Board of Contract Appeals
U.S. Department of Housing and Urban Development
Washington, D.C. 20410-0001

In the Matter of:	:	
LYNNE BORRELL AND LYNNE BORRELL AND ASSOCIATES,	:	HUDBCA No. 91-5907-D52 Docket No. 91-1654-DB (LDP)
Respondents.	:	

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DETERMINATION BY ADMINISTRATIVE JUDGE TIMOTHY J. GRESZKO

September 20, 1991

Statement of the Case

By letter dated December 6, 1990, Gertrude W. Jordan, Regional Administrator - Regional Housing Commissioner, Chicago Regional Office, U.S. Department of Housing and Urban Development ("Department," "Government," or "HUD") notified Lynne Borrell ("Respondent" or "Borrell") and Lynne Borrell and Associates ("LB&A") that a twelve-month Limited Denial of Participation ("LDP") was being imposed on them, which would restrict their eligibility to participate in HUD programs. The notice stated that the LDP was being imposed because, in 1984, Respondent had obtained her former position as a Deputy Executive Director of the Chicago Housing Authority ("CHA") by misrepresentation of her professional and educational qualifications. In addition, the notice stated that Respondent's duties as Deputy Executive

Director of the CHA included direct supervision of the Directors of Development and Modernization, and that: (1) CHA Development and Modernization programs were operated in substantial violation of numerous HUD regulations and program requirements; (2) failure to obligate 1983 and earlier modernization funds despite repeated time extensions led HUD to recapture modernization funds initially estimated at $11 million, causing grievous financial loss to the CHA; (3) failure to implement effective financial and budgetary controls on development and modernization expenditures led directly to massive cost overruns and uncontrolled expenditures in both programs, the disallowance by HUD of millions of dollars of expenditures, and grievous financial harm to the CHA; and (4) continuing and long standing mismanagement of the development program caused the program to be placed in receivership, delaying the availability of additional public housing units to low income residents of Chicago and increasing the cost to the Government of providing such housing. The notice stated that these conclusions were drawn from the judicial record in Borrell v. City of Chicago, et al., No. 87 C 1045 (N.D. Ill., 1990). On the basis of these assertions, the notice concluded that cause for the imposition of an LDP existed under 24 C.F.R. §§ 24.705(a)(2) and (4).

The LDP was affirmed on March 1, 1991, after an informal conference on the matter. Respondents filed an appeal from the affirmance of the LDP, pursuant to 24 C.F.R. § 24.713. A hearing was held in Chicago, Illinois on July 24-25, 1991. At the conclusion of the Government's case, Respondents moved for a directed verdict. The motion was granted in part on the grounds that the Government had failed to prove cause for the imposition of an LDP under 24 C.F.R. § 24.705(a)(2) (failure to honor contractual obligations or to proceed in accordance with contract specifications or HUD regulations).

The parties elected to waive post-hearing briefs. This determination is based upon a consideration of the entire record in this case.

Findings of Fact

1. Respondent was employed as Deputy Executive Director for Special Housing Programs of the CHA from October 4, 1984 until February 2, 1987. Respondent was invited to apply for this position, and was hired by the former CHA Executive Director Zirl Smith in August of 1984. She had general supervisory responsibility for a number of Federally-funded programs for CHA, including: the Section 8 program; the Modernization program; the Development program; and the Scattered Site Management Program. Respondent had no authority in these areas for: maintaining CHA's financial books and records; obligating funds on specific CHA projects; preparing contract plans and specifications; reviewing

bids; awarding contracts in excess of $5000; or awarding contracts for which bids had been solicited by the CHA. Respondent reported to Executive Director Smith during her tenure at the CHA, and was closely supervised by Smith, who gave her specific directions relative to most major decisions within her areas of responsibility. (Tr. pp. 200-202, 204, 206-208; Resp. Exh. F, Management Review of the Chicago Housing Authority, Nov. 5, 1986 - April 17, 1987).

2. Respondent had significant contact with a number of HUD employees during her tenure at the CHA. These employees encountered numerous problems with projects under Respondent's supervision, including lengthy delays, inadequate plans and specifications, a general failure on the part of the CHA to obligate funds, which resulted in the loss of these funds to the CHA, and the improper utilization of "Force Account" labor on modernization projects*. HUD employees also experienced little or no follow-through by Respondent on agreements they had reached with her during negotiations. HUD employees also felt that Respondent did not understand applicable Departmental rules and regulations while she worked at the CHA. These employees and other HUD officials now attribute significant responsibility to Respondent for all of the problems cited above, because of her apparent authority, because they had contact with her during many of the discussion of these problems, and because the problems were not resolved. (Tr. pp. 13-15, 19, 21-22, 50- 51, 53, 68-70, 72, 73, 93-96, 104-106, 159-160).

