

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

In the Matter of:

BOYD C. BULLOCH, CHEYENNE
SQUARE APARTMENTS, INC.
and PATRICIA BULLOCH,

Appellants

HUDBCA Nos. 81-667-D
and 81-668-D9

Mr. Boyd C. Bulloch
Cheyenne Square Apartments
3301 Civic Center Drive
North Las Vegas, Nevada 89030

Mrs. Patricia Bulloch
Cheyenne Square Apartments
3301 Civic Center Drive
North Las Vegas, Nevada 89030

Marylea W. Byrd, Esquire
Office of General Counsel
U. S. Department of Housing
and Urban Development
Washington, D. C. 20410

DETERMINATION

Statement of the Case

By separate letters dated April 21, 1981, Philip D. Winn, Assistant Secretary for Housing and Housing Commissioner, notified Appellants, Boyd C. Bulloch, President, ("Bulloch") and Patricia Bulloch, Secretary-Treasurer, of Cheyenne Square Apartments, Inc., ("Mortgagor") that as a result of an Inspector General's Audit dated February 13, 1980, the Department of Housing and Urban Development ("HUD") proposed to debar each of them and their affiliates from further participation in HUD programs for a period of five years from the date of their respective letters. The Assistant Secretary also notified the Appellants that they were temporarily suspended from

participation in Departmental programs pending the final determination of the proposed action.

Citing 24 C.F.R. §§24.6(a)(3), (4), and (5) as causes for the debarment action, the Assistant Secretary in each notice enumerated certain violations and failures in the management of the apartment project. Appellants filed a timely request for hearing. Appellants failed to respond by June 29, 1981, as required by the Notice of Docketing and Order dated May 27, 1981. Efforts to establish contact with the Appellants to arrange a date for a hearing were unavailing. After the parties failed to respond to the undersigned's February 2, 1981, letter advising them that they were in default of applicable orders to provide the status report and other information by February 12, 1982, the parties were directed by order dated March 3, 1982, to show cause no later than March 15, 1982, why the appeal should not be dismissed with prejudice for want of prosecution.

By letter dated March 14, 1982, Bulloch requested that the case be resolved on the written record and that he be allowed to answer on behalf of himself and Patricia Bulloch. An order dated March 29, 1982, consolidated the cases of the two Appellants, HUDBCA 82-667-D8 and 82-668-D9, for all purposes and authorized Bulloch to file a brief on behalf of both Appellants. On April 26, 1982, Patricia Bulloch filed a written consent, personally and as Secretary of the Mortgagor, authorizing Bulloch to act on her behalf. Appellant's counsel withdrew, and leave was granted for successor Government counsel to enter an appearance by order dated April 29, 1982.

Pursuant to an enlargement of time, the Government filed its brief on May 5, 1982. Pursuant to requested extensions of time, the Appellants filed their brief on July 26, 1982. The Government's reply brief and a request by Appellants, which was not opposed by the Government, that a letter from a U. S. Senator be considered as part of Appellants' answer, were both filed August 31, 1982. This determination is based upon the written record thus supplied.

Findings of Fact

1. Cheyenne Square Apartments, North Las Vegas, Nevada, Project No. [REDACTED], (the "Project") is a 160-unit multifamily project subject to a mortgage insured by HUD/FHA under Section 221(d)(3) of the National Housing Act. The Project is owned by Cheyenne Square Apartments, Inc. (the "Corporation" or "Mortgagor") of which Appellant Boyd C. Bulloch ("Bulloch") is President and Appellant Patricia Bulloch is Secretary-Treasurer. (Audit Report at 4.) It is undisputed that Patricia Bulloch has maintained a passive role and has not been actively involved in the conduct of the Mortgagor's affairs or in the management of the Project (App. Brief at 23). I find that Bulloch's unfettered control of the Corporation has made the Mortgagor, for all

practical purposes, his alter ego. The Corporation had notice of this proceeding through Bulloch, but has not responded or appeared separately.

