

In the Matter of:

FRANK LAGRUA, : HUDBCA No. 95-G-141-D25
: Docket No. 95-5052-DB

Respondent.

For the Respondent:

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For the Government:

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U. S. Department of Housing and
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Washington, D.C. 20410

DETERMINATION BY ADMINISTRATIVE JUDGE DAVID T. ANDERSON

March 5, 1996

Statement of the Case

By letter dated April 27, 1995, Nicolas P. Retsinas, Assistant Secretary for Housing-Federal Housing Commissioner for the U.S. Department of Housing and Urban Development ("HUD," "Department," or "Government"), notified Frank LaGrua ("LaGrua" or "Respondent") that, based on an indictment for violation of 18 U.S.C. §§ 1343, 1344, 1621, 371, 2 and 3551 et seq., the Department was temporarily suspending Respondent from participating in primary covered transactions and lower-tier covered transactions as either a participant or principal at HUD and throughout the executive branch of the federal government, and from participation in procurement contracts with HUD, pending the completion of such legal and debarment proceedings as may ensue.

By letter dated May 22, 1995, Respondent requested a review of the suspension. Inasmuch as this suspension is based on an indictment, this hearing will be limited to the consideration of briefs and documentary evidence filed by LaGrua and the Government in support of their respective positions on the suspension action. 24 C.F.R. § 24.313(b) (2) (ii).

Findings of Fact

1. Respondent was a salesman from 1984 to 1988, and then sales manager from 1988 to 1991 at Liberty Mortgage Banking, Ltd ("Liberty"), a licensed New York mortgage banking firm. As sales manager, Respondent supervised a sales force of up to twenty people. (Resp. Exhibit D, at 10-12; Resp. Brief, at 2). In 1987, the Federal Home Loan Mortgage Corporation ("Freddie Mac")

approved Liberty as a mortgage seller authorizing Liberty to sell conventional, fixed rate, and adjustable mortgages to Freddie Mac. (Resp. Exh. A, at 2). HUD had regulatory and oversight responsibility over Freddie Mac during all pertinent times. (Govt. Brief, at 7).

2. From 1991 to 1995, Respondent served as an employee, officer, and director of Consumer Home Mortgage Inc., a licensed mortgage bank in New York. (Resp. Brief, at 2).

3. Respondent was named as a defendant in a Superseding Indictment returned on April 5, 1995 in the United States District Court for the Eastern District of New York. Respondent was indicted for knowingly approving, during his employment with Liberty, loans to false borrowers that were based on false statements, and paying or causing to be paid \$5,000 to each of the false borrowers. The Indictment also charges Respondent with violation of federal wire fraud statutes, 18 U.S.C. §§ 1343, 1344, 1622, 371, 2 and 3551 et seq. (Resp. Exhibit A)

4. In April 1995, LaGrua entered a plea of not guilty. (Resp. Brief, p. 4) . The record before me does not reveal the course of the criminal proceeding involving Respondent.

5. Respondent has submitted pleadings, filings, submissions, a deposition, and an affidavit from United States of America v. Kenneth Ashley and Frank LaGrua, United States District Court for the Eastern District of New York, 94 CR 1235 (5-1) (DRH), and from the Liberty Mortgage Banking. Ltd.. et al v. Federal Home Loan Mortgage Corp.. et al, U.S. District Court for the Eastern District of New York, 90 Cir. 4046 (LDW). (Resp. Exhibits A-G). Respondent has submitted Ashley's statement which was filed In the Matter of Kenneth Ashley, HUDBCA No. 95-G-138-D23, explaining Ashley's version of events and the reasons why Ashley believes his suspension is not warranted. (Resp. Exhibit, E). The affidavit is that of LaGrua's attorney, Paul Batista, in support

of defendant's motion for dismissal filed in United States of America v. Kenneth Ashley and Frank LaGrua, supra.

Discussion

A suspension is a serious action, only to be imposed where there exists adequate evidence of one or more causes of suspension and when immediate action is necessary to protect the public interest. 24 C.F.R. § 24.400(b). The Government bears the burden of demonstrating that cause for suspension exists. 24 C.F.R. §§ 24.313(b) (3), and (4). When the proposed suspension is based on an indictment, the evidentiary standard of adequate evidence is deemed to have been met. 24 C.F.R. §§ 24.405(b) and 24.313(b) (3). Adequate evidence is a minimal standard of proof. It is defined in the regulations applicable to suspension as "information sufficient to support the reasonable belief that a particular act or omission has occurred." 24 C.F.R. § 24.105 (a) . The adequate evidence test has been analogized to the standard of probable cause necessary for arrest, search warrant, or a preliminary hearing. Horne Bros., Inc. v. Laird, 463 F.2d

1268 (D.C. Cir. 1972). See also Transco Security, Inc. of Ohio v. Freeman, 639 F.2d 318 (6th Cir. 1981)

The Government contends that Respondent falls within the definition of a participant and a principal as defined by the pertinent HUD regulations.

