



Board of Contract Appeals

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

In the Matter of: _____ :
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MARCUS PAYNE, : HUDBCA No. 99-C-103-D2
: Docket No. 99-9014-DB (LDP)
:
Respondent :
:
_____ :

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For the Government

FINDINGS OF FACT AND RECOMMENDED DECISION

by Administrative Judge Jean S. Cooper

May 17, 1999

Statement of Jurisdiction

On February 23, 1999, the HUD Board of Contract Appeals received and docketed the request of Marcus Payne (Payne) for a hearing on a Limited Denial of Participation (LDP) imposed on him by Matthew O. Franklin, Acting Deputy Assistant Secretary for Single Family Housing of the U.S. Department of Housing and Urban Development (HUD). The administrative judges of the HUD Board of Contract Appeals are authorized to serve as hearing officers and to issue findings of fact and a recommended decision for consideration by the HUD official who imposed the LDP. 24 C.F.R. §§ 24.105, 24.314(b)(2), and 24.713(b). The findings of fact and recommended decision set forth below are based on the administrative record (AR) in this case, the written submission of the parties to this proceeding, and the transcript and exhibits admitted at the hearing held in this matter on April 6, 1999, in Memphis, Tennessee.

Statement of the Case

On December 18, 1998, Matthew O. Franklin, HUD Acting Deputy Assistant Secretary for Single Family Housing, imposed an LDP on Payne. The notice of LDP states that Payne is subject to an LDP as a participant and principal, as defined at 24 C.F.R. § 24.105. The reason cited for the LDP was that Payne completed a fraudulent Verification of Employment form for mortgage applicant Betty L. Reed while Payne was employed as a loan originator at Community Mortgage Company.

The causes cited as the legal basis for imposition of the LDP on Payne are as follows: irregularities in Payne's past performance in a HUD program, 24 C.F.R. § 24.705(a)(2); falsely certifying in connection with any HUD program, whether or not the certification was made directly to HUD, 24 C.F.R. § 24.705(a)(7); violation of any law, regulation or procedure relating to the application for financial assistance, insurance or guarantee, or the performance of obligations incurred pursuant to a grant of financial assistance or pursuant to a conditional or final commitment to insure or guarantee, 24 C.F.R. § 24.705(a)(9); and 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)(10).

The LDP was imposed for a period of twelve months, effective throughout the United States. It prohibited Payne from participating, directly or indirectly, in any transaction involving HUD's Home Mortgage Insurance Program.

By letter dated February 1, 1999, Payne requested a hearing on the propriety of the LDP before a Departmental hearing officer, pursuant to 24 C.F.R. § 24.713. He contends that the act on which the LDP is based occurred over three years ago, he is presently responsible, and the LDP is punitive. Payne avers that a former employer reported Payne to HUD to prevent Payne from competing with the former employer. The parties mutually agreed that the hearing would begin on April 6, 1999. The transcript of the hearing on which these findings of fact and recommended decision are based was received by the Board on April 27, 1999.

Findings of Fact

1) From June 1, 1995 to June 10, 1996, Payne was employed at Community Mortgage Corporation (CMC), Cordova, Tennessee, a HUD-approved direct endorsement (DE) lender. Payne began his employment with CMC as a loan officer trainee under the direction of Sherry Quinley, a loan officer at CMC. Quinley gave no actual instruction to Payne on the rules and requirements for proper loan originations. Payne sat with her and watched her work to learn how to be a loan officer. CMC provided no separate

training for Payne. HUD handbooks containing loan origination requirements were available at CMC's office but Payne was not made aware of them until shortly before he left CMC's employ. In September, 1995, Payne became a loan officer at CMC. (AR Tab 3; Exhibit G-8; Tr. 11-12, 29-30, 53, 63, 162-164.)