2. The Project and its Mortgagor were audited during the period from November 19, 1979 to January 11, 1980, for the period for January 1, 1978 to October 31, 1979. The result was the Audit Report dated February 13, 1980. */

3. By letters dated April 21, 1981, to Bulloch and Patricia Bulloch, respectively, Philip D. Winn, Assistant Secretary for Housing, advised the Bullochs that HUD was considering their debarment under 24 C.F.R. §§24.6(a)(3), (4), and (5). The Assistant Secretary's notice stated that the audit of the Mortgagor's records dated February 13, 1980, had indicated irregularities of a serious nature in their business dealings with the Government. The Audit had been sent to the Appellants under cover of a letter of transmittal dated February 27, 1980. The notice indicated that they had not replied to the letter of transmittal and subsequent letters dated April 1, June 3, September 24, and December 1, 1980, requesting explanations for the cited deficiencies and indicating the necessity of bringing the operation of the Project into compliance with HUD procedures and the applicable Regulatory Agreement. The Appellants were also advised that they were suspended immediately from participating in Departmental programs pursuant to 24 C.F.R. §24.13(a)(2)(i). The following summary of the findings of the Audit Report on which the action was based was enumerated in the Assistant Secretary's notice:

1. unauthorized distribution of \$21,696.00 in unallowable management fees;
2. disbursement of \$17,431.78 for costs which were not allowable project expenses;
3. project funds in the amount of \$4,406.88 not deposited in the project operating bank account;
4. tenants' security deposit account under funded by \$11,199.94;
5. inadequate accounting records;

*/ Audit Report, Audit Case No. SF-93, issued Feb. 13, 1980, from Patrick J. Collins, Regional Inspector General for Audit, Region IX, to Henry Dishroom, Area Manager, San Francisco, California, re: Multifamily Mortgagor, Cheyenne Square Apartments, Inc. The Audit Report followed the affidavit of the auditor in charge, Robert Stevens, designated as Government's Exhibit 4 attached to the Government's brief, but bore no exhibit number itself.

6. deficient tenant eligibility and rental procedures;
7. rents charged in excess of the latest HUD approved rate;
8. tenants charged excessive amounts for security deposits;
9. inadequate fidelity bond coverage of the mortgagor.

4. As a condition precedent to the issuance of HUD/FHA mortgage insurance, the Bullochs had executed a standard Regulatory Agreement on behalf of the Mortgagor. That Agreement set forth HUD's requirements for the management of the HUD-assisted Project. (Exh. G-3.)

5. According to the Audit Report, after final endorsement of the Project mortgage for HUD insurance on July 28, 1965, the Project was managed by Bulloch under a management agreement that expired by its terms on January 1, 1979. The San Francisco Area Office of HUD informed the Mortgagor that the management contract would not be extended and that the Project was recognized after expiration of the management contract as being "owner-managed." The Mortgagor was also informed that any funds taken for management fees from Project funds after January 1, 1979, would be considered an improper distribution of project funds. (Audit Report at 4-6.)

6. Under cover of a letter dated August 3, 1982, and with the consent of the Government, Bulloch added "a copy of the unsigned and unapproved management contract" ("Management Contract") to the record. That copy lacks a signature in the space provided for HUD concurrence. Bulloch indicated in both the cover letter and his brief that this contract had never been approved by HUD and, "In fact, no approved management agreement has been in effect since 1971...." In its brief, the Government has asserted simply that "A management agreement dated January 1, 1972, and expiring January 1, 1979 provided for a management fee of 6.5% of gross collections."

7. The copy of the Management Contract was signed by R. Julian Moore, President, on behalf of Cheyenne Square Apartment, Inc., as Owner, and by Bulloch as Agent and dated January 1, 1972. Bulloch has identified Moore as his "partner at the time." (App. Brief at 2.) It provided in detail for the collection of rents, maintenance of the buildings and grounds of the Project, handling of finances and operating expenses, and other responsibilities of the project management by Bulloch as Agent. It provided in the fifth paragraph for sole compensation of the agent with a fee computed and payable in an amount equivalent to 6-1/2% of gross collections, excluding security deposits, and that the "fee may at the discretion of the Owner be increased to the maximum permitted by the Federal Housing Administration."

The Agreement also provided for termination by either party, the mortgagee, or FHA, as of the end of any calendar month, with or without cause and without liability, upon thirty days written notice to the other party and the FHA. (Copy of Management Contract.) There is no evidence of any written notice of termination pursuant to that authority. Subparagraph (c) provided, "This Agreement shall be of no force and effect unless there is endorsed herein the consent of the Mortgagee." There was no evidence in the record of the Mortgagee's endorsement or consent. I find that there is insufficient evidence to establish whether the Management Contract in the form submitted was ever formally approved by HUD. However, the parties at least tacitly adhered to its relevant provisions. Except for the absence of a signature by FHA, there is no evidence that Bulloch or HUD had previously questioned the applicability or validity of this Management Contract.

