

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

U.S. DEPARTMENT OF HOUSING AND URBAN
DEVELOPMENT,

Petitioner,

v.

CARL R. GREENE,

Respondent.

14-AF-0042-PF-002

December 5, 2014

Appearances

Philip A. Kesaris, Attorney
United States Department of Housing and Urban Development, Washington, D.C.
For Petitioner

Thomas A. Bergstrom, Attorney
Buchanan Ingersoll & Rooney PC, Philadelphia, PA
For Respondent

INITIAL DECISION AND ORDER

BEFORE: Alexander FERNÁNDEZ, Administrative Law Judge

On January 15, 2014, the United States Department of Housing and Urban Development (“HUD”) filed a *Complaint* against Carl R. Greene (“Respondent”) seeking three civil penalties under the Byrd Amendment, 31 U.S.C. § 1352, as implemented by 24 C.F.R. Part 87, and three civil penalties under the Program Fraud Civil Remedies Act of 1986 (“PFCRA”), 31 U.S.C. §§ 3801-3812, as implemented by 24 C.F.R. Part 28. As a basis for the civil penalties, HUD alleges Respondent made, or caused to be made, three materially false statements to HUD. These alleged false statements were disclosures and certifications submitted to HUD by the Philadelphia Housing Authority (“PHA”). HUD seeks a total award of \$232,500.

On March 18, 2014, Respondent filed a timely *Answer* to the *Complaint*, wherein Respondent admitted to signing the forms at issue and acknowledged the content of those documents. However, Respondent denied all other allegations contained in the *Complaint*.¹

¹ By filing dated February 5, 2014, Respondent’s counsel acknowledged receipt of the *Complaint* but requested an extension until March 20, 2014 to file his response. For good cause, Respondent’s request was granted pursuant to a *Notice of Hearing and Order* dated that same day.

On July 8, 2014, the hearing for this matter was held in Philadelphia, Pennsylvania. The hearing was conducted in accordance with 24 C.F.R. Part 26, Subpart B. The following witnesses testified at the hearing: Ashley Morelli, Auditor with the Office of Inspector General; Alison Smith, Housing Innovation Specialist in the Moving to Work Demonstration at HUD; and Respondent.

In accord with a *Revised Post-Hearing Order*, dated August 11, 2014, the parties submitted post-hearing briefs and reply briefs on September 11, 2014; and September 25, 2014, respectively. This matter is now ripe for decision.

Applicable Law

Byrd Amendment. Section 1352 of United States Code title 31, (“Byrd Amendment”) prohibits a recipient of a Federal contract, grant, loan, or cooperative agreement from paying a person for the purpose of influencing or attempting to influence an officer or employee of any agency, or any officer, employee, or Member of Congress in connection with certain Federal actions. 31 U.S.C. § 1352(a); 24 C.F.R. § 87.100. The Byrd Amendment requires that a recipient of a Federal contract, grant, loan, or cooperative agreement must file a declaration that: (1) identifies the name of any registered lobbyist that has made lobbying contacts on behalf of the person with respect to a Federal contract, grant, loan, or cooperative agreement; and (2) certifies that the person making the declaration has not and will not use federally appropriated funds to pay for lobbying activities. 31 U.S.C. § 1352(b). The failure to file or amend the required certifications and disclosures may result in the imposition of a civil penalty. 24 C.F.R. § 81.110(f).

Program Fraud Civil Remedies Act. The Program Fraud Civil Remedies Act (“PFCRA”) places liability on a person for making a written statement that the person knows or has reason to know contains a false material fact or omits a material fact that results in the statement being false, and accompanies the written statement with an express certification of the statement’s truthfulness and accuracy. 31 U.S.C. § 3802(a)(2). A “statement” includes “any representation, certification, affirmation, document, [or] record” made with respect to a contract with or a grant from an authority. 31 U.S.C. § 3801(a)(9). Additionally, “knows or has reason to know” includes instances when a person acts in deliberate ignorance of the truth or falsity of the statement; or acts in reckless disregard of the truth or falsity of the statement. 31 U.S.C. § 3801(a)(5). “Each written representation, certification, or affirmation constitutes a separate statement.” 31 U.S.C. § 3801(c)(1). Persons found liable for making false statements may be subject to civil penalties of up to \$7,500 per statement. 31 U.S.C. § 3802(a)(2); 24 C.F.R. § 28.10(b).

Burden of Proof. The Byrd Amendment incorporates the procedures of the PFCRA. 31 U.S.C. § 1352(c)(3). Pursuant to applicable HUD regulations, HUD has the burden to prove Respondent’s liability and any aggravating factors by a preponderance of the evidence. 24 C.F.R. § 26.44(e). Thereafter, Respondent must prove any affirmative defenses and mitigating factors, also by a preponderance of the evidence. *Id.* If Respondent is found liable for one or more counts under either the Byrd Amendment or the PFCRA, the amount of penalties imposed

shall be based on consideration of evidence in support of the factors specified by regulations implementing either statute. 24 C.F.R. §§ 28.40(b) and 87.300(d).

