

**UNITED STATES OF AMERICA  
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
BOARD OF CONTRACT APPEALS  
WASHINGTON, DC**

In the Matter of:

**GARY ALAN FRISCHMAN,**

Respondent

HUDBCA No. 93-C-D47  
Docket No. 93-2024-DB (S)

For the Respondent:

Gary Alan Frischman, Pro se

For the Government:

Philip A. Kesaris, Esq.  
Government Counsel  
U. S. Department of Housing and  
Urban Development  
451 7th Street, S.W., Room 10251  
Washington, DC 20410

**DETERMINATION BY ADMINISTRATIVE JUDGE JEAN S. COOPER**

October 5, 1993

**Statement of the Case**

By letter dated April 9, 1993, James E. Schoenberger, Associate General Deputy Assistant Secretary for Housing, notified Gary Alan Frischman ("Frischman" or "Respondent") that the United States Department of Housing and Urban Development ("HUD," "the Department," or "the Government") was suspending Respondent from participating in primary covered transactions and lower tier covered transactions as either a participant or principal at HUD and throughout the Executive Branch of the Federal Government and from participating in procurement contracts with HUD. The suspension was initiated pursuant to 24 C.F.R. §§ 24.405 and 24.105(h), and was based on a two count

Criminal Information, as amended, charging Respondent with violations of Colorado Revised Statutes (C.R.S.) §§ 18-5-802 and 18-4-401(1)(a).

Frischman filed a timely request for a hearing on the suspension. Inasmuch as this suspension is based on a Criminal Information, a hearing is limited to consideration of briefs and documentary evidence only. 24 C.F.R. § 24.313(b)(2)(ii).<sup>1</sup>

### Findings of Fact

1. In 1987 and 1988, Respondent purchased several HUD/FHA insured properties in the Denver, Colorado area. Respondent assumed the mortgages on these properties and collected rents, but did not apply the rents to the outstanding mortgages. The mortgages went into default. (Govt. Exhs. 1, 3, 4, 8; Resp. letter).

2. After a HUD investigation for equity skimming, a warrant for Respondent's arrest was issued in February 1988. In April of 1988, Respondent left Denver, Colorado while attempts were being made to have Respondent arrested. (Govt. Exh. 1, p. 2).

3. On April 23, 1992, Alex M. Hunter, Boulder County District Attorney, filed a one-count Criminal Information in the Twentieth Judicial District, State of Colorado, County of Boulder. The Criminal Information charged Respondent with Equity Skimming of Real Property in violation of C.R.S. § 18-5-802. Specifically, Respondent failed to apply rents to the outstanding mortgage on the property located at 4819 D White Rock Circle, Boulder, Colorado. (Govt. Exh. 3).

4. On March 18, 1993, the District Attorney amended the Criminal Information to add a second count charging Theft between \$50 and \$300 in violation of C.R.S. § 18-4-401(1)(a), as amended. (Govt. Exh. 4, p. 2).

5. Respondent pled guilty to Count Two (Theft) of the Criminal Information and was sentenced on June 25, 1993. The sentencing court placed Respondent on probation for one year. In addition, the sentencing court prohibited Respondent from maintaining a checking account and from purchasing real estate for the period of probation. Respondent also must perform 100 hours of community service and pay restitution in the amount of \$5,897.45. (Govt. Exh. 6). Of the total restitution to be paid, Respondent must pay \$3,300 to HUD, \$2,000 to the sellers of the property at issue and \$597 to the Boulder County Sheriff's Office for the cost of extraditing him. (Govt. Exh. 7).

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<sup>1</sup> HUD has subsequently proposed the debarment of Respondent, based upon his conviction. (Govt. Exh. 9.) However, this proceeding involves only the propriety of the suspension imposed on Respondent, based upon his indictment.

### Discussion

Respondent is a "participant" in a covered transaction because he has in the past entered into a covered transaction and may reasonably be expected to do so in the future, and therefore is subject to HUD regulations. 24 C.F.R. § 24.105(m).

