

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

In the Matter of:

GERALDINE SIMON,

Respondent

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: HUDBCA No. 87-2459-D53
: Docket No. 87-1154-DB
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DETERMINATION

Statement of the Case

By letter dated June 11, 1987, Geraldine Simon ("Respondent" or "Simon") was notified by the U.S. Department of Housing and Urban Development ("HUD" or "Department") that it was suspending her from participation in Departmental programs pursuant to 24 C.F.R. §§24.13(a)(1) (iii) and 24.13(c). The letter stated that Respondent's suspension was based on her indictment by a Federal grand jury convened by the U.S. District Court for the Northern District of Georgia, Atlanta Division, for alleged violations of 18 U.S. §§ 1001, 371, and 2. All of the counts of the indictment relate to activities in HUD Programs. Simon made a timely request for a hearing on the propriety of the suspension. In cases of suspension based upon an indictment, a hearing is limited to submission of briefs and documentary evidence. 24 C.F.R. §24.5(c)(2). Each party has submitted a brief with documentary attachments and this decision is based upon a consideration of the entire record in this case.

Findings of Fact

1. Geraldine Simon was Vice President and Branch Manager of Equitable Mortgage Resources, Inc., at its branch office in Norcross, Georgia. During all pertinent times, Simon acted in the capacity of mortgage loan originator and FHA mortgage loan underwriter. (Govt. Exh. 1, Count 1.)

2. By letter dated November 22, 1985, the Department informed Respondent that it was in receipt of adequate evidence of irregularities in her participation in the Single Family Mortgage Insurance Programs of the Department, and that on the basis of these irregularities, a decision had been made to issue a Temporary Denial of Participation ("TDP"). As a result of that TDP, Respondent was denied participation in the Single Family Mortgage Insurance Program for a period of 12 months. The irregularities cited in the TDP notice involved the sale of property located at [REDACTED] Oak Ridge Drive, Stone Mountain Georgia (FHA Case No. [REDACTED]). This sale was effected by an improper payment on behalf of the purchaser by Respondent, which had the effect of reducing the purchaser's investment in the property below the required amount, in violation of HUD borrower investor requirements. 24 C.F.R. §203.119 (Govt. Exh. 3.)

3. In 1987, a Federal grand jury convened for the United States District Court For the Northern District of Georgia and returned an indictment charging Respondent with over 200 violations of Sections 1001, 371 and 2 of title 18 of the United States Code. The indictment charges that Respondent and others between December, 1983 and September, 1985, conspired to defraud the United States by knowingly and willfully making false real estate sales contracts, false HUD/FHA applications for commitment for insurance, and false affidavits for the purpose of obtaining insurance from FHA on mortgages on certain residential properties. The indictment also charges that Respondent and others aided and abetted one another in making, using and causing to be made, and used, false real estate sales contracts and other false documents for the purpose of obtaining FHA insurance and mortgages for such properties. Count 16 of the indictment charges Respondent with violations of 18 U.S.C. §§1001 and 2 with respect to the irregularities which formed the basis of the Department's 1985 TDP. (Govt. Exh 1, Counts 1, 12-18, 19-224; Govt. Exh. 3.)

Discussion

Affirmative Defenses

Respondent has pleaded a number of affirmative defenses in its Answer which were not discussed in Respondent's brief. Respondent first asserts that it is unfair for the Department to take this suspension action because Respondent was "suspended" in 1985-86 for the same conduct. While this argument is accurate to

the extent that one instance of misconduct is common to both the TDP and the indictment, the indictment alleges hundreds of other matters in addition to the matter alleged in the TDP. Furthermore, the TDP was not based upon the indictment. I accordingly find this argument unpersuasive, as the facts which underlie the TDP are far more limited than the facts which provide the grounds for the present suspension.

Respondent also asserts that the complaint filed by HUD fails to state a claim cognizable under the Code of Federal Regulations. An indictment constitutes adequate evidence of grounds for a suspension under 24 C.F.R. §24.13. Since the complaint is founded upon the indictment, the complaint clearly states a claim cognizable under the Code of Federal Regulations, Part 24.

