

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

In The Matter of:

WASHINGTON BUTLER, JR.,

Respondent.

HUDALJ 90-1466-DB (LDP)

Washington Butler, Jr.  
For the Respondent, *pro se*

John K. Grisso, Esquire  
For the Government

Before: Robert A. Andretta  
Administrative Law Judge

**INITIAL DETERMINATION**

**Jurisdiction and Procedure**

This is an appeal by the Respondent, Washington Butler, Jr., from a Limited Denial of Participation (LDP) which was issued on December 5, 1989, by Raymond A. Harris, Regional Administrator - Regional Housing Commissioner (Administrator) of HUD's Region IV Office in Atlanta, Georgia. It is conducted pursuant to the regulations of the Department of Housing and Urban Development (HUD) that are codified at 24 CFR Parts 24 and 26 (1989), and jurisdiction is thereby obtained. The one-year LDP took effect on the date of the letter and prohibited Butler's participation in programs administered by the Assistant Secretary for Housing - Federal Housing Commissioner, including, but not limited to, all FHA programs, throughout the Department's Region IV, which includes Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee. Moreover, all other HUD Regional Offices are permitted to act on such an LDP in accordance with the regulation found at 24 CFR 24.705(a)(11)(c).

As his reason for imposing the LDP, the Administrator stated that the Office had found irregularities in the Respondent's business dealings with the government which

evidence irresponsibility and which provide cause for an LDP under the regulation codified at 24 CFR 24.705(a)(2). This regulation states that a limited denial of participation shall be based upon adequate evidence of "[i]rregularities in a participant's or contractor's past performance in a HUD program." More specifically, the Administrator stated that Audit Report No. 89-AT-214-1004 of October 26, 1989, which was prepared and issued by HUD's Region IV Office of the Regional Inspector General, revealed that, prior to and during the time of the audit, Respondent had served as Executive Vice President and Property Manager of American Diversified Management Corporation (ADAM). In that capacity, the audit states that Respondent was responsible for the general management and operations of six HUD-insured projects in the Region, and was in violation of numerous provisions of HUD's regulations and the applicable Regulatory Agreements at all of them.

As of the date of the LDP, the Administrator stated that the Regional and Field Offices had attempted to resolve the audit findings, but that the following five violations of the Regulatory Agreements remained, each of which required payment by HUD:

1. Payments totaling \$633.00 for unauthorized off-site payroll processing charged to Golden Age Retirement Village;
2. Payment of \$900.00 each to five consultants for unauthorized financial services at five projects, for a total of \$4,500.00;
3. Payment of \$37,548.00 in unsupported costs for Haynes Gardens Apartments;
4. Payment of \$120.00 in unsupported long distance calls from Haynes Gardens Apartments; and
5. Payment of \$15,258.00 to South Central Village and \$333.00 to Abel Court to settle the amounts owed from an agent's central disbursing account.<sup>1</sup>

In addition, the Administrator stated in the notice letter, as further reason for imposition of the LDP, that a management review of Golden Age Retirement Village in Knoxville, Tennessee, that was conducted in April of 1988, produced an unsatisfactory rating in all aspects of management of the property. Many of the deficiencies cited in the report indicated violations of the Management Agreement. He further stated that Respondent was in attendance at the review while serving as Property Manager and Executive Vice President of the management company and that he was therefore in a position of responsibility for the deficiencies.

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<sup>1</sup> Late in the hearing, all of these items in the complaint were dropped by the government's attorney, and he declared that he would rely only on the facts complained of in the following paragraph. (T 157)

In accordance with instructions contained in the notice letter, Respondent requested a conference for reconsideration of the LDP. The conference was held on January 29, 1990, and on February 15, 1990, he was advised by the Administrator that the LDP was affirmed. Respondent was also advised of his rights, including his right to this proceeding.

On March 13, 1990, Respondent filed a timely request for a hearing, and I issued a Notice Of Hearing And Order on April 2, 1990. In accordance with this Order, the Department timely filed its Complaint on April 27, 1990, and Respondent timely filed his Answer on May 25, 1990. A hearing was conducted in Nashville, Tennessee on July 31, 1990. In accordance with an oral order at the hearing, the Respondent and the Government timely filed their post-hearing briefs on September 18 and 19, 1990, respectively. Respondent's brief was received in this office on October 1, 1990, and thus, this case became ripe for determination on this last-named date.

