UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
BOARD OF CONTRACT APPEALS
WASHINGTON, D.C.

In the Matter of: **JAMES F. HARPER,** Respondent	HUDBCA No. 92-C-7529-D39 Docket No. 92-1822-DB (LDP)

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DETERMINATION BY ADMINISTRATIVE JUDGE JEAN S. COOPER

June 16, 1993

Statement of the Case

By letter dated December 11, 1991 James F. Harper, Respondent in this case, was notified that a Limited Denial of Participation ("LDP") had been imposed on him by Walter G. Sevier, Acting Regional Administrator-Regional Housing Commissioner for the United States Department of Housing and Urban Development (HUD) in Fort Worth, Texas. The cause for the LDP, as stated in the letter, was Harper's alleged mismanagement of the Housing Authority of the City of Gladewater, Texas, which was based upon allegations of the lack of adequate maintenance, unsanitary condition of many of the units, management and occupancy deficiencies, and the large number of unwarranted vacancies. In addition, Harper was accused of failing to adhere to tenant selection procedures and outreach

procedures required by the Interim Injunction in Young v. Kemp, a Title VI desegregation case. The LDP excluded Harper from participation in all programs within the jurisdiction of the Assistant Secretary for Public and Indian Housing, including Section 8 programs, within the geographic jurisdiction of the HUD Fort Worth Regional Office for a period of one year.

The LDP was affirmed on February 11, 1991, after an informal conference on the matter. Harper filed an appeal from the affirmance of the LDP pursuant to 24 C.F.R. § 24.713. A hearing was held in this case from July 6 to July 14, 1992. The post-hearing briefing schedule was extended at the request of Respondent, due to illness, and the LDP expired before a decision in this case could be written.

Findings of Fact

Background

James Harper is the Executive Director of the Gladewater Housing Authority ("GHA") in Gladewater, Texas. In May 1985, Harper was appointed as the Executive Director by the Board of Commissioners of the GHA. The Executive Director is responsible for supervising the administration of the business of the GHA and for managing the housing projects of the GHA, subject to the direction of the Board of Commissioners of the GHA. The GHA employs two full-time and one part-time maintenance person for the low income public housing units. Besides working as the Executive Director of the GHA, Harper also works as a part-time Maintenance Supervisor for the GHA. Harper receives one third of his salary as Maintenance Supervisor and two thirds as Executive Director. Harper's brother, Neil Harper is in charge of maintenance at one of the GHA's properties, Juliawood, and is also the project manager for that property. (G-14; Tr. 194, 196, 198, 1064, 1227.)

The GHA operates 125 units of public housing pursuant to the U.S. Housing Act of 1937, as amended, 42 U.S.C. § 1401, et seq. The units are located at 4 sites, with 66 units subsidized under Section 8 contained in the most recently built site. The public housing sites are Greenway Village, Weldon Homes, Pacific Gardens, and Greenway Terrace. The Section 8 site is Juliawood. A Consolidated Annual Contributions Contract ("ACC") sets out the GHA's duties in connection with the public housing units, and a Housing Assistance Payments Contract ("HAPC") sets out the GHA's duties in connection with the Section 8 units. HUD has a cooperative information sharing agreement with the Farmer's Home Administration ("FmHA"), which finances the Section 8 housing at the GHA, while HUD provides the rental subsidy for the Section 8 housing. (G-2A, G-2B, G-18; Tr. 471, 476, 523.)

HUD Handbook 7460.7, REV-1 sets out the performance standards which HUD expects Public Housing Authorities ("PHAs") to meet. Although the Handbook is not written for PHAs, it is generally provided to PHAs by HUD, so that PHAs can anticipate the criteria used by HUD inspectors. HUD performance standards cover objective measures for key

aspects of PHA operations so that satisfaction of the standards serves as an indicator of acceptable management performance. (G-9.)

Young v. Kemp is a class action suit in the U.S. District Court in Texas that applies not only to the GHA but to 35 other PHAs in East Texas. The court in Young v. Kemp issued an interim injunction directing HUD to take specific measures to remove the vestiges of discriminatory housing practices. (G-18B; R-1.)

Pursuant to that suit, HUD put in place a program of review and inspection to make sure that the covered PHAs were implementing the requirements set out in the interim injunction. HUD and FmHA inspection teams visited the GHA on six occasions between August 1990 and March 1992, and found serious deficiencies in the operations of the GHA, including problems with unit vacancies and unit turnover, with no apparent outreach efforts to correct these problems, inadequate maintenance, and unsanitary conditions related primarily to lack of pest control. (G-1, G-18B, G-22, G-24, G-25, G-35.)

I. VIOLATIONS OF PERFORMANCE STANDARDS

A. MAINTENANCE AND INSPECTION STANDARDS

Under Section 209 of the ACC, the GHA is required to "at all times maintain each project in good repair, order, and condition." Under the HAPC, the GHA agrees to maintain and operate the units to provide decent, safe, and sanitary housing and to provide all ordinary and extraordinary maintenance on the structures and grounds. The Local Housing Authority Management Guide states that maintenance is performed to: (1) keep all plant elements in condition so that they fulfill their intended functions during their life expectancies; (2) remove upon detection any condition that may lead to an injury or accident to project occupants or employees; and (3) forestall breakdowns by regular inspections and to repair or replace a plant element before it involves other adjacent elements in a breakdown. The latter purpose is usually known as preventative maintenance. (G-2B, G-6, G-18.)

24 C.F.R. §884.217(b) requires inspections to insure that each public housing unit is decent, safe, and sanitary. 24 C.F.R. §884.217(c) requires each unit to be inspected "at least annually" and at such other times as may be necessary to assure that the Owner is meeting his obligation to maintain the units in decent, safe, and sanitary condition. 24 C.F.R. §966.4(i) states that the PHA and the tenant shall be obligated to inspect the premises prior to commencement of occupancy by the tenant, and that the PHA shall be obligated to inspect the unit at the time the tenant vacates the unit. HUD Monitoring Handbook 7460.7 REV-1, 2-1(c)(1)(g) states that a minimum standard of "Housing Quality Standards" ("HQS") should be used when inspecting low income public housing. This Handbook governs HUD inspectors, not PHAs, but it is given to PHAs in training sessions for guidance. It states that inspectors should note that PHAs should be moving towards a number of requirements relating to maintenance operations, including performing annual inspections using HQS as a minimum standard. HAPC Paragraph 1.7(b)(2) requires units to be inspected at

least annually and at such other times as may be necessary. (G-4, G-5, G-18, G-30; Tr. 688-90.)

During the 1990 Section 8 Review of the GHA, Jackie Miller, Housing Management Program Assistant of the HUD Fort Worth office, reviewed nine tenant files at random and found that two of the files did not contain annual inspection reports. In addition, she found that "even though the tenant files reflect that the unit inspections have improved since the last review, a physical inspection conducted by this office shows the need for repairs in many of the units inspected." Harper stated that "as [tenant] inspections are done annually and not daily, we do not know" what the daily condition of each unit may be. (G-22, G-23; Tr. 487, 492, 511, 512, 514.)

In conducting a two-part Limited Management Review/ Occupancy Audit ("LMR/OA") in September 1990 and May 1991, Housing Management Specialist Judy Derrington found that the unit inspection performance standard requiring 100% of units to be inspected, using Housing Quality Standards (HQS) as a minimum standard, had not been met by the GHA. Derrington found that while move-in and move-out inspections "seemed to be made, they were not following the inspection requirements" in that none of the units were being inspected using HQS as a minimum standard. (G-18B; Tr. 621.)

Derrington stated that the GHA was using pre-printed inspection forms which did not include some of the HQS standards. Specifically, the GHA inspection forms did not address exterior and neighborhood conditions. Derrington admitted, however, that the pre-printed list being used by the PHA for the interior inspections was "pretty much a complete list" reflecting the HQS. Harper stated that although the exterior conditions were not included on the GHA form, he conducted inspections of the exteriors on an informal basis for upkeep purposes. Harper stated that the exterior inspection is not covered in each tenant's annual inspection because the tenants share apartment buildings. (G-18B; Tr. 617-18, 692, 694, 1402-03.)

