prior to the next HUD visit. On March 15, 2001, she left two messages on the office answering machine to inform Respondent that the HUD visit was scheduled to occur on March 27, 2001. On March 19, 2001, Ms. Hutchenson made another call that was not returned. On March 26, 2001, she left a message on a phone that she believed to be Respondent's home answering machine.⁹ She also left a message on the PHAs' answering machine at 2:44 p.m. on March 26th.

14. At approximately 10:00 p.m. on March 26th, Mr. Heaton contacted the Chair of the Board of the Hackleburg Housing Authority, Danny Baker, who stated that

⁹Respondent stated that she did not have an answering machine on her home phone at the time Ms. Hutchenson allegedly placed her call. Tr. p. 572. Linda Swiney, a member of the Hackleburg Board called by Respondent to corroborate Respondent's testimony, recalled that she called Respondent at work and began calling her at home "since she's been home," (Presumably after Respondent was removed from her position as Executive Director). She could not recall whether any calls placed to Respondent's home prior to that time were referred to an answering machine. Tr. p. 650. Because I find Ms. Hutchenson to be a credible witness, whereas for reasons discussed *infra*, I do not find Respondent to be credible, I credit Ms. Hutchenson's testimony that she attempted to leave a message on Respondent's home answering machine. This is not to say that the record establishes that Respondent had a home answering machine on March 26th. Perhaps she did not. It is possible that Ms. Hutchenson misdialed and left a message on someone else's answering machine.

Respondent would be available, as far as he knew, for HUD's planned visit the next day and that he should plan to send the HUD staff to the PHA office. Mr. Baker never contacted Mr. Heaton to inform him otherwise. In fact, Respondent was absent from the office on March 27th because she was attending a conference elsewhere in the state.¹⁰ She did not inform HUD of her attendance at the conference. Tr. pp. 38-39, 63, 496-97, 506-07, 511-13, 570-71.

15. On March 27, 2001, HUD employees arrived at the office of the housing authorities only to find that the files were locked and inaccessible. Respondent was absent. Mr. Baker granted permission to obtain locksmiths to unlock the file cabinets. Despite hiring two locksmiths not all of the files could be unlocked. On March 30, 2001, Respondent filed a police report complaining that HUD employees broke into Housing Authority Files. J. Ex. A.; Tr. pp. 425-26.

16. On May 7, 2001, HUD notified Respondent by phone of a complaint lodged by ██████ Gravitt, a Section 8 tenant, that there was raw sewage underneath her unit, a leaky ceiling, and only two functioning electrical outlets. HUD requested that Respondent inspect the unit to determine whether the unit met Housing Quality Standards ("HQS"). The same day HUD confirmed the substance of this conversation in writing. Respondent acknowledged receipt by fax; HUD, by return fax, restated the need for the HQS inspection and requested a copy of the lease. Receiving no response, Mr. Heaton wrote to Respondent on May 10, 2001, May 16, 2001, and May 24, 2001, repeating the request. On June 14, 2001, Mr. Heaton denied the release of Ms. Gravitt's housing assistance payment check for her unit because of Respondent's failure to comply with the request. J. Exs. L, M, N, O, Y; Tr. pp. 104-09, 135-36, 593-604.

17. On May 9, 2001, Mr. Heaton sent Respondent a request for information from United States Congressman Robert Aderholt concerning William Rice's March 22, 2001, application for housing in the Bear Creek community. According to Mr. Rice his application was delayed because Ms. Shackelford had been away from work for over a month and no one else had the authority to do anything. Respondent did not provide any information in response to the Congressman's question other than that Mr. Rice was in jail. J. Ex. AA. HUD requested Respondent to state the current status of the application or the basis for any denial. J. Ex. 12, pp. 9, 13-14 of 50. By May 24, 2001, there was still no response. J. Ex. N; Tr. p 616. Respondent eventually sent a letter dated July 24, 2001, to Mr. Rice stating that his application had been denied because he demonstrated

¹⁰ Anticipating Respondent's possible absence due to her attendance at this conference, Ms. Hutchenson attempted to determine if Respondent was an attendee. She contacted the President of the organization sponsoring the conference and did not hear back. Tr. pp. 62-64, 498.

hostile behavior during the interview process.

