

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

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In the Matter of:	:	
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JEROME W. CURRY and JEROME W.	:	HUDBCA No. 84-864-D26
CURRY AND ASSOCIATES, INC.,	:	Docket No. 84-937-DB
	:	
Respondents	:	
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636 Logan Building  
Fifth Avenue & Union Street  
Seattle, Washington 98101                      For the Respondents

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Department of Housing and  
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DETERMINATION

Statement of the Case

This case comes before me as the result of a request for a hearing on a decision by the Multifamily Participation Review Committee ("MPRC"), U.S. Department of Housing and Urban Development ("HUD"), granting conditional approval of the participation of Jerome W. Curry and Associates, Inc. ("JWCA") as management agent for Kawabe Memorial House ("Kawabe House"), a HUD-insured project. The conditional approval prohibits Jerome W. Curry ("Curry"), sole owner of JWCA, from personally representing Kawabe House before HUD. The reason given for the limitation on Curry's personal representation is that it would be in violation of 18 U.S.C. §207(a), a provision of the Ethics in Government Act of 1978.

Curry and JWCA, Respondents, made a timely request for a hearing on the propriety of the conditional approval. Respondents contend that, based on applicable case law, Curry would not be in violation of 18 U.S.C. §207(a) if he represented Kawabe House before HUD. They contend that because interpretation of the scope of 18 U.S.C. §207 was the sole reason for withholding unconditional approval of Respondents, the

decision to grant conditional approval was incorrect. The Government contends that the legal interpretation of 18 U.S.C. §207(a) relied upon by the MPRC was correct, and that, in any event, a Departmental hearing officer lacks jurisdiction to interpret or construe 18 U.S.C. §207(a) in the context of a hearing. This determination of findings of fact and conclusions of law issued pursuant to 24 C.F.R. §200.245 is based on the record established at the hearing and the briefs submitted by the parties.

#### Findings of Fact

1. JWCA is a corporation chartered in July, 1983 by Curry for the purpose of providing consulting and management services in the field of housing and real estate. Curry is the sole owner and only employee of JWCA. (Tr. 64.)

2. Prior to forming JWCA, Curry had been employed by the HUD Seattle Area Office (and its predecessor FHA) from October, 1969 until May 20, 1983. From 1970 until December 10, 1979, Curry was the Director of Loan Management for the Seattle Area Office. On December 10, 1979, he was reassigned against his will and refused to report for his new assignment. From December 10, 1979 until November 2, 1981, Curry was on leave in protest of the reassignment. From November 2, 1981 until May 20, 1983, Curry served as Special Assistant to the Director of Housing, Seattle Area Office. His employment with HUD terminated on May 20, 1983. (Tr. 65-68.)

3. The regular duties of the Director of Loan Management ("Director") included from 1970-79, and still include, processing requests for rental increases from HUD insured or subsidized projects, making sure that project reserve accounts are adequate, releasing funds from project reserve accounts, causing inspections and reviews of HUD projects to be performed, and making sure that financial statements are filed with the Department. The Director delegates most of his duties to the loan servicers under his supervision, but does become involved in a project when he is personally asked to do so or the problems are unusually complex. The Director ordinarily relies on the recommendations of the loan servicers when making decisions on the matters within his jurisdiction. (Tr. 20, 29.)

4. The Director approves or denies requests for both rental increases and requests for release of reserve funds by applying set formulae and criteria available to the public. The same formulae and criteria have been used for a number of years, including the period during which Curry served as Director. In addition to the published formulae and criteria, and only other information used by the Director in processing rental increase or reserve fund requests is the information supplied by the requester in support of the request. The Director has little latitude in making decisions on rental increase or reserve fund

requests. The only criterion for which it is possible for him to exercise any discretion is that of allowable property expenses, but his discretion is very limited and must be based on the information submitted by the requester. (Tr. 29, 31.)

