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

In The Matter of:	
AMERICAN RENTAL MANAGEMENT COMPANY, et. al,	
Respondents.	HUDALJ 99-01-CMP Decided: May 26, 2000

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For the Government

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For the Respondents

Before: Thomas C. Heinz
Administrative Law Judge

INITIAL DECISION

Statement of the Case

This proceeding arises out of action taken pursuant to 24 C.F.R. Parts 30 and 35 by the Director, Office of Lead Hazard Control, U.S. Department of Housing and Urban Development ("the Department" or "HUD") on March 29, 1999. On that date HUD sent prepenalty notices to Respondents American Rental Management Company ("ARMC") and Chastleton Apartments Associates ("Chastleton") stating that the Department proposed to seek the imposition of civil money penalties against them for violations of the Residential Lead-Based Paint Hazard Reduction Act, 42 U.S.C. §4852d, and implementing regulations codified at 24 C.F.R. Part 35. The prepenalty notices concerned tenant leases at two apartment complexes in Washington, D.C., during the period from September 6, 1996, through December 1998. Although Respondents ARMC

and Chastleton opposed the action, on June 9, 1999, HUD issued a Complaint and Notice of Opportunity for Hearing against ARMC. On September 9, 1999, HUD served ARMC, Chastleton, and Respondent Interstate General Company, L.P. ("IGC") with its First Amended Complaint and Notice of Opportunity for Hearing. The First Amended Complaint notified Respondents that the Department proposed civil penalties totaling $6,760,270. On September 24, 1999, the Department initiated this proceeding by filing the complaints and Respondents' requests for hearing with the Chief Docket Clerk of the Office of Administrative Law Judges.

On October 4, 1999, Respondents filed a motion to dismiss. On October 14, 1999, HUD moved for partial summary judgment. Both motions were denied in an Order issued November 8, 1999, that also directed the Department to re-analyze the factors used to determine the amount of civil penalties to be sought, with the goal of generating a realistic and reasonable proposal. On November 24, 1999, the Department filed a revised proposal seeking penalties of $619,100. An oral hearing was held on December 8 and 9, 1999, in Washington, D.C. The parties filed post-hearing briefs and reply briefs. The last briefs were filed March 28, 2000.

Findings of Fact

1. Chastleton owns The Chastleton, a 300-unit apartment building located at 1701 16th Street, N.W., Washington, D.C. (Stip. 1-3, 7)[1].

2. The Capitol Park apartment complex ("Capitol Park") consists of three buildings located in Washington, D.C.: (l) The Capitol Park Towers apartment building located at 301 G Street, S.W.; (2) The Capitol Park Twin Towers located at 101-103 G Street, S.W.; and (3) the Capitol Park Plaza located at 201 I Street, S.W. Capitol Park was constructed in the early 1960s and contains 936 rental units. (Stip. 4-6).

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[1]The following reference abbreviations are used in this decision: "TR." for "Transcript"; "GX." for "Government's exhibit"; "RX." for "Respondents' exhibit"; and "Stip." for "Parties' Agreed Stipulation of Facts."

3. IGC was the property management agent of both The Chastleton and Capitol Park until January 1998. (Stip. 9).

4. In January 1998, ARMC became the property management agent of both The Chastleton and Capitol Park. (Stip. 8). ARMC was created from the apartment division of IGC and carried over the same employees, but it is now a separate company. (TR.215).

5. In 1992, the owner of Capitol Park sought HUD-backed refinancing. As a condition of refinancing, HUD required that all identified lead-based paint be removed. (TR. 220, 234-35). The owner contracted with a HUD-approved inspector, Comprehensive Environmental Assessments ("CEA"), to survey the apartment units for lead-based paint in conformance with HUD requirements then in effect. (TR. 117-19).

6. CEA tested the properties in late 1992 and early 1993 and found lead-based paint on certain balcony railings and interior panel doors. No other surfaces tested positive for lead-based paint. (TR. 121, 235).

7. Contractors were then hired to remove all identified lead-based paint at Capitol ParkOne contractor removed, stripped, repainted, and reinstalled the contaminated balcony railings. Another contractor replaced the interior doors bearing lead-based paint. (TR. 235-37).

8. CEA conducted a follow-up inspection in 1994 and advised IGC in writing that all known lead-based paint had been removed. (TR. 176-77, 236; RX. 9, 10). The total cost of the testing and abatement program was between $250,000 and $300,000. (TR. 237).

9. When the lead-based paint disclosure requirements now in effect first became effective in late 1996, IGC asked CEA how to comply. On November 21, 1996, CEA advised IGC to give new tenants the disclosures set out in a suggested letter supplied by CEAAmong other things, the letter suggested the following language: "<u>All areas identified with lead have been removed per Comprehensive Environmental Assessments documentation (attached).</u>" CEA's advice was silent regarding renewing tenants. (TR. 241-42, 295-96; RX. 11, 12).

10. By spring 1997, IGC had learned that disclosures should be made to renewing tenants as well as new ones. IGC promptly instituted procedures to fulfill this requirement as well. (TR. 242-44; RX. 2).

