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

In the Matter of

ENG. ROBERTO SOTO CARRERAS

Respondent

HUDALJ 88-1234-DB(TDP)

Gerardo A. Quiros Lopez, Esquire
For the Respondent

Ivonne Ramirez-Aneses, Esquire
For the Department

Before: ALAN W. HEIFETZ
Administrative Law Judge

INITIAL DETERMINATION

Statement of the Case

This is an appeal from a Temporary Denial of Participation ("TDP") imposed on Roberto Soto Carreras ("Respondent") by the Caribbean Regional Office of the U.S. Department of Housing and Urban Development ("the Department" or "HUD") pursuant to 24 C.F.R. § 24.18 (1987). The TDP was imposed upon Respondent for a period of 12 months beginning August 3, 1987, as a result of evidence that Respondent defrauded HUD by submitting false purchase orders to obtain pay for materials not delivered and services not rendered to Las Margaritas Modernization Project.

Respondent requested and was granted an informal hearing on October 1, 1987, at which time Respondent submitted documentary evidence in his defense. Upon review of this evidence, the Caribbean Regional Office affirmed its issuance. Respondent appealed. Pursuant to an Order dated May 2, 1988, the Respondent and the Department were directed to file briefs and documentary evidence by June 2, 1988. Both parties filed their briefs and documentary evidence in a timely fashion. Therefore, based on the evidence before me, I make the following findings and conclusions:

Findings of Fact

Respondent Roberto Soto Carreras was the Engineer-in-charge of Las Margaritas Modernization Project, a HUD Low-Rent Housing

Program Project, from 1979-80. During this period, Respondent allegedly submitted false purchase orders to obtain pay for materials not delivered and services not rendered. In 1984, the Government of Puerto Rico filed criminal charges against Respondent. However, in exchange for Respondent's oral testimony concerning illegal activities at Las Margaritas Modernization Project, the Puerto Rican Government granted him full immunity on August 13, 1984, from criminal and civil action for his own fraudulent activities. From at least December 28, 1983, to December 9, 1986, the Office of the Inspector General ("OIG") conducted an investigation into Respondent's fraudulent activities that resulted in the issuance on August 3, 1987, of a Temporary Denial of Participation in the Low-Rent Housing Program under the U.S. Housing Act of 1937 (as amended at 42 U.S.C. § 1437 et seq. (1982)). The TDP was issued by Emilio Diaz-Colon, identified as Acting Manager for the Caribbean Office, and was based on three sworn statements obtained on December 28, 1983, January 16, 1984, and February 1, 1984. Respondent made a timely request for a hearing, which was held on October 1, 1987. By letter dated January 22, 1988, the Department affirmed the TDP, but did not give any reasons for doing so. Although by letter dated February 2, 1988, Respondent requested a review of the determination, the matter was not referred to me until April 26, 1988.

Conclusions of Law

Department regulations provide that a TDP may be invoked upon adequate evidence of irregularities in a contractor's or grantee's past performance in a Department program. 24 C.F.R. § 24.18(a)(2)(ii) (1987). Respondent does not dispute that he is a contractor or grantee within the meaning of the Regulations, or that he committed fraudulent acts against the Department. (Respondent's Brief at 6). Rather, Respondent argues that the TDP should not be sustained for the following three reasons: [1] (1) the HUD Acting Manager who issued the TDP lacked the authority to do so, (2) the Respondent had been given full immunity by the Puerto Rican Legislature regarding the facts involved in the present case, and (3) the TDP was unreasonable, arbitrary and capricious. (Respondent's Brief at 10). These three arguments will be dealt with separately below.

Respondent first alleges that the Acting Office Manager of the Caribbean Regional Office did not have the authority to issue the TDP because 24 C.F.R. § 18(a)(1) permits only an Area Office Director, Insuring Office Director or a Regional Administrator to

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[1] Respondent argues also that the procedures at the informal hearing violated his due process rights. (Respondent's Brief at 13-15). Regardless of whether the procedures at the informal hearing violated Respondent's due process rights, the process of the informal hearing is cured by the appeal procedure and this resulting proceeding.

issue a TDP. (Respondent's Brief at 10). HUD argues that an Office Manager comes within the category of Area Director and thus is authorized to issue TDP's. (HUD Brief at 3). Further, HUD states that the signer of Respondent's August 3, 1987, TDP was not an Acting Office Manager, but was in fact the Manager of the Caribbean Office effective July 19, 1987. (Id. at 4).

