

as the interviewer. These reasons are cited as causes for the LDP pursuant to 24 C.F.R. §§24.705(a) (2), (4), (7), (8), (9), and (10). The LDP prohibits Scott from participating in all single family housing programs administered by the Assistant Secretary for Housing/FHA Commissioner within the geographical jurisdiction of the Atlanta Homeownership Center for a period of one year.

Scott requested a conference on the LDP, in accordance with 24 C.F.R. §24.712. A conference was held on March 16, 1999, by N. Daniel Rogers, III, Deputy Director of the Atlanta Homeownership Center. By letter dated April 5, 1999, Gardner affirmed the LDP, based on Rogers' recommendation. Scott thereafter requested a hearing on the LDP pursuant to 24 C.F.R. §24.713.

Scott contends that he was unaware of HUD's conflict of interest regulations and the related program requirements set out in HUD Handbook 4060.1-REV. 1. He also states that he did not attempt to conceal anything by signing six loan applications as the interviewer in cases in which Johnson actually conducted the interviews, and he did not intend to falsely certify that he had conducted the interviews by signing the loan applications. He further states that he had no authority over payments made by FCM to Johnson, nor did he have knowledge of other payments received by Johnson in connection with those six transactions.

The parties mutually agreed to extend the period established for the commencement of the hearing. Pursuant to 24 C.F.R. §24.314(b) (2) (iii), the hearing was held in Memphis, Tennessee on September 14-15, 1999, and the transcript of the hearing was received on September 29, 1999.

Findings of Fact

1. Scott was the branch manager of the Southhaven branch of FCM in 1996. He resigned as branch manager on July 1, 1998. Scott has been active in the mortgage lending business since 1976, acting at various times as a loan officer, branch manager, and vice-president of a large mortgage company. He has worked with HUD single family programs in his various positions, and considers himself knowledgeable about HUD loan origination requirements. (Tr. 291-292, 303, 307, 316.)
2. FCM is a direct endorsement (DE) mortgage lender approved by HUD. DE lenders are required to be familiar with HUD program requirements applicable to loan originations and loan underwriting. DE lenders are also required to make HUD handbooks containing program requirements available to its employees, in order to make sure that its employees are conducting business in accordance with HUD program requirements and regulations. Each DE lender is provided with a complete set of applicable HUD handbooks when it is approved by HUD, and it is also sent copies of any changes in HUD handbooks or program requirements. Additional copies of these documents are easily obtained by the lender from HUD. HUD does not provide training on the program requirements applicable to a DE lender, and the DE lender is responsible for any training needed by its employees. FCM provided no training for its employees. A copy of HUD Handbook 4155.1, which addresses how to originate and process loan applications, was available at the Southhaven branch. However, other HUD handbooks relevant to FCM's business were kept in the Memphis branch. A copy of HUD Handbook 4060.1 REV-1 was in FCM's Memphis office but not in the Southhaven branch. (Exhibit G-1; Tr. 78-79, 86, 108-109, 170, 273-274, 276, 278.)
3. When Scott was the branch manager of the Southhaven branch of FCM, he had to clear all hiring with Gary Luzader, who was located in the Memphis office of

FCM. Scott reviewed and signed the monthly closing reports for the loan officers in his branch. The monthly closing reports were used to calculate the pay to which a loan officer was entitled for each loan that the loan officer originated. Luzader also signed the monthly closing reports and had the authority to direct payment to the loan officers. The loan processors in the Southhaven branch of FCM were under the supervision of Linda Galligher, and their time cards were turned in to Galligher for approval and payment. Scott did not have authority to set company policy. Matters of company policy were resolved by Luzader, sometimes after Luzader would confer with his superior, Barry Molder. (Tr. 242-246, 268, 279.)