18. During its review of June 6-7, 2001, HUD requested Respondent to provide certain personnel information within 60 days. On September 9, 2001, Respondent requested an extension of time to provide this information. On September 12, 2001, HUD granted her an extension until September 21, 2001 to provide the “status” of each of her findings after which HUD would decide the extent of any additional extension. Govt. Exs. 9, 10. HUD received no response to its September 12, 2001, letter.¹¹ As of the hearing date HUD had not received the requested information.¹²

19. Respondent is a principal and a participant in a primary covered transaction through HUD’s Public and Indian Housing Program. As such, she is subject to administrative sanction if cause exists and it is in the public interest to sanction her. 24 C.F.R. §§ 24.110(a) and 24.115.

Discussion and Subsidiary Findings of Fact

An LDP is a limited type of debarment. The purpose of all debarments imposed by agencies of the federal government, including debarments, suspensions, and LDPs imposed by HUD, is to protect the public interest by precluding persons who are not “responsible” from conducting business with the federal government. 24 C.F.R. § 24.115(a). *See also Agan v. Pierce*, 576 F. Supp. 257, 261 (N.D. Ga. 1983); *Stanko Packing Co., Inc. v. Bergland*, 489 F. Supp. 947, 948-49 (D.D.C. 1980). The debarment process is not intended to punish; rather, it is designed to protect governmental interests not safeguarded by other laws. *Joseph Constr. Co. v. Veterans Admin.*, 595 F. Supp. 448, 452 (N.D. Ill. 1984). In other words, the purpose of debarment is remedial, not punitive. *See* 24 C.F.R. § 24.115.

In the context of debarment proceedings, “responsibility” is a term of art that encompasses integrity, honesty, and the general ability to conduct business lawfully. *See* 24 C.F.R. § 24.305; *Gonzales v. Freeman*, 334 F.2d 570, 573 & n.4, 576-77 (D.C.Cir. 1964); 48 Comp. Gen. 768 (1969). Determining “responsibility” requires an assessment of the current risk that the government will be injured in the future by doing business with a respondent. *See Shane Meat Co., Inc. v. U.S. Dep’t of Defense*, 726 F. Supp. 278 (D.Colo. 1989). The test for whether a sanction is warranted is present responsibility,

¹¹Respondent claims that she did not receive the September 12, 2001, letter. Tr. p. 608. For reasons discussed below, I do not find her to be a credible witness.

¹²There is one exception. At the hearing Respondent produced a copy of Pam Knight’s leave record which had been requested during the June 6-7 interview.

although lack of present responsibility may be inferred from past acts. *Schlesinger v. Gates*, 249 F.2d 111 (D.C. Cir. 1957), *cert. denied*, 355 U.S. 939 (1958). The Government bears the evidentiary burden of demonstrating by adequate evidence that cause for the LDP exists, that the LDP is in the public interest, and that it was not imposed for punitive purposes. 24 C.F.R. § 24.705. Adequate evidence is defined in applicable regulations as “information sufficient to support a belief that a particular act or omission has occurred.” 24 C.F.R. § 24.105(a).

HUD regulation 24 C.F.R. § 24.705(a) includes the following grounds for imposing an LDP:

- (2) Irregularities in a participant’s or contractor’s past performance;
- (4) Failure to honor contractual obligations or to proceed in accordance with contract specifications or HUD regulations;
- (7) Falsely certifying in connection with any HUD program, whether or not the certifications were made directly to HUD; and
- (8) Commission of an offense listed in 24.305.¹³
- (9) Violation of any law, regulation, or procedure relating to the application of financial assistance, insurance, or guarantee, or to performance of obligations incurred pursuant to a grant of financial assistance or pursuant to or final commitment to ensure or guarantee.

