

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

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In the Matters of:	:	
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NELL WITT	:	HUDBCA Nos. 90-5321-D82
CHARLES HAGER	:	90-5322-D83
CHARLES FORBUSH	:	90-5323-D84
AGNES COWAN	:	90-5324-D85
	:	
	:	
Respondents.	:	

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For the Government

DETERMINATION BY ADMINISTRATIVE JUDGE TIMOTHY J. GRESZKO

April 22, 1991

Statement of the Case

By letters dated June 1, 1990, Raymond A. Harris, Regional Administrator - Regional Housing Commissioner, Atlanta Regional Office, U.S. Department of Housing and Urban Development ("Department," "Government," or "HUD") notified Nell Witt, Charles Hager, Charles Forbush, and Agnes Cowan ("Respondents"), that a twelve month Limited Denial of Participation ("LDP") was being imposed on them on the grounds that, as members of the Bristol Tennessee Housing Authority ("BTHA"), they had acted improperly by impeding a Departmental investigation which was being conducted under Title VI of the Civil Rights Act. On August 14, 1990, the LDPs were affirmed by Harris. By letters

dated August 24, 1990, Respondents requested a hearing on the imposition of the LDPs pursuant to 24 C.F.R. § 24.713. Respondents' appeals were consolidated for purposes of a hearing, and an oral hearing was held on January 16, 1991, in Bristol, Tennessee.

On November 16, 1990, the Government filed a consolidated Motion for Partial Summary Judgement in these cases and the case of Larry Carter, HUDBCA No. 90-5301-D70. The motion sought a determination on whether the BTHA, through Carter, the Executive Director of the BTHA, and its Commissioners, acted properly in refusing to allow the inspection of certain BTHA records by Departmental 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, Chairman of the BTHA Board of Commissioners, from Kathleen Coughlin, Director of HUD's Regional Office for Fair Housing and Equal Opportunity ("FHEO"). The ruling concluded that the BTHA's refusal to provide these documents to the HUD investigators 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 Judgement was granted on that basis.

All parties in the instant case filed post-hearing briefs. This determination is based upon a consideration of the entire record in this case.

### Findings of Fact

1. Larry Carter is the Executive Director of the BTHA. 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. Carter has performed in this capacity since 1963, with one short break in service. Nell Witt is the Chairman of the BTHA Board of Commissioners. Charles Hager, Charles Forbush, and Agnes Cowan are Commissioners of the BTHA, and do not receive compensation for their services. (Ruling on Motion for Partial Summary Judgement, Larry Carter, Nell Witt, Charles Hager, Charles Forbush, and Agnes Cowan, HUDBCA Nos. 90-5301-D70, 90-5321-D82, 90-5322-D83, 90-5323-D84, 90-5324-D85 (November 21, 1990) ("Ruling"), para. 1; Transcript of hearing in Carter, supra. ("Tr. I"), p. 298, 334).

2. The BTHA and HUD are parties to Consolidated Annual Contributions Contract ("ACC") No. A-3076, as amended. By the terms of that contract, HUD makes annual monetary contributions

to the BTHA for the development and maintenance of public housing projects. Section 310 of the ACC mandates as follows:

The Local Authority shall furnish the Government such financial, operating and statistical reports, records, statements and documents at such times, in such form, and accompanied by such supporting data, all as may be reasonably required from time to time by the Government.

Section 311(A) of the ACC states:

The Government . . . shall have full and free access to the Projects and to all the books, documents, papers, and records of the Local Authority that are pertinent to its operations with respect to financial assistance under the Act, including the right to audit, and to make excerpts and transcripts from such books and records. (Ruling, para. 2; Govt. Exh. N).

3. As recipients of Federal funds through the ACC, the BTHA is bound to comply with Title VI of the Civil Rights Act of 1964 ("Title VI"), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), which prohibits Federal fund recipients from discriminating against the handicapped, and 24 C.F.R. Part 1, which implements Title VI. (Ruling, para. 3.)