8. Bulloch asserts that HUD had "allowed reasonable compensation to be paid to us for every year since that time" and that since the Department had never returned a signed agreement to him and his partner, R. Julian Moore, "we proceeded under the assumption that the Department would allow reasonable compensation and claimed reasonable compensation for our management services." He asserts "that the Department's attempt to change course in mid-stream and disallow reasonable compensation is unreasonable and intransigent." (App. Brief at 4-5.) There is no evidence in the record of what compensation for management services was approved by HUD prior to 1978. Nor is there any claim or evidence that prior to 1978 such compensation deviated from the 6.5 percent of gross revenues specified in the Management Contract.

9. The audit of the Project by the Regional Inspector General for Audit, Region IX, between November 19, 1979, and January 11, 1980, followed an "internal audit" by the same office which had indicated that significant deficiencies existed in the operation of the Project (Audit Report at 1). The resulting Audit Report identified certain "serious irregularities" in the management and operation of the Project. The conclusions of the Audit Report, incorporating both findings and recommendations, are set out in nine numbered "Findings." The Audit Report is supported by an affidavit of Robert Stevens, who, as the auditor in charge, declared under oath that the audit was conducted in the normal course of business, that it was conducted in accordance with general accepted accounting principles, and that the findings were based on the project books and records provided for the audit. In the context of this record and in the absence of significant impeachment, I find both the affidavit and the substance of the Audit Report itself to be credible. Therefore, except in certain respects as I have otherwise indicated, I adopt the findings of fact set forth in the Audit Report.

10. Bulloch's basic defense, stated in his brief, was that "The Audit Report findings were without exception either unwarranted or immediately resolved if they were warranted. We believe that the assertion in the HUD counsel's 30 April 1982 brief that the audit findings were not timely resolved is simply inaccurate." (App. Brief at 18.) These categorical assertions are clearly not supported by the record before me.

11. Following issuance of the Audit Report, HUD made repeated attempts to obtain responses from Bulloch to the audit findings so that the identified deficiencies could be resolved and the audit findings cleared. A letter from William H. Harrison, Chief, Loan Management Branch, to Bulloch in early April 1980 stated that no response had been received to the Audit Report transmitted on February 28, 1980, or to HUD's management review of February 20, 1980. It notified Bulloch that a complete and acceptable response to each of the reports was due no later than April 15, 1980, and that further delay or lack of corrective action would be considered a direct violation of the Regulatory Agreement (Exh. G-6A). A subsequent letter from Harrison to Bulloch dated June 3, 1980, indicated that no response to the issues raised by the Audit Report had been received and that a response was expected not later than June 15, 1980 (Exh. G-6b).

12. By letter to Bulloch dated September 24, 1980, Henry Dishroom, Deputy Area Manager, San Francisco Office, notified Bulloch that HUD still had not received a detailed response to the Audit Report transmitted February 28, 1980, or to the two follow-up letters dated April 1 and June 3, 1980. This letter notified Bulloch that his continued noncompliance demonstrated a serious breach of the Loan Agreement and Regulatory Agreement controlling operation of the Project, and that if a complete response to the audit report and evidence of the correction of all findings in that report were not submitted to the Area Office by October 8, 1980, the matter would be referred to HUD's Area Counsel for further action. The letter also warned that "Your further uncooperative attitude may result in your disbarment (sic) from all HUD programs, including Section 8 Program administered by the Local Housing Authority," and, "As we have previously informed you, we will take no action on any requests for rent increases or withdrawals from the Replacement Reserve account until we are assured of full compliance with HUD regulations." The letter indicated that "a complete written response" was expected "to all the items noted in the audit and the appropriate documentation including but not limited to the audited financial statement for 1979." (Exh. G-6c.)

13. A letter to Bulloch dated December 11, 1980, from Alexander J. Pires, Jr., Deputy Assistant Secretary for Multifamily Housing Programs, gave "formal notice by the Secretary that there have been violations of the Regulatory Agreement executed on March 10, 1964, between yourself, as owner of the Cheyenne Square Apartments, and the Secretary," and

demanded correction within thirty days, including that Project rents be restored to the rental schedule previously approved by HUD. The letter also cited the deficient accounting and record keeping systems for the Project, and Bulloch's failure to respond to the San Francisco Office's letters or offers to discuss those deficiencies. (Exh. G-6d.)

14. By a Memorandum dated March 5, 1981, to the Associate General Counsel for Litigation, George O. Hipps, Jr., Acting Assistant Secretary for Housing, requested legal action by the Department to recover improperly disbursed funds and to force clearance of the Audit Report's findings. In summarizing the program office's position for counsel, he adopted substantially all of the findings as they were presented in the Audit Report, with certain noted exceptions. (Exh. G-5.) His summary did not differ significantly from the summary of violations and failures in the management of the project cited in the notices of proposed debarment dated April 21, 1981.