I. Failure to Follow Procurement Guidelines

Paragraph A of the LDP alleges that Respondent failed to follow required procurement guidelines by retaining counsel without obtaining HUD’s approval. Respondent executed Annual Contributions Contracts (ACCs) on behalf of each housing authority. The ACC is a contract between HUD and the PHA that sets forth the terms

¹³HUD regulation 24 C.F.R. § 305 provides:

(b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as:

- (1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;
- (2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions;
- (3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction;

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

and conditions by which HUD agrees to provide contributions to the PHA in return for which the PHA agrees to conform to HUD requirements and standards. The first paragraph of the ACC incorporates by reference “those regulations issued by HUD for the development, modernization, and operation of public and Indian housing projects contained in Title 24 of the Code of Federal Regulations, as said Title shall be amended from time to time.” It further provides that “Nothing herein shall release the HA [PHA] from compliance with all applicable laws, executive orders, and regulations that are not specifically incorporated herein by reference.” J. Ex. T.

Paragraph 3-3b(1) of the Litigation Handbook requires that if a PHA requests authority to initiate litigation, the HUD Regional Counsel shall review the agency’s reasons, and shall concur unless the action would be frivolous, contrary to HUD policy, or not cost-beneficial. Paragraph 3-3b(3) of this Handbook requires the PHA to obtain the concurrence of the Regional Counsel in litigation services contracts with private attorneys where the fee is expected to exceed \$10,000. J. Ex. D. The PHA’s own model attorney employment agreement reflects this requirement by providing that “The agreement is subject to review and approval by the U.S. Department of Housing and Urban Development.” J. Ex. 3, p. 49.

I find that Respondent did not consult the Litigation Handbook prior to entering into the Contingency Agreement. I do not credit her claims that she took into account the \$10,000 figure in ascertaining whether to obtain HUD Regional Counsel approval, and that she obtained approval of the PHA Boards prior to entering into the Contingency Agreement. I further find that even after learning of the HUD requirement, Respondent took no action to obtain the approval of the Regional Counsel.

During HUD’s January 22, 2001, visit to the PHA’s office, Respondent was told of the HUD requirement to obtain permission from HUD’s Regional Counsel prior to initiating litigation. She was informed in writing of this requirement by letter dated January 26, 2001. In that letter, Mr. Heaton stated that the PHA is required to “communicate in writing any proposal to institute such litigation to the Regional Counsel together with the reasons for the proposed action.” J. Ex. J; Tr. pp. 30, 420.

Respondent did not write to HUD’s Regional Counsel regarding the litigation until August 13, 2001. Writing to Regional Counsel Donnie Murray, she asserted that she was “unaware of any HUD requirement regarding legal action,” admitted to not consulting with HUD prior to entering into the contract, and stated that she has “since become aware your office should be contacted before filing any lawsuit involving a

housing authority.” *Compare* J. Exs. FF, GG.¹⁴ At the hearing Respondent testified that she had not previously looked at the Litigation Handbook. Tr. p. 592.

However, in her Answer and Position Statement, dated December 20, 2001, she provided a different explanation for her failure to contact HUD’s Regional Counsel. Respondent asserted that she relied upon Section 5-4 of the Litigation Handbook. This section provides: “[A] PHA must submit to HUD Regional Counsel for prior written concurrence any contract with a private attorney for litigation services involving a PHA program, project, or activity receiving loan, grant, or subsidy assistance from HUD. If the services are estimated to cost no more than \$10,000, this concurrence is not necessary.” Govt. Ex. E. She asserts that she did not estimate legal fees to exceed \$10,000. *Id.* Her estimate that the legal action would involve less than \$10,000 in legal fees lacks a factual basis. Indeed, the initial demand letter from Mr. Warwick to Mr. Berryman, dated January 12, 2001, claims \$273,600 in liquidated damages at a rate of \$200 per day per contract for each day beyond the completion date. J. Ex. Q. Assuming that this amount could be recovered, the 50% contingency fee would net the law firm far in excess of \$10,000.

Finally, in her August 13, 2001, letter Respondent stated that “The Housing Authorities for both Bear Creek and Hackleburg approved the contract.” Govt. Ex. E. In fact, Respondent did not obtain approval from the respective PHA Boards of Directors prior to entering into the Contingency Agreement. Mr. Heaton credibly testified that such approval was a requirement prior to obtaining HUD approval to initiate litigation. Tr. pp. 36-38, 291, 495-96, 624-25.

