

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

In the Matter of:

ROBERT FRANCIS

Respondent.

HUDALJ 90-1518-DB (LDP)
Decided: January 11, 1991

Kenneth L. Marten, Esq.
For the Respondent

John P. Deller, Esq.
Louis Smigel, Esq.
For the Department

Before: William C. Cregar
Administrative Law Judge

INITIAL DETERMINATION AND ORDER

Respondent, Robert Francis, appeals a Limited Denial of Participation ("LDP"), dated April 23, 1990, issued by A.M. Villane, Jr., the then Acting Regional Administrator/Regional Housing Commissioner for the New York Region of the U.S. Department of Housing and Urban Development ("the Department" or "HUD"). The LDP denies Respondent the right to directly or indirectly participate in all HUD Programs within the geographic jurisdiction of the New York Regional Office for a period of twelve months from the date of issuance. *See* 24 C.F.R. Sec. 24.700, *et seq.* The action taken against Respondent is based upon an indictment by the Grand Jury of Nassau County, New York for the crimes of Offering a False Instrument for Filing in the First Degree and receiving unlawful gratuities in violation, respectively, of Sections 175.35, and 200.35 of the Penal Law of the State of New York. In addition, the indictment charges that Respondent filed a false and fraudulent New York tax return in violation of Article 22 of the New York State Tax Law. On June 6, 1990, the Acting Deputy Regional Administrator, Herbert Geller, affirmed the LDP. Respondent appealed the LDP on July 9, 1990.

Sections 24.313(b)(2)(ii) and 24.713 of the Department's regulations (24 C.F.R. 24.313(b)(2)(ii), 24.713) provide that where, as here, the LDP is based on an indictment, the hearing shall be limited to the opportunity to submit documentary evidence and written briefs. The Department submitted its brief on August 14, 1990. Respondent's brief was submitted September 17, 1990. Respondent's brief challenges the validity of the indictment and the constitutionality of the regulatory provision which "deems" an indictment to be evidence sufficient to sustain an LDP. 24 C.F.R. Sec. 313(b)(3), 24 C.F.R. Sec. 24.705(b).¹ On October 26, 1990, the parties were ordered to brief whether the indictment was void under New York law and, if so, whether this defense constituted a basis for rescission of the LDP. The parties filed timely briefs. The Department's brief, filed on November 7, 1990, states that the matter is presently before the The Supreme Court of the State of New York and requested dismissal of the appeal or, in the alternative, deferral of any decision pending the outcome of the State proceeding. Respondent was afforded until November 28, 1990, to file any response to the Government's pleading. He did not do so. On November 29, 1990, the Department filed a Motion for Preliminary Determination of Jurisdiction. By order dated November 29, 1990, Respondent was afforded until December 7, 1990 to file any response to the Motion. Respondent did not file a response to the Department's Motion.

Findings of Fact

Respondent is the former Commissioner of the Town of Hempstead, New York's Department of Planning and Economic Development. In this capacity he administered the HUD-funded commercial facade improvement program. This program involves the use of HUD Community Development Block Grant funds to rehabilitate the exterior of commercial buildings. As Commissioner, Respondent was a "person within a participant with primary management or supervisory responsibilities"; and a "person who has a critical influence on or substantive control over a covered transaction. . ." He was, therefore, a "principal" under 24 C.F.R. Sec. 24.105(p).

The Grand Jury of Nassau County, New York, returned an undated indictment against Respondent which was received by HUD's Regional Office of Inspector General on March 1, 1990. Although signed by the Grand Jury Foreman, it was not signed by the District Attorney. However, the printed name of the District Attorney appears on the cover page of the indictment. In addition, the Assistant District Attorney for the County of Nassau, Edward Miller, filed a document in connection with the litigation pending before the New York Supreme Court entitled Affirmation in Opposition, in which he argues in favor of the validity of the indictment. By implication this document establishes that the indictment was authorized by the Office of the District Attorney.

¹I have not addressed Respondent's contention that the HUD regulation is unconstitutional, since an administrative proceeding is not an appropriate forum for considering and deciding that type of constitutional argument. *Califano v. Sanders*, 430 U.S. 99, 109 (1977).

Respondent was indicted² for Offering a False Instrument for Filing in the First Degree and for receiving unlawful gratuities in violation, respectively, of Sections 175.35 and 200.35 of the Penal Law of the State of New York, and for filing a false and fraudulent New York tax return in violation of Article 22 of the New York State Tax Law. With the exception of receiving an unlawful gratuity (which is a misdemeanor punishable by up to one year in prison), these offenses are felonies punishable by up to four years in prison.

The indictment alleges that Respondent used his position as Commissioner to obtain free home improvements from two contractors who, in return for providing the free construction work on Respondent's home, received contract awards of approximately \$1.5 million. The estimated value of the work performed by the contractors is alleged to be approximately \$25,000. It is further alleged that the \$25,000 was not reported as income on two state income tax returns filed by Respondent, and that the tax returns were, as a result, false and fraudulent.

