

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
BOARD OF CONTRACT APPEALS
WASHINGTON, D. C.

In the Matter of:

AMERICAN INVESTORS
DIVERSIFIED,

Petitioner

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HUDBCA No. 83-804-M2

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DECISION

Background

American Investors Diversified ("Petitioner"), a mortgage lending company organized and incorporated under the laws of the State of Delaware with its principal place of business in Coral Gables, Florida, was approved as a HUD-FHA non-supervised mortgagee on August 5, 1980 (Government's Statement of Charges, Exh. A). With this approval, Petitioner was obligated to comply with certain departmental rules, standards, and procedures with respect to the conduct and reporting of audits (Government's Statement of Charges, pp. 2-3, Exhs. B and C).

By letter dated April 19, 1983 from J. Parker Deal, Director, Lender Recertification Division, the Petitioner was advised that it had not submitted a required annual audit report of its financial condition and that "if a satisfactory annual audit report [was] not received within 30 days from receipt of this letter," approval of the Petitioner's mortgagee approval would be withdrawn pursuant to 24 C.F.R. Part 25. By letter from

Petitioner's counsel dated May 19, 1983 to the Docket Clerk of the Department's Mortgagee Review Board ("MRB" or "Board"), the Petitioner requested "a hearing before a Departmental hearing officer to contest the Determination set forth in the HUD letter." This request was forwarded to the undersigned Hearing Officer.

On May 27, 1983, a Notice of Docketing and Order was issued by the undersigned Hearing Officer requesting, inter alia, mutually agreeable hearing dates, directing the Government to file a Statement of Charges within 20 days of receipt of the Notice and directing the Petitioner to respond thereto within 20 days of receipt of a copy of the Government's Statement of Charges. The Government's Statement of Charges was received on June 3, 1983. No response from the Petitioner to the Government's Statement of Charges has been filed.

By letter dated June 9, 1983, attorney for Petitioner requested a conference for the primary purpose of clarifying the status of Petitioner's current mortgagee approval during the pendency of these proceedings. On June 13, 1983, a Notice of Hearing and Order was issued by the undersigned Hearing Officer scheduling a hearing and directing the parties to this dispute or their counsel to present and argue their respective positions on the following procedural and jurisdictional issues:

1. Whether the letter dated April 19, 1983 from J. Parker Deal, Director, Lender Recertification Division, to Petitioner, constituted a legally sufficient notification of withdrawal of Petitioner's mortgagee approval.
2. Whether the letter dated April 19, 1983 from J. Parker Deal, Director, Lender Recertification Division, to Petitioner, advised Petitioner of, or constituted per se, an authorized action on behalf of the Mortgagee Review Board ("MRB").
3. Whether the Mortgagee Review Board, pursuant to 24 CFR Part 25, has acted with respect to the withdrawal of Petitioner's mortgagee approval.
 - (a) If so, provide a description of the MRB action
 - (b) If not, advise whether in your opinion an MRB action is necessary to withdraw Petitioner's mortgagee approval.
4. Whether the Petitioner's mortgagee approval was withdrawn in fact as of May 25, 1983.

5. Whether the undersigned hearing officer has been duly designated by the Chairman of the MRB pursuant to 24 CFR 25.4(b), and if not, by what authority the undersigned hearing officer has been designated to hear this matter.

On June 24, 1983, a hearing relating to these issues was held. At the hearing, the Government asserted that the letter dated April 19, 1983 from J. Parker Deal ("Deal letter") constituted an effective and authorized action on behalf of the MRB. The Government presented as Government's Exhibit A a copy of the minutes of the February 26, 1979 meeting of the MRB, the pertinent part of which states:

Delegation of Authority

At this meeting the Board delegated to the Assistant Secretary for Housing-Federal Housing Commissioner the authority to withdraw and reinstate the HUD-FHA approval of those mortgagees that failed to submit their annual audited financial statements as required by HUD regulations. The procedure to be followed is the same as the Board currently utilizes. The Board determined that these types of action were of a nature that did not require presentation at a Board meeting.

The copy of the minutes were executed by the Acting Secretary of the MRB, C. E. Hall, Jr., and by the Chairman and members of the MRB.

