

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

In the Matter of:

ARNOLD SMITH
ARECO REALTY

Respondents.

HUDALJ 93-1981-DB(LDP)

Date Decided: September 8, 1993

Arnold Smith, *pro se*

Ofelia C. Franco, Esquire
For the Government

Before: Paul G. Streb
Administrative Law Judge

INITIAL DETERMINATION

STATEMENT OF THE CASE

Arnold Smith appealed a Limited Denial of Participation ("LDP") issued on December 11, 1992, by the Manager of the Cincinnati, Ohio office of the U.S. Department of Housing and Urban Development ("the Government" or "HUD"), pursuant to 24 C.F.R. Part 24, Subpart G. The LDP covers Mr. Smith and his alleged affiliate, ARECO Realty ("Respondents").

The LDP prohibits Respondents from participating in HUD programs concerning single family housing within the jurisdiction of the Cincinnati office for one year beginning December 11, 1992. This sanction was based on irregularities in Respondents' participation in HUD's Single Family Property Disposition Program. Specifically, HUD alleges that Mr. Smith, a real estate broker, violated requirements set forth in HUD's *Broker Information Release*.

Mr. Smith requested reconsideration of the decision, and on January 21, 1993, the Manager of the Cincinnati office affirmed his decision to impose the LDP. Following the filing of Mr. Smith's appeal, the Government's Complaint, and Mr. Smith's Answer, the parties waived an oral hearing and agreed to a hearing consisting of the submission of written evidence and arguments. Mr. Smith filed his argument against imposition of the LDP on June 15, 1993, and the Government filed its argument in support of the

sanction the next day. Although the opportunity to submit rebuttal evidence and arguments was granted, no rebuttal was submitted by either party.

ANALYSIS, FINDINGS AND CONCLUSIONS

Burden of Proof

An LDP will be sustained if the Respondent is covered by the applicable HUD regulations, if there is cause for an LDP, and if an LDP is necessary to protect the public interest and the federal government's interest in doing business with responsible persons. 24 C.F.R. §§ 24.110, 24.115, 24.700. The Government bears the burden to prove by "adequate evidence" that cause exists for the LDP. *Id.* §§ 24.313(b)(3) and (4), 24.705(a).

"Adequate evidence" is defined as "[i]nformation sufficient to support the reasonable belief that a particular act or omission has occurred." *Id.* § 24.105(a). The "adequate evidence" standard is a minimal one; it is similar to the standard of probable cause for an arrest, search warrant, or preliminary hearing in criminal cases. *Horne Bros., Inc. v. Laird*, 463 F.2d 1268, 1271 (D.C. Cir. 1972); *In re Emily Guillen and Emily Investments*, 1991 WL 45853, HUDBCA No. 91-7008-D99, slip op. at 11 (Final Determination, April 9, 1992) (citations omitted).

Jurisdiction

The regulations governing LDPs apply to all persons who have participated, are currently participating, or may reasonably be expected to participate in transactions under federal nonprocurement programs. 24 C.F.R. § 24.110(a). These transactions can include any nonprocurement transaction between the Government and a person. *Id.* § 24.110(a)(1)(i). Mr. Smith is a real estate broker who sold homes owned by HUD under the Single Family Property Disposition Program. G-Ex. 3-A.¹ Therefore, he participated in covered transactions and he is covered by the regulations. *See id.* §§ 24.105(n), 24.110(a)(1)(i) and (ii)(C)(9).

LDP actions may include affiliates of a participant who are specifically named and given notice. *Id.* §§ 24.710(c), 24.711(a). Individuals or legal entities are affiliates of each other "if, directly or indirectly, either one controls or has the power to control the other" *Id.* § 24.105(b).

¹The following abbreviation refers to the record in this case: "G-Ex." for Government's Exhibit.

