

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

In the Matter of :
 :
MICHAEL J. PAPA, SR. : HUDBCA No. 83-770-D14
 :
Appellant :
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Daniel Y. Sachs, Esquire
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U. S. Department of Housing
and Urban Development
Washington, D. C. 20410 For the Government

DECISION

Statement of the Case

By letter dated September 7, 1982, the Hartford Area Office of the U. S. Department of Housing and Urban Development ("HUD") notified Mr. Michael J. Papa, Sr. ("Appellant"), that it had imposed a sanction temporarily denying his participation and the participation of Michael J. Papa Associates in multifamily projects insured or assisted by HUD within the jurisdiction of the Hartford Area Office for a period of twelve (12) months pursuant to 24 C.F.R. §24.18(a)(3)(i). The reason given for the imposition of the temporary denial of participation ("TDP") was the failure of Michael J. Papa Associates and Appellant, as managing partner of Michael J. Papa Associates, to comply with the terms of the Regulatory Agreement incorporated into Contract Number 017-44113LDP between Michael J. Papa Associates, a general partnership, and the Secretary of Housing and Urban Development for mortgage insurance under Section 236 of the National Housing Act.

Appellant made a timely request for an informal hearing on the TDP pursuant to 24 C.F.R. §24.18(a)(5)(iii). A hearing was not requested on behalf of Michael J. Papa Associates. The

informal hearing was held on November 10, 1982, in the HUD Hartford Area Office. Subsequent to the informal hearing, the HUD Hartford Area Manager issued an affirmation and modification of the original TDP, pursuant to 24 C.F.R. §24.18(a)(5)(iii) in which he reduced the original period of temporary denial of participation from twelve months to eight months.

By letter of November 17, 1982, Appellant requested a hearing pursuant to 24 C.F.R. §24.18(a)(5)(iv) and 24 C.F.R. §24.7(b) on the propriety of the TDP. At the hearing, counsel for Appellant moved that the TDP be voided for procedural reasons. That motion was denied. A motion by Appellant's counsel to reduce the scope of the TDP to the Section 236 program was taken under advisement.

Findings of Fact

Appellant was the managing partner of Michael J. Papa Associates, a general partnership, which owned and managed the Porter Street Apartments in Waterbury, Connecticut, a multi-family housing project. (Tr. 17.) In November of 1971, Appellant executed on behalf of the partnership a Regulatory Agreement between the partnership and HUD and a Mortgagor's Certificate for mortgage insurance under Section 236 of the National Housing Act. (Govt. Exhs. 1 and 2.) The final endorsement was made on October 29, 1973. (Govt. Exh. 5.)

Under the terms of the Regulatory Agreement, which is an essential component of the contractual relationship between the Secretary of Housing and Urban Development and Appellant's partnership, specific obligations were imposed on the Appellant and his partners. The Regulatory Agreement provided that:

1. Owners ... shall promptly make all payments due under the note and mortgage;

* * *

9. (d) The books and accounts of the operations of the mortgaged property and the project shall be kept in accordance with the requirements of the Commissioner.

(e) Within sixty days following the end of each fiscal year the Commissioner shall be furnished with a complete annual financial report based upon an examination of the books of the mortgagor prepared in accordance with the requirements of the Commissioner certified to by an officer or responsible Owner and, when required by the Commissioner, prepared and certified by a

Certified Public Accountant, or other person acceptable to the Commissioner.

* * *

11. Upon a violation of any of the above provisions of this Agreement by Owners, the Commissioner may give written notice, thereof, to Owners by registered or certified mail If such violation is not corrected to the satisfaction of the Commissioner within thirty (30) days after the date such notice is mailed or within such further time as the Commissioner reasonably determines is necessary to correct the violation, without further notice the Commissioner may declare a default under this Agreement effective on the date of such declaration of default and upon such default the Commissioner may:

(c) Take possession of the project ...
(Govt. Exh. 1.)

Michael J. Papa Associates as owner-manager of Porter Street Apartments defaulted on the mortgage payments in 1975, and again in 1977. (Tr. 56, 72-73.) The mortgage payment default in 1975 was subsequently cured, but the 1977 default on the mortgage payments was not cured and led to the assignment of the mortgage to HUD as mortgagee by the Federal National Mortgage Association (Tr. 25, 72-73). By letter dated April 23, 1977, addressed to Appellant and Michael J. Papa Associates from Mr. Joseph Gorecki, Loan Specialist Realty Officer in the HUD Hartford Area Office, notice was given of HUD's receipt of a Notice of Intention to assign the mortgage from the Federal National Mortgage Association as mortgagee because Michael J. Papa Associates, the mortgagor, had failed to make timely payments on the mortgage (Govt. Exh. 3; Tr. 25, 36).