3. A Management Review of the CHA was conducted by HUD from November 5, 1986 to April 17, 1987. The review covered the period January 1, 1984 to April 17, 1987. The report contained seventy-six findings of violations by CHA of a HUD regulation or provision of the Annual Contributions Contract ("ACC") between the Department and the CHA. The overall conclusion of the review was that the CHA was not well managed during the period reviewed. The review concludes, in relevant part, that:

> The findings of this review indicate that <u>the CHA Board of Commissioners was ineffective in carrying out its responsibilities as enumerated in the ACC</u>. We do not want to give the impression that efforts were not made, but that the sum of those efforts were insufficient to assure that the Authority's funds and programs were managed in accordance with good management practices and HUD requirements. (emphasis supplied).

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* "Force Account" labor involves the utilization of in-house employees to perform rehabilitation work typically performed by contractors. (Tr. p. 208).

Specific relevant findings of the Management Review state that:

(1) The Authority does not have a current management plan, neither for the entire agency nor by Department.

(2) CHA policies and procedures are not current and clearly defined. As a result, actual practices differ from written procedures.

(3) The Chicago Housing Authority does not have functional statements that clearly define the responsibility of each organizational unit.

(4) Internal monitoring and audit procedures are ineffective.

* * * * *

(6) Position descriptions are not current and accurate, and yet in many instances are not existent.

The Management Review does not contain any findings which attribute to Respondent any substantial responsibility for the ineffectiveness of the CHA. (Resp. Exh. F).

4. Respondent was discharged from employment by the CHA on February 2, 1987. Subsequently, Respondent filed a five-count complaint in the United States District Court for the Northern District of Illinois against the CHA and others, alleging, on various grounds, that her discharge from employment was improper. On March 29, 1990, the court granted a motion for summary judgement in favor of all defendants. The decision states, in relevant part, that Respondent did not rebut evidence submitted by the CHA and others which indicated that Respondent: (a) lost her job because she mismanaged her department, costing CHA millions of dollars, driving the program into receivership, and nearly causing a Federal takeover of CHA operations; (b) did not dispute that she misrepresented her educational and professional background to obtain her position at CHA, by falsely representing that she possessed a college degree as well as a law degree; and (c) did not meet the minimum professional requirement for her job. The Court expressly declined to question the CHA's business judgement that Respondent was not a competent employee at CHA. (Govt. Exh. 2).

5. A determination was made by the HUD Chicago Region to impose an LDP on Respondent because a number of Departmental officials and employees believed that Respondent was in large measure responsible for the CHA Development program at the time that program collapsed. The Department believed that Respondent was completely responsible for the administration of the programs in question by virtue of her title and apparent authority within

the CHA. The Department did not impose an LDP on Respondent at an earlier date because it lacked the resources to collect the information needed to support the imposition of that sanction. The judge's ruling in Borrell v. City of Chicago, et al., supra, and the information contained in the pleadings and briefs which were submitted by the parties in that decision, comprised a convenient source of information upon which to base the LDP. The Department would not have proceeded against Respondent and LB&A if the information about Respondent's activities at the CHA had not been generated and collected in the District Court case. The Department made the determination to impose the LDP when it learned that Respondent was entering into consulting contracts with public housing authorities. The Department has not imposed sanctions against other former high-ranking officials of the CHA, including its former Executive Director, who was fired for mismanagement and who is now acting as a paid consultant to public housing authorities. A number of Departmental employees in the HUD Chicago Region felt it would be punitive to impose sanctions on Respondent and not upon others in similar circumstances. (Tr. pp. 44, 88-89, 114-115, 159-160, 164, 180).

6. Lynne Borrell and Associates is owned and controlled by Respondent Borrell. LB&A has four full-time and three part-time employees. LB&A runs training programs for employees of public housing authorities. HUD employees also attend LB&A's training sessions on occasion. Since 1987, LB&A has been conducting training programs which have been attended by hundreds of public housing authority employees. Numerous attendees attest to the high quality of the training programs, characterizing them as intensive, complete, professional, and well-received. One witness held up the training as a model which should be adopted by HUD. These training programs are given in-house and at sites around the United States, and include topics such as construction contract administration, administration of the Department's Comprehensive Improvement Assistance Program, and automation.

Respondent and LB&A also act as consultants to public housing authorities. In this capacity, LB&A provides management consulting services to local housing authorities throughout the United States, including assistance in the preparation of program and funding applications; general management; physical needs assessments; and general technical assistance. Numerous local housing authorities attest to the high quality of LB&A's consulting services. (Tr. pp. 222-227, 231, 233-235; Resp. Exhs. B, E).

Discussion

An LDP may be imposed on participants in HUD programs upon adequate evidence of irregularities in a participants's or contractor's past performance in a HUD program. 24 C.F.R. § 24.705(a)(2). There is no dispute that Respondent, by virtue of her consulting contracts with public housing authorities, is a

participant in covered transactions of this Department, and as such, is subject to HUD sanctions, including the imposition of an LDP. 24 C.F.R. § 24.105(m); 24 C.F.R. § 24.110(a)((ii)(c)(11). Respondent is also a "principal" because she is the owner of LB&A and exercises control over it in that capacity. 24 C.F.R. § 24.105(p). LB&A is clearly Respondent's "affiliate" as defined in 24 C.F.R. § 24.105(b).