11. The senior vice president of IGC (and subsequently ARMC), Paul Resnik, instructed on-site general managers to make the requisite disclosures. (TR. 239). Mr. Resnik testified that he relied upon the general managers to ensure that disclosures were made, and that before HUD's 1998 inspection, verifying compliance with the lead-based paint disclosure requirements was not an especially high priority for him because he

believed that all lead-based paint had been removed from The Chastleton and that no lead-based paint remained at Capitol Park as a result of previous testing and abatement procedures. (TR. 177, 189, 237-40).

12. Bud Gale was the on-site general manager at Capitol Park from 1992 through the date of the hearing. He was instructed by Mr. Resnik, the senior vice president of IGC, to ensure that the required lead-paint disclosures were made to tenants. Mr. Gale, in turn, passed on these instructions to his leasing staff, who were responsible for making and documenting the disclosures. (TR. 214, 239, 310-11, 335-37, 342-43).

13. Because Mr. Gale believed that all lead-based paint had been removed from the complex, verifying full compliance with the lead-based paint disclosure requirements was not a high priority for him before HUD's inspections in 1998. (TR. 347).

14. Maria Aguilar was the administrative assistant to Mr. Gale. She worked at Capitol Park from 1995 through the date of the hearing. Among other things, she was responsible for handling all lease renewals. (TR. 365-66). She prepared the relevant paperwork, and she included the lead-based paint disclosures with the renewed leases. If a tenant came into the office on a weekday to sign the papers, she would handle the process herself. On the weekends, a member of the leasing staff would handle it. A number of renewing tenants had the paperwork sent to them for signature and later submission. Most of the time, but not always, the signed disclosure form would come back with the lease. (TR. 370-74).

15. New tenants at Capitol Park were routinely given lead-based paint disclosures as part of their "move-in" package of documents. However, in many instances, the tenants did not sign or return the disclosure forms. (TR. 309-10, 345-46).

16. At the time of the hearing, no tenant at Capitol Park had requested cancellation of his or her lease, or had complained to management about lead-based paint in the complex as a result of disclosures made during fall 1998 or as a result of additional disclosures made during 1999 based on tests conducted in 1999. The complex was fully occupied, and the only complaints that management had received concerning lead-based paint had come from tenants who were displeased with the number of lead-based paint disclosures that management had made. (TR. 247-54, 356-61; RX. 36-38; Stip. 12, 13).

17. For the past several years, IGC/ARMC has earned approximately $6,000 per year for managing Capitol Park. (TR. 264-65).

18. The Chastleton was substantially rehabilitated around 1986. The drywall, doors, windows, and other major components of the building, such as heating and air

conditioning systems, were replaced at a cost of $10-15 million. Given the thoroughness of the renovation, Respondents believed that all lead-based paint had been eliminated. (TR. 231-32, 244-45). Prior to July 1997, Respondents had no knowledge of any lead-based paint at The Chastleton. (TR. 232).

19. In July 1997, on its own initiative, IGC hired a HUD-approved lead-based paint inspector, AmeriSpec, to conduct spot inspections of three vacant apartments at The Chastleton. These inspections were voluntary and were not conducted for the purpose of assessing the condition of the entire building. The inspections revealed the presence of small amounts of lead-based paint inside a hall closet of one apartment and on the exterior door casings in the halls outside three apartments—that is, within the common areas of the building. The lead-based paint was intact; no lead hazard was found. (TR. 199-202, 209-10, 226-27; GX. 9).

20. The manager of The Chastleton at the time was instructed by Mr. Resnik, the senior vice president of IGC, to disclose these test results to new and renewing tenants. When that manager was replaced in September 1997, the new manager, Michael Barge, received similar instructions, including directions to give all new and renewing tenants a lead-based paint disclosure form. The disclosure form referenced the July 1997 inspection reports. Mr. Barge kept a copy of the reports in his office for tenants to peruse upon request. (TR. 232-34, 245, 375-79).

21. The disclosure form is part of the application package that is provided to all prospective tenants at The Chastleton. The leasing agents are responsible for providing the disclosure form to tenants and obtaining a signed disclosure. There are five leasing agents—two full-time and three part-time. (TR. 375-79).

22. Mr. Barge testified that although disclosure forms were given to all tenants, signed disclosure forms were not always returned. He did not know why, but he conceded that in the past he and his staff did not focus on obtaining signed disclosure forms from all tenants as they do now. (TR. 389-90).

23. A series of blanket disclosures were made to all tenants by ARMC to apprise them of the results of additional lead-based paint testing conducted in 1999. (TR. 248-51).

24. Only two tenants have asked to review the lead-based paint inspection reports in Mr. Barge's office, and both of those tenants did so in response to the blanket disclosures made in 1999. These tenants did not seek to terminate their leases or request that any action be taken regarding their apartments. (TR. 388-89). No tenant at The Chastleton has requested cancellation of his or her lease in response to the disclosures

regarding lead-based paint. The building is fully occupied, and units are rented even before the current tenant moves out. (TR. 393).

25. Eight children resided at The Chastleton during the period from September 6, 1996, to the date of the hearing. (TR. 256-57). The one apartment found to contain lead-based paint as a result of the 1997 inspection was subsequently occupied by a family with a child during the period September 1998 until May 1999. An appropriate disclosure was made to—and written acknowledgment received from—that family before they moved in. (TR. 394-96; RX. 60).