By letter dated April 23, 1977, notice was given to Appellant and Michael J. Papa Associates that because the mortgage on the Porter Street Apartments was assigned to HUD, Michael J. Papa Associates was required by the FHA Regulations to submit to HUD's Washington, D. C. office monthly financial reports and any excess rental collections. (Govt. Exh. 3; Tr. 22-23.)

Michael J. Papa Associates did not make any payments on the mortgage after the mortgage was assigned to HUD in April of 1977. (Tr. 25.) Michael J. Papa Associates also failed to submit annual audited financial statements on the Porter Street Apartments to HUD, as required by the Regulatory Agreement, from 1973 through 1982, excluding 1975, or to submit monthly financial

reports, as required by FHA regulations, when the mortgage went into default in January 1977. (Govt. Exh. 3; Tr. 24.)

By letter dated August 5, 1977, from Mr. Gorecki of the HUD Hartford Area Office to Appellant and Michael J. Papa Associates, notice was given to Appellant and Michael J. Papa Associates of the failure to submit monthly financial reports. That failure was cited as a violation of paragraph 9(d) of the Regulatory Agreement. The letter warned that if the violation were not corrected immediately, a default might be declared under the Regulatory Agreement. (Govt. Exh. 3.) After notice was given of the violations of the Regulatory Agreement by HUD's letter of August 5, 1977, Michael J. Papa Associates failed to correct the violations. A letter dated April 11, 1978, from John Conway, Acting Chief, Loan Management Branch, HUD Hartford Area Office, addressed to Appellant and Michael J. Papa Associates, declared a default of the Agreement. (Govt. Exh. 3.) HUD took possession of the Porter Street Apartments as mortgagee in January, 1979 and foreclosed on the mortgage on July 30, 1982. (Tr. 10-11). By letter of September 7, 1982, the HUD Hartford Area Office invoked a TDP against Michael J. Papa Associates and Appellant for their failure to comply with the terms of the Regulatory Agreement which Appellant had signed as managing partner for the Porter Street Apartments (Govt. Exh. 1).

Appellant was aware of the financial difficulties the partnership was having with the Porter Street project as early as 1973. He knew that the partnership had defaulted on the mortgage payments in 1975 and he was also aware of the communications from HUD concerning the mortgage payment default in 1977. (Tr. 82, 114.) Furthermore, he was fully aware of the financial reporting requirements imposed upon the partnership and the failure of the partnership to comply with those requirements. (Tr. 89.)

From December, 1976 to April, 1978, Appellant was seriously ill and was not active in the partnership. In 1977, during his absence from the business due to illness, his two partners abandoned their partnership responsibilities and became involved in the food business together. A project coordinator and a secretary were left to manage the Porter Street Apartments as best they could. (Tr. 82, 118-119.) In April, 1978, Appellant returned to his place of business. He shared office space with the secretary who operated the Porter Street Apartments on behalf of the partnership from 1977 until foreclosure took place in 1982, but never asked her anything about the property during that entire time. (Tr. 103.) Although fully aware of the reporting requirements of the Regulatory Agreement, Appellant made no attempt to comply with them after he returned to his business because, as he testified, he did not believe that it was his "function" to make either the mortgage payments or file the required financial reports. (Tr. 112-113.) Appellant also testified that he had determined that it was not his function to apply for a rent increase in 1978, despite the fact that a rent

increase might have improved the financial ability of the partnership to meet its mortgage obligation. (Tr. 99.) Appellant testified that he was aware of his obligations as a partner under law and his responsibilities to HUD after his partners had left, but offered no coherent explanation for his refusal to fulfill any of the responsibilities of the partnership or even notify HUD that his partners had abdicated their partnership roles. (Tr. 114.)

I find that the failure to make prompt payments due under the note and mortgage and the failure to file annual financial reports for any year except 1975 were in violation of Paragraphs 1 and 9(3) of the Regulatory Agreement between Michael J. Papa Associates and HUD. I further find that Appellant, as managing partner of the partnership, deliberately took no action to either prevent or cure those violations.

Discussion

The purpose of a Temporary Denial of Participation, comparable to that of the administrative sanction of debarment, is to assure the Government that contracts are awarded to responsible contractors and grantees who can demonstrate that public funds will be properly utilized. 24 C.F.R. §24.0. Appellant is a "contractor or grantee" within the meaning of the departmental regulation because he, as managing partner of Michael J. Papa Associates, is a participant in a program in which HUD is the insurer. 24 C.F.R. §24.4(f).

The basis for imposition of the TDP upon Appellant was the failure of Michael J. Papa Associates to comply with the requirements of the Regulatory Agreement applicable to the Porter Street Apartments, and Appellant's failure as its managing partner to take any action to either prevent or correct those failures of the partnership. That failure put the Department at increasingly serious financial risk and loss by causing first an assignment of the mortgage to HUD for default on payment of the mortgage and then a default and foreclosure on the property itself. I find that Appellant's course of conduct constitutes adequate evidence of irregularities of past performance as a HUD contractor in a departmental program to support imposition of the TDP. 24 C.F.R. §24.18(a)(2)(ii). Furthermore, no attempt to correct those failures has been made at any time and therefore the record does not support early termination of the sanction.

