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

In the Matter of ROY A. BAHAM Respondent	HUDALJ 86-1065-DB(TDP)

Roy A. Baham, pro se

Odessa F. Vincent, Esquire
For the Department

Before: ALAN W. HEIFETZ
Administrative Law Judge

INITIAL DETERMINATION

Statement of Case

This is an appeal from a Temporary Denial of Participation ("TDP") imposed on Respondent Roy A. Baham, by the New Orleans Office of the U.S. Department of Housing and Urban Development ("the Department" or "HUD") pursuant to 24 C.F.R. § 24.18(a)(2)(ii). The TDP was imposed upon Respondent because of his failure to properly and competently inspect rehabilitation work, thereby permitting improperly performed repair work, undocumented changes and payment irregularities. On January 10, 1986, a letter from the Manager of HUD's New Orleans office notified Respondent that the TDP was to take effect as of that date and would be in effect for a period of six months. Following an informal hearing held on February 28, 1986, the duration of the TDP was shortened to three months. The TDP was also limited to the denial of participation in housing rehabilitation activities financed with Community Development Block Grant funds falling under the jurisdiction of the HUD New Orleans office. Respondent was notified of these modifications by letter dated March 21, 1986, upon receipt of which he appealed the decision and requested this hearing in accordance with 24 C.F.R. § 24.7(b).

A hearing was held in New Orleans on May 14, 1986. Upon consideration of the evidence presented and oral argument, I make the following findings and conclusions:

Findings of Fact

Respondent Roy A. Baham is currently employed by the Community Improvement Agency of the City of New Orleans ("CIA")

as a Community Rehabilitation Counselor I. Tr. 217. Mr. Baham's responsibilities include performing property inspections both prior to and following rehabilitation to insure that contractors participating in the Housing Rehabilitation Program comply with codes, rules and regulations of the city and HUD. Gov't Ex. 46. This program is financed with Community Development Block Grants issued by HUD to the City of New Orleans and administered by the CIA. Gov't Ex. 46.

The position of Community Improvement Rehabilitation Counselor I requires, in addition to graduation from high school, a minimum of five years work experience in general building construction, three of which must have been in a supervisory capacity. Gov't Ex. 47; Tr. 231. Normally, when a new counselor is hired, she or he is given a stack of manuals and other job-related literature to read during the first week of employment. Tr. 232-3. Newly hired inspectors also accompany experienced counselors on inspections of jobs already underway, and an experienced counselor is present when each new inspector conducts his or her first pre-rehabilitation inspection. Tr. 233. It is not known whether new inspectors are so accompanied on their first inspection of a site after the completion of construction. Tr. 237. Respondent's prior experience included approximately 18 years in the construction field. Tr. 218. He had been employed to inspect construction on interstate highway systems, the NASA space shuttle facilities and the Super Dome. Tr. 216, 218. As a result of this experience, Respondent is familiar with construction contract plans, specifications and requirements. Tr. 218-20. Respondent had never before worked on the rehabilitation of residential properties, neither as an inspector nor as one who did the actual construction. Tr. 216. Respondent observed another counselor conduct inspections for the first two weeks he was employed by the CIA. Tr. 240. An inspector went with Respondent when he conducted his first pre-construction inspection, but no one went with him when he performed his first inspection following rehabilitation. Tr. 236, 237. Respondent was given the full caseload of a former employee, which included many cases previously handled incorrectly, so that he was forced to repeat much of the original work. Tr. 240.

Approximately three months after Respondent began work with the CIA, he conducted inspections of the properties located at 2530 St. Ann Street, and 9422 Forshey Street, New Orleans, Louisiana. Tr. 216. When a subsequent inspection of the property on St. Ann Street was undertaken by HUD inspector John Johnson, the rehabilitation underway was proceeding according to the specifications of the original contract as executed by the homeowner and the contractor and as approved by Respondent's predecessor. Tr. 189, 194. However, replacement of the front door, although called for in the contract, was found by Johnson to be inappropriate since the property was located in an historic district. Tr. 192-3. The HUD inspection also revealed that the

wooden floors in the structure were sound, and it was not necessary that they be recovered. Tr. 189. Those floors were covered by the old linoleum and, therefore, were not visible when Respondent conducted his inspection. Tr. 208. The contract said nothing about the historical significance of the construction. Tr. 194. Once it was recognized that the property was located in an historic district, the original front door was refinished and reinstalled. Tr. 208.

