

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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| GASPAR F. SCIMONE, | : | HUDBCA No. 85-912-D3 |
| | : | (Docket No. 84-979-DB) |
| Respondent | : | |
| | : | |
| | : | |

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DETERMINATION

Statement of the Case

By letter dated September 24, 1984, Warren T. Lindquist, Assistant Secretary for Public and Indian Housing, advised the Respondent, Gaspar F. Scimone, that he was suspended from further participation in HUD programs. The action was based upon Scimone's indictment by a Federal Grand Jury convened for the District of Massachusetts for alleged violations of 18 U.S.C. §641, theft of Government property, and §1001, false statements. The letter indicated that it was to serve as the Department's complaint if Scimone requested an opportunity to submit documentary evidence and written briefs in opposition to the action as permitted by 24 C.F.R. §24.5(c)(2) and §24.7. Scimone made a timely request to be heard and, accordingly, the parties have submitted documentary evidence and briefs. The Government requested permission to submit a reply brief, which has been duly filed. That submission is hereby authorized and received as part of the written record.

Findings of Fact

On or about July 31, 1984, Gaspar F. Scimone was indicted by a Federal grand jury in Massachusetts with five counts of theft of Government property and false statements arising out of payments made by the Chelsea Housing Authority under the Section 8 Housing Assistance Program funded by HUD. Count 1 charged Scimone under 18 U.S.C. §641 with embezzling and converting to his own use monthly checks amounting to \$6,032 of HUD's funds. The remaining counts charged him with various false statements in violation of 18 U.S.C. §1001. Count 2 charged him with completing an application for HUD assisted housing on behalf of Mary Folan Lukes */ which fraudulently concealed that she had certain assets which she was required to disclose including an ownership interest in a house at [REDACTED] Essex Street in Chelsea. Count 3 charged Scimone with knowingly completing a Welfare Verification Form for Luke which falsely stated that she was a recipient of welfare assistance from the Massachusetts Department of Public Welfare. Count 4 charged him with forging a letter purportedly written by one "Darlene Seaforth" which fraudulently certified that Luke was a recipient of welfare assistance. Count 5 charged him with forging another letter purportedly written by "[REDACTED] Pascucci" which falsely certified that Luke was an employee of the Efelcy Corporation.

The Government's evidence consisted of a copy of the notice of suspension (Govt. Exh. A), an unsigned and undated copy of Scimone's indictment (Govt. Exh. B), and a copy of a two-page Housing Assistance Payments ("HAP") Contract dated September 1, 1980, between Scimone's company, Porter Realty, and the Chelsea Housing Authority, for the benefit of [REDACTED] Folan under a lease of [REDACTED] Essex Street, in Chelsea, Massachusetts (Govt. Exh. C). The one year contract beginning in September 1980 provided for total monthly rent of \$409, with \$83 to be paid by Folan and \$326 by the Chelsea Housing Authority.

The Respondent's documentary evidence consisted of a statement by Mary Folan Luke; copies of the allegedly false statements referred to in the indictment consisting of the Application for Dwelling and Welfare Verification to the Chelsea Housing Authority; and copies of correspondence between Scimone and certain of his tenants, between Scimone and the Chelsea Housing Authority, and between certain of Scimone's tenants and the Chelsea Housing Authority. This correspondence provides evidence, and I find, that at the time of the charged

*/ According to documents submitted by Scimone, Mary Folan's married name was actually Luke, not "Lukes" as indicated in the indictment. Her statement submitted by Scimone indicates that she was repeatedly separated and ultimately divorced from her husband, so that she was also known as Mary Folan.

embezzlement Scimone had asserted a claim, which was unresolved, that the Chelsea Housing Authority owed him back rent assistance payments. That claim, at or about the times of the alleged embezzlement, may, at times, have exceeded the amount allegedly embezzled. Scimone's documentary evidence also included copies of checks paid to Scimone by the Chelsea Housing Authority, and checks paid by Luke to Scimone, rent ledgers maintained by Scimone for his rental properties, and a schedule of mortgage payments by Luke. I find that Luke's application for Section 8 housing assistance, which Scimone prepared and Luke signed, did omit the material disclosure of Luke's interest in the house at 78 Essex Street.

Discussion

As a landlord participating in HUD's Section 8 Housing Assistance Program and thus receiving HUD funds indirectly through the Chelsea Housing Authority pursuant to the HAP Contract (Govt. Exh. C), as well as other unspecified HAP contracts, Scimone is a "contractor or grantee" under 24 C.F.R. §24.4(f).

Scimone admits having been indicted with one count of embezzling money of the United States Government and four counts of false statements to the United States in connection with the tenancy of Luke, a Section 8 housing assistance payment recipient. However, he denies that he is guilty of any of the crimes with which he is charged.

Scimone cites the documentary evidence he has submitted in support of his position that his suspension is inappropriate. He argues that the regulations make suspension a matter of administrative discretion where an indictment has been returned. He contends that it is not in the interest of the Government to suspend a landlord like himself who provides numerous units to the Section 8 Program in an area where the need for such units is great and the supply scarce, unless that landlord is suspected of offenses that seriously threaten the Section 8 Housing Assistance Program. In this regard, Scimone contends that, at most, the Government will be able to prove only that, in attempting to help a needy individual qualify for the Section 8 program, he erroneously misstated Luke's financial condition.