Respondent further asserts that the complaint should be dismissed for lack of jurisdiction over the subject matter, lack of jurisdiction over Respondent, improper venue and insufficiency of process and service of process. Under the Department's regulations and pursuant to a delegation from the Secretary, this Board is granted jurisdiction to conduct suspension hearings. 24 C.F.R. §20.4(b). As discussed below, Respondent is a contractor or grantee as defined in 24 C.F.R. §24.4(f), and as such, Respondent is subject to the Department's suspension regulations. Respondent's assertions with respect to jurisdiction and venue are unsupported by any legal authority cited by Respondent and are wholly without merit. The Board's records indicate that the Secretary's suspension notice of June 11, 1987 was mailed to Respondent in care of her attorney, and that Respondent requested a hearing of this matter by letter dated July 16, 1987. Although the Department's regulations provide that "the contractor or grantee concerned shall be furnished ... a written notice of the suspension," 24 C.F.R. §24.16(a), Respondent obviously received the notice in sufficient time to assert her rights in this matter, and Respondent has effectively asserted such rights. In any event, Respondent's request for a hearing through her attorney constitutes an entry of appearance by her attorney on Respondent's behalf in this proceeding, and Respondent cannot now claim defective service of the Government's complaint. I accordingly find that Respondent suffered no prejudice as a result of the Government's mailing of the notice of suspension to her attorney, and I further conclude that that service of process was legally sufficient.

Suspension

The basic issue before me is whether Respondent's indictment constitutes "adequate evidence" to support the Department's suspension action notwithstanding Respondent's contention that the indictment is not evidence of wrongdoing.

The basis for the Government's exercise of its discretion not to do business with certain contractors is the requirement that agencies only do business with "responsible" contractors or

grantees. 24 C.F.R. §24.0. The term "responsible" as used in the context of suspension and debarment is a term of art which includes not only the ability to perform a contract satisfactorily, but the honesty and integrity of the contractor as well. 48 Comp. Gen. 769 (1969). The test for whether suspension is warranted is present responsibility. It is well established that a lack of present responsibility may be inferred from past acts. Schlesinger v. Gates, 249 F.2d 111 (D.C. Cir. 1957); Stanko Packing v. Bergland, 489 F. Supp. 947, 949 (D. D.C. 1980).

Respondent's suspension is based upon her indictment. The HUD regulation applicable to suspension provides that causes for suspension include:

Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records (24 C.F.R. §24.13(a)(1)(iii).) (emphasis supplied.)

The sufficiency of an indictment as the basis, per se, for a suspension has long been upheld. Alexander v. Alexander, Ltd., HUDBCA No. 82-727-D46, 83-1 BCA ¶16,238, and cases cited therein.

Respondent's activities as a loan originator for HUD/FHA insured mortgages renders Respondent an indirect recipient of HUD funds within the meaning of 24 C.F.R. §24.4(f), and as such, Respondent is subject to the sanction of suspension if application of the sanction is determined to be in the public interest and is otherwise effected in conformity with the law.

The scope of the indictment so clearly provides an ample basis for suspension under the causes listed in 24 C.F.R. §13(a) as to obviate the need for elaboration. Respondent has submitted a number of exhibits which directly contradict the allegations of Respondent's involvement in the conspiracy, and which otherwise go to the elements of the offenses underlying the indictment. While these documents may be probative of Respondent's guilt or innocence, my role as the hearing officer in this case is not to weigh the merits of the criminal case. Therefore, I consider Respondent's exhibits to be irrelevant in determining whether this suspension is warranted because these exhibits address the issue of Respondent's guilt or innocence, and not whether the suspension was properly imposed following Respondent's indictment. In the Matter of Glenwood Patterson, HUDBCA No. 87-2306-D9 (Slip op., Oct. 22, 1987).

The formalities attendant to issuing an indictment carry sufficient indicia of reliability to allow the Government to act to protect itself against future dealings with someone accused of fraud. James A. Merritt & Sons v. Marsh, 791 F.2d 328, 330-31 (4th Cir. 1986). A suspension is to be imposed "for the purpose of protecting the public and ... not for punitive purposes." 24 C.F.R. §24.5. However, it is well established that, "It is not

only correct for the Government to question the integrity of a contractor who has been indicted for the manner in which he carried out contracts ..., but failure to do so would be highly irresponsible." Merritt v. Marsh, supra. I find that the Department has shown adequate cause for Respondent's suspension, that this suspension is not punitive, and that it has been properly imposed for the protection of the public interest. L. P. Steuart & Bro. V. Bowles, Price Administration, 332 U.S. 398 (1943).

CONCLUSION

For the foregoing reasons, it is my determination that the suspension of Respondent is warranted.



Timothy J. Greszko
Administrative Judge

Date: July 29, 1988