26. For the past several years, IGC/ARMC has earned approximately $18,000 per year for managing The Chastleton. Chastleton has never made a profit. (TR. 264-65, 287).

Subsidiary Findings and Discussion

The Residential Lead-Based Paint Hazard Reduction Act (42 U.S.C. § 4852d) ("the Act") provides in part:

> (a) Lead disclosure in purchase and sale or lease of target housing
>
> (1) Lead-based paint hazards
>
> Not later than 2 years after October 28, 1992, the Secretary [of HUD] and the Administrator of the Environmental Protection Agency shall promulgate regulations under this section for the disclosure of lead-based paint hazards in target housing which is offered for sale or lease. The regulations shall require that, before the purchaser or lessee is obligated under any contract to purchase or lease the housing, the seller or lessor shall--
>
> (A) provide the purchaser or lessee with a lead hazard information pamphlet, as prescribed by the Administrator of the Environmental Protection Agency under section 406 of the Toxic Substances Control Act;
>
> (B) disclose to the purchaser or lessee the presence of any known lead-based paint, or any known lead-based paint hazards, in such housing and provide to the purchaser or lessee any lead hazard evaluation report available to the seller or lessor; . . .
>
> (2) Contract for purchase and sale
>
> Regulations promulgated under this section shall provide that every contract for the purchase and sale of any interest in target housing shall contain a Lead Warning Statement and a statement signed by the purchaser that the purchaser has--

> (A) read the Lead Warning Statement and understands its contents;
> (B) received a lead hazard information pamphlet; . . . .

Counts 1 through 3 of the complaint allege that in 677 transactions Respondents knowingly and materially failed:

> · to provide lessees with an EPA pamphlet prior to the lessees' becoming obligated under their lease contracts, as required by 24 C.F.R. §35.88(a)(1) (Count 1);
>
> · to disclose to the lessees the presence of any known lead-based paint in the housing prior to the lessees' becoming obligated under their lease contracts, as required by 24 C.F.R. §35.88(a)(2) (Count 2);
>
> · to provide the lessees with any records or reports available to Respondents pertaining to lead-based paint and/or lead in dust or soil in the housing prior to the lessees' becoming obligated under their lease contracts, as required by 24 C.F.R. §35.88(a)(4) (Count 3).

Counts 4 through 9 of the complaint allege that in 677 transactions Respondents knowingly and materially failed to include, as an attachment or within the contract to lease Respondents' housing, the following:

> · the Lead Warning Statement required by 24 C.F.R. §35.92(b)(1) (Count 4);
>
> · a statement by the lessor disclosing the presence of known lead-based paint and/or lead in dust or soil in the housing being leased or indicating no knowledge of the presence of lead-based paint and/or lead in dust or soil, as required by 24 C.F.R. §35.92(b)(2) (Count 5);
>
> · a list of any records available to the lessor pertaining to lead-based paint and/or lead in dust or soil in the housing that have been provided to the lessee, or an indication that no such records or reports are available, as required by 24 C.F.R. §35.92(b)(3) (Count 6);
>
> · a statement by the lessee affirming receipt of the information set out in paragraphs (b)(2) and (b)(3) of 24 C.F.R. §35.92 and the lead hazard information pamphlet, as required by 24 C.F.R. §35.92(b)(4) (Count 7);
>
> · a statement that the agent has informed the lessor of the lessor's obligations under 42 U.S.C. 4852d and that the agent is aware of his/her duty to ensure compliance with the requirements of the regulations, as required by 24 C.F.R. §35.92(b)(5) (Count 8); and

> · the signatures of the lessor and lessees, along with the date, certifying to the accuracy of their statements, as required by 24 C.F.R. §35.92(b)(6) (Count 9).

In other words, the Department alleges in the complaint that Respondents committed 6,093 violations of the regulations promulgated pursuant to the Act. For these violations the Department originally proposed civil penalties of $6,760,270, but now seeks penalties of $619,100. The Department introduced no evidence at hearing to prove the substantive allegations of the complaint, but instead relies upon Respondents' stipulations and admissions to sustain the charges.

Respondents agreed to the following stipulations:

> 12. A review of tenant records shows that, during the time period in issue, there were a total of 636 instances (involving 436 units) in which timely disclosures pursuant to the Lead Hazard Reduction Act were not made to residents at the Chastleton and the Capitol Park apartment complex (195 instances at the Chastleton and 441 instances at the Capitol Park apartment complex).
>
> 13. The chart prepared by Matthew Ammon, attached hereto as Exhibit 1, accurately summarizes whether, based on a review of the tenant records, timely disclosures pursuant to the Lead Hazard Reduction Act were made to residents at the Chastleton and the Capitol Park apartment complex.