Scimone also contends, in regard to the embezzlement charge, that the correspondence submitted as documentary evidence shows that Scimone was owed substantial amounts of back rental assistance payments by the Chelsea Housing Authority at the time he received the alleged \$6,030 of embezzled funds. He contends that the rental payments made to him by the Chelsea Housing Authority do not indicate a connection with any particular housing unit, and that none of these funds were specifically designated for Luke's account. He claims, therefore, that these payments were not so identified as to make it possible to prove

he received money in relation to the Luke account to which he was not entitled. Scimone asserts in regard to the false statements that two of them, Luke's Application for Dwelling and her Welfare Verification, were admittedly submitted and actually signed by Luke herself. He asserts that the other statements were addressed "To whom it may concern" and cannot be characterized as statements made "in a matter within the jurisdiction" of HUD. Thus, Scimone contends that he made, at most, an error in judgment in an attempt to assist a person in need, and his acts do not constitute any large scale conspiracy to defraud the Government. He also contends that because he was owed significant amounts of money by the Chelsea Housing Authority at the time the alleged offenses occurred, he did not profit in any way from his alleged wrongdoing.

The Government's position is that a contractor or grantee may be suspended under 24 C.F.R. §24.13(a)(1)(iii) if suspected, upon adequate evidence, of:

Commission of embezzlement, theft ... or any other offense indicating a lack of business integrity or business honesty, which seriously and directly affects the question of present responsibility.

The Government contends further, in reliance on 24 C.F.R. §24.13(c) that:

An outstanding indictment of the contractor or grantee ... is adequate evidence of suspected criminal conduct and may be the basis for imposition of a suspension.

Consequently, the Government contends that no further showing is necessary to sustain the imposition of the sanction. The Government admits that HUD's suspension of an indicted contractor or grantee is not mandatory, but contends that the Assistant Secretary has determined that Scimone's indictment is sufficiently serious to warrant suspension and that this determination is reasonable and should be upheld.

The Government rejects Scimone's arguments that because Scimone is a Section 8 landlord in a community which requires Section 8 housing and that because the Chelsea Housing Authority owed him money, he did not take anything to which he was not entitled. The Government also asserts that what is in the Government's best interests in the Section 8 housing program in Chelsea is a matter of policy not appropriately a part of this proceeding. It contends that HUD is not obliged to terminate Scimone's Section 8 contract because he is suspended, but that the contract could be terminated or phased out in such a way as to avoid harm to either the tenants or HUD. The Government contends that the very assertion that, simply because the Chelsea Housing Authority owed him money, Scimone was entitled to

embezzle the money in question, is a manifestation of his lack of business responsibility.

The applicable HUD regulations state that the purpose of a suspension or debarment is the protection of the public interest, ensuring that the Department does not do business with contractors or grantees that are not responsible. 24 C.F.R. §§24.0 and 24.5(a). "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 the contractor. Roemer v. Hoffman, supra; 49 Comp. Gen. 139 (1969); 39 Comp. Gen. 468 (1959); 34 Comp. Gen. 86 (1954). Although the test to be applied is whether the contractor is presently responsible, present lack of responsibility can 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 Company, Inc. v. Bergland, 489 F. Supp. 927, 949 (D. D.C. 1980); 46 Comp. Gen. 651, 658-59 (1967).


I find on this record that Scimone was charged with offenses in his five count indictment which are of such character as to manifest a clear lack of business responsibility. Under the applicable regulation, the indictment without more is adequate evidence upon which the Department, initially acting through the Assistant Secretary, may impose a suspension in order to protect itself in the public interest from having to deal with irresponsible contractors. 24 C.F.R. §24.13(c). I find nothing in the documentary evidence submitted by Scimone that brings this conclusion into question or casts doubt upon the judgment of the Assistant Secretary. Indeed, the materials which Scimone has submitted and the attitudes reflected in his presentation of his case tend to confirm the conclusion that HUD should not be required to do business with this individual directly or indirectly until the criminal case and any further related administrative proceedings have been finally resolved. Luke's statement appears to corroborate the allegations in the indictment in certain significant respects. The fact that Scimone may have had an unresolved claim for a substantial amount of money against the Chelsea Housing Authority is irrelevant.

It is not necessary for me to determine the likelihood that Scimone will be convicted in order to find the suspension to be reasonable and proper. I need only find that there is adequate evidence, which in this case is established by proof of the indictment, to support the sanction. 24 C.F.R. §24.13(c). See Transco Security, Inc. of Ohio v. Freeman, 639 F. 2d 318, 324 (6th Cir.), cert. denied, 454 U.S. 820 (1981); Horne Bros. v. Laird, 463 F. 2d 1268, 1271 (D.C. Cir. 1972). There is additional evidence on this record, as noted, which provides further support for this finding. I find that the adequate evidence of embezzlement and false statements disclosed by this record, viewed as a whole, suggests no abuse of discretion by the

sanctioning official. I also find a suspension to be in the public interest and in the best interest of the Government.

Conclusion

Gaspar F. Scimone's temporary suspension from participation in HUD programs is sustained for a reasonable time as permitted by law pending such administrative or legal proceedings as may ensue which are related to his indictment.



EDWARD TERHUNE MILLER
Administrative Judge

January 8, 1985