2) A Request for Verification of Employment (VOE) form is required by HUD to be completed for each mortgage application by the applicant's current employer, and also by previous employers in certain circumstances to establish an earning history. The purpose of the VOE is to verify the employment and pay of an applicant to determine whether the applicant satisfies the underwriting requirements for the mortgage. The mortgage company is required by HUD to mail the VOE to the employer for completion and signature, and to include the VOE in the loan package submitted to HUD for mortgage insurance. At CMC, loan processors send out the VOEs to the employers after the loan officer takes a loan application with the employment history provided by the loan applicant. Payne rarely used a loan processor because he felt they were too slow to keep up with his loan application production, and he did many of the loan processor's tasks himself, including sending out VOEs for completion by employers. CMC management knew that Payne did most of his own loan processing and repeatedly asked him to use the loan processors to do the loan processing functions. (Exh. G-1; Tr. 12-13, 20-21, 34-37, 58, 108.)

3) Payne was the loan officer for mortgage applicant [REDACTED], who had applied to CMC for a HUD-insured mortgage to purchase a property. [REDACTED] was a private duty nurse who had previously worked for Catherine Bartlett for a period of slightly more than three years from August 4, 1991 to October 27, 1994. To complete [REDACTED] loan application file, a VOE or income tax returns were needed to substantiate Reed's earnings during her employment by Bartlett. Payne was under pressure from [REDACTED] and the realtor to complete the [REDACTED] loan. Payne believed that [REDACTED] would lose the opportunity to purchase the property if the loan was not approved by a certain date. Payne belatedly realized that a VOE had not been sent to Bartlett, and he was unable to gather prior tax returns from [REDACTED] or have Bartlett complete a VOE by the deadline that Payne believed was applicable in [REDACTED] case. Payne admits that he filled out a VOE dated March 4, 1996, and forged Bartlett's signature on it. Payne did not tell anyone that he had filled out the VOE or forged Bartlett's signature. The information placed on the VOE by Payne was accurate as to [REDACTED] period of employment and rate of pay but had not been provided by Bartlett, as required for a VOE. (Exh. G-1; AR Tab 2; Tr. 60-61, 68, 107.)

4) The VOE clearly states on its face how to use it in the Instructions section. It also states that there are severe penalties for any fraud, intentional misrepresentation or

criminal acts committed in filling out and signing the VOE. Payne knew when he filled out the VOE and forged Bartlett's name that it was wrong to do so. He claimed that he was unaware at the time of the HUD requirements for the handling of a VOE, but the instructions on the VOE were adequate to inform Payne that what he did was not only not permissible, but carried severe penalties. (AR Tab 2; Tr. 64, 107.)

5) CMC Management discovered in early June, 1996 that Payne had filled out the VOE and forged Bartlett's name. At that time, the [REDACTED] loan had not yet closed. Payne's handwriting, which is distinctive, was recognized on the VOE by CMC's underwriting department. On June 6, 1996, Katherine L. Harris, Senior Vice President and Manager of Mortgage Credit at CMC, and Douglas Thompson, also part of CMC management at that time, held a disciplinary meeting with Payne to discuss the falsified VOE. The meeting report, dated June 6, 1996, states that "Marcus committed fraud on borrower [REDACTED] by completing a previous VOE himself" because Payne was "under pressure from realtors and borrowers." Harris and Thompson told Payne that what he had done was forbidden by HUD and showed Payne the HUD Handbook section applicable to VOEs. Harris and Thompson recommended that Payne depend more on processors, and that CMC management help him to manage his case load better. The report further states "Automatic Termination If Reoccurs." The report was signed by Payne, Harris, and Thompson. (AR Tab 3; Tr. 14.)

6) CMC audited Payne's files and found evidence that Payne had falsified at least one other loan document in another transaction. Payne was fired by CMC for cause on June 10, 1996, as evidenced by company personnel records. CMC did not report Payne's actions to HUD. It placed the fraudulent VOE in Payne's personnel file as an attachment to the report of the June 6, 1996 meeting. CMC also delayed paying Payne commissions due him pursuant to an agreement with Payne until CMC could determine that there would be no losses attributable to Payne's falsification of loan documents. Payne was ultimately paid the commissions due him by CMC. (AR Tab 3; Exhs. G-7, G-8; Tr. 15-17, 22, 25, 32-34, 159-161.)