What did the parties mean by the phrase "timely disclosures pursuant to the Lead Hazard Reduction Act were not made"? The Department argues that through these stipulations Respondents admitted that they committed the violations charged in the complaint--or more precisely, 5,724 out of the 6,093 violations charged (636 x 9 = 5,724). But the Act and the regulations do not require "timely disclosures" as such, and the complaint does not charge Respondents with failing to make "timely disclosures." The Act and the regulations set out a long list of specific duties that lessors are required to perform regarding the dissemination of lead-based paint information to their tenants, and the complaint charges Respondents with having failed to perform each of nine specific duties. Respondents argue that by entering into the stipulations they admitted to no more than a failure on 636 occasions to timely *document* that they fulfilled their duties.

Exhibit 1 to Stipulation 13 shows that the number of "untimely disclosures," 636, is the sum of those instances where HUD's investigation of Respondents' records found blank, undated, or missing disclosure forms, plus those instances where the dates on the disclosure forms were later than the dates on the leases, plus those instances where the dates on the disclosure forms were later than the dates of lease renewals or rent increases. None of this evidence proves that each of the listed tenants did not in fact receive the required information *before* signing a lease. Four witnesses for Respondents testified that

Respondents routinely made the required disclosures to new and renewing tenants before they signed their leases, but that many tenants did not sign or return the disclosure forms or did so only after the lease had been signed and after repeated requests by Respondents. (TR. 309-10, 345-46, 370-74, 375-79). The Department introduced no testimony or other evidence to contradict this testimony.

Although counsel for Respondents admitted in several pleadings that an unspecified number of unidentified tenants did not receive the required disclosures before they signed or renewed their leases, such generalized admissions do not satisfy the Department's burden to prove by a preponderance of evidence each of the separate elements of proof necessary to show that Respondents committed the 6,093 violations charged in the complaint. For example, for a finding to be made in this case that Respondents failed on 677 (or 636) occasions to give the EPA pamphlet regarding lead-based paint to new and renewing tenants before they became obligated under their lease contracts, the record must show exactly that. It does not. The facts contained in the stipulations and in Respondents' admissions do not satisfy the Department's burden to prove the substantive allegations in Counts 1, 2, and 3 by a preponderance of the evidence. Accordingly, these Counts must be dismissed, with the exceptions discussed below.

Count 2 as to Capitol Park must be dismissed for another reason. It alleges that Respondents failed to disclose the known presence of lead-based paint to tenants. But Respondents cannot have committed this offense regarding Capitol Park, because during the period at issue Respondents reasonably believed that no lead-based paint was present on the property. They had been assured by CEA that all identified lead-based paint had been removed. (TR. 176-77, 236; RX. 9,10). Section 35.88(a)(2) of 24 C.F.R. does not require lessors to disclose the prior presence of lead-based paint that has been since removed. It is irrelevant that tests in 1999 showed that CEA was mistaken and that lead-based paint remained on the property. Respondents cannot be charged with failing to disclose what they did not know and could not have known.

Respondents stipulated that Exhibit 1 to Stipulation 13 accurately summarizes their "untimely disclosures." Respondents' evidence indicates that new tenants received the required disclosures via receipt of a "move-in" package that, among other things, contained the disclosure form which is the subject of Exhibit 1. Renewing tenants received their disclosure forms along with their new leases. The disclosure form apparently disclosed the CEA report indicating that all identified lead-based paint had been removed from the building. However, page 13 of Exhibit 1 contains the following comment taken from a disclosure form dated October 6, 1998, by the Capitol Park tenant in unit A615: "I moved in on 6-15-86; did not rec. this until 10-6-98!" After the regulations became effective in September 1996, that tenant's lease was renewed twice:

on February 1, 1997, and February 1, 1998. On both of those dates Respondents possessed the report from CEA. The quoted comment demonstrates that the tenant in unit A615 on two occasions had not received the disclosure form before the lease was renewed and hence was unaware of CEA's report before execution of the lease. These two failures are charged in Count 3 as violations of 24 C.F.R.§35.88(a)(4). Therefore, the factual allegations in Count 3 as to unit A615 at Capitol Park are supported by the record.

As for Counts 2 and 3 regarding The Chastleton, before July 1997, management believed that all lead-based paint had been removed as a result of extensive renovations in 1986 and that there was no disclosure to make. After tests in July 1997 showed the presence of lead-based paint in the building, management instructed staff to disclose the July 1997 test results to new and renewing tenants. Witnesses for Respondents testified that they routinely did so. (TR. 233-34, 245, 375-79). The Department introduced no evidence to contradict this testimony. However, page 7 of Exhibit 1 to Stipulation 13 contains the following comment taken from a disclosure form dated October 9, 1998, by the tenant in unit 627: "[U]ntil today I had no knowledge of lead in this building. I have been a tenant here for 4 years." The tenant's lease was originally signed September 11, 1997, and renewed October 1, 1998. On both of those dates, Respondents had knowledge of intact lead-based paint in common areas of the building and possessed a report from the firm that had discovered it. The quoted comment demonstrates that this knowledge and this report were not communicated to the tenant in unit 627 before that tenant's lease was originally executed and before it was renewed. These four failures are charged in Counts 2 and 3 as violations of 24 C.F.R.§§35.88(a)(2) and (a)(4). The record therefore supports the factual allegations of Counts 2 and 3 as to unit 627 at The Chastleton. The counts are not multiplicious because the elements of proof differ between them. Knowledge regarding the presence of lead-based paint can be communicated apart from disclosures of lead-based paint reports.