The Government also presented as Government's Exhibit B, a copy of a memorandum dated January 19, 1982 to the MRB from "G. H. Bowers, Jr., Single Family Housing and Mortgagee Activities" relating to "Termination of Mortgagees for Failure to Submit Annual Financial Statements." The memorandum reads:

Background

At its meeting of 26 February 1979, the Mortgagee Review Board granted a delegation of authority to the Office of Lender Certification to withdraw, on behalf of the Board pursuant to 24 CFR Part 25, the HUD-FHA approval of mortgagees that fail to submit required annual financial statements. The Board determined that this type of withdrawal is a routine action and not a matter which requires attention by the Board.

The withdrawal notices to mortgagees comport with all due process requirements and have been prepared for the signature of the Chairman of the

Board. In order to achieve a better utilization of staff resources and to reduce the administrative burden to the Department, we are requesting a modified delegation of authority which grants to the Director, Office of Lender Certification and to the Director, Lender Recertification Division the authority to notify mortgagees on behalf of the Board of their withdrawal of mortgagee approval for failure to submit annual financial statements. A similar delegation has been granted by the Board with respect to the withdrawal of mortgagees failing to pay required annual fees to the Department.

Recommendation

We recommend that the Board grant the requested delegation of authority as it will reduce the administrative burden to the Department and achieve a better utilization of staff resources without affecting the due process rights of any mortgagee.

The memorandum bears an illegible signature "for Deputy Assistant Secretary." Below the word "Concurrence" appear the signatures of Philip D. Winn, a former Assistant Secretary for Housing--Federal Housing Commissioner; Judith L. Tardy, Assistant Secretary for Administration; and Alan Coffey, a former Deputy General Counsel.

The Petitioner challenged both delegations of authority as improper and contended that the Deal letter, which was predicated upon such delegated power and which advised Petitioner of the conditional withdrawal of its mortgagee approval, notified the Petitioner of actions which were in violation of Departmental regulations.

The Government further stated that the Petitioner's mortgagee approval was withdrawn in fact as of May 25, 1983, */ pursuant to 24 C.F.R. §25.6(a) and that, as a result, Petitioner's mortgagee approval has been effectively terminated notwithstanding the pendency of this hearing. 24 C.F.R. §25.6 states in pertinent part:

*/ This date was determined, explained counsel for the Government, by adding 30 days to April 25, 1983, the uncontested date of receipt by Petitioner of the Deal letter. The Government characterized the thirty days granted to Petitioner as a "grace period."

Effective date of withdrawal.

Withdrawal of a mortgagee's approval pursuant to this part shall be effective:

(a) Immediately if the Board unanimously determines that continuation of the mortgagee's approval pending a request of the mortgagee for a hearing pursuant to §25.4(c) would not be in the public interest or in the best interests of the Department;

* * *

Petitioner contended that even if it were conceded that the Deal letter represented an authorized action of the MRB, there was no indication that the MRB had unanimously determined that "continuation of the [Petitioner's] mortgagee's approval pending a request of the mortgagee for a hearing pursuant to §25.4(c) would not be in the public interest or in the best interest of the Department," and further, that in view of Petitioner's timely request for a hearing, the effective date of the withdrawal of Petitioner's mortgagee approval by the Government should be governed by the provisions of 24 C.F.R. §25.6(c), which would delay the effective date of withdrawal to "30 days after the hearing officer's written determination"

The Government asserted that the undersigned Hearing Officer had been properly designated to hear this matter pursuant to 24 C.F.R. Part 25, and submitted an Affidavit from the current Secretary of the MRB, Andrew Zirneklis, which states at paragraph 5:

5. As Secretary to the Board, I act on behalf of the Chairman in ensuring that a Hearing Officer is designated to hear the appeal from withdrawal actions. In this regard, the Board maintains a list of available Hearing Officers and I have appeals forwarded to them on a rotating basis. The request for a hearing by counsel for American Investors Diversified was forwarded to Administrative Judge David T. Anderson by the Docket Clerk for the Board upon my instructions because Judge Anderson was the next available Hearing Officer on the list. The Board has continuously utilized this practice since its inception.