ARECO was named in the LDP Notice sent to Mr. Smith and was given specific notice of the LDP in a separate letter sent December 11, 1992. The Government alleges in its Complaint that ARECO Realty is under the direct control of Arnold Smith. As Mr. Smith does not dispute this allegation, it is deemed admitted. See 24 C.F.R. § 26.11. Therefore, ARECO is an affiliate of Mr. Smith and is subject to the LDP.

Analysis Of The Allegations

The LDP is based upon the Respondents' alleged violation of requirements outlined in the *Broker Information Release*, which was provided to Mr. Smith and other brokers selling HUD-owned property. The applicable requirements involve prohibitions against giving keys to clients, holding open houses at HUD-owned properties, allowing repairs to be made on HUD-owned homes prior to closing, and allowing clients to occupy HUD-owned homes prior to closing. Additionally, when a broker purchases a HUD-owned home, he or she cannot show that home to prospective clients until the broker has closed with HUD. G-Ex. 3-A, 3-B. The Government alleges that Respondents committed eleven separate violations of those prohibitions.

Providing keys to HUD-owned property directly to prospective buyers

The Government alleges that keys were provided for homes at three different addresses: ■ Acacia Avenue, Dayton, Ohio; ■ Trail-On Road, Moraine, Ohio; and, ■ Eavey Drive, Xenia, Ohio. In support of these allegations, HUD relies chiefly on the affidavit of Thomas Meyung, a HUD Realty Specialist who investigated several complaints against the Respondents.

In the first incident, a HUD Area Management Broker told Mr. Meyung that someone had moved furniture into the house at ■ Acacia Avenue even though the closing had not occurred. Mr. Meyung contacted Ms. Cole, the purchaser of the house, in July 1991. She told him that Arnold Smith had given her a key and permission to move her furniture into the house. After advising Mr. Smith in July 1991 that he was not permitted to give Ms. Cole the key to the residence, Mr. Meyung received a call from Ms. Cole. She informed him that Mr. Smith asked her not to let HUD know that he had given her a key and permission to move in her furniture. G-Ex. 3-A, G-Ex. 4.

The second incident occurred in August 1992 when Mr. Meyung was inspecting the HUD-owned property at Trail-On Road. He was approached by a couple, who were not real estate brokers, who had a key to the residence. They told him that ARECO Realty gave them the key to the house. G-Ex. 4.

In his Argument in Defense, Mr. Smith asserts that the Government did not furnish evidence to support the charges and that he will submit affidavits to rebut all charges of misconduct. Despite this assertion, the uncontested evidence clearly constitutes adequate evidence to support HUD's allegations. Additionally, both parties had

the opportunity to offer rebuttal evidence after the initial arguments were submitted. Nevertheless, the Respondents failed to submit any rebuttal or offer any defense other than a general denial. Therefore, I find that the Government proved violations at the Acacia Avenue property and the Trail-On Road property.

However, the only evidence offered to prove a violation at the Eavey Drive property was Mr. Meyung's conclusory statement that "a client of Respondents had received keys to the property and was making repairs with no authority from HUD. At the time, Respondent had contracted to purchase the property from HUD for resale but had not closed on the property." However, the basis for that statement was not set forth. The client was not identified, no details or corroboration were offered, and Mr. Meyung did not reveal the source of his information about the incident. Therefore, I find that there is not adequate evidence of a violation at Eavey Drive.

Holding open houses at HUD-owned properties

The Government alleges that the Respondents held open houses at three different addresses. In support of these allegations, the Government submitted the following three advertisements for the properties:

**HOMES FOR SALE
OPEN FRIDAY 5-7 P.M.
████ STANTON CIRCLE**

FRANKLIN--HUD OWNED. Open listing \$59,900. Special financing. 3 bedroom bi-level, 1½ baths, central air. Completely redecorated, new carpet, new deck. 2 car garage & more! Seldom available to show.

