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

United States Department of Housing and Urban Development, Plaintiff, v. Doris N. Weaver Defendant.	HUDALJ 92-1802-PF Decided: January 15, 1993

Alexia McCaskill, Esq.
For the Defendant

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For the Department

Before: Paul G. Streb
Administrative Law Judge

INITIAL DECISION

STATEMENT OF THE CASE

The United States Department of Housing and Urban Development ("HUD" or "the Government") seeks an assessment and a civil penalty against Doris Weaver-Churchwell[1] ("the Defendant"), pursuant to the Program Fraud Civil Remedies Act of 1986 ("the Act"), 31 U.S.C. §§ 3801-3812, and the implementing regulations, 24 C.F.R. Part 28. HUD bases this action on her submission of two allegedly false travel vouchers in 1987.

[1] After this matter was initiated, the Defendant remarried; her last name is now Weaver-Churchwell.

In 1988, HUD investigated Ms. Weaver-Churchwell's submission of the travel vouchers in question. In 1989, HUD suspended her for ten days for falsifying the travel vouchers and ordered her to repay the amount falsely claimed. In 1990, she filed a grievance protesting those actions. On June 1, 1990, an arbitrator ruled that she had not falsified the vouchers; he vacated the suspension, but he did not reverse HUD's repayment order.

On November 27, 1991, the Government initiated the present proceeding under the Act by issuing a complaint against Ms. Weaver-Churchwell alleging that she had falsified the vouchers. The Government requested an assessment of $659 in lieu of damages and a civil penalty of $5,000. On January 3, 1992, Ms. Weaver-Churchwell filed an answer to the complaint. She denied the allegations and contended that, in view of the arbitrator's decision, the doctrine of collateral estoppel precluded a finding under the Act that she had falsified the vouchers.

On April 14, 1992, this case was referred to this office for adjudication. After a prehearing conference, the parties were directed on May 6, 1992, to brief the issue of whether the doctrines of collateral estoppel or deference should be applied to the arbitrator's ruling. Upon consideration of the briefs, I ruled on September 10, 1992, that collateral estoppel was inapplicable in this case; I reserved judgment on the deference issue.

Ms. Weaver-Churchwell waived her right to an oral hearing, and the parties were given the opportunity to submit briefs and evidence on the merits of the case. The record closed on October 20, 1992, after the filing of the briefs and evidence.[2] The following findings of fact and conclusions of law are based upon a review of the entire record.

ANALYSIS, FINDINGS, AND CONCLUSIONS

Threshold Issues

Effect Of Collective Bargaining Agreement

Ms. Weaver-Churchwell contends that the collective bargaining agreement between the American Federation of Government Employees (AFGE) and HUD bars HUD from prosecuting the present action under the Act. She argues that, pursuant to the agreement, HUD's action charging her with submitting false travel vouchers constitutes a grievance against her. Thus, she argues, HUD's exclusive remedy is to follow the procedures provided

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[2] On October 20, 1992, the Government moved to strike Defendant's brief on grounds that certain arguments therein were untimely and others were outside the scope of this tribunal's jurisdiction. The Government moved in the alternative that I accept its reply to Defendant's brief. The Government's alternative motion is GRANTED. Consequently, the Government has not been harmed by the alleged untimeliness of Defendant's arguments. Moreover, I have considered the Government's jurisdictional arguments. Therefore, the motion to strike Defendant's brief is DENIED.

in the agreement for resolving grievances -- informal resolution attempts followed by arbitration.[3]

Ms. Weaver-Churchwell relies on section 22.01 of the agreement, which provides that "[Article 22] constitutes the sole and exclusive procedure for the resolution of grievances by employees of the bargaining unit and between the parties." (Emphasis added). Ex. D-1.[4] The parties to the agreement are HUD and AFGE. Because HUD's charge of falsification is not against AFGE, its action cannot be viewed as a grievance against AFGE subject to the agreement.

