

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

In the Matter of:

THOMAS J. ELIAS, JR.,

Respondent.

HUDBCA No. 92-C-7575-D44
Docket No. 92-1833-DB (LDP)

For the Respondent:

James R. Di Francesco, Esq.
115 Donald Lane
Johnstown, Pennsylvania 15904

For the Government:

Dane Narode, Esq.
Office of General Counsel
U.S. Department of Housing
and Urban Development
Room 10251
Washington, D.C. 20410

DETERMINATION BY ADMINISTRATIVE JUDGE TIMOTHY J. GRESZKO

November 19, 1992

Statement of the Case

By letter dated January 17, 1992, Choice Edwards, Manager, Pittsburgh Office, U. S. Department of Housing and Urban Development ("Department," "Government," or "HUD"), notified Thomas J. Elias ("Respondent") that a twelve-month Limited Denial of Participation ("LDP") was being imposed on him which would restrict his eligibility to participate in HUD programs. The LDP was based on the submission of allegedly false documents to HUD by the Johnstown Housing Authority ("JHA"), of which Respondent was the Executive Director, to refute a finding that the JHA failed to conduct a proper salary comparability study in 1986. The LDP was issued pursuant to 24 C.F.R. §§ 24.705(a)(4), (7) and (10). Subsequent

to an informal conference, the LDP was reduced by Edwards to ninety-days on February 19, 1992. Respondent filed an appeal from the affirmance of the LDP, pursuant to 24 C.F.R. § 24.713. A hearing was held in Pittsburgh, Pennsylvania on July 21 and 22, 1992. This determination is based upon a consideration of the entire record in this case.

Findings of Fact

1. Respondent was employed as the Executive Director of the JHA from June, 1980, until April 15, 1992. As such, he was responsible for the day-to-day operation of the JHA, which included supervisory responsibility over its employees. Under applicable HUD guidelines, the JHA was required to prepare salary comparability studies to determine whether salaries paid to JHA staff were comparable to those of other pertinent local positions as required by HUD. (Tr. I, pp. 37-39).

2. HUD Handbook 7401.7, Chapter 2, provides the following guidelines, in relevant part, for the conduct of salary comparability studies:

2-1. DETERMINING ADMINISTRATIVE SALARY COMPARABILITY

a. **Salaries.** All administrative staff salaries shall be comparable to local public practice, unless a PHA is governed by State or local civil service Such comparability is determined by identifying and utilizing those pertinent local public entities which are suitable for comparison. If there are no local comparable positions, the PHA may use comparable State positions if prior HUD approval is obtained Comparability is used by PHA's to obtain labor market pay information and for administrative jobs which are common and unique to the PHA or other local public entities For example, a common position would have the same or similar duties such as a property manager for a city. A unique position would have duties that are unlike the PHA position but are comparable, such as a school principal. Comparability requires documentation which must be used in determining the salary to be paid an employee. However, comparability is not intended to be an exact science or absolute in nature, thus allowing PHAs flexibility in evaluating similarities and differences between positions used to establish comparability. Salary comparability is based on the total job performed by the PHA employee though part of the salary may be charged to other program(s).

b. **Determining Comparability.** PHAs may determine comparability independently, or upon request, the Field Office can provide suggested methods by which the position and compensation comparability may be determined

2-2. FREQUENCY FOR DETERMINING COMPARABILITY. Once comparability is established, a new study is required only for the establishment of a new position, such as Deputy Executive Director, or realignment of either a PHA position, or the position used to

establish comparability. Once established, PHA salaries shall be adjusted to reflect changes in local public salaries (e.g., cost of living increases)

3. A Comprehensive Management Review of the JHA was conducted by the HUD Pittsburgh Office in 1986. The report of that review dated May 30, 1986 took only one exception, not relevant here, to the salary comparability data maintained in the JHA's files in 1986, which included copies of letters sent to forty-three local agencies seeking salary comparability data. The files of the JHA also contained a document which indicated that in 1985 - 1986, Cambria County School District Superintendents were paid annual salaries from \$32,000 to \$60,025. Copies of the letters from the JHA to the forty-three local agencies were provided by Respondent during the audit to Ronald Pomposini, of the Pittsburgh HUD IG Office. Pomposini also reviewed during the audit a JHA document entitled "Comparability Salary Range - 1985," which contained a summary of salaries of officials of fourteen local agencies and entities. A number of these documents were reviewed by HUD in the performance of the 1986 Comprehensive Management Review, and formed the basis of HUD's acceptance of JHA's salary levels in 1986. (Resp. Exhs. 5, 8, 9, 10; Tr. II, pp. 56-58).

