

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

In the Matter of:

CORNELIUS TURNER, and
MAJOR ASSOCIATES, INC.

Respondents

HUDALJ 93-2073-DB(LDP)
Decided: March 22, 1994

Cornelius Turner, *pro se*

Bryan P. Saddler, Esq.
For the Government

Before: ALAN W. HEIFETZ
Chief Administrative Law Judge

INITIAL DETERMINATION

Statement of the Case

This proceeding arose pursuant to 24 C.F.R. § 24.700 *et seq.* as a result of action taken by Sandra S. Freeman, the Manager of the Jackson, Mississippi Office of the U.S. Department of Housing and Urban Development ("the Department" or "HUD") on July 14, 1993, imposing a twelve-month Limited Denial of Participation ("LDP") upon Cornelius Turner and his affiliate, Major Associates, Inc. ("Respondents"). The LDP prohibited Respondents from participating in programs administered by the Assistant Secretary for Housing-Federal Housing Commissioner, including Multifamily Programs, throughout the jurisdiction of the Jackson Office, including the State of Mississippi. The LDP notice stated that the LDP was imposed based on Respondent Turner's having falsely certified that he had not been restricted by a Department or an agency of the Federal Government.

An informal conference was held on August 3, 1993 (*see* 24 C.F.R. § 24.712). On August 9, 1993, Ms. Freeman affirmed the LDP. By letter dated September 2, 1993, Respondents appealed the affirmation of the LDP, and thereby requested a hearing (*see* 24 C.F.R. § 24.713). As a result of an agreement reached during an October 27, 1993, pre-hearing conference, the parties limited the hearing to the submission of documentary

evidence and written briefs. The Department filed its brief in support of the LDP on December 14, 1993, and Respondents filed their brief in opposition to the LDP on January 5, 1993. Having received no further pleadings, this matter is ripe for decision.

Findings of Fact

1. Respondent Turner is a Mississippi resident involved in the ownership and management of multifamily housing projects financed under Section 202 of the Housing Act of 1959 and/or with mortgages insured by HUD/FHA under the National Housing Act. He is also the president of Major Associates, Inc., which is involved in the construction of multifamily housing projects financed under Section 202 of the Housing Act of 1959 and/or with mortgages insured by HUD/FHA. (Complaint ¶ 3; Answer ¶ 3).

2. On May 24, 1985, HUD's Jackson Office issued a notice of Conditional Denial of Participation ("CDP") against Respondent Turner. The letter by which Respondent was notified of the CDP was signed by James S. Roland, then the Manager of the Jackson Office. The letter stated that the CDP was issued pursuant to 24 C.F.R. § 24.18(b), and was based upon Respondent Turner's failure to correct certain construction deficiencies at the Lower Woodville Heights Housing Project ("Lower Woodville Heights"), located in Natchez, Mississippi. The letter further stated that as a result of the CDP, Respondent Turner would not be allowed to participate in Mississippi in the Section 221(d)(4) Program, and thereby, would not be issued any commitments and all applications for commitments would be rejected. Regarding a hearing on the CDP, the letter stated:

Unless withdrawn or modified as a result of evidence presented by you at the informal hearing discussed below, this conditional denial of participation will be in effect until the correction of the deficiencies described above.

Within ten (10) days from receipt of this notice, you may request in writing that the Jackson Office arrange an informal hearing for reconsideration of this action. Mrs. Sandra S. Freeman, Director, Housing Development Division, has been designated by me to act on my behalf as hearing officer in the event a hearing is requested. You should contact Mrs. Freeman directly concerning a date for a hearing. . . .

(Exhibit A to Complaint).

3. Ms. Freeman did not receive any request, by telephone call or mail, from Respondent Turner or anyone purporting to act on his behalf, for an informal conference concerning the notice of CDP issued on May 24, 1985. (Freeman Affidavit, ¶ 4, attached to Government's Brief).