### **Findings of Fact**

The Department of Housing and Urban Development administers a program of direct loans to non-profit sponsors to build housing for the elderly under the National Housing Act, as amended, 12 U.S.C. Sec. 1701, *et seq.*, and provides rental subsidies for low income tenants under authorization of Section 8 of the Housing Act of 1937, 42 U.S.C. Sec. 1437f. Under Section 202 of the National Housing Act, the Secretary is authorized to assist non-profit organizations in providing rental and cooperative housing for low income tenants by direct loans for the project and by insuring mortgages which satisfy certain eligibility requirements. Under Section 8 of the Housing Act, the Department subsidizes tenants' rent in accordance with formulations which depend upon their assets and income. Under this part of the plan, the Secretary establishes the "fair market rent" for each dwelling. In turn, the property owner must agree to collect and deposit "excess rental charges" and to comply with rules and regulations as well as methods of operation that are established by HUD for the specific project and are promulgated in a Management Agreement which is agreed to by the owner.

During all times relevant to this LDP, Canaan Baptist Housing Corporation was the owner of Golden Age Retirement Village in Knoxville. It employed the ADAM Corporation as its Managing Agent during this period. (T 9)<sup>2</sup> A Management Agent must be familiar with HUD requirements and is responsible for hiring and firing staff and for monitoring the operation of the project to ensure it remains in conformance with HUD regulations and the Management Agreement. (T 10) The Management Agent is responsible for correcting situations that are not in conformance with the regulations and Agreement. (T 14)

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<sup>2</sup> Capital letter T stands for the transcript of the trial, and the number refers to the transcript page. The Secretary's exhibits are cited with a Capital S and an exhibit number, and the Respondent's exhibits are cited with a capital R and an exhibit number.

HUD officials dealt mainly with the Respondent during this period. (T 17) He had held himself out to be the executive vice president of ADAM Corporation as well as the property manager by signing his name to letters over those titles on ADAM letterhead stationery. (T 18, *e.g.*, S 4, 6, 11) This, the content of the letters, and numerous phone and in-person conversations with Respondent led HUD officials to believe that Respondent was their primary point of contact and that he had the responsibility for the success or failure of the project. (T 33, 34) Indeed, by signing correspondence in the two capacities and by performing in those capacities Respondent was in fact the point of contact responsible for the Managing Agent, and his performance in that capacity was the reason for the LDP.

The first indication of problems at Golden Age was when the HUD office began getting complaints from tenants who were not receiving the services they had a right to and from vendors who had not been paid for services or products supplied to the project, *e.g.*, garbage had not been collected for three months because the collector had not been paid for five months. (T 76, 77) HUD officials began to call other vendors, and every one that was called indicated it had bills that were past due, that had not been paid in months. Other essential services were being cut off because of this situation. (T 78) In addition, there was a default in the mortgage on the project because of the on-site manager's failure to submit subsidy billings to HUD on time for the project to pay them. (T 79)

Cynthia R. Keller is a loan specialist in the Knoxville HUD office. She has responsibility for Golden Age as well as other similar projects and dealt daily with Respondent during this troubled period. She discussed these matters with Respondent throughout 1987 and was assured that they would be taken care of, but when she conducted the management review a year later, there had been no improvement. (T 80) Again, she worked with Respondent, but there was no improvement. An in-depth audit was requested, and the Inspector General's Office completed it in 1988. (T 84; S 2) It revealed numerous problems as discussed above, plus considerable problems with how rent payment and rent subsidies were collected and determined. (T 88) For example, no records were kept on whether tenants actually paid their rent; only whether or not they had come to the office to pay. There was no record regarding partial payments; the project simply assumed that all payments were full payments. (T 90) All rent was paid in cash, rather than by check, because Respondent considered checks to be "too risky." (T 92)

Some of the problems revealed by the management review and audit had to do with the timeliness of reports. Submission to HUD of a budget for the project was due by the first of each year, but as of April 1988, when the audit was done, there was no budget for that year. (T 97) Financial statements were required by the Agreement to be submitted to HUD sixty days after the end of each fiscal year. These were three to six months late for 1984 through 1987. (T 98) Monthly accounting statements, which are due ten days after the end of each month, were an average of four months late. (T 99)

Other problems revealed by the review and the audit had to do with poor business judgment and procedures, as well as practices that were contrary to the

governing statute and regulations. Respondent authorized the purchase of a three thousand dollar phone system for the project office as well as new drapes for every apartment, at over \$250.00 per unit, during the period when the monthly \$130.00 garbage bill was not being paid and the garbage was not being collected. All accounts payable were past due, and Respondent admitted that he picked which bills to pay and which to defer in spite of the Agreement's requirement that all bills be paid on a timely basis. (T 99) Tenants who were unqualified for the subsidy program because they were over income, not old enough, or not handicapped, were living in the property. (T 101) Files required to establish qualification and subsidy level were in total disarray, contained little or no documentation, and were in many cases simply missing. Security deposits were not properly accounted for and were not returned when they should have been. (T 10)

### **Discussion**

Respondent argues that the LDP is a baseless attack on him by HUD employees of questionable motivation and that he should not be held liable as a responsible party because he was only a consultant at ADAM corporation, doing as he was told, and not in any way in authority. He stated at the hearing:

We [sic] intend to demonstrate by the testimony that will be presented that the government has prejudicially and with bias, malice, forethought, conspired to deprive this respondent of his civil rights, by singling him out as the perpetrator of various violations that were those of a corporate entity, which he did not control, for which he was not the senior officer, for which he was not the final auditor [sic] of decisions that were made in that corporate entity.