5. New information is submitted each time a project files a rental increase request or a request for release of reserve funds. For each request, the Director and his subordinates must reapply the applicable criteria and formulae. The basic data for each request is different, although the requester is the same. Each request is treated as a separate matter requiring a new evaluation. (Tr. 32, 92.)

6. In his position as Director, Curry was directly and personally involved in activities and decisions concerning the funding and management of Kawabe House, a multifamily housing project insured by HUD. Those activities and decisions included reviewing requests for rental increases submitted by Kawabe House for HUD approval, discussing problems concerning removal of a management agent from the project, and discussing problems concerning the project's Board of Directors. (Tr. 66, 81-82.)

7. From December 10, 1979 until termination of his employment with HUD on May 20, 1983, Curry did not participate directly or indirectly in any matter concerning Kawabe House (Tr. 67, Stipulation of the Parties at Tr. 68).

8. In June, 1983, Takeshi Kubota, the Chairman of the Board of Kawabe House, requested Curry's assistance in representing the project before HUD. In particular, Kubota wanted Curry to help prepare a Request for Rental Increase, and represent Kawabe House before HUD on that matter. In addition, Kawabe House was having difficulties getting funds released by HUD from the reserve account. Curry agreed to represent Kawabe House before HUD on the rental increase request, the reserve fund problem and other matters. (Exh. R #1; Tr. 88-91.)

9. No proprietary information that would have been available to Curry during his tenure as Director would be used by him as representative of Kawabe House. The specific matters and problems involving Kawabe House that he dealt with personally during his tenure as Director have all been completed. Matters that would now concern Kawabe House are different than those with which Curry had contact as Director. (Tr. 90-92.)

10. HUD requires that a Form 2530 Previous Participation Certification be filed by all individuals or principals in businesses who will play a principal role in the ownership or management of a HUD-owned, assisted or insured multifamily project (Exh. G #3).

11. On July 18, 1983, Curry filed a Form 2530 with HUD, apparently for blanket approval of his representation of unspecified "HUD clients" (Exhs. R #3, R #4; Tr. 69-70).

12. Before his 2530 application was approved, Curry contacted HUD's Management Division on behalf of Kawabe House. Curry was told by HUD that he could not act as an agent for Kawabe House unless he filed a Form 2530 for that specific purpose. (Exh. R #3.)

13. Curry filed a second Form 2530 dated November 1, 1983. He listed "Jerome W. Curry and Associates, Inc." as the principal participant and signed the form as President of JWCA. He indicated that the functions JWCA would perform in relation to Kawabe House were "Developer, Owner, Consultant, Mg. Agent." (Exh. G #3, emphasis supplied.)

14. The HUD Regional Counsel issued a legal opinion in which he concluded that Curry could not represent Kawabe House before HUD in any way, including submission of the project's financial statements or any documents related to rental increase requests by Kawabe House, or personal contact with HUD employees to discuss Kawabe House. The Regional Counsel based his legal opinion on his interpretation of the restrictions on activities of former Government employees in 18 U.S.C. §207(a) and 24 C.F.R. §0.735-213. (Exh. R #2.)

15. Curry's 2530 application was referred to HUD's Previous Participation Branch in Washington, D. C. The Previous Participation Branch requested a legal opinion from David White, HUD Assistant General Counsel for Administrative Law, on the question of whether Curry's personal representation of Kawabe House was precluded by 18 U.S.C. §207(a). White notified the Previous Participation Branch by memorandum dated January 13, 1984 that he agreed with the legal opinion of HUD's Regional Counsel that Curry "... is barred from 18 U.S.C. §207(a) from acting as management agent for this project." White attached copies of two letters, dated December 16, 1983 and January 11, 1984, that he had written to Curry outlining the basis for his legal opinion. (Exhs. G #4, G #5, G #6.)