4. From late 1989 through January 1990, HUD's Office of Inspector General ("OIG") conducted an audit of the JHA. The auditors reviewed the salaries paid to JHA staff to determine whether the salaries were comparable to those of other pertinent local positions, as required by HUD Handbook 7401.7. An audit report was issued on March 14, 1990, which found, in pertinent part, that Respondent and the JHA Controller had received salaries in excess of the maximum allowed or reported to HUD. Audit finding 2 states, that:

The Authority's Executive Director and Accounting Department Head received salaries in excess of the maximum allowed or reported to HUD. Because salary comparability had not been questioned by HUD in the past, the Executive Director felt that the salaries were not excessive. HUD was not aware of the total salaries received by the Executive Director and Accounting Department Head because portions of the salaries were paid as miscellaneous income and the authority underreported total salaries to the Pittsburgh Office. As a result, from January 1, 1987 through December 31, 1989, the Authority made \$104,470 of salary expenditures which are not eligible Program costs

During the course of the audit, Respondent was asked by the auditors to gather up salary information for 1987 - 1989. Finding 2 of the audit report, which determined that excessive salaries were paid is based in large part upon a document which was obtained from Beverly Sypes, an Executive Secretary at the JHA. The document, which is entitled "Comparability Salary Range - 1987," contains a summary of salary figures for other local agency officials. The document shows amounts of \$38,000 per annum and \$30,000 per annum as the highest salary rates, respectively for executive directors and comptrollers in the Johnstown, Pennsylvania area. The audit stated that the maximum allowable salary for Respondent for 1987 - 1989 was \$114,000 (3 x \$38,000). Respondent's actual salary for 1987 - 1989 was

\$194,632. The audit concluded that for the period 1987 - 1989, Respondent was overpaid \$80,632, the difference between the maximum salary payable on the 1987 "Comparability Salary Range" and Respondent's actual salary. The audit also concluded, on the same basis and documentation, that the JHA Controller had been overpaid by \$23,838. The audit recommended that the JHA repay HUD, from non-Federal funds, the \$104,470 of allegedly ineligible salary expenditures. Respondent strongly disagreed with this finding. (Govt. Exhs. 1, 5).

5. The OIG also determined that Respondent was receiving a salary in excess of the amounts reported to HUD on the Operating Budgets, Form HUD 52566, for the years at issue. The OIG auditors determined that Respondent's salary was being reported in two separate ways. Respondent received an IRS Form W-2 in the same amount as reflected on the Operating Budgets submitted to HUD. Respondent was also receiving an IRS Form 1099-MISC for the additional payments he was receiving from the JHA. These amounts were not reported to HUD, and were attributable to work performed by Respondent on another JHA-owned project known as Belmont. The practice of reporting income on two forms was originated by Respondent's predecessor, Executive Director Conner, sometime before 1977, under the belief that the Belmont project was to be short-lived. HUD became aware of the JHA's practice of reporting certain salaries on two forms during an OIG investigation of Respondent conducted in 1986, and did not object to it at that time. (Tr. I, pp. 22-48, 65-66, 98-100, 102; Govt. Exhs. 2-5.)

6. John E. Pisano, then the Manager, HUD Pittsburgh Office, wrote a memorandum dated April 20, 1990 to Edward F. Mommarella, HUD Regional Inspector General for audit, seeking reconsideration of a number of the audit findings, including Finding 2 on salary comparability. The memorandum took exception to audit Finding 2 on the basis that the JHA had provided HUD with comparability documentation in 1986 that fully supported the salaries at issue for the years 1987 - 1989, if adjusted for local pay increases. (Resp. Exh. 11).

7. Shortly after the audit report was issued, in April, 1990, Rhonda Szarka, who was then a personnel assistant with the JHA, received certain salary information from the Peoples Natural Gas Company of Pittsburgh, Pennsylvania ("PNG"). The PNG document did not identify PNG as the source of information. To clarify that the document had been received from PNG, Szarka fabricated a cover letter from PNG by copying the PNG logo from an envelope onto a plain piece of paper, which made the plain paper appear to be PNG letterhead. Szarka then typed a letter of transmittal addressed to Respondent on this "letterhead," representing thereon that the salary information had been transmitted to Respondent by PNG. On April 19, 1990, Szarka sent the document by facsimile to Paul LaMarca, Chief, Assisted Housing Management Branch, HUD Pittsburgh Office. The facsimile transmittal sheet identifies the JHA as the sender. There is no indication on the transmittal sheet that the document was sent by Szarka or that it was sent on behalf of Respondent. Under applicable JHA operating procedures, the facsimile transmittal sheet

should have identified the individual responsible for sending of the document. (Tr. I, pp. 196-199; Govt. Exh. 7).

