

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

In the Matter of:

JOE BARRON and
ALLIED REALTY,

Respondents.

HUDALJ 90-1534-DB
Decided: June 7, 1991

Joe Barron, *pro se*

William V. Cerbone, Jr., Esquire
For the Government

Before: Robert A. Andretta
Administrative Law Judge

INITIAL DETERMINATION

Jurisdiction and Procedure

This proceeding arose as a result of an action taken by the Department of Housing and Urban Development ("the Department" or "HUD") to suspend Respondents, Joe Barron and his named affiliate, Allied Realty, pending the outcome of a government investigation, and any legal, debarment or Program Fraud Civil Remedies Act proceedings, from participating in any primary or lower-tier covered transactions either as a participant or a principal at HUD and throughout the executive branch of the federal government and from entering into any procurement contract with HUD. Such a suspension is authorized by HUD's debarment and suspension regulations. *See generally* 24 CFR Part 24. Jurisdiction is obtained thereby and through 24 CFR Part 26.

On August 9, 1990, HUD notified Respondents of the immediate suspension to which they timely appealed. Pursuant to the Notice of Hearing and Order, the Department filed its Complaint on October 1, 1990. HUD's Complaint states that Respondent Barron sold a home that was financed by a mortgage insured by the Federal Housing Administration ("FHA"). The Department alleges that Respondent Barron

agreed with the purchasers that they need only pay a \$200 deposit rather than the three percent minimum investment required on FHA-insured mortgages. The Complaint further avers that the Respondent certified the HUD settlement statement as correct, thus indicating that the buyers paid the requisite minimum investment even though Respondent did not receive or expect to receive this amount. Finally, the Department asserts that Respondents are the subject of a government investigation into the furnishing of false documents for the purpose of inducing HUD to insure mortgages where minimum down payments were not made. Respondents filed an Answer essentially denying all of the allegations in the Complaint.

A hearing was conducted on March 20, 1991, in San Antonio, Texas. HUD presented oral testimony and written exhibits. Respondent Barron cross-examined HUD's witnesses and testified on his own behalf. In accordance with an oral order at the end of the hearing, the parties submitted post-hearing briefs and additional documents that became part of the record, and this case became ripe for determination on May 13, 1991.

Findings of Fact

HUD, a federal executive department established pursuant to 42 U.S.C. section 3531, administers FHA mortgage insurance programs under the National Housing Act, which is codified at 12 U.S.C. section 1701, *et seq.* It has authority, among other things, to insure eligible mortgages that are submitted and to issue commitments for insuring such mortgages upon such terms as the Secretary of the Department may prescribe. *See* 24 CFR sec. 201.1. The Department's FHA Direct Endorsement Single Family Program enables HUD-approved lenders to grant loans for FHA insurance without HUD's specific prior consent. *See* 24 CFR Part 203. The approved mortgage lender involved in the subject transactions was MISCorp., INC. (T 49-50; H 3A).¹

Since November of 1988 Respondent Barron has been the owner of Respondent Allied Realty, a business involved in marketing and selling properties with FHA-insured mortgages. (T 30; Final Brief of Joe Barron and Allied Realty at 1 (undated, rec'd Apr. 25, 1991) ("Respondents' Brief")). On May 11, 1989, Respondent Barron sold the single-family home located at [REDACTED] Hermine Boulevard, San Antonio, Texas, to [REDACTED] Plasencia. Respondent Allied Realty was the real estate brokerage firm for the sale. (H 3A and 3C). The sale was financed by an FHA-insured mortgage. (H 3C).

The HUD settlement statement ("the HUD-1") for the Plasencias' FHA-insured mortgage reported that the purchasers made the minimum three percent investment

¹ Capital letter T followed by a number references a hearing transcript page. HUD's and the Respondents' exhibits are cited with capital letters H and R, respectively, followed by exhibit numbers.

required for FHA insurance totaling approximately \$1800. (T 35, 42-43).² Respondent Barron certified the HUD-1 as correct, thus verifying that the buyers made the minimum requisite investment. (H 3A; T 97). The Plasencias, however, did not pay the required minimum deposit; rather, they invested only \$200 of their own funds. (T 71-75, 79). They were given some additional money by Allied Realty to be applied toward the difference between their \$200 payment and the remainder of the minimum three percent investment. (T 79-80).

Within approximately a two-year period starting from October 1, 1988, more than 30 of MISCorp.'s FHA-insured loans defaulted.³ Allied Realty was involved in 15 of these loans, one of them being the Plasencia loan. (T 23, 31-33; H 1).⁴ Of these 15 loans, at least 13 of the buyers paid from nothing to \$250, as opposed to the FHA minimum required three percent investment, which is approximately \$1300 to \$2500. (T 31-33). However, on at least these 13 loans, the HUD-1 forms showed the buyers as having made the minimum three percent investments. (T 35).

