

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

In the Matter of:

KENNETH A. ASHLEY,
CAMEL PROPERTIES,
22-12 123RD STREET CORP.,

Respondents

HUDBCA No. 95-G-138-D23
Docket No. 95-5050-DB(S)

For the Respondent:

Kenneth A. Ashley, pro se

For the Government:

Luke H. Brown, Esq.
Office of General Counsel
U. S. Department of Housing and
Urban Development
415 7th Street, SW
Washington, D.C. 20410

DETERMINATION BY ADMINISTRATIVE JUDGE DAVID T. ANDERSON

March 6, 1996

Statement of the Case

By letter dated April 27, 1995, Nicholas P. Retsinas, Assistant Secretary for Housing-Federal Housing Commissioner for the U.S. Department of Housing and Urban Development ("HUD", "Department", or "Government"), notified Kenneth A. Ashley ("Ashley" or "Respondent") and his affiliates, Camel Properties, Inc. and 22-12 123rd Street Corporation, that the Department was suspending Respondent and his affiliates from participating in primary

covered transactions and lower tier covered transactions as either a participant or a principal 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 was based on the indictment of Ashley for violation of 18 U.S.C. §§ 371, 1343, 2 and 3551 *et seq.*. Respondent made a timely request for a hearing on the suspension. Inasmuch as this suspension is based on an indictment, this hearing is limited to consideration of briefs and documentary evidence. 24 C.F.R. § 24.313 (b)(2)(ii).

Findings of Fact

1. At all times relevant, Respondent was president of Liberty Mortgage Banking Ltd. ("Liberty"), a HUD-approved lender in the business of originating residential mortgage loans, underwriting mortgage loans, and reselling the loans to the Federal Home Loan Mortgage Corporation ("Freddie Mac"). (Govt. Exh. B, ¶¶ 2,3). At all times relevant, Respondent was president of Camel Properties, Inc., a corporation in the business of acquiring residential properties to be used as rental income; Respondent was also president of 22-12 23rd Corporation, a corporation in the business of building multiple family properties. (Govt. Exh. B, ¶¶ 11, 12).

2. Freddie Mac is a corporation formed pursuant to the Federal Home Loan Mortgage Corporation Act, Title III of the Emergency Home Finance Act of 1970. In order to develop a secondary mortgage market for conventional residential loans, Freddie Mac purchases conventional mortgage loans from approved mortgage sellers. (Govt. Exh. B, ¶ 1). In 1987, Liberty entered into an agreement with Freddie Mac whereby Liberty became an approved Freddie Mac mortgage seller. (Govt. Exh. B, ¶ 3). Under the agreement, Liberty offered mortgage loans to Freddie Mac, which Freddie Mac paid for with cash or negotiable securities. (Govt. Exh. B, ¶ 5).

3. On November 4, 1994, Respondent and his business associates, [REDACTED] [REDACTED] and [REDACTED] [REDACTED] were indicted in the United States District Court for the Eastern District of New York. (Govt. Exh. B). The indictment charges that, in or about and between March, 1990 and December, 1992, Respondent and his associates knowingly and willfully conspired to devise a scheme to defraud Freddie Mac in violation of Title 18, United States Code, Section 1343. (Govt. Exh. B, ¶14).

4. The indictment states that Respondent and his associates recruited individuals with good credit histories to pose as applicants for mortgage financing in exchange for \$5,000. (Govt. Exh. B, ¶ 15). Respondent and his associates would then cause fraudulent mortgage loan applications to be prepared for the false borrowers and submitted to Liberty. (Govt. Exh. B, ¶ 16). Liberty provided mortgage loans to the false borrowers and forwarded the proceeds of the loans to entities in which Respondent and his associates were officers and shareholders. (Govt. Exh. B, ¶ 21). The loans were then sold to Freddie Mac, and payments on the loans were made by Liberty to Freddie Mac in the names of the false borrowers. (Govt. Exh. B,

¶ 23). Finally, the indictment alleges that the loan proceeds advanced from Freddie Mac to Liberty for the fraudulent mortgage loans were diverted to Camel Properties and 22-12 23rd Street Corporation. (Govt. Exh. B, ¶ 24).

5. In support of his position, Respondent has filed a narrative which outlines his arguments regarding the events leading to his indictment and the reasons he believes his suspension should be rescinded. (Resp. undated letter). Respondent has also filed various exhibits, most of which relate to Respondent's activities as president of Liberty. (Resp. Exhs. 3-39).

Discussion

It is uncontested that Respondent is a "participant" as defined at 24 C.F.R. § 24.105(m) because he has previously entered into multiple covered transactions with HUD and may reasonably be expected to do so in the future. It is also uncontested that Respondent is also a "principal" as defined at 24 C.F.R. § 24.105(p) because he exercised control over Liberty at the time the offenses were committed. Respondent does not contest that Camel Properties, Inc and 22-12 23rd Street Corp. are his affiliates. *See* 24 C.F.R. § 24.105 (b). As such, Respondent's affiliates are also subject to Departmental sanctions such as suspension.

24 C.F.R. § 24.405(b) states: "Indictment shall constitute adequate evidence for purposes of suspension actions." 24 C.F.R. § 24.405(a)(1) states that a suspension may be imposed upon adequate evidence "[t]o suspect the commission of an offense listed in § 24.305(a)." 24 C.F.R. § 24.405(a)(1) (emphasis added). 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;

* * *

- (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 Government bears the burden of demonstrating that cause for suspension exists. 24 C.F.R. § 24.400. Since the instant suspension is based on an indictment charging Respondent with offenses listed in § 24.305(a), this burden is deemed to have been met. 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 or entity is the requirement that agencies only do business with "responsible" persons or entities. 24

C.F.R. § 24.115. The term "responsible" 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 an administrative sanction, such as suspension, 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, 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).