16. The Previous Participation Branch referred Curry's case to the MPRC for review, together with the legal opinion given by White. The MPRC considered itself bound by the legal opinion and concluded that if Curry's participation as a principal of Kawabe House would be in violation of criminal law, the project could be imperiled by his representation. The MPRC decided to grant JWCA a conditional approval, which would allow the corporation to represent Kawabe House, but forbade any personal representation of Kawabe House before HUD by Curry. The MPRC was aware that the corporation would have to hire an employee to perform those representation functions. (Exhs. G #7, G #8; Tr. 38, 41-42, 48-50.)

17. The legal opinion on which the MPRC relied discussed no case law interpreting the scope of 18 U.S.C. §207(a). The rationale of the legal opinion was outlined in a letter dated December 16, 1983, to Curry from White. That letter was provided to the MPRC by HUD's Office of General Counsel as a statement of the law as it applied to Curry. The pertinent part of the letter opinion was as follows:

As you know, 18 U.S.C. §207(a) prohibits a former employee from representing another before the United States in connection with any particular matter involving a specific party in which the employee participated personally and substantially during Government service. A particular matter "typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identifiable parties." 5 C.F.R. §737.5(c)(1). The same particular matter may continue in part or in another form. 5 C.F.R. §737.5(c)(4). In addition, the former employee's involvement in such a matter must have been personal and substantial, and may be exercised through decision, approval, disapproval, recommendation, the rendering of advice or investigation.

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A former federal employee is also prohibited, for two years, from representing another before the United States in connection with a particular matter, involving a specific party, if the matter was pending under the person's official responsibility within one year prior to the termination of that responsibility. 18 U.S.C. §207(b)(1). The types of representational activities prohibited are the same as those barred by 18 U.S.C. §207(a), discussed above.

In this case, Mr. Taylor found that as Chief, Loan Management Branch, Seattle Area Office, you were personally and substantially involved in a variety of matters concerning Kawabe Memorial House, such as review and approval of requests for rent increases and submissions of financial statements. Such activities amount to personal and substantial involvement in a particular matter within the meaning of 18 U.S.C. §207(a). Therefore you may not represent another before HUD, or any other agency or court, concerning the same particular matter (Kawabe Memorial House). (Exh. G #5.)

18. Curry had taken issue in writing with the legal opinion contained in the letter of December 16, 1983 on which the MPRC relied, as well as with the prior legal opinions of the Regional Counsel. In a letter dated December 20, 1983, Curry responded to the December 16 letter as follows:

First, as the former Chief, Loan Management Branch I did not perform "ANY" personally and substantially "ACTS" that could be categorize (sic) as being "INVOLVED IN" since 12/7/79. The "PARTICULAR MATTERS" that I was "INVOLVED IN" prior to 12/7/79 were of a "ONE TIME MATTER" and has long ago been completed.... NO MATTERS OR ISSUES CURRENTLY HAS ANYTHING TO DO WITH THE PERIOD (Prior to 12/7/79) WHEN I WAS THE CHIEF, Loan Management Branch. (Exh. R #6.)

19. Curry's legal position as outlined in a series of letters he had sent to the Regional Counsel, the Assistant General Counsel, and the HUD Director of Participation and Compliance was known to the MPRC (Exh. G #8).

20. By letter dated February 24, 1984, Curry was notified by the MPRC of its decision to grant conditional approval to JWCA as management agent for Kawabe House. The letter stated that:

...The Committee was advised by the General Counsel's Office that the prohibitions imposed by the applicable statutes do not prohibit either you or your firm from being granted approval as management agent for Kawabe Memorial House. Rather, the prohibitions apply to any representations you might make before the Department in carrying out actual management activities relating to the project. (Exh. G #8.)

#### DISCUSSION

Two issues are raised in this case. The first issue is whether the Administrative Judge appointed as the hearing officer has jurisdiction in this proceeding to "override" or any way deviate from the legal opinion given by the Office of General Counsel to the MPRC that Jerome Curry would be in violation of 18 U.S.C. §207 if he personally represented Kawabe House before the Department. The second issue, provided that jurisdiction attaches, is whether Curry's personal representation of Kawabe House before the Department would constitute a violation of 18 U.S.C. §207.