Findings of Fact

The Court has considered all matters presented by the parties, including the *Complaint*, the *Answer*, the exhibits, the testimony at hearing, and the post-hearing submissions. The Court finds the following facts to be established on the record by a preponderance of the evidence.

1. Carl R. Greene (“Respondent”), a “person” under the Byrd Amendment and the PFCRA, was the executive director of the Philadelphia Housing Authority (“PHA”) from March of 1988 through August of 2010.
2. The PHA is a public housing authority created by the U.S. Housing Act of 1937. It is the nation’s fourth largest housing authority.
3. In 2002, the PHA entered the Moving to Work Program (“MTW Program”), which is a HUD demonstration program authorized by Congress in 1996. The MTW Program allows participating housing authorities to gain additional flexibility with their funding.
4. Under the MTW Program, the PHA is required to submit an annual plan outlining the PHA’s participation in demonstrations. This plan is submitted before each fiscal year and describes the flexibility the PHA is exercising under the authority of the MTW Program.²
5. After the close of the fiscal year, the PHA is required to submit to HUD a report that describes the results of the PHA’s activities. The report enables HUD to make broader policy recommendations and to monitor whether objectives are being completed.
6. As appendices to an annual plan, the PHA must submit disclosures on any lobbying activities that PHA may have made with nonfederal funds, and certify that no lobbying activity was occurring with federal funds.
7. HUD relies on certifications to ensure that participants in the MTW Program are continuing to comply with certain applicable federal laws, including the lobbying restriction and reporting requirements of the Byrd Amendment.
8. One such certification is the Certification of Payments to Influence Federal Transactions (HUD Form 50071), on which the signatory certifies, in pertinent part, that, to the best of his or her knowledge and belief:

- (1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for lobbying activities; and

² The term “flexibility” refers to a housing authority’s ability to waive certain requirements or constraints of a regulation in order to achieve one of the statutory purposes of the demonstration, which include cost effectiveness in federal expenditures, increasing housing choice, and improving self-sufficient outcomes.

- (2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for lobbying activities, the signatory will complete and submit a Disclosure Form to Report Lobbying (Standard Form-LLL) in accordance with the form's instructions

9. HUD Form 50071 also includes the following disclosure:

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into . . . Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

10. The following language can be found above the name and signature of the authorized official acting as the signatory for HUD Form 50071, "I hereby certify that all the information stated herein, as well as any information provided in the accompaniment herewith, is true and accurate."
11. As an accompaniment to HUD Form 50071, Standard Form-LLL is completed and submitted to identify lobbying registrants and individuals performing lobbying services on behalf of a housing authority.
12. For MTW Program year seven, the PHA attached a HUD Form 50071 and a Standard Form-LLL to its annual plan. Both the HUD Form 50071 and the Standard Form-LLL were dated June 24, 2008, and signed by Respondent.
13. For MTW Program year eight, the PHA attached a HUD Form 50071 and a Standard Form-LLL to its annual plan. The HUD Form 50071 and Standard Form-LLL for MTW Program year eight were both dated January 23, 2009, and signed by Respondent.
14. The PHA also submitted a second HUD Form 50071 and second Standard Form-LLL to HUD as attachments to the PHA's post-fiscal year report for MTW Program year eight. These forms were both dated June 29, 2009, and signed by Respondent.
15. On each of the three Standard Form-LLs, the words "Not Applicable" were typed into the field designated for identifying the name and address of a lobbying registrant. Also, the field for identifying individuals performing lobbying services was left blank.
16. However, the three Standard Form-LLs were erroneously completed, because between June 2007 and August 2008, American Continental Group, LLC ("ACG") provided lobbying services to the PHA pursuant to a Service Contract (Contract No. 003479).
17. ACG is a government affairs firm registered as a lobbying firm. In four lobbying reports submitted to Congress that covered reporting periods spanning from July 1, 2007 through December 31, 2008, ACG listed the PHA as a client.

18. David Urban, who is a registered lobbyist, is a managing partner of ACG. Mr. Urban participated in several meetings among HUD staff, Senate staff, and Respondent.
19. Between July 2007 and September 2009, Mr. Urban billed the PHA for his services at a monthly rate of \$10,000, which was paid by the PHA.
20. The PHA also paid the law firm of Ballard, Spahr, Andrew & Ingersoll, LLP (“Ballard Spahr”) for services rendered through July 31, 2007 and October 31, 2007. The services totaled over \$17,000.
21. The Ballard Spahr invoices detailed time spent on conversations and meetings with Mr. Urban and Tobias Rodill, who is also a registered lobbyist with ACG. Their interactions revolved around the MTW Program extension and other HUD programs, preparing “talking points for meeting with Congressional delegation,” reviewing and responding to e-mails regarding meetings with Congressional staff, and conferring with Respondent on the MTW extension.
22. During the course of an investigation into the PHA’s compliance with federal lobbying requirements and restrictions conducted by the Office of Inspector General (“OIG”), Inspector Morelli traced the funds used to pay the Ballard Spahr invoices.
23. Investigation revealed that the Ballard Spahr invoices were paid using a 001 funding code. The Philadelphia Housing Authority identified that code as being for federal funds.

