

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF HEARINGS AND APPEALS

UNITED STATES DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT,

Petitioner,

v.

LINDA BLACKMON-BRACE,

Respondent.

15-AF-0117-PF-019

August 20, 2018

**ORDER GRANTING THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT
AND INITIAL DECISION**

Before the Court is the *Government's Motion for Summary Judgement* ("Motion") filed February 8, 2018. In the Motion, the United States Department of Housing and Urban Development ("Government" or "HUD") requests that the Court find Linda Blackmon-Brace ("Respondent") liable for the submission of false claims to HUD in violation of the Program Fraud Civil Remedies Act ("PFRCA"), 31 U.S.C. §§ 3801-3812, as implemented by 24 C.F.R. Part 28.

Procedural History

On September 23, 2015, the Government filed the *Complaint* in this matter alleging that Respondent submitted nine (9) false claims through the Section 8 Housing Choice Voucher Program. Due to these alleged false claims that were paid to Respondents, the Government sought a total of \$84,654 in civil penalties and assessments.

Respondent timely responded to the *Complaint* by two letters, one dated October 23, 2015, and one dated October 28, 2015. The extent of the October 23, 2015, letter was a request for a hearing. The October 28 letter contained a more formal response but did not deny any of the charges stated in the *Complaint*. The Court granted Respondent's request for a hearing and issued a *Notice of Hearing and Order* on October 28, 2015.

On February 2, 2016, the Government filed a *Motion for Stay* pending the outcome of Respondent's Chapter 13 Bankruptcy Petition filed in the United States Bankruptcy Court for the District of South Carolina on December 14, 2015. The Court granted the Government's *Motion for Stay* in an *Order Granting Stay of Proceedings* issued that same day. Respondent's initial Chapter 13 Bankruptcy Petition was dismissed on April 10, 2017. However, on May 8, 2017,

Respondent filed a subsequent Chapter 13 Bankruptcy Petition which was ultimately dismissed on January 25, 2018.

On February 8, 2018, the Government filed a *Motion to Lift Stay and for Summary Judgement* (“Motion”). Respondent did not file a timely response to the *Motion*. The Court then issued an *Order to Show Cause* (“Order”) which lifted the stay and gave Respondent until May 17, 2018 to show cause why the Government’s *Motion* should not be granted. Again, Respondent did not file a timely response. Consequently, she is deemed to have waived any objection to the granting of the *Motion*. 24 C.F.R. § 26.16(c)

Applicable Law

Standard of Review. Upon motion of a party, this Court is authorized to “decide cases, in whole or in part, by summary judgement where there is no disputed issue of material fact.” 24 C.F.R. § 26.32(l). The Court may exercise its discretion in application of Rule 56 of the Federal Rules of Civil Procedure. 24 C.F.R. § 26.40(f)(2).

Summary judgement is proper where no genuine issue of material fact exists and the moving party is entitled to judgement as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Fed. R. Civ. P. 56(a). A “genuine” issue exists when the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson, 477 U.S. at 248. Furthermore, a fact is not “material” unless it might affect the outcome of the suit. Id.

Summary judgement is a “drastic remedy” because, when applied, it curtails a party’s ability to present its case. Selva & Sons, Inc. v. Nina Footwear, Inc., 705 F.2d 1316, 1323 (Fed. Cir. 1983). Accordingly, the movant bears the burden of demonstrating the absence of any disputes of material fact. Anderson, 477 U.S. at 256. Pursuant to Rule 56, when a party asserts that a fact cannot be genuinely disputed, that party must: (i) cite to materials in the record; or (ii) show the cited materials do not establish the absence or presence of a genuine dispute. Fed. R. Civ. P. 56(c)(1). In considering a motion for summary judgement, the Court’s function is not to resolve any questions of material fact, but to ascertain whether any such questions exist. In re Beta Dev. Co., HUDBCA No. 01-D-100-D1, at *12. (February 21, 2002). Therefore, when the moving party has met its burden under Rule 56(c), the nonmoving party may not rest upon mere allegations or denials, but must come forward with “specific facts showing that there is a *genuine* issue for trial.” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986) (emphasis added) (citing Fed. R. Civ. P. 56(e)).

