

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

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In the Matter of .  
JAMES T. ROSE, JR. . HUDALJ 86-1094-DB (TDP)  
Respondent .  
. . . . .

Peter B. Broida, Esquire  
For the Respondent

Emmett N. Roden, Esquire  
For the Department

Before: ALAN W. HEIFETZ  
Administrative Law Judge

INITIAL DETERMINATION

Statement of the Case

By letter dated August 27, 1986, the U.S. Department of Housing and Urban Development ("HUD") Richmond Field Office notified James T. Rose, Jr. ("Respondent") that he was temporarily denied participation in all HUD programs which require the services of a fee appraiser. The basis for the Temporary Denial of Participation ("TDP") was that Respondent, prior to his retirement from HUD in May 1986, assigned to himself over 50 single family appraisal cases for review and payment in anticipation of his pending return to the private sector. This action was determined to be in violation of the Department's Standards of Conduct. See, 24 C.F.R. 0.735-205 (1986). The letter further advised that Respondent could request an informal hearing in seeking reconsideration pursuant to 24 C.F.R. § 24.18.

Following an informal hearing, the TDP was affirmed by correspondence dated September 30, 1986. Respondent appealed the decision and requested a hearing in accordance with 24 C.F.R. § 24.7(b). At the conclusion of that hearing, held on December 18, 1986, the government requested an opportunity to submit a post hearing brief. I granted the request with the proviso that the brief be filed by January 6, 1987.

Findings of Fact

Respondent James T. Rose, Jr. is a self-employed real estate appraiser in Richmond, Virginia. From October 14, 1963, to

May 2, 1986, Respondent was employed as a real estate appraiser by HUD. Respondent's last position prior to retiring from government service was that of Chief of the Valuation Branch. As Chief of the Valuation Branch, Respondent was responsible for hiring, supervising and managing all appraisal activity administered in the HUD Richmond Area Office. (Govt. Exhs. 2, 3; Tr. 21, 134-39.)

During his more than 20 years of employment at HUD, Respondent progressed steadily through the ranks of HUD real estate appraisers before accepting the Chief Appraiser position on October 31, 1984. Respondent's record of government service up until his retirement on May 2, 1986, was unblemished. (Govt. Exh. 3; Tr. 29, 133.)

From 1984 to 1986 the workload at HUD's Richmond Area Office increased significantly due to the number of homeowners refinancing their homes at lower interest rates. Since approximately 1982, private contractors had been hired to conduct fee appraisals for mortgage loans insured by HUD. While conventional appraisal fees range from \$150-\$225, HUD fee appraisers are paid from \$95-\$125. Field reviews are appraisals designed to assess the performance of particular fee appraisers. Field reviewers are paid \$50 per appraisal. Because of the workload, there existed a shortage of qualified individuals to perform field reviews in the spring of 1986. (Tr. 135-40.)

In early 1986, two of Respondent's subordinates terminated their HUD employment in order to become independent appraisers. On May 2, Respondent did likewise. However, before terminating at HUD, Respondent assigned over 500 appraisals to his former employees and over 50 appraisals to himself. (Govt. Exhs. 3, 36-41, 56, 141.)

Approximately one week after Respondent's retirement from HUD, his replacement telephoned him and requested that he immediately return all unfinished appraisals in his possession. Respondent did so. Shortly thereafter, Andrew Epps, Deputy Manager of the HUD Richmond Field Office began an investigation into the circumstances surrounding Respondent's retirement on May 2. This investigation culminated in the issuance of the TDP letter on August 27, 1986. That letter stated:

This action is based on your violation of the Department's Standards of Conduct in that you used your public office for personal gain, afforded preferential treatment to yourself and adversely affected the confidence of the public in the integrity of the Government. More specifically, while Chief of the Valuation Branch, you assigned to yourself, in anticipation of your termination of HUD employment, single family appraisal cases for subsequent field review and payment.

