UNITED STATES OF AMERICA

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

BOARD OF CONTRACT APPEALS

Washington, D. C.

In the Matter of:	:	
ALVIN L. SINGLETON,	:	HUDBCA No. 84-889-D44
	:	Docket No. 84-962-DB
Respondent	:	

Herbert R. Scott, Esquire
152 Temple Street
New Haven, Connecticut 06510 — For the Respondent

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Department of Housing and
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Washington, D. C. 20410 — For the Government

DETERMINATION

STATEMENT OF THE CASE

By letter from William H. Hernandez, Jr., Area Manager of the Hartford Office of the U.S. Department of Housing and Urban Development ("HUD" or "Department"), dated April 2, 1984, Alvin L. Singleton ("Respondent") was notified that he was the subject of a temporary denial of participation ("TDP") which barred Respondent from participating in National Housing Act Section 236 programs for a period of twelve months. Following an informal hearing, the Area Manager informed Respondent by letter dated June 18, 1984, that the TDP would remain in effect. Pursuant to 24 C.F.R. §24.18(a)(5)(iv), Respondent filed a timely request for a hearing.

HUD's Complaint alleges that Respondent "[a]ppropriated tenants' security deposits for unauthorized purposes", in violation of Connecticut law and Section 7(f) of the Regulatory Agreement. It also alleges that Respondent failed to record and account for rental payments received from nine tenants in January and February of 1981. A hearing was held on October 16, 1984, and post-hearing briefs were filed by February 22, 1985.

FINDINGS OF FACT

Respondent was a founder and Vice President of Inner City Housing Corporation ("ICHC"). At various times since 1965, Respondent has been a registered real estate broker in Maryland, Washington, D.C., and Connecticut (Tr. 138). Respondent is currently employed as Executive Director of Hill Development Corporation of New Haven. In this capacity, he has had dealings with HUD (Tr. 163-64). In 1974, ICHC completed construction of a 69-unit housing project ("Project") in Waterbury, Connecticut. (Tr. 135-36.) On July 3, 1974, ICHC entered into a Regulatory Agreement for Nonprofit Mortgagors governing this Project, pursuant to Section 236 of the National Housing Act. Under the terms of the Regulatory Agreement, ICHC agreed to operate the Project in accordance with specified HUD requirements. (Govt. Exh. 4.) This agreement was to remain in effect for the 40-year term of the Project mortgage (Tr. 24).

In 1975, the original Project Manager was succeeded by Respondent (Tr. 137). Respondent was President of Waterbury Management Corporation, a realty management firm. He employed one secretary. The record discloses no reason to distinguish between Respondent and Waterbury Management. On April 7, 1976, Respondent executed a two-year Management Agreement with ICHC, whereby Respondent became the Management Agent for the Project. (Tr. 30; Govt. Exh. 5.) When this Management Agreement expired in 1978, HUD refused to approve a subsequent Management Agreement between ICHC and Respondent, due largely to inadequate financial reporting by Respondent under the previous Management Agreement (Tr. 33-34, 51; Resp. Exh. 1).

HUD assumed possession of the Project on Friday, January 30, 1981, after ICHC had been behind on mortgage payments on the HUD-insured mortgage on the Project for some time (Tr. 13-14, 45, 57, 141, 187). Actual foreclosure on the Project took place approximately one year later (Tr. 23). Upon taking possession, HUD hired Greater Hartford Realty Management Corporation ("GHRMC") to replace Respondent as Management Agent on the Project (Tr. 45, 57). Under an informal agreement between Respondent, HUD, and GHRMC, GHRMC did not begin actual management of the Project until February 2, 1981 (Tr. 60, 139).

Mitchell Realty Company assumed responsibility as HUD's Management Agent on the Project on January 1, 1982. Richard Mitchell of Mitchell Realty discovered that Respondent had failed to record eight rental payments made to Respondent or his secretary in January and February 1981. Five of these payments had been made prior to the HUD takeover; three were made after. (Tr. 87-88, 93-100; Govt. Exhs. 7, 8a-8i.) These rental payments received by Respondent may have been used to meet Project expenses or forwarded to GHRMC, or were otherwise not accounted for. HUD does not contend that Respondent appropriated these funds for his own use. (Tr. 167-71; Govt. Brief at 13.) In

addition, Respondent received rental payments from several other tenants during the month of February, 1981 which Respondent forwarded to GHRMC (Tr. 74, 80-84, 169-79; Resp. Exhs. 2-5, 15). With the assistance of a secretary, Respondent was the bookkeeper for Waterbury Management (Tr. 182). Throughout the period that Respondent managed the Project, he received only periodic compensation from ICHC for the performance of his duties as a management agent (Tr. 144, 163).