For at least those 13 of the 15 loans, Allied Realty performed the preliminary loan application process verifying the buyers' deposits, employment, and other financial data. (T 34-35). Respondent Barron was the seller for three of the fifteen loans. (T 30, 33). Respondents and others are subjects of an ongoing criminal investigation. (T 65-66).

Discussion

Respondent Barron, as a seller of properties subject to FHA-insured mortgages, is a "participant" in "covered transactions." Respondent Allied Realty, as a real estate company involved in the sale of properties with FHA mortgages, is a "participant" in "covered transactions," and Respondent Barron, as owner of Allied, is a "principal". See 24 CFR 24.105 (m), (p), and 24.110. Since Respondent Barron is in a position to exercise control over Respondent Allied, they are "affiliates" of each other (24 CFR 24.105(b)), and are subject to HUD's suspension and debarment regulations in accordance with the regulations codified at 24 CFR 24.110.

"Suspension is a serious action to be imposed only when [there is] adequate evidence of one or more of the causes [for suspension, or to suspect the commission of

² HUD's witness incorrectly added the amounts totaling the 3% investment. The HUD-1 indicates that the buyers paid \$900 and \$893.98, for a total investment of slightly less than \$1800, not \$1900 as the witness computed. (T 35-36, 43).

³ Exhibit H 1 reports 33 defaulted loans for the period from October 1, 1988, to March 31, 1990. Respondent Barron, however, did not own Allied until November of 1988. This one-month discrepancy is not particularly troubling since, prior to his affiliation with Allied Realty, Respondent Barron owned First Choice Realty which was also involved in one of the defaulted MISCorp. loans. (T 23).

⁴ Although HUD's witness originally testified concerning 16 loans, after examining his spreadsheet he recalled the number as being 15. (T 23; T 32-33).

certain offenses, and immediate action is necessary to protect the public interest." 24 CFR 24.400(b). "Adequate evidence" is defined as "[i]nformation sufficient to support the reasonable belief that a particular act or omission has occurred." 24 CFR 24.105(a). This standard is analogous to that required to establish probable cause prior to the issuance of an arrest or search warrant. *Transco Sec., Inc. v. Freeman*, 639 F.2d 318, 324 (6th Cir.), cert. denied, 454 U.S. 820 (1981); *Horne Bros. Inc. v. Laird*, 463 F.2d 1268, 1271 (D.C. Cir. 1972).

A suspension may be imposed when there is adequate evidence of a "[v]iolation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program." 24 CFR 24.305(b); see also 24 CFR 24.405(a)(2). Further, suspension is appropriate when there is adequate evidence to suspect the commission of (1) fraud in connection with performing a contract, (2) falsification of records, or (3) an "offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a person." 24 CFR 24.305(a)(4); see also 24 CFR 24.405(a)(1).

"Responsibility" is a term of art which encompasses business integrity and honesty. See, e.g., *Gonzalez v. Freeman*, 334 F.2d 570, 573 & n.4, 576-77 (D.C. Cir. 1964). Determining "responsibility" requires an assessment of the current risk that the government will be injured in the future by doing business with a respondent. See *Shane Meat Co., Inc. v. U.S. Dep't of Defense*, 800 F.2d 334, 338 (3d Cir. 1986). That assessment may be based upon past acts. See *Agan v. Pierce*, 576 F. Supp. 257, 261 (N.D. Ga. 1983); *Delta Rocky Mountain Petroleum, Inc. v. U.S. Dep't of Defense*, 726 F. Supp. 278 (D. Colo. 1989).

The suspension and debarment process is not intended as a punishment. Rather, it protects governmental interests not safeguarded by other laws. *Joseph Constr. Co. v. Veterans Admin.*, 595 F. Supp. 448, 452 (N.D. Ill. 1984). These governmental and public interests are safeguarded by precluding persons who are not "responsible" from conducting business with the federal government. See 24 CFR section 24.115(a). See also *Agan v. Pierce*, 576 F. Supp. 257; *Stanko Packing Co., Inc. v. Bergland*, 489 F. Supp. 947, 948-49 (D.D.C. 1980).

While the Department has the burden of establishing the cause for suspension, Respondents have the burden of establishing any mitigating circumstances. 24 CFR 24.313(b)(4) and 24.413. There is adequate evidence to suspect the commission of offenses indicating that Respondents are not presently responsible. In addition, there is adequate evidence to suspect fraud and falsification of records. Further, I find that there is adequate evidence of actions affecting the integrity of the FHA Direct Endorsement Single Family Program. Respondents have offered no evidence to show otherwise.