4. The Jackson Office files do not contain any request for an informal conference from Respondent Turner or any attorney or other person purporting to act on his behalf. Although Respondent alleges that a written request was made, there is no evidence that such a letter existed or was sent. (Freeman Affidavit, ¶ 5; Moize Affidavit, ¶¶ 3, 4, both attached to Government's Brief; Respondents' Answer and Exhibit B attached thereto, filed pursuant to Order dated September 21, 1993; Nichols Deposition Transcript, pp. 47-48, 52, attached to Government's Brief ("Nichols Tr. at ___")).

5. Three years after issuance of the CDP notice, R. Hunter Cushing, Deputy Assistant Secretary for Multifamily Housing Programs, responded to an April 4, 1988, letter sent by Respondent Turner to HUD concerning the Jackson Office's denial of his annual rent adjustment for Lower Woodville Heights. In his letter, dated April 21, 1988, Mr. Cushing stated:

There is nothing at this time that would specifically prevent you from participating in HUD programs. However, the Jackson Office has recommended that, because of your continued failure to correct the erosion problem [at Lower Woodville Heights], you be debarred from participating in all programs funded by HUD. If you are debarred, you will be prohibited from participation in any federally funded programs. Until final debarment action is taken, you remain eligible to participate in all HUD programs.

(Exhibit C to Answer).

6. On February 3, 1993, nearly eight years after issuance of the CDP notice, Respondent Turner signed a Form HUD-2530, "Previous Participation Certification." The form was submitted on behalf of Respondents to the Jackson Office in connection with the development of Eagle Wing Estates. Eagle Wing Estates was a multifamily housing project located in Hattiesburg, Mississippi, to be financed under Section 202 of the Housing Act of 1959. Principals, including those seeking to participate in projects financed pursuant to Section 202 of the Housing Act of 1959, are required to use Form HUD-2530 to certify to their previous participation in Federal programs. HUD reviews Form HUD-2530s to ensure that certifying participants are responsible and will honor their legal, financial and contractual obligations. (Exhibit B to Complaint; Complaint ¶¶ 5, 6, 9; Answer ¶¶ 5, 6, 9; Cook Affidavit, ¶¶ 3, 4, attached to Government's Brief; *see also* 24 C.F.R. § 200.217(a)(2)).¹

¹Section 200.217(a)(2) of Title 24 of the Code of Federal Regulations provides:

(a) A previous participation certification on a form prescribed by the Assistant Secretary for Housing-Federal Housing Commissioner shall be completed by every principal in each of the following transactions and shall be filed with HUD at the times specified herein:

7. The certification set forth in Form HUD-2530 states:

I (meaning the individual who signs as well as the corporations, partnerships or other parties listed above who certify) hereby apply to HUD or USDA - FmHA, as the case may be, for approval to participate as a principal in the role and project listed above based upon my following previous participation record and this Certificate.

* * *

A. I further certify that:

* * *

2. For the period beginning 10 years prior to the date of this certification, and except as shown by me on the certificate.

* * *

f. I have not been suspended, debarred or otherwise restricted by any Department or Agency of the Federal Government or of a State Government from doing business with such Department or Agency.

* * *

D. Statements above (*if any*) to which I cannot certify have been deleted by striking through the words with a pen. I have initialed each deletion (*if any*) and have attached a true and accurate signed statement (*if applicable*) to explain the facts and circumstances which I think helps to qualify me as a responsible principal for participation in this project.

(Exhibit B to Complaint; Complaint ¶6; Answer ¶ 6).

8. Reba G. Cook, Director of the Jackson Office Housing Development Division, reviewed the Form HUD-2530s submitted in connection with the development of Eagle

* * *

Projects to be financed pursuant to section 202 of the Housing Act of 1959. . . .

Wing Estates. During Ms. Cook's review, she examined the Form HUD-2530 submitted by Respondents. (Cook Affidavit, ¶¶ 1,4, attached to Government's Brief).

