

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

U.S. Department of Housing
and Urban Development,

Plaintiff,

Kenneth Turner and
Karen Turner

Defendants.

HUDALJ 92-1832-PF
(Decided September 30, 1992)

Dane M. Narode, Esquire
For the Plaintiff

Kenneth Turner, *pro se*
For the Defendants

Before: Robert A. Andretta
Administrative Law Judge

INITIAL DECISION AND ORDER

The plaintiff, the U.S. Department of Housing and Urban Development ("the department" or "HUD") seeks the imposition of damages and a civil penalty against the defendants, Kenneth Turner and Karen Turner, pursuant to the Program Fraud Civil Remedies Act of 1986, 31 U.S.C. Sections 3801-3812 ("the Act") and HUD's regulations that are codified at 24 CFR Part 28, and jurisdiction is thereby obtained. The department asserts that on five separate occasions the Turners submitted false claims for rent subsidization under Title 8 when they knew that these claims were false. HUD seeks an assessment of damages in the amount of \$2,410 and a civil penalty of \$25,000.¹ The defendants deny that they knew that the claims were false.

This action was initiated by a Complaint filed on April 15, 1992. The Defendants had already denied the allegations against them in a letter dated March 3, 1992, and this

¹ The assessment is twice the amount of the false claims, and the penalty is five times the amount permitted for each false claim. See 31 U.S.C. Section 3802(a).

was taken to be their Answer to the Complaint and their request for a hearing. The hearing was conducted in Des Moines, Iowa, on Tuesday, June 23, 1992. In accordance with an oral order at the end of the hearing, post-hearing briefs were submitted by the parties by September 3, 1992, and, thus, this case became ripe for decision on this last named date.

Findings of Fact

In November 1987, Defendant Kenneth Turner entered into a Housing Assistance Payments Contract ("HAP Contract") with the Southern Iowa Regional Housing Authority ("SIRHA"). (P 4).² The HAP Contract specified that Kenneth Turner would lease an apartment at [REDACTED] South Walnut Street, Creston, Iowa, to [REDACTED] Moran. The HAP Contract provided that the total amount due to Defendant each month was \$326, of which SIRHA would pay \$241³ and the tenant would pay the difference of \$85. Section 5 of the HAP Contract is as follows:

The Owner shall be paid under this Contract on or about the first day of the month for which payment is due. The Owner agrees that the endorsement on the check:

- (1). shall be conclusive evidence that the Owner has received the full amount of the housing assistance payment for the month, and
- (2). shall be a certification by the Owner that:
 - (ii). the Contract unit is leased to the Family named in Section 1(A), and the Lease is in Accordance with section 1(B).

* * * * *

- (iv) except with respect to payment for a vacant unit in accordance with, and subject to the conditions of, section 7, to the best of the Owner's knowledge, the members of the Family occupy the Contract unit, and the unit is used solely for residence by the Family, and as the Family's principal place of residence.

In May of 1988, [REDACTED] Moran reported to officials at SIRHA that she was involved with the defendants in a scheme to collect Section 8 payments for her apartment even though she was not residing there. Under the scheme described to the officials, Moran was to receive \$40 - \$50 per month from the Turners for maintaining a lease on the apartment while not living in it so that they would receive the Section 8 subsidy

² The plaintiff's exhibits are identified with a P and a sequential number assigned during the hearing, and the Defendants' exhibits are identified with a D and a number. T stands for the transcript of the hearing and is followed by a transcript page number.

³ SIRHA receives funds from HUD to administer its rent subsidy program pursuant to Section 8 of the U.S. Housing Act of 1937 ("Section 8").

payments each month. (T 72). As a result of Moran's statement, SIRHA terminated the HAP Contract with the Turners and notified HUD of the possible fraud. SIRHA also recovered the \$1,205 in payments made to the defendants under the HAP Contract by withholding payments with respect to other Section 8 tenants. (P 1. 2).

