

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

U. S. DEPT. OF HOUSING &
URBAN DEVELOPMENT

Charging Party,

vs.

CHRISTOPHER L. JENKS,

Respondent.

HUDALJ No. 04-224-PF
OGC Case No. 04-3173-PF
Decided: June 17, 2005

Christopher L. Jenks, pro se

Michael L. Casillo, Esq.
For the Government

Before: Constance T. O'Bryant
Administrative Law Judge

INITIAL DECISION

The United States Department of Housing and Urban Development ("HUD" or "the Department") brought charges against Christopher L. Jenks ("the Respondent") seeking to establish the Respondent's liability under the Program Fraud Civil Remedies Act of 1986 ("PFCRA"), Pub. L. No. 99-509, 31 U. S. C. §§ 3801-3812, as implemented by 24 C.F.R. Part 28. The Department charged that Mr. Jenks, while a police officer, submitted a false claim to HUD that was supported by a false material statement for the purpose of influencing the determination of his eligibility to participate in the Officer Next Door ("OND") program thereby allowing him to purchase a single-family home from HUD at a discount of 50-percent off the HUD list price of \$61,000. The Department sought the maximum civil penalty and damage assessment allowed under the statute and regulations.

On October 25, 2004, the Department filed a Motion for Partial Summary Judgment against the Respondent. HUD argued that the facts of the Respondent liability

were not in dispute, having been established by his conviction of a crime involving the charge. Evidence submitted with the motion showed that on May 1, 2001, Respondent entered a guilty plea to the charge of making a false statement to HUD in violation of 18 U. S. C. § 1010, in connection with his application to participate in the Officer Next Door sales program. *United States v. Christopher L. Jenks*, No. CR. 01-038 P, United States District Court for the Northern District of Texas. A judgment of conviction was entered against the Respondent by the same court on or about July 31, 2001. Ex.9.

In his answer to the Complaint and at pretrial conferences, the Respondent did not deny the charge, but asserted his inability to pay the amount of civil penalty and assessment requested by the Department, or indeed any amount of penalty or assessment.

By Order dated November 8, 2004, the Motion for Partial Summary Judgment was granted and the matter was set for trial on the sole issue of the appropriateness of the civil penalty and assessment sought by the Department.

The matter came on for trial on January 19, 2005, in Dallas, Texas. Subsequent to trial, Respondent was allowed to supplement the record with a written submission which he sent in on February 11, 2005. HUD was given opportunity to respond to the submission, but did not do so. The matter has been ripe for decision since February 23, 2005, however, the decision was delayed because the undersigned was on extended leave from March 1, 2005 through May 18, 2005.

Based on consideration of the evidence and factors I am required to consider, (*see* 24 C.F.R. § 28.40(b)), especially considering the mitigating circumstance of the Respondent's inability to pay any penalty or assessment, I decline to order the Respondent to pay any additional penalty or assessment in this case.

STATUTORY AND REGULATORY BACKGROUND

Congress enacted the Program Fraud Civil Remedies Act of 1986 to provide Federal agencies which are the victims of false claims and statements with an administrative remedy to recompense such agencies for losses resulting from such claims and statements and to deter the making of false claims and statements in the future. Section 6102 (b)(1), subtitle B, Title VI of Pub. L. 99-509. In enacting the PFCRA, Congress reacted to concerns that the existing civil and criminal remedies for false claims and statements were not sufficiently responsive to curtailing the serious problem of the substantial loss to the Government when persons were allowed to receive Federal funds or benefits to which they were not entitled.