(T 133) The first part of this ingenuous argument was easily brought to ground. Respondent was not singled out for an LDP; ADAM Corporation, the church board sponsor, the resident manager, and the site manager were all LDP'd as a result of the mismanagement of Golden Age. (T 135) Moreover, additional people were LDP'd as a result of the mismanagement of the other projects that were named in the Complaint against Respondent in counts that were later dropped.

Respondent's argument that he was merely a contractor working on an hourly basis at \$50.00 per hour and, later, at \$75.00 per hour, on an unwritten contract, is also without merit. He held himself out to be the Project Manager and the Vice President of the Management Agent. HUD employees treated him as such based upon the things he controlled, his obvious decision-making authority and the manner of his daily dealings with HUD. When questioned on this, he claimed it was not necessary for him to notify HUD that he was a consultant rather than an employee or owner of ADAM (T 169), even though he knew, or should have known, that HUD was relying upon him in trying to get the many deficiencies straightened out for a period of at least twenty-one months. His was actual control, and it is of little consequence what his title was during this period.

Respondent's own witness, ██████ Fugate, stated that she was employed as a property manager for ADAM at Golden Age for the period from November, 1988 through January, 1989. Although this was after Respondent claims to have resigned from ADAM, Fugate expressed great familiarity with Respondent. She stated that she found the tenant files in disarray and without proper documentation. (T 175) She further stated that she knew Respondent as an executive vice president of ADAM and that he was directly employed with the president of ADAM, but did not know the applicable regulations. (T 185) Clearly, Respondent assumed the authority which would go with the titles with which he styled himself in every letter to HUD and others, and HUD properly has held him answerable for the responsibility that travels with that authority.

Debarment is a sanction which may be invoked by HUD as a measure for protecting the public interest by ensuring that only those qualified as "responsible" are allowed to participate in HUD programs. *Stanko Packing Co. v. Bergland*, 489 F. Supp. 947, 949 (D.D.C. 1980); *Roemer v. Hoffman*, 419 F. Supp. 130, 131 (D.D.C. 1976). "Responsibility" is a term of art used in government contract law. It encompasses the projected business risk of a person doing business with the government. This includes that person's integrity, honesty, and ability to perform. The primary test for debarment is present responsibility, although a finding of present lack of responsibility can be based upon past acts. *Schlesinger v. Gates*, 249 F.2d 111 (D.C. Cir. 1957); *Roemer, supra*. The debarment sanction may also be justified on the basis of its deterrent effect on those who do business with the government.

Respondent Butler has not overcome the government's demonstration that he is not presently responsible. His statements that he was a mere employee or consultant without authority is patently incredible. As the property manager of Golden Age Retirement Village, Respondent was, at all times relevant to this Complaint, a participant in a covered transaction under HUD's nonprocurement programs and was, thus, a principal as defined in 24 CFR 24.105(p)(2), (11), and (13), thus making 24 CFR Part 24, the regulations governing suspension and debarment from conducting business with the federal government, applicable to him. The total mismanagement of Golden Age and the consistent violations of HUD's regulations and the Regulatory Agreement fulfill, at least, the regulation that is codified at 24 CFR 24.705(a)(2) as cause for an LDP. That regulation does not require that the government show wilfulness, but only that there are "irregularities in a participant's or contractor's past performance in a HUD program." The government has a responsibility to the public to limit the participation not only of dishonest people, but also of incompetent people.<sup>3</sup>

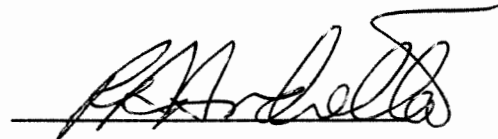
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<sup>3</sup>In *The Matter of Arnold K. Litman, et al*, (HUDALJ 89-1361-DB, decided October 3, 1989) the Respondent claimed that he honestly believed he was doing right while acting in violation of the regulations. The deciding official stated that this in itself posed a risk to the government resulting from a lack of competence.

**Conclusion and Order**

Upon consideration of the need to protect the public interest, I conclude and determine that good cause existed to limit Respondent's participation in HUD programs as described in the opening paragraph of this initial determination. Accordingly, the LDP is affirmed.

So ORDERED.

A handwritten signature in black ink, appearing to read "R. Andretta", written over a horizontal line.

ROBERT A. ANDRETTA  
Administrative Law Judge

Dated: December 3, 1990.