HUD Litigation Handbook, HUD 1530.1 Rev-4 sets forth a “*procedure. . . relating to. . . the performance of obligations incurred pursuant to a grant of financial assistance i.e., the requirement to obtain Regional Counsel approval prior to obtaining counsel and initiating litigation.*” 24 C.F.R. § 24.705(a)(9)(emphasis added). Because the procedure set forth in the HUD Litigation Handbook was not followed, I conclude that adequate evidence supports the conclusion that Respondent violated 24 C.F.R. § 24.705(a)(9). The execution of the Contingency Agreement had the potential to obligate the PHAs to pay the law firm a substantial sum in attorney fees. These funds would be unavailable to the PHA for other uses and their replacement by the United States’ taxpayers through HUD might have been necessary. Accordingly, I find that after learning of the HUD requirement in February, Respondent’s failure over a period of six

¹⁴Even at this late date, Respondent was not requesting permission to retain the law firm in the Berryman matter. The August 13, 2001, letter merely explains why she did not do so and requests assistance to remedy the situation. J. Exs. FF, GG.

months even to attempt to obtain the Regional Counsel's approval of the litigation and the Contingency Agreement, violates the terms of a public agreement (the ACC) "so serious as to affect the integrity of an agency program such as a willful failure to perform in accordance with the terms of one or more public agreements or transactions; and a willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction so serious as to affect the integrity of an agency program." *See* 24 C.F.R. § 24.305 (b). Respondent's failure to obtain the approval of the Regional Counsel and the PHA Boards also provides adequate evidence of a lack of present responsibility. 24 C.F.R. § 24.305 (d).

II. Failure to Submit Accurate Financial Information

A. Paragraph B of the LDP charges Respondent with submitting inaccurate salary information for Mr. Engle for fiscal years 1999 through 2001. HUD's Form 52566 (Schedule of All Positions and Salaries) requires the Executive Director or Designated Official to provide employees' "present salary rate" and to certify that the information is true and accurate. The form contains a warning that HUD will prosecute false claims. HUD Handbook 7475.1 REV provides instructions for the preparation of this form stating that the preparer is to ". . . enter the present annual salary according to the latest payroll record." J. Ex. II, Exhibit 2-3, p. 2-53.

The "present salary rate" for Mr. Engle for fiscal years 1999, 2000, and 2001, was erroneously reported to be in excess of the amount he was actually paid. F.F. No. 10; J. Exs. NN, U. Mr. Robert Boyd, who conducted an independent audit of the PHAs, testified that it was an acceptable practice to include a budgeted salary amount approved by the PHA Board rather than the actual amount paid to the employee. He stated that the unexpended funds could be tracked and that there was no evidence of embezzlement in this case. Tr. pp. 182, 190.

Despite Mr. Boyd's testimony to the effect that Respondent's certifications reflected the actual practice at the PHAs and that no harm was done by submitting Mr. Engle's budgeted rather than his actual salary, the HUD Form 52566 and HUD Handbook 7475.1 REV unambiguously require reporting an employees' "present annual salary rate according to the last payroll period." Respondent admitted that Mr. Engle was never paid overtime and that he never received the amounts that she certified that he received. She also admitted that she did not refer to the regulations in order to determine if the Form 52566 was properly completed. Tr. pp. 149, 152-53, 592-93.

Accordingly, adequate evidence establishes that Respondent violated the Handbook and submitted a false certification to HUD. 24 C.F.R. § 24.705(a)(7).

Adequate evidence also establishes that the false certification contravened HUD Handbook 7475.1 REV, a “procedure . . . relating to . . . the performance of obligations incurred pursuant to a grant of financial assistance.” 24 C.F.R. § 24.705(a)(9). Respondent’s neglect to consult the instructions HUD Financial Management Handbook in order to ascertain the correct method for documenting financial information on the Form 52566 also provides adequate evidence of a lack of present responsibility. 24 C.F.R. § 24.305 (d).

B. Respondent claims that the use of the budgeted salary figure rather than the actual salary of Mr. Engle was ignored by HUD in a previous review. She also correctly notes that there was no evidence that any harm resulted as the difference between the two amounts was accounted for. Regardless of whether or not HUD detected and focused on this error in its previous review and regardless of whether or not harm resulted, the fact remains that these entries did not comport with HUD requirements. Absent evidence that HUD specifically waived these requirements, they continue to apply to the PHA. Mere inaction by HUD to enforce this reporting requirement does not constitute a waiver. Accordingly, this defense fails.