After Derrington's September 1990 visit, Georgia Turner, the GHA's project manager, made several fruitless attempts to obtain the HQS inspection form from HUD Forms Supply. By the time of the hearing, the GHA still did not have the HQS inspection form and Turner had been told by HUD Forms Supply that they had "never heard of that form." Harper stated that he would use the correct form if he could obtain it. At the time of the hearing the GHA was doing annual inspections on occupied apartments, move-in inspections, and move-out inspections. (G-33; Tr. 649, 1140-41, 1290.)

Derrington also found that there was no recognizable program to prevent units from deteriorating. Harper stated that although he did not have a public housing preventative maintenance program in place at the GHA, he and his staff did preventative maintenance "all the time." Examples he gave included: cleaning heaters and lighting pilot lights; unhooking garden hoses to prevent the faucets from freezing; covering vents in walls when a hard freeze was expected; and repairing fences. (Tr. 636, 1291-92.)

All six inspections from 1990 to 1992 found maintenance deficiencies at the GHA. HUD General Engineer Aniva Yazzie noted deferred exterior maintenance at the GHA consisting of torn screens, worn wooden posts, broken screen doors, falling brick facia, and loose brick fascia. Miller also noted torn screens, bricks falling off the fascia of buildings, ceiling leakage, missing roof shingles, loose doorknobs and paint sliding down a wall due perhaps to underlying grease which had been painted over. Other inspectors found tenant trash and a caved-in ceiling in a unit which had been vacant for over a year, broken toilet seats, and interiors in need of painting. Georgia Turner, the GHA project manager, stated that, given the staff limitations and the work load, the GHA was a decent, safe, and sanitary as possible. There are 10 to 20 routine work orders a month but no formal system for monitoring whether the work is done. Harper did not always personally check repairs but assumed they were done. Harper had an annual inspection schedule in place and repairs were being performed, as found, during these inspections. Otherwise, repairs would be performed if a tenant called in for a work order between inspections. A November 1991 FmHA Review Report expressed concern with the deteriorated condition of the units inspected and strongly recommended that a quarterly routine inspection policy be established, as opposed to the ineffective annual inspection routine. (G-1, G-18B, G-22, G-24, G-25, G-35; Tr. 101, 492, 563, 907, 977, 1043-44, 1110-11, 1113, 1442, 1508-11.)

I find that Harper was not providing an acceptable level of physical maintenance, as was noted in each of the inspections done over a one and a half year period.

B. UNIT TURNOVER AND VACANCIES

Section 201 of the ACC requires that vacant low income housing units be used at all times "in such a manner as to promote serviceability, efficiency, economy, and stability..." HUD Handbook 7460.7 REV-1, 2e-1 states that the performance standard for occupancy is 97% occupancy or the occupancy goal set out in an approved Comprehensive Occupancy Plan. ("COP"). The HAPC states that a PHA owner will receive reduced housing assistance payments for Section 8 units which are not leased within a certain period of time. 24 C.F.R. § 884.223 states that if the owner does not lease vacant Section 8 units in a timely manner, the number of units receiving FmHA payments may be reduced. HUD Handbook 7460.7 REV-1, 2e-1(c)(1) states that the performance standard for unit turnover is an annual average number of vacancy days per turnaround of not more than 30 calendar days. The six inspection teams that visited the GHA from August 1990 to March 1992 found an unaccountable number of vacancies, slow unit turnover, and poor "outreach" (marketing to get applicants). (G-1, G-4, G-2B, G-18, G-18B, G-19, G-22, G-24, G-25, G-35; Tr. 464.)

The occupancy level of both the GHA's low-income sites and the Section 8 site from 1990 to the present has been dramatically lower than the 97% standard. All but one of the inspection reports covering the period from August, 1990 to March, 1992, expressed concern with the low occupancy level at the GHA. In December 1990, the GHA had a total of 32 vacancies, 20 of which were in the two Greenway sites and 10 of which were in the Juliawood site. In comparison, in 1989, the two Greenway sites only had 2 vacancies and

the Juliawood site had 1 vacancy. The GHA's COP had expired in 1990 and the GHA was not allowed to submit another COP until it had had 97% occupancy for at least 12 months. That occupancy level has not been met. Miller, after inspecting the Section 8 units in August 1990, found 11 of the 66 Juliawood units vacant. In 1990, Terry Rees, on a Desegregation Task Force visit, found a total of 51 vacancies at the GHA, 12 of which were at Juliawood. Rees noted that one of the units had been vacant for almost four years. Harper stated that he "just never got to that one." Derrington in September 1990 and May 1991 found a vacancy rate of 30%. That audit calculated that the GHA's loss in rental income due to vacancies from 1987 to 1990 was approximately $103,665.00. In addition, it noted that, since the GHA's vacancies were so longstanding and its COP had expired without its goals met, the GHA lost $22,826.00 in Section 8 subsidies from HUD for fiscal year 1991. An October 1991 Desegregation Follow-up Study and a November 1991 FmHA review of Juliawood found that there was still a longstanding number of vacancies. (G-1, G-18B, G-22, G-24, G-35; Tr. 216, 218, 483, 1421, 1565.)

At Juliawood during a six month period in 1990, there were seven one-bedroom units vacant, held for elderly residents and five non-elderly designated units vacant, four of which were one- bedroom units, and one of which was a two-bedroom unit. In a November 1990 letter to HUD, Harper stated that the vacant Juliawood apartments were in various stages of make-ready, and any one of them could be occupied within one day. (G-1, G-22, G-23.)

The various inspections and reviews also found unacceptably slow unit turnover at the GHA. An analysis was made of all units leased between July 1, 1990 and December 31, 1990 to determine average turnover time by site and program. Turnover time for all four sites was over one hundred days: 104 days for site 1; 583 days for site 2; 180 days for site 3; 143 days for site 3B; and 116 days for site 4 Juliawood. The average of 253 days turnover time in public housing units exceeded the 30 day time limit considered acceptable by HUD by 223 days. The October 1991 Desegregation Follow-up Report stated that the GHA should hire independent contractors to make units ready for occupancy. One reviewer stated that she recommended sending a Comprehensive Improvements Assistance Program ("CIAP") independent contractor to the GHA immediately because the tenants were being deprived of units. The follow-up report recommended that Harper charge 100% of his time to the Executive Director position, as this would allow for the hiring of more maintenance staff to actually handle maintenance needs, including making vacant units ready for occupancy. The FmHA follow-up review in March 1992 found the quality of the "make ready" of vacant units lacking and long delays between the time a tenant vacated a unit and the time the unit was ready to be inhabited. This review also concluded that there was a strong need for additional maintenance personnel. (G-1, G-25, G-35; Tr. 595, 626.)

In his responses to the various inspections, Harper maintained that the vacant units were either in differing stages of "make-ready" or being held for a major overhaul through HUD's CIAP grant program because they were badly damaged or contained lead-based paint. He also stated that he had to maintain a 60/40 racial ratio in the sites, and therefore, if an applicant was not of the correct group, a vacancy could not be filled without upsetting the

ratio. There have been a number of delays in the CIAP process. The GHA submitted its CIAP application in April 1990 but, due to delays on both Harper's and HUD's parts, the GHA had just sent the plans and specifications to HUD only three weeks before the hearing. Harper stated that in the first part of 1990, Neil Harper, who was in charge of maintenance at Juliawood, was in the hospital for 90 days. James Harper believed that Neil Harper's absence contributed to the vacancy level at Juliawood during that period because units were not being made ready for new occupants as quickly during his absence. Regarding slow turnover time, Harper maintained that, considering the high rate of turnover and the age of the project, 2.5 maintenance persons, as limited by HUD budgetary guidelines, was an inadequate number to both keep up with rental turnover work and to take care of serious repairs. Harper never requested relief from this requirement, nor did he request permission to use outside contractors on a temporary or as-needed basis to accomplish the work that the permanent employees could not accomplish on a timely basis. Harper stated that "several years ago I discussed [the 2.5 maintenance persons limitation] with the financial section and they indicated [it was] pretty much set in stone, so I have not discussed it with them since." (G-23, G-24, G-33; Tr. 551-52, 1076, 1118, 1302-04, 1313-15, 1386, 1423.)