PFCRA. The PFCRA imposes liability on a person for making, presenting, or submitting a claim that the person knows or has reason to know is false, fictitious, or fraudulent, or is supported by a written statement which asserts a material fact which is false, fictitious, or fraudulent. 31 U.S.C. § 3802(a)(1). A claim includes any request, demand, or submission made to a recipient of property, services, or money from an authority for the payment of money if the United States provided any portion of the money requested or demanded. 31 U.S.C.

§ 3801(a)(3)(B)(ii). A person knows or has reason to know a claim falsely asserts a material fact if they: (i) possess actual knowledge that the claim is false, (ii) act in deliberate ignorance as to the truth or falsity of the claim, or (iii) act in reckless disregard as to the truth or falsity of the claim. 31 U.S.C. 3801(a)(5). A liable person may be subject to a maximum civil penalty of \$7,500 per false claim. 72 Fed. Reg. 5586 (Feb. 6, 2007).¹ Additionally, a liable person may be subject to an assessment of twice the amount of the claims if the Government made any payment on the claim. 37 U.S.C. § 3802(a)(1) and (3); 24 C.F.R. § 28.10(a)(6).

Housing Choice Voucher Program. The Section 8 Voucher Program (“the Program”) is a housing rental subsidy program established by HUD pursuant to Section 8 of the United States Housing Act of 1937, 42 U.S.C. 1437(f), to help low-income families afford safe, decent, and sanitary housing. 24 C.F.R. §§ 982.1(a)(1), 982.2, and 982.201(a)-(b). Generally, HUD provides funds to authorized public housing agencies (“PHAs”) who administer the program within their locale. 24 C.F.R. §§ 982.1(a)(1), 982.151, and 982.4(b) (defining “PHA”). Authorized PHAs use the funds to make housing assistance payments (“HAPs”) to the owners of housing units occupied by families approved for participation in the Program. 24 C.F.R. §§ 982.1(a)(1), 982.51, 982.157(b)(1)(i), and 982.4(b) (defining “HAP” and “owner”).

The PHA may not enter into a HAP contract with any of the following classes of persons during their tenure in office or for one year after: (i) any present or former member or officer of the PHA, (ii) any employee, contractor, or agent of the PHA who formulates policy or who influences decisions with respect to the Program, (iii) Any public official, member of a governing body, or State or local legislator, who exercises functions or responsibilities with respect to the programs, and (iv) any member of Congress. 24 C.F.R § 982.161(a). Under the terms of the contract, these classes of people are considered “covered individuals.”² Covered individuals must disclose their prohibited interest to both the PHA and HUD, but the HUD field office may waive conflicts for good cause. Unit owners are not entitled to receive housing assistance payments unless they are in compliance with all provisions of the HAP contract.

Findings of Fact

Since 1991, Respondent participated in the Program as a landlord receiving HUD-funded rental subsidies from the Housing Authority of Lancaster (“LHA”). From November 2002 through December 2006 and again from January 2009 through March 2011, Respondent was also a member of the Lancaster City Council. Pursuant to S.C. Code Ann. §§ 31-3-340 and 31-3-370, members of the Lancaster City Council are authorized to appoint LHA commissioners for up to five-year terms and remove commissioners for cause.

¹ Pursuant to 78 Fed. Reg. 4057 (Jan. 18, 2013), a person may be subject to a maximum civil penalty of \$8,500 for false claims filed after February 19, 2013. See also 81 Fed. Reg. 38931 (June 15, 2016); 82 Fed. Reg. 24521 (June 29, 2017). However, at the time these alleged violations occurred, the maximum allowable civil penalty was \$7,500. Accordingly, the Government is only seeking a \$7,500 penalty per alleged false claim.

² The HAP contract and the HUD regulation recognize the same four classes of covered individuals.

On November 3, 2005, Respondent entered into a HAP contract to receive HUD funds through the LHA for the rental of [REDACTED]. Pursuant to this contract, the LHA disbursed monthly subsidy payments to Respondent from October 2005 through August 2010. On or about July 30, 2018, Respondent entered into another HAP contract to receive a HUD-funded subsidy through the LHA for the rental of [REDACTED].³ Pursuant to this contract, the LHA disbursed monthly subsidy payments from September 2008 through August 2010. From December 2009 through August 2010, Respondent received nine checks from the LHA,⁴ totaling \$8,577.