The Government stated that for reasons of "economy and efficiency," the "name and address of the designated Departmental hearing officer to whom the mortgagee should address a request for a hearing" as required by 24 C.F.R. §25.4(b) is not given on the "hundreds" of letters from the Director of the Lender Recertification Division to mortgagees notifying them of the withdrawal of mortgagee approval due to the failure to file timely annual audit reports.

The Petitioner challenged the propriety of the manner of designation of the hearing officer in this matter, sought a ruling on its mortgagee approval status during the pendency of this hearing, and requested the dismissal of the Government's Statement of Charges on grounds that the Statement reflected and alleged actions of the MRB which were improper, inconsistent with Department regulations, unauthorized by Departmental regulations, and unconstitutional in that they denied the Petitioner due process.

On June 24, 1983, an Interlocutory Determination was issued containing the following findings:

1. The letter dated April 19, 1983, from J. Parker Deal, Director, Lender Recertification Division, did not constitute a legally sufficient notification of withdrawal of Petitioner's mortgagee approval pursuant to 24 C.F.R. 25.4(a) and 24 C.F.R. 25.4(b);

2. The letter dated April 19, 1983, from J. Parker Deal did not advise Petitioner of, nor constitute per se, an authorized action of the Mortgagee Review Board pursuant to 24 C.F.R. 25.4(a) and 24 C.F.R. 25.4(b);

3. The Mortgagee Review Board did not properly determine that the Petitioner's mortgagee approval be withdrawn nor did the Chairman of the MRB properly notify, or cause to be notified, the Petitioner of a determination by the MRB relating to the extent, duration and nature of the withdrawal of the Petitioner's mortgagee approval pursuant to 24 C.F.R. 25.4(b);

4. The Petitioner's mortgagee approval was improperly withdrawn by the Department on May 25, 1983;

5. The undersigned hearing officer has been duly designated by the Chairman of the MRB pursuant to 24 C.F.R. 25.4(b).

This Decision, in incorporating this Interlocutory Determination, affirms its finding and holds them to be consistent with the findings herein.

DISCUSSION

In examining the propriety of the Departmental action which has in effect withdrawn the mortgagee approval of Petitioner, two issues must be resolved. First, a determination must be made as

to whether the MRB did in fact properly delegate its authority to act in this case to J. Parker Deal. Secondly, a determination must be made as to whether the Deal letter properly notified the Petitioner, on behalf of the MRB and in accordance with Departmental regulations, that its mortgagee approval was being withdrawn.

Delegate Authority

On February 26, 1979, a purported delegation was made by the MRB to the Assistant Secretary for Housing to act on behalf of the Board to "withdraw and reinstate the HUD-FHA approval of those mortgagees that failed to submit their annual audited financial statements as required by HUD regulations" (Govt's Exh. A). On January 19, 1982, another purported delegation was made to the Director, Office of Lender Certification and to the Director, Lender Recertification Division "to notify mortgagees on behalf of the Board of their withdrawal of mortgagee approval for failure to submit annual financial statements" (Govt's Exh. B).

Pursuant to 24 C.F.R. §25.1, the Mortgagee Review Board is established in the Office of the Secretary and is authorized, pursuant to 24 C.F.R. §25.3, to "perform all of the functions of the Secretary with respect to withdrawal of mortgagee approval." Neither of these professed delegations of authority were endorsed by the Secretary of HUD. There is no evidence that the February, 1979 delegation of authority to the Assistant Secretary for Housing was ever rescinded or revoked. There is no evidence that the January, 1982 delegation of authority to the Director, Office of Lender Certification, and to the Director, Lender Recertification Division, contained any provision authorizing either Director to grant on behalf of the Board a 30-day "grace period" to mortgagees being notified that their HUD-FHA approval was being withdrawn.

24 C.F.R. §25.2 relating to the composition of the MRB, provides that the membership of the MRB may consist of "designees" of specified HUD officials. 24 C.F.R. Part 25 contains no other provision which explicitly authorizes that the MRB or its members may delegate authority. A strict interpretation of 24 C.F.R. Part 25, noting this single provision expressly permitting a designation of authority, would hold that no other transfer, delegation or reassignment of power was intended by the drafters of this regulation. There is no compelling reason, however, to apply such a strict construction here.