Preliminary Matters

Respondent raised several preliminary matters: Respondent moved to dismiss the Byrd Amendment counts, alleging that the hearing (1) was not commenced within the six-year statute of limitations period; and (2) did not commence within 90-days of Respondent’s *Answer* being filed. Respondent also moved to dismiss the first PFCRA count on statute of limitations grounds. At the hearing, the Court denied Respondent’s motions for the following reasons.

The Byrd Amendment states that the procedures of the PFCRA, so long as they are not inconsistent with the Byrd Amendment, are applied when civil penalties are imposed or collected under the Byrd Amendment. 31 U.S.C. § 1352(c)(3). The PFCRA requires that a hearing must commence within six years of a claim or statement being made, presented, or submitted. 31 U.S.C. § 3808(a). The PFCRA further provides that the presiding officer commences a hearing by mailing by registered or certified mail, or by delivery of, a notice which complies with paragraphs (2)(A) and (3)(B)(i) of subsection (g) to such person. 31 U.S.C.A. § 3803(d)(2)(B); 24 C.F.R. § 26.45(d); see also 31 U.S.C. § 3801(a)(7) (defining “presiding officer” as an administrative law judge (“ALJ”)).

The parties have stipulated that Respondent signed the documents alleged to be false statements, and that the first alleged false statement was made no earlier than June 24, 2008. On February 5, 2014, the Court issued a *Notice of Hearing and Order* notifying Respondent of the time and place of the hearing, in addition to the legal authority and jurisdiction under which the

hearing was to be held. As attachments to the *Notice of Hearing and Order*, the Court included a copy of the applicable hearing procedures. Pursuant to the PFCRA, the *Notice of Hearing and Order* sufficiently meets the requirements for commencing a hearing by mailing of a notice. See 31 U.S.C. §3803(d)(2)(B). Accordingly, the Court finds that the hearing in this matter commenced on February 5, 2014, and within the six-year statute of limitations period.

Respondent also moves for dismissal of the Byrd Amendment counts because the hearing date of July 8, 2014, was outside the 90-day period to commence a hearing. The regulations implementing the PFCRA are found at 24 C.F.R. part 28, which refers to 24 C.F.R. part 26, subpart B for hearing procedures. As a procedural requirement, 24 C.F.R. § 26.45 states that hearings shall commence not later than 90 days after the filing of a complaint and response unless the time is extended for good cause. 24 C.F.R. § 25.45(a). However, the regulation also includes an exception for PFCRA matters, which are deemed to have commenced upon the issuance of a notice of hearing and order by the ALJ. 24 C.F.R. § 26.45(d).

The hearing date was scheduled after receipt of Respondent's request for an extension of time to file his *Answer*. In scheduling the hearing, the Court contemplated the time requested to answer the *Complaint*, to file dispositive motions, and to otherwise prepare for the hearing. The July 8, 2014 hearing date was the first available trial date on the Court's docket that would afford the parties sufficient time to complete the aforementioned actions.

Moreover, Respondent's argument that the exception for PFCRA matters should not apply to the Byrd Amendment counts is without merit. The provision establishing that hearings are commenced upon notice issued by the presiding officer is not only found within HUD regulation, but also within the PFCRA itself. Though the Byrd Amendment counts are brought under a separate statute, that statute incorporates the procedures of the PFCRA. In so doing, the Byrd Amendment adopts the PFCRA provision stating that hearings are commenced upon the issuance of a notice by the presiding officer. Accordingly, the Court finds that the hearing commenced on February 5, 2014.

Last, Respondent's opposition to the hearing date was first raised in the *Prehearing Statement of Respondent Carl R. Greene*, dated June 10, 2014, nearly a month after dispositive motions were due, and only four business days before the expiration of the 90-day period cited by Respondent. Respondent's motion to dismiss was, therefore, untimely.

For the aforementioned reasons, Respondent's request to dismiss the three Byrd Amendment counts and the first PFCRA count is **DENIED**.

Discussion

HUD seeks three civil penalties under the Byrd Amendment, and three civil penalties under the PFCRA, based on the three certifications (HUD Form 50071) and three disclosures (Standard Form-LLL) made to HUD. Each HUD Form 50071 was accompanied by a Standard Form-LLL. HUD submits that each pair of documents constitutes a separate violation under the Byrd Amendment and PFCRA.

