

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

In the Matter of:

EARL R. COLEMAN,
AGNES MAY WILLIAMS,
WILLIAM F. PERSONS, and
AM MANAGEMENT

Respondents.

HUDALJ 94-0005-DB
HUDALJ 94-0003-DB
HUDALJ 94-0004-DB
Decided: February 3, 1995

Hallison H. Young, Esq.
For Respondents Williams,
Coleman, and AM Management

Horace D. Cotton, Esq.
For Respondent Person

Maura Malone, Esq.
For the Department

Before: SAMUEL A. CHATOVITZ
Administrative Law Judge

INITIAL DECISION

Statement of the Case

This proceeding arose pursuant to 24 C.F.R. § 24.100 *et seq.* as a result of actions taken by Nicholas P. Retsinas, Assistant Secretary for Housing-Federal Housing Commissioner of the U.S. Department of Housing and Urban Development ("HUD"). By letters dated September 15, 1993, HUD notified Respondents that HUD was suspending them and proposing their debarment for a period of three years based upon their improper activities in connection with the Philip C. Sims Elderly Apartments ("Project"), a project developed under HUD's Section 202 Program. HUD proposed to debar Respondents from non-procurement participation in primary and lower tier covered transactions as either participants or principals at HUD and throughout the Executive Branch of the

Federal Government and from participating in procurement contracts with HUD for a three year period from November 23, 1992.

Respondents appealed and requested a hearing. Accordingly an Order was issued requiring HUD to issue complaints and for Respondents to file answers. The complaints and answers were filed and a consolidated hearing involving all Respondents was held on May 3-5, 1994, in Detroit, Michigan. Briefs were filed by June 13, 1994, and Respondent Persons filed an additional statement on August 9, 1994.

Based on the entire record in this matter, including the evidence and testimony presented at the hearing and my observation of the witnesses and their demeanor, I make the following findings of fact.

Findings of Fact

1. Respondent Agnes May Williams, age ■■■, is employed as administrator of the Jefferson Chalmers Citizens District Council ("Council") and has been a resident of the Council's area for 50 years. Tr. 454.¹ Respondent Williams was a member of the Board of Directors of the Jefferson Chalmers Non-Profit Housing Corporation ("Corporation") in 1984 when it submitted an application to HUD for financing the Project. Tr. 466.

2. Respondent Williams was elected President of the Corporation in 1987, shortly after the death of Philip Sims. Tr. 454.

3. The Project is a Section 202 elderly housing development. A non-profit sponsor, in this case the Corporation, applied for a loan to build the Section 202 project. The loan for the Project was \$6.7 million. HUD also provides a subsidy for the residents of the building whereby they pay 30% of their income for rent and HUD pays the balance. Tr. 31, G. Ex. 1, 2. The Corporation's application for the Project was initiated in 1984 and the initial closing occurred in 1990. Tr. 42, G. Ex. 1, 2.

4. HUD and the Corporation entered into a Regulatory Agreement (HUD Form 92466-EH) ("RA") on November 30, 1990. Paragraph 3 of the RA provides:

(3) Not later than 30 days prior to the beginning of each fiscal year, the Mortgagor shall submit an operating budget for that fiscal

¹References to the transcript of the hearing in this matter will be noted as "Tr." followed by the transcript page number. References to HUD exhibits will be noted as "G. Ex." followed by the exhibit number. Respondents' exhibits will be referred to as "RP Ex." or "RW Ex." followed by the exhibit number.

year to HUD. The budget shall include all necessary operating expenses, current maintenance charges, expenses of reasonable upkeep and repairs, taxes and special assessment levies, prorated amounts required for insurance and all other expenses incident to the operation of the project; and shall show the expected revenues to pay such expenses, including annual debt service requirements and reserve fund deposits. The expenses incurred and disbursements shall not exceed the reasonable and necessary amount thereof, and the Mortgagor will not expend any amount or incur any obligations in excess of the amounts approved in the annual operating budget except upon written certification by the Mortgagor to HUD that such expenses are unanticipated and are necessary...

