

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

In the Matter of:

WESTPORT HOUSING CORPORATION
and Affiliates,

Respondents

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: HUDBCA No. 90-5275-D47
: Docket No. 90-1471-DB
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DECISION AND ORDER ON MOTION TO DISMISS
HUD'S SUSPENSION ACTION AGAINST SUZANNE
MAGNUSON, DOROTHY LONG MITCHELL AND RICHARD TELL

Background

On August 17, 1990, Respondents filed a motion to dismiss HUD's suspension action against Suzanne Magnuson, Dorothy Long Mitchell and Richard Tell. Respondents further moved that HUD be ordered to remove the names of Magnuson, Mitchell and Tell from the consolidated suspension list and to withdraw the suspension action against them ab initio. Attached to the motion was a letter indicating that Richard Tell had resigned from all corporate offices in Westport Housing Corporation and "all other AFC affiliates" on June 18, 1990, and that Dorothy Long Mitchell had resigned from Westport Housing Corporation on July 10, 1990. Magnuson, Mitchell and Tell were each suspended as affiliates of Westport Housing Corporation by HUD because they were Westport corporate officers. No indicia of wrongful conduct or control by Magnuson, Mitchell or Tell were cited in the Government's notice of suspension or its complaint, other than their corporate positions.

The Government responded that it would not object to dismissing its suspension action against Mitchell or Tell because they had resigned their corporate offices. The Government objected to withdrawing their suspensions ab initio because they had not resigned until well after their suspensions had been initiated on April 6, 1990, and the departmental regulations provided a basis for their suspensions until their subsequent resignations. The Government opposes dismissing the suspension of Suzanne Magnuson because she is still the Secretary of Westport, has not resigned, and is therefore an affiliate of Westport as defined in 24 C.F.R. §24.105(b).

The regulation most relevant to the motion to dismiss is 24 C.F.R. §24.105(b). That regulation defines "affiliate" as follows:

Persons are affiliates of each other if, directly or indirectly, either one controls or has the power to control the other, or, a third person controls or has the power to control both. Indicia of control include, but are not limited to: interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the suspension or debarment of a person which has the same or similar management, ownership, or principal employees as the suspended, debarred, ineligible, or voluntarily excluded person.

The Government contends that simply by being a corporate officer, an individual is an affiliate of the corporation in which he or she is an officer because of the power inherent in corporate officers to control a corporation, and, in turn, be controlled by the corporation as an officer-employee. The Government argues that it need not even submit a position description for an officer, or cite the specific authority to control the corporation from that particular office, to meet the threshold pleading burden to establish that an individual is an affiliate within the scope of 24 C.F.R. §24.105(b).

I ruled against the Government's interpretation of the regulation in Patrick Quinn, Robert A. Kriensky, and Debra Ernst, HUDBCA Nos. 90-5270-D42, 90-5272-D44 and 90-5273-D45 (June 8, 1990). However, on September 7, 1990, in a Determination on a Petition for Secretarial Review filed by the Government in Quinn, Kriensky, and Ernst, the Secretary has reversed that decision and remanded it for further proceedings, concluding that simply by stating the corporate title of an individual, the Government has satisfied the requirements of 24 C.F.R. §24.105(b). That Secretarial Determination is binding on me.

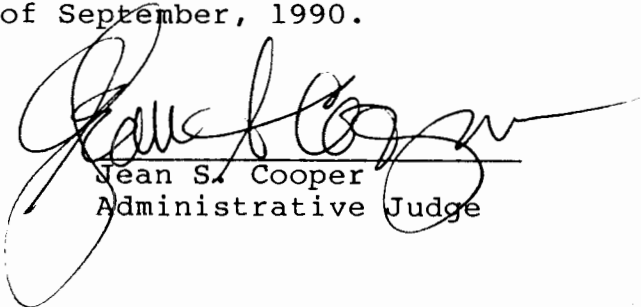
Therefore, I deny the motion to dismiss the suspension against Suzanne Magnuson as an affiliate of Westport because she is still an officer of that corporation and, as such, falls within the definition of affiliate at 24 C.F.R. §24.105(b), as determined by the Secretary of HUD. Likewise, Dorothy Long Mitchell and Richard Tell were affiliates of Westport until they resigned their offices. The motion to withdraw their suspensions ab initio is denied because, on the dates their suspensions were imposed, they were affiliates of Westport.

However, the suspensions of Dorothy Long Mitchell and Richard Tell as affiliates of Westport were no longer legally supported under 24 C.F.R. §24.105(b) as of the dates of their resignations because they ceased to be affiliates of Westport on those dates. Therefore, I grant the Motion to Dismiss to the extent that the suspension of Dorothy Long Mitchell shall be terminated as of July 10, 1990, and the suspension of Richard Tell shall be terminated as of June 18, 1990.

ORDER

The Motion to Dismiss is granted in part and denied in part. The suspension of Dorothy Long Mitchell shall be terminated as of July 10, 1990 and the suspension of Richard Tell shall be terminated as of June 18, 1990. The suspension of Suzanne Magnuson shall not be terminated at this time.

So ordered this 12th day of September, 1990.


Jean S. Cooper
Administrative Judge