I. Respondent's Liability under the Byrd Amendment

HUD maintains that Respondent is liable under the Byrd Amendment for three civil penalties because the three HUD 50071s and three accompanying Standard Form-LLLs that Respondent signed were erroneous. HUD claims that the certifications and disclosures were false because the Standard Form-LLLs should have identified ACG and David Urban as lobbyists paid by the PHA. HUD also claims the HUD 50071 or MTW Program year 7 was also false because the PHA used Federal funds to pay Ballard Spahr to lobby on PHA's behalf.

To help ensure compliance with the Byrd Amendment's restriction on lobbying activities, persons receiving federally appropriated funds are required to submit certain declarations. HUD Form 50071 and the Standard Form-LLL are identified in HUD regulations to be documents that fulfill such a requirement. 24 C.F.R. part 87, appendices A and B. If a recipient of a Federal contract, grant, loan, or cooperative agreement fails to file or amend the required disclosures and certifications, the person is subject to a civil penalty. 31 U.S.C. § 1352(c)(2)(A); 24 C.F.R. § 87.400(b). Further, "[s]ubmitting an erroneous certification or disclosure constitutes a failure to file the required certification or disclosure, respectively." 24 C.F.R. § 87.110(f).

Respondent admits to signing the documents and acknowledges that the Standard Form-LLLs should have identified ACG.³ However, Respondent contends that he is not liable for the Byrd Amendment counts because HUD has not met its burden to prove that Ballard Spahr or ACG were paid with Federal funds, and that Ballard Spahr was actually lobbying for the PHA. This argument, however, is without merit.

There is no requirement under the Byrd Amendment that the PHA actually used Federal funds to pay for lobbying activities before Respondent, as the signatory on the declarations, can be subject to a civil penalty. While HUD Form 50071 is a certification that no Federal funds have gone towards for lobbying activities, the signatory also certifies that "[i]f any funds *other than Federal appropriated funds* have been paid or will be paid to any person for lobbying activities, the signatory will complete and submit a Disclosure Form to Report Lobbying (Standard Form-LLL) in accordance with the form's instructions." (emphasis added.) Respondent signed each Standard Form-LLL despite the fact that they included the words "Not Applicable" instead of identifying ACG and David Urban. Additionally, Respondent falsely certified on the HUD Form 50071 that he would complete and submit the Standard Form-LLL as appropriate. Accordingly, Respondent is liable for the three counts under the Byrd Amendment for submitting the erroneous Standard Form-LLLs and for his false certifications on the HUD Form 50071.

³ At the hearing, HUD asked Respondent whether Government's exhibits 2, 4, and 6, which were identified as the three Standard Form-LLLs that Respondent signed, were erroneous.

Q. I ask you then to look at item 10(b) in Government's Exhibits 2, 4, and 6. Was item 10(b) in those forms in error?

A. I can only say based upon the testimony I heard before me and the documents that maybe this [Standard Form-LLL] should have been filled out differently. I'm clear that we should have put ACG's name in [box 10(b)].

II. Respondent's Liability under the PFCRA

HUD claims Respondent is also liable for three civil penalties under the PFCRA based on Respondent's submission of three false certifications and disclosure forms to HUD on June 24, 2008; January 23, 2009; and June 29, 2009.⁴

The PFCRA provides that penalties may be imposed upon any person who makes, presents, or submits a written statement that the person knows or has reason to know asserts a material fact that is false, fictitious, or fraudulent, and that contains, or is accompanied by, an express certification or affirmation of the truthfulness and accuracy of the contents of the statement. 31 U.S.C. § 3802(a)(2).

As discussed in the preceding section, Respondent acknowledges signing the certifications and their accompanying disclosures, which were erroneous. However, Respondent disputes that he knew or had reason to know the statements were false, and he disputes that the false statements were material. Therefore, those elements of a PFCRA act violation are at issue and will be addressed below.

First, Respondent disputes that he knew or had reason to know the statements were false. Under the PFCRA, "knows or has reason to know" includes instances when a person acts in deliberate ignorance or in reckless disregard of the truth or falsity of the statement. 31 U.S.C.A. § 3801(a)(5). There is no requirement that Respondent acted with the specific intent to defraud. Id.

The invoices submitted to the PHA by Mr. Urban were teeming with references to meetings with U.S. Senators Spector and Casey, and their respective staffs regarding federal programs in which the PHA participated. Although Respondent testified that he never saw the invoices, Respondent admitted:

A. . . . I've attended several meetings with the Assistant Secretary Steve Nesbitt and David Urban. I mean, I attended meetings with them in Washington. I've attended meetings with them here in Philadelphia when they came up along with David Urban to meet with me. I had conference calls with Alphonso Jackson, David Urban over at a meeting in Senator Spector's office."

...