Paragraph 7(b) provides that the Mortgagor shall not, without HUD approval, "Assign, transfer, dispose of, or encumber any personal property, including rents or charges, and shall disburse or pay out any funds except as provided herein and under the Note and Mortgage." Paragraph 7(e) provides that the Mortgagor shall not, without HUD approval, enter into any contract or contracts for supervisory or managerial services. Paragraph 11(b) of the RA states "Mortgagor shall provide for the management of the project satisfactory to HUD." Respondent Williams executed the RA as President of the Corporation, which was the Mortgagor and Owner of the Project. G. Ex. 3.

5. The Corporation entered into a management agreement with AM Management Company ("AM") on or about March 21, 1991, a few months after commencement of construction of the Project. The management agreement acknowledges that additional documents were required in accordance with HUD requirements. Tr. 386, 387; G. Ex. 36; RW Ex. 1. Respondent Williams was aware that AM was a newly formed corporation. Tr. 530. The Corporation and AM executed, and filed with HUD, a Management Certification for Project with Identity of Interest or Independent Management Certification dated February 21, 1992, which states, at paragraph 3:

We agree to:

- a. Comply with this project's Regulatory Agreement, Mortgage and Mortgage Note, and Subsidy Contract or Workout/Modification Agreement, and any applicable handbooks, notices, or other policy directives that relate to the management of the project.

G. Ex. 6D

6. Respondent Williams submitted a letter and other documents to HUD requesting approval of AM as management agent for the Project. G. Ex. 6A-6G. HUD did not receive the management agreement until well over a year after the execution date and HUD would never have accepted such an agreement. Tr. 347; G. Ex. 36.

7. AM was never approved by HUD to be the management agent for the Project and HUD never communicated approval of AM to AM or the Corporation. HUD kept Respondent Williams and AM informed as to the status of approval of the management agent and the fact that HUD had not yet made any such approval. Tr. 78-79, 337, 572, 685; G. Ex. 8, 11, 14, 38; RP Ex. 8.

8. Respondent Williams permitted AM to operate the building and move in tenants. Tr. 480. Even after receiving written instruction from HUD, she failed to instruct AM to discontinue these activities. Tr. 504-505. At no time did Respondent Williams have keys to the Project and she, herself, never moved any tenants into the apartment units. Tr. 479-480.

9. AM had keys to the building, set up an office in the Project, moved tenants into the building, collected rents from the tenants and cashed checks against a Corporation account totalling \$4,800, which were purportedly "management fees." Tr. 558, 580, 654; G. Ex. 18, 25.

10. HUD Handbook 4381.5 provides that a person who receives a certification from a nationally recognized management organization would be an acceptable management agent. Tr. 300. By letter dated August 27, 1991, HUD advised Respondent Williams that the minimum requirement a property manager had to meet in order to be approved was that such agent had to have a designation in housing management from a national organization that provides such accreditation, or a minimum of two years experience in directing and overseeing the management of a multifamily project serving a similar resident clientele. G. Ex. 8. In a letter dated January 29, 1992, Arthur Hill, then HUD Assistant Secretary for Housing-Federal Housing Commissioner, advised AM that HUD "must maintain measure to review applicants." He states that AM claimed that it had full time staff that met HUD's requirements for property managers, and that if that were the case, AM should be qualified to manage the property. He further stated that AM must provide the HUD Field Office with the necessary information on such staff to fulfill HUD requirements. G. Ex. 9.

11. In May of 1992, [REDACTED] Williamson was employed by AM as property manager. TR. 546. A Letter of Agreement was entered into on May 6, 1992, between AM and Williamson which employed Mr. Williamson as a property manager. This letter

was signed by Respondent Persons on behalf of AM. The letter did not set forth Respondent Persons' title or his capacity. G. Ex. 34.

12. Mr. Williamson also performed marketing services. TR. 434. Mr. Williamson was certified as a Property Manager ("CPM") by the Institute of Real Estate Management of the National Association of Real Estate Boards and supervised 100 employees. Tr. 569; G Ex 33. Mr. Williamson had no experience with subsidized property. He was responsible for certifying tenants to receive subsidies and for training AM employees to do such certification. Mr. Williamson contacted HUD while certifying tenants because he did not know how to fill out the necessary forms. Tr. 308, 323, 570; G. Ex. 32. HUD determined that although Mr. Williamson met the criteria of the years of experience and the CPM designation, he did not have specialized experience in government-subsidized housing in a Section 8 program or a Section 202 program. Tr. 322-323. Mr. Williamson was hired to replace Mr. [REDACTED] Thornton, a CPM, who had not been employed by AM as a full time property manager, as required by HUD. Tr. 308, G. Ex. 32. Mr. Thornton had no experience in subsidized elderly housing and, at the time in question, he was not up to date on government programs. Tr.300-301.