### Discussion

A TDP is an exclusion from HUD programs for a specified period not to exceed 12 months. The denial is limited in effect to the jurisdiction of the office initiating the action and the specific program under which this action is taken. 24 C.F.R. § 24.4. The purpose of a TDP is to insure that grant and contract awards issued by HUD are made only to responsible contractors and grantees. Like debarments and suspensions, a TDP is a remedy intended to protect the public. It is not a punitive sanction. 24 C.F.R. §§ 24.0, 24.5(a).

The causes and conditions under which a TDP may be initiated are set forth in 24 C.F.R. § 24.18(a), et seq. On August 27, 1986, HUD-Richmond Deputy Area Manager Andrew Epps sent Respondent notice of the TDP in accordance with Department regulations. Respondent was informed that he was being temporarily denied participation in programs arising under Section 203 of the National Housing Act and any other programs requiring fee appraisers. The letter stated, inter alia, that Respondent violated HUD Departmental Standards of Conduct. The factual basis for the TDP involved allegations that Respondent, acting in his capacity as Chief of the Valuation Branch at HUD's Richmond Office, improperly assigned appraisal cases to himself for field review and eventual compensation in anticipation of his retirement from HUD.

Respondent maintains that the Department has failed to prove a violation of HUD regulations. He asserts that the notice of the temporary denial of participation is "vague in the extreme" because only the general regulation under which the TDP proceedings commenced was specified in the notice. Respondent contends that HUD officials were unable to identify with specificity the applicable regulations because TDP procedures are inapplicable to violations of Departmental Standards of Conduct. This conclusion is necessary, argues Respondent, because he has not been indicted or convicted of any criminal offense.

24 C.F.R. § 24.18(a)(4)(ii) mandates that notice of a TDP clearly state the grounds upon which the action is based. Paragraphs three and four of the August 27, 1986, Notice letter set forth the factual and legal bases for the Departmental action. The TDP Notice clearly identifies the causes for denial of participation, Respondent's right to an informal hearing and the applicable regulation. I find that the Notice, given by Deputy Manager Epps, was adequate to inform Respondent of the charges and of the bases for those charges, and to enable him to prepare any defense to those charges.

24 C.F.R. § 0.735-202 provides in pertinent part,

An employee shall avoid any action whether or not specifically prohibited by the regulations in this

subpart, which might result in, or create the appearance of:

- (a) Using public office for private gain;
  - (b) Giving preferential treatment to any person; . . . or
  - \* \* \*
  - (f) Affecting adversely the confidence of the public in the integrity of the Government.
- . . . .

These subsections are recognizable as the basis for the TDP action contained in the notification letter from Mr. Epps to Respondent. The record reveals that Respondent's conduct violated all three subsections above. As Chief of HUD Richmond's Valuation Branch, Respondent was responsible for assigning work to field reviewers as well supervising and managing all valuation activities in the Area Office. While still a HUD employee, Respondent admits to assigning himself 54 field review appraisals to be performed subsequent to his retirement from public service. Respondent completed 20 field reviews. He demanded payment for his services. Respondent thus utilized his position as a senior government employee to his private advantage by attempting to assure himself of gainful employment upon his retirement. By misusing his position of trust, Respondent has used public office for private gain, has given preferential treatment to himself over other qualified field review appraisers and undermined the confidence of the public in the integrity of Government officials. I find that the Department properly concluded that Respondent violated the Standards of Conduct.

Respondent's argument that a TDP is an inappropriate remedy for violations of Departmental Standards of Conduct is based on a misreading of applicable regulations. 24 C.F.R. 24.18(a)(2) outlines possible causes for denial of participation in Department programs:

- (i) Adequate evidence that approval of an applicant for insurance would be an unsatisfactory risk;
- (ii) Adequate evidence of irregularities in contractor's or grantees' past performance in a Department program.
- (iii) Failure of a contractor or grantee to maintain prerequisites of eligibility to participate in a Department program.
- (iv) Causes under § 24.13(a)

Possible causes under 24.13(a) include but are not limited to a number of criminal offenses. Other causes and conditions for suspension under § 24.13(a) are serious and compelling infractions affecting present responsibility as may be determined by the appropriate HUD official.