Although the violations of the Regulatory Agreement were the responsibility of the partnership entity, Appellant's failure to take any positive action on behalf of the partnership was inexcusable. His testimony that it was not his function to fulfill the basic obligations to which he had committed the partnership as its managing partner is not only incorrect, but egregiously irresponsible. The State of Connecticut, in which

Appellant does business, has adopted the Uniform Partnership Act. Title 34, Connecticut Statutes, Chapter 611. The Uniform Partnership Act and the Connecticut Statute provide that a general partner in a partnership is jointly and severally liable for all wrongful acts and omissions of the partnership and is jointly liable with the other partners for all other debts and obligations of the partnership. Title 34, Connecticut Statutes, Section 34.53.

Appellant had a personal responsibility as the managing partner of Michael J. Papa Associates to make sure that acts and omissions on behalf of the partnership that were in derogation of the partnership's obligations to HUD did not occur. His cavalier attitude toward the partnership's continuing and repeated breach of contract constituted a violation of his duty as a partner. It was his function to make sure that the requisite financial statements were filed by the partnership, and that either the mortgage payments were made or a work-out agreement for delayed payment of the mortgage was arranged with HUD.

Appellant contends that his denial of participation should have been limited to the Section 236 program to which the Regulatory Agreement was applicable. Appellant argues that, by temporarily denying him participation in all multifamily projects assisted or insured by HUD within the jurisdiction of the HUD Hartford Area Office, the Area Manager exceeded his authority under 24 C.F.R. §24.18(3)(i), which provides that a "denial of participation is limited to the program under which the offense occurred."

The word "program" is not defined in the regulation. However, the regulatory definition of a temporary denial of participation does state that the sanction is "... limited in effect to ... the specific program under which this action is taken." 24 C.F.R. §24.4 (h) (Emphasis added). The Department contends that a 1977 legal interpretation of the meaning of "program" by the HUD General Counsel is applicable in the instant case. The General Counsel construed the meaning of "program" to include "all functions within the jurisdiction of an Assistant Secretary."

I find that the interpretation of the word "program" by the General Counsel offers little useful guidance in construing the scope of the language of the regulation applicable to a TDP. A TDP is not imposed by an Assistant Secretary but by a HUD Area Director, Insuring Office Director or Regional Administrator. 24 C.F.R. §24.18(a)(1). The function of a given Assistant Secretary would be irrelevant to consideration by an Area Director in deciding the scope of a TDP. Assistant Secretaries have a wide variety of functions within their jurisdiction. The TDP applied to Appellant did not exclude him from participation in all programs within the purview of the Assistant Secretary for Housing. Rather, it was limited to multifamily projects insured

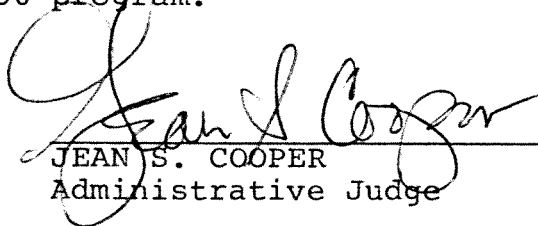
or assisted by HUD. Thus, the TDP applied in this case was not applied according to the General Counsel's very broad interpretation of the meaning of "program."

While the overall policy objective of the various departmental sanctions is to protect the public interest, the TDP sanction is a short, local, specific sanction as compared to the broad scope of a debarment or suspension. I find that the definition of a TDP in the regulation gives the best guidance as to the scope of the TDP sanction. The use of the word "specific" as a modifier to the word "program" argues against a finding that the "specific program" in the context of this case encompasses all multifamily projects insured or assisted by HUD.

The specific program in this case is the Section 236 program. 1/ The scope of the TDP applies to Appellant exceeded the appropriate scope of the sanction, as defined, because it included all of the programs involving multifamily project insured or assisted by HUD. Therefore, I find that the HUD Area Manager exceeded the regulatory scope of the TDP sanction by extending it to programs beyond Section 236, the specific program under which the offense occurred.

Conclusion

The temporary denial of participation of Michael J. Papa, Sr. and Michael J. Papa Associates is sustained, but the scope of the sanction, as applied, exceeded the appropriate limits of the sanction. The scope of the sanction should have been limited to the Section 236 program.


JEAN S. COOPER
Administrative Judge

Dated: This 25th day of May, 1983.

1/ The Section 236 program is not presently funded for new loans. However, Section 236 is part of the National Housing Act and existing Section 236 mortgages are being serviced under the program.