13. A meeting was held on May 28, 1992, among representatives of HUD, the Corporation and AM. Present at the meeting were, among others, HUD staff, Respondent Williams, Respondent Persons, Mr. Williamson, representatives of the City of Detroit, and attorneys representing the parties. Tr. 101-102, 325. At the meeting the HUD representatives gave Respondent Williams a copy of a letter dated May 28, 1992, (G. Ex. 14) which advised the Corporation that it was in default of the Mortgage by not providing adequate security for the premises of the Project and that HUD would provide security for the premises. HUD stated it would continue to provide security until the Corporation took certain steps that would establish that the Corporation was providing sufficient security. These steps included hiring a full time resident manager and a maintenance staff and beginning the lease-up process until the building was at least 20% occupied. The letter also stated that the Corporation was in default of Paragraph 2.16(b) of the Agreement to Enter Into a Housing Assistance Payments Contract (G. Ex. 4). The Corporation was declared in default because, among other things, it had not commenced marketing activities 90 days before completion of the Project, had failed to begin lease-up, and had failed to execute a HAP Contract with HUD. The letter also stated that the Corporation had violated the RA by failing to provide security and by allowing the building to remain unoccupied for an extended period of time after permission to occupy. G. Ex. 14.

14. At the May 28, 1992, meeting, HUD learned that the Project was being marketed when Mr. Williamson stated that he had approximately 60 applications of persons who were able to move into the Project. HUD had directed the Corporation to

engage in these activities and held it responsible for them. TR. 324-326. HUD advised the representatives of the Corporation and AM that there was no currently approved management company. HUD representatives stated that Mr. Williamson's qualifications were not satisfactory, and that if he were going to be hired by AM, an additional person with more specific experience would have to work on the site. HUD advised that Mr. Williamson could be the supervisor, but HUD required someone who had more specific experience in certification, recertification, and processing applications in Section 202 elderly housing developments. Mr. Williamson stated that there was no problem with that requirement. Tr. 103, 326-328.

15. HUD memorized the May 28, 1992, meeting in a letter dated June 12, 1992, to Respondent Williams. TR. 108, 328; G. Ex. 15. Respondent Williams admittedly received this letter. Tr. 498. The letter reiterated that a Resident Manager with in-depth Section 8 experience should be retained. The letter observed that Mr. Williamson had indicated that it would take ten days to two weeks to find a Resident Manager with the requisite Section 8 experience. This letter stated further, in part:

To further clarify this issue, it should be understood that while pre-leasing activities may continue at the owners' discretion, no tenants may be moved into the building until a Management Agent under contract with the owner has received full HUD approval. This is irrespective of whether the proposed management agent has retained a Resident Manager as discussed above.

G. Ex. 15, p.2.

16. By letter dated June 18, 1992, Respondent Williams responded to HUD's June 12, 1992 letter. G. Ex. 16. Respondent Williams advised HUD that daily maintenance of the Project was being provided by AM. The letter further stated that as of June 17, 1992, there were 21 persons scheduled to move into the Project and that the "20% factor of Occupancy being (24) move-ins will be accomplished as required by your office." G. Ex. 16, p. 1. Respondent Williams did not halt the move-in of tenants after receipt of HUD's June 12, 1992 letter. (G. Ex. 15). The Project had 8 tenants in the building on or about June 23, 1992, 19 tenants in the building for the month of June of 1992, and 29 tenants for the month of August 1992. G. Ex. 16, 17, 18; Tr. 580. The leasing and management activities were performed by AM on behalf of the Corporation. G. Ex 18; Tr. 480, 504-505.

17. On August 27, 1992, Judge Susan D. Borman of the Wayne County Circuit Court, issued an Order Appointing Receiver in the case of *Jefferson Chalmers Non-Profit Senior Housing Corporation v. AM Management Inc.*, Case No. 92-219427. G. Ex. 22.