4. In October, 1988, in response to a complaint, HUD's FHEO Office conducted an investigation of the BTHA pursuant to Title VI and 24 C.F.R. § 1. The investigators examined 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. (Tr. I, pp. 303-306); Transcript in the hearing of Witt, Hager, Forbush and Cowan, supra ("Tr. II"), p. 106; Discovery Deposition of Charles Forbush dated November 14, 1990, pp. 9-11).

5. During September 1989, a thirteen page memorandum was signed by Thomas D. Casey, HUD's General Deputy Assistant Secretary for Fair Housing and Equal Opportunity, based upon a 1988 Title VI complaint investigation of the BTHA (the "memorandum" or "Casey memorandum"). The memorandum concluded, among other things, that the BTHA had assigned housing units on the basis of race, in violation of the Civil Rights Act of 1964, and further concluded that ten black applicants were denied housing and were "skipped over" in favor of white applicants, for the purpose of ensuring racial segregation. (Resp. Exh. 1; Tr. II, p. 15).

6. Carter attempted to obtain a copy of the Casey memorandum from HUD in September, 1989, but the Department refused at that time to provide a copy to the BTHA. Carter "felt terrible" because HUD would not provide a copy of the Casey

memorandum to the BTHA Board, notwithstanding the fact that it had been provided to the press and had been filed in another court proceeding involving the BTHA. (Resp. Exh. 2; Tr. II, pp. 23-26).

7. On December 29, 1989, Joe L. Tucker, in his capacity as Acting Director, Atlanta Regional Office, FHEO, issued a six-page preliminary letter of findings of non-compliance with Title VI, addressed to Nell Witt (the "Tucker letter" or "preliminary letter of findings"). The Tucker letter listed ten alleged instances in which the BTHA "skipped over" applicants for public housing vacancies because of the race of the applicants. The letter stated, among other things, that the BTHA may, within thirty days, present documentary evidence to: (1) demonstrate that the Department's findings are factually incorrect; (2) demonstrate that there were legitimate, non-discriminatory reasons for the actions of the BTHA; or (3) request the commencement of discussions to resolve this matter voluntarily. (Ruling, para. 4; Government Exh. A).

8. Carter conducted an independent review of the alleged "skip-over" cases, and concluded that none of the cases were racially motivated. He found that one case involved application of the HUD-approved "local preference test," which gave priority to applicants who are residents of Tennessee. Another case involved application of the "urgency of need" test, a preference criteria also approved by HUD. He also found names of applicants misspelled and basic errors of facts in the Tucker letter, including the race of one of the applicants alleged to have been skipped over. The BTHA provided an oral response to the Tucker letter and produced rebuttal records in the HUD office in Atlanta, Georgia on January 17, 1990. The BTHA provided HUD with a detailed written rebuttal on March 7, 1990. (Tr. I, pp. 314-317, 319-323, 325-329; Tr. II, pp. 30-40; Govt. Exh C: Resp. Exh 4).

9. By letter dated March 29, 1990, Kathleen Coughlin, Regional Director of FHEO, advised the BTHA that an on-site investigation would be conducted by Yvette Boykin and Marie Vevik of the FHEO staff, to confirm the accuracy of the rebuttal information supplied by the BTHA. The investigation also sought information with respect to a Section 504 complaint alleging discrimination based on handicap that had been filed by a public housing resident. (Ruling, para. 5; Govt. Exh. B).