4. Scott wanted FCM to hire Carole Johnson as a loan officer in the Southhaven branch because she had been a "high producer" of loan business, bringing in \$800,000 to \$1,000,000 worth of loans monthly when she and Scott had worked together at another mortgage company. Since that time, Johnson had become more involved in the real estate business as a builder. She also had an active real estate agent's license, which she used in conjunction with sales of properties that she owned and sales of properties that she did not own but for which she acted as the real estate agent. Scott was aware of Johnson's real estate activities when he sought to have her hired as an FCM loan officer. Scott also wanted Johnson to work for FCM so that FCM would not lose her business as a real estate agent. Johnson's daughter worked for FCM, and Johnson sent a lot of loan origination business to FCM through her daughter. However, her daughter was having personal problems that affected her work at FCM so adversely that Scott recommended that her daughter be fired. Scott believed that if Johnson replaced her daughter as a loan officer at FCM, FCM would keep Johnson's loan business and there would not be ill will due to the termination of Johnson's daughter's employment with FCM. Johnson was eager to work part time at FCM as a loan officer, provided it would be permissible for her to remain active in the real estate business as a builder and real estate agent. (Tr. 141-142, 295-296, 298-299, 307-310.)

5. Scott discussed the matter of hiring Johnson with Luzader, and Luzader was very interested in hiring Johnson as a loan officer. Both men realized that there was at least an appearance of a conflict of interest if Johnson was a FCM loan officer and continued her real estate activities. Scott claims that his concern about hiring Johnson was that other real estate agents and brokers might refuse to bring any loan business to FCM if Johnson were employed there as a loan officer, but Scott never doubted that FCM could employ Johnson as a loan officer. It was agreed between Scott, Luzader, and Johnson that Johnson would be a loan officer at FCM part-time, and that she would be able to continue her other real estate activities. Luzader thought that it would be permissible for Johnson to be an FCM loan officer, so long as she was not actively involved in a transaction in which she had a financial interest. Luzader claims that he intended that if Johnson originated a loan in which she had a financial interest, Scott would conduct the loan application interview and fill out the loan application as the interviewer, and that Johnson would play no role at any time in the loan application, processing, or approval process at FCM. However, she would be paid as the loan originator for such loans, because she brought that loan business to FCM. Scott and Johnson did not remember the arrangement as Luzader described it. In practice, Johnson conducted the loan application interviews and filled out the loan applications, except she did not sign them, Scott did. This process was used for HUD-insured loans only. There is no evidence that loans not insured by HUD were handled in this manner. (Tr. 156, 160, 247-248, 254, 255, 270, 283, 287, 282, 283-284, 303, 311, 317, 319-320.)

6. Johnson contacted the Mississippi Real Estate Commission to inquire whether she could work as a loan officer at FCM and also keep her real estate agent's license. She was told there was no problem with her working in these positions. She did not contact HUD because, in the mortgage business, she believed that no one except a branch manager or underwriter was to contact HUD about HUD program requirements. She relied on FCM to verify with HUD whether the arrangement that Scott and Luzader proposed to her was permissible. (Tr. 146-147.)

7. Neither Scott nor Luzader checked HUD regulations, handbooks, or called HUD to find out whether Johnson could be compensated by FCM for loan originations if she had a financial interest as the real estate agent, builder-seller, or both, in those particular transactions. They did not even discuss the possibility of checking with HUD before going ahead with Johnson's employment. Scott testified that he "relied on" Luzader to check with HUD, but it was Scott who proposed the hiring of Johnson. Scott also testified that he and Luzader "mutually" worked out the roles that Scott and Johnson would perform on HUD-insured loans in which Johnson had a financial interest outside of her role as the loan officer. Johnson understood that Scott would sign the loan applications as the interviewer for HUD-insured loans in those instances when she was also the real estate agent or the seller, but she would be compensated by FCM for such loans as the loan originator. (Tr. 158-160, 247, 255, 272-273, 267, 270, 301, 311, 322.)

8. HUD regulations applicable to approval of mortgagees to participate in HUD mortgage insurance programs that were in effect in 1996 contained a conflict of interest provision at 24 C.F.R. § 202.12(p), which states as follows:

Conflict of interest. A mortgagee may not pay anything of value, directly or indirectly, in connection with any insured mortgage transaction or transactions to any person or entity if such person or entity has received any other consideration from the mortgagor, seller, builder, or any other person for services related to such transactions or related to the purchase or sale of the mortgaged property, except that consideration as may be approved by the Secretary may be paid for services actually performed. The mortgagee shall not pay a referral fee to any person or organization.