The order was effective immediately and provided that the receiver take possession and control of the Project, and operate it during the pendency of the receivership. G. Ex. 22 p. 3. The order also provided:

12. All parties and their trustees, officers, partners, agents, and servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, are hereby restrained from doing or taking, or causing to be done or taken, any action which interferes with the operation and management of the property by either the Receiver and either Receiver's agents and employees, and shall provide access to the documents described in this Order.

G. Ex. 22 p. 7.

18. Between September 4, 1992, and September 15, 1992, Respondent Williams executed five checks, totalling \$7,500, from a Jefferson Chalmers Non-Profit Housing Corporation account. G. Ex. 25, Checks No. 1025-1029. These checks were not approved by HUD. Tr. 516. Although Respondent Williams was in Wayne County Circuit Court and was aware that Judge Borman intended to appoint a receiver (Tr. 507), the record herein does not establish when she became aware of the Order Appointing a Receiver, or when it was served upon her.

19. When AM was enjoined from operating the Project in July of 1992, Respondent Williams permitted two other management agents, Edward Carter and E&S Diversified, Inc., to take over the operation of the Project. HUD was informed after the fact. Tr. 509-510, 134. Respondent Williams issued checks to these entities from the Project account and noted that the payments were for "management fees." Tr. 513; G. Ex. 25 (Checks Nos. 1025 and 1028). HUD never approved either entity as a management agent, and Respondent Williams did not know of any such approval. Tr. 162-163, 348, 510-511.

20. AM continued to act as the management agent of the Project until July 17, 1992, the day Judge Borman enjoined AM from acting as the management agent of the project. G. Ex. 20; Tr. 556-557, 677. Judge Borman enjoined AM from, among other things, transferring, removing or disposing of all memoranda, books, papers, and other pertinent information pertaining to the Project. G. Ex. 20. The order further restrained all parties, their employees, agents, etc., who receive actual notice by personal service or otherwise, from doing or taking, or causing to be done or taken, any action which interfered with the operation and management of the property by the Receiver. G. Ex. 20 ¶ 12.

21. In addition to the management activities carried on by AM as described above, AM also took actions pertaining to the Project involving insurance and maintenance. Tr. 645, 697.

22. AM negotiated two checks on September 1, 1992 and September 17, 1992 totaling \$4,800. They were written by the Corporation against the Project's account for management fees. G. Ex. 25, (checks Nos. 1015, 1030).

23. AM submitted a number of Previous Participation Certificates, HUD-Form 2530, which name as one of its principals proposing to participate in the Project, Respondent Earl R. Coleman, Vice-President and shareholder of AM. Respondent Coleman signed the Previous Participation Certificates certifying that the information contained on them was correct. G. Ex. 27, 30. The Complaint herein alleges that Respondent Coleman was Vice-President of AM and is a principal and participant, as those terms are defined at 24 C.F.R. §24.105(m) and (p). Complaint in Case No. HUDALJ 94-0005-DB, ¶ 5. Respondent Coleman's Answer admits this allegation. Answer in Case No. HUDALJ 94-0005-DB, ¶ 5. Respondent Coleman had no direct involvement with the Project. Tr. 595-596.

24. By a Letter of Agreement dated October 28, 1991, Respondent Persons was hired by AM as a consultant to design and install computer software needed to comply with various governmental agencies for the management functions of the various properties of AM. This letter also required that Respondent Persons provide data management and document preparation in his capacity of "Assistant to the President" in the preparation of systems designed to comply with reporting requirements. G. Ex. 5.

25. Respondent Persons signed Stock Certificates for AM, dated March 31, 1992, which named him as Treasurer. RP Ex. 6, 7.

26. The HUD-2530s, received by HUD to review AM's qualifications listed Respondent William Persons as the treasurer of AM, and contained his signature certifying that this information was accurate. These forms certify that the names listed are those of the principals. These HUD-2530s were dated February 14, 1992, and March 30, 1992, respectively. G. Ex. 27, 30.² I conclude that AM stated, and Respondent Persons confirmed with his signature, that Respondent Persons was the Treasurer of AM and a Principal of AM.

² In July of 1991, The Corporation submitted a HUD-2530 on behalf of AM that listed Willie L. Mayo, CPA, as AM's treasurer. G. Ex. 6c; Tr. 252.