Respondent certified that the Forshey Street rehabilitation had been completed according to contractual requirements and program standards, and authorized payment to the contractor. Gov't Ex. 36; Tr. 197, 222. The subsequent HUD inspection, conducted by James Pipps, revealed that several items required by the rehabilitation contract had not in fact been completed. Tr. 195. The missing items included two working outlets on the porch, four splash blocks for downspouts, a bathroom closet door and a gas cock valve and rigid heater line. 1/ Tr. 195. A flexible heater line had been installed in place of the rigid line specified in the contract, and a window and door were installed instead of replacing the closet door. Tr. 210. These contract changes were agreed upon by the homeowner and the contractor. Tr. 210. The changes were never written down, nor were the proper written change orders ever submitted to the CIA, despite Respondent's awareness of his duty to prepare and submit such change orders. Tr. 210-11, 226. The two outlets on the porch were not operable since they were not connected to the circuit breaker panel. Tr. 199. Respondent did not trace the wires from the outlet to see if they had been connected. Tr. 212.

Conclusions of Law

Department regulations provide that a TDP may be invoked upon adequate evidence of irregularities in a contractor's or grantee's past performance in a Department program. 24 C.F.R. § 24.18(a)(2)(ii). "Contractor" is defined to include "[i]ndividuals, state and local governments ... or those in a business relationship with such recipients ... ." 24 C.F.R. § 24.4(f). Respondent is a "contractor" within the meaning of the regulation's application to the TDP sanction because he has, under the auspices of the CIA, inspected the performance of contractors participating in the Housing Rehabilitation Program. The program is financed with Community Development Block Grant funds issued from HUD.

1/ There was also a quality concern with respect to the installation of a smoke detector. Tr. 195. Evidently, because the smoke detector went off and could not be silenced, someone removed it. Tr. 198. However, because no direct evidence was presented on this point, I make no finding as to this issue.

The basis for the TDP imposed on Respondent was the Department's assertion that Respondent falsely certified that contractual work had been completed, authorized payments to contractors for work not completed, and failed to properly and competently inspect rehabilitation work. The Department supports this position by pointing to discrepancies between the inspections of two properties conducted by Respondent and subsequent HUD inspections of the same properties.

Respondent did not fail to properly and competently inspect the property located at 2530 St. Ann Street, New Orleans. When Respondent saw the property, he found wooden floors covered with old floor covering. The rehabilitation contract called for them to be recovered. It was not negligent nor improper for Respondent to accept compliance with this contract provision instead of attempting to determine whether the floors could have been refinished. As a matter of fact, recovering can be cheaper than refinishing, and there is no evidence in this case upon which one could conclude that either course would be the less expensive. Since the homeowner and the contractor agreed on a reasonable way to rehabilitate the floors, and since that agreement was embodied in the contract approved by HUD, Respondent had no further duty to insist upon refinishing as an alternative.

Although the contract provision specifying replacement of the front door was not reasonable, for such replacement failed to comply with the regulations that apply to homes located in historic districts, Respondent's failure to recognize this unreasonableness does not amount to a lack of competence on his part. Respondent took no part in drafting or approving the rehabilitation contract that included the offensive provision, nor did the contract itself make reference to the historic significance of the property location. At the time Respondent inspected the property, the construction in progress was in compliance with contract specifications. When it was made known that the new door did not comply with the historic district requirements, it was removed and the old one refinished and reinstalled. Respondent's only error, his failure to recognize that the property was located in an historical area, is not egregious enough to justify imposition of a TDP, especially since Respondent had been working for the CIA for only three months at the time of the inspection.

Respondent did fail to properly and competently inspect the property located at 9422 Forchey Street, New Orleans. Further, Respondent falsely certified contract items as complete and authorized payments for work that had not been done. The subsequent HUD inspection noted four items required by the rehabilitation contract that were not completed, in spite of Respondent's certification that the work had been finished and his request for the contractor's payment for the "completed" work.

