

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

In the Matter of:

LARRY CARTER,

Respondent

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:
: HUDBCA No. 90-5301-D70
: Docket No. 90-1517 DB (LDP)
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DECISION BY ADMINISTRATIVE JUDGE JEAN S. COOPER

April 5, 1991
Statement of the Case

By letter dated April 17, 1990, Larry Carter, (Carter), Respondent in this case, was notified that a Limited Denial of Participation (LDP) had been imposed on him by Raymond Harris, the Regional Administrator for the United States Department of Housing and Urban Development (HUD) in Atlanta, Georgia. The cause for the LDP, as stated in the letter, was Carter's alleged refusal to allow the inspection of certain files of the Bristol Tennessee Housing Authority (BTHA) by investigators from HUD's Regional Office for Fair Housing and Equal Opportunity (FHEO).

The investigators were conducting an investigation of alleged civil rights and handicapped rights violations by the BTHA. Carter, as Executive Director of the BTHA, was also charged with otherwise interfering with the investigation in ways outlined in affidavits of two investigators, which were attached to the letter notice of the LDP. The LDP excludes Carter's participation in all programs within the jurisdiction of the Assistant Secretary for Public and Indian Housing, including Section 8 programs, within the geographic jurisdiction of the HUD Atlanta Regional Office for a period of one year.

The LDP was affirmed on June 7, 1990, after an informal conference on the matter. Carter filed an appeal from the affirmance of the LDP pursuant to 24 C.F.R. § 24.713.

On November 16, 1990, the Government filed a consolidated Motion for Partial Summary Judgment in this case and the cases of Nell Witt, HUDBCA No. 90-5321-D82; Charles Hager, HUDBCA No. 90-5322-D83; Charles Forbush, HUDBCA No. 90-5323-D84; and Agnes Cowan, HUDBCA No. 90-5324-D85. The Motion sought a determination on whether the BTHA, through Carter and the other individuals who are Commissioners of the BTHA, acted properly in refusing to allow the inspection of certain BTHA files by the FHEO investigators. In a ruling on the motion dated November 21, 1990, it was held that the BTHA, and its officers and employees, had a legal duty to present to HUD, for its inspection and review, all of the documents and records listed in a letter dated April 18, 1990 to Nell Witt, Chairperson of the BTHA, from Kathelene Coughlin, Director of HUD's Atlanta FHEO office. The BTHA's refusal to provide these documents to the HUD investigators in April, 1990, and thereafter, was in violation of 24 C.F.R. § 1.6(C), and Sections 310 and 311 of the Annual Contributions Contract (ACC) between HUD and the BTHA. The Government's Motion for Partial Summary Judgment was granted on that basis.

A hearing was held in this case on November 26-27, 1990. The record was held open for the filing of a deposition or affidavit of John Yeary. An affidavit dated December 6, 1990 was accepted into the record as Government Exhibit F. The Government also filed a post-hearing brief.

FINDINGS OF FACT

1. Larry Carter is the Executive Director of the BTHA and has been so since 1963. His duties are to supervise the day-to-day operations of the BTHA, to maintain the records of the BTHA, and to perform other tasks as assigned by the Board of Commissioners of the BTHA. He also serves as Secretary to the Board of Commissioners at BTHA Board meetings. Carter does not have a vote as Secretary to the Board. (Tr. 298, 334.)

2. On October 5, 1988, five HUD investigators arrived at the BTHA to conduct an investigation, its purpose then undisclosed, for three days. The investigators went through all of the records of the BTHA, and left the records dismantled and in a shambles. It took the BTHA staff two weeks to reconstruct the files. One file is missing altogether. The investigators were Morris Gray and Les Wynn of the HUD Atlanta Regional Office, and three investigators from the HUD Knoxville Office. (Tr. 303-306, 448-449.)

3. A letter of findings dated December 29, 1989 from Joe L. Tucker, Acting Director of FHEO at HUD Headquarters, to Nell Witt, Chairperson of the BTHA Board of Commissioners, set out the preliminary findings of HUD against the BTHA, based on the 1988 investigation. The letter outlined alleged race-based "skip-overs" of applicants for public housing apartment units, in violation of Title VI of the Civil Rights Act of 1964 (Title VI). The BTHA was given an opportunity to present documentary information demonstrating that the investigative findings were factually incorrect or incomplete, or that there were legitimate non-discriminatory reasons for the actions of the BTHA, or to "[R]equest the commencement of discussions to resolve this matter voluntarily." (Joint Exhibit 4.)