The HUD reserve account at the time of the hearing contained $812,000.00 and could have been accessed by the GHA through a special claim in order to correct problems with vacancies and physical damage at the Section 8 site. In addition, FmHA has a reserve fund containing a $137,000.00 replacement account for extraordinary maintenance and repairs. There were no special claims made by Harper from 1988 to 1992, nor has Harper ever drawn on the GHA's operating reserves which were at about 77%. The GHA is required to maintain 40% reserves. Harper is allowed to spend operating reserves for an emergency, or with HUD's permission and a budget revision to reflect that permission. Regarding the utilization of independent contractors to make the apartments ready, Harper stated that "there's no small contractors around...that can do it and furnish us a bond." However, in making such a sweeping statement, he offered no evidence of how many contractors he had contacted and when such contact occurred. (Tr. 494, 495, 1391, 1529, 1530.)

Lead-based paint exists on the interiors of Weldon Homes and Greenway Village and on the exteriors of all four low-income sites. HUD's September 1990 lead-based paint standards state that children under 7 years old are not to be housed in units containing lead-based paint. HUD completed a lead-based paint study in the Spring of 1991 which stated that thirty year old apartments with lead-based paint on interior chewable surfaces are a severe health risk. As a result, Harper stopped renting the apartments in Greenway Village and Weldon Homes because he believed that the clear health risks of lead-based paint were a more serious consideration than improving occupancy without regard to health and environmental risk. He neither cleared this GHA policy with HUD, nor notified HUD of it. Derrington stated that the CIAP budget provided for abatement of lead-based paint in units where the paint was either peeling or in a hazardous location. There is no evidence in the record with regard to the extent of the lead-based paint problem as to which units had peeling paint. Furthermore, Harper did not even receive the results of the lead-based paint study

until 1991. Thus, his vacancy problems in 1990 were probably attributable to other causes. (Tr. 654, 1074, 1075, 1086, 1245, 1246, 1247, 1249.)

II. PEST CONTROL

Under Section 201 of the ACC and HUD Handbook 7460.7, a PHA is responsible for providing "decent, safe, and sanitary" housing to low income families. HUD's concerns with the health and safety hazards of cockroach infestation are reflected in the HUD Maintenance Guide for Insect Control and in the HUD Housing Inspection Manual, which sets out guidelines on pest control to which a PHA is expected to adhere. 24 C.F.R. §884.118 requires a PHA owner to perform ordinary and extraordinary maintenance. (G-2A, G-3, G-4, G-5, G-8, G-7.)

The GHA was informed of its pest infestation problem through five government inspections from 1990 to 1992. One reviewer, Aniva Yazzie, stated that the GHA had the highest level of roaches of all six PHA's that she had reviewed. She inspected 20% of all GHA units and found 90% of the units, including vacant ones, infested with cockroaches. While Yazzie discovered serious roach infestation in both low income and Section 8 units, she found the level of roach infestation to be especially severe in the Section 8 units, where she discovered a "swarm" of roaches in one unit, sighted 25-40 roaches "running almost everywhere" in an adjacent unit, and also found the problem prevalent in a unit across the hall from both units. Yazzie also found pest fecal matter in the unit with the "swarm". Harper testified that the most infested unit was usually well-maintained, however the tenant had left the apartment vacant for a period of time during which food and trash were left out in the kitchen. That unit was sprayed after Yazzie informed Neil Harper of the situation. Overall, Yazzie concluded that the roaches and the pest fecal matter on the walls posed a real health hazard, and she found no evidence of any plan or schedule to rectify or control the problem. (G-1, G-18B, G-24, G-35; Tr. 63, 99, 100, 105, 125-26, 140, 1162, 1435.)

Although the GHA did provide free roach powder (boric acid) to tenants upon request until December 1991, Yazzie and another reviewer both stated that this was not adequate to address the scope of the roach infestation. In addition, the GHA only provided extermination services when units were vacated and upon tenant request. During the first six months of 1991, out of 337 work orders, only 19 were for pest extermination. Georgia Turner, the Project Manager of the GHA, stated that generally, if she noticed a pest problem in dirty units she would speak to the tenant about housekeeping, but she would not put in a work order for pest control. Turner believes that cockroaches in the units are attributable to poor housekeeping. Vabbie Fortson, the GHA Tenant Coordinator, agrees, and stated that in order to control pests, tenants must "keep constantly at it." Harper believed that only 5 to 10% of the occupied units have a "serious" roach problem, which he, too, attributes to poor housekeeping. (R-6; Tr. 143, 644, 762, 899, 939, 1022, 1159, 1457-59.)

In 1991, Derrington saw pests in the units she entered, even in "very clean" units, and also saw pests through windows of units she did not enter. The 1991 LMR/OA Report

required Harper to immediately obtain the services of a licensed exterminator because the condition of the GHA units was considered a threat to the health and safety of the tenants. Harper did not do so when he received the LMR/OA Report because he believed the GHA would go "broke in two years" if it complied. He stated that "the apartments are provided in a decent, safe, and sanitary condition to the tenants upon initial occupancy. [Under the lease] the tenants are responsible for, and agree to, maintain the premises and all equipment assigned to him/her in a clean and safe condition." The last inspection, in March 1992, found that there was still a most definite need to establish a regular routine for exterminating. At the time of the hearing, Harper stated that he was soliciting bids from extermination contractors but had not yet obtained a contract for this service. (G-18B, G-25, G-33; Tr. 643, 678-79, 696-97, 1161, 1209, 1438.)

I find that Harper failed to comply with the guidelines for pest control, and thus there were unsanitary conditions created by pest infestations. The problem was not adequately addressed or solved when the record in this case closed.

III. COMPLIANCE WITH YOUNG V. KEMP

A. TENANT SELECTION AND ASSIGNMENT

Under the Young v. Kemp Interim Injunction, the GHA is required to adhere to a Tenant Selection and Assignment Plan ("TS&A"). This TS&A Plan must contain a number of procedures relating to maintaining a vacancy "pool", waiting list, and transferring tenants for desegregation and other purposes. Specifically, the vacancy pool must contain all appropriately sized units which are vacant in both the public housing and Section 8 sites. The applicant at the top of the waiting list is to be offered a unit in a project site where the applicant's race does not predominate, if such units are available in the vacancy pool. If an offer is refused, the applicant is placed at the bottom of the waiting list. An offer will be deemed rejected if not accepted within ten days from the offer date. Transfers are to be implemented if they will result in a desegregated housing opportunity to a class member or if they are needed to correct "over-housed" and "under-housed" situations. The latter type of transfers are to have priority over the filling of vacancies from the waiting list. Regarding applicant eligibility, Section 205 of the ACC states that the GHA shall admit as tenants of the projects only low income families of two or more persons or an elderly family. (G-2A, G-9.)

The GHA's 1988 TS&A Plan states that applicants shall be selected from a community-wide waiting list consisting of applicants for public housing and Section 8 housing operated by the GHA. Applicants who have not been housed and have met the applicable eligibility and screening requirements will constitute the waiting list. To qualify for admission, a family must meet the definition of family and have a total annual income below the income limits for admission. Single persons 62 years or older, disabled persons, handicapped persons, or persons displaced by a disaster or public action may also be admitted. No applicant family shall be admitted without thorough verification of income,

family composition, preferences, and other information. Regarding evaluation and screening, all applicants are to be evaluated to determine whether they will be reasonably expected to have a detrimental effect on the other tenants or on the project environment. Applicants whose habits and practices may be expected to have a detrimental effect on other tenants or the project environment will be denied admission. Applicants will also be denied admission who currently owe rent or other amounts to the Authority in connection with the public housing or Section 8 programs or have committed fraud in connection with any federal housing assistance project. However, an applicant who owes the Authority money may enter into an agreement to pay back the amount owed. (G-11.)