10. By letter dated April 6, 1990, Vincent Sikora, attorney for the BTHA, wrote, in response to Coughlin's letter, that the BTHA's rebuttal evidence had demonstrated that the Department's findings were incorrect, that the BTHA would only allow the investigators to inspect the ten files for the alleged "skipped over" applicants, and that the BTHA would not allow further investigation of the BTHA under Title VI unless HUD had received

additional discrimination complaints within the preceding six months. The letter stated that HUD had no right, under 24 C.F.R. §§ 1.7(b) and (c) to perform another on-site investigation, because there had been no new discrimination complaints within the preceding six months, and that any further investigation would be neither prompt nor timely, as required by Departmental regulations. The letter concluded that the "fair and proper action for HUD is to dismiss the charges and close the case." (Ruling, para. 6; Govt. Exh. C)

11. By letter dated April 12, 1990, Coughlin informed Nell Witt that FHEO had the authority to continue its investigation, the BTHA had a responsibility to cooperate with the FHEO investigation, and that two FHEO investigators would be at the BTHA during the week of April 23, 1990. (Ruling, para. 7; Govt. Exh. D).

12. Coughlin sent a letter to Witt, dated April 18, 1990, outlining the documents and information that the BTHA would have to make available to FHEO investigators. These included records for the ten individuals named in Tucker's letter dated December 29, 1989, and further included: all current tenant records; all records of tenants who vacated since July, 1985; all Tenant Selection and Vacancy Register Reports from July 1, 1985 through September 30, 1988; all waiting reports from July 1, 1985 through September 30, 1988; all rent control sheets or tenant ledger records as of July 1, 1985; and all ineligible and inactive applicant files. (Ruling, para. 8; Govt. Exh. E).

13. At a meeting held on April 24, 1990, the BTHA Board of Commissioners passed a resolution that the FHEO investigators could only see the ten files of the alleged "skipped over" applicants. The minutes of the Board meeting state that the Board of Commissioners voted to limit HUD's access to the records in question because "HUD had acted improperly, unfairly and outside its rules and regulations governing the conduct of a Civil Rights investigation." The Commissioners believed that, under section 311(A) of the ACC, they were not obligated to provide HUD with full and free access to the records in question, because these records were not "financial records." The Board also felt that HUD's only motivation for the continuation of the investigation was to conduct a politically motivated "fishing expedition" in the hope of uncovering wrongdoing, but that Board members were not authorized to release certain records which were protected under the provisions of the "Privacy Act." In May, 1990, 190 BTHA tenants signed a petition objecting to the release of their records to HUD, asserting a right to privacy. (Ruling, para. 9; Tr. II, pp. 104-105, 111-113; Govt. Exh F; Discovery Deposition of Nell Witt dated November 15, 1990, pp. 13-24; Discovery Deposition of Agnes Cowan dated November 15, 1990, pp. 15-19; Discovery Deposition of Charles Forbush dated November 14, 1990, pp. 12-32).

14. Yvette Boykin was directed by Kathleen Coughlin, her supervisor, to review the rebuttal evidence submitted by the BTHA to determine if it was sufficient to rebut the preliminary findings of Title VI violations. Boykin concluded that additional information was needed and that an on-site investigation was 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 supportable 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. (Tr. I, pp. 41-49).

15. On April 25, 1990, Boykin and Vevik arrived at the BTHA office to meet with Carter and Sikora. Sikora told Boykin that she would not be provided with information on Title VI cases other than the files for the ten individuals listed in the Tucker letter. (Ruling, para. 10; Tr. I, pp. 51-54).

16. Boykin and Vevik were given the ten files. Carter did not provide them with any other files relative to the Title VI investigation. The HUD investigators were allowed to see all records and files that they requested for the Section 504 investigation. (Ruling, para. 11; Govt. Exhs. G, H; Tr. I, p. 55).

17. By letter dated April 27, 1990, an LDP was issued against Carter by the HUD Regional Office in Atlanta, Georgia, on the grounds that he improperly denied the FHEO investigators access to requested files, and that he interfered with their investigation. (Ruling, para. 12; Govt. Exh. I).

18. The HUD Regional Office in Atlanta, Georgia, sent a letter dated May 2, 1990, addressed to all of the members of the BTHA Board of Commissioners. The letter notified the Board members of the LDP imposed on Carter, and outlined certain employment restrictions on Carter's employment created by the LDP. It also outlined certain limits that HUD could place on the BTHA if Carter continued in its employment. The Board was directed to notify HUD of the actions it intended to take with respect to Carter's employment. The letter also stated that the HUD investigators would return to the BTHA to review the files that were not produced on the April 25, 1990 site visit. The Board was directed to contact Kathleen Coughlin within five days of receipt of the letter "to confirm that the necessary arrangements have been made and to schedule a date for the file review." (Ruling, para. 13; Govt. Exh. I).

