

UNITED STATES OF AMERICA

BEFORE THE

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

In the Matter of

JUAN SANTANA,

Appellant

Docket No. 81-799-DB

Lucindo Suarez, Esquire
South Bronx Community Housing
Corporation
810 E. 152nd Street
Bronx, NY 10455

William Perricelli, Esquire
Office of Regional Counsel
U.S. Department of Housing
and Urban Development
26 Federal Plaza, 35th Floor
New York, NY 10278

DETERMINATION

(Read from the bench on January 7, 1981)

The Department of Housing and Urban Development's New York Area Office (HUD) undertook a comprehensive management review of the South Bronx Community Housing Corporation (SBCHC or the Corporation) in May, 1981. As a result of this review, HUD issued a draft comprehensive management report (Government's Exhibit 3) which cited a large number of substantial and serious deficiencies and violations with respect to five projects managed by the SBCHC:

Davidson Avenue - Project No. [REDACTED];
Hunts Point - Project No. [REDACTED];
Borinquen Court - Project No. [REDACTED];
OUB - Project No. [REDACTED]; and
MINS Plaza - Project No. [REDACTED]

These problems involved maintenance and security, financial management, leasing and occupancy, and general management practices. HUD's findings basically are not disputed by the Appellant, Juan Santana, who is President of the Corporation. These findings constituted cause for imposition of a Temporary Denial of Participation (TDP) under 24 C.F.R. §24.18(a)(2).

SBCHC is a HUD contractor or grantee subject to this regulation under 24 C.F.R. §24.4(f), since it is a public or private organization that is a direct recipient of HUD funds or that receives HUD funds indirectly through non-Federal sources, and is a management agent. As a corporation, it can only act through its officers, who are accountable to HUD for compliance with its procedures and requirements. These officers include Appellant, Juan Morales (Vice President of the Corporation), and Pedro Mendez (Director of Management). In the absence of proof that these individuals had no responsibility for or had satisfactorily resolved the problems cited in the HUD report, or that HUD's findings were unfounded, they also were subject to the sanction. As of July, 1981, no such proof was presented, either at the exit conference on HUD's draft report, or otherwise.

Accordingly, the TDP issued by the HUD New York Area Manager against Appellant and the other cited officers on July 2, 1981 is sustained. The one-year period of exclusion imposed by the TDP was authorized under the regulations and is reasonable. I need not consider whether the HUD findings would have sustained a debarment action proposing a longer period of exclusion.

Appellant has not shown that evidence was submitted at the informal hearing subsequently held in the New York Area Office to warrant a lifting of this TDP. The Corporation's response to the comprehensive management review, Government's Exhibit 4, was insufficient to remove the Government's concerns. Accordingly, the denial of Appellant's appeal for a reversal of the TDP, which was issued by the New York Area Manager on January 6, 1982, is also sustained.

However, our inquiry does not end here. As indicated, Appellant does not contest that cause existed for the TDP. Rather, his argument is that the Corporation and its officers have learned their lesson during the six months that they have been excluded and have made great strides in resolving management problems. He therefore asks that the TDP be modified to a nine-month exclusion.

24 C.F.R. §24.18, the portion of HUD's administrative sanction regulations applicable to TDPs, states:

(a) (3) Period and scope of temporary denial of participation.

* * *

(ii) Denial of participation shall be for a temporary period pending correction or dismissal of the grounds for the denial, demonstration by the contractor or grantee that it is in the best interest of the Government to resume business with such contractor or grantee ...

This language is consistent with the recognized standard of exclusion known as "present responsibility." Under this standard,

an exclusion cannot last beyond the period of projected business risk. See Roemer v. Hoffmann, 419 F.Supp. 130, 131 (D.D.C. 1976).

Accordingly, my consideration of this matter must go beyond a determination of cause for initial exclusion. It must include an examination of Appellant's and the Corporation's present business risk to the Department and the public interest, six months after the TDP was imposed, and seven to eight months after HUD's comprehensive management review.

In considering present responsibility, I favorably note Appellant's testimony that \$103,000 owed on one project, OUB, because of unauthorized distributions cited in the management report, has been paid back. (The repayment was not disputed by the Government.) I further note Mr. Morales' statements regarding present attempts to repay the equally substantial amounts owed on another project, Hunts Point (also due to unauthorized distributions cited in the HUD report), and Appellant's statements with regard to management reforms he has made. Both Appellant and Mr. Morales are credible witnesses. However, so is Mr. McClaine, the Government's chief witness, and I also believe and appreciate the deep and broad concerns cited by him which underlie HUD's management report. In view of these concerns, SBCHC and its officers may not be the best judges of their present business risk.

