

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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 JOHN M. FITZPATRICK, : HUDBCA No. 89-4503-D43  
 : Docket No. 89-1370-DB  
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 Respondent. :  
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DETERMINATION BY ADMINISTRATIVE JUDGE TIMOTHY J. GRESZKO

February 7, 1990

Statement of the Case

By letter dated June 14, 1989, Thomas Sherman, the Acting General Deputy Assistant Secretary for Public and Indian Housing, U.S. Department of Housing and Urban Development ("Department," "Government" or "HUD"), notified John M. Fitzpatrick ("Respondent"), that, pending resolution of the subject matter of the indictment against him and any legal debarment or Program Fraud Civil Remedies Act proceedings which may ensue, he was excluded from primary covered transactions and lower tier covered transactions, as either a participant or principal at HUD and throughout the Executive Branch of the Federal government, and from participating in procurement contracts with HUD.

Respondent's exclusion in this case is in the nature of a suspension, and is based upon Respondent's indictment by the

Cuyahoga County, Ohio grand jury. The indictment charges Respondent with violations of sections 2913 and 2921 of the Ohio Revised Code. This determination is based upon written submissions of the parties, as Respondent is not entitled, under applicable HUD regulations, to an evidentiary hearing in this matter. 24 C.F.R. §24.313(b)(2)(ii)(1989).

### Findings of Fact

1. Respondent has been the Executive Director of the Wayne (Ohio) Metropolitan Housing Authority ("WMHA") since 1982. (Respondent's brief, p.3).

2. Late in 1982, Respondent asked for and received permission from the WMHA Board of Directors to serve as a consultant to the owners of the Alhambra Apartment Building, in Cleveland, Ohio ("the Alhambra"). The owners of the Alhambra were seeking Moderate Rehabilitation Program funds from the Cuyahoga (Ohio) Metropolitan Housing Authority ("CHMA"), under Section 8 of the United States Housing Act of 1937, as amended, 42 U.S.C. §1437(f). Respondent assured the WMHA Board that his clients did not have and would not have any relationship with WMHA. (Affidavit of Esther Ditch, pp. 2-4; Resp. brief, p.2).

3. Respondent was indicted by a Cuyahoga County (Ohio) grand jury on two counts, grand theft and falsification, under sections 2913 and 2921 of the Ohio Revised Code, arising from alleged receipt of excessive Section 8 funds by the property owners of the Alhambra Apartment building in Cleveland, Ohio, to whom he acted as a consultant. The indictments allege that the offenses occurred between June 1, 1983 and October 31, 1988, and January 6, 1983 and June 30, 1983, respectively. (Resp. brief, p. 1; Affidavit of Kenneth Pemberton; Govt. brief, attachments).

4. Following his indictment, Respondent was placed on an involuntary leave of absence from the WMHA, following HUD's notice to the WMHA that it would not continue to deal with him in that capacity. HUD further stated that WMHA would face sanctions if it continued to pay Respondent with Federal funds. (Affidavit of Kenneth Pemberton; letter from George L. Engel to Kenneth Pemberton dated May 12, 1989).

5. As evidence of mitigation, Respondent submitted the affidavits of Kenneth Pemberton and Esther Ditch, the Chair and Vice-Chair of the WHMA, respectively. Pemberton and Ditch characterize Respondent as a person of high integrity and responsibility, and conclude that it would be in the best interests of the WMHA if Respondent were permitted to return to work. (Affidavit of Kenneth Pemberton; Affidavit of Esther Ditch).

### Discussion

Under applicable HUD regulations, an indictment constitutes "adequate evidence" of suspected criminal conduct and may be the basis for the suspension of a "participant" in a "covered transaction" in the public interest. 24 C.F.R. §24.405(b)(1989). The sufficiency of an indictment as the basis, per se, for a suspension has long been upheld. Alexander & Alexander, Ltd., HUDBCA No. 82-727-D46, 83-1 BCA ¶16,228 and cases cited therein.

Respondent's activities as a consultant to recipients of HUD funds, and as Executive Director of the WMHA, renders Respondent a participant in covered transactions and a principal within the meaning of 24 C.F.R. §§24.24.105(m), (p); 24.110(a)(1)(1989). As such, Respondent is subject to the sanction of suspension if application of the sanction is otherwise determined to be in the public interest and is otherwise effected in conformity with the law. John P. Moscony, HUDBCA No. 89-4444-D17 (May 24, 1989), and cases cited therein.