9. HUD Handbook 4060.1 REV-1, entitled "Mortgagee Approval Handbook," which was kept in Luzader's office at FCM, also contained conflict of interest provisions at paragraphs 2-14 and 2-24 A(3) and (4) that mirrored the regulatory conflict of interest prohibition in 24 C.F.R. § 202.12(p). The HUD handbook with which mortgagee employees are most familiar is Handbook 4155.1 applicable to mortgage credit analysis, and it contains no guidance on the conflict of interest problem posed by Johnson's employment with FCM. Not one FCM employee who testified at the hearing, including one of the two underwriters, was even aware of the existence of Handbook 4060.1 REV-1, with the exception of Luzader, and he was not familiar with its contents. (Exhibit G-1; Tr. 170, 182, 216, 219, 228, 254, 324-325.)

10. Between September, 1996 and November, 1997, Johnson originated six loans that were insured by HUD in which Johnson had a financial interest. She was the real estate agent for all six transactions and she was also the seller in the earliest of these transactions, to a couple named Earwood. Johnson's role outside of FCM is clearly indicated on the contract of sale for each of these

transactions. She was compensated by FCM as the loan originator when each of these six loans closed. She was also compensated as the seller of the property to the Earwoods, and she also received a real estate agent's commission for each of these transactions when the loans closed. In each of these six transactions, Johnson interviewed the loan applicants and filled out the loan application form. However, she signed none of these loan application forms on page 3 of the form as the interviewer.

11. Scott entered his name and signed each of the six loan application forms on page 3 as the loan interviewer. The form, which was not a new form in 1996, has blocks for the Interviewer's Name", "Interviewers signature," and a block "To be completed by Interviewer" on how the application was taken: by face-to-face interview, by mail, or by telephone. The form also has a block for "Interviewer's Phone Number." The only block that makes reference to the mortgagee entity, as opposed to the individual interviewer, is a block for "Name and Address of Interviewer's Employer." (AR Tab 11.)

12. Scott testified that he did not notice that Form 1003 required the interviewer's name and signature, not merely the name and signature of a representative of the mortgagee. He believed that it was appropriate for him to sign the form instead of Johnson, and pointed out sections of HUD Handbook 4155.1, which all referenced "the lender," rather than a specific interviewer, as having to take a loan application and conduct an application interview. He also claimed that his signing the loan application, rather than Johnson, was a quality control guarantee, although he was unable to explain how having a person who was not the interviewer sign the loan application as the interviewer would provide "quality control." Scott's signature on the loan application form made it appear that he was the loan originator in those transactions, not Johnson, although it was clear that the FCM loan processors knew that Johnson was the loan originator, not Scott. The loan files also clearly showed her other roles for which she would also be compensated. This should have been apparent to the FCM underwriters and to FCM's quality control officer, but no one questioned the unusual circumstance that had Scott signing the loan applications for HUD-insured loans originated by Johnson in which Johnson also played other roles. Scott did this for no other loan officers at FCM. Joni Bragg, one of the FCM loan processors, did notice this unusual procedure, but she assumed that Luzader had gotten clearance from HUD to use such an unusual procedure. (Exhibits R1, R2, R3, R4; Tr. 203-205, 206, 208-209, 222, 302-303, 317.)

13. Scott reviewed Johnson's monthly closing reports for accuracy, and signed them. Luzader also checked the monthly closing reports to determine that the loans listed on the reports had actually closed, and then he approved them for payment. If a loan was listed on Johnson's monthly closing report, Scott had signed the report, and Luzader verified that the loan had closed, Luzader automatically approved the payment to Johnson for that loan origination. (AR Tab 10; Tr. 244-246, 249-250, 262, 323-324.)