##### I. Jurisdiction

The right to a hearing when the MPRC grants conditional, rather than unconditional, approval of participation of a principal in a HUD multifamily project owned, financed or insured by HUD is governed by 24 C.F.R. §200.243. That regulation provides that the principal may request a hearing in accordance with 24 CFR, Part 24. The procedures at the hearing are those set forth in Part 24, excepted as modified by 24 CFR §200.245. 24 C.F.R. §200.243(b). 24 CFR §200.245 provides as follows:

The Hearing Officer will determine the facts and the law relevant to the issues and will report the determination in writing to the Review Committee and to the principal. The

Review Committee shall be bound by the Hearing Officer's findings of fact and law and will make a final decision based upon its application of the uniform underwriting and risk evaluation standards contained in this Part. It will notify principal of the final action taken. (Emphasis supplied.)

Government counsel contends that not only the MPRC but the Administrative Judge is bound by the legal opinion of HUD's Assistant General Counsel David White that Curry's direct representation of Kawabe House would be in violation of 18 U.S.C. §207(a). In effect, it is Government counsel's position that the Administrative Judge lacks jurisdiction to make an independent interpretation and application of that statute to the facts established at the hearing. Government counsel relies on 24 C.F.R. §0.735-104 to establish the proposition that only the "Departmental counselor" or "deputy counselor" may give a legal opinion concerning or otherwise construing the provisions of the Ethics in Government Act, which includes 18 U.S.C. §207(a).

24 C.F.R. §0.735-104 provides that a Deputy Counselor may be designated "to give authoritative advice and guidance to current and prospective employees and special Government employees who seek advice and guidance on questions of conflict of interest and other matters covered by this part." One of the matters covered by the regulation is prohibited activities by former employees, found at 24 C.F.R. §0.735-213, which implements 18 U.S.C. §207(a) and (b). A former government employee may request an advisory opinion on possible violation of 18 U.S.C. §207 from the agency Deputy Counselor or from the Office of Government Ethics, Office of Personnel Management. 5 CFR, Part 738 Subpart C. An opinion given by the Office of Personnel Management may be relied upon by the affected former employee. Id. Curry had not sought an opinion from either source.

The regulatory procedures for advice and formal advisory opinions on possible violations of the Ethics in Government Act in no way preclude interpretation or application of the requirements of that statute in an unrelated proceeding in which the statute is raised as an affirmative defense or otherwise interjected into the proceeding. In this case, the matter for decision is whether the conditional approval of the MPRC was appropriate as a matter of law under the facts established. In order to fulfill my regulatory duty as an independent hearing officer, which is to make findings of fact and conclusions of law in regard to Respondent's case based on the record established before me, I must perform an independent assessment of both the factual evidence and the relevant law. Of necessity, I must consider the facts established before me in relation to 18 U.S.C. §207 because the action of the MPRC was predicated entirely on its understanding of how the facts in this case related to the strictures of that statute as interpreted by HUD's Office of the General Counsel.

The Office of General Counsel, in which Mr. White is employed, represents parties in an adversary role before the Departmental hearing officers. To even suggest that an independent hearing officer is bound by the legal advice of adversary counsel is to completely undermine the neutrality and independence that is at the heart of the administrative law process. Not only do the regulations relied on by the Government not mandate such a result, but such a result would be wholly inappropriate. The only forum Respondents have available for a hearing on and possible redress of the action of the MPRC is a hearing before a Departmental hearing officer pursuant to 24 C.F.R. §200.243.

It is the hearing officer, not the Office of General Counsel, whose duty it is to make the required findings of fact and conclusions of law that will be applied by the MPRC. 24 C.F.R. §200.245. The MPRC is bound by those findings and conclusions. Id. Although I lack jurisdiction to afford relief or redress under 18 U.S.C. §207, a point which I emphasized to Respondents at the hearing, I do have jurisdiction to consider whether that statute has been improperly applied to a matter in contest in a proceeding over which I do have jurisdiction. Space Age Engineering, Inc. v. U.S., 4 Cl. Ct. 739 (1984).