15. In Finding 1 of the Audit Report, the auditor had concluded that in 1978, the Mortgagor paid a management fee of \$21,423, or \$2,696 in excess of the \$18,727 which was allowable under the formula specifying 6.5% of gross collections in the Management Contract. In 1979 the Mortgagor paid \$19,000 in Management Fees. HUD considered that payment to include an unauthorized disbursement of project funds because there was no authorizing Management Agreement, which had expired in January 1, 1979. (Audit Report at 5-6.) The Government has abandoned the auditor's recommendation that Bulloch be required to pay the Project \$24,170 for certain reimbursements of advances Bulloch had made for Project operating expenses. (Exh. G-5; Audit Report at 4-5.) I find that there was no applicable management contract in effect after January 1, 1979, and no evidence that HUD had approved a management fee in excess of 6.5% of gross collection in 1978 as Bulloch claimed. Paragraph 6 of the Regulatory Agreement provides that Bulloch was not entitled to draw a management fee without the prior written approval of the Housing Commissioner. There is no evidence that Bulloch had such approval.

16. Under Finding 2, relating to "Questionable Disbursements for Unrelated, Inadequately Supported, and Unnecessary Project Expenses," the auditor found that the Project paid \$17,431.78 for costs considered to be management expenses rather than Project expenses; vehicle expenses that were not properly allocated; and telephone and insurance costs that were considered unnecessary project expenses paid out in violation of paragraph 6(b) of the Regulatory Agreement. \$4,000 of these expenses were for bookkeeping services to maintain project books and records, and \$440 were for armored car services used to handle and bank rent receipts at the Project. HUD subsequently authorized the cost for armored car services if the Project were located in a crime area (Exh. G-5). Because the third paragraph

of the Management Contract provided that all obligations and expenses incurred by the management Agent, except the overhead expenses of the Agent's office, were at the expense of the Owner, there is no basis in the record for the auditor's contention that bookkeeping expenses of the Project should have been covered by the Agent's fee. No proof establishes that HUD had explicit authority to determine whether computer services were necessary or appropriate to manage the Project. (Audit Report at 6-7.)

17. Bulloch has not documented and accounted for the \$4,694 costs of maintenance and operation of a truck between January 1, 1978, and October 31, 1979, for Project purposes and as a necessary project expense (Audit Report at 6-8).

18. I also find that Bulloch has not documented and accounted for \$900 of telephone costs as proper project costs. (Audit Report at 7-8.) The substantial deficiency citation involving the propriety of medical insurance costs of \$4,911.14 for Bulloch and two employees of the Mortgagor, and life insurance costs of \$474.64 for Bulloch as Project expenses also remains unresolved, although the auditor's position might be determined after appropriate consideration to be erroneous. Subparagraph (k) of the second paragraph of the Management Contract provided that the cost of insurance, [for operating personnel], including bonding, workmen's compensation, liability insurance, and health insurance, if any, shall be an operating expense of the Project."

19. Finding 3, citing income totaling \$4,406.88 between February 24, 1978, and October 1, 1978, that had been recorded in the cash receipts journal, but not deposited in the Project bank account, has not been resolved because Bulloch did not properly deposit the funds received by the Project or document, or otherwise account for their proper application for Project purposes as the auditor alleged. (Audit Report at 8-9.)

20. In Finding 4, the auditor concluded that the tenants' security account was underfunded by \$11,199.94 on October 31, 1979, and that the missing funds had been used to pay Project operating expenses and to reimburse funds advanced to the Project in violation of paragraph 6(g) of the Regulatory Agreement. That unambiguous provision of the Regulatory Agreement required any funds collected as security deposits to be segregated in a trust account equal in amount to the aggregate of all outstanding obligations of the account. The auditor found that the security deposit funds had been incorrectly deposited to a project operating account; \$1900 had been paid to the "Mortgagor" as an advance repayment; and \$5000 had been transferred to the Project account to pay Project operating expenses. Bulloch has not disputed these findings. (Audit Report at 9; App. Brief at 10-11.)