7) After Payne was terminated by CMC, he briefly worked at First Commercial and at Priority Mortgage as a loan officer. He then became the manager of a new branch of American Home Loans (AHL). AHL was a correspondent mortgagee of Corinthian Mortgage Corporation (Corinthian). Corinthian sponsored AHL under the HUD direct endorsement program. Although Payne denies that he falsified any more loan documents after he left CMC, there is adequate documentary evidence and credible witness testimony that he falsified the signatures of purported employers on VOEs in two loan transactions while at AHL. Payne admitted that his handwriting is distinctive. Corinthian discovered the falsified loan documents when it audited and verified all loan packages

from AHL that were pending. Janeth Jones, the Quality Control Manager for Corinthian, was familiar with Payne's handwriting, and concluded that the handwriting on two falsified VOEs found in AHL's audited files was Payne's writing. The falsified VOEs that Corinthian discovered were dated September 11, 1998 and October 31, 1998. They both appear to have signatures of purported employers in Payne's distinctive handwriting. Corinthian tried to have AHL fire Payne, but AHL refused. (Exhs. G-4(a) and (b), and G-5; Tr. 79, 86, 112-116, 145-151, 158.)

8) Payne started his own mortgage company, Heritage South Mortgage & Loans, Inc. (Heritage) in the fall of 1998. Heritage was licensed as a Tennessee financial institution in August, 1998, but did not start originating loans until November, 1998. During the period between September and November, I find that Payne continued to perform certain loan origination functions on behalf of AHL, as evidenced by the two VOEs in Payne's handwriting dated September 11, 1998 and October 31, 1998, although Payne denied this. He performed these functions for AHL while hiring loan officers and loan processors for the start-up of Heritage. (Exhs. G-4(a) and (b) and G-5; Tr. 120-121.)

9) By letter dated November 23, 1998, addressed to Payne at Heritage, Corinthian ceased its relationship with Payne, effective November 20, 1998, for discrepancies found on multiple loans that Payne had submitted to Corinthian. Corinthian notified Payne that it would spot audit all loans purchased from him in the past, and that if any discrepancies were found in Payne's files from AHL, Corinthian would request that AHL repurchase those loans. Corinthian also notified Payne not to attempt to submit loans to it through AHL or any other broker. (Exh. G-6(c).)

10) Payne intended that Heritage would originate all types of loans, including HUD-insured loans. However, on December 18, 1998, HUD imposed an LDP on Payne for his falsification of the Reed VOE that had occurred while he was employed as a loan officer at CMC. HUD first learned of Payne's actions at CMC when HUD was performing a routine audit at CMC and requested the personnel files of employees who had been discharged for cause within a certain time period. (AR Tabs 4, 5; Tr. 25, 120.)

11) According to Payne, Heritage currently originates only conventional loans. Payne scheduled off-site training in loan origination requirements for one of the two loan processors that he hired at Heritage. That training took place in early 1999. In early 1999, Payne also ran a six-week on-site training program for his staff after working hours, going over all aspects of the loan origination process. Payne checks every loan file before it leaves Heritage because Heritage will bear the cost of any loans that go into default. (Tr. 120-125, 128-129.)

Recommended Decision

An LDP is a discretionary administrative sanction that is imposed in the best interest of the Government. 24 C.F.R. § 24.700. 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 administrative sanctions such as LDPs, debarments and suspensions, is a term of art which includes not only the ability to perform satisfactorily, but the honesty and integrity of the participant. 48 Comp. Gen. 769 (1969).