## II. Applicability of 18 U.S.C. §207 to the 2530 Application of Respondents

18 U.S.C. §207, in relevant part, provides as follows:

### §207. Disqualification of former officers and employees; disqualification of partners of current officers and employees

(a) Whoever, having been an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, including a special Government employee, after his employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, any other person (except the United States), in any formal or informal appearance before, or, with the intent to influence makes any oral or written communication on behalf of any other person (except the United States) to

(1) any department, agency, court, court-martial, or any civil, military, or naval commission of the United States or the District of Columbia, or any officer or employee thereof, and

(2) in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other



particular matter involving a specific party or parties in which the United States or the District of Columbia is a party or has a direct and substantial interest, and

(3) in which he participated personally and substantially as an officer or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, while so employed; or

(b) Whoever, (i) having been so employed, within two years after his employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, any other person (except the United States), in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of any other person (except the United States) to, or (ii) having been so employed and as specified in subsection (d) of this section, within two years after his employment has ceased, knowingly represents or aids, counsels, advises, consults, or assists in representing any other person (except the United States) by personal presence at any formal or informal appearance before

(1) any department, agency, court, court-marital, or any civil, military or naval commission of the United States or the District of Columbia, or any officer or employee thereof, and

(2) in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in which the United States or the District of Columbia is a party or has a direct and substantial interest, and

(3) as to (i), which was actually pending under his official responsibility as an officer or employee within a period of one year prior to the termination of such responsibility, or, as to (ii), in which he participated personally and substantially as an officer or employee....

The critical element of the legal opinion construing 18 U.S.C. §207 on which the MPRC relied was the interpretation of the scope of the phrase "particular matter" in §207(a)(2). It interpreted "particular matter" broadly to apply to Kawabe House and anything having to do with Kawabe House in relation to HUD, including requests for rental increases and release of funds from the reserve account. On that basis, the HUD Office of General

Counsel concluded that Curry could never represent Kawabe House directly before HUD or make oral or written communications concerning it. The MPRC's action granting conditional approval was predicated solely on that legal opinion construing the scope of 18 U.S.C. §207(a)(2).

The purpose of the Ethics in Government Act of 1978 is to avoid actual conflicts of interest or undue influence. Space Age Engineering, Inc. v. United States, supra, at 744. It is difficult to see how Jerome Curry would be guilty of a conflict of interest by representing Kawabe House before HUD. His contacts with any matters concerning Kawabe House while a Government employee are so remote in time as to render the notion ridiculous. Furthermore, there are no facts in the record that would lead me to conclude that Curry's representation of Kawabe House before HUD would give it an unfair advantage.

The legal opinion on which the MPRC relied failed to recognize the purpose of the statute, or to discuss or distinguish the case law construing the phrase "particular matter" in 18 U.S.C. §207. The broad construction of the phrase "particular matter" applied by the HUD Office of General Counsel was rejected by the United States Court of Appeals for the Federal Circuit in the case of CACI, Inc.-Federal v. United States, 719 F.2d 1567 (Fed. Cir. 1983). The legal opinion also appeared to disregard the many factors set forth in the regulation 5 CFR §737(c), implementing the statute, to determine what constitutes a same "particular matter." 5 CFR §737.5(c)(4) exhorts the agency to consider ... "the extent to which the matters involve the same basic facts ... time elapsed, the same confidential information," as much as whether the matters involve the same or related parties. The legal opinion in question restricted itself to the most general factor--that Kawabe House would always be the party involved in matters Curry would bring before HUD.

The facts in CACI are instructive. In CACI, a former Department of Justice employee named Stevens had served as chief of the Department's proposal evaluation team for procurement contracts for litigation support services. Stevens left his Government position and became vice-president of a private corporation. Subsequently, Stevens prepared and presented the corporation's proposal for a litigation support services contract to the Department of Justice. The proposal evaluation team ranked the corporation's proposal best. Another proposer protested the evaluation, charging conflict of interest and violation of 18 U.S.C. §207 by Stevens. The protester contended that the contract proposal prepared and presented by Stevens concerned the same "particular matter" as the proposals which Stevens had formerly evaluated while at the Department of Justice.