21. The auditor concluded under Finding 5 that the Mortgagor maintained only a Cash Disbursements Journal and an incomplete Cash Receipts Journal, but did not maintain a project general ledger and subsidiary journals in accordance with HUD requirements. (Audit Report at 9-10; App. Brief at 11-13.) I also find that Bulloch intentionally failed to submit the Project's 1980 and 1981 financial statements to proper HUD authorities as required. The Mortgagor had been previously advised of this deficiency in the 1978 annual CPA audit report and by correspondence from HUD. HUD's requirements for establishing a financial accounting system are set forth in HUD Handbook 4371.1, Financial Operations and Accounting Procedures for Insured Multifamily Projects. Paragraph 9(d) of the Regulatory Agreement requires that the Project books and accounts of operations conform to HUD's requirements.

22. Under Finding 6, the auditor found a substantial number of particular deficiencies in the Mortgagor's tenant eligibility and rental procedures. These included failure to verify tenants' income, failure to obtain required recertifications of income, and failure to execute current leases. The result was that at least four ineligible tenants were living in the Project, and the auditor inferred that other tenants might be ineligible or paying incorrect rents. In reviewing 69 tenant files which did not relate to units leased to the Las Vegas Housing Authority, the auditor found that three tenants files were not maintained at all; that there were four instances in which the tenants' income exceeded HUD's eligibility limits; twenty-three instances in which the tenants' income was not adequately verified, or where the tenants' income was not recertified as required, or where income verification was missing entirely; three instances in which leases were not in the files; forty-three instances in which the leases in the files had expired; and two instances in which a HUD Form 91705, Total Family Income Certification, was not on file as required (Audit Report at 10-11). HUD Handbook 4351.1 REV, Management of HUD-Insured Multifamily Projects Under Section 221(d)(3), specifies requirements for tenant eligibility and supporting documentation.

23. Under Finding 7, the auditor cited twenty-four examples culled from the Mortgagor's monthly rent role in which the gross potential annual dwelling rent income exceeded the amounts approved by HUD on June 8, 1977, in violation of the requirements of paragraph 4(b) of the Regulatory Agreement. Bulloch has not disputed that tenants of the Project were charged rents in excess of those approved by HUD, but has sought to justify the rents charged by various undocumented explanations. Bulloch's explanation recorded in the Audit Report was that a rent increase had been requested in accordance with HUD requirements, but when

HUD did not respond within a reasonable time, the requested increase was instituted. The auditors recommended reimbursement of the excess rent to the tenants and reduction of the rates to those approved in writing by HUD. (Audit Report at 12; App. Brief at 14-15.)

24. Under Finding 8, the auditor found twenty-one instances in which the Mortgagor had charged tenants not receiving Section 8 assistance for a security deposit, key deposit, and non-refundable cleaning deposit as a condition of occupancy, and that these amounts totaled more than the one month's rent allowed by HUD for security deposits under paragraph 6(g) of the Regulatory Agreement. (Audit Report at 12-13; App. Brief at 15; Exh. A-14; Audit Report at 12.)

25. The auditor's Finding 9, relating to fidelity bond coverage as required by paragraph 22 of HUD Handbook 4351.1 REV, Management of HUD-Insured Multifamily Projects, has been corrected, and the deficiency citation has been abandoned by the Government.

26. With the exceptions noted, these deficiencies cited in the Audit Report have not been resolved or cleared because Bulloch has willfully failed and refused either to respond appropriately to the citations or to remedy the deficiencies cited by complying with the cited requirement.

27. By letter to Bulloch dated June 20, 1981, William H. Harrison, Deputy Director for Housing Management, for the San Francisco Area Office, confirmed the results of a meeting on June 3, 1981, in the office of Mr. A.I. Robison, Regional Assistant in Las Vegas for United States Senator Paul Laxalt of Nevada. The meeting was held in an attempt to resolve HUD's concerns identified in various reviews "and to initiate action to improve the management of the property." In the letter Harrison stated that,

we feel that most of the problems at Cheyenne Square are directly attributed to ineffective management, and the hiring of an independent property management firm acceptable to HUD would alleviate this concern and would allow us to work closely together over the next twelve months to clear up all the outstanding audit findings and to improve the conditions of the project.

The letter indicated that Bulloch had agreed to hire a mutually satisfactory professional management agent effective November 1, 1981, a date chosen to accommodate personal considerations raised by Bulloch. This would have occurred after Harrison and Bulloch had interviewed three to five management firms. In the letter Harrison stated further that, in return, he had agreed on behalf of HUD, (1) to process a release from the Replacement Reserve Account to make necessary roof repairs, and (2) to process a rent

increase request to reflect current operating expense levels, using an unaudited financial report for the latest fiscal year, if prepared by a public accountant. Harrison indicated that both agreements were subject to the necessary documentation and adherence to technical requirements and HUD's regulations. Harrison indicated that the letter reflected his best recollection and that Bulloch should indicate any corrections. (Exh. G-6e.) There is no indication in the record that this was not an accurate summary of the results of the meeting, and I find that the results of the meeting were as Harrison recorded in the letter.

