

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

In the Matter of:

GAYE FLOOD,

Respondent

HUDALJ 89-1395-DB

Decided: December 21, 1989

Patrick B. Mathis, Esquire
For the Respondent

Marylea W. Byrd, Esquire
For the Department

Before: ALAN W. HEIFETZ
Chief Administrative Law Judge

INITIAL DETERMINATION

Statement of the Case

This is an appeal from a Suspension imposed on Gaye Flood ("Respondent") by James E. Schoenberger, General Deputy Assistant Secretary of the U.S. Department of Housing and Urban Development ("the Department" or "HUD") pursuant to 24 C.F.R. sec. 24.405(b)(1989). The Suspension was imposed on Respondent and her affiliate, Re/Max Realty Company, as the result of an indictment returned against her by a Federal Grand Jury convened for the U.S. District Court, Southern District of Illinois, charging that Respondent violated 18 U.S.C. sections 1001, 2 and 371.

By Letter dated August 16, 1989, the Deputy Assistant Secretary notified the Respondent and her affiliate that they were suspended from further participation in HUD programs pending resolution of the indictment and any legal, debarment or Program Fraud Civil Remedies Act proceedings which may ensue.

Because the suspension action is based on an indictment, the hearing was limited to submission of documentary evidence and written briefs. See 24 C.F.R. sec. 24.313(b)(2)(ii).

Findings of Fact

Respondent, a real estate broker involved in selling properties with HUD/Federal Housing Administration ("FHA")-insured mortgages, was a principal under 24 C.F.R. sec. 24.105(p). On April 20, 1989, she was indicted for violation of 18 U.S.C. sections 1001, 2, and 371, based on her involvement and participation in a series of transactions for HUD/FHA-insured mortgages (Department's Brief, Ex. A). On August 25, 1989, a superseding indictment was issued again charging Respondent with violating those laws. (Id., Ex. B).

Respondent is charged with conspiring to devise a scheme to defraud HUD, through FHA, and the Department of Veterans Affairs through the submission of false, fictitious and fraudulent material facts contained in loan application statements. More specifically, the indictments allege that Respondent directed an individual to submit mortgage applications concerning the contract sales price, and false, fictitious and fraudulent information about the financial assets and liabilities of the prospective purchaser. They also allege that Respondent induced and caused another individual to make false statements in an application for a home loan guaranty concerning the source of the prospective purchaser's cash assets.

DISCUSSION

Suspension may be imposed only when there exists adequate evidence of one or more of the causes set out in section 24.405 and immediate action is necessary to protect the public interest. The Department relies on Respondent's indictment as cause for the suspension action. Pursuant to 24 C.F.R. sec. 24.405(a), the Department may suspend a principal if there is adequate evidence (1) to suspect the commission of an offense listed in section 24.305(a); or (2) that a cause for debarment under section 24.305 may exist. Section 24.405(b) specifically provides that an "[i]ndictment shall constitute adequate evidence for purposes of suspension actions." See also 24 C.F.R. sec. 24.313(b)(3).

In her brief in opposition to the suspension, Respondent admits that she was indicted but argues that the testimony of an investigating agent of the Federal Bureau of Investigations (FBI) before the grand jury is false, misleading, and fails to

present exculpatory evidence of which the FBI agent is aware. Evidence of the alleged fraudulent conduct, Respondent argues, was "supplied almost entirely by the tainted testimony" of that FBI agent. Respondent's Brief at 9. Respondent filed motions to dismiss the indictments in federal court, arguing that the presentation of this testimony constitutes prosecutorial misconduct which warrants dismissal of the indictments. (Appeal of Notice of Suspension, Ex. A and B). As of the date on which the Respondent filed her brief in this forum, the motions were being considered by the court. (Respondent's Brief at 10-11). Respondent further maintains that she is innocent of the allegations in the indictments.

In her Brief at page 2, Respondent states that various witnesses appeared before the grand juries. Respondent further states that the testimony of the FBI agent "was apparently crucial in setting forth the alleged violations of Title 18, United States Code sections 1001, 2 and 371, which testimony resulted in the grand jury's issuing the above-mentioned indictments." Respondent argues that there were "several significant discrepancies" between that agent's testimony and evidence Respondent's counsel obtained through pre-trial discovery in the criminal proceedings.