Under 31 U. S. C. § 3802(a)(1) and HUD's regulations at 24 C.F.R. § 28.10(a), the Secretary is authorized to impose a civil penalty against any person who makes, presents, or submits, or causes to be made, presented, or submitted a *claim* that the person knows or has reason to know -

- (A) is false, fictitious or fraudulent; or
- (B) includes or is supported by any written statement which asserts a material fact which is false, fictitious, or fraudulent;

31 U.S.C. § 3802(a)(1)(A)-(C); 24 C.F.R. § 28.10(a)(1)(i)-(ii). A civil penalty of no more than \$5,500 may be imposed on a person for causing such a claim. See 31 U.S.C. 3802(a)(1)(2002). See also 24 C.F.R. 28.10(a)(2002).¹ For a violation under 31 U.S.C. § (a)(1)(A), if the Department has made any payment or transferred property on the claim, an assessment, in lieu of damages sustained by the Department because of such claim, may also be imposed of not more than twice the amount of the claim. See 31 U.S.C. § 3802(a)(1) &(3) and 24 C.F.R. § 28.10(a)(6). This penalty and assessment may be in addition to any other remedy that may be prescribed by law. See 31 U.S.C. § (a)(1)(D).

UNDISPUTED FACTS

The Officer Next Door sales program enables full-time law enforcement officers to purchase a HUD-owned home at 50-percent off the list price. At all times relevant to this decision, in order to participate in the OND program and to qualify for the 50-percent discount, a law enforcement officer who wanted to purchase a HUD property was required to sign, at the time of closing, HUD Form 9548-A, "Police Officer's Certification," certifying that he would use the property as his principal residence for at least three (3) years from the date of the closing. See HUD Notice 97-51.

The following facts are established by Respondent's conviction in the United States District Court:

In 1998, Respondent Jenks was a Dallas, Texas police officer. On May 19, 1998, Respondent Jenks signed HUD Form 9548-A, certifying that he would use the property being purchased at [REDACTED] Dallas, Texas, as his principal residence for three years from the date of the closing and agreeing not to resell the property during this three-year period. Ex. 3. The Form 9548-A was submitted to HUD as an addendum to

¹Effective April 16, 2003, HUD regulations allow a civil penalty of up to \$6,500.

the Sales Contract. On July 23, 1998, HUD sold the OND property to Respondent Jenks at a 50-percent discount. See Exs. 4 and 1.

On February 6, 2001, the Respondent was indicted by the Grand Jury for the United States District Court for the Northern District of Texas for making and causing to be made a false material statement to HUD for the purpose of influencing HUD's determination of his eligibility and participation in the OND program, thereby allowing him to purchase the OND property in violation of 18 U. S. C. § 1010. Ex. 6, 1. On May 1, 2001, the Respondent pled guilty to the charges in the indictment. Ex. 7. Pursuant to the Plea Agreement, a "Factual Resume" was filed with the Court admitting to the charges. Ex. 8. On July 31, 2001, the District Court convicted the Respondent on the charges alleged in the indictment.

The facts established by the Factual Resume show that at the time the Respondent signed the Police Officer Certification Form 9548-A he knew it was false because he did not intend to make the OND property his principal residence. Ex. 8. At the time, the Respondent was living full-time in an apartment complex called Pecan Square Apartments, which was being provided to him for free under a "courtesy officer" program established by the complex's management company. Ex. 6. The Respondent did not occupy the HUD OND property as his principal residence for the three-year period from the date of the closing. After he purchased the property from HUD, the Respondent continued to live rent-free in an apartment at Pecan Square Apartments until on or about May 2000, twenty-two months after the closing on the OND property.

The facts as established by the Factual Resume constitute a violation of the PFCRA and establish Respondent's liability on the charge. Thus, the Motion for Partial Summary Judgment was granted.

The parties convened for a hearing on January 26, 2005 in Dallas, Texas, limited to the issue of the appropriate civil penalty and assessment to be imposed against the Respondent.

CIVIL PENALTY AND ASSESSMENT

Under the PFCRA, for a violation committed prior to April 16, 2003, HUD could impose a civil penalty against Respondent of not more than \$5,500. In addition to the civil penalty, HUD could impose against him an assessment of up to twice the amount of the claim, or \$61,000.