19. The Board members of the BTHA did not respond to Coughlin's letter of May 2, 1990, or contact Coughlin to schedule a file review. (Ruling, para. 14).

20. By letters dated June 1, 1990, LDPs were issued by Raymond A. Harris, Regional Administrator - Regional Housing Commissioner, HUD Atlanta Regional Office, against Respondents Witt, Hager, Forbush, and Cowan, for a period of one year. As grounds for the LDPs, the letters cite the BTHA's failure to respond to HUD's letter of May 2, 1990. As additional grounds, the letters state that, in contravention of the requirements of the ACC and HUD regulations, the Board passed a resolution improperly limiting HUD officials access to records pertinent to the Title VI investigation. (Ruling, para. 15).

21. BTHA Commissioner John Yeary resigned from the Board in 1990 because he felt he was being harassed by the Department. Commissioner Hager refused to resign from the Board, because of his belief that he was innocent of the discrimination charges that were leveled by the Department. Several of the Commissioners believed that certain newspaper articles related to the controversy had a negative impact on their reputations in the community and that they had lost friends as a result of the adverse publicity generated by the articles. (Tr. II, pp. 82-87, 93); Resp. Exhs. 7-9).

22. The BTHA had not provided HUD with access to the records in question as of the date of the hearing. (Tr. II, p. 128).

### Discussion

An LDP may be imposed on participants in HUD programs upon adequate evidence of: (1) failure to honor contractual agreements or to proceed in accordance with contract specifications or HUD regulations; and (2) a willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction (24 C.F.R. § 24.700; 24 C.F.R. § 24.705(a)(4); 24 C.F.R. § 24.305(b)(3), as incorporated by 24 C.F.R. § 24.705(a)(8)).

There is no dispute that Respondents are, by virtue of their positions on the Board of Commissioners of the BTHA, participants and principals in primary covered transactions, as defined in the relevant Department regulations. 24 C.F.R. §§ 24.105(m) and (p); 24 C.F.R. § 24.110(a)(1). As such, they are subject to sanctions, including the imposition of an LDP.

Underlying the Government's authority not to do business with an individual or party is the requirement that agencies only do business with "responsible" persons and entities. 24 C.F.R. § 24.115(a). The term "responsible," as used in the context of these regulations, is a term of art, which includes not only the ability to perform a contract satisfactorily, but the honesty and integrity of the participant as well. 48 Comp. Gen. 769 (1979). Like a debarment or suspension, an LDP may not be used for punitive purposes, but only to protect the public interest. 24 C.F.R. § 24.115(b). The test for the need for any of these sanctions is present responsibility. Although a finding of lack of present responsibility may be based on past acts, Schlesinger v. Gates, 249 F.2d 111 (D.C. Cir. 1957), all mitigating circumstances must be taken into consideration in deciding whether a sanction is necessary. Gonzalez v. Freeman, 344 F.2d 570 (D.C. Cir. 1964).

The Government asserts that Respondents' refusal to provide the Department with full access to its records establishes cause for the imposition of an LDP pursuant to 24 C.F.R. §§ 24.705(a)(4) and (8). The Government cites two means by which Respondents allegedly interfered with its right to full access to records: (1) Respondents failed to respond to the Department's request for the production of records, thus impeding the Title VI investigation; and (2) Respondents passed a resolution which denied to HUD officials access to records for the Title VI investigation. The Government contends that such actions constitute a failure to honor contractual and regulatory obligations, and a willful violation of applicable statutory or regulatory requirements. Respondents' response to the Government's argument is that they were not required, under either the ACC or applicable Departmental regulations, to provide HUD officials access to the documents at issue.