1. Adequate Evidence of Violations Affecting a HUD Program

There is adequate evidence of violations of terms of transactions "so serious as to affect the integrity of an agency program." Since the FHA Direct Endorsement Single

Family Program allows for the granting of loans for FHA insurance without the specific prior consent of HUD, the government places heavy reliance on the integrity of the participants in the program. Respondent Allied gathered and validated the information during the preliminary loan application process on a number of loans that were defaulted. This portion of the loan application process, particularly the verification of deposits, is critical in reducing HUD's potential risk and is pivotal to the integrity of the program. (T 34-35).

By falsely verifying buyer deposits on a number of loans, Respondent Allied directly affected the integrity of the Direct Endorsement Single Family Program and substantially increased the government's risk. Had accurate information been reported, HUD would not have insured the loans. HUD was misled into consummating these transactions because, without the false verifications, the loans would not have been eligible for FHA insurance. (T 51-52).

While Respondent Allied was involved in providing false information for the 13 loans, there is no direct evidence definitively proving that Respondent Barron himself gathered and verified any of the information. This is unnecessary, however, as a basis for a suspension. Respondent Barron was a "principal" and the owner of Allied during the relevant time period. According to Respondent Barron's own statement, he had only 15 agents working for him. (T 95). As concerns a company this size, it is unlikely that he would not have known of the large number of false verifications. Even if he did not have actual, direct knowledge of the misdeeds, he should have. In addition to being the sole owner of a small company, three of the thirteen transactions involved the sale of property owned by Respondent Barron himself. Consequently, at a minimum, he had reason to know of Allied's malfeasance, and Allied's conduct is imputed to Respondent Barron. *See* 24 CFR 24.325(b)(2).⁵

Furthermore, because Barron personally owned three of the thirteen properties, I find that his level of participation and knowledge at least as concerns these transactions was substantial. *See* 24 C.F.R. 24.410(c). As seller as well as owner of the brokerage firm that handled these transactions, he was certainly in a position to have knowledge of the falsifications of the HUD-1 forms.

Finally, there has been no remedial action to prevent such wrongdoing in the future. *See infra* p. 7. Thus, HUD's program and the public interest continue to be threatened. I find that there is adequate evidence of violations "so serious as to affect the integrity of [the FHA Direct Endorsement Single Family Program]" and that suspension of the Respondents is necessary to protect the public interest.

2. Adequate Evidence to Suspect the Commission of Offenses

There is adequate evidence to suspect the commission of fraud and falsification of records. As concerns the one transaction that was the subject of the Department's

⁵ Section 24.325 is applicable to suspensions. 24 CFR 24.420.

Complaint,⁶ Respondent Barron certified the HUD-1 as correct, thus verifying that the Plasencias made the minimum deposit. (T 97). The buyers, however, only paid \$200 of their own funds.

The loan file indicates that only a \$200 deposit was made. (T 44-45). Further, I found Mr. Plasencia a credible witness concerning his testimony that he invested only \$200 of his own money. (T 72, 75, 79). It is believable that while he might not remember all of the details of the transaction, he would clearly remember the amount of money that he expended out-of-pocket for the purchase of his home. Further, he would have no motive to lie. In fact, if anything, he had reason to equivocate concerning the \$200 because, by testifying that he deposited only \$200 of his own money, he admitted to falsely certifying the HUD-1, a certification that could possibly lead to actions being taken against him.

While Respondent Barron submitted a document (i.e., the Residential Earnest Money Contract (Resale) (Apr. 10, 1989)) with his post-hearing brief to support his allegation that the buyers paid an additional \$700, I do not credit this document as proof of the required additional payment for several reasons. The body of the document indicates that \$200 was paid. The additional \$700 payment is merely appended at the end of the document as if it were an afterthought. The escrow agent apparently wrote on the bottom of the last page "[r]eceipt of additional \$700.00 earnest money is acknowledged in the form of cash from Mr. & Mrs. Plasencia by Joe Barron on 4-17-89." Thus, while the escrow agent recorded the addendum, she merely indicated that the seller acknowledged receipt of additional money. She, herself was not attesting to this fact. Finally, even if an additional \$700 was paid, it would not fulfill the requisite three percent for an FHA loan guaranty.