Respondents argue that Counts 4 through 9, which allege violations of 24 C.F.R. §35.92(b), are legally flawed because they allege violations of regulatory provisions not authorized by the Act; hence they violate the delegation doctrine. Section 35.92(b) of 24 C.F.R. sets out the lessor's disclosure requirements in connection with the content of lease contracts and appears to be related to section (a)(2) of the Act. Because the regulations were duly promulgated under color of the Act, they must be given the force and effect of law in this forum. Therefore, Respondents' argument on this point cannot be entertained.

Counts 4, 5, 6, 7, and 9 of the complaint allege violations of five separate subsections of 24 C.F.R. §35.92(b). This section identifies a list of elements that the

lessor must include either in the body of the lease contract or in an attachment to the

contract before the contract is signed. Stipulations 12 and 13 show that Respondents failed to comply with these requirements on 636 occasions. The disclosure form that is the subject of Exhibit 1 to Stipulation 13 includes the following: (l) a Lead Warning Statement that, among other things, informs the lessee that lessees must be given a pamphlet on lead poisoning (required by 24 C.F.R. §35.92(b)(1)); (2) statements regarding the lessor's knowledge or lack of knowledge regarding the presence of lead-based paint (required by 24 C.F.R. §35.92(b)(2)); (3) statements indicating whether the lessor has or has not provided the lessee with reports pertaining to lead-based paint (required by 24 C.F.R. §35.92(b)(3)); (4) acknowledgments by the lessee that the lessee has received all of the required information and a pamphlet pertaining to lead-based paint (required by 24 C.F.R. §35.92(b)(4)); and (5) certifications by all parties (required by 24 C.F.R. §35.92(b)(6)). By failing to secure tenants' signatures on the disclosure forms before or at the same time that the tenants signed their leases, Respondents failed to make their disclosures a part of the lease contracts. In other words, they failed to create written proof that the tenants were fully informed about the lead-based paint status of their intended living environment *at the time* they signed their leases, thereby subverting the purpose of 24 C.F.R. §35.92(b). This regulatory provision requires the creation of a document, and counsel for Respondents correctly characterize Respondents' conduct (with the exceptions noted above) as a failure to *document* their disclosures. Accordingly, the record supports the factual allegations of Counts 4, 5, 6, 7, and 9.

Count 8, on the other hand, is fatally defective and must be dismissed. It alleges that Respondents' agents violated 24 C.F.R. §35.92(b)(5), which requires contract agents to inform the lessor of the lessor's obligations under the Act, and 24 C.F.R. §35.94(a)(2), which requires contract agents to ensure that the lessor has complied with the regulations. Respondents' agents in this case are not the type of agents covered by the cited regulations. Section 35.86 of 24 C.F.R. provides in part: "*Agent* means any party who enters into a *contract* [emphasis supplied] with a seller or lessor, including any party who enters into a contract with a representative of the seller or lessor, for the purpose of selling or leasing target housing." Respondents' leasing agents are not real estate agents or brokers (that is, independent contractors) who entered into contracts with Respondents to lease apartments. They are at-will employees exempt from the requirements of 24 C.F.R. §§35.92 and 94. The record contains no evidence that Respondents contracted to have their apartments leased through the services of agents. Moreover, it would make no sense to impose a penalty on an employer because his employee did not tell him what to do, yet that is exactly what the Department seeks to accomplish through Count 8.

Respondents' Violations Were Committed "Knowingly"

Although Respondents concede that they failed to document lead-based paint disclosures and that in an unspecified number of instances they failed to provide tenants with the requisite disclosures before the leases were signed, they argue that they did not violate the law because they did not do so "knowingly" within the meaning of the Act and the regulations. That argument has no merit. Section (b)(1) of the Act (42 U.S.C. §4852d(b)(1)) provides:

> (1) Monetary penalty
> Any person who knowingly violates any provision of this section shall be subject to civil money penalties in accordance with the provisions of section 3545 of this title [Section 102 of the HUD Reform Act of 1989 (42 U.S.C.§3545)]. . . .

The Act does not define "knowingly," but 24 C.F.R. Part 30, the civil money penalty regulations under which this case was brought, contains the following definition: "Having actual knowledge of or acting with deliberate ignorance of or reckless disregard for the prohibitions under [the Act.]." The same definition appears in section 102 of the HUD Reform Act at 42 U.S.C. §3534(m)(5), incorporated by reference by the Act. Respondents unquestionably had actual knowledge of the requirements of the Act and the regulations. CEA, the inspector at Capitol Park, informed them of the disclosure requirements (Stip. 17; GX. 6), as did AmeriSpec, the inspector for The Chastleton. (TR. 202; GX. 9). By early 1997, Respondents were aware that the Lead Disclosure Rule applies to renewals as well as new leases. (TR. 366-67; GX. 5). Furthermore, both the Department and Respondents agree that Respondents complied with the law as to some tenants. Because compliance is too complex to be accomplished by accident, Respondents must have known what they were required to do. Respondents contend that they complied about 70 percent of the time, whereas the Department contends that they complied only 30 percent of the time. Regardless of who is correct, the large number of violations over a significant period belies the argument that the violations were the result of mere mistake or inadvertence. The record shows an inattentiveness that constitutes a reckless disregard for the requirements of the law. Respondents concede that they did not take the duties imposed upon them under the Act and the regulations very seriously until HUD began its investigation of their records. (TR. 240, 347, 361-62, 389-90).