HUD's Des Moines office issued a Limited Denial of Participation ("LDP")⁴ against Defendant Turner for his participation in the scheme, and HUD's Office of Inspector General conducted a criminal investigation of the matter which led to this case.

Applicable Law

The Act was passed to address cases of fraud against the government that involve small dollar amounts. Congress recognized that the judicial remedies that were at the government's disposal were to be had only at a cost of litigation in excess of the amount lost due to the fraud.⁵ Thus, the government chose not to prosecute many small cases per year and suffered a resulting loss of many millions of dollars. To remedy this situation, the congress provided for an administrative adjudicatory process to afford the government the opportunity to recapture lost money while stemming the erosion of public confidence in government programs and administration. See H.R. Rep. No. 1012, 99th Cong., 2d Sess. 257-58 ("the House Report"), reprinted in 1986 *U.S. Code Cong. & Admin. News* 3902-03. In addition, the Act is intended to deter future fraudulent conduct. *Id.*; S. Rep. No. 212, 99th Cong., 1st Sess. at 2 (1985) ("the Senate Report").

The Act provides that any person submitting a claim to the government "that the person knows or has reason to know ... is false, fictitious, or fraudulent [or] includes or is supported by any written statement which asserts a material fact which is false, fictitious, or fraudulent ... shall be subject to, in addition to any other remedy that may be prescribed by law, a civil penalty of not more that \$5,000 for each such claim." 31 U.S.C. Section 3802(a)(1); 24 CFR 28.5(a). Moreover, if the government has paid such a claim, it may assess up to twice that amount against the claimant. *Id.*, Section 3802(a)(1)(D), 3802(a)(3). The assessment is "in lieu of damages sustained by" the government. 31 U.S.C. Section 3802(a)(1); 24 CFR 28.5(a)(5). A claim includes any "submission made to ... HUD for ... money" which may have "the effect of decreasing an obligation to pay or account for ... money." 24 CFR 28.3. The Act is only applicable, however, if the claim is not in excess of \$150,000. 31 U.S.C. Section 3803(c)(1).

Specific intent is not a necessary element under the Act to showing that a person has defrauded the government. However, the government must show by a

⁴ Kenneth Turner did not request a hearing to appeal his LDP.

⁵ The False Claims Act, 31 U.S.C. Sections 3729-3731, which allows the government to seek civil penalties from \$5,000 to \$10,000 for each fraudulent claim, as well as a maximum of three times the amount of damages to the government, is one such judicial remedy. However, the fact that cases under this act must be brought by the Justice Department in a U.S. District Court makes such cases inherently more costly than cases brought under the Act that controls the instant case.

preponderance of the evidence that the person knew or had reason to know that his claim was false. 31 U.S.C. Sections 3801(a)(5), 3803(f); 24 CFR 28.5(d), 28.59(b). This standard may be found to have been breached by the person in one of three ways. If that person (1) has "actual knowledge that the claim ... is false;" (2) acts in "deliberate ignorance of the truth or falsity of the claim;" or (3) acts "in reckless disregard of the truth or falsity of the claim," he may be found to have "known or have reason to know" that his claim was false. 31 U.S.C. Section 3801(a)(5); 24 CFR 28.3. Persons who recklessly disregard facts that are known or "readily discoverable upon reasonable inquiry" may be found liable, while those who file a false claim through "mere mistake, momentary thoughtlessness, or inadvertence" may not. House Report at 259. "Only those individuals who are extremely careless, who demonstrate an extreme departure from ordinary care" are subject to liability. Senate Report at 20.