4. Carter did an independent review of the alleged "skip-over" cases, and concluded that none were racially motivated. He found that one case involved application of the HUD-approved "local preference" test. Another involved application of the "urgency of need" test, also approved by HUD. He also found names of applicants misspelled and basic errors of fact in the letter of findings, including the race of one of the applicants alleged to have been skipped over. A formal written response to the letter of findings was presented to HUD by the BTHA. (JE 5; Tr. 314-317, 319-323, 325-329.)

5. A letter dated March 29, 1990 from Kathelene Coughlin, Director of the Office of FHEO in HUD's Atlanta Office, to Nell Witt stated that HUD would "immediately take the actions necessary to confirm the accuracy of the information" provided by the BTHA. The letter further stated that the investigators would also obtain any necessary information to process a Section 504 (handicapped discrimination) complaint filed with HUD. Coughlin informed Witt that Yvette Boykin and Marie Vevik of Coughlin's staff "will conduct an on-site investigation on April 16-19, 1990." (Govt. Exh. B.)

6. BTHA Counsel Vincent Sikora drafted a letter dated April 6, 1990 on behalf of the BTHA, in response to Coughlin's letter of March 29, 1990. Sikora stated the legal objections of the BTHA to any further on-site investigations. The letter also stated that:

If you desire to review any of the records on the ten (10) individuals named in the December 29, 1989, letter, BTHA will make them available for your inspection at a time when I and the Executive Director will be available. The Executive Director will be out of town from April 6 through April 19. (J.E.8.)

7. Coughlin sent a letter dated April 12, 1990 to Witt, expressing her disagreement with the legal objections contained in Sikora's letter dated April 6, 1990, but agreeing to postpone

the on-site investigation until the week of April 23, 1990, to accommodate the schedules of Sikora and Carter. (Govt. Exh. D.)

8. Coughlin sent another letter to Witt, dated April 18, 1990, in which she outlined the sources of the BTHA's legal obligation to cooperate fully with the HUD investigators. She also attached a list of information that the BTHA was to make available to the investigators "for review and copying" on Wednesday, April 25, 1990 on both the Title VI racial discrimination charges and the Section 504 (handicapped discrimination) complaint. (Govt Exh. E.)

9. On April 24, 1990, the Board of Commissioners of the BTHA held a meeting. At the meeting, Coughlin's letters dated March 29, April 12, and April 18 were discussed. Commissioner John Yeary made a motion to limit the access of the HUD investigators to the records on the individuals named in the letter of findings on the alleged Title VI violations. The vote was unanimous in favor of the motion. The Board also voted that all information requested by HUD in regard to the Section 504 complaint be made available. (J.E. 12.)

10. There is no evidence that Carter spoke for or against Yeary's motion to limit access to the Title VI information that would be made available to the HUD investigators. Although Carter had no vote on the Board, he did periodically speak on matters to the Board, and his advice was taken in all instances that Yeary could recall. The Board's attorney, Vincent Sikora, was present at the meeting. His legal advice, as contained in his letter of April 6, 1990, was discussed. The minutes of the April 24 meeting state that,

It was the opinion of the Board of Commissioners that HUD had acted improperly, unfairly and outside its rules and regulations regarding a Civil Rights investigation conducted on October 5-7, 1988 and its current charges of a Handicap violation. (J.E. 12; Govt. Exh. F; Tr. 378.)

11. Yvette Boykin and Marie Vevik were the two investigators sent by HUD to conduct the on-site investigation of the BTHA. Boykin was the team coordinator and she was also in charge of the Title VI investigation. Vevik was in charge of the Section 504 investigation. Kathelene Coughlin, as Boykin's supervisor, had directed Boykin to look at the evidence submitted by the BTHA in rebuttal to determine if it was sufficient to rebut the preliminary findings of Title VI violations. It was Boykin who concluded that additional information was needed and that an on-site investigation would be the best way to verify the rebuttal information. Boykin found that the rebuttal evidence presented by the BTHA showed that much of HUD's evidence was "not factually correct." She also concluded that there had not been any illegal

skip-overs for one-bedroom apartment units. However, to make justified findings, Boykin concluded that she needed to look at other files to determine whether the "local preference" test was consistently applied to all applicants without regard to race. She also needed to look at other files to determine whether the "urgency of need" test applied by the BTHA in one of the alleged skip-over cases was justified. This was to be the scope of the Title VI follow-up investigation. (Tr. 41-49.)