The term "[p]articipant" is defined at 24 C.F.R. § 24.105(m) as:

Any person who submits a proposal for, enters into, or reasonably may be expected to enter into a covered transaction.

Respondent does not contest the Government's position on this issue. The term "[principal]" is defined, in pertinent part, at 24 C.F.R. § 24.105(p) as:

Officer, director, owner, partner, key employee, or other person within a participant with primary management or supervisory responsibilities; or a person who has a critical influence on or substantive control over a covered transaction, whether or not employed by the participant.

Respondent submits that the Government has not shown, in the absence of an evidentiary hearing, that he was a key employee. As such, Respondent suggests, he is not a principal as defined by these HUD regulations. However, Respondent stated at his deposition that he was a salesman from 1984 to 1988, and then sales manager from 1988 to 1991 at Liberty. (Resp. Exhibit D, at 10-12) . Based on Respondent's own statements, I conclude that Respondent was a "principal" in a covered transaction because he was a sales manager at Liberty, an FHA-approved mortgagee. He was engaged in the review of loans to determine if they were worthy of funding. One of the main functions of Liberty's sales persons was to originate and close loans. As sales manager, he supervised up to 20 sales persons. Id. Clearly, such duties place Respondent, even in the face of his denial that he was a key employee, well within the definition of a principal as one "with primary management or supervisory responsibilities" under the HUD regulations noted above. Consequently, I find Respondent's argument on this issue to be totally without merit.

Underlying the Government's authority not to do business with a person or entity is the requirement that agencies only do business with "responsible" persons or entities. 24 C.F.R. § 24.115. The purpose of a suspension is to protect the Government and the public interest. To that end, HUD may impose a suspension against participants and principals who it believes, based upon adequate evidence, are not "responsible." "Responsibility" is a term of art that includes the ability to perform a contract, but it also includes the honesty and integrity of the participants and principals. 48 Comp. Gen 769 (1969). The test for whether a suspension or debarment is necessary is based on a determination of present responsibility. However, a lack of present responsibility may be inferred from past acts. Matter of Bio-tech Research Laboratories Inc. and Jacob Savage, Nos. 94-C154-D21,94-0071-DB(S) (Sept 28, 1995) citing

Schlesinger v. Gates, 249 F.2d 111 (D.C. Cir. 1957); Stanko Packing Co. v. Bergland, 489 F. Supp. 947, 949 (D.C. 1980)

The Government can reasonably infer from the indictment that there is reason to believe that Respondent lacks responsibility. 24 C.F.R. § 24.405(b). The offenses alleged in the indictment involve dishonesty, which directly impacts upon the question of Respondent's present responsibility. In James A. Merritt and Sons v. Marsh, 791 F.2d 328, 330-31 (4th Cir. 1986), the United States Court of Appeals ruled that the formalities attendant to issuing an indictment carry sufficient indicia of reliability to allow the Government to protect itself against future dealings with someone accused of criminal acts.

Respondent makes several arguments in support of his contention that he should not be suspended. First, Respondent argues that he has "pleaded not guilty to the criminal charges made against him." He contends that he is entitled to a presumption of innocence, "[the Government] proceeds as though the allegations of the indictment were established facts, ... and [he] is entitled to an evidentiary hearing on the factual issues on which the suspension is based." (Resp. Brief, at 4)

Respondent apparently believes that the evidentiary hearing to which he is entitled for a review of his suspension also entitles him to a oral hearing. (Resp. Brief, at 7). The applicable HUD regulation does not provide for an oral hearing under these circumstances. 24 C.F.R. §24.313(b) (2) (ii). The Department's regulatory guidelines relating to a hearing where the suspension is based on an indictment are reasonable limitations. The U.S. Court of Appeals for the Sixth Circuit has held administrative regulations which permit a hearing limited to the submission of written evidence and briefs as legally sufficient to assure due process. Transco, supra. "Simply because a party was not afforded an oral hearing does not mean he has been denied due process." Monumental Health Plan, 510 F. Supp. 244, at 248. The regulatory restrictions on oral hearings when the suspension is based on an indictment assure that this Department's hearing officers will not re-examine the merits of, or the issues involved in, an indictment.