Respondents' attempts to define "knowingly" using definitions from the criminal law fall wide of the mark. Such definitions are clearly inapposite in a civil case. The Department need not show specific intent to make out a violation of the Act or regulations.

Respondents Committed "Material" Violations

Before a civil money penalty may be imposed, the record must show that a respondent both “knowingly” and “materially” violated the Act and regulations. The "materially" element comes from section 102 of the HUD Reform Act (42 U.S.C.§3545), which the Act incorporates by reference. Section 102f of the HUD reform Act provides in relevant part that "[w]henever any person knowingly and materially violates any provision of subsection (b) or (c), the Secretary may impose a civil money penalty on that person in accordance with the provisions of this section." Standard rules of statutory construction dictate that:

> In a statute of specific reference only the appropriate parts of the statute referred to are considered. When the reference is made to a specific section of a statute, that part of the statute is applied as though written into the reference statute.

Sutherland Stat. Const. §51.08 (5th ed. 1992). In other words, when a specific section of another statute is incorporated by reference, everything in the incorporated statute that *can* apply to the incorporating statute *must* apply. Therefore, everything but the phrases "subsection (b) or (c)" and “this section” in section 102f applies to the Act, thereby making "materially" an element of proof in all violations charged under the Act. If a violation is immaterial, then no civil penalty may be imposed.

HUD’s civil money penalty regulations define “materially” at 24 C.F.R. §30.10 to mean: “In some significant respect or to some significant degree.” A definition using a synonym for “material” is not helpful to the task of determining whether the violations at issue are material. However, the Secretary of HUD has ruled that in civil money penalty cases, materiality is to be determined by application of a "totality of the circumstances" standard, which is to be determined in turn by consideration of the regulatory factors codified at 24 C.F.R. §30.80 that are used to determine the amount of a civil penalty. Order on Secretarial Review, *In the Matter of Associate Trust Financial Services,* HUDALJ 96-008-CMP, September 15, 1997. In other words, to be considered material, a violation need not be predicated on a material fact. Liability for a civil money penalty may rest on any fact, whether material or immaterial, arising out of the "totality of circumstances" that are used to determine the amount of any civil penalty. Although it is illogical to decide whether to impose a penalty by considering the factors used to determine the size of a penalty *if* a penalty were to be imposed, the Secretary’s decree constrains me to do so. Accordingly, the following findings are made pursuant to the Secretary’s instructions:

1. Gravity of the Offenses

To determine whether an offense is material by asking whether it is grave begs the question. A grave offense is necessarily a material offense.

Respondents' violations are sufficiently grave to merit the imposition of a civil money penalty, as discussed below in the section considering the appropriate penalty to be imposed in this case.

2. History of Prior Offenses

Absent proof that the facts alleged in the case at hand mirror facts charged in a previous case, a respondent's history of a prior offense does not prove whether he committed the offense charged in the current case. Put more precisely, that a respondent committed a material violation in the past does not prove that he committed a material violation as charged in the case at hand. A history of offenses is, with rare exception, irrelevant to the liability issue. In any event, Respondents in this case have no history of prior offenses.

3. Ability to Pay the Penalty

Any decision finding that a respondent is liable for a penalty because he has the ability to pay it unquestionably would violate the equal protection clause of the 14th Amendment of the United States Constitution. A wealthy respondent must be in precisely the same jeopardy as a poor one when accused of violating the law.

Respondents have stipulated that they are capable of paying the civil penalty sought by the Department in this case.

4. Injury to the Public

The preponderance of the evidence does not show any significant harm to any individual as a result of Respondents' violations. The violations did, however, injure the Department's regulatory and enforcement program, as more particularly described below.

5. Benefits to Respondents

An immaterial violation can generate huge profits to a violator while a material violation can generate an equally large loss. There is no necessary causal relationship between the materiality of a violation and the benefits reaped from it.

In the instant case, the record contains no evidence that Respondents reaped any

economic benefit from their violations. They neither gained nor kept a tenant by withholding lead-based paint information. In fact, the evidence suggests that virtually all of Respondents' tenants considered the information irrelevant or immaterial. No one refused to renew a lease or sought to cancel a lease based on disclosures regarding lead-based paint. With full disclosures accomplished, all apartments are occupied.

6. Potential Benefits to Other Persons

Determining materiality by considering this element suffers from the same logical defect identified in element 5 above.

There is no evidence that any person has benefited or will benefit from Respondents' conduct .

7. Deterrence

Imposition of a civil money penalty can deter both material and immaterial violations. Therefore, an analysis of deterrence sheds no light on whether a particular violation was material or immaterial.

The principle of deterrence will be served by imposition of a penalty in this case.

8. The Degree of Respondents' Culpability

The purpose of this analysis is to determine whether Respondents are responsible--that is, culpable for material violations. It makes no sense to assess the degree of Respondents' culpability in order to determine whether the Respondents are culpable in the first place. Such reasoning is circular. In any case, Respondents are fully culpable for their violations.