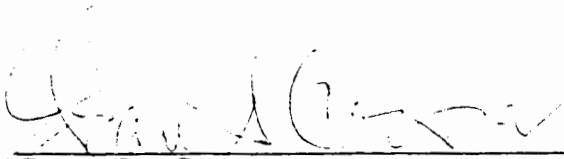
The Court of Appeals rejected the construction of the phrase "particular matter" relied on by the protester in CACI as including all proposals for litigation support service contracts with the Department of Justice. The Court of Appeals concluded that the contract proposal prepared by Stevens was not the same "particular matter" as he had dealt with while a Government employee. The Court placed reliance on the fact that the evaluation criteria applied by the Department of Justice to the proposal had not been created by Stevens and the new contract for which Stevens prepared the proposal was not the same contract or a "follow-on" contract to the ones he had been involved with as a Government employee. The Court concluded that Stevens had not violated 18 U.S.C. §207 by presenting his corporation's proposal to the administrative body on which he had formerly served and evaluated similar proposals. CACI, Inc.-Federal v. U.S., supra, at 1576.

While the facts in the instant case are different than those presented in CACI, the problem is decidedly similar. Curry's activities on behalf of Kawabe House would be analogous to Stevens' activities on behalf of his corporation. In neither case would those activities involve the same "particular matter" as either Curry or Stevens participated in personally and substantially as Government employees. The two main subjects on which Curry would represent Kawabe House before HUD are rental increase requests and reserve fund release requests. For purposes of this case before me, each request for a rental increase or a request to release funds from the reserve account is a new request, standing on its own, separate and distinct from prior requests based on different facts. Substantial time has elapsed since Curry was involved in any way in evaluating rental increase requests from any HUD project, let alone Kawabe House. At no time during his employment with HUD did Curry have the discretion to create or change the relevant evaluation criteria. The application of the evaluation criteria to the facts presented in a rental increase request were all but ministerial in nature. Furthermore, I can find no areas of possible representation in which Curry would be involved on behalf of Kawabe House that would concern either the same facts or involve proprietary information that Curry had because of his prior employment with HUD. For these reasons, I find that Curry's activities as agent for Kawabe House would not involve the same "particular matter" as any prior matter or request presented to Curry made while he was a Government employee and are therefore outside the strictures of 18 U.S.C. §207(a). CACI, Inc.-Federal v. U. S., supra; 5 CFR §737(c)(4). The mere fact that they would concern Kawabe House does not make them the same "particular matter."

Nonetheless, this case presents a very difficult situation. As stated previously in the section of this decision on jurisdiction, I do not have jurisdiction under 18 U.S.C. §207. Rather, my jurisdiction arises under 24 C.F.R. §200.245. While

the MPRC is bound by the findings of fact and conclusions of law I have made, the Department of Justice is not so bound. The Department of Justice has the authority to decide whether to prosecute an individual for alleged violation of 18 U.S.C. §207. The only Court of Appeals to have construed the scope of "particular matter" in 18 U.S.C. §207 is the Federal Circuit. To date, no other Court of Appeals has spoken on the matter, nor have other trial courts construed it after CACI, although the U.S. Claims Court has applied the statute generally in accordance with the rationale in CACI. Space Age Engineering, Inc. v. United States, supra. I have deliberately waited to issue this decision in hopes of receiving more guidance from other courts.

However, in the absence of such guidance, and because I agree with the approach of the court in CACI, I conclude as a matter of law that, based upon the facts presented, Jerome Curry would not be in violation of 18 U.S.C. §207(a) if he were to represent Kawabe House before HUD.

  
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Jean S. Cooper  
Administrative Judge

Date: January 23, 1985