III. Failure to Make Files Available and to Provide Requested Information

A. Paragraphs C and F of the LDP charge Respondent with disregarding HUD’s repeated requests for information. Section 15(B) of the ACC states: “The HA must furnish HUD such financial and project reports, records, statements, and documents at such times, in such form, and accompanied by such reporting data as required by HUD.” Section 15 (C) of the ACC states: “The United States Government, including HUD and the Comptroller General, and its duly authorized representatives, shall have full and free access to all HA offices and facilities, and to all books, documents, and records of the HA relevant to the administration of the projects under this ACC, including the right to audit and make copies.” J. Ex. 7.

Adequate evidence establishes that Respondent 1) delayed submitting records and documents requested by HUD, and 2) failed to provide access and to provide requested records and documents requested by HUD.

First, following the January 22, 2001, visit Respondent failed to comply with, or even respond to, HUD’s request of January 26, 2001. The documents were not provided until February 9, 2001. *See* F.F. No. 11.

Second, Respondent failed to provide access to records and documents to HUD during its March 27, 2001, visit. Mary Hutchenson credibly testified that on March 15,

2001, she left two messages on Respondent's office answering machine to inform her that the HUD visit was scheduled to occur on March 27, 2001. On March 19, 2001, she made another call that was not returned. On March 26, 2001, she left a message on a phone that she believed to be Respondent's home answering machine and she also left a message on the Housing Authority's answering machine at 2:44 p.m. Respondent denies that she was notified of the planned March 27th visit. With the exception of the March 26th message, Respondent claims that Mary Hutchenson did not leave messages on the office answering machine on March 15th and was unaware of any other attempts to contact her. She further states that she did not have an answering machine on her home phone. Tr. pp. 570, 572.

I do not credit Respondent's testimony that she was unaware of the pending March 27th HUD visit. First, Ms. Hutchenson was a credible witness. Lacking any apparent bias, she testified forthrightly from contemporaneous notes. Second, in the normal course of performing her duties Respondent would have checked the office answering machine. It is highly unlikely that she was unaware of the calls placed on March 15th.¹⁵ Third, Respondent's testimony on other aspects of the case was contradicted by the testimony of credible witnesses or by record evidence. For example, her testimony that the PHAs authorized her to enter into the Contingency Agreement was contradicted both by the minutes of the meeting and the testimony of Mr. Baker. *Compare* J. Ex. E and Tr. p. 291. A second example, is Respondent's notation on a letter dated May 11, 2001, in which she claimed that a copy of the Gravitt lease was sent to HUD. Were the notation accurate, the lease would have been sent before HUD requested it. *See infra*, note 18. Because Respondent lacks credibility, I conclude that she learned about the visit from the calls Ms. Hutchenson placed beginning on March 15th.¹⁶ Knowing that HUD would need to review office records and documents, she did nothing

¹⁵No one but Respondent could have listened to or erased the messages because no one else had access to the office answering machine. This fact is established by the employee petition which listed the lack of employee access to the office answering machine among the employees' complaints. J. Ex. R.

¹⁶The government challenges Respondent's testimony that she was unaware of the March 26th message left by Ms. Hutchenson because Mr. Tony Wooten, a PHA employee, testified that he saw Respondent in the housing authority's office on the evening of March 26th. (Because the message was left at 2:44 p.m., it should have been on the answering machine when Respondent arrived). Questioned about this at the hearing Respondent, admitted to being in the office "in the evening." Asked whether she checked her answering machine messages at that time, she agreed that she had, but claimed that she was in the office at approximately 1:45p.m., before Ms. Hutchenson placed her call. Asked about her presence during the "evening," she provided the following statement: "In the South after 12:00 [p.m.] would be referred to as evening." Tr. p. 569 "Evening," referring to the afternoon is, indeed, a recognized usage in parts of the South. *See, e.g., Webster's New Collegiate Dictionary*, G. & C. Merriam Co., Springfield, Mass., 1979. Because it is possible that both Mr. Wooten and Respondent were using the term "evening" to include the afternoon, I have given Respondent the benefit of the doubt on this portion of her testimony.

to provide access or otherwise cooperate with HUD.¹⁷

When HUD employees arrived at the Hackleburg Housing Authority on March 27, 2001, they discovered locked file cabinets. They hired a locksmith to obtain the files. Nevertheless, many files remained inaccessible. Upon her return Respondent filed a police report claiming that employees of HUD broke into Housing Authority files. A charitable explanation for this action is that Respondent lacked knowledge of a basic requirement of the ACC that HUD be permitted “full and free access to HA offices and facilities.” A less charitable interpretation is that she was intentionally defying HUD.