In any event, if any additional sum over and above the \$200 was applied to the minimum required buyers' investment, it was given to the buyers by one of the Respondents. (T 73-74, 79-80). Although Mr. Plasencia was unable to recall whether Respondent Barron or another Allied agent gave him additional money, either scenario supports suspension of both Respondents. Allied's wrongdoing can be imputed to Respondent Barron (*see supra* p. 5) and vice versa. *See* 24 CFR 24.325(b)(1).

The Plasencia transaction, as well as the other 12 of the 13 fraudulent transactions, illustrate Respondents' present irresponsibility. False certifications were made concerning the buyers' minimum investment - - information directly relevant to HUD's risk. HUD was misled by this information into insuring loans that it would not have otherwise guaranteed. Individuals wrongly profited at the expense of the government. Respondent Allied, as the realty company, earned fees and commissions

⁶ Even though the Department's Complaint focuses only on the Plasencia transaction, the Department's case-in-chief encompasses this one transaction, the 15 defaulted loans, and other assorted allegations. I find, however, that amendment at this time of HUD's Complaint to include these other allegations is unnecessary. The issues concerning the 15 Allied loans are "reasonably within the scope of the proceeding" and were "tried by express . . . consent" of the Respondents. Therefore, these other issues may be "treated in all respects as if they had been raised in the pleadings." 24 CFR 26.12(a)(3). *See also* Fed. R. Civ. P. 15(b).

from the sales. At a minimum, Respondent Barron himself benefitted from at least those three transactions that were sales of his own property.⁷

Respondent Barron failed to manage his company to prevent such activities. More importantly, he has offered no evidence that he has since instituted controls to prevent the recurrence of similar misconduct. In fact, he disavows responsibility for any of his company's misdeeds. (T 95). The institution of operational changes at a company to prevent future harm to the government and the public interest is an additional yardstick for measuring present responsibility. See *Shane Meat Co.*, 800 F.2d at 338; *Delta Rocky Mountain Petroleum, Inc.*, 726 F. Supp. at 280, 281.

Besides the lack of evidence of remedial actions, Respondent Barron has offered no mitigating circumstances to contest the propriety of the suspension. Respondent in his post-hearing brief contends that HUD's main witness is not versed in the procedural aspects of loan closings and that no irregularities transpired. (at 2-3). First, despite his few difficulties tallying numbers, I found HUD's main witness, Mr. Lawson, to be extremely credible. See *supra* nn. 2 & 4. Second, even assuming that Respondent Barron is correct concerning certain procedures, the fact remains that false information was provided for at least 13 loans, and that three of those thirteen were loans for property owned personally by Respondent Barron. Concerning the large number of defaulted loans, Respondent attempts to shift the blame to MISCorp. rather than his company or himself. (Respondents' Brief at 5). However, the false information emanated from Allied. This tactic on Respondent's part, illustrating an attempt to shift accountability, further reveals his lack of present responsibility.

As concerns the Plasencia transaction, Respondent Barron attacks Mr. Plasencia's credibility. (Respondents' Brief at 2, 4-5). While I recognize that Mr. Plasencia had difficulty in remembering all of the aspects surrounding the purchase of his home, I found him credible. See *supra* p. 6. There is no need to repeat my determinations pertaining to Respondent's offering of the document attached to his brief as evidence that Mr. Plasencia invested more money.

Finally, concerning Respondent's statements that he did not personally commit certain wrongdoing, proof of such involvement is unnecessary here to uphold the suspension. See *supra* p. 5. I see no need to specifically address other proposed mitigating factors offered by Respondent except to state that I find them equally unconvincing.

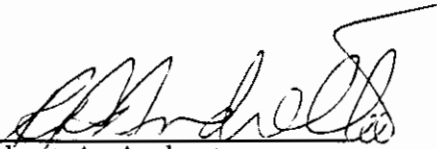
Conclusion and Determination

Suspension of Respondents Barron and Allied is appropriate based on adequate evidence of the commission of various offenses. There are no mitigating factors demonstrating otherwise. Upon consideration of the public interest and the entire record in this matter, I conclude that good cause exists to suspend Respondents from

⁷ As the Department failed to present evidence of which Allied agents participated in the 13 transactions, any gain that he might have received does not include any of his own agent commissions or fees.

further participation in primary and lower-tier covered transactions (*see* 24 CFR 24.110(a)(1)), as either participants or principals at HUD and throughout the executive branch of the federal government, and from participating in procurement contracts pending the outcome of the ongoing investigation, and any legal, debarment or Program Fraud Civil Remedies Act proceedings which may ensue. Accordingly, the suspension of Joe Barron and his named affiliate, Allied Realty, is affirmed, and it is hereby

So **ORDERED**.



Robert A. Andretta
Administrative Law Judge

Dated: June 7, 1991.