Respondent Persons contends he was not AM's Treasurer, that he was a consultant, and that the two HUD-2530s were altered or forged. Tr. 664-668, 670-671. With respect to the HUD-2530 dated February 14, 1992, (G. EX. 27), Respondent Persons admits that his signature appears on the document, but he states that this document had been altered from an earlier HUD-2530 which had been submitted by him to HUD in December of 1991 and did not list him as treasurer. Further he states that although his signature appears on the bottom of this HUD-2530 (G. Ex. 27), when he signed it in December of 1991, the word treasurer, written after his name, and the date, 2/14/92, were not on the form. Tr. 664-668. With respect to the other HUD-2530s, dated March 30, 1992 (G. Ex. 30), Respondent claims that his signature that appears thereon is a forgery. Tr. 670-671.

Respondent Persons testified that he told HUD representatives King and Hill that he was a consultant to AM. Tr. 741. Neither of the HUD representatives confirmed such a statement. Tr. 163, 354. There was no written communication from either AM or Respondent Persons that advised HUD that Respondent Persons was a consultant. Tr. 742. On the contrary, there were many written documents from AM signed by Respondent Persons wherein he was entitled Assistant to the President, Agent, etc., but in none was it indicated that Respondent Persons was a consultant to AM. *E.g.*, G. Ex. 18, 34; RP Ex. 6, 7.

In light of all of the foregoing I do not credit Respondent Persons to the extent he testified that he told the HUD agents that he was a consultant to AM or that the Form HUD 2530 (G. EX. 27) had been altered to state that he was Treasurer of AM, and that his signature had been forged on the other Form HUD-2530 (G. Ex. 30). In this regard I note that Respondent Persons made no attempt to secure or produce the original, or a copy, of the December 1991 HUD-2530 which he stated had been altered, and his signature on the other HUD-2530 (G. Ex. 30) matches his signatures that appear on all of the documents and letters he signed on behalf of AM. Further, his conduct at the various meetings with HUD, wherein he represented AM, was inconsistent with someone who was merely attending in the capacity of some sort of computer consultant.

Accordingly, I find that although Respondent Persons was hired by AM as a consultant, AM submitted two Form HUD-2350s (G. Ex. 27, 30) that stated that Respondent Persons was AM's Treasurer and was a principal. Persons confirmed this by signing these two forms. Also, at various meetings and in various documents, Respondent Persons held himself out as a principal of AM, and at no time did he inform anyone from HUD that he was not a principal of AM, but was solely a consultant to AM.

Discussion and Conclusions of Law

A. Debarment

1. Legal Framework

Debarment is a discretionary action and it must be determined whether a respondent's conduct is serious, whether debarment is necessary to protect the public interest, and whether there are mitigating factors. See 24 C.F.R. § 24.115(a)(b), and (d). The respondent has the burden of proof for establishing mitigating circumstances. *Id.* at § 24.313(b)(4).

The debarment process is not intended as punishment; rather, it protects governmental interests not safeguarded by other laws. *Id.* at § 24.115(b); *See also Joseph Constr. v. Veterans Admin.*, 595 F. Supp. 448, 452 (N.D. Ill. 1984). These governmental and public interests are safeguarded by precluding persons who are not "responsible" from conducting business with the Federal Government. 24 C.F.R. § 24.115(a); *see Stanko Packing Co. v. Bergland*, 489 F. Supp. 947, 948-949 (D.D.C. 1980).

"Responsibility" is a term of art which encompasses business integrity and honesty, and includes a person's ability to perform a contract. 24 C.F.R. §24.304; *see also, Gonzalez v. Freeman*, 334 F.2d 570, 573 & n.4, 576-77 (D.C. Cir. 1964); *Delta Rocky Mountain Petroleum, Inc. v. Department of Defense*, 726 F. Supp. 278, 280 (D. Colo. 1989). Determining "responsibility" requires an evaluation of all pertinent information, including the seriousness of the acts or omissions, and any mitigating circumstances. 24 C.F.R. §§ 24.114(d), 24.314(a), and 24.320(a). An assessment of "responsibility" must be made as to whether the Federal Government is at risk by doing business with a respondent. *See, Shane Meat Co. v. U.S. Dep't of Defense*, 800 F.2d 334, 338(3rd Cir. 1986). That assessment may be based on past irresponsible acts. *See, Agan v. Pierce*, 576 F. Supp 257, 261 (N.D. Ga. 1983); *Delta Rocky Mountain Petroleum, Inc.*

24 C.F.R. § 24.305(a)(4), (b), (d) and (f) provide that debarment may be imposed for:

(a) Conviction of or civil judgement for:

(4) Commission of any other offense indicating
a lack of business integrity or business honesty

that seriously and directly affects the present responsibility of a person.