Moreover, Ms. Weaver-Churchwell is not a party to the agreement. Thus, assuming for the sake of argument that HUD's charge of falsification against her constitutes a grievance, the collective bargaining agreement does not require HUD to pursue the matter through the grievance procedure. Therefore, the collective bargaining agreement does not bar HUD from prosecuting this matter pursuant to the Act.

Collateral Estoppel

Ms. Weaver-Churchwell next contends that, under the doctrine of collateral estoppel, the arbitrator's decision precludes a finding under the Act that she falsified the vouchers. I disagree.

The arbitrator examined the issue of whether HUD had just cause to suspend Ms. Weaver-Churchwell for ten days without pay based in part on a charge of falsification of the same travel vouchers that are at issue in the present case. The arbitrator found that the charge "requires intent of which there is no evidence." Moreover, his decision stated: "Falsifying a government record is a heavy charge. [HUD] has a commensurate burden to prove the charge. It has not done so." Accordingly, the arbitrator found the suspension based on the falsification charge to be unjustified.

Collateral estoppel, or issue preclusion, prevents the relitigation of issues actually and necessarily decided in a prior action. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979). When an issue of fact or law was previously litigated and determined by a prior judgment, and the previous determination was essential to the prior judgment, that determination is conclusive in a subsequent action. *Restatement, Second, Judgments* § 27 (1982). Further, rules of issue preclusion may be applicable with respect to arbitration decisions.

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[3] The Government argues that this tribunal lacks jurisdiction to consider that contention. I disagree. In adjudicating matters within its jurisdiction, this tribunal lacks only the authority to declare federal statutes or regulations invalid. 24 C.F.R. Sec. 28.35(c). However, Defendant is not arguing that the Act is invalid; she contends simply that it is inapplicable.

[4] The following abbreviations will be used: "Ex. D" for Defendant's Exhibit; "Ex. G" for Government's Exhibit.

See generally id. § 84; *see, e.g., Greenblatt v. Drexel Burnham Lambert, Inc.*, 763 F.2d 1352 (11th Cir. 1985).

The issues in the two proceedings, however, must be identical. *See* 4 Kenneth C. Davis, *Administrative Law Treatise*, § 21:5, at 59 (2d ed. 1983); *see also Kroeger v. U.S. Postal Service*, 865 F.2d 235 (Fed. Cir. 1988). The "matter raised in the second proceeding must involve the same set of events or documents and the same bundle of legal principles that contributed to the rendering of the first judgment." *Comm'r of Internal Revenue v. Sunnen*, 333 U.S. 591, 601-02 (1948).

As the party seeking the application of collateral estoppel, Ms. Weaver-Churchwell bears the burden to establish that the criteria for applying the doctrine are present. *Chisholm v. Defense Logistics Agency*, 656 F.2d 42, 50 (3rd Cir. 1981). I find that she has not met that burden.

The issue in arbitration concerning falsification of the vouchers is not identical to the falsification issue in this proceeding because the elements of the offenses are dissimilar. *See Graybill v. U.S. Postal Service*, 782 F.2d 1567, 1572 (Fed. Cir.), *cert. denied* 479 U.S. 963 (1986). While the arbitrator demanded a showing of intent as an element of falsification, the Act requires "no specific intent to defraud." 31 U.S.C. § 3801 (a) (5). *Cf. Pacific Seafarers v. Pacific Far East Line*, 404 F.2d 804 (D.C. Cir. 1968), *cert. denied* 393 U.S. 1093 (1969) (a finding of lack of "foreign commerce" under the Shipping Act did not prevent a later finding of "foreign commerce" under the Sherman Act where the two statutes had different requirements).