Section 7(f) of the Section 236 Regulatory Agreement between HUD and ICHC provided that

> [a]ny fund collected as security deposits shall be kept separate and apart from all other funds of the project in a trust account the amount of which shall at all time equal or exceed the aggregate of all outstanding obligations under said account[.] (Govt. Exh. 4.)

Section 10(i) of the Management Agreement further stated in part that "[s]ecurity deposits will be deposited by the Agent in an interest-bearing account, separate from all other accounts and funds...." ICHC had established an account for tenant security deposits in the Need Action Federal Credit Union ("Credit Union") (Tr. 141).

On January 23, 1978, with the Project lacking funds to pay for heating oil, Respondent attended a meeting of the ICHC Directors at which the Directors passed a resolution authorizing him to withdraw funds from the security deposit account to "pay delinquent oil bills." (Tr. 150-55; Resp. Exhs. 8, 9.) That same day, a $4,000 check was drawn on the Credit Union and deposited in the ICHC project account with Colonial Bank and Trust Company which was managed by Respondent. A $3,000 check also dated January 23, 1978 was then drawn on the Project's Colonial Bank account for payment to the Amodeo Fuel Company. On March 26, 1978, a $3,000 check was drawn on the Credit Union and also deposited in the Project's Colonial Bank account. A month later, on April 23, a $2,500 check was drawn on the Colonial Bank account, payable to "Colonial Bank and Trust." Respondent was the drawer of each of the checks drawn on the Project's Colonial Bank account (Tr. 157-58;). HUD does not dispute that this money was withdrawn in order to buy oil for the Project (Complaint at 3).

After HUD assumed possession of the Project from ICHC, Respondent provided GHRMC with a list of the security deposits of all current tenants that had been paid prior to this change in management at the Project (Tr. 57). GHRMC confirmed these deposits by correspondence with the tenants (Tr. 57-58). In 1982, it was proved that the Project's security deposit account at the Credit Union did not even contain sufficient funds to repay the $163 security deposit of a former tenant. GHRMC never withdrew any money from the account at the Credit Union. (Tr.

58-59, 72, 85-86). No evidence was presented to suggest that Mitchell Realty ever withdrew any funds from the security deposit account.

The Project had suffered from construction defects and financial difficulties almost from the start (Tr. 37-39, 106-07). Although HUD had been aware of these problems for some time, HUD refused to approve a rent increase for the Project because neither ICHC nor Respondent would submit the financial documentation required by HUD before it could approve such an increase. This information had often been requested of Respondent and of ICHC by HUD officials in order to expedite a rent increase for the Project. (Tr. 23, 36-39, 43-44, 101-03, 106-07, 111-17, 143-45, 186, 201-07; Govt. Exh. 9; Resp. Exhs. 6A, 6B.) Despite this refusal, Respondent implemented at least one unauthorized rent increase during his management of the Project (Tr. 124). The only financial information that Respondent submitted to HUD was an unaudited balance sheet and financial statements for the year ending December 31, 1978, and incomplete monthly income statements for November and December, 1980, and January, 1981 (Tr. 44, 103, 110, 115, 124, 145-46, 180, 186, 195, 201-07; Govt. Exh. 9; Resp. Exhs. 7, 16-18).

The Regulatory Agreement provides in part:

4. The owners covenant and agree that:

(a) with the prior approval of the [Federal Housing] Commissioner, they will establish for each dwelling unit (1) a basic rental charge ...

* * *

(i) they shall remit to the Commissioner on or before the tenth day of each month the amount by which the total rentals collected on the dwelling units exceeds the sum of the approved basic rentals for all occupied units, which remittance shall be accompanied by a monthly report on a form approved by the Commissioner, provided that a monthly report must be filed even if no remittance is required;

* * *

(l) no change will be made in the basic rental or fair market value unless approved by the Commissioner;

* * *

10. (c) The mortgaged property, equipment, buildings, plans, offices, apparatus, devices, books, contracts, records, documents and other papers relating thereto shall at all times be maintained in reasonable condition for proper audit ...