The TS&A Plan states that the applicants meeting the screening criteria are those: (1) whose past performance in meeting financial obligations, especially rent, is satisfactory; (2) who have no record of disturbing neighbors, destroying property, or living or housekeeping habits which adversely affect the health, safety, or welfare of other residents; (3) who have no history of criminal activity involving crimes of physical violence to persons or property or other criminal acts which adversely affect the health, safety, or welfare of other residents; (4) who do not pose a health risk to themselves or others and, where necessary, have secured the support services required to meet all obligations of the lease; and (5) who are legally competent in terms of age and faculties to sign a lease and abide by its terms. The TS&A Plan states that in the event of receipt of unfavorable information regarding conduct of the applicant, the Authority shall give consideration to time, nature and extent of the applicant's conduct and to factors which might indicate a reasonable probability of favorable future conduct or financial prospects in determining the eligibility of the applicant. Factors to be considered in such a case will include evidence of rehabilitation,and evidence of applicant's participation or willingness to participate in social service or other appropriate counseling service programs and the availability of such programs. (G-11.)

1. Violation of TS&A Plan through Manipulation of Vacancy Pool

Some of the HUD inspectors, particularly Janice Stanfield, Judy Derrington, Jackie Miller, and Terry Rees strongly suspected that Harper was manipulating the tenant selection and assignment process through his practice of selectively making ready units in both the low-income housing and the Section 8 sites, thus ensuring that the units in the vacancy pool would be the units he wanted to be occupied, not the units which were vacant the longest. This practice of not putting units in the vacancy pool in the order in which they were vacated was seen as Harper's method of violating the design of the Interim Injunction and the TS&A Plan. Inspectors found no evidence that Harper was skipping over qualified applicants. Rather, they saw tenant placement problems related to his practice of not making ready certain units. The LMR/OA concluded that the fact that Harper was both the Executive Director and the Maintenance Supervisor allowed him to make the decisions as to which units to make ready as well as the final decision on admitting applicants. The LMR/OA determined that Harper should realign the GHA personnel and create the separate position of maintenance supervisor, so that units could be made ready in the order in which they were vacated. (G-1, G-18B, G-22; Tr. 179, 209, 223, 281.)

Although Harper admitted that he was putting units back in the vacancy pool as they were repaired, not as they were vacated, he stated that he did so in order to serve the largest number of applicants with the available staff. Priority was placed on units that required the least amount of work to make them ready, in the sizes that corresponded to the waiting list with the most applicants. Harper stated that there is a demand for two and three bedroom apartments as opposed to one bedroom apartments. He stated that he did not want to spend a month on a unit that needed substantial repairs when he could repair five units in the same amount of time. Harper stated that HUD's contention that he manipulated the make ready decisions was due to a lack of information, but that he did not give that information to HUD because no one ever asked for it. Harper prioritized repairs requested by tenants and the needs of ordinary maintenance over make ready work. (G-33; Tr. 1111, 1119, 1269-70, 1325, 1375, 1384-85.)

2. Violation of the TS&A Plan Relating to Offers

After conducting the desegregation inspection and the LMR/OA inspection, HUD inspectors concluded that Harper was applying an overly stringent screening policy. One inspector, Terry Rees, looked at 20 to 25 of the applications at random and concluded that 82% of the applicants were never actually housed because of "stringent screening." She stated that about half of the applications were rejected for minor reasons. Rees, however, did a limited review and could give no specific examples of improper screening. Not only did Rees agree that a PHA should screen applicants to remove those that pose a hazard or threat to the other tenants, she also admitted that she found that none of Harper's negative screening had an invalid basis for rejection. Harper estimated that he rejected not more than 15 percent of all applications. HUD inspectors estimated that he "screened out" as many as 82% of all applicants. (G-1, G-18B; Tr. 187-88, 190-92, 232, 238, 262-63, 1167.)

Helms stated that an applicant cannot be removed from the waiting list unless the applicant dies, is determined to be ineligible or unsuitable, is no longer interested in housing, or is actually housed. When an applicant is determined to be ineligible or unsuitable the GHA must be notify the applicant in writing. She stated that if an applicant does not respond, a PHA should further notify the applicant that he or she will be removed from the waiting list. However, Helms also stated that it is within the discretion of a PHA to decide how far to pursue an applicant to get the information to complete a file. Rees noted that several applicants were dropped from the GHA waiting list without notice, usually when income verification was not received. Originally, Harper enforced a 30-day deadline for verification information to be received before dropping an applicant from the waiting list. Harper discontinued this practice in response to the 1991 LMR/OA, which required him to stop it. Now Harper allows applicants to stay on the list for six months before receiving information. Harper stated that after an applicant has been on the waiting list for six months, the GHA will send the applicant a notice asking if the applicant is still interested in housing. If the applicant does not respond within 30 days, the applicant is purged from the waiting list without further notice. (G-1, G-18B, G-33; Tr. 300-01, 385, 415-16, 1354, 1441.)

The GHA's application procedure starts when an application is received and stamped in. At that point the applicant's name is put on a community-wide waiting list. Vabbie Fortson, the GHA Tenant Coordinator, then schedules an interview with the applicant, during which she reviews the application point by point with the applicant and finds out why needed information is missing. If there is information missing, Fortson gives the applicant a list of required information. The required information includes a birth certificate, Social Security card, past landlord information or parent's name, and personal references (name, address, phone number). Fortson assists applicants in reconstructing required information, including obtaining Social Security numbers, and starts her verifications as soon as adequate information is provided. When all documents are received, Fortson begins the screening process to find those who are "suitable" for housing. Fortson conducts the screening by calling personal references, landlords,and by obtaining information of criminal convictions. The GHA does not run a credit check. (Tr. 960-62, 964-65, 967, 1003, 1163.)

In the final analysis, Harper decides if an applicant is suitable or unsuitable, by applying the criteria that is in GHA's TS&A, in conjunction with information obtained in the screening process, including rent paying habits, disturbance reports, criminal records and other information with respect to the potential for detrimental impact on the project environment or the tenants. Before deciding to reject an applicant on the basis of criminal activity, Harper examines efforts that have been made by the applicant to become rehabilitated. Harper will reject any applicant for crimes against children, murder, assault and theft, as evidenced by both arrests and convictions. However, an arrest for a minor crime will not be the basis for rejecting an applicant. Wanda Helms, Director of HUD's Public Housing Management Division in the Fort Worth Regional Office, agreed that the drug-free housing rules and the conduct of drug trade activities around the GHA make Harper's screening duty very real. Helms also agrees that it is appropriate screening to look at past history in paying rent. (Tr. 381-82, 384, 1347, 1348, 1165-67.)

For a time Harper was not housing single mothers with children in one-bedroom units because he believed that the TS&A Plan "did not allow it," but he ceased this policy when directed to do so. Juliawood has 30 units designated elderly and 47 units occupied by elderly. Juliawood is used by Harper for elderly tenants because the units are primarily one-bedroom, one story apartments most suited to the needs of elderly tenants. (Tr. 499, 561-62, 1174.)

I find that HUD has failed to prove the rejection of any applicant for reasons not acceptable to HUD, and never proved that Harper was not leasing units to eligible and otherwise acceptable families, as required by the TS&A Plan or the Interim Injunction.

3. Violation of TS&A Relating to Transfer Costs

The GHA's TS&A Plan states that the GHA will assume the reasonable cost of transfers made to correct overhoused and underhoused tenants or made upon request if

transfer will result in desegregated housing for the tenant. The placement of transfer tenants was given priority over the placement of waiting list applicants. The GHA Board of Directors recognized that the GHA was responsible for payment of transfer costs on June 25, 1988, but the GHA did not start compensating tenants until 1991. In explaining this delay, Harper stated that he "tried to find out how much to pay them, no one knew." In trying to find out how much to pay, Harper called a number of other housing authorities to find out what they were doing. He was informed that they just "pick[ed] a number". In addition, Harper stated that he could not determine how to reflect the payment of transfer costs in the budget. (G-11, G-33; Tr. 193-94, 1175-77, 1200-03, 1296-97, 1378.)