The applicable regulation states that a suspension may be imposed upon adequate evidence "To suspect the commission of an offense listed in § 24.305(a)." 24 C.F.R. § 24.405(a)(1). Offenses listed in § 24.305(a) include:

- (1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;
- (3) Commission of . . . theft . . . ;
- (4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly effects the present responsibility of a person.

The burden is on the Government to prove by adequate evidence that cause for suspension exists. 24 C.F.R. § 24.313(b)(3). Since the instant suspension is based on a Criminal Information<sup>2</sup> charging Respondent with offenses listed in § 24.305(a), this burden is deemed to have been met. 24 C.F.R. § 24.313(b)(3). However, cause for suspension does not automatically require that a suspension be imposed. The suspension must be necessary to protect the public interest. 24 C.F.R. § 24.400(b)(2).

Underlying the Government's authority not to do business with a person is the requirement that agencies only do business with "responsible" persons and entities. 24 C.F.R. § 24.115. The term "responsible," as used in the context of suspension and debarment, 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 (1969). The test for whether a debarment is warranted is present responsibility, although lack of present responsibility may be inferred from past acts. Schlesinger v. Gates, 249 F.2d 11 (D.C. Cir. 1957); Stanko Packing Co. v. Bergland, 489 F. Supp. 947, 949 (D.D.C. 1980). In gauging the adequacy of the evidence in favor of suspension, various factors must be considered, including how much information is available, the credibility of the evidence,

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<sup>2</sup>Under the regulations a Criminal Information is the equivalent to an Indictment. 24 C.F.R. § 24.105(h).

whether or not the allegations have been corroborated, and what inferences may reasonably be drawn from the evidence. 24 C.F.R. §§ 24.400(c) and 24.410(c). A suspension shall be used only to protect the public interest and not for purposes of punishment. 24 C.F.R. § 24.115(b).

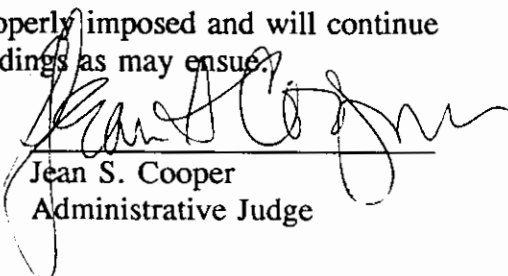
The crime for which Respondent was indicted and subsequently convicted is a crime of personal lack of honesty and integrity. It directly affected HUD, and put a financial burden on the mortgage insurance fund after default on the mortgage. The crime itself is sufficiently serious that the public was entitled to immediate protection from Respondent through the suspension sanction, unless there were compelling reasons in mitigation.

This record is all but devoid of evidence in mitigation of the seriousness of Respondent's criminal conduct. Respondent has only submitted one document in this entire proceeding, a letter written by his attorney, dated April 23, 1993. In that letter, Respondent, through his attorney, states that the criminal charges were brought more than four years after the misconduct occurred and that he has done nothing wrong since. However, this delay in the criminal proceeding was caused by Respondent's fugitive status, an indication of his continuing lack of responsibility. There is no evidence that Respondent accepts responsibility for any of his actions. The letter submitted by his attorney characterizes Respondent's misconduct as a mere "misjudgment," and states that he was unable to pay the mortgages due to a collapse of the Colorado real estate market. I find this to be an unacceptable rationalization of Respondent's conduct. I note that Respondent was collecting rents that were intended to cover the mortgages, but he chose to use them for other purposes.

I find that Respondent is presently not a responsible participant, based on the record before me. I consider it significant that the sentencing court imposed unusual restrictions on Respondent, showing that the court had serious concerns about Respondent's present responsibility to participate in real estate transactions. Not only is there adequate evidence of the cause for the suspension, but the need for the suspension to protect the public interest was clearly warranted. The suspension was properly imposed in accordance with 24 C.F.R. § 24.400 (b).

### Conclusion

The suspension of Gary Alan Frischman was properly imposed and will continue pending completion of such legal and debarment proceedings as may ensue.

  
Jean S. Cooper  
Administrative Judge