Respondent claims that the Government has failed to adduce adequate evidence demonstrating that he committed an "offense" under § 24.13(a)(1). According to Respondent, such a failure precludes the imposition of a temporary denial of participation under § 24.18 and subsections thereunder.

Respondent's argument is focused on whether or not an "offense" was committed within the meaning of § 24.13(a). Respondent's reasoning presupposes that § 24.13(a) is the sole provision which renders Respondent's conduct subject to a TDP. This postulate is simply incorrect. Although Deputy Manager Epps testified under cross-examination that he predicated his TDP determination upon § 24.13, he also testified that he sought and relied on the advice of counsel after making his determination. For purposes of this proceeding, it is immaterial what Mr. Epps' understanding or memory of the legal basis for issuing a TDP is or was; what matters is whether there is, in fact, a legal basis for the action taken.

Respondent's violation of Departmental Standards of Conduct constitutes irregular behavior in the performance of a Department program. When Respondent assigned himself field reviews, he not only violated the technical requirement that field reviews be assigned to approved fee appraisers, but also breached the public trust by using his position to grant preferences and create business opportunities for himself. This behavior is adequate cause for issuance of a TDP under both 24 C.F.R. § 24.18(a)(2)(ii) and (iii) quoted above.

Additional authority for concluding that Respondent's conduct amounts to a cause for suspension, and thus for the imposition of a TDP, is 24 C.F.R. § 24.13(a)(2). Under that provision HUD officials may suspend contractors and grantees for serious and compelling infractions affecting present responsibility. "Responsibility" is a term of art in government contract law which speaks to the projected business risk of a contractor or grantee, including his integrity, honesty and ability to perform. See, Roemer v. Hoffman, 419 F. Supp. 130 (D. D.C., 1976.)

Mr. Epps, Acting Manager of HUD's Richmond Area Office, determined that Respondent's conduct was sufficiently serious to warrant a TDP. Upon examination of documents and payment vouchers submitted by Respondent, Mr. Epps felt that the matter was one of grave concern. After interviews with several HUD employees and consultation with the Regional Counsel and Inspector General, Epps issued the August 27th letter. The contents of that letter reveal that, in Mr. Epps opinion, Respondent was guilty of misconduct before and after his termination from HUD. I find that the evidence supports the conclusion that Respondent's conduct constituted a serious and compelling infraction affecting present responsibility.

Respondent argues that the 12-month duration of the TDP was arbitrarily imposed without consideration of possible mitigating factors. Respondent suggests that imposition of a 12-month TDP constitutes a sanction disproportionate to the gravity of any misconduct.

A TDP is a temporary exclusion from participation in a specific HUD program, imposed by a local HUD official. By comparison, a debarment proceeding excludes a contractor or grantee from participating in all HUD programs and is potentially indefinite in nature. These administrative remedies share a common purpose - the protection of the public. Applicable regulations make clear that these measures are not to be imposed for punitive purposes.

Respondent has correctly pointed out that failure to consider mitigating factors bearing upon "responsibility" may transform an administrative sanction into a criminal penalty. The court in Roemer v. Hoffman, supra, instructed that a "hard look" must be given to mitigating factors bearing on the length of the ineligibility period that should be imposed.

The imposition of an administrative sanction such as a TDP is within the sound discretion of the issuing official. Under Roemer, mitigating factors must be considered when determining the length of any ineligibility period. While on the stand, Mr. Epps was unable to articulate precisely why he chose 12 months as the length of the sanction. Documents exchanged by Epps and Regional Counsel Campanilla confirm that little or no thought was given to the duration of the TDP. The proof before me compels the conclusion that HUD officials mechanically imposed a 12-month TDP without consideration of mitigating factors impacting upon the length of the ineligibility period.