Moreover, there is a substantial question as to whether the arbitrator applied the standard of proof provided for in the Act--the preponderance of the evidence standard. 31 U.S.C. § 3803 (f). The arbitrator was unclear about the burden of proof. He stated that HUD had a "heavy burden" to prove its charge. Thus, it is possible that the arbitrator imposed a heavier burden on HUD to prove its charge than is required by the Act.[5] In any event, the lack of clarity in the arbitrator's description of the burden of proof precludes a finding that he applied the same standard as provided in the Act. Therefore, Ms. Weaver-Churchwell has not shown that the doctrine of collateral estoppel should be applied in this case.[6]

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[5] Although HUD was unable to prove its case under the burden imposed by the arbitrator, it cannot be precluded from attempting to prove its case under the Act's "preponderance" standard if that is a lesser standard than the one imposed by the arbitrator. *See Graybill*, 782 F.2d at 1572; *Chisholm*, 656 F.2d at 48 n. 11.

[6] Because I have not found that the issues are identical, it is not necessary to determine whether the other criteria for the application of the doctrine are present.

Deference

Ms. Weaver-Churchwell also contends that this tribunal should give deference to the arbitrator's decision. She relies largely on *Devine v. White,* 697 F. 2d 421 (D.C. Cir. 1983), in which the court stated that, "A principle characteristic of the common law of labor arbitration ... is judicial deference to arbitral decisions." *Id.* at 435. However, the present proceeding under the Act does not involve labor arbitration, and my role is not to engage in an appellate review of the arbitrator's decision.

Moreover, Congress clearly intended that adjudications under the Act be conducted by federal agencies and that persons found to have violated the Act be subject to assessments and civil penalties. 38 U.S.C. §§ 3802, 3803. Deferral to arbitral decisions would be inconsistent with that intent. *Cf. Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (deferral to arbitral decisions inappropriate where Congress intended federal courts to exercise final responsibility for enforcement of Title VII); *United States v. Reed,* 937 F.2d 575, 578 (11th Cir. 1991) (it would be absurd to allow an employee to avoid prosecution for an act by using arbitration and its less severe sanctions). Therefore, I will not give deference to the arbitrator's decision.

Analysis Of The Allegations

The Government alleges that Ms. Weaver-Churchwell submitted the two travel vouchers in violation of 31 U.S.C. § 3802 (a) (1). That section prohibits any person from submitting a claim to a federal agency "that the person knows or has reason to know . . . is false . . . ." The Government must prove the allegation by a preponderance of the evidence. 31 U.S.C. § 3803 (f).

In 1987, Ms. Weaver-Churchwell was a Loan Specialist in HUD's Richmond, Virginia office. On or about September 29, 1987, she submitted two travel vouchers to HUD to account for funds previously "advanced" to her for travel. One voucher covered her travel from June 1 through June 5, 1987, and claimed $316 for lodging ($79 per night). The other voucher covered her travel from August 17 through August 21, 1987, and also claimed $316 for lodging. Certification statements appear above her signature stating that each voucher is true and correct.

Under the Act, a claim includes the submission of a voucher to a federal agency which has the effect of decreasing an obligation to account for money. 31 U.S.C. §§ 3801 (a) (3) (C) and (b) (1). Thus, Ms. Weaver-Churchwell's submission of the travel vouchers to account for her "travel advance" constituted a claim subject to the Act.

Ms. Weaver-Churchwell noted on the vouchers that her lodging receipts were lost. In their place, she submitted copies of checks apparently written to hotels for her lodging. These documents were not photocopies of checks that had been canceled and returned to her by her bank. Rather, they were marked "NOT NEGOTIABLE" and appeared to be "carbon copies"

of the checks made for recordkeeping. One "carbon copy" showed a payment of $316 to the Holiday Inn in Springfield, Virginia for the June trip; the other showed the same payment to the Ramada Inn in Manassas, Virginia for the August trip. Ex. G-1, G-1E, G-1F.