In cases where application of these formulations results in a finding of liability, HUD regulations identify 16 factors to be considered when determining the amounts of the penalty and the assessment. These factors are: (1) the number of false claims submitted; (2) the time period over which they were made; (3) the degree of culpability; (4) the amount of money falsely claimed; (5) the government's loss, including the costs of investigation; (6) a comparison of the amount of the penalty to the government's loss; (7) the potential or actual impact of the misconduct upon the national defense, public health or safety, or public confidence in the management of government programs and operations, including particularly the impact on intended beneficiaries of such programs; (8) any pattern of misconduct; (9) any attempts to conceal the misconduct; (10) whether the claimant involved other people in the misconduct or its concealment; (11) where an agent's misconduct is imputed to a defendant, the extent to which the defendant's practices fostered the misconduct of others; (12) the defendant's cooperation with or obstruction of the government's investigation; (13) the defendant's assistance in identifying and prosecuting other wrongdoers; (14) the complexity of the program or transaction, and the degree of the defendant's sophistication, including defendant's prior participation in the program or similar transactions; (15) any previous criminal, civil, or administrative findings of dishonest dealings with the government; and (16) the need to deter the defendant and others from engaging in the same or similar misconduct. 24 CFR 28.61(b). In addition, the administrative law judge assigned to decide the case may consider any other factor that tends to mitigate or aggravate the offense. 24 CFR 28.61(c).

Discussion

The preponderance of the evidence in this case shows that the defendants devised a scheme to defraud the government and recruited █████ Moran to take part in it. Moran testified at the hearing:

I was staying at Janet's. And Kenny's son had came over and asked me to come over to their house 'cause they had a deal for me. I went to Karen and Kenny's and Kenny was telling me that instead of getting off of HUD that I could stay on HUD but I wouldn't have to live in this apartment

and that he would get the HUD subsidy for this apartment and he would pay me approximately \$40 to \$50 per month. And then if I didn't go to Oklahoma, then I could have this apartment. (T 72).

The Turners did in fact pay Moran a total of \$200 for her participation in the scheme. She went five times to their house to pick up her monthly share. (T 76). Moran reimbursed SIRHA the \$200 that she took from the Turners. (T 84).

During the time that Moran was supposed to be living in the Turners' apartment she was actually living with her mother, [REDACTED] Larson. (T 123; P 5). Another two witnesses, one of whom lived in the only other apartment in the same building, swore that Moran never lived in the subject apartment. (T 101; statement of [REDACTED] Mills).

The defendants deny ever having participated in the described scheme. They claim that they never paid money to Moran, that they only gave her money and meals because her son is their nephew. They further claim that they never realized that Moran did not occupy the apartment, that they gave her the key and they thought she lived there. Their version of the events of this case is not credible. I find that the Turners had "actual knowledge" that their claims for the five months were false and that they intended to defraud the government of the rent subsidy money for which they were contracted with SIRHA.

Remedies

The Act authorizes the imposition of an assessment of up to twice the amount of the false claims paid by the government, as well as the imposition of civil penalties, for the purposes of providing a remedy to reimburse the government for its losses and to deter the making, presenting and submitting of false claims to the government by others. Pub. L. 99-509, Section 6102(b). In considering the False Claims Act, the Supreme Court has stated, "the Government is entitled to rough remedial justice, that is, it may demand compensation according to somewhat imprecise formulas, such as reasonable liquidated damages or a fixed sum plus double damages ..." *U.S. v. Halper*, 490 U.S. 435, 446 (1989).

Assessment

In addition to the actual amount of the false claim, the government is entitled to consider other factors relative to a financial loss such as incalculable damage to the agency's programs as well as investigative and prosecutorial costs. *Id.*

As noted above, the Act authorizes an assessment in lieu of damages that is equal to twice the amount that the government has paid because of the false claims. In this case, the government paid \$241 per month for five months, for a total of \$1,205, which is appropriately doubled to \$2,410. Since SIRHA recouped \$1,205 from the defendants and \$200 from Moran, there remains an assessment of \$1,005 to be paid by the defendants.

Penalty

The government seeks a penalty of \$5,000 for each of the claims that were falsely made for a total penalty of \$25,000. It argues that the defendants perpetrated "a well thought out scheme, conceived and implemented by Defendants who have had extensive dealings in the Section 8 program." Government's Post-Hearing Brief, p. 6. It is necessary to review the facts of this case while considering the 16 factors that are listed under 24 CFR 28.61(b).