Third, Respondent failed to provide certain information requested by HUD during its review of June 6-7, 2001. On September 9, 2001, Respondent requested an extension of time to provide this information. HUD responded on September 12, 2001, granting her an extension until September 21, 2001 to provide “the status” of each of HUD’s findings. F.F. No. 18; Govt. Exs. 9, 10. Except for the leave record of employee, Pam Knight, these records had not been provided as of the date of the hearing. J. Ex. 14.

Respondent’s disregard of her responsibility to make records and documents available and accessible contrary to the terms of the ACC is adequate evidence of irregularities in past performance, and adequate evidence of her failure to honor contractual obligations or to proceed in accordance with contractual obligations or HUD regulations. 24 C.F.R. § 24.705(a)(2),(4). It is also adequate evidence of a violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as a willful failure to perform in accordance with the terms of a

¹⁷ The credibility of the PHA’s Administrative Assistant, █████ Knight is also open to question. She was engaged in several disputes with Respondent, and she may have been seeking Respondent’s job. She was, therefore, arguably motivated not to tell Respondent about calls from HUD to schedule visits.

Respondent and Ms. Knight are at loggerheads. Ms. Knight and Mr. Engle have sued Respondent over the termination of the PHA employee’s life insurance policies, thereby allegedly depriving them of their retirement plans. J. Ex. EE. Ms. Knight was also one of the employees who signed the petition sent to HUD complaining about Respondent’s employment practices. Ms. Knight submitted her own complaint to HUD. J. Exs. R, S.

Respondent hired a private investigator, Lawrence Shackelford (no relation to Respondent), to investigate whether Ms. Knight was working at her husband’s lumber shop while still employed by the PHAs. Included in the record are photographs he took of Ms. Knight at the lumber shop on October 19, 2001, while she was still employed at the PHAs and claiming to be on sick leave. Resp. Ex. 5; Tr. pp. 194, 218. Mr. Shackelford credibly testified that on the day he took the photos she provided several indications that she was effectively running the shop. Tr. p. 381. Mr. Shackelford also recorded a telephone conversation in which Ms. Knight opined that she might become the Executive Director, replacing Respondent. Resp. Ex 9; Tr. pp. 380-91. The photographs and tape establish that Ms. Knight was 1) not being forthright by claiming sick leave when she was not sick and 2) that she evidenced bias by her interest in obtaining Respondent’s job.

Accordingly, in reaching my conclusion that there is adequate evidence to establish that Respondent was aware of HUD’s intended March 27, 2001, visit and refused to cooperate with HUD, I have not credited Ms. Knight’s testimony.

public agreement or transaction, and a willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction. 24 C.F.R. § 24.305 (b). Her filing of a police report challenging HUD's right to obtain PHA documents and records is adequate evidence that she was totally aware of HUD's responsibilities to oversee the expenditure of PHA funds. Accordingly, it constitutes adequate evidence of a lack of present responsibility. 24 C.F.R. § 24.305 (d).

B. Respondent's defense to the failure to make files available for the March 27th HUD visit relies upon language in HUD Handbook 7460.7 REV-2, *The Field Office Monitoring of Public Housing Agencies (PHAs)*:

C. Arrange on-site review. Scheduling the review and interviews, obtaining documents and files, etc., must be arranged in advance, so the review team can maximize their time on-site. In setting up the on-site review, the team leader should perform the following tasks:

1. Contact the PHA Executive Director. *The PHA should be given as much advance notice (30 days or more) of the pending review as possible.*

J.Ex. 4, p. 7 (emphasis added).