Contrary to the information she provided in her vouchers, Ms. Weaver-Churchwell gave HUD's investigator a sworn statement asserting that she stayed at the Ramada Inn in Springfield, Virginia on August 17-18, 1987, and at the Ramada Inn in Woodbridge, Virginia on August 19-21, 1987. Ex. G-1. Furthermore, the Ramada Inn in Manassas showed no record of her stay and does not accept personal checks. *Id.*

The Holiday Inn also found no record of Ms. Weaver-Churchwell's stay. Additionally, the Holiday Inn only accepts personal checks from Holiday Inn Priority Club members. Ex. G-1 at 5. Ms. Weaver-Churchwell presented no evidence that she is a member of that organization.

When the investigator attempted to interview Ms. Weaver-Churchwell a second time to discuss the information that contradicted her travel vouchers, she refused to be interviewed. Ex. G-1 at 5. Some time later, she provided a receipt for one night's stay, August 18, at the Holiday Inn in Springfield, for $63.90. However, that receipt is for a lesser amount than the $79 per night she claimed on the voucher; also, it is inconsistent with both the "carbon copy" of the check to the Holiday Inn and her sworn statement.

Ms. Weaver-Churchwell offered no affidavits or other evidence to explain the inconsistencies between her travel vouchers, her sworn statement, the Holiday Inn receipt, and the facts disclosed during the investigation. It is clear from those inconsistencies that Ms. Weaver-Churchwell falsified both the travel vouchers and the "carbon copies" of checks that she attached to them. It is also clear that she had actual knowledge that her vouchers were false. Therefore, I find that she violated section 3802 (a) (1) by submitting them.

Assessment and Civil Money Penalty

Because a finding of liability has been made, I must determine the appropriate amount of any civil penalty or assessment to be imposed, considering any aggravating or mitigating factors. 31 U.S.C. § 3803 (f) (2); 24 C.F.R. § 28.59 (a). The Government has the burden to prove any aggravating factors by a preponderance of the evidence; the Defendant has the burden to prove any mitigating factors by the same standard. 24 C.F.R. § 28.59 (b) and (c).

The following aggravating and mitigating factors are applicable in this case. *See* 24 C.F.R. § 28.61. Ms. Weaver-Churchwell did not commit an isolated offense. She submitted two false claims. Although they were submitted on the same day, the similarity of the claims establishes systematic, illegal behavior.

Because she had actual knowledge that the vouchers were false, her culpability is greater than if she had acted in deliberate ignorance or reckless disregard of the truth or

falsity of the claim. However, the amount falsely claimed ($632) is relatively small compared to the maximum false claim subject to the Act ($150,000). *See* 31 U.S.C. § 3803 (c) (1) (A).

There is no evidence that Ms. Weaver-Churchwell involved other persons in her misconduct. However, it is evident from both the manner in which she falsified the vouchers and her refusal to comply with the investigator's request for a second interview that she attempted to conceal her misconduct. It is evident from her refusal to be interviewed that she failed to cooperate in the investigation.

The submission of travel vouchers is not complex and does not involve a high degree of sophistication on the part of the employee. As a Loan Specialist, Ms. Weaver-Churchwell was required to travel and should have been familiar with travel reimbursement procedures. The travel voucher forms contained a warning that falsification of a claim could result in a $10,000 fine or imprisonment. Thus, she had specific notice that serious consequences could result from her misconduct.

Although Ms. Weaver-Churchwell eventually reimbursed HUD for the amount falsely claimed, she did not do so voluntarily. Moreover, the Government still suffered considerable monetary loss as a result of her misconduct, considering the cost of the investigation. The investigator, who was compensated at the GS-13 level, spent a substantial amount of time on the case. He traveled from Washington, D.C., to Wheaton, Maryland; Springfield, Virginia (twice); Richmond, Virginia (twice); Philadelphia, Pennsylvania (twice); and Manassas, Virginia. Ex. G-1. He also prepared a 22-page investigative report.

The Government asserts that its prosecutorial costs (HUD counsel's time spent on the case) should also be considered as part of the Government's loss. I disagree. HUD supports its argument by citing *United States v. Halper*, 490 U.S. 435, 446 n.6 (1989), in which the court allowed "prosecutorial costs " to be factored into the consideration of civil penalties under the False Claims Act, 31 U.S.C. § 3729.