By entering into each HAP contract, Respondent was required to certify “that no person . . . has or will have a prohibited interest, at execution of the HAP contract, or at any time during the HAP contract term.” However, as a local legislator, Respondent was a covered individual within the meaning of the conflict of interest provisions in the HAP contract and 24 C.F.R. § 982.161.

Discussion

In its *Motion*, the Government seeks entry of summary judgment against Respondent for submitting nine allegedly false claims to the Lancaster Public Housing Agency which were paid using HUD funds. Each claim stems from a separate monthly subsidy payment made to Respondent pursuant to two ongoing HAP contracts. The nine payments at issue were made between December 1, 2009 and August 1, 2010. The subsidies from the HAP contracts were combined into one monthly check for \$953, for a total amount of \$8,577.

I. There is no genuine dispute as to the material facts.

The Government asserts that summary judgement is appropriate because Respondent did not deny any of the material facts that establish her liability in her lone substantive filing with this Court. Further, as Respondent failed to timely respond to this Court’s *Order* dated May 10, 2018, she has waived any objection to the granting of the *Motion*. See 24 C.F.R. 26.16(c).

In support of its position, the Government submitted several documents which purport to establish the truth of the material facts alleged. The memorandum of Respondent’s interview with HUD OIG investigators indicated that she had participated in the Lancaster Section 8 program since 1991. Other documents produced by the Government include copies of the HAP contracts, request for tenancy forms, a request for rent increase, a spreadsheet detailing monthly payments made by the LHA to Respondent on behalf of the tenants at [REDACTED] and [REDACTED]. The HAP contracts required Respondent to certify that no person had

³ The page with the signature line was missing from the record, but Respondent had inquiry notice of the Conflict of Interest provision through signing past HAP contracts. Further, her continued acceptance and deposit of PHA checks for this property imputes her assent through course of dealing.

⁴ The rent subsidies from [REDACTED] and [REDACTED] were consolidated into one monthly check.

a prohibited interest at the time of execution or would have a prohibited interest at any point in the lease term. By Respondent's own admission, she signed the HAP contracts in question, although she claimed she did not read them.⁵

After reviewing the Government's *Motion*, and the documents offered in support thereof, the Court concludes that the Government has met its initial burden of showing there is no genuine dispute as to the material facts. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (Asserting that the movant seeking summary judgement bears the initial responsibility for citing to specific information in the record that demonstrates the absence of a genuine issue of material fact). To survive summary judgement, the nonmoving party must "go beyond the pleadings and by . . . [citing to materials in the record] designate specific facts showing that there is a genuine issue for trial." Id. (citing Fed. R. Civ. P. 56(e)).

Here, Respondent has not met this burden. In her initial response to the *Complaint*, she did not deny any of the Government's allegations. Further, as she failed to oppose the Government's *Motion* or respond to this Court's *Order*, Respondent has failed to "designate specific facts showing that there is a genuine issue for trial." Id. (citing Fed. R. Civ. P. 56(e)). Considering the Government's evidence, the Court concludes that Respondent has failed to raise a dispute as to any material fact in this case.

II. The Government is entitled to judgment as a matter of law.

The Government claims it is entitled to judgment as a matter of law, because the undisputed material facts in this case support a finding that Respondent violated PFCRA by receiving HAP payments that she was not entitled to.

The PFCRA places liability on a person for making, presenting, or submitting, or causing to be submitted, a false claim or a claim that the person knows is supported by any written statement which asserts a material fact which is false, fictitious, or fraudulent. 31 U.S.C. § 3802(a)(1)(B). A claim includes any request, demand, or submission made to a recipient of property, services, or money from an authority for the payment of money if the United States provided any portion of the money requested or demanded. 31 U.S.C. § 3801(a)(3)(B)(ii). When the false claims are housing assistance payments, each payment made by the PHA to the owner constitutes a separate claim. HUD v. McGee, HUDALJ 12-F-026-PF-13 (Jun. 27, 2012); In re Mirvice and Najiba Babar, HUDALJ 08-074-PF (Order Granting Government's Petition for Review, June 25, 2009) (finding that initial written certification implies an affirmation of continuing accuracy).