9. Respondent Turner did not strike through Section A.2.f. of the Form HUD-2530, thereby certifying that he had "not been suspended, debarred or otherwise restricted by any Department or Agency of the Federal Government. . .from doing business with such Department or Agency" during the preceding ten years. (Exhibit B to Complaint; Complaint ¶ 9; Answer ¶ 9). As a result of discussions with Jerry D. Moize, Chief Counsel of the Jackson Office, and her review of the Jackson Office LDP files which contained the May 24, 1985, CDP notice issued to Respondent Turner, Ms. Cook determined that by failing to strike through Section A.2.f., Respondent Turner had falsely certified that he had not been restricted by HUD within the 10 years preceding submission of the Form HUD-2530. (Cook Affidavit, ¶ 5, attached to Government's Brief).

10. On April 30, 1993, three months after Respondent Turner signed the Form HUD-2530, Ms. Freeman, as Manager of the Jackson Office, wrote to attorney Dorian E. Turner about the selection of a contractor for Eagle Wing Estates. The letter responded to concerns raised by Ms. Turner on behalf of Respondents. In the letter, Ms. Freeman stated:

There is currently no Limited Denial of Participation action outstanding against Cornelius Turner nor Major Associates, Inc.; therefore, your reference to actions required by this process is not appropriate.

* * *

The fact that a contractor is not debarred, suspended, or otherwise denied participation in HUD programs is not the only determining factor in the selection process. It is merely the minimum requirement. Our determination as to the acceptability of Cornelius Turner d/b/a Major Associates, Inc., as a contractor is based on previous unsatisfactory experience with this entity.

(Exhibit D to Answer).

11. On July 14, 1993, the notice of LDP was issued, alleging that in view of the existence of the May 24, 1985 CDP, Respondent Turner had falsely certified on the Form HUD-2530 that he had not been restricted by a Department of Agency of the Federal Government during the preceding 10 years. (July 14, 1994 Notice of LDP, attached to Respondents' Sept. 2, 1993, appeal request; Cook Affidavit, ¶ 6, attached to Government's Brief; Complaint ¶ 11; Answer ¶ 11).

12. An informal conference on the LDP was held on August 3, 1993. Ms. Cook presided over the conference. By letter dated August 9, 1993, Ms. Freeman affirmed the LDP. (Cook Affidavit, ¶ 7, attached to Government's Brief; Aug. 9, 1993, letter from Freeman to Turner, attached to Respondents' Sept. 2, 1993, appeal request). Under the heading "Reason for the Sanction," Ms. Freeman stated:

On HUD-2530, Previous Participation Certification, dated February 3, 1993, in which you request consideration as the contractor for Eagle Wing Estates, you falsely certified that you had not been restricted by an agency of the Federal Government, within the last 10 years, from doing business with that agency, when, HUD, issued to you a Conditional Denial of Participation.

(Aug. 9, 1993, letter from Freeman to Turner, attached to Respondents' Sept. 2, 1993, appeal request).

Discussion

1. Respondent Turner and His Named Affiliate are Subject to LDP Under 24 C.F.R. Part 24

Respondent Turner is involved in the ownership and management of multifamily housing projects financed under Section 202 of the Housing Act of 1959 and/or with mortgages insured by HUD/FHA under the National Housing Act. He is also the president of Major Associates, Inc., which is involved in the construction of multifamily housing projects financed under Section 202 of the Housing Act of 1959 and/or with mortgages insured by HUD/FHA. As a result, he is considered a "participant" and "principal" in "covered transactions." *See* 24 C.F.R. §§ 24.105(m) and (p), 24.110(a)(1). *See also* Complaint ¶ 3, Answer ¶ 3. Respondent Turner is therefore subject to HUD's regulations governing the imposition of LDPs. Furthermore, Respondents acknowledge that Major Associates, Inc., is an "affiliate" of Respondent Turner. *See* Complaint ¶ 11; Answer ¶¶ 11, 17. As Respondent Turner's affiliate, Major Associates, Inc. may also be the subject of an LDP. *See* 24 C.F.R. §§ 24.105(b), 24.710(c).