Both "delegations" of authority in essence recite that this type of withdrawal of mortgagee approval is not of such a nature as would require attention by the MRB. The function delegated is essentially a ministerial one to be exercised where there is a failure to submit in a timely manner a required annual audit report of a mortgagee's financial condition. Serious financial hardship can, nevertheless, result from this "routine" exercise of the withdrawal sanction.

An agency is empowered to delegate a large portion of its responsibility for administrative fact gathering and fact finding to its subordinate employees, and the delegations before me reflect the use of such power. While I find that this delegation of ministerial power by the MRB to the Director of the Lender Recertification Division as written may be injudicious, I do not find that it is, per se, an improper delegation, nor that it is violative of the regulations of this Department.

Notice

24 C.F.R. Part 25 authorizes the establishment of the Mortgagee Review Board of the U. S. Department of Housing and Urban Development and sets forth its functions, duties, and powers, including the procedures by which Departmental approval of mortgagees participating in programs of the Department may be withdrawn. It is well established that an agency is bound by and must comply with the terms of its own regulations. There does not appear to be any ambiguity with respect to the functions of the Mortgagee Review Board as set forth in 24 C.F.R. Part 25, nor should it cause any confusion on the part of the Department as to how a mortgagee should be properly notified that its approval was being withdrawn. If an agency acts in such a way as to violate its own regulations resulting in prejudice to a party with rights thereunder, the governmental action cannot stand. Pacific Molasses Co. v. FTC, 356 F. 2nd 386 (1966); FTC v. Foncha, 356 F. Supp 21 (1973); Atlantic Richfield Co. v. FTC, 398 F. Supp. 1 (1975).

In examining the adequacy of the Deal letter itself, there are substantial deficiencies in its notification language to the Petitioner of the withdrawal of its mortgagee approval. I, therefore, conclude that it fails to comport with the notification requirements set forth in 24 C.F.R. §25.4(b). Absent from the Deal letter is any notification (1) that a Board action had taken place vis-a-vis the Petitioner's status, (2) that a Board determination had been made that the Petitioner's mortgagee approval should be withdrawn, (3) that Mr. Deal was acting with the delegated authority of the Board, or (4) that the withdrawal of Petitioner's mortgagee approval was being effected for a specified "extent, duration and nature" as required by this regulation. The Deal letter contains no reference or mention whatsoever of the MRB. Moreover, the 30-day "grace period" permitted by the terms of the Deal letter of notification granting an interval for submission by the Petitioner of the required report was not a power delegated by the Board nor one permitted by 24 C.F.R. Part 25.

For these reasons, I find that the Deal letter did not properly advise Petitioner of an authorized action of the Mortgagee Review Board nor properly notify the Petitioner of the withdrawal of its mortgagee approval pursuant to 24 C.F.R. §25.4(a) and 24 C.F.R. §25.4(b).

Designation of Hearing Officer

24 C.F.R. §25.4(b) requires such a notification as that undertaken by Mr. Deal to "specify the name and address of the designated Departmental hearing officer to whom the mortgagee should address a request for a hearing...." The Deal letter merely indicated that the Petitioner could convey such a request to the "Docket Clerk, Mortgagee Review Board." Paragraph 5 of the Affidavit of Andrew Zirneklis, Secretary to the Board, states that a list of available Departmental hearing officers is made available to the MRB in this regard. I do not find the omission of the name of the hearing officer in the Deal letter to be a defect of significance or a deficiency which could cause an infringement upon the right of the Petitioner to obtain a fair and impartial hearing in this matter. The Petitioner acted in good faith in directing a timely request for a hearing to the Docket Clerk of the MRB. Moreover, the initial selection of a Departmental hearing officer is a ministerial function within the Department over which an aggrieved party seeking a hearing need have no control. Certainly, where actions of administrative clerks do not have the effect of making the administrative decision for their superior officials, in this case the MRB Secretary making a ministerial decision for the Chairman of the MRB, the reliance by the Chairman on the ministerial act is warranted. Bacon v. Holzman, 264 F. Supp. 120, reversed, Briscoe v. Kusper, 435 F. 2d 1046 (1967). The manner in which I was selected in no way impacts upon the substantive right of the Petitioner to present its grievance before an independent and impartial hearing officer.