(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;
- (2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions;
- (3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction;

(d) Any other cause of so serious or compelling a nature that it affects the current responsibility of a person.

(f) In addition to the causes set forth above, HUD may debar a person from participating in any of the programs or activities of the Department for material violation of a statutory or regulatory provision or program requirement applicable to a public agreement or transaction including applications for grants, financial assistance, insurance or guarantees, or to the performance of requirements under a grant, assistance award or conditional or final commitment to insure or guarantee.

B. Respondents are subject to debarment.

1. Respondent Williams is subject to debarment under 24 C.F.R. Part 24.

At material times Respondent Williams was a Board member and President of the Corporation, which was participating in the Section 202 Program involving the Project. Accordingly, Respondent Williams is subject to debarment because, in her capacity as Board member and President of the Corporation, she was a principal who participated in "covered transactions". 24 C.F.R. § 24.105(p), § 24.325(b)(2).

2. Respondent Coleman is subject to debarment under 24 C.F.R. Part 24.

At material times Respondent Coleman has been President and a principal of AM, a corporation participating in Section 202 Program. Accordingly Respondent Coleman is a principal who participated in covered transactions and is thus subject to debarment. 24 C.F.R. § 24.105(p), § 24.325(b)(2). This is so even though Respondent Coleman had no direct involvement in managing the Project.

3. Respondent Persons is subject to debarment under 24 C.F.R. Part 24.

At material times Respondent Persons held himself out to HUD and others as Treasurer and an official of AM, and his actions were consistent with his being an official of AM, a corporation participating in a Section 202 program. In so finding I reject Respondent Persons' contention that he was merely a computer consultant to AM. Accordingly, Respondent Persons is a principal and participant in covered transactions and is thus subject to debarment. 24 C.F.R. § 24.105(p), 24.325(b)(2).

C. Respondents' conduct warrants debarment.

1. Respondent Williams.

HUD contends that Respondent Williams should be debarred pursuant to 24 C.F.R. § 24.305(a)(4), (b), (d), and (f).

The RA between HUD and the Corporation requires the Corporation to provide a manager of the Project who is satisfactory to HUD and prevents the Corporation from entering into any contract for supervisory or managerial services without written HUD approval. Respondent Williams executed the RA as the Corporation's president. The record herein clearly establishes that HUD never approved AM, although it attempted to do so, and that Respondent Williams, the Corporation, and AM were kept apprised by

HUD that, at no time, had it approved AM. In this regard, HUD's action in not approving AM was appropriate, as described below.

Despite all of the foregoing, Respondent Williams entered into a management agreement for AM to provide management services at the Project and Williams permitted AM to operate the Project and to move-in tenants. Even after express instructions from HUD, Respondent Williams failed to instruct AM to discontinue these management activities. Similarly Respondent Williams permitted Mr. Carter and E&S Diversified to be active in the operation of the project, even though neither had ever been approved by HUD. TR. 510-511, 348, 162-163. Without HUD approval, Respondent Williams executed checks from the Project account to these persons, in payment for their services.

Respondent Williams contends that she did not read the RA and mortgage before executing them. Tr. 533-534. This argument, made to mitigate her actions, is rejected. In fact, her failure to read these documents before signing them, itself, suggests irresponsibility. *See, Matter of Ray Riddle, R.H. Riddle Co., and Westley Village Associates*, HUDBCA No. 87-1953-DB, p.7. Further, Respondent Williams did not even know if AM had keys to the Project (Tr. 479).

Respondent William's contention that her actions were an effort to protect the Project (Tr. 465-469) is rejected. The requirement that HUD approve management agents is to protect HUD's investments and projects. HUD's failure to approve the management organizations utilized by the Corporation was itself an indication that the use of these organizations were not appropriate to protect the Project. Respondent Williams' further contention that she felt she had complied with HUD requirements concerning the management (Tr. 482) is also rejected. HUD representatives made it clear, orally and in writing, that AM had not been approved and that no tenants were to be moved into the Project until a management agent had been approved by HUD. *See, G. Ex. 15*. The RA makes it clear the Corporation is responsible for providing management satisfactory to HUD.