Underlying the Government's authority not to do business with a person is the requirement that agencies only do business with "responsible" persons and entities. 24 C.F.R. §115 (1989). 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 a 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 F2d 111 (D.C. Cir. 1957); Stanko Packing Co. v. Bergland, 489 F. Supp. 947, 949 (D.C. D.C. 1980). In gauging whether to suspend a person, all pertinent information must be assessed, including the seriousness of the alleged acts or omissions, and any mitigating circumstances. See 24 C.F.R. §§24.525(d), 24.313(b)(4), and 24.410(c)(1989).

The indictment which underlies this matter charges Respondent with the unlawful making of false statements to secure the payment of benefits administered by a governmental agency, and further charges that Respondent unlawfully obtained or exerted control over HUD monies in excess of \$5000, with the intent to deprive HUD of such monies. This indictment involves allegations of misconduct, which, if proven, would clearly raise serious concerns with respect to Respondent's fitness to participate in the programs of this Department. Moscony, Id. at 4; 24 C.F.R. §24.305(a)(1)-(4)(1989).

In opposition to the suspension, Respondent argues that the suspension is based on accusations that are not proven by the mere issuance of the indictment. In James A. Merritt and Sons v. Marsh, 791 F2d 328, 330-31 (4th Cir. 1986), the United States

Court of Appeals ruled that the formalities attendant to issuing an indictment carry sufficient indicia of reliability to allow the Government to protect itself against future dealings with someone accused of such criminal acts. Thus, Respondent's contention that the indictment does not constitute proof of guilt is irrelevant for purposes of this proceeding.

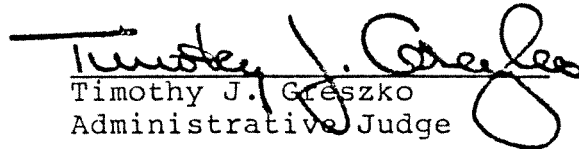
Respondent also argues that this suspension is punitive, because it denies him of his ability to earn a living. This argument is also unpersuasive. There can be no doubt that the consequences of administrative termination of all rights to participate in government programs are potentially severe. The severity of the consequences does not, however, render the sanction punitive in nature, and it well established that a debarment or suspension is not punitive in nature if the imposition of the sanction is for the purpose of protecting the public interest. Stanko Packing Co. v. Bergland, 489 F. Supp. 947, 948 (D.C. D.C. 1980). There is no evidence in this record that the suspension of Respondent was imposed by the Department for any reason other than his indictment, and the indictment is based upon activities which appear to have been directly related to the programs of this Department. I find accordingly, that this suspension is not punitive, as it was imposed for the purpose of assuring the HUD that it will not have to take the risk of doing further business, directly or indirectly with Respondent, while his indictment and any other legal proceedings arising out of the same set of facts are being litigated. Id; See also James E. McFrederick, et al., HUDBCA No. 89-4475-D27 (Sep. 28, 1989).

Respondent argues in mitigation that the incident giving rise to his indictment was a single incident which occurred over six years ago, that the alleged offenses are predicated upon his having apparently witnessed and notarized a land contract, and "perhaps most important of all, that the officers and Board of Directors of the WMHA never have and do not now question his integrity." Although this Board has previously held that the passage of time is a potentially mitigating circumstance, Spencer H. Kim and Kamex Construction Corp., HUDBCA No. 87-2468-D58 (Jun. 21, 1988), Respondent is charged with acts occurring as recently as 1988. I accordingly do not find the passage of time to be mitigating of the acts in question. Furthermore, I do not find Respondent's explanation of his conduct sufficiently exculpating to override the "sufficient indicia of reliability" which attaches to the indictment process. James A. Merritt & Sons v. Marsh, 791 F2d 328, 330-31 (4th Cir. 1986). While it appears on this record that at least two of Respondent's colleagues at the WMHA consider Respondent to be a person of high integrity, I find such character evidence insufficient to overcome the evidence of lack of present responsibility that flows from the indictment.

I find on the evidence before me that the Department has shown adequate cause for the suspension of Respondent, and that the suspension has been properly imposed in the public interest.

Conclusion

For the foregoing reasons, it is my determination that the suspension of Respondent is warranted. Respondent shall remain suspended pending resolution of the subject matter of the indictment and any legal or debarment proceedings that may ensue. 24 C.F.R. §24.415 (1989).

  
Timothy J. Graszko  
Administrative Judge