In this case, the Department seeks the imposition of the maximum civil penalty of \$5,500 against the Respondent for the false claim submitted, plus the maximum assessment of twice the amount of the claim or \$61,000. Citing language from the regulations, that "because of the intangible costs of fraud, the expense of investigating fraudulent conduct, and the need for deterrence, ordinarily double damages and a significant civil penalty should be imposed," the Department argues that this is a case where maximum civil penalty and damages are warranted. The Department agreed to reduce the total of \$66,500 it sought by the amount of restitution Respondent had already made under the District Court order (\$5,865),² for a recovery of \$60,635. Complaint at para.35.

Respondent's arguments against the imposition of a civil penalty and/or an assessment in this forum are twofold: 1) That he has already been ordered to make restitution to HUD in the amount of \$35,990 by the District Court. As of the time of the Complaint, he had paid \$5,865 and still owed \$30,125 of that amount. He argued that by seeking an additional \$60,635, HUD was attempting to recover more than the maximum penalty and assessment it was allowed to recover under the statute and regulations; and 2) That his financial situation was such that he was in dire straits and had no funds with which to pay any additional penalty or assessment.

DISCUSSION

Respondent's contention that he is already making restitution to HUD has support in the record. The judgment of conviction in the U. S. District Court for the Northern District of Texas was entered on July 31, 2001. Respondent was ordered by the Court to make restitution of \$35,990.³ The defendant was required to make payments to the Clerk, United States District Court, Dallas, Texas, "*for disbursement to: U. S. Department of Housing and Urban Development FAN Collection \$35,990.*" Ex.9 p.4. Indeed, the Department acknowledges that the \$35,990 was intended as restitution to HUD. See Complaint at ¶¶ 26 & 27. Thus, the \$35,990 the Respondent is required to pay to the District Court will be disbursed to HUD as restitution for HUD's loss from Respondent's fraudulent conduct.

² \$5,865 is the amount Respondent had paid at the time the Complaint was filed. At the time the case was submitted for decision Respondent claims to have paid \$7,565, with a balance still due of \$28,425. HUD has not challenged this amount. However, for ease of decision, the \$5,865 figure used in the Complaint will be used in the calculations herein.

³The Order was to pay \$36,000; however, \$10 of that amount went to pay court costs and therefore was not part of the restitution to HUD. Ex. 9.

The purposes of a civil penalty and assessment in PFCRA cases are to provide agencies an administrative remedy to recompense for losses resulting from false claims and statements, and to deter the making of false claims and statements in the future. In allowing for an assessment of up to twice the loss, Congress took into consideration the cost to the agency of investigating and of litigating the false claim.

The maximum assessment HUD is allowed to impose in this case is \$61,000. \$30,500 of this amount constitutes restitution to HUD for its loss from the sale of the property to the Respondent at 50% value. Considering that the Respondent is already required by the District Court to make restitution to HUD in the amount of \$35,990, I agree with the Respondent that it is appropriate that the maximum allowable recoverable in this forum, i.e. \$61,000, should be reduced by the full \$35,990 ordered by the District Court, not merely by the amount of restitution the Respondent has already paid under that order (\$5,865). The Respondent still remains liable to the District Court for restitution payments of \$30,125. If I allowed the \$60,635 recovery requested by HUD in this forum, full payments to HUD would total \$90,760 (\$60,635 plus \$30,125). Accordingly, I conclude that the maximum allowable recovery by HUD in this forum should be a civil penalty of \$5,500 and assessment of \$25,010 (\$66,500 - \$39,990).

The remaining question is whether a \$5,500 civil penalty and/or an assessment of \$25,010 is warranted in Respondent's case. For the reasons set forth below, I conclude that no additional penalty or assessment should be ordered.