Ms. Poteet testified that not every visit to a PHA is considered to be an "on-site review." Tr. p. 115. Regardless of whether the March 27th HUD visit technically qualified as an "on-site review," the word "should" does not establish a requirement. Adequate evidence establishes that HUD was responding to a petition from disgruntled PHA employees and needed to react quickly. I credit Ms. Hutchinson's testimony that she left messages on the PHA office answering machine beginning on August 15, 2001. Under the circumstances, this was sufficient notice.

IV. Failure to Conduct Housing Quality Standards Inspection

Paragraph D of the LDP charges Respondent with failing to make a housing quality standards inspection as required by 24 C.F.R. § 982.404(a)(2). This regulation requires a PHA to take "prompt and vigorous" action to enforce the Section 8 owner's obligation to maintain the unit in accordance with Housing Quality Standards ("HQS"). HUD Handbook 7420.7 Paragraph 5-8(c)(1) requires that an HQS inspection must be made of the unit once a tenant registers a complaint regarding that unit's condition. Tr. p. 105.

Adequate evidence establishes that Respondent failed to comply with HUD's repeated oral and written requests to provide a copy of the lease and to conduct an HQS inspection of Teresa Gravitt's unit following her complaint that there was raw sewage underneath her unit, a leaky ceiling, and only two functioning electrical outlets. F.F. No. 16. Adequate evidence also establishes that she did not inform HUD that Ms. Gravitt had moved and continued to request the release of Section 8 Housing Assistance Payment Checks for a unit which did not meet HQS. J. Exs. M., O; Tr. pp. 595, 599-00, 603.¹⁸

Finally, even if Respondent had sent the May 11, 2001, letter on or near that date, she should have resent the letter or contacted HUD upon receipt of HUD's repeated requests of May 10, 2001, May 16, 2001, and May 24, 2001. That she did not do so provides additional evidence of her lack of present responsibility.

Respondent's disregard of her responsibilities to provide a copy of the Gravitt lease and to conduct, or have conducted, an HQS inspection is adequate evidence of irregularities in past performance and adequate evidence of her failure to honor contractual obligations or to proceed in accordance with contractual obligations or HUD regulations. 24 C.F.R. § 24.705 (a)(2) and (4). Her continued failure to insure that a unit meets HQS while still requesting HUD reimbursement checks for that unit is adequate evidence of a violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as a willful failure to perform in accordance with the terms of a public agreement or transaction, and a willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction.

V. Failure to Assist HUD to Respond to a Congressional Inquiry

Paragraph E of the LDP charges Respondent with failing to respond to the inquiry of Congressman Robert Aderholt regarding the application of William Rice. Mr. Rice

¹⁸ Respondent offered into evidence a May 11, 2001, letter which she claims was a response to HUD's May 10, 2001, request. J. Ex. L; Res. Ex. 14. I conclude that this letter was not sent to HUD until shortly before the hearing and not when Respondent claims that it was sent. This circumstance provides an additional basis for not crediting Respondent's testimony. Ms. Poteet credibly testified that the letter does not appear on the office log of correspondence. Tr. p. 654-58. Second, had this letter been received, it is unlikely that HUD would have continued to request a response from Respondent. Third, HUD first requested a copy of the lease on May 7, 2001. The May 11, 2001, letter contains a notation on the bottom that "Ms. Knight informed me that she sent you a copy of the lease last week." Were this true, it means that a copy of the lease was sent to HUD before HUD requested it. Fourth, the May 11, 2001, response stated that Respondent had visited the property "on several occasions." Res. Ex. 14. The implication that she visited the property between May 7th and May 11th conflicts with her testimony that May 7th was her first day back to work after surgery and that she was in no condition to conduct the inspection. J. Exs. E; p. 6, L; Tr. pp. 595-97.

applied for housing on March 20, 2001. J.Ex. 12, pp. 15-17. By letter dated May 9, 2001, HUD requested Respondent to provide the status of Mr. Rice's application in order to respond to Congressman Aderholt. J.Ex. Z. Respondent did not provide an answer to the Congressman's question, instead replying that he was in jail. J. Ex. AA. This nonresponsive reply prompted HUD to send another letter, dated May 10, 2001, specifically asking whether Mr. Rice's application had been accepted or denied and the basis for any denial. J. Ex. BB; TR. pp. 613-14. By May 24, 2001, there was still no response. J. Ex. N; Tr. p 616. Respondent eventually sent a letter to Mr. Rice (not HUD) dated July 24, 2001, stating that his application had been denied because "he demonstrated hostile behavior during the interview process."¹⁹ J. Ex. 12, p. 50.