Respondent attempts to re-litigate the factual issues presented to and decided by the grand juries. Despite the fact that there were "various witnesses" who testified before the grand juries, Respondent points to perceived discrepancies in one witness' testimony, and opines that that testimony was "apparently crucial" both to determining that there were violations of law and to the issuance of the indictments.¹

The regulatory history of the suspension and debarment regulations and analogous case precedent support the proposition that this forum cannot re-litigate the underlying facts in an indictment. See *Edythe (A VA) Kupchick and A VA Realty, Inc., Affiliate*, HUDALJ 88-1277-DB (1989) (a conviction may not be collaterally attacked in a debarment proceeding). The Department adopted the final common rule on nonprocurement debarment and suspension published by the Office of Management and Budget ("OMB"), with certain amendments not relevant to this issue. 53 Fed. Reg. 19179, 19180 (May 26, 1988). The

¹Because an administrative body is not empowered to re-litigate the factual basis for an indictment, it is unnecessary to decide whether there were in fact significant discrepancies in the witness' testimony and the documentary evidence.

comments received by HUD in response to its proposed and interim suspension and debarment rules were addressed in the preamble to the common rule published by OMB. *Id.* That preamble reveals that one commenter requested clarification of the language in section ____405(b) that an "[i]ndictment shall constitute adequate evidence for purposes of suspension actions." 53 Fed. Reg. 19161, 19169 (May 26, 1988). In response, OMB stated that

[a]n indictment represents a determination by competent authority that probable cause exists to believe that the named defendant has committed a criminal act; executive agencies are neither authorized nor positioned to question the factual support for the allegations contained therein. Accordingly, an indictment satisfies the standard of section ____405(a)(1) that there must be "adequate evidence * * * to suspect the commission of an offense." Therefore, as a technical matter, the adequate evidence standard is met. Agencies would be remiss if they failed to acknowledge the significance of the issuance of an indictment and to act upon it where a legitimate Federal Government interest is threatened. Nonetheless, even where an indictment would serve as a basis for suspension, suspension cannot occur unless immediate action is necessary to protect the public interest.

Id.

Thus, the drafters clearly intended that administrative agencies not look behind the indictment to re-litigate the relevant facts.² Respondent's allegations in this proceeding that the testimony of the FBI agent was false, misleading, and failed to include exculpatory

²Respondent cited 24 C.F.R. sec. 24.410(c), which states that

[i]n assessing the adequacy of the evidence, the agency should consider how much information is available, how credible it is given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result. This assessment should include an examination of basic documents such as grants, cooperative agreements, loan authorizations, and contracts.

Respondent's Brief at 8. This regulation identifies certain factors to consider when the adequacy of the evidence must be evaluated, but it does not apply to situations where suspension actions are based on indictments. Under section 24.405(b), an indictment is, in and of itself, adequate evidence to support a suspension.

evidence,³ were presented to the federal court in her motions to dismiss the indictments and those issues appropriately will be decided by the federal court. Here, Respondent's indictment constitutes adequate evidence for suspension under 24 C.F.R. sec. 24.405(a)(1).

If there is adequate evidence of cause for suspension, a suspension may be invoked only when immediate action is necessary to protect the government's interest. 24 C.F.R. sec. 24.410(c). The government's interest is to assure that it conducts business only with responsible persons. "Responsibility" is a term of art which speaks to the projected business risk of a contractor, including his integrity, honesty and ability to perform. See, *Roemer v. Hoffman*, 419 F. Supp. 130, 131 (D.D.C. 1976).

In the indictment on which the suspension action is based, Respondent was charged with conspiracy, making false statements, and aiding and abetting making false statements in connection with her participation in a HUD program. The acts charged by the indictment are serious and flagrant, and implicate the Respondent's integrity, honesty and ability to perform. Because the indictment signifies that there is probable cause to believe that the acts alleged therein are true, immediate action is necessary to protect the government's interest to deal only with principals who are responsible.

Under the circumstances, I conclude that Respondent's suspension is based on adequate cause, is in the public interest, and should be sustained.

Alan W. Heifetz
Chief Administrative Law Judge

³Even assuming, arguendo, that a claim that the prosecution knowingly failed to present exculpatory evidence to the grand jury was cognizable, Respondent has merely alleged such a claim and has not produced any supporting evidence.

Dated: December 21, 1989

CERTIFICATE OF SERVICE:

I hereby certify that copies of this DECISION issued by ALAN W. HEIFETZ, Chief Administrative Law Judge, in HUDALJ 89-1395-DB, were sent to the following parties on this 21th day of December, 1989, in the manner indicated:

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