At the hearing, the Department presented the testimony of two witnesses in support of its petition for maximum civil penalty and assessment. The testimony addressed most of the seventeen factors relating to aggravating circumstances which the court is required to consider in determining the appropriate amount of civil penalty and assessment. See 24 C.F.R. § 28.40(b). The factors are:

- (1) The number of false, fictitious, or fraudulent claims or statements
- (2) The time period over which such claims or statements were made
- (3) The degree of the respondent's culpability with respect to the misconduct;
- (4) The amount of money or the value of the property, services, or benefit falsely claimed;
- (5) The value of the Government's actual loss as a result of the misconduct, including foreseeable consequential damages and the cost of investigation
- (6) The relationship of the civil penalties to the amount of the Government's loss;
- (7) The potential or actual impact of the misconduct upon national defense, public health or safety, or public confidence in the management of Government programs and operations, including particularly the impact on the intended beneficiaries of such programs;

- (8) Whether the respondent has engaged in a pattern of the same or similar misconduct;
- (9) Whether the respondent attempted to conceal the misconduct;
- (10) The degree to which the respondent has involved others in the misconduct or in concealing it;
- (11) If the misconduct of employees or agents is imputed to the respondent, the extent to which the respondent's practices fostered or attempted to preclude the misconduct;
- (12) Whether the respondent cooperated in or obstructed an investigation of the misconduct;
- (13) Whether the respondent assisted in identifying and prosecuting other wrongdoers;
- (14) The complexity of the program or transaction, and the degree of the respondent's sophistication with respect to it, including the extent of the respondent's prior participation in the program or in similar transactions;
- (15) Whether the respondent has been found, in any criminal, civil or administrative proceeding, to have engaged in similar misconduct or to have dealt dishonestly with the Government of the United States or a State, directly or indirectly;
- (16) The need to deter the respondent and others from engaging in the same or similar misconduct; and
- (17) Any other factors that in any given case may mitigate or aggravate the offense for which penalties and assessments are imposed.

The Department's evidence showed that the violation in this case is a serious one, warranting a significant penalty and assessment to deter the Respondent and others from similar misconduct in the future. The Respondent set up an elaborate scheme of renters of the property to avoid detection of his false claim, thereby involving others in his scheme. HUD's reputation was harmed by the Respondent's actions. The discovery and disclosure of Respondent's fraud negatively impacted on the public's confidence in the management of the OND program. Finally, although the Respondent's actual monetary benefit from the purchase under the OND program was \$30,500, the cost to HUD because of the necessity of investigating and litigating the case is substantially higher and would justify the imposition of the assessment of \$25,010 at issue.

On the other hand, there are factors which tend to mitigate against a maximum assessment. The Complaint involves only one false claim, which was made on one occasion. There is no evidence that the Respondent had a pattern of making false claims or statements or engaged in any similar conduct. He has no criminal conviction or administrative sanction for similar misconduct apart from this case. The Respondent's conduct in this case has already caused him to be convicted of a Federal felony offense. As a result of the conviction, he lost his job as a police officer and was required to make

restitution to HUD of \$36,000.⁴ Moreover, there is the issue of the Respondent's ability to pay any additional penalty or assessment.

I conclude that there are mitigating circumstances in the case (*see* factor 17 above) which warrant waiving any additional assessment. Although, the PFCRA allows for a civil penalty and an assessment of up to twice the amount claimed in addition to any remedy imposed in a civil or criminal trial, I conclude that the criminal remedy has been effective in addressing the concerns Congress had in enacting the PFCRA, and thus decline to impose any additional penalty or assessment in this case. The fact of the Respondent's felony conviction, loss of his police career with resultant ramifications, and required restitution can be seen to be significant enough to satisfy the concerns of Congress in enacting the PFCRA. These consequences alone serve to deter the Respondent, as well as others, from similar misconduct and to provide recompense to HUD for its \$30,500 loss on the property. The investigation was necessary for the criminal prosecution. And, although the assessment does not provide an amount to compensate HUD for the cost of litigating the case in this forum, it is not clear to the undersigned that litigation was warranted, considering the Respondent's conviction and sanctions in the District Court and, more importantly, his likely inability to pay any additional penalty or assessment, which inability was known or should have been known to HUD at the time it filed the Complaint.

