

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

United States Department of Housing
and Urban Development,

Plaintiff,

v.

Joshua Thomas Bailey,

Defendant.

HUDALJ 95-5060-PF
Decided: April 23, 1996

Luke Brown, Esquire, and
Dane Narode, Esquire
For the Plaintiff

Benedict Werlinger-Lebeau, Esquire
For the Defendant¹

Before: Robert A. Andretta
Administrative Law Judge

INITIAL DECISION AND ORDER

The plaintiff, the U.S. Department of Housing and Urban Development ("the department," "the government," or "HUD") seeks the imposition of damages and a civil penalty against the defendant, Joshua Thomas Bailey, pursuant to the Program Fraud Civil Remedies Act of 1986, 31 U.S.C. §§ 3801-3812 ("the Act") and HUD's regulations that are codified at 24 CFR Part 28, by which jurisdiction is obtained. The government's Complaint was sent to the defendant on September 7, 1995, enclosed with a cover letter

¹ Benedict Werlinger-Lebeau signed Defendant's Answer as "Counsel of Record," and filed it with this forum on October 11, 1995. He has not been heard from since that time in spite of numerous phone calls and letters to him requesting that he contact this forum. In each case, either a message was left on his telephone recorder or a letter was sent, first class, but not returned as undeliverable.

which, *inter alia*, explained defendant's right to a hearing to contest the allegations contained in the Complaint.

On October 11, 1995, Defendant's counsel of record filed his Answer, in which he denied all allegations of wrong-doing. Since that action was taken, neither Defendant nor Defendant's counsel has been in touch with this forum. Numerous letters were sent to both by regular mail, but they were neither answered nor returned. Phone calls were placed to counsel on many occasions by which messages were left on his answering machine, but he did not return the calls. These letters and calls simply requested Defendant and his attorney to contact this forum by letter or phone.

On February 15, 1996, I issued an Order To Respond, which was sent by regular first class mail, in which Defendant was ordered to provide valid addresses and phone numbers for himself and his attorney, and counsel was ordered to define his relationship to the defendant by February 28, 1996. Neither Defendant nor his attorney responded to this Order, and the Order was not returned as undeliverable from either of their addresses.

On March 19, 1996, the government filed a Motion For Issuance Of An Initial Decision For Failure To Prosecute An Action. In response to the Motion, I issued an Order To Show Cause on March 20, 1996. Defendant was ordered to respond fully to the Order of February 15, 1996, by close of business April 12, 1996, or to show cause by that date why this forum should not assume the facts alleged in the Complaint to be true and issue an initial decision that imposes the civil penalty and assessment demanded in the Complaint. The Order To Show Cause ended with the following warning: "Failure to adequately and timely respond to this latest Order will constitute Defendant's consent to entry of the proposed default judgment."

There has been no response to the Order To Show Cause. The copies of the Order sent via certified mail, return receipt requested, were returned "unclaimed." The copies sent via regular first class mail have not been returned. Therefore, the government's Motion For Issuance Of An Initial Decision For Failure To Prosecute An Action is **GRANTED**, and the Initial Decision that follows is entered on the basis of the defendant's default.

Findings of Fact

1. Pursuant to Title II of the United States Housing Act of 1937, as amended by the Indian Housing Act of 1988, 42 U.S.C. § 1437aa, *et seq.*, HUD contributes financial assistance to local Indian housing authorities that provide housing and related facilities to

lower-income American Indians. Indian housing authorities, which are established under state or tribal law, develop and operate housing projects, and HUD provides funding to them for their development, operating subsidies, and modernization.

2. The Puyallup Nation Housing Authority ("PNHA") is an Indian housing authority located in Tacoma, Washington. Defendant, Joshua Thomas Bailey, is an individual who resides in [REDACTED].

3. In January, 1990, PNHA solicited bids for the supply and delivery of 50 ranges and 50 refrigerators to be installed at a new 50-unit apartment project.