**OPEN THURS. & FRI. 5-7 P.M.
████ BURWICK DRIVE**

FRANKLIN--CASTLEBROOK ESTATES. HUD OWNED. Open listing. Only \$80,000 with special financing. Lovely 4 bedroom brick & aluminum, 2 story. Dining room, family room, woodburning fireplace, central air, 2½ baths, full basement, 2 car garage & more! Salesman available to show.

**FAIRFIELD █████ FAIRDALE DR.
AVAILABLE FOR INSPECTION
SUNDAY, AUG. 9th 1 - 5 P.M.
HUD OWNED - OPEN LISTING**

Lovely tri-level, 2 car garage. 3 bedrooms, 2 baths, fireplace in family room and more. Only \$82,500 or offer. Special financing 3% Down. Or call 1-800-232-6858 for appointment.

The Government tacitly argues that these advertisements constitute announcements for open houses because they indicate a time period that the homes will be available to show for inspection and do not require that an appointment be made to see the properties.

In his defense, Mr. Smith claims that these advertisements are merely solicitations for appointments and not open houses. This argument is unpersuasive. The Stanton and Burwick advertisements both indicated that the homes were open during the time periods listed. Neither advertisement stated that buyers should call for appointments. The Fairdale advertisement stated that the house was "available for inspection" during the period listed; it concluded by stating, "*Or call . . . for appointment*" (emphasis added). A reasonable person reading that advertisement, as well as the other two, would conclude that an appointment was not needed to see the properties. Therefore, I find that the Government proved all three violations of the open-house policy.

Mr. Smith also argues that two ARECO Realty advertisements that use the term "Open House" were the result of error by the newspaper clerk taking the advertisement over the phone. The government does not allege violations with respect to those advertisements, so I need not decide the merit of Respondents' argument.

Allowing a client to make repairs prior to closing

The Government alleges that this violation occurred at [REDACTED] Eavey Drive, Xenia, Ohio. As discussed above, the Government did not prove a violation at this address because it relied solely on conclusory statements that a client of the Respondents was making repairs to the property.

Allowing a client to occupy a HUD-owned property prior to closing

The Government alleges that this violation occurred at [REDACTED] Acacia Avenue, Dayton, Ohio. As discussed above, the Government proved that Respondents gave a client keys to the property and permission to move her furniture into the residence. I find that Respondents' actions effectively allowed the client to occupy the property. Therefore, this allegation is sustained.

Prior to closing, showing prospective clients homes that ARECO was purchasing from HUD

The Government alleges that ARECO showed homes prior to closing at three different addresses: [REDACTED] Eavey Drive, Xenia, Ohio; [REDACTED] Rose Marie Road, Franklin, Ohio; and, [REDACTED] Fleenor Road, New Paris, Ohio.

As discussed above, the Government did not prove a violation at Eavey Drive because it relied on Mr. Meyung's conclusory assertion about a client making repairs at

the residence. HUD also did not prove a violation at Rose Marie Road. Aside from a vague and unsupported catch-all assertion by Mr. Meyung that he "personally received numerous complaints regarding the Respondents' failure to abide by [the policies in the public information release]," the Government presented no evidence of a violation at Rose Marie Road. G-Ex. 4.

However, with respect to Fleenor Road, the Government offered adequate support for its allegation. According to Mr. Meyung, Karen Leet informed him in November 1992 that Mr. Smith had shown her a home on Fleenor Road. When they could not agree on a purchase price, Ms. Leet contacted another broker who inquired into the availability of the home. The broker learned that the home had been purchased by Mr. Smith prior to his showing it to Ms. Leet. At the time of the showing, Mr. Smith had not closed with HUD on the Fleenor house. G-Ex. 4.

As discussed above, Respondents' defense was no more than an unsupported general denial. Therefore, I find that the Government proved a violation at Fleenor Road.

Cause For LDP

The regulations set forth various acts and omissions that constitute cause for an LDP. 24 C.F.R. § 24.705(a). HUD asserts that Respondents' actions constitute cause under §§ 24.705(a)(2), (a)(4), and (a)(8). Section 24.705(a)(2) provides that an LDP may be based on "[i]rregularities in a participant's or contractor's past performance in a HUD program."