Ability to pay penalty or assessment

Respondent has consistently stated that he has no ability to pay any penalty or assessment beyond the \$35,990 ordered by the District Court. In his answer to the Complaint he stated that he had no money to hire an attorney, was "poor," was 40 years old with a felony conviction and that no one would hire him for a decent paying job. He had lost his job and "lost everything" he previously had. He was doing some work moving furniture. In his November 4, 2004 pretrial filing he stated that he did not have any money at his disposal. He was struggling just to pay the \$35,990 ordered by the U. S. District Court in the criminal case.

In PFCRA cases, ability or inability to pay the penalty and/or assessment is not one of the seventeen enumerated factors at 24 CFR § 28.40. However, it is a consideration by statute (31 U.S.C.3802) as reflected in HUD's own regulations.

⁴The amount of restitution ordered by the District Court judge is equivalent to the sum of the \$5,500 civil penalty and \$30,500 lost to HUD from Respondent's participation in the OND program, minus \$10.

24 C.F.R. § 28.20(b) provides, *inter alia*, that if HUD determines that an action under PFCRA is supported, it *must* submit a written request to, and obtain approval from, the Department of Justice ("DOJ") to issue a notice under § 28.25. The request to the DOJ *must* include an estimate of the amount of money or the value of the property or benefits lost as a result of the fraudulent claim or statement and "a statement that there is a reasonable prospect of collecting an appropriate amount of penalties and assessments." Thus, HUD was required to certify to DOJ that there was a reasonable prospect of collecting from the Respondent the \$60,635 it requested in the Complaint. The record does not show that such a statement was ever submitted to the DOJ, and the evidence supports a finding that the Respondent does not have the ability to pay any penalty or assessment.

To determine where the burden of proving ability or inability of the Respondent to pay a penalty or assessment shall be assigned, 24 CFR 26.44(e) provides that HUD shall prove the respondent's liability and any aggravating factors by a preponderance of the evidence. Respondent shall prove any affirmative defenses and any mitigating factors by a preponderance of the evidence. I consider Respondent's assertion that he is unable to pay any amount of money in addition to the \$35,990 ordered by the U. S. District Court as a mitigating factor under 24 CFR 28.40(b)(17). The Respondent has met his burden of proving his inability to pay any additional penalty or assessment by a preponderance of the evidence.

The Department has been silent in the face of Respondent's claimed inability to pay the amount of penalty and damages requested or as to any amount. Although the Department has not specifically addressed the issue, evidence that would strongly infer Respondent's inability to pay any additional penalty or assessment is contained in the exhibits submitted by the Department in support of its liability finding. The evidence shows that, after the Respondent's conviction in the criminal case, the District Court judge recognized Respondent's limited financial ability. Upon conviction, Respondent faced financial consequences up to \$200,000 in fines and \$35,990 in restitution, plus required interest. Although the sentencing guidelines called for a fine in Respondent's case in the range of \$2,000 to \$20,000, the judge did not impose a fine, noting "defendant's inability to an pay" any fine. While the judge did order the Respondent to pay \$35,990 in restitution, he waived the requirement that the Respondent pay interest on the \$35,990, as requested by HUD, again because of his determination that the Respondent did not have the ability to pay any interest. In addition, the judge allowed the Respondent to make payments on the \$35,990 by monthly installments, in amounts as low as \$200, and gave him up to 30 days to make his first payment. *See Ex. 9*. If Respondent paid the minimum monthly installment allowed under the judge's order, it would take him upwards of 15 years to meet his District Court imposed obligation. The

record shows that Respondent has not met even this minimal obligation. As of February 2005, the Respondent had paid only \$7,565 of the required restitution (see Posthearing Ex. R-1).⁵ Based on this amount, as of January 31, 2005, the Respondent was behind on his payments to the District Court by more than \$800. Accordingly, I find that Respondent's ability to pay more than the remaining \$28,425 on his U. S. District Court ordered restitution to HUD is in serious doubt.