Respondent seems to believe, quite erroneously, that his constitutionally protected presumption of innocence in his criminal proceeding is a valid defense to the Government's right to protect the public interest when it treats an indictment as a presumptive threat to the integrity of a Federal program. However, a determination of a participant's guilt or innocence in a criminal proceeding utilizes different standards, pursues different purposes, and involves completely different issues than a review of the propriety of an administrative sanction such as a suspension.

Respondent has cited certain cases for the proposition that he should not be suspended at this stage based on the indictment alone. Yet, Respondent's reliance on these cases is misplaced. Respondent cites Roemer v. Hoffman, 419 F. Supp. 130 (D.C. D.C. 1976), for the proposition that the decision-maker should not "simply [infer] from the nature of the particular offense that it is not presently a good risk for the government to do business with Roemer, ... for three years at least...." The issue in Roemer, however, was whether the decision-maker gave a "hard look" to all the considerations present." Id. 131. Respondent's case can be distinguished from the circumstances in Roemer because this administrative

proceeding concerns a temporary suspension, rather than a three-year debarment as was the circumstance in Roemer.

Respondent mistakenly relies on Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers, 534 F. Supp. 1139, (D.C. D.C. 1982), rev'd on other grounds, 714 F.2d 163 (D.C. Cir. 1983), in support of his contention that he should not be suspended at this time. In Kiewit the contractor was held in "abeyance" for an indefinite period of time. The court decided that the debarment of the contractor was not warranted because Kiewit neither received notice of any charges being filed nor did Kiewit receive any hearing. There was also a combination of strong mitigating factors present. Unlike Kiewit, the present case does not involve a de facto debarment. LaGrua has received notice of the charges underlying his suspension, and now avails himself of this opportunity to rebut the presumption of a lack of responsibility by the submission of any mitigating factors.

Respondent bears the burden of proving the existence of mitigating circumstances. 24 C.F.R. § 24.313(b) (4). In mitigation, Respondent has submitted pleadings, submissions, a deposition and an affidavit filed in United States of America v. Kenneth Ashley and Frank LaGrua, 94 CR 1235 (S-1) (DRH), and in Liberty Mortgage Banking. Ltd., et al, supra. Respondent submitted Ashley's statement explaining Ashley's version of events and Ashley's reasons why his suspension by HUD was not warranted. Respondent's brief, however, makes no reference to Ashley's statement, and provides no argument as to the relevance of Ashley's statement to this proceeding. The affidavit of Respondent's attorney, Paul Batista, in support of LaGrua's Motion for Dismissal of the Superseding Indictment, lacks corroborating evidence, is of questionable objectivity, and is deficient in its probative value.

Respondent also alleges that, based on his professional conduct before and after the alleged acts which led to his indictment, the circumstances surrounding the alleged offense, and the circumstances relevant to the method and reasons by which his criminal investigation was procured and/or initiated, his suspension is not warranted. However, despite his allegations, Respondent has neither proven these allegations nor offered persuasive documentary evidence in support of them. Therefore, I find that these assertions fail for lack of proof.

Respondent suggests that a period in excess of five years has passed since the allegedly offensive conduct took place. That fact, Respondent submits, coupled with the absence of recent misconduct, makes the imposition of suspension unwarranted. The appropriate test for present responsibility does not focus merely on the number of years which have passed since Respondent's misconduct occurred, but rather on current indicia of Respondent's professionalism and business practice which the Government must consider before it again assumes the risk of conducting business with Respondent. Respondent has submitted inadequate evidence of his current professional conduct or business conduct upon which a determination of present responsibility can be based.

The offenses for which Respondent has been indicted are deplorable and place the integrity of several Federal programs at serious risk. There is insufficient evidence of mitigating circumstances in the record of this proceeding which would show that Respondent does not pose an immediate risk to HUD's mortgage lending programs. Consequently, I

conclude that the suspension of Respondent is well-founded, in the best interest of the public, and supported by adequate evidence.

Conclusion

For the foregoing reasons, I find that the suspension of Respondent is warranted and that Respondent's suspension should continue for the period established by 24 C.F.R. § 24.415.

David T. Anderson
Administrative Judge