⁵ Although Respondent entered into the second HAP contract while she was not a sitting public official or within one year of having sat as a public official, the Government is only seeking liability for subsidy payments made after Respondent commenced her second span of service on the Lancaster City Council. Even without considering the second contract, liability is still established by the payments disbursed during this time on the initial contract.

A liable person may be subject to a maximum civil penalty of \$7,500 per claim for claims made on or after March 8, 2007, but before February 19, 2013. 72 Fed. Reg. 5586 (Feb. 6, 2007); See note 1, *supra*. Additionally, a liable person may be subject to an assessment of twice the amount of the claims if the Government has made any payment on the claim. 37 U.S.C. § 3802(a)(1) and (3); 24 C.F.R. § 28.10(a)(6).

As noted, *supra*, Respondent was paid monthly housing assistance payments by the LHA, with HUD funds, while she was a member of the Lancaster City Council. Each monthly payment between December 2009 through August 2010 constitutes a distinct claim paid by the LHA using HUD funds. The LHA made these payments to Respondent based on her certification that she was and would remain in compliance with the terms of the HAP contract. One of the terms was that Respondent did not have a prohibited interest at the time the HAP contract was executed, and would not have a prohibited interest at any time during the HAP contract term.

However, the Lancaster City Council is authorized by local law to remove LHA commissioners for cause and appoint new commissioners. Therefore, Respondent was authorized to exercise functions with respect to the Program. As such, Respondent was a “covered individual” within the meaning of the HAP contract. See 24 C.F.R. § 982.161. Covered individuals may not have any interest in the HAP contract or payments under the contract while they remain in office or for one year thereafter. Id.

Respondent knew or should have known that she was ineligible to receive Program funds as a “covered individual” based on the plain language of the HAP contracts. Therefore, Respondent’s implicit certifications of continued adherence to Program requirements were false, and they were material to LHA’s decision to disburse housing assistance payments to Respondent. See In re Mirvice and Najiba Babar, HUDALJ 08-074-PF (Order Granting Government’s Petition for Review, June 25, 2009). Accordingly, the Court finds that the nine housing assistance payments identified in the *Complaint* and the *Motion* constitute false claims made by Respondent.

III. Civil Penalties and Assessments

The Government seeks a judgement of \$67,500 in civil penalties for the nine false claims made between December 1, 2009 and August 1, 2010. Additionally, the Government seeks an assessment of \$17,154, for a total amount of \$84,654.

Pursuant to the PFCRA, Respondent is liable for a penalty of up to \$7,500 for each false claim. 24 C.F.R. § 28.10(b)(1); 72 Fed. Reg. 5586 (Feb. 6, 2007). In addition, Respondent may also be liable for an assessment of twice the amount of each false claim, because the Government issued payment on those claims. 31 U.S.C. § 3802(a)(1) and (3); 24 C.F.R. § 28.10(a)(6).

The regulation implementing the PFCRA recommends that “Because of the intangible costs of fraud, the expense of investigating fraudulent conduct, and the need for deterrence, ordinarily twice the amount of the claim as alleged by the government, and a significant civil penalty, should be imposed.” 24 C.F.R. § 28.40(b). However, the Court should impose an appropriate amount of penalties and assessments based on its consideration of evidence in support of one or more of the following factors:

- (1) The number of false, fictitious, or fraudulent claims or statements;
- (2) The time period over which such claims or statements were made;
- (3) The degree of the respondent's culpability with respect to the misconduct;
- (4) The amount of money or the value of the property, services, or benefit falsely claimed;
- (5) The value of the Government's actual loss as a result of the misconduct, including foreseeable consequential damages and the cost of investigation;
- (6) The relationship of the civil penalties to the amount of the Government's loss;
- (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;
- (8) Whether the respondent has engaged in a pattern of the same or similar misconduct;
- (9) Whether the respondent attempted to conceal the misconduct;
- (10) The degree to which the respondent has involved others in the misconduct or in concealing it;
- (11) If the misconduct of employees or agents is imputed to the respondent, the extent to which the respondent's practices fostered or attempted to preclude the misconduct;
- (12) Whether the respondent cooperated in or obstructed an investigation of the misconduct;
- (13) Whether the respondent assisted in identifying and prosecuting other wrongdoers;
- (14) The complexity of the program or transaction, and the degree of the respondent's sophistication with respect to it, including the extent of the respondent's prior participation in the program or in similar transactions;
- (15) Whether the 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;
- (16) The need to deter the respondent and others from engaging in the same or similar misconduct; and
- (17) The respondent's ability to pay, and
- (18) Any other factors that in any given case may mitigate or aggravate the seriousness of the false claim or statement.