12. On April 25, 1990, Boykin and Vevik arrived at the BTHA Office at Edgemont Towers to meet with Sikora and Carter, and to open their investigation. Carter turned on a tape recorder after he introduced Sikora to Boykin and Vevik. Boykin called back to HUD to verify whether Carter could use the tape recorder. Coughlin gave permission for Carter to use the recorder during formal interviews. (Tr. 51-53, 248, 342-343.)

13. Based upon the tape recording made by Carter, which was played at the hearing, I find that he complied with the ground rules established for the taping, and turned off the tape only during breaks in the general introduction and interviews. Comments he may have made to the investigators when the tape recorder was turned off were made during breaks in the general introduction and interviews. When the tape was turned off, he expressed his anger at HUD for pursuing what he believed was a vindictive investigation based on a negligently performed site investigation in 1988. (Tr. 202, 346-349, 350-354.)

14. Sikora told Boykin that she would not be provided any information on the Title VI cases other than the files for the ten individuals listed in the letter of findings. Boykin understood that Sikora was the spokesman for the BTHA on that matter. (Tr. 53-54, 231.)

15. Carter told Boykin that she would only be allowed to see one file at a time. When Boykin objected, Carter stated that some files had been lost during a prior investigation and that he would preserve the files by this procedure. Boykin did not believe that she could force either Sikora or Carter to give her more files at that time or to see more than one file at the same time. She agreed to the procedure set out by Carter and Sikora to get the investigation started. (Tr. 55, 200.)

16. In the afternoon of April 25, 1990, Carter and his assistant, Pamela Pinkerton, brought the ten files applicable to the Title VI complaint into the room for Boykin to review. Boykin reviewed those files at one end of the table from about 1:00 to 2:30 p.m., while Vevik was getting information from Carter about the 504 complaint at the other end of the table. Boykin asked Carter for clarification of one of the Title VI cases, and told Carter that she needed other files to properly write up that case. Carter referred her to Sikora's statement

about the limitation on the Title VI case files that she could review. He did not provide any additional files to Boykin at that time. (Tr. 118, 154, 157, 203-204, 356-357, 410.)

17. In the late afternoon of April 25, 1990, Carter, Pinkerton, Boykin and Vevik went to the Ft. Shelby Apartments (Ft. Shelby) to look at files related to the Section 504 complaint. Carter assigned them to a small room in which to conduct the file review, with three chairs at a table, a window, and a copier machine. The room was across from the main office at Ft. Shelby. Boykin had requested that she and Vevik be allowed to review the files in a larger room, but Carter denied her request. (J.E. # 20; Tr. 58, 62, 203-204, 210-212, 219-220, 459.)

18. Carter sat in the chair between Vevik and Boykin at the small table. When Boykin asked for a private room in which to review the files out of Carter's hearing, he refused her request on the ground that he had to oversee the review of all BTHA records. Carter refused to leave the room despite repeated requests by Boykin and Vevik. At Ft. Shelby, Carter allowed Boykin and Vevik to see all files kept there because the BTHA had placed no restrictions on the files that could be reviewed for the 504 complaint. However, he handed the files to them one at a time, and did not allow the comparison of files. Boykin was not permitted to gather the files she needed for the investigation, nor was she given the files in the file groupings she prefers to use when performing an investigation. (Tr. 60-62, 173-175, 213-214, 255, 278, 357-362, 371.)

19. If Vevik or Boykin needed to make a copy of any document in a file, they had to identify that document for Carter or Pinkerton. Carter told them that he would be charging HUD by the page for any copies made. Neither investigator believed that they should risk incurring a cost to HUD for copying entire files. Carter later testified that he was "joking" about the copying charge, but he did nothing to indicate at the time to either Boykin or Vevik that he was joking. (Tr. 215, 238, 407-408.)