2. Respondent Turner's Failure to Strike Through Section A.2.f. of the HUD Form 2530 Constitutes Cause for the Imposition of an LDP

Pursuant to HUD regulations at 24 C.F.R. § 24.705(a), an LDP may be imposed for the following causes:

- (7) Falsely certifying in connection with any HUD program, whether or not the certification was made directly to HUD;

* * *

(10) Making or procuring to be made any false statement for the purpose of influencing in any way an action of the Department.

24 C.F.R. § 24.705(a)(7), (10). Cause for an LDP must be established by "adequate evidence." *Id.* at § 24.705(a). *See also* 24 C.F.R. § 24.313(b)(3). "Adequate evidence" is defined as "[i]nformation sufficient to support the reasonable belief that a particular act or omission has occurred." *Id.* at 24.105(a). The Department has the burden of proving cause. *Id.* at 24.313(b)(4).

According to the Government, the CDP was effective upon issuance, and not having been modified or withdrawn as a result of evidence presented at an informal conference, remained in effect until its expiration. Given the existence of the CDP, the Government argues, Respondent Turner falsely certified, and made a false statement, to HUD when he failed to strike through Section A.2.f. of the Form HUD-2530. Respondents counter that the Jackson Office never responded to their attorney's written request for an informal conference, and thereby denied them due process. Accordingly, they argue that the CDP never matured into final action and never became effective. Respondents assert that because no CDP existed, the failure to strike through Section A.2.f. was appropriate and therefore did not constitute a false certification or false statement.

Respondents offer no explanation for their own failure to produce a copy of the purported request for a conference, despite the deposition testimony of John A. Nichols, who stated that as Respondent Turner's attorney, he routinely provided Respondent Turner with copies of all correspondence prepared on his behalf. *See Nichols Tr.* at 47-48. In his deposition, Nichols stated that he prepared and mailed a letter requesting an informal conference to the Jackson Office, but that he did not have a copy of the letter because the files containing the letter were stored in a building that was ravaged by termites.² *Id.* at 21-23, 30, 38, 46-49. Nichols, however, is a convicted felon and a disbarred attorney.³ Respondents have introduced no evidence to corroborate his story of termite infestation.⁴ As a result, Nichols' testimony does not constitute reliable and credible evidence that an informal hearing request was made or sent.

²According to Nichols, any client bill or diary entry which could evidence the preparation of the letter would also have been maintained in the files destroyed by termites. (*Nichols Tr.* at 21-24).

³*See Nichols Tr.* at 55-57 and Government Exhibit 3, thereto.

⁴Respondents' confirmation of Nichols' testimony regarding the termite infestation is self-serving, and as such, does not constitute reliable and probative corroborating evidence. *See Respondents' Brief* at 8.

According to Respondents, the April 28, 1988, letter from R. Hunter Cushing to Respondent Turner and the April 30, 1993, letter from Ms. Freeman to Dorian E. Turner demonstrate that HUD acknowledged that no CDP ever became effective. Although the record does not establish precisely when the CDP expired, it was, by definition, a temporary sanction. See 24 C.F.R. § 24.18(b)(3)(iii) (1985). All Mr. Cushing stated, three years after the CDP notice had been issued, was that nothing *at the time* prevented Respondent Turner from participating in HUD programs. In a similar fashion, Ms. Freeman stated, eight years after the notice had been issued, that there was then no outstanding LDP against Respondents. Neither statement is inconsistent with the May 24, 1985, issuance of a CDP and its subsequent expiration.⁵

The letter by which the Jackson Office notified Respondent Turner of the CDP expressly and unambiguously stated that the sanction had immediate effect, and would remain in effect unless modified or withdrawn as a result of an informal conference. In the absence of any evidence supporting Respondents' claim that a request for an informal conference was made on their behalf, but went unanswered by the Jackson Office, I find that the CDP went into effect on May 24, 1985, and remained in effect until its expiration. Accordingly, I conclude that Respondent Turner made a false certification when he failed to strike through Section A.2.f. of the HUD form, and that therefore, cause for issuance of an LDP exists under 24 C.F.R. § 24.705(a)(7).