Finally, in the 1991 submission of the budget, Harper called Ruth Ballard, at that time the supervisor of the Financial Section at the Area Office, and asked her how to put the transfer costs on the budget. She told Harper to use the form for extraordinary maintenance. Harper recalls asking for help before that time, but not getting much assistance. Harper also stated that a budget dispute with HUD impacted his ability to apply the transfer costs because he did not have the clear approval or money to pay them. Therefore, he decided that "rental credits" would satisfy the TS&A Plan requirement to pay for the cost of transfers because giving a rental credit would satisfy the definition of payment. Harper never asked HUD to help with how much to pay for transfers. The LMR/OA report stated that if Harper was unable to determine allowable costs, he should have called for assistance from HUD, as opposed to "penalizing" lower income families. (G-18B, G-33; Tr. 1177, 1203, 1296, 1453.)

Harper and the GHA were operating in violation of the TS&A Plan from 1988 to 1991 by failing to compensate tenants for transfers. This violation could have been avoided by asking HUD at the outset for help and guidance. However, the violation was corrected to the extent that all of those due compensation who are still residing in a GHA unit have been compensated through rental credits. There is no evidence with respect to the compensation of tenants who left the GHA before 1991, and the TS&A Plan requires such compensation, even for former tenants.

B. OUTREACH

Under the Young v. Kemp Interim Injunction, the GHA is required to report to HUD its implementation of outreach efforts. HUD Handbook 7465.1 REV 2, 2.3a(1) states that PHAs must attempt to attract a sufficient number and variety of applicants to fill all vacancies as they arise, and that the means to maintaining a well-balanced application pool is to perform outreach. HUD Handbook 4350.3 CHG-1 sets out an Affirmative Fair Housing Market Plan which requires PHAs to perform marketing and outreach activities for both Section 8 and low-income public housing. Under 24 C.F.R. §884.223, a PHA owner has an affirmative duty to make good faith efforts to fill vacancies in Section 8 housing. (G-9, G-10, G-19, G-21; Tr. 474, 476.)

All of the HUD inspections concluded that the GHA needed to perform outreach to attract an adequate applicant pool in order to fill all vacancies once they were prepared for

occupancy. The reviews from 1990 to 1992 found almost no evidence of actual outreach. Although Harper testified that he spoke to the Rotary Club and elders in churches, the only evidence of Harper's efforts at outreach consists of a copy of a short newspaper article covering a speech to the Chamber of Commerce, and a copy of a letter mailed to 17 apartment complexes in the Longview/Tyler area in June 1991. Harper also stated that since 1991, he has placed advertisements in three area newspapers. The Desegregation Follow-up study required Harper to present evidence of outreach because previous GHA quarterly reports reflected outreach activities which had not been taken in that quarter. Harper filled the form out incorrectly, making it appear that he was doing the required outreach, but he was not. The quarterly report requires the GHA to check the actions it has taken or intends to take and to attach a description, including dates of the actions taken in each instance. Harper stated that he believed "actions taken" meant all the actions he had ever taken, as opposed to the actions he had taken that quarter. In addition, Harper stated that he did not date the actions or attach descriptions because he was not aware that instructions on the quarterly report required such information. (G-1, G-12, G-18B, G-22, G-27, G-35, G-36, R-10; Tr. 180-81, 185, 187, 228, 1149, 1153, 1154, 1335, 1336.)

Regarding outreach, Harper stated he did not do more outreach until directed to do so in the 1991 LMR/OA Report because he mainly needed applicants for one bedroom units and he believed he was not allowed to do unit-specific advertisements. Harper admitted, however, that he probably could have advertised which units were available by bedroom size. Wanda Helms stated that not only are PHAs allowed to do room-specific outreach, but Harper has received training in how to target the types of tenants that the GHA needs. Helms testified that four years earlier Harper told her he did not like to do outreach because it would attract unsuitable applicants who would need to be screened out. Derrington stated that Harper told her that advertising in Longview would attract "the wrong kind" of applicant. (Tr. 340, 631, 632, 1337, 1431, 1647, 1654.)

I find that Harper did not perform the required outreach until absolutely directed to do so, and that the outreach done at that point was limited to the mailing of some letters, but did not include giving speeches or posting notices in public buildings, churches, grocery stores, or schools, where the public would have been most likely to have seen the outreach information.

IV. MANAGEMENT DEFICIENCIES

A. RECORDS OF VEHICLE USE

24 C.F.R. §85.20(b)(3) states that effective control and accountability must be maintained for all grant and subgrant cash, real and personal property, and other assets. Grantees and subgrantees are required to assure that it is used solely for authorized purposes. Derrington, in her 1991 LMR/OA, stated that there were no internal controls assuring that

the GHA vehicles were used for official business only. Derrington stated that she could not monitor the use of either the PHA owned or non-owned vehicles because there were no records of use of either vehicle. She assumed there were no records because when she asked Harper and other staff for the vehicle use records she did not receive them. (G-18B, G-28; Tr. 612.)

Turner kept vehicle logs for the use of her car for GHA purposes. Derrington saw the logs at her deposition and considered them to be inadequate because they did not indicate which vehicle was used or the name of the person who made the trip. She explained that the GHA needs to know for insurance reasons that authorized persons are using non-GHA owned vehicles.(Tr. 612, 614.)

Although 24 C.F.R. §85.20(b)(3) was relied on by Derrington in her finding that the GHA was not effectively controlling and accounting for vehicle use, that regulation does not specifically require that a PHA maintain use records or logs. Harper testified that use logs on privately owned vehicles were available in the GHA front office at the time of Derrington's May 1991 "close out" meeting. However, there were no use logs for the two GHA-owned vehicles or for any other GHA-owned equipment. There was no evidence of real or suspected misuse of the GHA's vehicles or private vehicles used for GHA purposes. (Tr. 1335, 1441.)

B. LATE BUDGET SUBMITTAL

Section 407(c) of the ACC states that a PHA must submit a proposed Operating Budget 90 days before the end of its fiscal year. The GHA's fiscal year ends December 31st. HUD sent a notice extending the budget filing due date for the GHA until February 1, 1991. The GHA submitted its 1991 Operating Budget for HUD's review and approval on March 11, 1991, past the extended deadline date of February 1, 1991. Harper stated that the budget was late because he could not get the GHA's Board of Commissioners appointed and together to work on it. Although Harper submitted the operating budget late, it was unclear to him that it would be considered a problem, since HUD had never set a "delinquency" date for budgets before. Harper testified that the GHA budget had always been submitted late and sent back by HUD late. The GHA had never received filing extensions from HUD in the past, and HUD had never complained or objected in any way to late submissions. (G-2B, G-16, G-17; Tr. 317-19, 1179-80.)

The first time HUD ever extended the GHA filing deadline on its own initiative was in 1991. The HUD notice sent out to the PHA's in 1991 did not alert PHA's of an end to HUD's treatment of deadlines as non-binding or that February 1 was a real deadline that would have to be observed. Helms testified that a firm enforcement of deadlines was necessary because HUD's staffing is based on a quarterly schedule of receipt of financial budget filings. She stated that late filing "impacts on the next quarter" by creating more burden on the staff member assigned to review and approve it. However, both the 1991 Winter and Spring quarters were extended, so this schedule was already affected by HUD's

own actions. Helms' explanation also does not respond to HUD's past practice, on which Harper relied, or why notice of HUD's change of practice was not made clear. (G-16, G-17, R-18; Tr. 318-20, 1425, 1583.)