8. Pisano wrote a letter to Respondent dated June 26, 1990, in which he requested Respondent to submit "a copy of the comparability study that justified and/or supported" the salaries established during Fiscal Year Ended December 31, 1986." This information was to be submitted not later than July 2, 1990. Respondent interpreted this letter as requiring the JHA to verify the information that was already established in the 1986 comparability study. (Tr. II, pp. 53-55; Resp. Exh. 7).

9. Based on the June 26, 1990 letter from Pisano, Respondent instructed the JHA staff to collect data to verify the information contained in the 1986 study. This effort involved virtually the entire JHA staff, about twenty individuals, who collected information relevant to 1986 by searching newspaper articles, making telephone calls, and writing letters. A compilation of this data, entitled "1986 Salary Comparability Study," ("the study") was assembled in four days. Szarka performed much of the work in the collection and assembly of the information for the study, and received her instructions for this work from Sypes. Sypes also helped Szarka collect and assemble the information. Szarka did not get her orders directly from Respondent. The study contained numerous undated letters from a number of local agencies and undated salary survey forms which had been filled-in by JHA employees who obtained the information in telephone interviews of the responding officials. These forms were entitled "Johnstown Housing Authority 1986 Salary Comparability Study." The letters and forms were not date-stamped. The dates on the letters, which were all received by the JHA in 1990, were covered with "post-it" notes to obliterate the dates during copying. As a result, the copies of the letters that were included in the study bore no dates. The study also contained a document entitled "Johnstown Housing Authority 1986-1990 Salary Comparability Study," a Miner's Hospital fact sheet with a hand written date of May 1, 1987, a copy of a union agreement containing wage scales through 1988, and a number of newspaper articles from various months throughout 1986. (Govt. Exh. 6; Resp. Exh. 7; Tr. I, pp. 187-195; Tr. II, p.12).

10. Szarka is no longer a personnel assistant at the JHA, although she continues to work there in another capacity. She was removed from that position by Respondent because the union representative with whom she dealt complained that she lacked credibility. (Tr. I, p. 186; Tr. II, pp. 42-44).

11. In September, 1990, the JHA engaged the services of Attorney J. Michael Dorsey, a former HUD General Counsel, to represent the JHA's position in the audit process. A meeting was held at HUD Headquarters in Washington, D.C. on May 3, 1991, in the HUD General Counsel's Office. The meeting was attended by HUD General Counsel Frank Keating, a number of HUD attorneys including John Kennedy, Associate General Counsel for Program Enforcement, Dorsey, and Respondent. During that meeting, Dorsey gave Keating a copy of the study, and a cover letter dated May 3, 1991, which states, in relevant part:

My understanding of our discussions of this morning are as follows:

1. The 1986 Salary Survey will be sent to the Regional Inspector General with instructions to review it and to reconsider the Audit finding on 1987, 1988 and 1989 salary comparability in light of the salary survey. The IG will review the 1986 salary survey on the basis that it was reviewed and approved in the Pittsburgh Field Office in 1986. (Govt. Exh. 9).

Kennedy left the meeting with the impression that Dorsey represented that the study and all of the attachments to the study existed in 1986, and that the auditors had refused to consider the study. Kennedy did not carefully examine the study during the meeting. Kennedy also believed that Respondent concurred in Dorsey's representations during the meeting, based upon Respondent's body language during the meeting. Shortly after the meeting, Kennedy forwarded the study and the attachments to the HUD Philadelphia Regional IG Office, because he was concerned over the allegation that the OIG had not considered relevant information. Several months later, certain individuals in the HUD Philadelphia Region IG Office expressed concern to Kennedy over the study, because they had not previously seen a number of the documents in the study, and because some of the documents were undated. (Tr. II, pp. 120-132).

12. In early 1991, the JHA retained the Grey Group to do a management assessment of the housing authority. The Grey Group is a consulting firm headed by Kirk Grey, a former high-level official of the Department who held numerous jobs within the Department, including Deputy Assistant Secretary and Director of the Office of Public Housing. As part of that assessment, David Buches of the Grey Group performed a salary comparability study for the JHA in 1991, and came to the conclusion that the 1991 salaries of the JHA Executive Director and Controller were comparable for the area. (Tr. I, pp. 255 - 266).