Also, Section 18 of the Management Agreement between ICHC and Respondent provided in part as follows:

> 18. Records and Reports. In addition to any requirements specified in the Management Plan or in other provisions of this Agreement, the Agent will have the following responsibilities with respect to records and reports:
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> a. The Agent will establish and maintain a comprehensive system of records, books, and accounts in a manner conforming to the directives of the Secretary, and otherwise satisfactory to the Owner and the Consenting Parties....
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> b. With respect to each fiscal year ending during the term of this agreement, the Agent will have an annual financial report prepared by a Certified Public Accountant or other person acceptable to the Owner and Secretary, based upon the preparer's examination of the books and records of the Owner and the Agent. The report will be prepared in accordance with the directives of the Secretary, will be certified by the preparer and the Agent, and will be submitted to the Owner within (60) days after the end of the fiscal year, for the Owner's further certification and submission to the Secretary and the Mortgagee. Compensation for the preparer's services will be paid out of the Rental Agency Account as an expense of the Project.
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> * * *
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> d. The Agent will furnish such information (including occupancy reports) as may be requested by the Owner or the Secretary from time to time with respect to the financial, physical, or operational condition of the Project..
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> * * *
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> f. By the fifteenth (15th) day of each month, the Agent will furnish the Owner with an itemized list of all delinquent accounts, including rental accounts, as of the tenth (10th) day of the same month.
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> g. By the tenth (10th) day of each month, the Agent will furnish the Owner with a statement of receipts and disbursements during the previous month, and with a schedule of accounts receivable and payable, and reconciled bank statements for the Rental Agency Account and Deposit Account as of the end of the previous month.

Discussion

As President of Waterbury Management Corporation and the manager of the Project for ICHC, Respondent served as Management

Agent for two years under an express contract between Waterbury Management and ICHC. He continued to perform as Management Agent following the expiration of this express contract and did receive occasional compensation from ICHC for his performance. Respondent's management of the HUD-insured project qualifies him as a participant in a HUD-insured program, and brings him within the definition of "contractor or grantee" as used in the HUD debarment regulations. 24 C.F.R. §24.4(f).

In its brief, HUD asserts that Respondent's failure to document and account for rental payments, and his use of tenants' security deposits in a manner prohibited under the terms of the Regulatory Agreement and Connecticut state law, constitute grounds for issuance of a TDP pursuant to 24 C.F.R. §24.18(a)(2)(ii), and also 24 C.F.R. §24.18(a)(2)(iv) and 24 C.F.R. §24.13(a)(2)(i).

Sections 24.18(a)(2)(ii) and (iv) provide:

> (2) Causes for denial of participation shall include:
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> * * *
>
> (ii) Adequate evidence of irregularities in contractor's or grantee's past performance in a Department program; and
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> * * *
>
> (iv) Causes under §24.13(a).

Section 24.13(a)(2)(i) provides that cause shall include adequate evidence of:

> (i) 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.

Respondent has been active in real estate and real estate management for many years. He has been a registered real estate broker in jurisdictions including Connecticut, at various times dating back to 1965. He is also the president of a realty management corporation. Respondent knew or should have known of the protected status granted to tenant's security deposits under Connecticut law as well as Section 10(i) of the Management Agreement with ICHC, which he signed in 1976. See Conn. Gen. Stat. §§47a-21, 22(b) (1978), 47a-21 (d)(2), 21(h)(1984). Section 7(f) of the Regulatory Agreement is consistent with the Management Agreement and Connecticut law in prohibiting the use of tenants' security deposits to meet Project expenses. See id. Consequently, Respondent's drawing on the security deposit

account to pay Project oil bills is evidence of irregularities in the performance of a HUD program.

Respondent's failure to record and account for rental payments is also evidence of irregularities in the performance of a Department program. Section 10(c) of the Regulatory Agreement charges the Project Owner with the duty to keep Project records "in reasonable condition for audit." Respondent's failure as the Project Owner's management agent to record and account for all Project receipts is inconsistent with that obligation. The irregularities evidenced by Respondent's improper expenditure of funds from the security deposit account and his failure to record and account for rental payments constitute cause for imposing a TDP against Respondent pursuant to 24 C.F.R. §24.18(a)(2)(ii).