In light of the foregoing, I conclude that Respondent Williams knowingly and willfully violated material terms of a public agreement, which violations are sufficient bases for debarment. 24 C.F.R. § 24.305(b) & (f). Respondent Williams' permission to unauthorized agents to manage the Project and her unauthorized payments to those agents from Project funds jeopardized the security of the tenants and the financial well-being of the Project. The foregoing indicates a lack of business integrity so serious as to affect the present responsibility of Respondent Williams. 24 C.F.R. § 24.305(d).

Respondent Williams permitted tenants to move into the project in violation of written statements and instructions from HUD. Respondent Williams directed AM to

move tenants into the Project, and she failed to stop that activity after she received direct written instructions from HUD not to move in tenants until a management agent had been approved by HUD. This action endangered the well-being of the tenants and is a violation so serious as to warrant debarment. 24 C.F.R. § 24.305(d) & (f).

Respondent Williams' execution of the check to [REDACTED] Rodnick, in the amount of \$2,500 from the Project funds to pay for her legal fees to defend the state court action, was for her personal benefit. It was not a reasonable and necessary expense, nor was it approved by HUD, as required by the RA. Such payments out of the Project funds jeopardized the financial security of the Project and evidences a serious irregularity in Respondent Williams' performance that reflects upon her honesty, integrity, and reliability. *Riddle*, at p. 7. These actions constitute a violation of the RA and evidence a lack of business responsibility so serious as to provide a basis for debarment. 24 C.F.R. § 24.305(b), (d) & (f).

HUD contends that Respondent Williams violated state court orders regarding the project. The record fails to establish that the state court found that Respondent Williams violated its order. Respondent Williams testified that she did not know when the receiver was appointed. Tr. 514. This testimony was not contradicted. Although it may be, as HUD contends, highly suspect, I am not prepared to discredit it. Thus, absent evidence of a specific finding by the state court that its order had been violated, I cannot conclude that Respondent Williams violated the order.

2. Respondent AM and its "Principals", Respondents Coleman and Persons

HUD contends that AM, and its principals, Respondents Coleman and Persons, improperly acted as a management agent for the project, permitted tenants to occupy the Building in violation of express HUD directives, and violated state court orders. Such actions are alleged to be cause for debarment. 24. C.F.R. § 24.305(b), (d) & (f).

The Corporation and AM executed and filed with HUD a Management Certification for Project with Identity of Interest or Independent Management Agents. G. Ex. 6D. This provided that the parties thereto agreed to comply with, among other things, the project's RA, mortgage and mortgage note, and any applicable notices or other policy directives that apply to the management of the project.

HUD never approved AM as a management agent for the Project, and HUD consistently advised the Corporation and AM that AM had not been approved. AM, however, proceeded to operate the Project as management agent. AM had the keys to the building, set up an office in the Project, moved tenants into the Project, collected rents, filed requests for subsidy payments on behalf of those tenants, and cashed checks from

the Corporation in payment of management fees. AM also took actions concerning insurance and maintenance relating to the Project. Tr. 645, 797.

AM acted as management agent in clear violation of the RA and the express instructions of HUD. Respondents argue that AM met the qualifications of a management agent and should have been approved by HUD. I conclude that HUD did not act unreasonably in failing to approve AM as the management agent for the project because AM's employees and agents and the full time property manager for the Project did not have sufficient training or experience to manage a Section 202 subsidized Project. Thus, although AM might have met some minimum standards for approval (HUD Handbook 4381.1), HUD acted reasonably, in this case, in requiring more specialized experience.

Respondent Persons claims that he thought AM was merely acting to assist the Corporation, which had the right to manage the property. Tr. 688. This, however, ignore's the clear requirement of the RA that management agents must be approved by HUD. Further, throughout the period in question, AM was trying to get HUD approval as a management agent and had signed a contract with the Corporation to act as the management agent for the Project. Thus, I reject Respondent Persons' contention that AM was merely assisting the Corporation and not acting as a management agent.