On November 21, 1990, this Board issued its Ruling on Motion for Partial Summary Judgement, which held that nothing in the applicable Departmental regulations limits, in any way, the scope of an investigation made to determine compliance with Title VI. (See 24 C.F.R. Part 1). That ruling also held that Sections 310 and 311 of the ACC place on the BTHA the obligation to provide reports and records to HUD as HUD determines it needs, and in the form required by HUD. The BTHA's refusal to provide all of the records requested in Coughlin's letter of April 18, 1991 to Witt was in violation of 24 C.F.R. § 1.6 and Sections 310 and 311 of the ACC. I find that such refusal to provide these records to HUD constitutes grounds for the imposition of an LDP under 24 C.F.R. § 24.705(a)(4).

As the Government has established cause for the imposition of an LDP, Respondents have the burden of proof for establishing mitigating circumstances. 24 C.F.R. § 24.313(b)(4). Respondents assert, as mitigation, that: (1) the sanction was unjustified and



unwarranted; (2) the case arose over an honest dispute about the construction and application of the ACC and Federal housing regulations; (3) the dispute was aggravated by an aggressive HUD regional office; (4) such a dispute never arose before; (5) Respondents were "unfairly bombarded" by adverse publicity; (6) Respondents reasonably provided all of the information requested in the § 504 investigation; (7) Respondents have diligently attempted to be reasonable and fair with HUD but have received no reciprocal consideration; and (8) it is inappropriate to sanction Respondents for merely expressing their belief on the meaning of the ACC and trying to fulfill the duties of their unpaid positions to promote the BTHA.

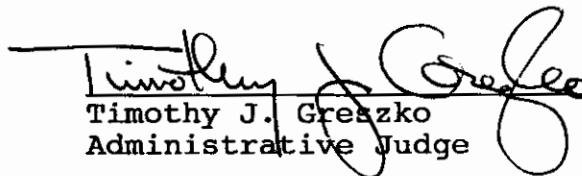
The evidence in this record does not establish that Respondents willfully violated the record production requirements of either the ACC or applicable Departmental regulations. While I find that Respondents' interpretation of the record production requirements of the ACC and applicable Departmental regulations was incorrect as a matter of law, their interpretation appears to have been made in good faith on the record at a public meeting of the Board. However, their interpretation of these regulations and contractual provisions was clearly faulty.

Some of Respondents' complaints about the Department may have substance, and Respondents may be justifiably upset with certain investigatory tactics of the Department. The Department's thoughtless mishandling of the BTHA's records in 1988 is appalling. It is also disturbing that the Department's investigation contained a number of factual errors, which the Department has made no attempt to explain. Furthermore, Respondents were subjected on multiple occasions to demeaning and embarrassing publicity in a local newspaper, when the underlying charges may have been without merit.

These conclusions, however, do not exculpate Respondents. The BTHA has a legal obligation to run a discrimination-free public housing program. Likewise, the Department has an equally important responsibility to review the practices of recipients of Federal housing funds to determine whether they are complying with Title VI. See generally 24 C.F.R. § Part 1. The unresolved specter of possible racial discrimination cannot be put to rest until HUD's investigation is completed. The BTHA's continuing failure to provide HUD investigators with unimpeded access to the records in question renders it impossible for the Department to complete its investigation. The circumstances attendant to the underlying investigation and the publicity surrounding it, while unfortunate, do not excuse Respondents from complying with HUD's request for access to all of the BTHA's records. Until such time as full access to the records is provided, I find that the continuation of the LDP is in the best interests of the public and the Department.

Conclusion

For the forgoing reasons, I find that the LDP of Nell Witt, Charles Hager, Charles Forbush, and Agnes Cowan is supported by adequate evidence. As the cause for the imposition of the LDP has not been eliminated, the LDP shall not be terminated at this time. See 24 C.F.R. § 24.710(b).

  
Timothy J. Greszko  
Administrative Judge