14. Scott, Johnson and Luzader all maintained under oath that they did not know that HUD had any rules or regulations against "dual compensation" such as Johnson received in the six transactions. One FCM loan processor, Sherry Williams, had learned about HUD's prohibition of "dual compensation" in real estate law classes that she had taken in 1992-1993, but she was unaware of the arrangement made by Luzader and Scott for Johnson because she did not process Johnson's loans. She also had never heard of HUD Handbook 4060.1 REV-1, and I therefore find that she did not derive her knowledge from that handbook. The Chief Executive Officer of Brighton Bank, a HUD-approved lender, also knew that there were HUD conflict of interest limitations that prohibited a loan officer

from having an outside financial interest in loans originated by the loan officer, which he learned from his underwriting and marketing staff. He had also called HUD to verify that information when he was faced with an issue analogous to the one posed by Johnson's outside activities. (Tr. 134, 137-140, 148, 228, 230-232, 248, 255, 282-283, 301.)

15. HUD found out from an anonymous tip that Johnson was getting paid for loan originations by FCM and she was also getting paid as a broker and as a seller. Linda Whitehead, a single-family housing specialist for HUD in Quality Control, monitors HUD-approved lenders to make sure that they are in compliance with HUD's rules and regulations. Based on the anonymous tip, she performed a review of Johnson's files at FCM, and found that Johnson was paid by FCM for loan originations in six transactions in which she was also receiving compensation as a real estate agent or seller. She also determined that the loan applicants had not been interviewed by Scott, despite his signature as the interviewer on the loan application for each of the six transactions. Whitehead concluded from this information that FCM had compensated Johnson in violation of HUD handbook 4060.1-REV 1, Chapter 2-24 and 24 C.F.R. § 202. She had interviewed Luzader, Galligher, Jean Morrow (FCM's head underwriter), Barry Molder (FCM's president), but she did not interview Scott or Johnson. The FCM employees and officers that she interviewed all indicated to her that they were not aware that HUD prohibited "dual compensation" such as Johnson received in the six transactions identified by Whitehead. However, Whitehead did not consider lack of knowledge to be an excuse because all of a DE lender's employees must be knowledgeable about HUD's applicable rules and regulations. (AR Tabs 7, 8, 9, 10, 11, 12; Tr. 64-66, 73-79, 81, 86-89, 97-99, 104, 106, 108.)

16. At the hearing, Scott admitted that he did not keep up with HUD's rules and regulations applicable to conflicts of interest, and he offered no excuse for that failure. He admitted in his closing argument that he should have been aware of the conflict of interest regulations that apply to HUD-insured loans. However, he did not think that it was fair to hold him responsible for what no one at FCM knew, including the underwriters and the quality control officer who failed to identify the conflict of interest problem in the six transactions. He also faulted HUD for abdicating all responsibility for providing training. Scott further stated that he would not now sign loan applications as the interviewer if he had not done the interview because "HUD says you can't." He added that "In my heart I still don't think that in signing for lender (sic) . . . I was doing anything wrong." Scott presented various scenarios that lacked credibility to justify his actions, including that he had no authority to get Johnson paid and that he had no way to know if she actually received compensation as a real estate agent or seller of a property. I find that Scott did not understand the reason for HUD's prohibition against "dual compensation," or why the prohibition served a public purpose. (Tr. 303-306, 333, 335, 363.)

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. 1930). The Government bears the evidentiary burden of demonstrating by adequate evidence that cause for Respondent's LDP exists, that the LDP is in the public interest, and that the LDP 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, for a preliminary hearing. Home Bros. v. Laird, 463 F.2d 1268, 1271 (D.C. Cir. 1971). It is not a rigorous level of proof.

Scott was a participant in a primary covered transaction through the HUD-insured loans with which he was involved at FCM, 24 C.F.R. § 24.105. As a branch manager of FCM, he was also a principal, as defined at 24 C.F.R. §24.105. As such, he is subject to administrative sanction by HUD if cause exists for a sanction and it is in the best interest of the public and the Government to sanction him. 24 C.F.R. §24.110(a) and §24.115.