The TDP is not a punitive sanction. Rather, a TDP is a means of preventing the Department from contracting with irresponsible contractors or grantees. 24 C.F.R. §§24.0 and 24.5(a). L. P. Steuart & Bros. v. Bowles, 322 U.S. 398 (1964); Gonzales v. Freeman, 344 F.2d 570 (D.C. Cir. 1964). Consequently, once the Department has established cause for the imposition of a sanction under the regulations, the determinative question must be whether the contractor is in fact presently responsible. 24 C.F.R. §24.0. 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).

Respondent's improper withdrawal of funds from the security deposit account and his failure to record and account for all rental payments constitute persuasive evidence that Respondent lacks the present responsibility required by 24 C.F.R. §24.0 to participate in HUD programs. The record also reveals a significant amount of corroborating evidence to support a finding that Respondent lacks present responsibility. Section 18(b) of the Management Agreement in effect from 1976 through 1978 required Respondent to prepare certified annual financial statements for submission to HUD. Section 10(e) of the Regulatory Agreement required the yearly submission of a "complete annual financial report" on the Project. However, the only annual financial statement Respondent had prepared was an unaudited statement for 1978. Sections 18(f) and (g) of the Management Agreement also required Respondent to prepare monthly statements of receipts and expenditures, scheduled accounts payable and receivable, reconciled bank statements, and listings of delinquent accounts. Respondent submitted only two incomplete monthly income statements for 1980 and 1981. On behalf of ICHC, Respondent implemented at least one rent increase at the Project without HUD approval, contrary to Section 4(l) of the Regulatory

Agreement. HUD had failed to approve requests for a rent increase because Respondent did not provide HUD with the documentation sought by HUD pursuant to Section 18(d) of the Management Agreement to justify the rent increase. The documentation HUD sought prior to approval of a rent increase was largely that which Respondent and ICHC were already required to submit pursuant to Sections 4(i) and 10(e) of the Regulatory Agreement and Sections 18(b), (f), and (g) of the Management Agreement.

In mitigation, Respondent cites evidence to show that he documented some of the rental payments he received. He relies on the Board Resolution of January 23, 1978, to avoid accountability for his withdrawal of funds from the security deposit account. He also cites the Project's need for heating oil, and continuous financial difficulties. Finally, Respondent asserts that he was only infrequently compensated for his services by ICHC, and that he spent sizeable amounts of his own money on behalf of the Project.

The evidence in mitigation offered by Respondent is insufficient to overcome the strong inference of Respondent's lack of responsibility. First, Respondent's failure to record and account for the receipt of all rental monies may not be excused by noting that some rental payments were in fact documented. Second, Respondent was the President of a real estate management firm and had been active in real estate and real estate management for many years. He cannot avoid accountability for his withdrawal of the Project's security deposit funds by claiming reliance on a Board Resolution which he knew or should have known was in violation of state law, as well as HUD's requirements. Third, even though the Project was in need of heating oil, Section 7(f) of the Regulatory Agreement, and Connecticut law prohibit the use of security deposit funds to meet operating expenses. Respondent's management of ICHC's problematic finances was clearly deficient. This was a significant factor contributing to ICHC's financial crises which made Respondent invade the tenants' security deposits to buy heating oil. Thus, the humanitarian justification for invading the security deposits is not a mitigating factor affecting Respondent's present responsibility. Finally, Respondent claims that he expended a significant amount of his own money on the Project's behalf, and that he was not compensated for some of his work for the Project. However, the Project's financial shortcomings are, at least in part, attributable to Respondent's failure to maintain and to file the financial information sought by HUD to evaluate the merits of a Project rent increase. Moreover, Section 16(c) of the Management Agreement, clearly states that a Management Agent on a Section 236 project shall not be required to use its own funds to meet project expenses.

Conclusion and Order

The temporary denial of participation barring Alvin L. Singleton from participating in Section 236 programs through April 1, 1985 was warranted in this case and is sustained .

Edward Terhune Miller
Administrative Judge
Board of Contract Appeals

Date: April 26, 1985