Adequate evidence establishes Respondent's unresponsiveness to HUD by failing to provide HUD the status of Mr. Rice's application so that it could reply to Congressman Aderholt. Respondent's disregard of her responsibilities to cooperate with HUD in responding to these requests is adequate evidence of irregularities in past performance, and adequate evidence of her failure to honor contractual obligations or to proceed in accordance with contractual obligations or HUD regulations. 24 C.F.R. § 24.705 (a)(2) and (4). This failure also constitutes adequate evidence of a lack of present responsibility. 24 C.F.R. § 24.305 (d).

VI. Respondent's Retaliation Claim

Respondent asserts that this action was taken in retaliation for her bringing the lawsuit against Mr. Berryman, who presumably was being protected by HUD. Implicit in this defense is the assumption that Respondent is innocent of the charges set forth in the LDP. I conclude that insufficient evidence exists to establish retaliation on the part of HUD.

In her post hearing brief Respondent points out 1) that the HUD reviews and LDP followed Mr. Cannon's letter and Mr. Berryman's December 15, 2000, visit to the HUD office complaining to Mr. Sprayberry about his treatment by the PHA,²⁰ and 2) that HUD

¹⁹Mr. Rice claimed that he never received this letter. Tr. p. 263 .

²⁰Respondent notes that the HUD Acting Deputy Secretary for Congressional and Intergovernmental relations, Frank J. Vaccarella, wrote Congressman Aderholt on July 23, 2001, stating that Mr. Berryman's first meeting with Mr. Sprayberry was January 9, 2001 when, in fact, their first meeting was on December 15, 2001. Resp. Ex. 10; Tr. pp. 448-50. She characterizes this meeting as "highly suspect," since no other HUD official met with Berryman on December 15th. These circumstances do not establish that the LDP is without justification.

Respondent correctly notes that Mr. Vaccarella's letter to Congressman Aderholt erroneously reports that the first meeting between Berryman and Spreyberry was January 9th and not December 15th. Presumably, the content of Mr. Vaccarella's letter was supplied by the HUD Alabama State Office. However, this error does not

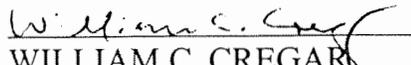
took no action to LDP or debar Mr. Berryman. Indeed, Mr. Sprayberry never discussed taking a debarment action against Mr. Berryman.

The fact that HUD's visits to the PHAs followed the Berryman visit is explained by HUD's need to react to the Berryman lawsuit. It first learned of this lawsuit on January 12, 2001. In order to determine the vacancy rate (which was related to the liquidated damages question raised by the lawsuit) HUD needed information. Similarly, the complaint about Respondent by the PHA employees necessitated an additional visit and additional requests for information. Had Respondent cooperated with HUD and followed the requirements of the ACC, there would have been no reason to impose the LDP.

The second assertion, raises a more serious question. No HUD official provided an explanation as to why no LDP or debarment action was initiated against Mr. Berryman. Indeed, it does not appear that such an action was even considered. Tr. p. 492. While there may be a satisfactory explanation for not taking an action against Mr. Berryman, it does not appear in the record of this case. While troubling, HUD's failure to proceed against Mr. Berryman does not relieve Respondent of the requirements that she adhere to HUD regulations and procedures, and cooperate with HUD by supplying requested information. These failures on the part of Respondent are supported by adequate, even abundant, evidence. Accordingly, the claim that the LDP was retaliatory fails as a defense.

ORDER

For the reasons set forth above adequate evidence supports HUD's Limited Denial of Participation. Accordingly, it is **ORDERED** that the LDP of October 10, 2001, is *affirmed*.


WILLIAM C. CREGAR
Administrative Law Judge

appear to be significant. There does not appear any reason to conceal the fact that the first visit took place in December. Indeed, Mr. Sprayberry candidly testified to this effect. Tr. p. 415.