The significance of the list of titles in 24 C.F.R. § 24.18 is not in the appellations themselves. Rather, the list serves to illustrate that only someone with authority, such as an Office Manager, may issue a TDP. [2] In addition, whether Mr. Diaz-Colon was an Acting Office Manager or an Office Manager is not important because Acting Officer Managers have the same power and authority as Office Managers. Consequently, I cannot conclude that Mr. Diaz-Colon was without authority to issue the TDP.

Respondent's second argument is that the TDP should not be authorized because the Puerto Rican Legislature granted him full immunity in relation to the same facts that form the basis for the TDP. (Respondent's Brief at 15). Therefore, Respondent states, HUD must show that the evidence forming the basis of the TDP action was derived from sources independent of Respondent's immunized testimony. (Id. at 17). Respondent asserts that HUD failed to do this. (Id.) HUD argues that it could not have used the immunized testimony of Respondent either directly or indirectly because the three sworn statements on which the TDP was based were dated more than six months before Puerto Rico gave immunity to Respondent. (HUD Brief at 6-7).

A grant of immunity by a state does not preclude the United States from enforcing its own laws. Murphy v. Waterfront Commission, 378 U.S. 52 (1964). However, state immunized testimony cannot be used, directly or indirectly, in a Federal action. Id. As a result, the prosecuting party must show that its evidence is derived wholly from independent sources. Kastigar v. United States, 406 U.S. 441 (1972).

The three sworn statements that form the basis of the TDP are dated December 28, 1983, January 16, 1984, and February 1, 1984. (HUD Exhibits A, B and C). Respondent was granted full immunity on August 13, 1984, and did not testify until some time after this date. (Respondent's Exhibits 8 and 9). Since Respondent did not testify until after the sworn statements were taken, the

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[2] The revision to 24 C.F.R. § 24.25 issued on October 2, 1987, which replaces "Area Director" with "Office Manager," reflects the abolition of the designation "Area Director" within HUD's organizational structure.

Department's evidence could not possibly have been derived, directly or indirectly, from Respondent's immunized testimony. [3]

Respondent's third argument is that the TDP is unreasonable, arbitrary and capricious because the facts on which the action was based occurred in 1979-80, and the TDP action itself was the result of political bias against Respondent. (Respondent's Brief at 11-12).

Temporary denials of participation, like debarments, are not punitive in nature. See Gonzalez v. Freeman, 344 F.2d 570 (D.C. Cir. 1964). Rather, these administrative actions are used remedially and as deterrents to protect the Department and the public from irresponsible contractors or grantees. Id. This does not mean, however, that TDP's are never punitive. Used incorrectly, a TDP can become penal in nature, and thus in conflict with the purpose of the administrative action. See 24 C.F.R. § 24.5 (1987). Despite the Department's stated interest in protecting itself and the public from individuals who manifest a lack of responsibility and honesty, the circumstances of the present case raise questions as to the true nature of the TDP action against Respondent. From these questions, I can only conclude that the TDP issued against Respondent was punitive in nature, and involved a serious violation of Respondent's due process rights.

To begin with, an inordinate amount of time was taken in bringing charges against Respondent. The events upon which the TDP was based occurred in 1979-80, yet no action was taken against Respondent until 1987 even though the facts had been public knowledge since at least 1984. Also, while it would appear that the OIG took at least three years to investigate Respondent's activities (from 1983-84, when the three sworn statements were taken until the conclusion of the investigation on December 9, 1986), the evidence on which the TDP was based (the sworn statements) had been in the OIG's possession since February 1984. Moreover, it took seven months from the Caribbean Office's receipt of the OIG investigation until the issuance of the TDP.

Lack of present responsibility may be inferred from past acts. Schlesinger v. Yates, 249 F.2d 111 (D.C. Cir. 1957); Roemer v. Hoffman, 419 F.Supp. 130, 131 (D.D.C. 11976). However, the

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[3] Respondent alleges that the U.S. Attorney's Office for the District of Puerto Rico never indicted Respondent because it was unable to prove that its evidence against Respondent was derived from independent sources (Respondent's Brief at 17). Further, Respondent alleges that the evidence forming the basis of the TDP is the same evidence the U.S. Attorney's Office was unable to use (Id.) This allegation is unsupported. There is no evidence that the U.S. Attorney's Office attempted or even contemplated indicting Respondent, or that it relied on the same evidence used for the TDP.