Q. But you knew that Mr. Urban was lobbying Congress when you were executive director?

A. Well, I knew Mr. Urban was a consultant for us in Washington, and I think that he was lobbying Congress.

⁴ HUD's attempt to impose a civil penalty under the Byrd Amendment does not preclude their request for civil penalties under the PFCRA. 24 C.F.R. § 87.400(f).

Based upon Respondent's testimony and the invoices in the record, Respondent cannot credibly deny that he knew Mr. Urban and ACG were lobbying on behalf of the PHA. Still, Respondent claims that, at the time of signing, he had no reason to know the certifications and disclosures were false.

The Supreme Court describes the PFCRA as a "sister scheme" to the False Claims Act of 1986 ("FCA") and a means for creating administrative remedies. Vermont Agency of Natural Res. v. U.S. ex rel. Stevens, 529 U.S. 765, 786, 120 S. Ct. 1858, 1870, 146 L. Ed. 2d 836 (2000). Indeed, the PFCRA and the FCA, as amended, contain identical definitions for "knows or has reason to know." Congress, in amending the FCA determined that specific intent to defraud should not be required to prosecute false claims under the FCA. The legislative history of the amendment of the FCA explains that the "intention that the act not punish honest mistakes or incorrect claims submitted through mere negligence." S. REP. 99-345, 7, 1986 U.S.C.C.A.N. 5266, 5272. However, Congress recognized that "those doing business with the Government have an obligation to make a limited inquiry to ensure the claims they submit are accurate." Id. As such, this Court has held that, under the PFCRA, a person's failure to make a simple inquiry prior to signing a declaration constitutes a failure to exercise ordinary care sufficient to support a finding that the person knew or had reason to know the contents of their declaration was false. In re Mirvice Babar and Najiba Babar, 2009 WL 6869728, at *19 (HUDALJ April 27, 2009).

At the hearing, Respondent testified that he did not type the words "Not Applicable" in the field where ACG should have been identified. In fact, he did not complete a single portion of the form other than affix his signature. When asked if he read the forms prior to signing them, Respondent offered the following testimony:

Q. Had you read these [HUD 50071s and Standard Form-LLs] when you signed them?

A. You know, I do recall these forms, and I generally read them, perused them. I perused them is more likely what I've done.

...

Q. You say you perused these forms before you signed. Do you think you should have read them more carefully?

A. Well, I think the way I went about doing my job was to hire competent counsel for every form that had to be signed and required them to represent that these documents were appropriate for my signature.

Some forms and documents were beyond my level of expertise that I was required to sign . . . so we would hire appropriate staff and counsel to pre-certify that it was okay for me to then sign the appropriate certifications.

...

Q. Do you think there was something about these forms that was confusing?

A. I think today from what I've learned, there was some confusion on behalf of my staff that typed in not applicable.

Based on his testimony, Respondent knew the documents contained certifications to HUD, but still did not take the content of the documents into consideration prior to signing them.⁵ Instead, Respondent delegated the matter to staff members and attorneys. While it is not unreasonable to seek the counsel of specialists or attorneys, Respondent acted as nothing more than a rubber-stamp on pre-completed forms.⁶ Had Respondent actually read the language of the forms, he would have come to the conclusion that some sort of disclosure of ACG was necessary. This is the type of deliberant ignorance and reckless disregard that is actionable under the PFCRA when false statements are made to a government agency. Accordingly, the Court finds Respondent knew or had reason to know that the information contained in the three HUD Form 50071s and three Standard Form-LLs was false.

Second, Respondent disputes that the certifications and disclosures were material, because "HUD knew full well that PHA was paying ACG for lobbying with non-federal funds." Respondent claims ACG's lobbying reports on behalf of PHA were provided to HUD and the invoices from and record of payment to ACG were completely transparent. Respondent also testified:

A. . . . We made no attempts to hide David Urban. As I said, I sat in the Assistant Secretary's Office on the tenth floor. Steve Nesbitt . . . and David Urban were close friends. He was very pleased with the fact that David was working for us. I had several meetings with him, and they were very close friends, and he came out to our events. He spoke at our rallies.

However, it is unnecessary to find that Respondent had the intent to secrete the PHA's association with Mr. Urban in order to find that the false statement was material. As noted in the testimony of Alison Smith, a housing innovation specialist in the Moving to Work demonstration at HUD, her program office relies heavily on the certifications presented by participants in the

⁵ When asked whether he knew at the time he signed the documents at issue that they contained certifications to HUD, Respondent replied in the affirmative.

⁶ During one line of questioning regarding the Standard Form-LLs, Respondent testified to the following:

Q. So is it fair to say that when you received this form, all of the blocks were filled out by someone other than you?

A. Right.

Q. And you simply signed the form?

A. Yes.

MTW Program.

Q. Does your office rely on these certifications in any way in reviewing the public housing authority?

A. Yes. We rely on certifications quite often. As I said, the MTW Program only has the ability to provide flexibility on a very finite number of regulations. So there's a broad universe of other requirements that the public housing [authority] has to follow.