20. Boykin and Vevik were not able to properly conduct the investigation of the files because Carter was controlling the sequence and manner in which the files could be examined. Because he sat between them at Ft. Meyer while they reviewed the files, they did not feel free to discuss the files in a manner that would assist the investigation. Boykin and Vevik both felt that Carter's presence and his insistence on controlling the file inspection had a severe chilling effect on the way they conducted the investigation. Neither investigator had ever, in their career, conducted an investigation without unhindered access to records. (Tr. 63, 203, 206-208, 214-218, 268, 271.)

21. On April 26, 1990, Boykin and Vevik returned briefly to Edgemont Tower to interview Pamela Pinkerton, and then finished the file review at Ft. Shelby. Vevik and Boykin drove back to Knoxville on the afternoon of April 26, 1990. Upon their return to HUD, each prepared an affidavit describing Carter's interference with their investigation. (Attachments to Notice of LDP (Complaint); (Tr. 64-65, 369-371.)

22. Boykin was not able to determine the accuracy of the rebuttal evidence provided by the BTHA because she was not allowed to see comparative evidence to determine whether HUD-approved preference tests, such as the local residence preference and the urgency of need preference, were being applied by the BTHA in a race-neutral manner. The BTHA's rebuttal in two of the Title VI cases involved application of those preference tests. (Tr. 67-68, 70, 121-127.)

23. Executive Directors of two other Housing Authorities in the area allowed Government investigators to select and retrieve the files they wished to see, but did request that the investigators work in a space where Housing Authority employees could have a view of how the files were being handled. However, these Housing Authority Directors testified that they would not have gone to the physical extremes utilized by Carter to protect Housing Authority files and records. (Tr. 434-440, 443.)

24. Carter testified that he did not intend that his conduct frustrate the investigate or "chill it". He thought his communication style with the investigators was "cheerful banter". Carter was surprised by the affidavits prepared by Vevik and Boykin upon their return because he was unaware during their visit that they had such a negative reaction to the way in which he allowed them to see the files and records. (Tr. 368, 374, 408-409, 461.)

DISCUSSION

Carter is a participant in HUD's non-procurement programs as defined at 24 C.F.R. § 24.105(m) because he is authorized to act on behalf of the BTHA, which receives funding from HUD for its operations and programs. Therefore, he is subject to sanctions by HUD, including the imposition of an LDP.

The purpose of all administrative sanctions, including an LDP, is to protect the public interest by allowing the Government not to do business with persons who are not responsible. 24 C.F.R. § 24.115(a). "Responsibility" is a term of art when used in the context of Governmental sanctions. It includes not only the ability to perform work satisfactorily, but the honesty and integrity of the participant, as well. 48 Comp. Gen. 769 (1969). The test for whether a sanction is necessary is present responsibility. However, a lack of present responsibility may be

inferred from past acts. Schlesinger v. Gates, 249 F. 2d 111 (D.C. Cir. 1957).

An LDP is a limited sanction, both in scope and in duration. 24 C.F.R. § 24.710(a)(3). It may be terminated if the cause for imposition of the LDP is resolved. 24 C.F.R. § 24.710(b). The grounds cited for the LDP imposed on Carter constituted irregularities in his past performance in a HUD program, 24 C.F.R. § 705(a)(2), a failure to honor contractual obligations and a failure to proceed in accordance with HUD regulations, 24 C.F.R. § 24.705(a)(4). The Government has the burden of proof, by adequate evidence that cause for the LDP exists and that it is in the best interests of the public and the Government. 24 C.F.R. §§ 24.700 and 24.705(a).

The Government's case against Carter is two-fold. First, it claims that he refused Yvette Boykin and Marie Vevik access to the files needed to perform a follow-up investigation of alleged violations of Title VI of the Civil Rights Act of 1964. Second, the Government accuses Carter of having frustrated and interfered with the Title VI investigation and a Section 504 investigation of alleged discrimination based on physical handicap.

I find that Carter was not responsible for the denial of Boykin and Vevik's access to the files for the Title VI follow-up investigation. The Board of Commissioners of the BTHA, not Carter, made the decision to limit access to the files for the Title VI investigation. He personally agreed with the Board's action, but he took no part in the Board's decision, nor did he encourage the Board to take the action it did. Carter is an employee of the BTHA, and, as such, he is bound to carry out the dictates of the Board of Commissioners.. On April 25, 1990, when Boykin and Vevik arrived at the BTHA to begin the investigation of the files, it was Vincent Sikora, the attorney for the BTHA, not Carter, who refused the investigators access to the files requested for the Title VI investigation. When Carter subsequently referred the investigators to Sikora's statement after they indicated a need to see more files, Carter was, at best, indirectly enforcing the BTHA's directives by refusing to deviate from them. Under the circumstances, I do not find this adequate evidence that Carter denied access to those files to the investigators.