28. According to Harrison's affidavit dated April 30, 1982, in evidence, Bulloch did not hire a professional managing agent, despite an agreed upon deadline which had been extended to January 1, 1982. Harrison also indicated in his affidavit that his office still had received no substantive response from the Bullochs regarding the audit findings; that Bulloch had continued to ignore HUD's offers to be available to discuss HUD's concerns; that the management deficiencies cited in the Audit Report, a 1980 Management Review, and various documented site visits, of which the most recent was October 21, 1981, had not been corrected and had continued to occur. He also stated that Bulloch had not responded to requests for required Audited Annual Financial Statements for fiscal years ending 1980 and 1981, and that no Monthly Reports for Establishing Net Income (HUD Form 93479/80/81) had been received since April 1979. (Exh. G-7.) Two page financial statements titled "Statement of Profit and Loss" for the year ending December 31, 1980 and 1981 were submitted by Bulloch as evidence in the record before me, but there is no evidence that they have been submitted as required to the responsible Area Office or HUD Headquarters (Exh. A-11, A-12).

29. In a memorandum, dated July 2, 1981, containing an updated status report of the efforts to clear the audit findings, Harrison transmitted the following recommendation to Harold L. Conway, Administrative Support Division:

To summarize, as of this date the owner has taken no affirmative steps to resolve the audit findings. We recommend therefore that Headquarters initiate any action previously contemplated. Within the coming months we will have some indication of whether the owner is acting in good faith and we will keep you informed of any further developments in this regard. (Exh. G-[6f].)

30. The record is replete with evidence of protracted, bitter, and uncompromising hostility and intransigence by Bulloch toward HUD officials, primarily Harrison. While I would not condone the use of such a threat as Harrison is alleged to have made at a meeting on September 10, 1979, that "unless he

[Bulloch] put in professional management and accepted flex subsidy that he would cause so much bureaucratic harassment to this project that Mr. Bulloch would personally walk away from Cheyenne Square," I find no substantial evidence in this record of bureaucratic harassment. (Exh. A-31; App. Brief at 20.) I find no evidence that such an incident prevented Bulloch from resolving, or at least attempting to resolve, the issues raised by the findings in the Audit Report. Furthermore, regardless of the wisdom of Harrison's recommendation in the July 2, 1981, memorandum or its timing, I find no evidence in this record that either party was prevented from attempting to resolve the audit findings promptly after the meeting in Mr. Robison's office or from beginning the process of selecting a professional management agent.

31. In light of the circumstances, including Bulloch's history of refusals to conform to HUD's requirements despite repeated enforcement efforts, and the specific deficiencies reflected in the Audit Report, I do not find Bulloch's list of examples of alleged harassment by HUD set forth in his brief, or any other evidence, to be indications of bureaucratic harassment. (App. Brief at 20-21.) On this record, there is no evidence that audits by HUD's Inspector General, the Labor Department, the Nevada Industrial Commission, a HUD physical inspection, or a HUD management review would have been inappropriate or unreasonably motivated with respect to this Project. There is no evidence that HUD's denial of a request for approval of a rent increase or refusal to release funds from the replacement reserve account was so clearly unjustified as to constitute harassment. Nor is there a sufficient record to make any finding with respect to Bulloch's suggestion that he might have been improperly debarred from Section 8 participation with the North Las Vegas Housing Authority.

Discussion

The letters of recommendation submitted in connection with this proceeding suggest that Bulloch's reputation is considered by several responsible members of his community to be that of an honest, straight forward, and capable businessman and committed community leader. Nor do I doubt that Bulloch has committed substantial personal funds and much effort to the Cheyenne Square Apartments Project, which is in an area of Las Vegas where a number of other HUD-assisted projects have failed and have been acquired by the Department.

In his brief, Bulloch characterizes HUD's course of conduct, involving the Audit Report and the Government's brief as "representative of the pattern of blatant harassment and bad faith which have characterized HUD's relationship with us over the past several years." (App. Brief at 3.) However, the record is also clear that Bulloch has willfully failed and refused to comply with HUD's requirements as set forth in contracts, Handbooks, and other documents, and as interpreted and

communicated by William H. Harrison and other HUD officials. The record makes evident that Bulloch has not felt and does not feel compelled to conform to HUD's requirements with which he disagrees or of which he disapproves. He has a long history of such disapproval and resistance to HUD's requirements. I find no evidence that establishes that HUD or any official of HUD has acted in bad faith.