Discussion

An LDP may be imposed by a HUD Office Manager on participants in HUD programs for causes established by adequate evidence of: (1) irregularities in a participant's or contractor's past performance in a HUD program; (2) failure to honor contractual obligations or to proceed in accordance with contract specifications or HUD regulations; and (3) making or procuring to be made any false statement for the purpose of influencing in any way an action of the Department. 24 C.F.R. §§ 24.705(a)(2), (4), and (10). There is no dispute that Respondent is, by virtue of his former position in the JHA, a participant and principal in primary covered transactions, as defined in the relevant Departmental regulations. 24 C.F.R. §§ 24.105(m) and (p); 24 C.F.R. § 24.110(a)(1). As such, he is 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). The test for the need for any of these sanctions is present responsibility. In determining whether cause exists for the imposition of an LDP, HUD has the burden of proof for establishing cause for the imposition of the sanction, and Respondent has the burden of proving mitigating circumstances. Although a finding 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 should be imposed.

As the LDP at issue expired on April 17, 1992, the sole issue before me is whether the LDP was based upon "adequate evidence." The phrase "adequate evidence" is defined in the Department's regulations as "[i]nformation sufficient to support the reasonable belief that a particular act or omission has occurred." 24 C.F.R. § 24.105(a). The Government asserts at some length that under the adequate evidence standard, the hearing officer in an LDP is constrained to analyze the facts and circumstances from the perspective of the initial decision-maker who imposed the LDP, and that it is not the hearing officer's prerogative to "second-guess" the decision-maker. I disagree with this assertion, and find it fundamentally flawed for a simple reason. Under applicable Departmental regulations, the review in this case is a *de novo* review to determine whether the LDP sanction is supported by adequate evidence. See 24 C.F.R. § 26.24(a). The term *de novo* means "anew; afresh; a second time." See *Black's Law Dictionary* (4th ed. 1968). To accept the Government's assertion would, in effect, render this proceeding an appellate review instead of the requisite *de novo* review of the action of the local manager who imposed the LDP. Moreover, this argument is disingenuous because: (1) the Government did not call the local manager as a witness at the hearing and there is nothing in this record which identifies the evidence considered by him; and (2) the Government made no effort either before or after the hearing to limit the evidence to that which was considered by the local manager. Based upon the foregoing analysis, the application of an appellate review standard to this case would be inappropriate; I am required by Departmental regulations to determine the issue before me solely on the adequacy of the evidence presented at hearing.

The Government charges in its LDP letter dated February 19, 1992, that Respondent "submitted to HUD false documents intended to refute a finding that the JHA failed to conduct a proper salary comparability study." The Government contends in its brief that it has proven this charge because the study (Govt. Exh. 6) was assembled in 1990 and because the People's Natural Gas letter (Govt. Exh. 7) was a complete fabrication that was prepared by Szarka at Respondent's request.

Respondent contests the charge asserting that the study did not contain any false information; that he never represented to HUD that the study was prepared in 1986; and that he did not direct Szarka to fabricate the People's Natural Gas letter.

The gravamen of the Government's charge is that Respondent directed Szarka to fabricate the People's Natural Gas letter; that Respondent directed Szarka to remove 1990 dates from certain letters in the study so that the letters would not appear to have been sent in 1990; and that Respondent approved of Dorsey's alleged representation at the meeting in Keating's office that the study had been prepared in 1986.

I am unable to find that Respondent submitted false documents for a number of reasons. First, the evidence establishes conclusively that the JHA performed an adequate salary comparability study in 1985, which was accepted by the HUD Pittsburgh Office in 1986, and which appears to have justified Respondent's salary for the time period at issue, as adjusted for cost of living increases. This conclusion is corroborated by HUD's Comprehensive Management Review dated May 30, 1986 and by the testimony of David Buches of the Grey Group, who was hired by the JHA to independently determine the issue. Considering this evidence, I do not find that Respondent was drawing an excessive salary during the time period in question. The audit performed by the Department does little to support the Government's excessive salary argument, because audit Finding 2 does not appear to be sufficiently supported. Audit Finding 2, according to the testimony in this case, is based largely on a two-page document which was obtained from Sypes, and there is no evidence that the auditors attempted to obtain any additional evidence by other methods, such as an inspection of the JHA's files. Moreover, there is no evidence that the auditors even attempted to verify the validity of the information in the document obtained from Sypes. Field Work Standard No. 3 of the Generally Accepted Auditing Standards of the American Institute of Certified Public Accountants provides that "Sufficient competent evidential matter is to be obtained through inspection, observation, inquiries, and confirmation to afford a reasonable basis for an opinion" See Codification of Statements # 1-47 on Auditing Standards, AICPA (1990). The comments to this standard indicate that an independent auditor's direct personal knowledge through physical examination, observation, computation and inspection is more persuasive than evidence obtained by more indirect methods. Audit Finding 2 does not appear to comport with this standard, is based on very little evidence, and for those reasons is not persuasive.