The defendants filed five false claims over a period of five months before Moran called a halt to the operation by reporting it to SIRHA. There is no indication that the defendants' actions would ever have been ended but for Moran's confession. There cannot be a higher degree of culpability than that which attaches to a purposeful scheme devised to defraud the government of money and executed on a regular and recurring schedule. While the amount of money is low, almost nominal compared to the high money value of many government programs, it was the maximum that defendants could obtain from this particular government program.

On the other hand, the government's loss must be taken to include other expenses, such as the costs of the investigation and of this proceeding. Not only are these costs significant, but it is appropriate that a penalty do more than simply reimburse the government's losses in a case baring this degree of culpability. As with all programs, the government's resources are finite. Falsely taking money from this program not only undermines the public's confidence in its government, but deprives other potential beneficiaries of the amount appropriated but misspent.

Defendants engaged in a purposeful, monthly pattern of their misconduct with no indication that they would have broken the pattern or limited their claims in any way on their own volition. They not only concealed their collection by filing forms that they knew to contain false statements, but they continued to cover their misdeeds by perpetrating untruths to the investigators and at their hearing. They also drew █████ Moran into the scheme, depending upon her fragile financial situation to convince her to take part for the sake of a small cut of the proceeds.

No agents were involved in this case since the Turners handled the rental of their properties on their own. They not only failed to cooperate with the investigation but obstructed it with their false denials and lies about related events. There were no other defendants for these defendants to identify, and there was little if any sophistication or complexity in the scheme. These defendants have a great deal of experience with the Section 8 program, but there was no evidence adduced regarding other instances of false claims, and there was none regarding any previous criminal, civil, or administrative findings of dishonest dealings with the government. Finally as to the 16 factors, while there is little need to deter these defendants from like or similar conduct since they have lost nearly all their properties, there is always a need for the government to deter similarly-situated persons from doing the same or similar things.

Thus, not all, but most of the factors mandated for my consideration in determining an appropriate penalty point toward imposition of one that is at or near the upper limit. Accordingly, I conclude that a penalty of \$4,500 should be imposed for each of the five commissions of fraud against the government.

The regulation that is codified at 24 CFR 28.61(c) also permits me to consider "any other factor that mitigates or aggravates the offense." While the government has not claimed that there were any other factors to be considered that would tend to aggravate the offense in this case, the defendants described a poor financial status. (T 140-150). The unrefuted evidence is that they have lost all but one of their properties to foreclosure, they have very few assets, Kenneth Turner is unemployed, and they are approximately \$ [REDACTED] in debt. Therefore, I have determined to reduce the amount of the penalty to \$3,500 per instance.

Order

Having concluded that defendants Karen Turner and Kenneth Turner devised and participated in a scheme to defraud HUD of Section 8 housing assistance funds, and having further found that their actions fall within the purview of the Program Fraud Civil Remedies Act, it is hereby

ORDERED that

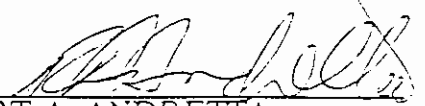
On the date that this Decision becomes final, the defendants shall be liable to the United States for:

- a. an assessment in the amount of \$1,005 and
- b. a civil penalty in the amount of \$17,500.

Defendants have a right:

- a. to file a motion for reconsideration with this forum within twenty (20) days of receipt of this Decision in accordance with 24 CFR 28.75; or
- b. pursuant to 31 U.S.C. Section 3803(i), to file a notice of appeal with the Secretary of HUD within thirty (30) days of issuance of this Decision or a decision responding to a motion for reconsideration, in accordance with 24 CFR 28.77.

Unless this Decision is timely appealed to the Secretary of HUD in accordance with paragraph b, or a motion for reconsideration is filed in accordance with paragraph a, this Decision will become the final decision of the Secretary and be final and binding upon the parties thirty (30) days after the date of issuance. *See* 24 CFR 28.73(d).



ROBERT A. ANDRETTA
Administrative Law Judge

Date: September 30, 1992.