To summarize, Respondents' violations must be deemed material for the following reasons: the offenses are sufficiently grave to merit a civil penalty; Respondents have the ability to pay a penalty; the violations harmed the Department's regulatory and enforcement program; the principle of general deterrence will be served by the imposition of a penalty; and Respondents are fully culpable for their violations. According to the Secretary, to prove materiality, the record need not contain sufficient evidence to satisfy all of the factors listed in the regulations—one will suffice. *A fortiori,* a finding of materiality is required in this case.

Respondents' Violations Merit a Civil Money Penalty

Respondents knowingly and materially violated the Act and the regulations. To determine whether a civil money penalty should be imposed for such violations, 24 C.F.R. §30.80 requires consideration of the following factors:

1. Gravity of the Offenses

The Director of HUD's Office of Lead Hazard Control, Dr. David Jacobs, described the purpose of the Act and the regulations as follows:

> Fundamentally, the Lead Disclosure Rule is a kind of "right to know" law. It basically is about providing information that parents can use to protect their children. It doesn't require an inspection or a risk assessment or the control of any hazards, but it does require an owner or a landlord or an agent to disclose any information they do have about lead paint so that the recipients of that information can do the right thing.
>
> . . . fundamentally, it's about informing people so that they can take preventive measures to control exposures.

(TR. 33; *see also* 61 Fed. Reg. 9063, 9080). In other words, the law does not impose a duty on a landlord to discover whether lead-based paint exists on his property, remove it if he knows it is present, or otherwise protect his tenants from harm caused by lead-based paint. In fact, if a landlord refuses out of concern for the welfare of a child to rent an apartment, he will become liable for familial status discrimination under the Fair Housing Act, 42 U.S.C. §3601 *et seq*. *See HUD v. DiBari*, 2 Fair Housing-Fair Lending (Aspen) ¶25,036 at pp. 25,374-77 (HUD ALJ 1992). In sum, the Act is nothing more nor less than a disclosure law.

The preponderance of evidence in this case shows that Respondents failed to document their disclosures, not that they failed to make the required disclosures in the first instance (with the exception of the two tenants discussed above). Therefore, in the main, this is not a case where tenants were deprived, as Dr. Jacobs put it, of their "right to know." This is a case where Respondents failed to create proof that they honored their tenants' "right to know."

If evidence shows that a landlord failed to disclose the presence of lead-based paint to pregnant tenants or tenants with children, the offense is considerably more serious than if the tenants had no children, because children, particularly children under the age of six, are more susceptible than adults to harm as a result of exposure to lead-

based paint. (GX. 11) Contrary to the Department's contentions, Respondents have no duty in this proceeding to prove how many children resided in their buildings. Inasmuch as the record does not prove that any family with children was deprived of its right to receive lead-based paint disclosures before becoming obligated on a lease, the number of children in Respondents' buildings is immaterial for purposes of determining the appropriate penalty. Furthermore, it is irrelevant that tests conducted on the buildings after Respondents' violations ended showed that the risks of harm were in fact greater than anyone knew during the period of Respondents' violations. Respondents cannot be punished for failing to disclose what they did not know and had no duty to discover.

The large number of violations, 636, makes Respondents' offenses more serious than if they had failed to document their disclosures on only a handful of occasions.

Respondents' violations are also serious because such violations make the Department's enforcement of the Act significantly more difficult, as explained below under the heading, "Injury to the Public."

2. History of Prior Offenses

Respondents are first-time offenders; they have no history of prior offenses under the Act.

3. Ability to Pay the Penalty

For the past several years, IGC/ARMC has earned approximately $6,000 per year for managing Capitol Park and $18,000 per year for managing The Chastleton. Chastleton has never made a profit. Respondents concede that they have the ability to pay a civil penalty.

4. Injury to the Public

The record contains no evidence of physical harm to anyone.[2] The preponderance of the evidence shows that only one person was exposed unaware to intact lead-based

[2] Contrary to the Department's argument, Respondents have no burden to prove the absence of injury. The Director of the Office of Lead Hazard Control is required by 24 C.F.R. §30.80 to consider whether the public has suffered any injury as a part of the decision whether to seek a civil money penalty. Therefore, the burden to prove injury as an element in a prosecution for civil money penalties rests on the Department, not on Respondents. In the absence of evidence of injury, it must be assumed that none occurred.

paint in the common area of The Chastleton. Intact lead-based paint poses a very low risk of injury to adults. (GX. 11). The tone of the comment taken from a disclosure form indicates that the person was displeased to have been deprived of the right to know that lead-based paint was in the building, but that displeasure did not prompt the tenant to seek cancellation of the lease. Also, one tenant at Capitol Park seems to have been displeased to have been deprived of the right to know that experts had issued a report stating that all identified lead-based paint had been removed from the building. This tenant was not exposed to any risk of harm as a result of Respondents' failure to make timely disclosures. Like the tenant at The Chastleton, when the Capitol Park tenant discovered the truth of the situation, no action was taken to cancel the lease. Other than these two tenants, the only other proven victim of Respondents' violations is the Department.