The Government also argues that the reporting of Respondent's compensation on two separate forms, a W-2 and a 1099 MISC, evidences an intent on the part of Respondent to hide salary overpayments. In light of my finding that Respondent does not appear to have been drawing an excessive salary, and further considering his explanation of a long-standing practice of reporting salaries on two forms, which I find reasonable and credible, I do not find any negative inference flowing from the circumstances. I am not convinced that Respondent, who appears to be both intelligent and rational, would have involved himself in an act as irrational and clumsy as the fabrication of the PNG letter, or as painfully obvious as the deletion of the dates from a large number of letters in the study. Based upon the foregoing, I find it highly unlikely that Respondent would have been motivated to submit false documents to HUD to justify his salary.

Second, I find the absence of corroborating evidence in this case both disturbing and damaging, especially in light of the testimony that the "entire housing authority was working on the study." (Finding of Fact 9). Szarka did not testify that Respondent instructed her to cover-up dates on the letters at issue, but testified that Joyce Elias, Respondent's spouse (who was an Administrative Assistant at the JHA), and Sypes instructed her to do so. Joyce Elias denied Szarka's accusation under oath, and testified that she had no responsibility for working on the salary comparability issue. (Tr. II, p. 15). Sypes was not called as a witness. With respect to Respondent's knowledge of Szarka's activities in the obliteration of dates, Szarka testified that Respondent "was aware of what I was doing" because he would ask questions about salaries, titles, and the number of responses she was obtaining from those surveyed. (Tr. I, pp. 195, 196, 216). This testimony does not attribute specific knowledge to Respondent that Szarka was covering-up dates on documents, does not bear on Respondent's knowledge of specific activities, and is not probative of the issue of Respondent's knowledge of these activities. There is nothing on the face of the documents which might indicate that the dates were obliterated during copying. When that fact is considered in conjunction with the fact that the study was collected and assembled in a matter of days, it is conceivable, as Respondent testified, that he simply did not notice that dates were missing. (Tr. II, p. 99). I do not find credible or convincing Szarka's testimony that Respondent instructed her to fabricate the PNG letterhead. Szarka's credibility is diminished for a number of reasons, including her removal from a position within the JHA upon an allegation by a union representative that she lacked credibility, because of the weakness of her testimony with respect to Respondent's knowledge of the obliteration of dates, and because of inconsistencies in her testimony with respect to Respondent's knowledge of her fabrication of the PNG letterhead. (Tr. I, pp. 199, 200, 204).

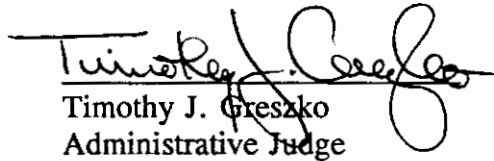
Third, the Government's assertion that it understood that the study was supposed to represent information and documentation submitted to the Department in 1986 is contradicted by the testimony of HUD's auditor, Sullivan, who admitted on cross-examination that he asked the JHA, at the beginning of the audit, to "gather comparability material for '87, '88 and '89." (Tr. pp. 65-66). This testimony, and the very existence of documents in the study bearing 1987-89 dates, lends credence to Respondent's assertion that the study was never intended to be a compilation of the documents which had been reviewed by the Department in 1986.

Fourth, I am not persuaded that the completion date of the study was misrepresented by Dorsey at the meeting in the HUD General Counsel's Office. The study contains significant material that was obviously not obtained in 1986, because such material clearly bears dates for later years. Even a cursory examination of the study reveals the fact that it covered multiple years. It would defy reason and logic for anyone to attempt to pass-off the study as having been prepared in 1986. There are no patent representations in the study that it was prepared in 1986, the study is not fraudulent on its face, and the Government concedes that the information in the study is accurate. I accordingly do not find the study to be a "false document." Kennedy's testimony is not sufficient to establish the false document charge because his beliefs rest solely upon his subjective interpretation of Dorsey's

statements and demeanor at the meeting in Keating's office, and because there is no evidence that Respondent made any misleading statements at that meeting. If Dorsey represented at the meeting that the study was prepared in 1985, then Dorsey made an inaccurate representation, in all likelihood, unwittingly. In light of my findings that the study is not a false document and that Respondent did not represent that it was prepared in 1986, I find Dorsey's cover letter of May 3, 1991, of little probative value to this determination.

Conclusion

Based upon the foregoing, I find that the Government has failed to show by adequate evidence that Respondent submitted false documents to the Department. I further find that the LDP should not have been imposed.


Timothy J. Greszko
Administrative Judge