Bulloch and his wife are "contractors or grantees" within the definition in 24 C.F.R. §24.4(f). They are officers of a corporation which is the mortgagor of a multifamily project whose mortgage is insured by HUD and which at relevant times has received funds from HUD's Section 8 program assistance to the local Housing Authority which has leased several units of the Project. The Appellants' status in this regard is not in dispute.

A substantial number of specific and significant instances of Bulloch's relevant noncompliance with HUD's requirements was credibly identified by the Audit Report. In certain instances, the record before me demonstrates that certain of the auditor's findings, which I have noted, involve disputable technical interpretations of documents or factual relationships. However, I find on this written record viewed as a whole that the findings of the auditor were generally reliable. To the extent I have not questioned them, those findings provide a prima facie case establishing the numerous and substantial failures and deficiencies cited by HUD as the basis for the proposed debarment of the Appellants. Nothing in this record indicates that there was no substantial factual basis for the findings or that the audit investigation or its conclusions were improperly influenced by unprofessional motives or bad faith.

Bulloch, therefore, has the burden of proving that the findings on which HUD's debarment action is based are invalid. He has chosen to respond to the proposed debarment, pro se, on his own and his wife's behalf, on a written record. In general, he has failed to prove that the causes cited for the Government's action under 24 C.F.R. §24.6(a)(3), (4), and (5) with respect to him and his affiliates are insufficient or invalid or that, notwithstanding the inference of nonresponsibility to be drawn from the cited deficiencies, he is presently sufficiently responsible to do business with HUD.

24 C.F.R. §24.6 provides in relevant part cited by the Government:

Subject to the following conditions, the Department may debar a contractor or grantee in the public interest for any of the following causes:

(a) Causes.

* * *

(3) Violation of contract provisions, as set forth below, of a character which is regarded by the Department to be so serious as to justify debarment action:

(i) Willful failure to perform in accordance with the specifications or within the time limit provided in the contract.

(ii) A record of failure to perform, or of unsatisfactory performance, in accordance with the terms of one or more contracts: Provided, That such failure or unsatisfactory performance has occurred within a reasonable period of time preceding the determination to debar. Failure to perform or unsatisfactory performance which the contractor can show was caused by events beyond its control which were not reasonably foreseeable shall not be considered to be a basis for debarment provided that no fault or negligence of the firm or individual was involved.

* * *

(4) Any other cause of such serious compelling nature, affecting responsibility, as may be determined by the Assistant Secretary, to warrant debarment.

(5) Violation of any law, regulation, or procedure relating to the application for financial assistance, insurance, or guarantee or to the performance of obligations incurred pursuant to a grant of financial assistance, or conditional or final commitment to insure or guarantee.

Bulloch has indicated that because of his unsatisfactory relations with HUD officials, he was waiting for an impartial arbiter. That is no justification for his irresponsible conduct, however. Bulloch's evidence and argument have neither justified the deficiencies cited by the auditor, nor overcome his refusal to respond to HUD's demands that he conform his management of the Project to HUD's requirements. He has not proved that any of HUD's requirements in issue were erroneous or were beyond the authority of the officials involved. Nor has he established any immunity on his part from those requirements, or from the need to respond to the deficiencies cited in order to allow the audit to be closed.

Bulloch's persistent and willful refusal to conform to contractual requirements and programmatic procedures prescribed

by HUD officials within the scope of their authority is cause for debarment under 24 C.F.R. §§24.6(3), (4), and (5), as contended by the Government. Such conduct reflects a manifest and continuing lack of responsibility.

"Responsibility" is a term of art in government contract law that has been defined to include not only the ability to complete a contract successfully, but also the honesty and integrity of a contractor. Roemer v. Hoffman, 419 F. Supp. 130 (D. D.C. 1976); 49 Comp. Gen. 139 (1969); 39 Comp. Gen. 468 (1959); 34 Comp. Gen. 86 (1954). Although the test for debarment is whether the contractor is presently responsible, a lack of present responsibility may be inferred from past acts. Schlesinger v. Gates, 249 F. 2d 111 (D.C. Cir. 1957), cert. denied, 355 U.S. 939 (1958); Stanko Packing Co. v. Bergland, 489 F. Supp. 947, 949 (D. D.C. 1980); 46 Comp. Gen. 651, 658-59 (1967).