The Department's regulatory and enforcement program suffered virtually all of the injury caused by Respondents' derelictions. When lessors do not timely document their disclosures, it becomes difficult if not impossible to determine whether disclosures were in fact timely made to all of the lessors' tenants. Absent written records, for large multi-family complexes the Department can investigate and prove compliance only by knocking on hundreds of tenants' doors, taking their statements, and if a case comes to trial, putting hundreds of people on the stand. To make enforcement of the Act more efficient and to save taxpayers a considerable amount of money, the Department's regulations require lessors to create records proving their compliance with the Act. Respondents violated those regulations.

5. Benefits Received by Respondents

The record contains no evidence that Respondents reaped any benefit from their violations.

6. Extent of Potential Benefit to Other Persons

Respondents' conduct had no potential benefit to other persons.

7. Deterrence

Lead-based paint is a significant problem in America's housing stock. Evidence shows that large numbers of people, mostly children, have suffered permanent damage from exposure to lead-based paint hazards. The problem will be expensive and difficult to solve. (GX. 2, 11, 12, 18-23). At a minimum, solution will require everyone in the housing industry to understand that they must comply with disclosure duties imposed by law. Respondents concede that they were not sufficiently serious about their duties.

Their slipshod management practices caused a large number of violations—record keeping violations, to be sure, but significant nevertheless. The Department cannot perform its duty to enforce compliance if landlords get the impression that they can fail to timely document their disclosures in a significant number of violations and yet suffer no significant consequences. The penalty imposed in this case should be large enough to deter housing providers from failing to take the duties imposed by the Act and the regulations seriously.

8. Degree of the Respondents' Culpability

Respondents are fully culpable for the violations. They are sophisticated, knowledgeable, and experienced landlords who were not misled by anyone or laboring in ignorance of their duties. As noted above, their violations can best be understood as a manifestation of slipshod management practices resulting from a failure to take the law seriously.

9. Such Other Matters as Justice May Require

Respondents complain that no penalty should be imposed in this case because they should not have been prosecuted in the first place. They argue that the Department failed to follow guidelines set out in the "Enforcement Response Policy" (ERP) jointly formulated by the Department and the Environmental Protection Agency pursuant to Congressional mandate. According to Respondents, the ERP requires issuance of a "Notice of Noncompliance" for first-time offenders who have not committed egregious violations. The Department disagrees and argues that prosecution of Respondents complies with the ERP. Both parties have missed the mark. Page 2 of the ERP (RX. 41) contains the following caveat:

> The policies and procedures set forth herein are intended solely for the guidance of employees of the EPA. They are not intended to, nor do they constitute a rulemaking by the EPA. They may not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person.

Inasmuch as the ERP has not been promulgated as a rule by the Department either, the quoted caveat applies with equal force here. Neither party may rely upon the ERP for any purpose in this forum. Moreover, the decision to prosecute a case is a matter that falls entirely within the discretion of responsible program officials. It is not a matter subject to review in a hearing before an administrative law judge.

Equally misplaced is the Department's reliance upon the ERP to justify the penalty proposed for this case. Not only is the ERP without legal effect in this forum, the

Department's proposal is bereft of a factual foundation because it is predicated on facts radically different from the findings of facts in this decision. The Department's proposed penalty of $619,100 therefore has no merit.

The civil money penalty imposed in this case takes into consideration the considerable expense Respondents have already incurred removing lead-based paint from their buildings, as well as Respondents' plans to remove all lead-based paint inside apartments and in common areas at The Chastleton at an estimated cost of $50,000 to $63,000.

Conclusions Regarding the Appropriate Penalty

For the reasons discussed above, Respondents will be ordered to pay a civil money penalty of $34,800, consisting of $500 for each of six violations of 24 C.F.R. §§35.88(a)(2) and (a)(4), and $50 for each of 636 instances in which Respondents failed to secure from tenants, before they became obligated on their leases, a properly completed and certified disclosure form containing the elements required by 24 C.F.R. §§35.92(b)(1), (b)(2), (b)(3), (b)(4), and (b)(6).

ORDER

It is hereby **ORDERED** that:

1. Counts 1 and 8 of the First Amended Complaint are dismissed;

2. Count 2 of the First Amended Complaint is dismissed except as to the tenant in unit 627 at The Chastleton;

3. Count 3 of the First Amended Complaint is dismissed except as to the tenant in unit 627 at The Chastleton and as to the tenant in unit A615 at Capitol Park Twin Towers;

4. Counts 4, 5, 6, 7, and 9 of the First Amended Complaint are sustained;

5. Within 10 days of the date on which this Initial Decision becomes final, Respondents shall pay $34,800 to the Secretary of the U.S. Department of Housing and Urban Development;

6. This Initial Decision shall become final within 30 days of issuance unless appealed to the Secretary within that time pursuant to 24 C.F.R. §26.50.

Done this 26th day of May, 2000.

_____
THOMAS C. HEINZ
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this **INITIAL DECISION** issued by THOMAS C. HEINZ, Administrative Law Judge, in HUDALJ 99-01-CMP, were sent to the following parties on this 26th day of May, 2000, in the manner indicated:

_____
Chief Docket Clerk

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