However, the manner in which Carter controlled the distribution of files, his silent enforcement of the limitation placed by the BTHA on the files that could be made available, and his insistence on sitting with the investigators at a small table and never leaving them alone to discuss the files, prevented the investigators from conducting an adequate investigation, and "chilled" the investigatory process, irrespective of Carter's intentions. Carter carried his concern with physically protecting the BTHA's files to an extreme that ultimately

of a subject of an investigation to physically interject himself into the investigatory process so as to render it impracticable for the investigators to compare, discuss, and review their observations with the files in hand. The room in which Carter placed Boykin and Vevik had a door with a glass window. Carter could easily have monitored the investigators' handling of the files without physically placing himself into their midst. Nor was there any justifiable basis for Carter to limit the number of files that can be seen at one time or the order in which they will be seen. It is significant to note that the other Executive Directors of local Housing Authorities testified that they did not, and would not, interfere physically with the investigative process as Carter did. Each would have assured the physical safety of Housing Authority files without resorting to the unreasonable measures used by Carter. Despite his protestations at the hearing to the contrary, Carter clearly relished the control he exerted over Boykin and Vevik. He believed that HUD was illegally persecuting the BTHA based on a poorly conducted investigation in 1988. Those investigators in 1988 mishandled BTHA files and some of their findings were based on clear errors. Nonetheless, the subsequent 1990 investigation was in accordance with law and Carter had no right to vent his frustration at HUD by intimidating and frustrating Boykin and Vevik.

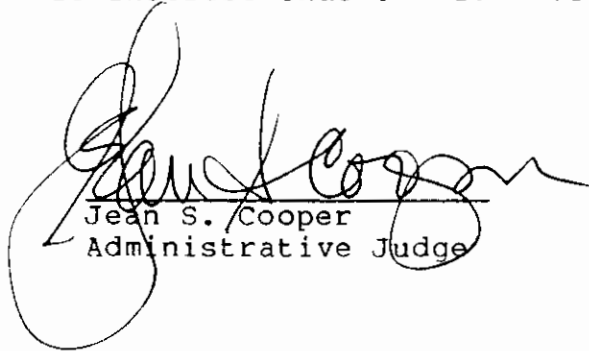
In the Ruling on Motion for Partial Summary Judgment in this case, it was held that Section 310 and 311 of the Consolidated Annual Contributions Contract (ACC) between HUD and the BTHA required the BTHA to give HUD investigators "full and free access" to "all the books, documents, papers and records... that are pertinent to the operations with respect to financial assistance..." Carter's extreme degree of physical control over the BTHA files during the investigation by Boykin and Vevik violated this contractual requirement. The Ruling on Motion for Partial Summary Judgment further held that failure to give access to all books and records was an interference with HUD's right to have "access... to books, records, accounts, and other sources of information, and its facilities as may be pertinent to ascertain compliance with this Part I..." [implementing Title VI of the Civil Rights Act of 1964] was in violation of 24 C.F.R. § 1. Carter's physical control of the ten files the BTHA authorized him to release in regard to the Title VI follow-up investigation violated 24 C.F.R. § 1 because he unreasonably interfered with full and free access to the ten files.

These violations of contractual and regulatory requirements by Carter constitute adequate evidence of causes for the imposition of an LDP. Whether Carter intended to frustrate the investigators or not, he did so. This is a matter of concern to the public and it is in the public interest and in the best interests of HUD to impose an LDP on Carter until his interference in the investigation is corrected. This can only be

done by arranging for a rescheduled on-site investigation that will not be hampered, limited, or otherwise "chilled" by Carter. Until such a time, the LDP is necessary to protect the public interest.

CONCLUSION

The Limited Denial of Participation imposed on Larry Carter on April 17, 1990, is supported by adequate evidence. Inasmuch as the causes for imposition of the sanction have not been corrected, it is in the public interest that the LDP not be terminated at this time.



Jean S. Cooper
Administrative Judge

Washington, D.C.
April 5, 1991