

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

In the Matter of:

MID-AMERICA MORTGAGE
CORPORATION,

Respondent.

HUDALJ 05-054-MR
OGC Case No. 05-5052-MR

**RULINGS ON PRE-HEARING MOTIONS AND
FINAL ORDER**

This case concerns the Department of Housing and Urban Development's (HUD's) Mortgagee Review Board's (MRB's) March 14, 2005, Notice Of Immediate Suspension (the Notice), which immediately suspended Mid-America Mortgage Corporation (Mid-America or Respondent) from participation in FHA programs based on the criminal indictment of Trenson L. Byrd, Mid-America's Director, Chief Executive Officer, President, and owner. *See* 24 CFR 25. The indictment in U.S. District Court was for conspiring with others to falsify information included in loan applications submitted to HUD/FHA for the purpose of obtaining mortgage loans with HUD/FHA mortgage insurance. The immediate suspension was for a temporary period pending resolution of the indictment.

On March 17, 2005, Mid-America requested "a hearing pertaining to the allegations contained by HUD." On the Government's motion, on or about June 21, 2005, the Board's hearing official decided that Mid-America's request for a hearing did not comply with the regulation codified at 24 CFR 25.8, and ordered Mid-America to supplement its request for a hearing. Mid-America provided its Response To Order For Supplementary Information on July 18, 2005. On July 28, 2005, the hearing official referred this matter to this forum "for findings of material fact." On October 20, 2005, the Board's hearing official amended the referral to this forum to include both matters of law and of fact. At my direction, the Government filed its Complaint on November 21, 2005.

Motions To Dismiss and to Strike

Mid-America's Motion To Dismiss Government's Complaint For Immediate Suspension And To Strike Notice Of Immediate Suspension lies before this forum. Respondent cites HUD's regulation, codified at 24 CFR 25.8(b), which entitles a respondent to a hearing if it wishes to appeal a suspension, and further provides that the hearing official shall hold a *de novo* hearing within 30 days of HUD's receipt of the mortgagee's request, unless the mortgagee requests a later hearing date. Respondent's request was submitted on March 17, 2005, with respect to the March 14th Notice, and it contained no request for a later hearing date. Additionally, Respondent complains that HUD's regulation found at 24 CFR 26.10(d) provides that a Complaint must be served within 30 days of the date of the request for a hearing. In fact, the Complaint was served on November 20, 2005.

Respondent argues that the intent of the regulation providing the mortgagee a hearing within 30 days is based upon the seriousness of a suspension and the need of a respondent to have it quickly lifted where appropriate by questioning whether the immediate suspension was supported by factual evidence. Mid-America asserts that it was denied the opportunity to contest the HUD action in a timely manner, and that the only remedy available is to strike or set aside the immediate suspension. Respondent suggests that, in assessing whether HUD has complied with the requirements of due process, this forum should be guided by the principles of *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), which stands for the proposition that where a Government action involves a punitive sanction, such as depriving Mid-America of doing business, the Government, in this case HUD, has the duty to act efficiently and expeditiously. Respondent also asserts that the Constitution requires that Mid-America was entitled to a hearing in which HUD should have provided "the opportunity to be heard at a meaningful time and in a meaningful manner," as required by *Cooper v. Salazar*, 196 F.3d 809, (7th Cir. 1999) (quoting *Mathews*, at 333).

The Government has filed its Opposition To Respondents' Motions, etc., in which it requests that this forum deny Respondent's Motions on the grounds that: 1) The Government complied with all applicable regulatory time periods; 2) Mid-America agreed to a hearing date and thus waived its request for a dismissal based

on the hearing date; 3) the regulatory 30-day and 45-day time periods are directory and not mandatory; and 4) Mid-America's due process rights were not prejudiced by any minor delay in the hearing proceedings. The Government also asserts that the Motion To Strike should be denied as "beyond the authority of the Court."

The Government asserts that, rather than holding an initial hearing, the Board's hearing official immediately referred the case to this forum for findings of fact and, later, for conclusions of law. The initial referral occurred ten days after Mid-America submitted its Supplementary Response; *i.e.*, well within the 30-day time frame for a hearing. This action terminated any obligation for the Board's hearing official to hold a hearing within the 30-day period.

The regulation found at 24 CFR 25.8(d)(2)(iii) provides that "Proceedings before a hearing officer or other independent official shall commence within 45 days after referral by the hearing official, unless the parties agree to an extension of time." In this case, the "hearing officer or other independent official" is a U.S. Administrative Law Judge (ALJ). While the regulation does not define what actions commence a proceeding, it is clear that this term is broader than the term "hearing" when used in 24 CFR 25.8(b). Many "proceedings" must be conducted prior to commencement of a hearing, including any conferences, the entire discovery process, and the handling of any pre-hearing motions.