The HUD inspector first found missing four splash blocks for downspouts which were to be installed. Respondent insists that the splash blocks were present when he conducted the original inspection. Although there is no reason to doubt the accuracy of the HUD inspector's findings, neither does the fact that the splash blocks were not present at the second inspection establish that they were never installed. Since splash blocks are highly portable, there are plausible alternative explanations for the HUD inspector's failure to find the splash blocks on the property.

According to the contract, the gas heater was to have been fitted with a gas cock valve and a rigid line. The HUD inspection indicated that the contractor had instead used a flexible line. Respondent did not regard this item as incomplete because, in his opinion, it was use of the flexible line, not the rigid, that was proper in this circumstance. Respondent did not write the contract, nor did he understand why it originally called for a rigid line. Regardless of whether use of the flexible line was actually a better choice in this situation, Respondent should not merely have ignored the fact that the contract specified use of a rigid line. At the very least, he should have made some sort of notation to the effect that a substitution had occurred. Ideally, he should have filed a change order.

An unauthorized substitution or "swap-off" also occurred with respect to the bathroom closet door. The rehabilitation contract called for replacement of the door, yet at the time of the HUD inspection the contractor had not complied with that provision. Respondent claims that the door was not replaced because the homeowner and the contractor had agreed to substitute installation of an extra window and an extra door. As with the gas line, there was no notation of the substitution nor any change order submitted.

Respondent was aware that the proper procedure in both of these situations was to submit a written change order. He did not do so because the homeowner was satisfied with the substituted item. Respondent claims that in such situations, everyone at the CIA certifies the job as complete, regardless of the substitutions or the lack of a change order. Respondent acknowledges that this general practice is improper, but feels that since the practice is widespread and the homeowner was satisfied, the impropriety is not particularly significant. The argument is not persuasive because permitting such verbal modification of the rehabilitation contract affords neither the parties to the contract nor HUD the necessary protection to assure that public funds are properly and prudently expended. Should there be a problem with the substituted work in the future, there are no contract specifications against which to assess the quality of that work. If approval is not required for "swap-offs," contractors and homeowners are free to contract for

certain high-priced construction items, privately "swap-off" for items of lesser value, and then collect the original amount from HUD. The requirement of submitting written change orders is not insignificant, for it provides HUD with a means to protect the government from this type of abuse.

The HUD inspection also found discrepancies regarding the outlets located on the porch of the house. Although it is unclear whether the total number of outlets should have been two or four, the contract does provide that two working outlets should have been installed. The two outlets noted by the HUD inspector were inoperable, since they were not connected to the circuit breaker panel. Respondent admits that he neglected to trace the wires from the outlet to the panel in order to confirm that they were connected. He said the homeowner had told him that the outlets had worked at one time, but were not operating at the time of the inspection. Respondent's failure to trace the wires, especially since he knew there was a problem with the outlets, shows a lack of propriety and competence on his part.

The Temporary Denial of Participation is the least severe sanction the Department can impose against a contractor or grantee. Its purpose is to impress upon that contractor or grantee the importance of complying with the rules, regulations and criteria governing the federal housing program in which he or she participates. HUD has provided adequate evidence that with respect to the property located at 9422 Forshey Street, Respondent neglected to submit the necessary written change orders, certified and authorized payment for work that was not complete, and was careless while conducting the inspection itself. Respondent was a fairly new employee at the time of the inspection and may not have received a satisfactory amount of introductory training prior to conducting inspections for the CIA. Nevertheless, Respondent did possess substantial experience in the construction field. By virtue of that experience, he knew or should have known that to certify an item as complete means that the work has been done according to contract specifications, not merely that it was finished in the opinion of the contractor or the homeowner. Respondent argues that among the other inspectors, the failure to file change orders was a common practice. If so, that may require greater regulatory oversight of CIA practices and policies. It is, however, no defense to what Respondent acknowledges is improper conduct.

Respondent is correct that the arguably insufficient training he received, the fact that he had only been working for CIA for a short time and the fact that he had no rehabilitation experience all constitute mitigating circumstances. However, these circumstances were taken into account when, following the informal hearing, the duration of the TDP was shortened from six months to three months.

ORDER

For the foregoing reasons, the imposition of the Temporary Denial of Participation, as subsequently modified, is affirmed.

Alan W. Heifetz
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Dated: June 24, 1986