Discussion

The Motion for Preliminary Determination of Jurisdiction

The Department contends that the Hearing Officer lacks jurisdiction to rule on the validity of the indictment and requests 1) a ruling prior to any further proceedings in this matter and 2) that the determination be that the Hearing Officer lacks jurisdiction. The Respondent has filed no opposition to the Motion. The Motion is granted to the extent it requests a ruling on the question of the jurisdiction of a Hearing Officer to determine as a threshold matter whether an indictment is valid. However, for the reason set forth below, the Department's request that this determination be made in the negative is denied.

The Department's argument implicitly posits an irrebuttable presumption of validity of any indictment. No basis for this presumption is contained in the HUD regulation which sets forth the applicable standard of proof. This regulation states that "adequate evidence" is necessary to satisfy the standard of proof for an LDP. The regulation states: "If the . . . limited denial of participation is based upon an indictment, . . . the standard shall be deemed to have been met." 24 C.F.R. Sec. 24.313(b)(3). Since "adequate evidence" is necessary to satisfy the standard, and an indictment is deemed to satisfy the standard, an indictment must be comprehended within the term, "evidence". Since an indictment is treated as evidence, its authenticity and validity can be disputed. If an indictment is demonstrably void, it fails to constitute "adequate evidence" upon which the action can be based since, for all practical purposes, it does not exist. Nothing in Part 26 of HUD's regulations precludes a Hearing Officer from making this threshold determination. Accordingly, a Hearing Officer has jurisdiction to rule on the voidness of an indictment.

²For the reasons set forth below, there is a sufficient basis upon which to conclude that the indictment is valid. According, I have determined that Respondent was, in fact, "indicted".

Respondent has failed to Demonstrate that the Indictment is Void

Respondent relies on Section 200.50 of the New York Criminal Procedure Law which enumerates certain requirements for valid indictments, including a requirement that an indictment be "signed" by the District Attorney.³ A presumption of regularity attaches to the acts of public officials. As stated by the U.S. Supreme Court, "In the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *U.S. v. Chemical Foundation*, 272 U.S. 1, 14,15 (1926). Accordingly, the burden is on Respondent to demonstrate the infirmity. Respondent has not met this burden. Although the indictment was not signed in the usual sense of a handwritten signature affixed to the document, New York case law appears to permit signatures to be printed on the document. *People v. Sanchez*, 543 N.Y.S. 2d 878 (Supreme Ct., Bronx Co., 1989).⁴ Nor does the statute appear to delimit the portion of the document which must contain the signature. *People v. Miller*, 346 N.Y.S. 2d 144 (Dutchess Co. Ct., 1973). As noted above, the question of whether the preprinted name of the District Attorney on the cover of the indictment constitutes a signature is before the New York Supreme Court. It is impossible to determine the validity of this particular indictment without anticipating the judgment of the New York Supreme Court, which is, of course, the appropriate forum, for interpreting New York law. Accordingly, in the absence of a definitive ruling in its favor by that court, Respondent has failed to demonstrate that the indictment is void.

The Indictment Constitutes Adequate Evidence

The Department relies upon the causes stated in 24 C.F.R. Secs. 24. 305(a)(3), (4) and 24.705(a)(8). The regulations authorize issuance of limited denials of participation for bribery, making false statements, and for "any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a person." As discussed above, there must be "adequate evidence" to support the action. 24 C.F.R. Sec. 24.313(b)(3). This standard is deemed to have been met if the Limited Denial of Participation is based upon an indictment. *Id.*, 24 C.F.R. Sec. 24.705(b).

Although more limited in duration and scope than a debarment, the purpose of an LDP, like a debarment, is to protect the public interest by precluding people who are not "responsible" from conducting business with the Federal Government. *See*, 24 C.F.R. Sec. 24.115(a) *See also*, *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) In government contract law, "responsibility" is a term of art which encompasses integrity, honesty, and

³Section 200.50 states: An indictment must contain. . .
9. The signature of the district attorney.

⁴Based upon the Affirmation in Opposition filed by the Assistant District Attorney, I have concluded that the indictment was, in fact, authorized.

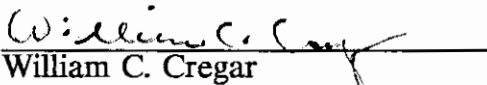
business performance ability. Determining "responsibility" requires an assessment of the present risk that the Government will be injured in the future by doing business with a respondent. That assessment may be based upon past acts. *Schlesinger v. Gates*, 249 F.2d 111 (D.C. Cir. 1957); *Roemer, supra*.

The indictment provides "adequate evidence" that Respondent, a public official, used his official position to obtain special favors from contractors, and failed to disclose these favors as income on his tax returns. Three of the four charges allege serious criminal conduct amounting to felonies. If proved, such conduct would demonstrate a serious lack of honesty and integrity, and, therefore, present responsibility.

CONCLUSION AND ORDER

The Department has demonstrated by adequate evidence that good cause exists for the imposition of the limited denial of participation and that such imposition would be in the best interests of the government. Accordingly, it is

ORDERED that the limited denial of participation is affirmed.



William C. Cregar
Administrative Law Judge

Dated: January 11, 1990.