We have to rely on certifications as sort of an affirmative response from the housing authority that they know that they are still bound by this.

...

Q. Are these certifications and disclosures significant to your office?

A. Yes. Definitely. We depend on them for the truth and accuracy of these documents to validate that the boundaries that we are setting for our program are maintained because we don't want to represent that our program has the authority to waive things outside of the 1937 Act or what was the authority that was given to us by Congress.

So it's important that we set these boundaries and rely on the truth and accuracy of the certifications beyond that.

Through Ms. Smith's uncontested testimony, the Court is persuaded that the certifications and disclosures were material to HUD in its efforts to oversee housing authorities in the MTW Program. Moreover, the HUD Form 50071, itself, states that, "[t]his certification is a *material representation of fact* upon which reliance was placed when this transaction was made or entered into." Accordingly the Court finds that the representations contained in statements submitted by Respondent were material.

Based upon the foregoing, the Court concludes that Respondent had reason to know the three HUD Form 50071s and three Standard Form-LLLs asserted false material facts. Respondent is, therefore, liable for three counts of violating the PFCRA.

Conclusion

The parties have stipulated that Respondent signed the three certifications and their accompanying disclosures, and that the documents contained erroneous or false statements. Additionally, based upon the evidence contained within the record, the Court finds that false statements asserted a material fact, and that Respondent knew or had reason to know that the

statements were false. As discussed, *supra*, Respondent's claims that no federal funds were used to pay Ballard Spahr or ACG; that he did not know the statements were false; and that the statements were material are insufficient to support a finding that Respondent is not liable under the PFCRA or Byrd Amendment. However, Respondent's claims may mitigate the penalty issued by the Court. As such, Respondent's claims, where applicable, will be considered below.

Penalty Factors

HUD seeks three civil penalties of \$10,000, \$100,000, and \$100,000 under the Byrd Amendment, totaling \$210,000, and three civil penalties of \$7,500 each under the PFCRA, totaling \$22,500, for a total award to HUD in the amount of \$232,500.

Respondent is subject to a civil penalty of \$10,000 for the first Byrd Amendment violation. 24 C.F.R. § 87.400(e). For the second and third counts under the Byrd Amendment, Respondent is subject to a civil penalty between \$10,000 and \$100,000 for each count. *Id.* In determining the amount of a civil penalty under the Byrd Amendment, the Court must consider "the nature, circumstances, extent, and gravity of the violation, the effect on the ability of such person to continue in business, any prior violations by such person, the degree of culpability of such person, the ability of the person to pay the penalty, and such other matters as may be appropriate." 24 C.F.R. § 87.400(d).

Pursuant to the PFCRA, Respondent is also liable for a penalty of up to \$7,500 per false statement. 24 C.F.R. § 28.10(b)(1). The amount of penalties imposed shall be based on consideration of evidence in support of one or more of the factors as listed in 24 C.F.R. § 28.40(b) and enumerated below. Many of these factors are sufficiently similar to the civil penalty factors under the Byrd Amendment for the Court to consider them in tandem.

(1) The number of false, fictitious, or fraudulent claims or statements.

Respondent made three written statements that each asserted a material fact that was false. Specifically, Respondent signed three Standard Form-LLLs that were each attached to a HUD Form 50071 certifying that the signatory would appropriately complete the attached Standard Form-LLL. Each HUD Form 50071 and accompanying Standard Form-LLL are considered jointly to be a statement under the PFCRA.

(2) The time period over which such claims or statements were made.

Respondent made three false statements over the period of one year.

(3) The degree of Respondent's culpability with respect to the misconduct.

HUD claims Respondent is fully culpable for making the false statements. While he was the only signatory on the certifications and disclosures, Respondent's testimony that he relied on competent counsel was credible. Respondent stated that "[h]iring the right lawyers, the right accountants was my job. In this case the lawyers and the accountants certified to me that it was appropriate to sign these forms. Maybe they erred, and it appears they have erred."

Respondent's reliance on his attorneys and accountants, though misplaced, was not unreasonable. However, Respondent cannot completely shift the blame to others. Respondent admitted, "At the end of the day, I was the executive director." Respondent acknowledged that, "what I should have questioned is what does "not applicable" mean, you know, why not disclose the name of the firm because David Urban was involved in meetings and at the HUD building with me and without me all the time on my behalf." Had Respondent considered what he was certifying to HUD and made this simple inquiry, Respondent would have realized that his statements to HUD were incorrect and could have remedied them.

(4) The amount of money or the value of the property, services, or benefit falsely claimed.

Neither party provided testimony or evidence as to this factor.

(5) The value of the Government's actual loss as a result of the misconduct, including foreseeable consequential damages and the cost of investigation.