Although the False Claims Act is analogous to the Program Fraud Civil Remedies Act, there is a significant difference regarding the determination of civil penalties. The False Claims Act specifically provides for consideration of "the costs of a civil action" in determining a civil penalty. However, the Program Fraud Civil Remedies Act does not contain such a provision; it does not set forth any factors to be considered in determining a civil penalty. Thus, *Halper* is inapposite.

Moreover, HUD regulations do not provide for consideration of prosecutorial costs. They provide only for consideration of "[t]he value of the Government's actual loss as a result of the misconduct, including foreseeable consequential damages and the cost of investigation." (Emphasis added). 24 C.F.R. § 28.61 (b) (5). Thus, there is no authority to support the Government's argument that its prosecutorial costs should be considered in determining the civil penalty and assessment.

Congress has found that false claims and statements are a serious problem that results in the loss of millions of dollars annually and undermines the integrity of federal programs. Accordingly, Congress has emphasized the need to deter Defendant and others from making false claims and statements in the future. 31 U.S.C. § 3801 note (Congressional Statement of Findings and Declaration of Purposes for the Act). Thus, a significant penalty is warranted here to demonstrate to Ms. Weaver-Churchwell and others that similar misconduct will not be tolerated. However, the amount of the assessment and civil penalty should be in reasonable proportion to the amount of the Government's loss.

The Government seeks the imposition of an assessment of $659 (twice the amount of the total false claims minus the amount of her reimbursement to HUD). The Government also seeks the imposition of a $5000 civil penalty.

If the Government has paid a claim, an assessment of not more than twice the amount of each false claim may be imposed. The assessment is "in lieu of damages sustained by" the Government. 31 U.S.C. § 3802 (a) (1) and (3); 24 C.F.R.§ 28.5 (a) (5). Because HUD processed the false travel vouchers and applied the total amount claimed ($632) to offset prior cash advances that had been made to Ms. Weaver-Churchwell, I find that HUD's action constituted payment of the claim.

The maximum civil penalty that may be imposed is $5,000 for each claim. Because each voucher constitutes a separate claim, the maximum possible penalty in this case is $10,000. 31 U.S.C. §§ 3801 (b) (1), 3802 (a) (1); 24 C.F.R. § 28.5 (a).

The seriousness of Ms. Weaver-Churchwell's offenses is evident from the fact that nearly all of the factors discussed above are aggravating. Therefore, I conclude that the maximum assessment of $659 is warranted and is necessary to compensate the Government for its losses. However, the relatively small amount of the false claims is a significant mitigating factor that militates against the imposition of an extremely large civil penalty. I conclude that a civil penalty of $3,000 is warranted. This is a significant penalty representing nearly five times the amount of the false claim.

DECISION AND ORDER

The Government's allegation that Ms. Weaver-Churchwell violated the Act is sustained; an assessment of $659 and a civil penalty of $3,000 is hereby imposed against her. It is ORDERED that, within ten days after this decision becomes final, she submit to HUD a check for $3,659 payable to the Treasurer of the United States.

RECONSIDERATION, SECRETARIAL REVIEW, AND FINALITY

Within twenty (20) days after receipt of this decision, any party may file a motion for reconsideration of this decision in accordance with 24 C.F.R. § 28.75.

Within thirty (30) days after issuance of this decision, the Defendant may file an appeal with the Secretary of HUD in accordance with 24 C.F.R. § 28.77. If a motion for reconsideration is filed, the Defendant may file an appeal with the Secretary within 30 days after the disposition of the motion.

Unless this decision is timely appealed to the Secretary of HUD, or a motion for reconsideration is timely filed, this decision shall constitute the final decision of the Secretary of HUD and be binding on the parties 30 days after its issuance.

Paul G. Streb

PAUL G. STREB
Administrative Law Judge