DISCUSSION

An LDP was imposed on Harper for mismanagement of the GHA. Generally, the alleged mismanagement was broken down into four broad areas of lack of adequate maintenance, unsanitary conditions, management and occupancy deficiencies. The letter notifying Harper of the LDP cited ten specific violations of his obligations as Executive Director of the GHA within the four broad areas of alleged mismanagement. They were:

1) violation of HUD's Housing Quality Standards relating to pest control; 2) violation of PHA performance standards relating to unit turnover, unit inspections, and occupancy; 3) violation of the PHA's Tenant Section and Assignment (TS&A) Plan relating to the vacancy pool, offers, transfers and relocation costs of transferred tenants, citing the Young v. Kemp Interim Injunction; 4) failure to effectively control and account for the use of vehicles owned or used by PHA employees; 5) failure to submit operating budget by required deadline; 6) failure to develop and implement a preventive maintenance program and to provide adequate general maintenance; 7) repeated failure to undertake sufficient measures to fill vacancies; 8) manipulating the tenant selection process through selective unit "make ready" decisions; 9) failure to conduct adequate outreach efforts required by the Young v. Kemp Interim Injunction, and furnishing quarterly reports to HUD that contain false information regarding outreach efforts; and 10) failure to take sufficient action to bring the PHA into compliance with Title VI of the Civil Rights Act of 1964. This last violation was withdrawn by the Government at the beginning of the hearing.

An LDP is a sanction that, like debarment and suspension, is to assure the Government that it only does business with responsible persons and entities. 24 C.F.R. §24.115. The term "responsible" is a term of art defined in this context to include not only the ability to perform a contract satisfactorily, but the honesty and integrity of the participant. 48 Comp. Gen. 769 (1969). The test for whether any sanction is warranted is present responsibility, but a lack of present responsibility may be inferred from past acts. Schlesinger v. Gates, 249 F. 2d 111 (D.C. Cir. 1957); Stanko Packing Co. v. Berglund, 489 F. Supp. 947, 949 (D.D.C. 1980). An LDP, like a debarment, may not be used for punitive purposes, and shall only be imposed to protect the public interest and the Government. 24 C.F.R. §24.115(b); Larry A. Carter, HUDBCA No. 91-5954-D77 (February 5, 1993). In each case, even if an offense or violation is of a criminal, fraudulent or other serious nature, the decision to impose an LDP is discretionary and shall be made "in the best interest of the Government." 24 C.F.R. §24.700. Harper is subject to sanction through an LDP as a "participant" and "principal", as defined at 24 C.F.R. §24.105(m) and (p), by virtue of his position of Executive Director of the GHA.

The evidentiary standard of proof applicable to an LDP is adequate evidence. 24 C.F.R. §705(a). Adequate evidence is defined in the applicable regulation to be "[i]nformation sufficient to support the reasonable belief that a particular act or omission has occurred." 24 C.F.R. §24.105(a). It is not a particularly high standard of proof. However, as the hearing officer, I must consider and weigh not only the adequacy of the Government's evidence, but Respondent's evidence, including evidence in mitigation of the seriousness of the causes for the LDP. Thomas J. Elias, Jr., HUDBCA No. 92-C-7574-D44, Order on Secretarial Review (April 6, 1993), citing 24 C.F.R. §313(b)(3) and 24 C.F.R. §24.314(a). The decision made in this case by me is a de novo consideration based upon all of the evidence presented at the hearing, not limited to the evidence considered by the Fort Worth Regional Office when the LDP was imposed. Ibid.

HUD cites 24 C.F.R. §§24.705(a)(2), (8), and (9) as causes for the LDP imposed on Harper. Those causes are:

> (a)(2) Irregularities in a participant's or contractor's past performance in HUD program;
>
> * * *
>
> (a)(8) Commission of an offense listed in 24 C.F.R. §305;
>
> * * *
>
> (a)(9) Violation of any law, regulation, or procedure relating to the application for financial assistance, insurance or guarantee, or to the performance of obligations incurred pursuant to a grant of financial assistance or pursuant to a conditional or final commitment to insure or guarantee.

24 C.F.R. §24.305 cited in 24 C.F.R. §705(a)(8), sets out causes for debarment that may also be causes for an LDP. Those causes, in pertinent part, include:

> (b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as:
>
> > (1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions; or
> >
> > (2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or
> >
> > (3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction.

All of the charges against Harper must be considered in light of the purpose of public housing, as stated in the ACC at Section (6)(A). It is to provide "decent, safe, and sanitary dwellings within the financial reach of families who are in the lowest income group and who cannot afford to pay..." for privately developed housing. Likewise, the HAP contract between the GHA and HUD provides that the GHA is to maintain and operate public housing units so as to provide decent, safe, and sanitary housing.

In essence, Harper is charged, as Director of the GHA, with failing to provide the requisite management and services required in the ACC and HAP contract, which resulted in a failure by the GHA to provide "decent, safe, and sanitary" housing to its residents. On their face, these are serious charges. In addition, as a result of the case of Young v. Kemp, an Interim Injunction placed additional obligations on the GHA and HUD, designed to rid the GHA of vestiges of racial discrimination. The LDP was imposed on Harper in the context not only of the contractual obligations of the GHA, but of the ongoing litigation of Young v. Kemp.

I. VIOLATIONS OF PERFORMANCE STANDARDS

Harper is charged by HUD with violation of performance standards relating to unit turnover, unit inspections, and occupancy. He is also charged with failing to maintain the project. Part 2, Article II of the ACC states that the project shall be operated solely for the purpose of providing decent, safe, and sanitary dwellings within the financial reach of families of low income "in such a manner as to promote serviceability, efficiency, economy, and stability and in such a manner as to achieve the economic and social well-being of the tenants". It imposes no specific performance standards on the GHA concerning unit turnover, unit inspections, or occupancy. However, it sets goals of serviceability, efficiency, economy and stability. 24 C.F.R. §884.217(c) requires units to be inspected "at least annually" and at such other times as HUD or the housing authority, as owner, determines necessary to assure that the Housing Authority is meeting its obligation to maintain units in a decent, safe and sanitary condition.

A. MAINTENANCE AND INSPECTION STANDARDS

HUD charges that Harper was delinquent in conducting inspections at the GHA's properties, in violation of HUD performance standards. After 1989, Harper was conducting pre-occupancy and annual inspections. Two annual inspection reports were missing from two files inspected at random during the August 1990, Section 8 New Construction Management Review, and HUD considered this evidence that those units had not been inspected. I find the fact that two inspection reports were missing to be evidence only of a failure to place a report in a file.

The gravamen of the charge of failure to meet performance standards for unit inspections really has to do with the Housing Quality Standards (HQS) in which Derrington

had such an interest. I find this charge to be without merit because it is not so serious as to affect the integrity of any program. The checklist used by Harper for interior inspections was admitted by Derrington to reflect HQS. Exterior inspections were not, apparently, done using a form that followed HQS. The forms that Derrington wanted Harper to use either don't exist, or are so rare that no one knows where they are. The GHA did request such forms.

Inspections of exterior as well as interior conditions are necessary to maintain the GHA properties. Harper did not take primary responsibility for the interior unit inspections. He left that to the maintenance men. He did exterior inspections "informally" to determine how much upkeep was needed, but he did not treat exterior inspections, whether formal or informal, as keyed to the annual interior unit inspections or to move-in-move-out inspections, because of the communal character of the exterior of the buildings.

I agree with Harper that it makes far more sense to regularly inspect the building exteriors and surroundings, unrelated to interior unit inspections. Despite the HQS form, there is no inspection requirement that makes an exterior inspection mandatory during an interior unit inspection. Nonetheless, exterior inspections are absolutely necessary and Harper failed to make and perform such inspections on a scheduled basis, aside from his personal observations of problems while going to or from a repair job.

HQS inspections were "required" in the HUD Handbook that governs HUD inspectors, not PHAs. There is no evidence that any HUD Handbook which was written specifically for PHAs contains the obligations of PHAs with reference to HQS. Although the Handbook with the HQS references, HUD Monitoring Handbook 7460.7 REV-1.2 was provided to PHAs for their information and guidance, that alone does not make HQS a requirement imposed on a PHA in doing inspections.

I find that Harper was doing interior inspections that reflected most, if not all, of the HQS standards for interior unit conditions. Also, the applicable contracts and regulations only make reference to what is clearly unit interior inspections. Exterior care is covered under the general maintenance requirements of the ACC and HAP contract. Section 8 housing is not even subject to HQS standards. I find that this cause for the LDP is overly technical, not required by the legal obligations imposed on the GHA, and not supported by adequate evidence. On this basis, I do not find that HUD has established cause for the LDP because Harper did not do HQS external inspections.