Unlike § 24.705(a)(7), § 24.705(a)(10) requires that the Government prove that Respondent Turner made the false statement with the intent of affecting Department action. According to Respondent Turner, he failed to strike through Section A.2.f. having relied in good faith on legal advice he received from Nichols as to the non-existence of the CDP. Despite Government argument to the contrary,⁶ two overriding and

⁵According to the Government, the applicable regulations compel a finding that the CDP expired in May 1986. See Government's Brief at 7, n.6. While that conclusion may be compelled as a matter of law, the regulations themselves are not definitive. See 24 C.F.R. §§ 24.18(b)(3)(iii), 24.4(i) (1985). However, I conclude that Mr. Cushing must have viewed the CDP as having expired.

⁶In its attempt to discredit Respondent Turner, the Government attributes great significance to his purported conduct during the August 3, 1993, informal conference and events leading up to Nichols' deposition. Chiefly, the Government alleges, and Respondents do not deny, that in gesturing to a document in his possession, Respondent Turner claimed that he had a copy of a letter from Nichols requesting an informal conference, but that when asked by Mr. Moize to produce the letter for incorporation into the record of the conference, or to make the document available for inspection, Respondent Turner declined. See Government's Brief at 4; Respondent's Brief at 9. In view of the controversies that have long marked his relationship with the Jackson Office -- controversies that will have to rely on other forums for any resolution -- I believe that Respondent Turner's conduct may be dismissed as grandstanding. It does not undermine his credibility. As discussed *infra*, the reasonableness of his reliance on the advice of counselor Nichols is more appropriately a factor to be considered in determining the duration of the LDP.

incontrovertible factors militate against a finding that Respondent Turner completed the form in bad faith. Respondent Turner has had a long, dispute-ridden history with the Jackson Office which predates his submission of the Form HUD-2530,⁷ and it was the Jackson Office which issued the CDP notice in the first place. Under those circumstances, it defies logic to infer that his failure to strike through Section A.2.f. was a purposeful attempt to hoodwink the Jackson Office that was well aware of his history. I therefore conclude that cause has not been shown to exist under 24 C.F.R. § 24.705(a)(10).

3. A Ten-Month LDP is Warranted

Having concluded that cause for an LDP exists, I turn to consideration of the appropriate period of LDP. In making that determination, the sanction should be viewed in the context of its intended purpose.

An LDP is a type of debarment. The purpose of all debarments imposed by agencies of the Federal government, including an LDP imposed by HUD, is to protect the public interest by precluding persons who are not "responsible" from conducting business with the Federal government. 24 C.F.R. § 24.115(a). *See also Agan v. Pierce*, 576 F. Supp. 257, 261 (N.D. Ga. 1983); *Stanko Packing Co., Inc. v. Bergland*, 489 F. Supp. 947, 948-49 (D.D.C. 1980). The debarment process is not intended to punish; rather, it is designed to protect governmental interests not safeguarded by other laws. *Joseph Constr. Co. v. Veterans Admin.*, 595 F. Supp. 448, 452 (N.D. Ill. 1984). In other words, the purpose of debarment is remedial, not punitive. *See* 24 C.F.R. § 24.115.