This case was referred to this forum on July 28, 2005, and to me on August 31, 2005. On that last-named date, my Clerk phoned the parties to schedule a conference call for the purpose of scheduling the discovery period, the requirement to submit lists of witnesses and exhibits, and a date for the hearing itself. This constituted the commencement of proceedings, well within the required 45 days. Due to the parties' schedules, the scheduling conference call was not conducted until September 22, 2005. In that conference, this ALJ and the parties agreed to a hearing date of December 14, 2005. In a subsequent conference call, this ALJ and the parties agreed to extend the hearing date to February 22, 2006. Even if the 45-day time limit had not already been complied with and, instead, referred to the date of the hearing itself, Mid-America's agreements to the hearing dates constituted a waiver of any such tortured interpretation of the regulation.

Even if the 45-day time period had not been met or waived, such a time frame is directory, and not mandatory. A statutory time period is not mandatory unless it both expressly requires an agency or public official to act within a particular time period and specifies a consequence for failure to comply with the provision. *See*, 1086 FDIC Enf., Dec. LEXIS 11. A failure to comply with a directory time frame is not fatal to an administrative action. *See, Brock v. Pierce County*, 476 U.S. 253, 259 (1986); *Fort Worth Nat'l Corp. v. Fed. Sav. & Loan Ins. Corp.*, 469 F.2d 47, 58 (5th Cir. 1972).

Finally, Mid-America's due process rights have not been prejudiced as it claims because a hearing scheduled more than 30 days after its Supplementary response does not pose undue harm. Respondent asserts that the Government is putting it out of business. However, the Government's actions only bear upon Mid-America's ability to originate FHA-guaranteed loans; not any other types of loans. In *Dominick Auciello v. Commodity Exchange*, 1996 CFTC LEXIS 186; Comm. Fut. L. Rep. (C.H.) ¶ 26,799 (Sept. 27, 1996), the Commission held that, although the Respondent would be unable to trade, a suspension did not amount to a termination of Respondent's business in the futures industry. Similarly, the court in *Easy Returns Worldwide, Inc. v. United States of America*, 266 F. Supp. 2d 1014, LEXIS 16426 (E.D. Mo. 2003) found no undue hardship where a Respondent could focus on other aspects of his business not subject to immediate suspension by a Government authority.

For these reasons, Respondent's Motion To Dismiss and Motion To Strike are **DENIED**.

Motion for Summary Judgment

HUD has moved for summary judgment on the grounds that there is no genuine issue of material fact concerning: whether Trenson L. Byrd (Byrd) is an officer, director, principal, or employee of Mid-America, and 2) whether Byrd was indicted for an offense that reflects upon the responsibility, integrity, or ability of Mid-America. Thus, HUD contends, it is entitled to judgment as a matter of law on this issue, and moves that this ALJ grant the Motion, thus dismissing Respondent's appeal and thereby upholding the Board's immediate suspension of Mid-America.

Findings of Fact

1. Mid-America is a corporation whose primary business is the origination of residential loans. *See* Exhibit 1 to the Motion For Summary Judgment (MSJ): Articles of Incorporation of Mid-America Mortgage Corporation.

2. Mid-America was, prior to the Notice, an FHA-approved lender. *See* Administrative Record (AR), Tabs 2 and 3.

3. Trenson L. Byrd, a/k/a T.L. Byrd, is the owner, director, president, CEO, and a loan officers of Mid-America. *See* MSJ Ex.1 and Ex.3: Mid-America's Statement of Change; and AR, Tab 3.

4. On February 17, 2005, Byrd was criminally indicted in the United States District Court for the District of Colorado for a violation of 18 U.S.C. § 371, conspiracy to falsify information submitted to HUD, and violation of 18 U.S.C. § 1956(h), money laundering. *See* Ex. 4: Superseding Indictment.

5. On March 14, 2005, the MRB sent notice to Mid-America by letter of its immediate suspension under the regulations that are codified at 24 CFR Part 25. *See* AR, Tab 2.

Hearings involving MRB suspensions are forwarded for adjudication to the Office of Administrative Law Judges, where they are conducted pursuant to the regulations found at 24 CFR Parts 25 and 26, subpart A. These regulations specifically provide that the Administrative Law Judge assigned to the case is authorized "[t]o consider and rule upon all procedural and other motions appropriate in adjudicative proceedings." 24 CFR 26.2(c)(7). Accordingly, the assigned ALJ is empowered to rule upon motions for summary judgment.

Discussion

Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In determining whether summary judgment should be issued, the facts and inferences from those facts are viewed in the light most favorable to the respondent, and the burden is placed on

the moving party to establish both the absence of a genuine issue of material fact and that such party is entitled to judgement as a matter of law. *See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Once the complaining party has met its burden, the respondent may not rest on the allegations in the pleadings, but by affidavit or other evidence must set forth specific facts showing that a genuine issue of material fact exists. *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 468 (1992).