It is the condition of the properties that rightly concerned HUD. I find that the record in this case supports a finding that the units and the exterior grounds were not being adequately maintained very well. The November 1991 FmHA review found that Harper was not keeping up with needed repairs in the units inspected. Harper relied totally on tenants to request internal repairs on units between annual inspections. This process was apparently not working well, based on the numbers of repairs found to be needed during virtually every inspection of units. Also, needed exterior repair work was being deferred, according to

Jackie Miller, who found torn screens, bricks falling off the fascia of the buildings, and in one case, paint "sliding down" a wall, which may have been caused by painting over grease.

B. UNIT TURNOVER AND VACANCIES

Unit turnover and unit vacancies became a serious problem for the GHA in 1990. In 1990, the GHA had a total of 32 units vacant, with the vast majority of vacancies in the two Greenway Village sites, which had a total of 20 vacancies, and Juliawood, which had 10 vacancies. In 1989, the two Greenway Village sites only had two vacancies, and Juliawood had one vacancy. Vacancies were not a problem for the GHA prior to 1990, even though some occasionally existed. Harper attributed the vacancy problem, variously, to the advanced age of Greenway Village and Weldon Homes, both about 40 years old, and both with lead-based paint; his inability to get units made ready for occupancy because of lack of maintenance staff at levels needed to keep up with maintenance and repairs, and to a lesser extent, lack of suitable applicants who were qualified to be residents and whose race would "fit" the percentage quotas mandated by the Interim Injunction in Young v. Kemp. However, Weldon Homes, as old as Greenway Village and also with lead-based paint, had no vacancies until 1990, and then it only had two. Therefore, the age of the units had little to do with vacancy levels in 1990, nor did lead-based paint, really, because Harper did not even receive the report on lead-based paint until 1991, and the only restriction up to 1990 was that children under 7 years of age should not be placed in units with peeling lead-based paint in them.

The Juliawood situation is a mystery. Juliawood was a relatively new building, populated in part by elderly residents who usually were single residents who only needed one-bedroom units, yet there were seven one-bedroom units vacant, held for elderly residents in 1990 over a six-month period. Of the units not reserved for the elderly in Juliawood, four were one-bedroom units, and one was a two-bedroom unit. As Harper admitted, these units could be made ready for occupancy in "a day," indicating no significant repairs were needed.

No less than six inspection reports between 1990 and 1992 noted a vacancy problem caused by a failure to repair units and make them ready for occupancy, and failure to do sufficient outreach to publicize the availability of units. I conclude that Harper made a conscious business decision to let all repairs, unit vacancies, and lead-based paint issues be resolved by a CIAP grant, and that he considered only this source of funding in trying to solve very real and immediate problems at the GHA. He did not use the "special claim" process to get work done; he did not make a request to use reserve funds to get this work started, if not completed; he did not even seriously inquire how to go about getting additional maintenance workers - even as outside contractors or on a temporary basis. He made an assumption that no outside contractor would be interested in such work, and abandoned the concept altogether.

This course of conduct was, indeed, mismanagement, aggravated by the three month absence of Neil Harper without even a temporary replacement. A CIAP grant takes a lot of

time to process, clearly shown in the record, with delays attributable to both HUD and the GHA. It was an unreasonable decision that Harper made to let everything wait for the CIAP funds. Those funds had not yet been provided as of the date of the hearing. In the meantime, properties of the GHA deteriorated, units were not made available for rent, and revenues were lost as a result. Even the desirable 2-bedroom units, which Harper claimed most applicants wanted, were standing vacant in record numbers - 20 such units during a six-month period in 1990. Some units had been vacant for years due to deferred repairs. This situation was one over which Harper exercised control to the detriment of the GHA, and to the detriment of the low-income public for whom the GHA was to provide decent, safe, and sanitary dwellings.

The purpose of the GHA itself was undermined by this course of conduct, and I find that not only were the occupancy standards and goals not met, but they were actually subverted. As a result, the GHA was in violation of its contractual obligations, program requirements, and its very purpose for existence. I attribute these failures to Harper because they were caused by decisions made by him, even if ratified by the Board of Commissioners of the GHA. This is the heart of the Government's case, and I find that it has carried its burden of proof by evidence that is more than adequate.

II. PEST CONTROL

The GHA had an affirmative duty to provide decent, safe, and sanitary housing. One element of providing such housing is to provide a pest control system for both removal of pests and prevention of pest infestations. Harper's program of pest control was essentially passive and reactive, depending upon the tenants to come to the management office to get boric acid, and also to request spraying when they could not control a pest infestation, usually roaches, with the boric acid. It was Harper's opinion and the opinion of his staff, that roach infestations were caused by poor housekeeping, and thus were the responsibility of the tenants. Harper and his staff also did not think there was a problem with roaches at the GHA.

To the contrary, there was a serious problem with roaches at the GHA. Aniva Yazzie, a very credible witness who had done compliance inspections at six PHAs, stated that she had never seen a level of roach infestation such as she had observed at the GHA. She not only found roaches but roach fecal matter on walls and surfaces. The situation was the worst at Juliawood. There was one unique situation resulting from a tenant having to temporarily leave a unit on a personal emergency with garbage uncollected. Although normally a well-kept unit, it became so roach-infested that it also contaminated nearby units. These units were subsequently sprayed based on Yazzie's inspection.

Yazzie was not the only inspector to observe roach problems of a serious magnitude. Derrington also noted infestations, even in units with apparently good housekeeping. The two FmHA inspections of Juliawood in November, 1991 and March, 1992, noted serious roach problems. Harper has not taken the matter seriously. There were only 19 work

orders for spraying for pests, a minuscule number considering the enormity of this continuing problem. Harper had no preventative plan other than to lecture tenants about good housekeeping.

I find the way in which Harper dealt with roach infestations was not in accordance with the obligations of the GHA. His "preventative" plan is ineffectual and gives no recognition to the fact that the GHA has an affirmative duty to prevent, as well as rid the units of pests. The GHA sorely needs a regular extermination service, but Harper has been taking his time in obtaining such services. In the meantime, the problem posed by roach infestations, particularly at Juliawood, caused unsanitary conditions not solely attributable to the tenants, and certainly not their sole responsibility to cure. I find that the Government has presented adequate evidence that unsanitary conditions have existed at various times due to ineffectual or non-existent pest control, in violation of the terms of both the ACC and HAP contract. Harper required tenants to take responsibility for their surroundings, a good policy, while at the same time refusing to take responsibility on behalf of the GHA to affirmatively prevent or remedy those same situations. This was unreasonable, and in violation of two public contracts.

III. COMPLIANCE WITH YOUNG V. KEMP

HUD charges Harper with, in effect, avoiding compliance with the Interim Injunction in Young v. Kemp in the area of tenant selection and assignment governed by the TS&A Plan, and in his failure to do outreach to the community to attain an appropriate racial mix of applicants.

A. TENANT SELECTION AND ASSIGNMENT

The charge that Harper manipulated the tenant selection and assignment process is the most complex and the most subtle charge in this case. It is predicated on a belief that Harper was controlling which applicants would be moved off the waiting list and into the project by his choice of which units to make ready for occupancy.

Nonetheless, even considering that the standard of proof in an LDP case is only adequate evidence, mere suspicion and conjecture do not rise to meet that level of proof. After careful consideration of this charge, I find that it is based on "impressions," and circumstantial evidence at best. The alternative explanation given by Harper to explain why units were repaired when they were overcomes these impressions and suspicions. It may not be a "pretty" explanation, but it is not rooted in controlling which applicants would become tenants, it is rooted in expediency, plain and simple. Harper made units ready on the basis of how quickly and easily he could have them cleaned and repaired, giving them lower priority than repairs requested by tenants and needs of ordinary maintenance. He also did

not make units ready if he had no waiting list for such a size unit, which was his explanation for the failure to make ready a number of one-bedroom apartments reserved for elderly applicants. Harper's decisions concerning make-ready and repairs were not good judgments, as has been discussed at length in this decision. However, I do not detect the malevolent motives ascribed by the Government to these decisions.