For the reasons explained below, I conclude that a preponderance of the evidence of record shows that the Respondent does not have the ability to pay \$60,635. Indeed, I find that the evidence supports Respondent's claim that he does not have the ability to pay any amount on this claim beyond that ordered by the U. S. District Court for the District of Dallas, Texas. Accordingly, considering all the applicable factors, including the Respondent's financial condition, I decline to impose any civil penalty or assessment.⁶

⁵By submission dated February 17, 2005, Respondent represented that he had paid a total of \$7,565.00 the U. S. District Court clerk in restitution to HUD for the violation. His balance owing was \$28,425. Although provided the opportunity, the Department has not challenged the stated amount of payment.

⁶Considering the issue of ability or inability to pay a civil penalty or damage assessment, I am guided by the Secretary's recent decision in *In the Matter of South Texas Mortgage Corporation*, HUDALJ: 04-003-MR, (April 12, 2005). That case involved an assessment of civil money penalty. There an administrative law judge ("ALJ") ordered the respondent South Texas Mortgage Corporation ("STM") to pay a civil money penalty ("CMP") of \$104,500 (for 331 violations) due and payable "in installment amounts to be determined by the Secretary of HUD." STM appealed the ALJ's decision, arguing, *inter alia*, that it was financially unable to pay a CMP of that amount. The Secretary, after review of the entire record and after considering STM's financial condition and the other factors specified in 12 U.S.C. § 1735f-14(c)(3) and 24 C.F.R. § 30.80, determined that the evidence did not support a finding that CMP had the ability to pay \$104,500. The Secretary determined that the CMP ordered by the ALJ should be reduced from \$104,500 to \$33,000 *because of STM's inability to pay a higher penalty*. The total penalty of \$33,100 was appropriate "considering all the applicable factors, including STM's financial condition."

CONCLUSION AND ORDER

The Respondent made a false claim in violation of PFCRA (31 U. S. C. 3801-3812) and is subject to a civil penalty up to \$5,500 for the false claim, plus an assessment of up to \$61,000 for a total of \$66,500 minus \$35,990 in restitution ordered by the U. S. District Court for a maximum recovery of \$30,510.

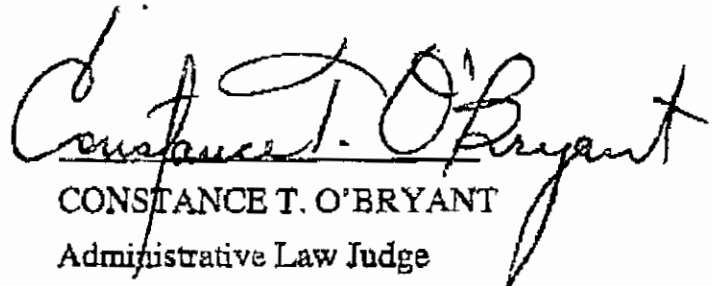
No penalty or assessment should be imposed in Respondent's case beyond the \$35,990 already imposed in the criminal case. This is based on the consideration of the aggravating and mitigating factors in the case as required by 24 C.F.R. 28.40(b), including the mitigating factor of the Respondent's inability to pay any additional penalty or assessment.

The Department's request for imposition of a civil penalty and a damage assessment in this case is DENIED.

Pursuant to 24 C.F.R. 26.50(b), only the Respondent may petition the Secretary for review of this determination. The petition must be filed within 30 days of service of the decision.

So ORDERED.

Dated: this 17th day of June, 2005.


CONSTANCE T. O'BRYANT
Administrative Law Judge