Thus, Mid-America “must do more than simply show that there is some metaphysical doubt as to material facts,” and “[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial’.” *Matsushita*, at 586-7; *see also Topalian, et al v. Ehrman, et al*, 954 F.2d 1125, 1131 (5th Cir. 1992). Consequently, “[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Anderson*, at 248.

The MRB has the authority to bring administrative actions against its FHA-approved mortgagors. Part 25.5 of the regulations codified at 24 CFR provides, “[t]he Board is authorized to take the following administrative actions: letter of reprimand, probation, suspension, withdrawal, or settlement agreement.” Furthermore, the regulations provide that “[t]he Board may issue a suspension if there is adequate evidence of violation(s) under § 25.9, and if continuation of the mortgagee’s HUD/FHA approval pending the completion of any audit, investigation, or other review, or other administrative or legal proceedings as may ensue, would not be in the public interest or in the best interests of HUD.” 24 CFR 25.5(d).

More specifically to this case, under the regulation codified at 24 CFR 25.9(m), the MRB is authorized to bring an administrative action for:

Indictment or conviction of a mortgagee or any of its officers, directors, principals, or any employees for an offense which reflects upon the responsibility, integrity, or ability of the mortgagee to participate in HUD/FHA programs as an approved mortgagee.

By his own submission to HUD, Byrd admitted that he is a President and CEO of Mid-America. *See AR, Tab 3*. In February 2005, Byrd was indicted in the U.S.

District Court for the District of Colorado for conspiracy to falsify information submitted to HUD. *See* MSJ, Ex.4. Byrd is also an owner of Mid-America. His ownership and extensive control of and participation in the affairs of Mid-America prevent any meaningful distinction between the integrity and present responsibility of Byrd and that of mid-America. Indeed, Byrd was indicted for his actions as an owner and loan officer of Mid-America. *See* MSJ, Ex. 4.

Conspiracy to falsify information *submitted* to HUD is a criminal offense that reflects on the responsibility, integrity, and ability of an individual, and that individual's conduct is properly imputed to his business affairs. *See In the Matter of Kenneth A. Ashley, et al.*, HUDBCA No. 95-G-138-D23, 1996, HUD BCA LEXIS 5 (March 6, 1996) (indicating that the respondent's indictment for conspiracy and fraud are offenses involving dishonesty that reflect on the respondent's responsibility and thus, respondent and his affiliated business are subject to suspension); *In the Matter of Joseph A. Strasuss, et al.*, HUDBCA No. 95-G-113-D11, 1995 HUD BCA LEXIS 4 (May 19, 1995) (indicating that respondent's guilty plea to conspiracy charges reflect upon his honesty and integrity and merited debarment of respondent and his affiliated business). Since Byrd controls Mid-America and he was indicted for crimes of a nature that reflect upon his responsibility and integrity, his lack of integrity negatively impacts on the integrity of Mid-America and its ability to participate responsibly as an FHA-approved lender. Thus, the MRB properly suspended Mid-America, based upon Byrd's indictment for conspiracy to falsify information submitted to HUD.

HUD's regulation codified at 24 CFR 26.13(c) provides in pertinent part:

Answers. Within seven (7) days after receipt of any written motion, or within any other period as may be designated by the hearing officer, the opposing party shall answer the motion. Failure to make a timely answer shall constitute a party's consent to the granting of the motion.

Respondent did not answer the Motion For Summary Judgment that had been filed on November 21, 2005, within the required seven days. In spite of a few invitations to file a response notwithstanding that it would be late, respondent still remained silent. In a conference call on February 10, 2006, due to the seriousness of a summary judgment, Respondent was again asked by this ALJ whether he would like to respond to the Motion For Summary Judgment. He answered that he

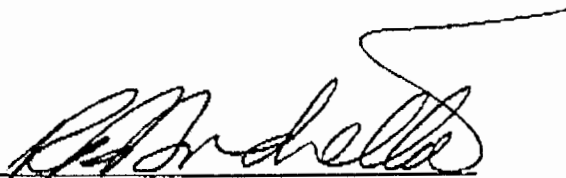
would have such a response filed "by next week." No such response has been received. Thus, Respondent is deemed to have consented to the granting of the Motion. Moreover, by his silence, Respondent has failed to "set forth specific facts showing that a genuine issue of material fact exists."

Accordingly, and for the reasons set forth above, the Motion For Summary Judgment is **GRANTED**.

ORDER

The Mortgagee Review Board's immediate suspension of Mid-America Mortgage Corporation based upon the criminal indictment of its officer and director, Trenson L. Byrd, is upheld. In accordance with the regulations codified at 24 CFR 25.8(d)(ii)(A), and 26.39(b), this Order constitutes final HUD action of this matter.

So **ORDERED**.



ROBERT A. ANDRETTA
Administrative Law Judge

Dated: March 13, 2006