Harper was a strict project manager in his view of who would be an appropriate tenant. The Government charges him with being too strict, to avoid placing applicants who were deserving of placement. The TS&A Plan sets out financial and behavioral qualifications that are not unreasonable. They were intended to screen out those applicants who would pose a safety threat to the other tenants, or who would be financially irresponsible. All witnesses agreed that these are appropriate criteria. I cannot find, based on the record at the hearing, any instances when Harper excluded an applicant who should not have been excluded as a tenant because he was interpreting qualifications standards "too strictly" or being too rigid. He did take into consideration evidence of changed behavior or special circumstances in considering negative information.

Rather, the vast majority of applicants appear to have been dropped from the waiting list when they failed to respond to notice that a unit was ready for them, or when the failed to provide the rest of the information needed to determine if they were suitable tenants. Harper would purge such applicants from the applicant pool if he did not hear from them within 30 days. However, he ceased this practice after he was directed to do so in the 1991 LMR/OA.

While this purging after 30 days without another request or notice may have limited the length of the waiting list, it is not a violation of the TS&A Plan so much as a self-defeating policy that may have eliminated potentially good tenants who just forgot to get the rest of their information in, or who were unable to do so. However, such applicants could reapply or reactivate their applications, but there is no evidence that they did so. Perhaps the GHA could have assumed more of the primary responsibility for gathering the needed information, rather than placing that duty on the applicants, but, again, this is not a violation of the TS&A Plan. Also, the Government witnesses only speculated about the "unfairness" of the way in which applicants had to document their application. However, I do not find the system used by Harper for eliminating applicants form the GHA waiting list to be either unfair or unreasonable, even if there were other equally reasonable ways to approach the process. I cannot find a "violation" of any requirement on this basis.

The only clear violation of the TS&A Plan concerned the GHA's initial treatment of transfers, in that it did not pay transfer costs. Harper was correctly satisfying transfer requests before placing applicants on the waiting list, because that was required by the desegregation plan. He failed to provide for the compensation to transferees for transfer expenses, which is clearly required by the TS&A Plan. When it was brought to Harper's attention in September, 1990, he was slow to figure out how to calculate the compensation, which is a poor excuse, but eventually the transferees who still lived in the project were

compensated through rental credits. The violation of the TS&A Plan was thus corrected for these tenants, but not for tenants who moved away before the beginning of the rental credit policy. Other than the compensation delay and possible lack of compensation for those who had moved, there is no evidence that the GHA violated the TS&A Plan as it applied to transfers. Certainly, this is not evidence of manipulation of tenant assignment.

In summary, the charge that Harper manipulated the tenant selection and assignment process to avoid compliance with the TS&A Plan mandated by Young v. Kemp fails for lack of adequate evidence.

B. OUTREACH

Outreach efforts to the community that would benefit from the GHA's operation was required of the GHA by HUD, and by the Interim Injunction in Young v. Kemp. A quarterly report had to be filed with HUD detailing outreach efforts already made during the quarter and those planned for the future.

Harper did almost no outreach until he was absolutely forced to do so, and that outreach was limited to sending out some letters. For a year, he kept listing on the quarterly reports a speech he had given once, but never listed the date that he presumably had given this speech. He later testified that he thought he was to list anything he had ever done on each report. This is absurd on its face, and Harper would have realized that if he ever appreciated the purposes of the quarterly reports. One witness recalled Harper's low opinion of outreach as a useful tool for attracting suitable tenants. His course of conduct certainly bears witness to this attitude.

Outreach serves two valuable purposes. It could have helped the GHA to attract more tenants to fill its vacant units once they were made ready for occupancy. Harper contended that some rentable units went vacant for want of a suitable tenant. Harper exacerbated the vacancy problem by failing to do outreach, and ultimately lost valuable revenues as a result of that approach. Second, outreach was to attract a mix of racially diverse applicants to achieve the racial percentages that the court was looking for in Young v. Kemp. The waiting list had African Americans in every category except elderly, but the waiting list had almost no elderly applicants of any race. It may be that too many units were being held vacant for elderly applicants when the real need was to house non-elderly applicants of both races.

In any event, it is clear from the record that Harper did no real outreach until June 21, 1991, despite repeated findings that his performance was deficient in this area. Even when he did outreach by sending letters, he could have done far more, such as scheduling speeches, providing flyers to be posted at local churches, supermarkets, and schools, and advertising in the newspaper. Contrary to his understanding, he was allowed to specifically advertise for tenants for certain size units, but he did not do so.

The failure to do outreach is one more component of the GHA's high vacancy rate. In light of this, it was not just a failure to comply with HUD's requirements concerning Young v. Kemp, but irresponsible conduct amounting to gross mismanagement not to do so. Even if Harper honestly thought he was filling out the quarterly reports correctly, which is difficult to believe, his real failure was in simply doing nothing about outreach and in believing that was the properly way to perform his job. Clearly, he did not take sufficient measures to fill vacancies. That problem, too, was to be left to the CIAP funds to remedy.

IV. MANAGEMENT DEFICIENCIES

A. RECORDS OF VEHICLE USE

HUD also cites as an example of mismanagement Harper's failure to keep accurate logs of the use of vehicles owned or used by PHA employees. Although Harper did not keep such records, there is little or no evidence of abuse of vehicles owned or used by PHA employees. Furthermore, the applicable regulation does not specifically require the keeping of such logs. It is a good management practice to keep detailed logs, to be sure. But I consider this issue to be too minor to justify an LDP, in any event, unless there was an outright refusal to keep such logs, which there was not.

B. LATE BUDGET SUBMITTAL

Finally, HUD cites as an example of mismanagement the GHA's failure to submit its operating budget by the required deadline. I decline to find cause for imposition of an LDP on this basis because HUD routinely had accepted late budgets in the past. There was inadequate notice of the change in its approach, and to impose an LDP for this reason, in the context of the history of HUD's course of dealings over time with late budgets, would be unreasonable.

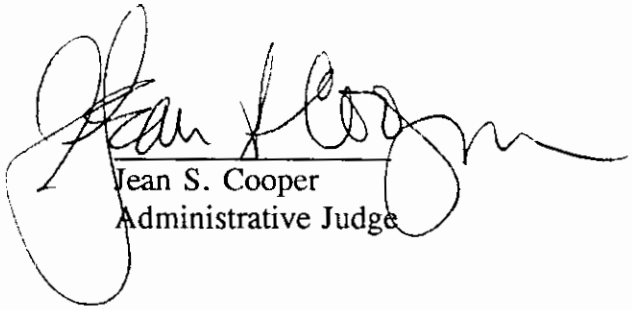
V. NEED FOR THE LDP

There are real and serious reasons for imposition of an LDP on Harper, established by adequate evidence. Although he is not bad or dishonest, and in many ways provided good services as Executive Director of the GHA, particularly in making the project safe. His greatest fault was to rely too much on the remedial effects of an elusive CIAP grant, while the GHA's operations were crumbling around him. He chose to do little or nothing in those areas in which the GHA had an affirmative duty to take action, be it in repairing units, making units ready for occupancy, doing outreach to broaden the base of applicants, or providing decent, safe and sanitary housing through a reasonable pest control program.

For these reasons, the LDP imposed on Harper was based on appropriate causes under 24 C.F.R. §§24.705(a)(2),(4),(8), and (9), supported by adequate evidence. The evidence submitted in mitigation was not sufficient to overcome the recent history of poor performance in critical areas amounting to mismanagement. It was in the best interests of HUD and the public to impose the LDP because the problems noted over six inspections and audits had become pervasive, and those problems were having a real and serious impact on the integrity of both the public housing program and the Section 8 program administered by HUD.

CONCLUSION

I, therefore, conclude that the Limited Denial of Participation imposed on James Harper on December 11, 1991, was properly imposed, was based on adequate evidence, and was in the best interests of both HUD and the public.



Jean S. Cooper
Administrative Judge