Id. Any mitigating or aggravating circumstances must be considered and stated in the opinion.
Id.

Respondent is liable for nine false claims made to the LHA and funded by HUD. These false claims covered a period of nine months, from December 2009 through August 2010, and resulted in wrongful payments totaling \$8,577. The HUD OIG investigation revealed that

Respondent had been a Section 8 landlord since 1991. The Government presented no evidence of regarding the number of HAP contracts Respondent allegedly signed between 1991 and 2002. However, the Court considers Respondent's extended period of time as a Program landlord to be an aggravating factor, in light of the numerous opportunities this provided to become familiar with HAP contract provisions.

Taking the facts in the light most favorable to the nonmovant, it is plausible that Respondent was not the sole party culpable for the misconduct. During HUD OIG's inquiry into this matter, investigators uncovered a handwritten note suggesting that the LHA Director assented to Respondent's participation in the Program at some point during her time in office. While the regulation requires disclosure of prohibited interests to both the PHA and HUD, Respondent's potential reliance on representation(s) made by the LHA Director would serve to diminish her culpability. See 24 C.F.R. § 982.161(b). For the purposes of the *Motion*, this Court considers the handwritten note to be a mitigating factor.

The Government's actual loss was \$8,577, plus an unknown amount of consequential damages expended in investigation and litigation. Citing "the intangible costs of fraud," and the need to deter similar misconduct, the Government proposes the regulatory maximum penalty of \$7,500 per false claim, for a total civil penalty of \$67,500. Due to the nature of this Order, the Court finds that a civil penalty of \$3,000 per false claim is reasonable and sufficient to accomplish the Government's objectives of deterrence and maintaining the public confidence.

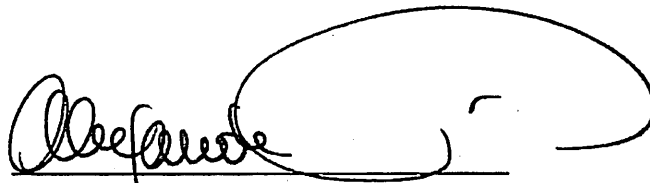
The Government has presented evidence that Respondent demonstrates the requisite ability to pay the proposed civil penalties and assessments. 24 C.F.R. § 28.5(c). Further, it is generally a respondent's burden to demonstrate inability to pay as a mitigating factor, and Respondent has not responded to the *Motion* or otherwise presented evidence tending to support this or additional mitigating factors. HUD v. Persondek, HUDALJ 18-JM-0065-PF-03 (Apr. 17, 2018).

Conclusion

The Court finds as undisputed facts that Respondent, as the owner, knew or should have known of her conflict of interest and falsely certified as to her eligibility, in order to receive housing assistance payments from LHA. Had LHA known her certifications were false, it would not have paid Respondent subsidies pursuant to two HAP contracts, unless she had properly informed HUD and received a waiver. Accordingly, Respondent is liable for nine counts of filing false claims under the PFCRA. Based on this Court's consideration of the aggravating and mitigating factors set forth in 24 C.F.R. § 28.40, the Court finds civil penalties totaling \$27,000 and an assessment of \$17,154 to be appropriate.

Accordingly, Respondent shall pay the Government civil penalties and assessments totaling \$44,154, which are immediately due and payable.

SO ORDERED.

A handwritten signature in cursive script, appearing to read "Alexander Fernández", written over a horizontal line. The signature is enclosed within a large, hand-drawn oval.

Alexander Fernández
Administrative Law Judge