In view of the fact that the Secretary to the MRB designated on behalf of the MRB Chairman, by means of an established impartial procedure, the undersigned to be hearing officer, I can find no significant non-compliance by the Government nor prejudice to the Petitioner in the manner of selection of the hearing officer. Therefore, I find that I am properly authorized to hear Petitioner's appeal of the governmental action to withdraw its mortgagee approval.

Effective Date of Withdrawal of Mortgagee Approval

The Government admits that "in all non-filer cases, mortgagee approval must be withdrawn." That such a policy determination was made, admittedly for the sake of "economy and efficiency," appears to be well within the discretion of the MRB. Despite this admirable objective, this mechanical approach to the withdrawal of mortgagee approval is not without risk. (See Lopez v. Secretary of Health, Education and Welfare, 342 F. Supp. 778 (1972) where the Court found it impossible for an agency to apply a general rule, straight across the board, without considering exceptions to the rule found in the same regulation which created the general rule. Compare this "res adjudicata rule" applied in Lopez, supra, and in Ruiz Olan v. Secretary of Health, Education and Welfare, 391 F. Supp. 309 (1974), with the delegated power granted to the named delegates in the case at bar.)

Due to the fact that the withdrawal of Petitioner's mortgagee approval is considered "routine" given the stated grounds, and since such withdrawals can be and are being effected perfunctorily by the Director of the Lender Recertification Division without requiring the attention of the MRB, it is clear that no determination by the MRB has been made, pursuant to 24 C.F.R. §25.6(a), that the Petitioner's withdrawal of its mortgagee approval should be immediate. 24 C.F.R. §25.6(a) provides for an immediate withdrawal of a mortgagee's approval, without a thirty day "grace period,"

... if the Board unanimously determines that continuation of the mortgagee's approval pending a request of the mortgagee for a hearing pursuant to §25.4(c) would not be in the public interest or in the best interest of the Department; (emphasis added).

The delegations of MRB authority to the Assistant Secretary, to the Director of the Office of Lender Certification, and to the Director of the Lender Recertification Division contained no express provisions advising these delegates that the MRB had unanimously determined in all "non-filer cases" that the continuation of the mortgagee's approval pending a hearing "would not be in the public interest or in the best interest of the Department" pursuant to 24 C.F.R. §24.6(a). Even if the MRB wished to delegate its power to make a public interest or Departmental interest determination to a subordinate or one exercising ministerial duties on behalf of the MRB, the use of such a delegated power would be of questionable legality since this type of determination is an adjudicatory power and not a ministerial function.

Th[e] concept is well established that administrative officers or bodies cannot legally confer on their employees or others authority and functions which under the law may be exercised only by them or by other officers or tribunals. Although mere ministerial functions may be delegated, in the absence of permissive constitutional or statutory provision, administrative officers and agencies cannot delegate to a subordinate or another powers and functions which are discretionary or quasi-judicial in character, or which require the exercise of judgment, and subordinate officials have no power with respect to such duties. 73 C.J.S. §57 at 381-82.

In the clear absence of such a specific determination by the MRB, I find that the effective date of the withdrawal of Petitioner's mortgagee approval is governed by 24 C.F.R. §25.6(c), i.e., "30 days after the hearing officer's written

determination." The Government's position that the Petitioner's mortgagee approval was withdrawn effective May 25, 1983, while concededly correct in fact, is null and void as a matter of law for the reasons stated above.

CONCLUSION AND ORDER

The letter dated April 19, 1983 from J. Parker Deal, Director, Lender Recertification Division, did not properly advise the Petitioner of an action of the Mortgagee Review Board nor properly notify the Petitioner of the withdrawal of its mortgagee approval pursuant to 24 C.F.R. §25.4(a) and 24 C.F.R. §25.4(b). The withdrawal of the Petitioner's mortgagee approval based upon this letter of notification is in violation of the regulations of this Department and is declared null and void.

This case is hereby dismissed without prejudice.



DAVID T. ANDERSON
Administrative Judge

Issued at Washington, D. C.
July 1, 1983