Scott does not deny that he placed his name on the six loan applications in the blocks for the interviewer's name and signature, although he was not the interviewer, and he also does not deny that he was not the loan originator on those loans. Technically, when Scott signed those loan applications as the interviewer, he was making false statements. By Scott signing them, instead of Johnson, he was obscuring her role in the loan interview process. It is significant that this was only done by Scott on applications for loans to be insured by HUD, not on all loan applications taken by Johnson. Scott, Johnson, and Luzader all apparently knew that applications for HUD-insured loans required different treatment. Both Scott and Luzader tried to devise a way to pay Johnson for loan business in which she was also the real estate agent or seller, when a loan would be insured by HUD. However, at no time did Scott or Luzader check HUD handbooks, HUD regulations, or call HUD to find out if what they wanted to do was allowable.

Scott never checked in advance whether Johnson's part-time employment by a DE lender would be permitted by HUD, or if she could be compensated by FCM for transactions in which she had an outside financial interest. Had Scott taken the time to do this, he would have learned that HUD required all employees of a mortgagee, except receptionists, whether full-time or part-time, to be employed exclusively by the mortgagee at all times, and conduct only the business affairs of the mortgagee during normal business hours. HUD Handbook 4060.1 REV-1 at paragraph 2-14. If Scott had taken the time and effort to check HUD Handbook 4060.1 REV-1, which addresses staffing requirements, supervision of staff, and how to conduct mortgage business as an approved mortgagee, he would have known that it was impermissible for Johnson to be employed by FCM and concurrently continue with her other real estate business activities. Had he referred to the same handbook at paragraph 2-24, entitled "Conflict of Interest," he would have learned that prohibited payments by a mortgagee include payment of a fee "to any person or entity who has received or is to receive any other payment or consideration for services related to the transaction, except a commission in connection with the sale of a hazard insurance policy at the request of the mortgagor." HUD Handbook 4060.1 REV-1 at paragraph 2-24(A) (3). Paragraph 2-24(A) (4) of HUD Handbook 4060.1 REV-1 also provides that a mortgagee may not pay a fee "to any person or entity for assistance in the preparation of the FRA mortgage insurance application..., if such party owns, is owned by, or is under

common ownership, with the builder, seller, or a person or entity which has received a real estate commission in connection with the transaction."

Scott cannot reasonably deny that he knew that Johnson would be receiving a real estate agent's commission in each of the six transactions in which he signed the loan application as the interviewer. The sale contract in each transaction clearly listed Johnson as the real estate agent. In the Earwood transaction, she was also the seller. Again, this fact was clearly identified in the sale contract. Scott had access to the sale contract in each case, and it is included in the file for each loan. His statement that he had no way to know whether Johnson actually received payment as the real estate agent or seller is patently absurd. Scott wanted FCM to get Johnson's loan business when she was the real estate agent or the seller of the property, and he consciously kept himself uninformed so that his goal could be accomplished.

The fact that Scott did not do any checking in HUD handbooks or with HUD was not the conduct of a responsible participant. He was a branch manager, and he had the requisite position within FCM to call HUD to find out whether Johnson could be hired by FCM, and what she could and could not do if she was hired. Leaving the entire matter to Luzader does not absolve Scott of responsibility for the errors that were made at FCM in connection with Johnson. Nor does the fact that HUD has turned over all training responsibilities to the DE lenders somehow absolve Scott from his decision not to check on HUD's program requirements by either researching the handbooks or calling HUD on the matter.

It is a matter of concern that no one in the process at FCM, not even the underwriters and the quality control officer, knew the basic HUD program requirements for the operation as a DE lender that would prohibit Johnson's hiring as a part-time employee with ongoing real estate business activities or her payment for loan originations in which she had an outside financial interest. HUD has apparently failed to emphasize these program requirements through mortgagee letters, and the placement of these requirements in a handbook that is unfamiliar to most mortgagee employees compounds the difficulty of bringing attention to these important requirements. Nonetheless, they are program requirements, and as Scott himself admitted, he failed in his professional duty to be informed about them. He also chose not to learn about them by research or by contacting HUD. Scott is being disingenuous when he says that he thinks what he did was not wrong. Signing loan applications as the interviewer for applications taken and filled out by Johnson created a smoke screen that obscured Johnson's role in the loan process. The form very clearly indicates that the interviewer is to sign it. Scott should have read the loan application form block headings. He should have known that the word "interviewer" did not include him. If he actually believed that it was appropriate for him to sign the loan application forms as the interviewer when the interviewer was available to sign the forms she had filled out, I view such a belief as proof that Scott is lacking in both common sense and responsibility.