In the context of debarment proceedings, "responsibility is a term of art that encompasses integrity, honesty, and the general ability to conduct business lawfully. *See* 24 C.F.R. § 24.305; *Gonzalez v. Freeman*, 334 F.2d 570, 573 & n.4, 576-77 (D.C. Cir. 1964). Determining "responsibility" requires an assessment of the current risk that the government will be injured in the future by doing business with a respondent. *See Shane Meat Co., Inc. v. U.S. Dep't of Defense*, 800 F.2d 334, 338 (3d Cir. 1986). That assessment may be based on past acts. *See Agan*, 576 F. Supp. 257; *Delta Rocky Mountain Petroleum, Inc. v. U.S. Dep't of Defense*, 726 F. Supp. 278 (D. Colo. 1989).

HUD regulations provide that an LDP "may be imposed for a period not to exceed 12 months," is "limited to specific HUD programs," and, under the circumstances presented in this proceeding, "shall be effective within the geographic jurisdiction of the office imposing it. . . ." 24 C.F.R. § 24.710(a)(3). The regulations further provide that in determining whether an LDP should be continued, "the hearing officer shall consider

⁷*See, e.g.*, Exhibit A to Respondents' Brief.

any evidence offered by respondent in opposition to HUD's proof as well as evidence of any mitigating circumstances." *Id.* at 24.313(b)(3). Unlike proving cause for an LDP, for which the Department bears the burden, a respondent has the burden of proof for establishing mitigating circumstances. *Id.* at 24. 313(b)(4).

Respondent Turner's submission of a false certification to HUD evidences a lack of present responsibility. The certification is a means by which HUD seeks to ensure that participants in its programs are responsible and will honor their obligations. By submitting a false certification, Respondent Turner thwarted that goal, and thereby jeopardized important governmental objectives. The imposition of an LDP is, therefore, warranted. Two countervailing factors, however, must be balanced to determine the appropriate period of the LDP. The seriousness of Respondent Turner's conduct is ameliorated by the finding that the false certification was made based upon the advice of counsel and without an intent to deceive the Department. Although the reliance on advice of counsel and absence of intent do not excuse Respondent's conduct, they do mitigate its severity. However, Respondent Turner relied, without confirmation, on what he believed was inaction on the part of the Jackson Office and on an interpretation of correspondence with a HUD official that did not clearly and unambiguously support his position. Such reliance, particularly given Respondent Turner's s prior dealings with the Jackson Office, was imprudent, and demonstrates a significant lack of business judgment.


The remaining grounds upon which Respondents seek to challenge the LDP are not evidence in mitigation. Respondents deny that Lower Woodville Heights was riddled with construction deficiencies and that they failed to correct any deficiencies when they were brought to Respondent Turner's attention. *See Answer*, ¶ 7. *See also Respondents' Brief* at 6-7. In making this argument, Respondents attempt to collaterally attack the basis for which the CDP was imposed. Such an attack cannot properly be maintained as a defense to the instant LDP action. *See In the Matter of Jeffrey J. Wirth and Affiliates*, HUDALJ 93-1942-DB(LDP)(Nov. 12, 1993). Respondents also assert that the LDP is part of a longstanding, concerted, baseless and discriminatorily motivated effort by certain officials and employees of the Jackson Office to impede their participation in HUD programs. *See Respondents' Brief* at 3-4, 7. The record does not contain evidence of any such impropriety. In any event, such allegations in their current incarnation are properly with the purview of another forum.

Given the record as a whole, I conclude that a ten-month LDP is warranted. A ten-month LDP is commensurate with the seriousness of Respondents' conduct and appropriate under the circumstances.

Conclusion and Determination

Upon consideration of the entire record and the public interest, I conclude and determine that cause exists to prohibit Cornelius Turner and his named affiliate, Major Associates, Inc., from participating in programs administered by the Assistant Secretary

for Housing-Federal Housing Commissioner, including Multifamily Programs, throughout the jurisdiction of the Jackson Office, including the State of Mississippi, for ten months from the date the LDP was imposed on July 14, 1993.



ALAN W. HEIFETZ
Chief Administrative Law Judge