4. On or about January 18, 1990, PNHA received a bid for \$46,929 from Pacific Rim Housing, a company owned by Kenneth R. Dodd, to supply the 50 ranges and 50 refrigerators for the new project.

5. In a separate letter to PNHA, dated January 20, 1990, Kenneth Dodd represented that the bid amount included delivery.

6. Kenneth Dodd's bid was accepted by PNHA.

7. Dodd accepted payment from PNHA, but he only paid an appliance store a portion of the money owed to it for the purchase of the 100 appliances.²

8. PNHA, which urgently needed the appliances for the new housing units, decided to pay the balance of the debt owed to the appliance store by Kenneth Dodd.

9. Dodd requested that PNHA pay an additional \$1,500 for delivery of the appliances, and it was agreed that Defendant would make the deliveries.

10. In a letter to PNHA, dated July 23, 1990, Defendant requested payment of \$1,500 for the delivery of the refrigerators and ranges.

11. On or about July 31, 1990, Defendant received a check in the amount of \$1,500 made payable to the order of "International Chemical Supply or Joshua Bailey."

² The government does not allege the amount of money left owing to the appliance store.

12. On or about August 1, 1990, Defendant endorsed the check from PNHA for payment for the delivery of the appliances.

13. Defendant never delivered the appliances.

Discussion

Defendant's endorsement of the check for payment was a request or demand for money from PNHA, and constitutes a "claim" within the meaning of 31 U.S.C. § 3801(a)(3)(B)(ii). His submission of a claim that he knew, or had reason to know, was for payment for the provision of services or property which he had not provided, as claimed, is subject to liability under 31 U.S.C. § 3802(a)(1)(D).

In his Answer, Defendant denies that HUD has jurisdiction over the claim because, he argues, it is properly a claim of PNHA, "an exclusive agency as [sic] arm of the Puyallup Indian Tribal Nation, a distinct sovereign nation as recognized by the United States of America as such by making land cession treaty with such nation in 1854. See 10 Stat. 1132." When a housing authority makes a payment with HUD funds as part of a HUD program, that authority is acting as an agent of HUD. Accordingly, Defendants' argument has no merit.

Remedies

The Act authorizes the imposition of an assessment of up to twice the amount of the false claim paid by the government, as well as the imposition of civil penalties. These are for the purposes of providing a remedy to reimburse the government for its losses and to deter the making, presenting and submitting of false claims to the government by others as well as the defendant in the instant case. Pub. L. 99-509, § 6102(b); 31 U.S.C. § 3802(a)(1). In considering the False Claims Act, the Supreme Court has stated, "the Government is entitled to rough remedial justice, that is, it may demand compensation according to somewhat imprecise formulas, such as reasonable liquidated damages or a fixed sum plus double damages" *U.S. v. Halper*, 490 U.S. 435, 446 (1989).

The government has demanded payment of a civil penalty against Defendant in the amount of \$5,000. It has also demanded an assessment of \$3,000, which is twice the amount of HUD's loss of \$1,500. Since these amounts are reasonable and in accord with

the Act, and since Defendant has failed to make arguments against their full imposition³, the amounts demanded will be Ordered in the next section of this Initial Decision and Order.

Order

Having concluded that Defendant, Joshua Thomas Bailey, claimed and accepted payment for services never rendered, and having further found that this conduct falls within the purview of the Program Fraud Civil Remedies Act, it is hereby

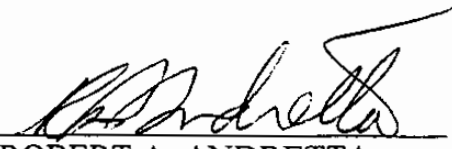
ORDERED that

On the date that this decision becomes final, the defendant shall be liable to the United States for an assessment in the amount of \$3,000 and a civil penalty in the amount of \$5,000.

Defendant has the right:

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

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


ROBERT A. ANDRETTA
Administrative Law Judge

³ In his Answer, defendant states that "mitigating circumstances are existent to reduce claims for penalties and assessments." However these circumstances were not articulated in the Answer, nor were they provided later.