I find that cause for an LDP exists under this provision. As discussed above, Mr. Smith failed to follow HUD requirements on numerous occasions. His repeated violations of HUD policy are adequate evidence of his willfulness in committing the violations.²

Public and Governmental Interest

HUD regulations state that an LDP "may be imposed for a period not to exceed 12 months" 24 C.F.R. § 24.711. However, I must determine whether a twelve-month LDP is necessary to protect the public interest and the federal government's interest in doing business with responsible persons. The LDP process is not punitive in nature. *See* 24 C.F.R. § 24.115(b). Rather, it protects public and governmental interests by precluding persons who are not "responsible" from conducting business with the

²Because I found cause under 24 C.F.R. § 24.705(a)(2), I need not decide if cause exists under §§ 24.705(a)(4) and 24.705(a)(8).

federal government. *See id.* § 24.115(a) and (b); *Delta Rocky Mountain Petroleum, Inc. v. U.S. Dep't of Defense*, 726 F. Supp. 278, 280 (D. Colo. 1989).

"Responsibility" is a term of art which encompasses business integrity and honesty. *See, e.g., Delta Rocky Mountain Petroleum*, 726 F. Supp. at 280. Determining "responsibility" requires an assessment of the current risk that the government will be injured in the future by doing business with a Respondent. *See Shane Meat Co., Inc. v. U.S. Dep't of Defense*, 800 F.2d 334, 338 (3d Cir. 1986). That assessment may be based on past acts. *See, e.g., Agan v. Pierce*, 576 F. Supp. 257, 261 (N.D. Ga. 1983).

Considering Mr. Smith's repeated violations of the requirements in the *Broker Information Release*, and his attempt to have Ms. Cole deceive HUD, a lengthy period of LDP is warranted. In a letter dated July 26, 1991, the Chief of the Property Disposition Branch at HUD's Cincinnati office told Mr. Smith that he was violating policies set forth in the public information release. He also told Mr. Smith that continued violation of the release's guidelines "could result in appropriate administrative action." G-Ex. 3-A. Despite this warning, Respondents committed at least two of the violations following the letter: giving keys for the Trail-On Road property to prospective buyers and showing the Fleenor Road property to Ms. Leet.

Respondents argue that penalties for violating the requirements in the *Broker Information Release* were not stated except in the case of holding an open house. Therefore, Respondents assert, no penalty should be imposed for those violations. This argument is without merit. There is no requirement that restrictions be accompanied by a listing of the penalties that will be imposed if there are violations. Moreover, Mr. Smith was on notice from the July 26 letter that violations would result in administrative action.

Although the Government did not prove all of its allegations, Mr. Smith committed many violations and continued to do so despite a written warning. Therefore, to protect the public interest, I find that the one-year LDP is warranted. If Respondents decide to participate in the Single Family Property Disposition Program after the expiration of the LDP, their hiatus will remind them of their obligation to comply with HUD's requirements.

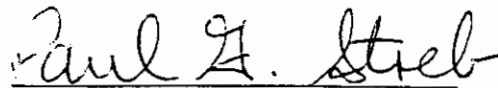
DETERMINATION AND ORDER

It is ordered that the one-year LDP of Mr. Smith and ARECO Realty is **AFFIRMED**.

FINALITY AND SECRETARIAL REVIEW

This Initial Determination shall be final unless the Secretary of HUD or the Secretary's designee, within 30 days of receipt of a request for review, decides as a

matter of discretion to review the Determination. Any party may request such a review in writing within 15 days of receipt of the Determination. 24 C.F.R. § 24.314(c).

A handwritten signature in cursive script that reads "Paul G. Streb". The signature is written in black ink and is positioned above a horizontal line.

PAUL G. STREB
Administrative Law Judge