The test for whether a sanction is warranted is present responsibility, although lack of present responsibility may be inferred from past acts. Schlesinger v. Gates, 249 F. 2d 111 (D.C. Cir. 1957); Stanko Packing v. Bergland, 489 F. Supp. 947, 949 (D.D.C. 1980). The Government bears the evidentiary burden of demonstrating by adequate evidence that cause for Payne's LDP exists, that the LDP is in the public interest, and was not imposed for punitive purposes. 24 C.F.R. § 24.705. Adequate evidence is defined in the regulations applicable to an LDP as "information sufficient to support a belief that a particular act or omission had occurred." 24 C.F.R. § 24.105(a). It is likened to the probable cause necessary for an arrest, search warrant, or a preliminary hearing. Horne Bros. v. Laird, 463 F. 2d 1268, 1271 (D.C. Cir. 1971). It is not a rigorous level of proof.

As a loan officer who was involved with HUD-insured loans, Payne is a "participant" and "principal," as defined at 24 C.F.R. § 24.105(m) and (p). Therefore, he is subject to administrative sanction by HUD if cause exists for a sanction and it is in the best interest of the Government to sanction him.

Payne does not deny the fact that he falsified the Reed VOE, and no matter how much pressure he was under to close the loan, his actions were not excusable. A VOE establishes the quality and reliability of a loan application, and any false information in a VOE can lead to underwriting decisions that might not have been made but for the false information. It is immaterial that the [REDACTED] mortgage was approved, and that there has not been a default on it. Payne's unprofessional and dishonest solution to the pressure that he felt at the time was not the conduct of a responsible participant or principal. It is also immaterial that Payne was not given training at CMC on how to fill out a VOE because the VOE itself gives explicit directions, Payne was asked by CMC management not do his own processing, and he admits that he knew it was wrong to forge a signature when he did it.

Payne testified under oath at the hearing in this case that he never filled out a VOE or forged the signature of an employer

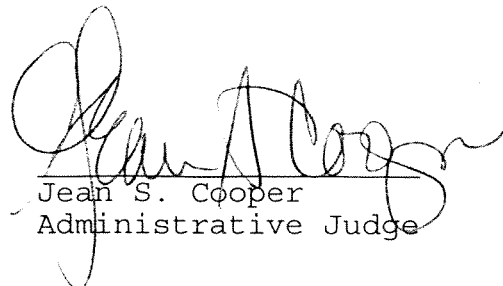
other than in the [REDACTED] transaction. I find that there is adequate, indeed compelling evidence in the record that Payne continued to falsify VOEs after he left CMC, most recently on October 31, 1998. He also falsified at least one other loan document while at CMC. Based on this evidence, I conclude that Payne is not presently responsible, despite his protestations to the contrary, and that he learned nothing from his dismissal by CMC.

Payne accused CMC of reporting the reason for his dismissal to HUD, which resulted in his LDP, to prevent Payne from competing with CMC. The record does not support this accusation. In fact, HUD auditors discovered the reason for Payne's dismissal during a routine audit of CMC, and CMC took no actions against Payne to prevent him from competing with CMC. However, even if CMC had reported Payne to HUD, Payne's actions while at CMC would have warranted imposition of an LDP because Payne's falsification of the VOE in the [REDACTED] transaction constituted irregularities in Payne's past performance in a HUD program in violation of 24 C.F.R. §§ 24.705(a)(7), (a)(9), and (a)(10), all cited by HUD as causes for the LDP.

There is little mitigation in this record, considering the fact that Payne is not presently responsible, based on adequate evidence that he continued to falsify loan documents after he left CMC. I find that it is in the best interest of HUD and the public interest that the LDP imposed on Payne shall continue. It was warranted when it was imposed and it is still necessary. The LDP was not imposed for punitive purposes, and there is a real public interest that is served in the continuation of Payne's LDP. It will protect HUD from having to do business with Payne through its Home Mortgage Insurance Program, and protection is sorely needed from Payne, who falsifies loan documents, forges signature on loan documents, and makes false statements for the purpose of influencing loan underwriting decisions in which HUD insures the loan.

Conclusion

For the foregoing reasons, it is recommended that the Limited Denial of Participation imposed on Marcus Payne on December 18, 1998, should not be terminated because there is adequate evidence that the sanction was warranted, Payne is not presently responsible, and the sanction is needed to protect the public interest.


 Jean S. Cooper
 Administrative Judge