The definition of a responsible contractor is not limited to honesty and integrity. Failure to know basic program requirements or to inform oneself about them is very much an element of lack of responsibility. HUD is entitled to only do business with participants, contractors and principals who can perform acceptably. Knowing or seeking to learn program requirements is basic to acceptable performance in HUD programs. Drew A. Benson, HUDBCA No. 90-5310-D77 (Oct. 25, 1990)

There is no evidence that HUD lost any money in the six transactions at issue in this case. However, abuse of public programs erodes the public trust

in them. The reason for HUD's program requirements restricting who may be employed by an approved mortgagee and prohibiting certain types of payments for services that are rendered to a mortgagee is to protect the loan process from actual or perceived conflicts of interest. They may be strict rules, but they are not unrelated to the public interest. What occurred at FCM, with Scott as a key player, was an abuse of the loan process.

The rule against conflicts of interest is also codified at 24 C.F.R. §202.12(p) (1996), and has the force and effect of law. This regulation prohibits the payments for loan originations made by FCM to Johnson. Even if Scott did not have the final authority for approving the payments to Johnson, he was part of the internal approval process at FCM and he bears some responsibility for participating in the approval of a prohibited payment. Had he bothered to learn HUD's rules and regulations applicable to Johnson's situation, he would have known that the payments made to her were prohibited payments and her employment as a part-time loan officer with outside real estate business was also prohibited.

I find that the Government has carried its burden of proof by adequate evidence that Scott committed irregularities in his past performance in a HUD program, which is a ground for an LDP pursuant to 24 C.F.R. §24.705(a)(2). I further find that he failed to proceed in accordance with HUD regulations, which is a ground for an LDP pursuant to 24 C.F.R. §24.705(a)(4). He also violated a procedure relating to the application for financial assistance, insurance or guarantee, which is another ground for the LDP pursuant to 24 C.F.R. §24.705(a)(9). Finally, I find that Scott made a false statement each time he signed as the interviewer on a loan application form when he did not, in fact, conduct the interview. However, there is insufficient evidence to find that he did this for the purpose of influencing in any way an action of the Department, inasmuch as FCM was a DE lender that made the decision whether or not to approve a loan, not HUD. There is also insufficient evidence as to Scott's intent, even though the effect of his signing loan applications made it appear that Johnson had not participated in the loan process when she had. In any event, Johnson's compensation by FCM was prohibited by HUD, whether or not she actively-participated in the loan process. I do not find that Scott falsely certified to anything, which was a cited ground for the LDP pursuant to 24 C.F.R. §24.705(a)(7), because there is no certification language in, or applicable to, the loan application interviewer's signature block and name block. Only the loan applicants certify on the loan application form that the information provided by them is true and correct.

Any mitigation of the seriousness of these acts, such as that Scott did these things out of ignorance but not with an intent to violate a HUD program requirement or regulation, is offset by Scott's failure to do any research or verification to determine whether what he wanted to do could be done. Luzader did not order him to do any of the acts for which HUD is holding him responsible, and even if the final decision at FCM as to what would be done was Luzader's, Scott was the proponent of and active participant in what was done.

At the hearing, Scott was still defending what was done, and still sees nothing wrong with it, other than the inconvenient fact that HUD does not permit it. He has little or no appreciation of the reasons why HUD has such requirements, and his explanations for why he thought his actions were a way to provide quality control verged on the ridiculous. Based upon his defensive attitude and lack of understanding, I have little basis on which to find that Scott is presently responsible.

Conclusion

For the foregoing reasons, I find that the imposition of the LDP was warranted. It is recommended that the Limited Denial of Participation imposed on James L. Scott on June 2, 1999, shall not be terminated before the one year period has elapsed.

Jean S. Cooper
Administrative Judge