Fortunately, the record affords a more reliable source for determining present responsibility. SBCHC, at the present time, and despite the TDP, still manages OUB, albeit under the guidance of the New York Department of Housing Preservation (HPD). That agency works closely with the Corporation and its officers, and reasonably is in a position to evaluate their present abilities and what progress, if any, they have made since imposition of the sanction.

In this regard, I found Ruth Lerner, Assistant Commissioner of HPD, an extremely credible witness. Given her agency's close ties with HUD as well as with the Corporation, her testimony could be viewed as objective. (Indeed, she was called as a witness by both parties.) She was extremely forthright in her responses to the Hearing Officer's questions and in her assessment of SBCHC and Appellant.

Basically, she stated that since the comprehensive management review, SBCHC has substantially improved its management procedures, but under very close monitoring by HPD on a regular basis. She indicated that HPD's role is closer to actual management than supervision. She also stated that, while she finds Appellant to be competent, SBCHC clearly needs training. However, she explained that this training could be on-the-job, and concluded that the Corporation could undertake another project in addition to OUB - under HPD's close monitoring - as long as the project is reasonably small, such as 75 or 80 units. One project meeting this criterion is MINS Plaza, another of the five projects covered in the HUD report, which has since been taken over by HPD. Ms. Lerner stated

that HPD would not at all mind assisting SBCHC with respect to managing MINS Plaza in the same way as it has on OUB.

This case has some unusual elements. First, SBCHC is not the type of participant generally associated with HUD sanctions. No fraud has been alleged; HUD does not claim that SBCHC or its officers attempted to milk the five projects in question or victimize intended recipients of Departmental assistance. Rather, as Ms. Lerner's testimony indicates, the problems cited in the management report appear to have arisen because SBCHC is a nonprofit, nonprofessional, community organization and requires experience and training. The basic concept and purpose of the entity, however, are sound. The record reflects that some very experienced and prominent people are associated with this Corporation, including former Senator Jacob Javits and Victor Murrero, former HUD Under Secretary.

Second, HUD, in allowing the present management of OUB, has more or less admitted that the public interest is consistent with some SBCHC participation in its programs. (The Corporation's management of OUB, despite the present TDP, is presumed to be with HUD's knowledge and approval.) Similarly, HUD's decision to opt for a TDP rather than propose a more extensive debarment indicates a policy of leniency in this particular case.

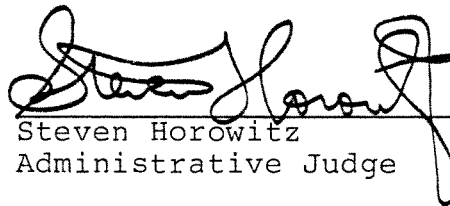
Given these factors, the progress attested to by Ms. Lerner, and SBCHC's voluntary repayment of its debt on OUB, the Corporation and its officers should be given an opportunity to demonstrate further improvement, as long as the public interest remains protected. In this regard, I note that, whatever is decided here, the Corporation, Appellant, and other officers will be free to participate in HUD programs without restriction in just six more months. HUD's and the public's interests would therefore be furthered by affording these parties additional HPD training before this time, as an added assurance of their future responsibility as HUD contractors.

Accordingly, I conclude that the TDP should be modified to allow SBCHC and its officers to manage the MINS Plaza project along with OUB and under the same monitoring arrangement with HPD. However, as a precondition to such management, SBCHC must present a repayment plan for Hunts Point which is acceptable to and approved by HUD. The TDP shall otherwise stand.

In so concluding, I specifically am not equating the problems at OUB with the evidently much more serious management deficiencies cited in the HUD report with regard to the other four projects. Rather, I am accepting HPD's conclusions as to SBCHC and its officers' present responsibility to participate in HUD programs. These conclusions, and both HUD's and the public's interests, support the closely monitored management of one additional small project by SBCHC, as discussed. However, in view of the Corporation's continued need for training and experience, I cannot justify broadening this participation at the present time. Further,

SBCHC's immediate goal should be repayment of the Hunts Point money. I have therefore made HUD's acceptance of a repayment plan a precondition to further participation.

The above limited, conditional exception to the present TDP is consistent with 24 C.F.R. §24.18(a)(3)(ii), supra and §24.5(a) of that Part, which states that TDPs "... shall be used for the purpose of protecting the public and are not for punitive purposes."



Steven Horowitz
Administrative Judge