AM's actions as an unauthorized management agent at the Project were knowing and material violations of the RA and HUD's express written instructions. AM's actions jeopardized the security of the project and its tenants. This conduct indicates a lack of business integrity sufficiently serious and compelling to affect AM's present responsibility and that of its principals, Respondents Coleman and Persons, and are, therefore, cause for debarment. 24 C.F.R. § 24.305(b), (d) & (f).

AM moved tenants into the Project during June and July of 1992, when AM had not been approved as a management agent by HUD. HUD had communicated to the Corporation and to AM that AM was not approved as a management agent and that tenants should not be moved into the Project until a management agent had been approved.

Respondent Persons' contention that permission to move tenants into the project was granted at the May 28, 1992, meeting is rejected. I find no such permission was given by the HUD representatives present at the meeting. However, even if there was some confusion, it was clarified by HUD in its June 12, 1992, letter. G. Ex. 15.

AM's rental of Project units in June and July of 1992 violated HUD's express instructions and was a material violation of the RA. AM's action jeopardized the security

of the tenants and evidenced a lack of business integrity so serious as to affect AM's present responsibility and is cause for debarment with respect to AM and its Principals, Respondents Coleman and Persons. 24 C.F.R. §24.305(b), (d) & (f).

HUD contends that AM violated state court orders in connection with the Project and that such conduct is cause for debarment. Judge Borman of the Wayne County Circuit Court issued a preliminary injunction on July 17, 1992, enjoining AM from removing or disposing of books, papers, etc. pertaining to the Project. On August 27, 1992, Judge Borman issued an order appointing a receiver to operate the project, effective immediately. The orders also restrained all parties, their employees and agents, who received actual notice, from doing or taking any action which interfered with the operation and management of the Project by the receiver. This order was approved as to form by AM's attorney. HUD contends that AM violated these orders by negotiating two checks written against the Project's account for a total of \$4,800. The Checks were negotiated on September 1 and 17, 1992, and purportedly paid management fees. The record does not establish that this conduct interfered with the receiver's management of the Project or was without his permission. The state court made no finding that its orders had been violated. Accordingly, I am not prepared to conclude that AM violated the state court's orders. The negotiation of the above-described checks for management fees, when AM had not been approved by HUD as a management agent, does, however, warrant debarment. 24 C.F.R. § 24.305(b), (d), & (f).

In light of all of the foregoing, I conclude that HUD has satisfied its burden of establishing that cause for debarment of Respondents Williams, Coleman, Persons and AM Management exists under 24 C.F.R. § 24. 305(b), (d) & (f) and § 24.313(b)(3).

D. A three year period of debarment is warranted

HUD argues that the gravity of Respondents' conduct justifies a three year debarment. HUD Br. p 4-6. Although Respondents do not raise any specific matters as mitigating circumstances, some of the indefenses to the proposed debarment will be considered as mitigating circumstances to justify a shorter debarment.

Respondent Coleman was not shown to have actually participated in any of the conduct of AM which was found to have justified debarment. Similarly Respondent Persons contends he was a consultant who was only involved in certain computer-related and administrative assistance activities. I conclude, on balance, that these matters do not warrant reducing the three year period of debarment. Respondents Coleman and Persons were Principals of AM and were responsible to make sure that AM conducted business in a responsible manner. They did not. Respondent Persons was not passive or so limited


as he contends; rather he was very active in representing AM to HUD and in seeking HUD's approval for AM.

Respondent Williams contends, that because she did not read the RA and the other documents she signed, she was ignorant of her responsibilities, that she thought she was authorized by HUD to move in tenants, and that she thought she was protecting the Project. These contentions were factually rejected. It was clear Respondent Williams was president of the Corporation and was active in the Project and securing AM. She was responsible for her actions, and I find nothing to warrant reducing the three year debarment.

Accordingly, in order to protect the public interest, a three year period of debarment is appropriate and necessary in order to permit Respondents Williams, AM Management, Coleman, and Persons to demonstrate "responsibility."

Conclusion and Determination

Upon consideration of the public interest and the entire record in this matter, I conclude and determine that cause exists to debar Agnes May Williams, AM Management, Earl R. Coleman, and William Persons from participation in primary covered and lower-tier transactions as either principals or participants at HUD and throughout the Executive Branch of the Federal Government and from participating in procurement contracts with HUD for a three year period from November 23, 1992.


SAMUEL A. CHAITOVITZ
Administrative law Judge