passage of time removes the probative weight which would be given to prior criminal activity. See, e.g., Solomon Sylvan, HUDBCA 87-2432-D40 (Apr. 13, 1988), citing John Servalli, Jr., et al., HUDBCA 84-880-D37 (May 30, 1985) and Paul Grevin, HUDBCA 85-930-D16 (July 10, 1986). In the present case, I am unwilling to conclude that the Department has proved that Respondent lacks present responsibility on the basis of activities that occurred eight years ago. HUD argues that it "must insist that the persons with whom it deals act responsibly" (HUD Brief at 5) and that to allow Respondent's actions to go unsanctioned "would greatly impair HUD's ability to request responsibility from persons doing business with HUD." (Id.) However, if Respondent's actions were such "serious violations of the law," (Id.) why did no official in the Caribbean Office, before Mr. Diaz-Colon, initiate administrative action against Respondent? HUD could not have thought Respondent's activities were serious if it allowed eight years to pass before bringing action. [4] Moreover, any impairment of HUD's ability to demand that individuals with which it does business be responsible would not be remedied by allowing administrative actions based solely on such remote charges. Consequently, HUD has failed to prove why, at this late date, the TDP action, with its immediate consequences, is a necessary sanction.

In addition, there has been a marked delay in the processing of Respondent's appeal. It took three months from the time of the informal hearing for the Caribbean Office to issue a decision to affirm the TDP, yet the one-page letter contained no reasons for the affirmance. Further, although Respondent requested a hearing on appeal by letter dated February 2, 1988, the appeal file did not reach my office until April 29, 1988. The Department, however, fails to explain why Respondent was denied a speedy adjudication of the action taken against him. More than 10 months of the 12-month TDP have elapsed to date! From this gross delay in processing the case, the remoteness of the charges on which the TDP was based and the lack of justification for an immediate remedy, I can only find that the TDP action was punitive in nature, as well as unreasonable, arbitrary and capricious.

Finally, Respondent has made an allegation that he was the only person who had an administrative action taken against him, out of a group of similarly-situated individuals who took part in the fraudulent activities against HUD involved in this case. [5]

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[4] The Department argues that compared to the seriousness of Respondent's actions, a one-year denial of participation is "not unreasonable" (HUD Brief at 5). However, if Respondent committed such serious violations of the law against HUD and the public, why is it that no suspension or debarment action has been proposed?

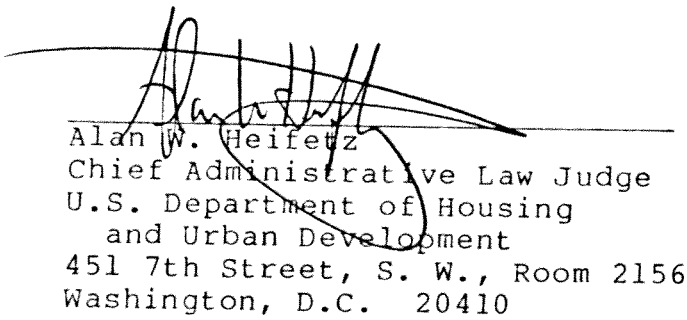
[5] Respondent argues that although criminal charges were filed against other engineers in connection with the same fraudulent activities that he was involved in, Respondent was the only one against whom administrative action was taken. (Respondent's Brief at 8-9).

(Respondent's Brief at 12). This selective action by HUD, alleges Respondent, is the result of a political bias against him held by the present Caribbean Office Manager, Mr. Diaz-Colon. (Respondent's Brief at 12; see Respondent's 11/09/87 Memorandum).[6]

In alleging selective administrative action, Respondent has the burden of establishing that others similarly situated have not been subject to an adverse action and that the allegedly discriminatory action was based on an impermissible motive. See Oyler v. Boles, 368 U.S. 448 (1962); United States v. Ness, 652 F.2d 890 (9th Cir. 1981). Respondent has raised factual questions that have gone unanswered by HUD. Consequently, I can only conclude that HUD has not addressed the allegation of selective administrative action because the answer would be adverse to its interests.

Conclusion and Order

The circumstances of this case compel the conclusion that Respondent has been denied due process in the adjudication of the TDP action against him. Not only is the delay in the process unconscionable, but also, there has been no rationale offered why the public needs protection through the precipitant action taken against Respondent, but based upon stale charges. Not even a mere thought has been given to the question whether Respondent's cooperation with investigators should be considered in mitigation. Accordingly, the Temporary Denial of Participation is hereby vacated.



Alan W. Heifetz
Chief Administrative Law Judge
U.S. Department of Housing
and Urban Development
451 7th Street, S. W., Room 2156
Washington, D.C. 20410

Dated: June 22, 1988

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[6] Respondent argues that the selective administrative action was a politically motivated act of revenge (Respondent's Brief at 12). Respondent alleges that his testimony was particularly embarrassing to the New Progressive Party because it exposed corruption in high levels of that party. (Id. at 6-9 and 12). Further, Respondent alleges that Mr. Diaz-Colon is a member of the New Progressive Party. (Id. at 10).