Respondent has been indicted for conspiracy and fraud, crimes which are directly related to his business performance. The offenses involve dishonesty, which impacts directly upon the question of Respondent's present responsibility. "To protect the public, it is paramount that individuals who contract with the government are forthright and responsible in their dealings Without the assurance that those who do business with the government are honest and have integrity, there is no guaranty that government funds are being properly spent." *Sidney Spiegel*, HUDBCA Nos. 91-5908-D53, 91-5920-D62 (July 24, 1992).

The Government submits that the offenses for which Respondent was indicted "inherently display a lack of business integrity or honesty that seriously and directly affects the present responsibility of a person . . .", and that Respondent's suspension, therefore, is proper. (Govt. Brief, p. 6). The Government states that because of the seriousness of the offenses with which Respondent was charged, suspension of Respondent and his affiliates is necessary to protect the public interest. (Govt. Brief, p. 7).

Respondent asserts that he is innocent of all charges in the indictment. However, notwithstanding Respondent's protestations of innocence, his indictment constitutes "adequate evidence" to support the Department's decision to suspend him as being in the best interest of the public. 24 C.F.R. § 405(b). I have no authority to determine the validity of the charges set forth in that indictment. See, *Ronald Jackson*, HUDBCA No. 95-A-1067-D5 (June 7, 1995). Such determinations in this instance rest solely with the U.S. District Court for the Eastern District of New York.

Respondent contends that his suspension should be rescinded because he has a "record of responsibility." (Resp. Unmarked Exh.) Respondent has cited examples of his "record of responsibility," including honoring his financial commitments following the 1987 bond market crash, selling \$500 million in loans to Freddie Mac with no losses prior to his termination, reporting fraud to the appropriate authorities, and cooperating with authorities following the termination of Liberty as an authorized Freddie Mac seller/servicer. Respondent has also submitted letters from Freddie Mac as evidence of his successful past relationship with Freddie Mac. (Resp. Exh. 4 - 6). Although past conduct is a mitigating

factor, it, *per se*, does not establish present responsibility. *Michael C. Kantrow*, HUDBCA No. 95-A-109-D7 (Aug. 2, 1995). Respondent admits that he became aware of fraudulent activities within his company in 1989 and took steps to advise the proper authorities (Resp. Exh. 7; Govt. Exh. A). Even assuming as true Respondent's contention that he has a prior record of acting responsibly, this fact does not establish that he is presently responsible notwithstanding his indictment for fraud and conspiracy. Because Respondent has been indicted for offenses which cast doubt on his present responsibility, the imposition of a suspension may well be justified as necessary to protect the public. See 24 C.F.R. § 24.115(b). Certainly, his indictment for fraud and conspiracy place at issue his contention that "there has not been one claim against [him] for any fraudulent act." (Resp. undated letter).

This Board has viewed a substantial passage of time following alleged misconduct leading to the imposition of an administrative sanction as being a potentially mitigating factor. *ARC Asbestos Removal Co., Inc.*, HUDBCA No. 91-5791-D25 (Apr. 12, 1991). However, the passage of time, *ipso facto*, does not establish present responsibility. *Howard L. Perlow*, HUDBCA No. 92-7131-D5 (Dec. 3, 1992); *Carl W. Seitz and Academy Abstract Co.*, HUDBCA No. 91-5930-D66 (Apr. 13, 1992). The appropriate test for present responsibility does not focus merely on the number of years which have passed since Respondent's misconduct occurred, but rather on current indicia of Respondent's professionalism and business practice which the Government must consider before it again assumes the risk of conducting business with Respondent. *Carl W. Seitz, supra*.

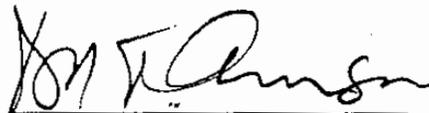
In cases where passage of time is viewed as a mitigating factor, it has been coupled with adequate evidence of present responsibility, rehabilitation, and/or remorse for causing injury to the integrity of Federal programs. See, *Kenneth Lange*, HUDBCA No. 92-A-7594-D56 (Oct. 23, 1992) (where Respondent expressed remorse and submitted evidence of rehabilitation); *The Mayer Company, Inc. and Carl A. Mayer, Jr.*, HUDBCA No. 81-544-D1 (Dec. 1, 1981) (where Respondent's statement of remorse and understanding of his irresponsible management was found to be a significant mitigating factor). Such evidence is absent here.

Respondent has submitted a number of documents as mitigating evidence to show his professional and personal responsibility in the past. Respondent's exhibits contain letters of praise from Freddie Mac, as well as documents in support of his position that he cooperated with authorities with respect to investigations of borrower fraud. (Resp. Exhs. 4, 5, and 12). While these documents provide some insight into Respondent's past conduct, I find them to be substantially deficient in probative value to the extent that they fail to demonstrate that Respondent poses no risk to the integrity of the Government's mortgage financing programs. These programs are far too crucial to the public interest to subject them to the possibility of abuse, a very reasonable possibility in light of the indictment charging Respondent with such egregious criminal conduct. Since Respondent's evidence of mitigation fails to persuade me that the interests of the public and the Department are not at risk during the criminal

proceedings which will examine Respondent's conduct, I find that his temporary suspension is warranted.

Conclusion

For the reasons set forth above, it is my determination that the suspension of Kenneth A. Ashley and his affiliates, Camel Properties, Inc., and 22-12 23rd Street Corporation, was properly imposed, and shall continue pending completion of such legal and debarment proceedings as may ensue.

A handwritten signature in black ink, appearing to read "David T. Anderson", written over a horizontal line.

David T. Anderson
Administrative Judge