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. § 24.15(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 burden is on the Government to establish adequate evidence for the imposition of an LDP. 24 C.F.R. § 24.705(a). The Government argues that such evidence is contained in this record. Respondent asserts that the LDP is not warranted on the grounds that the Government's evidence is too remote, that Respondent is being blamed for problems attributable to higher levels of management within the CHA, and that Respondent's activities since 1987 demonstrate that she is now presently responsible. I agree with Respondent for the reasons stated below.

First, Respondent correctly argues that the evidence upon which the Government relies is stale, and, as such, is too remote in time to demonstrate whether or not Respondent is presently responsible. Even assuming that Respondent bears responsibility for the mismanagement that occurred in the CHA in the 1980's, and further assuming that Respondent misrepresented her educational and work background to obtain her position with the CHA in 1984, the alleged acts occurred 4 1/2 to 7 years ago. While these acts may have been sufficient to have raised doubts with respect to Respondent's present responsibility in the time-frame in which they occurred, the passage of time diminishes their probative value as these acts relate to Respondent's present responsibility. See Charles Kirkland, HUDBCA No. 90-5285-D57 (Jan. 14, 1991); ARC Asbestos Removal Company., HUDBCA No. 91-5791-D25 citing Spencer H. Kim and Kamex Construction Corp., HUDBCA No. 87-2468-D58 (Jun. 21, 1988) (the passage of 4 - 1/2

years since improper conduct occurred in the absence of any additional misconduct was viewed as a mitigating circumstance). I find the passage of time to be a persuasive mitigating factor in this case.

Second, the record not only discloses an absence of any misconduct on the part of Respondent since she left the CHA, but also demonstrates that Respondent and LB&A have been running highly successful "model" training programs for housing authority employees. These programs have been well-received by housing authority employees in all parts of the country, and by employees of HUD as well. There is also evidence that Respondent has been providing management consulting services to public housing authorities, and there is no evidence of any complaints about these services. This evidence is indicative of a high degree of present responsibility, and, indeed, is strong evidence that Respondent, who no longer administers public funds, presents no current risk to the public fisc.

Third, the Government's reliance on the probative value of the judicial record in Borrell v. City of Chicago, et al., supra, is misplaced. That complaint in that case was based upon an allegation by Respondent that her firing was either racially motivated or retaliatory. The judgement entered in favor of all defendants resulted from a motion for summary judgement brought by the City of Chicago. Summary judgement was granted against Respondent, in large part, because she did not prove to the Court that she could rebut the City's documentary evidence that she was discharged because she was not a competent employee. That decision was "technical" in nature, was rendered on documentary evidence, and did not involve an evidentiary trial with full examination and cross examination upon which findings of fact and conclusions of law were made. Moreover, Respondent's defense of this matter is not limited by the doctrine of collateral estoppel, because the issues in this case are not the same issues that were litigated in Borrell v. City of Chicago, et al., supra. See generally 1B J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice, ¶ 0.441 [2] (4th ed. 1984), and cases cited therein. While the judgement in that case may preclude Respondent from bringing another discrimination action against the CHA and others on the same facts under the doctrine of res judicata, the reasoning supporting the order for summary judgement is not entitled to substantial weight in determining the present responsibility of Respondent. Moore's Federal Practice, supra. The Government has filed copies of depositions taken in the course of discovery in Respondent's District Court case. I cannot, as a matter of law, permit a trial by deposition in this case. See 24 C.F.R. § 26.18(f), which, with certain exceptions not applicable here, permits the introduction into evidence of depositions only if the deponent is unavailable. That is not the case here.

I find, accordingly, that the Government has not met its burden of proof, and that cause for the imposition of an LDP has not been demonstrated.

The blame which the Department affixes to Respondent for the operational problems of the CHA during her tenure at the CHA was based on her job title, and not upon any understanding of her actual, as contrasted with her apparent, authority within the CHA. The scope of Respondent's authority within the CHA is unclear on this record. I find troubling the Department's explanation that it chose to impose a sanction on Respondent, many years after she left the CHA, because it "conveniently" came into possession of the court decision which underlies this action. The fact that the Department did not chose to commit any resources in timely fashion to its effort to sanction Respondent is circumstantial evidence that Respondent does not pose a present threat to the programs of the Department. It is also disturbing that the Department did not take into consideration Respondent's lengthy record of responsible performance since her tenure at the CHA and has offered no viable explanation for its failure to do so. This evidence is sufficient to raise a suspicion that the intention of certain Departmental officials in imposing this LDP was punitive, particularly in light of the less than amicable relationship between HUD and Respondent during her tenure at the CHA. 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).

Conclusion

For the foregoing reasons, I find that the LDP should not have been imposed on Lynne Borrell and LB&A; that continuation of the LDP is not in the interests of the Department and the public; and that the LDP should be terminated immediately.

Timothy J. Greszko
Administrative Judge