Even if cause for the Bullochs' debarment can be established under one or more of the cited clauses of 24 C.F.R. §24.6(a), the decision as to whether debarment is warranted is discretionary. 24 C.F.R. §24.6(b). In addition, consideration of significant mitigating factors offered by the contractor or grantee is mandated by Roemer v. Hoffman, *supra*. The Appellants' defense to the Government's effort to debar them is couched in terms of a denial of substantial fault, not proof of mitigating circumstances. Patricia Bulloch has the additional defense that she played only a passive and ignorant role, and exerted no control over the Corporation. Nevertheless, I have considered the matters which the Appellants have raised in relation to the findings in the Audit Report in the context of possible mitigation also, but have found them unpersuasive in that regard. Debarments are imposed to protect the public by insuring that the Government is not required to deal with contractors or grantees who are not presently responsible. Debarment is not to be imposed in order to punish a contractor or grantee for a past wrong. 24 C.F.R. §24.0; see, L.P. Steuart & Bros. v. Bowles, 322 U. S. 398 (1964); Gonzales v. Freeman, 334 F. 2d 570, 577 (D.C. Cir. 1964).

Debarment of Bulloch and his affiliate, Cheyenne Square Apartments, Inc., for the proposed five year period is appropriate and reasonably necessary to protect the interests of the public and the Government. The fact that Bulloch may have been a creative and dedicated contributor to community welfare does not provide him with immunity from compliance with HUD's requirements, as he seems to imply. Nor would such immunity be provided by his willingness to invest substantial personal resources in the Project without regard to HUD's technical requirements.

Bulloch's complaints of inappropriate conduct by William Harrison, who has served as Deputy Director for Housing Management in HUD's San Francisco Area Office, do not raise

either a substantial defense nor substantial circumstances in mitigation of the causes for debarment which have been established on this record. Nor is there evidence that HUD failed in any way to cooperate, or to hope for fulfillment of Bulloch's agreement, or that HUD engaged in any overt conduct in its dealings with Bulloch which was inconsistent with the agreements reached at the meeting between Bulloch and HUD on June 3, 1981. Bulloch's evidence does not show that he either acted to conform his management practices to the requirements cited in the Audit Report or that he took affirmative steps to reach accommodation as to these issues after that meeting. Rather, the record shows that his intransigent posture has never changed.


The evidence that Harrison threatened Bulloch that he would "cause so much bureaucratic harassment to this project that Mr. Bulloch would walk away from Cheyenne Square," assuming it occurred in September 1979 as alleged, might well reflect personal animosity. But it must be viewed in the context of the very antagonistic relations which had developed over a protracted period as a result of Harrison's attempt to enforce HUD regulations as he perceived them and Bulloch's obstructionist conduct. There is also no showing that bureaucratic harassment formed any part of the basis for the proposed debarment action. I find this episode to be without material significance in light of the detailed and objective Audit Findings and the clear evidence of Bulloch's protractedly unyielding response to them.

The personalities which may have affected the course of events are immaterial in the face of a record containing such clear specific factual bases for the cited deficiencies and Bulloch's categorical refusal to respond to them through appropriate channels and procedures. I find no mitigating circumstances to have been shown which alleviate either the deficiencies found by the auditor or Bulloch's failure to respond to them. I therefore find that Bulloch's five-year debarment as proposed is necessary, reasonable, and appropriate under the applicable standards of 24 C.F.R. Part 24.

Patricia Bulloch had only a nominal role as Secretary-Treasurer of the Mortgagor Corporation. The Corporation was operated and managed by her husband who was wholly and exclusively in control of it. Since the Government has offered no evidence that she at any time actually participated in Bulloch's non-responsible conduct disclosed by this record or any course of conduct which would be a cause for her debarment, there is no legal basis for her debarment on the record before me. Accordingly, she should not be debarred and her suspension should be immediately terminated. Azzarelli Constr. Co. and Joseph I. Azzarelli, HUDBCA 82-670-D11, 82-1 BCA ¶15,676.

Conclusion

Appellant BOYD C. BULLOCH and his affiliate, CHEYENNE SQUARE APARTMENTS, INC., shall be debarred for five years. Credit is given for the period that these Appellants have been suspended, so that the debarment period should end on April 20, 1986. The Appellant Patricia Bulloch shall not be debarred, and her temporary suspension shall be terminated immediately.


EDWARD TERHUNE MILLER
Administrative Judge

Issued at Washington, D. C.
May 31, 1984