HUD states that it incurred costs as a result of Respondent's misconduct. Specifically, HUD cites the OIG's review that uncovered the false certifications and disclosures, as well as HUD's litigation. HUD proffers, but has not demonstrated, that such costs can reasonably be assumed to exceed the \$22,500 in penalties sought by HUD under the PFCRA. HUD has put in no evidence on this issue.

(6) The relationship of the civil penalties to the amount of the Government's loss.

HUD has requested \$22,500, which is the maximum total civil penalties allowed under the PFCRA. Such costs can be attributed to Respondent. See HUD v. Cabreja, HUDALJ 11-M-006-PF-2 (HUDALJ July 28, 2011). However, HUD has put into the record no quantifiable evidence with regard to the Government's loss. Therefore, the relationship between the civil penalties sought and HUD's actual loss has not been demonstrated.

(7) The potential or actual impact of the misconduct upon national defense, public health or safety, or public confidence in the management of Government programs and operations, including particularly the impact on the intended beneficiaries of such programs.

"Fraud erodes public confidence in the government's ability to efficiently and effectively manage its programs." U.S. ex rel. Rosales v. San Francisco Hous. Auth., 173 F. Supp. 2d 987, 1019 (N.D. Cal. 2001) (citing S.Rep. No. 345, 99 th Cong., 2d Sess. (1986), reprinted in U.S.C.C.A.N. 5266, 5268). There is no evidence that Respondent intended to defraud HUD. Respondent's failure to take proper care in signing the certifications and disclosures, however, is troubling. Respondent was the executive director of the fourth largest housing authority in the country. Respondent testified that the PHA's annual budget was \$350 million, but that the PHA actually expended close to half a billion. The failure by Respondent to adequately review and consider the certifications he is required to sign certainly undermines the public's confidence in

the PHA and HUD, who oversees the PHA's participation in the MTW Program.

(8) Whether Respondent has engaged in a pattern of the same or similar misconduct.

HUD alleges that Respondent has engaged in a pattern of the same misconduct by submitting two other false certifications and disclosures to HUD on February 2, 2006 and March 9, 2007. Even though the statute of limitations precluded the imposition of a penalty for those two false statements to HUD, 31 U.S.C. § 3808(a), they may still be considered as an aggravating incident of the same misconduct in assessing the imposition of civil penalties. See Cabreja, HUDALJ 11-M-006-PF-2, at 17.

(9) Whether Respondent attempted to conceal the misconduct.

There is no evidence that Respondent attempted to conceal the misconduct. In fact, Respondent testified that he openly participated in meetings with David Urban and Members of Congress or their staff. There was no effort to hide Mr. Urban's involvement with the PHA.

(10) The degree to which Respondent has involved others in the misconduct or in concealing it.

There is no evidence that Respondent involved others in the misconduct. While he delegated his responsibility in ensuring the accuracy of the certifications and disclosures to members of his staff and attorneys. As noted above, there is no evidence that Respondent attempted to conceal the misconduct. Similarly, there is no evidence that he involved others.

(11) If the misconduct of employees or agents is imputed to Respondent, the extent to which Respondent's practices fostered or attempted to preclude the misconduct.

The employees that completed and submitted the certifications and disclosures to Respondent for his signature are not alleged to have committed misconduct. Even Respondent testified that it was merely a "mistake" on the part of his staff and attorneys. However, Respondent's habit of delegating completion and review of the forms to others resulted in the false statements being submitted to HUD. As previously noted, had Respondent reviewed the documents and made simple inquiries prior to signing them, the errors likely would have been avoided.

(12) Whether Respondent cooperated in or obstructed an investigation of the misconduct.

The majority of the documents used by HUD in this litigation were submitted either to HUD or the OIG by the PHA.⁷ There is no evidence that Respondent either encouraged or discouraged the PHA's disclosures during the investigation by OIG.

⁷ Such documents include the Ballard Spahr and ACG invoices, the PHA's solicitation for services, proposals from Ballard Spahr and ACG, and contracts between the PHA and the two firms.

(13) Whether Respondent assisted in identifying and prosecuting other wrongdoers.

There is no evidence regarding this factor.

(14) The complexity of the program or transaction, and the degree of Respondent's sophistication with respect to it, including the extent of Respondent's prior participation in the program or in similar transactions.

Respondent first became executive director of the PHA in 1988. Prior to that, Respondent was the executive director for a housing authority in Detroit, Michigan for four years. He has worked for the Atlanta Housing Authority as well as the Washington, D.C. Housing Authority between 1988 and 1993. Respondent identified himself as “a creature of public housing authorities around the country.” Respondent also testified that he was “trained in finance and information technology and the law.”

The forms are a certification and a disclosure. The language included was not particularly complex. In fact, at the hearing Respondent was asked to read the forms and, after so doing, Respondent agreed that Mr. Urban and ACG likely should have been identified.