Respondent testified that the demand for appraisals increased exponentially during his tenure as Chief of Valuation. This increased volume of work was apparently due to the number of homeowners refinancing their homes to take advantage of low interest rates. Most fee appraisal work is conducted by private individuals. For conventional loans, these private appraisers receive between \$150.00 and \$225.00 per appraisal. As part of its mortgage insurance program, HUD hires private fee appraisers. However, these appraisers are paid between \$95.00 - \$125.00 per appraisal. In order to insure quality control, HUD conducts "field review" appraisals designed to evaluate the performance of the particular fee appraiser. The fee for a field review was \$50.00 in May 1986. HUD's Richmond Office assigned over 40,000 case numbers in 1986. Compliance with a 10% field review goal would require 4,000 field appraisals in Richmond alone. In Richmond, there were less than 20 individuals who were approved by HUD as field reviewers. Obviously, the volume of field appraisals far exceeded the number of individuals available to conduct such reviews. It is also apparent that a field review is

the least lucrative appraisal work available to private fee appraisers. Respondent testified that he was having trouble convincing appraisers to perform field reviews and that his primary motive was to help the HUD office reach its 10% goal because of the shortage of qualified field reviewers.

By assigning himself field reviews, Respondent assured himself a stream of income, albeit modest, after his retirement from HUD. But while it strains credulity to believe that Respondent's motives were purely altruistic, by performing the field reviews, Respondent would have helped to relieve the Department of an enormous workload. These factors, together with the low remuneration received by field reviewers, should be considered in determining the motives for Respondent's conduct and how that motive should bear on the length of any TDP.

Respondent's conduct, both prior to and after his infraction should be considered in mitigation. Respondent retired from HUD with over 20 years of service as a real estate appraiser. He progressed steadily through the ranks of HUD staff appraisers, and there is no evidence indicating any prior adverse personnel actions. Since the infraction, Respondent has admitted he acted with poor judgment. In addition, Respondent immediately returned all files when requested to do so. On direct examination, he stated that if he were in a position to do things over, he would not have assigned the appraisals to himself.

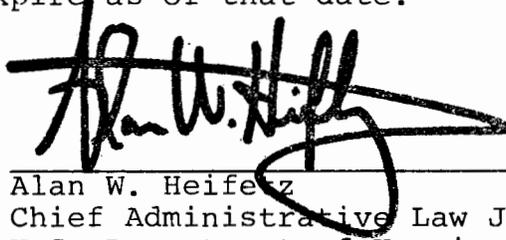
The maximum length of time for imposition of a TDP is 12 months. See, 24 C.F.R. §§ 24.4, 24.18. While imposition of the TDP in response to Respondent's conduct was justified, the duration of the sanction imposed was excessive. No members of the public were harmed by Respondent's action. The circumstances surrounding the assignment of field reviews to himself were such that Respondent believed that he was furthering the mission of the Department, and he did not even consider that he might be violating standards of conduct. Based upon his testimony and demeanor at the hearing, I conclude that he now appreciates the wrongfulness of his past conduct and that he will be able, in the future, to conform his conduct to the appropriate standards.

Based on the record as a whole, I cannot conclude that Respondent would pose a risk to the Government or the public if he were permitted to do business with HUD as of February 27, 1987. To further deprive Respondent of participation in HUD programs would not only be punitive, but also would be inconsistent with the best interest of the Government.

#### CONCLUSION AND ORDER

Upon consideration of the public interest and the entire record in this matter, I conclude and determine that good cause has not been shown for sustaining the temporary denial of participation imposed against Respondent, James T. Rose, Jr. past

February 27, 1987. Accordingly, the temporary denial of participation is modified to expire as of that date.

A handwritten signature in black ink, appearing to read "Alan W. Heifez", written over a horizontal line. The signature is stylized and somewhat cursive.

Alan W. Heifez  
Chief Administrative Law Judge  
U.S. Department of Housing and  
Urban Development  
451 7th Street, S.W., Room 2156  
Washington, D.C. 20410

Dated: January 12, 1987