(15) Whether Respondent has been found, in any criminal, civil, or administrative proceeding, to have engaged in similar misconduct or to have dealt dishonestly with the Government of the United States or of a State, directly or indirectly.

This factor is not relevant to the facts of this case.

(16) The need to deter Respondent and others from engaging in the same or similar misconduct.

Respondent was the executive director of the fourth largest housing authority in the country. Still, Respondent acted with deliberate ignorance and reckless disregard for the certifications he was making to HUD, which relied upon the accuracy of such certifications. There is great need to deter other similarly situated persons from engaging in similar misconduct.

(17) Respondent's ability to pay.

HUD seeks civil penalties totaling \$232,500. The regulations implementing PFCRA define “ability to pay” as including “Respondent’s resources available both presently and prospectively.” The evidence in the record shows that Respondent owns two properties. One of which is a townhome valued at \$320,000 that is unencumbered by any mortgage. Respondent also owns a condominium valued at around \$485,000. The condominium is encumbered by a mortgage, though the amount of the mortgage is not in evidence. Additionally, prior to Respondent’s departure from the PHA, he earned an annual salary of about \$300,000. His last paycheck from the PHA was received in August or September of 2010.

(18) Any other factors that in any given case may mitigate or aggravate the seriousness of the false claim or statement.

As noted, Respondent's false certifications and disclosures are also violations under the Byrd Amendment. In assessing a civil penalty under the Byrd Amendment, the Court must consider the nature, circumstances, extent, and gravity of the violation, the effect on the ability of such person to continue in business, any prior violations by such person, the degree of culpability of such person, the ability of the person to pay the penalty, and such other matters as may be appropriate." 24 C.F.R. § 87.400(d). Most of these factors were addressed above. However the Court must still consider, separately, the nature, circumstances, extent, and gravity of the violation, as well as the effect on Respondent's ability to continue in business.

First, the Court determines that the nature, circumstances, extent, and gravity of Respondent's erroneous disclosures and certifications do not warrant the maximum penalties under the Byrd Amendment. The Court is not persuaded that Respondent intentionally falsified the documents for the purpose of hiding ACG and Ballard Spahr's lobbying activities. Rather, Respondent recklessly disregarded his obligation to accurately certify information to HUD. While the certifications are material representations of fact relied upon by HUD, the harm caused by Respondent's misconduct is not detailed in the record. False statements involving Federal lobbying restrictions and disclosure requirements are, undoubtedly, serious. However, there is insufficient evidence in the record warranting a maximum civil penalty of \$100,000 for each such violation.

Last, the Court notes that there is no evidence on a civil penalty's effect on Respondent to do business. Respondent testified that he has not worked for the PHA for the past four years and there is no evidence that he is conducting any business elsewhere.

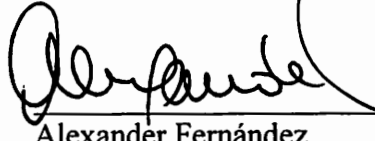
CONCLUSIONS

The evidence establishes that Respondent is liable for submitting three erroneous certifications and disclosures. Respondent's submission of the three erroneous certifications and disclosures constitutes a failure to file the required certifications and disclosures under the Byrd Amendment. Respondent is also liable for violating the PFCRA by knowingly making three false statements to HUD.

Upon consideration of the relevant factors set forth under the PFCRA and the Byrd Amendment, the Court finds civil penalties totaling \$75,000 to be warranted. Specifically, Respondent is liable for a \$10,000 civil penalty for the first Byrd Amendment count, and two \$25,000 civil penalties for the second and third counts under the Byrd Amendment. Additionally, Respondent is liable for three \$5,000 civil penalties under the PFCRA.

Accordingly, Respondent shall pay to the Secretary of HUD civil penalties of \$75,000, which are immediately due and payable without further proceedings.

So **ORDERED**,


Alexander Fernández
Administrative Law Judge

Notice of appeal rights. The appeal procedure is set forth in detail in 24 C.F.R. § 26.52. This order may be appealed to the Secretary of HUD by either party within 30 days after the date of this decision. The Secretary (or designee) may extend this 30-day period for good cause. If the Secretary (or designee) does not act upon the appeal within 30 days, this decision becomes final.

Service of appeal documents. Any petition for review or statement in opposition must be served upon the Secretary by mail, facsimile, or electronic means at the following:

U.S. Department of Housing and Urban Development
Attention: Secretarial Review Clerk
451 7th Street, S.W., Room 2130
Washington, DC 20410

Facsimile: (202) 708-0019

Scanned electronic document: secretarialreview@hud.gov

Copies of appeal documents. Copies of any Petition for Review or statement in opposition shall also be served on the opposing party(s), and on the HUD Office of Administrative Law Judges.

Judicial review of final decision. Judicial review of the final agency decision in this matter is available as set forth in 31 U.S.C. § 3805.