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

In the Matter of DENNIS I. ACKERMAN Respondent	HUDALJ 87-1201-DB

Thomas G. Shapiro, Esquire
Richard L. Nahigian, Esquire
For the Respondent

William L. Johncox, Esquire
For the Department

Before: ALAN W. HEIFETZ
Administrative Law Judge

INITIAL DETERMINATION

Statement of the Case

This proceeding arose as a result of a proposal by the Department of Housing and Urban Development ("the Department" or "HUD") to debar Dennis I. Ackerman ("Respondent") from further participation in HUD programs for a period of three years from the date of Respondent's suspension, August 24, 1987. The Department's actions are based upon Respondent's conviction in the United States District Court for the District of Columbia for accepting an illegal gratuity in violation of 18 U.S.C. § 201(g) (1982). [1] (HUD Brief, Ex. 3). The Department duly notified Respondent of the proposed debarment, and Respondent filed a request for hearing, which was limited to submission of documentary evidence and briefs, pursuant to 24 C.F.R. § 24.5(c)(2) (1987).

Upon the record submitted, I make the following findings and conclusions:

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1. The conviction was based upon a superseding Information, and the Judgment dismissed the previous indictment. (HUD Brief, Ex. 4). The Department based its decision to suspend Respondent on the Indictment (HUD Brief, Ex. 1).

Findings of Fact

In May 1982, Respondent was the Executive Director of the Taunton Massachusetts Redevelopment Authority (TMRA) and was involved with the administration of HUD Urban Development Action Grants ("UDAG"). (HUD Brief, Ex. 5). As the Information charged, on or about May 10, 1982, otherwise than as provided for by law for the proper discharge of his official duties, he directly and indirectly asked, accepted and received money for and because of an official act performed and to be performed by him in his position as Executive Director of the TMRA. (HUD Brief, Ex. 5). [2]

On June 8, 1987, the United States Attorney in Washington, D.C., filed an Information against Respondent, that charged that Respondent's actions, as described above, violated 18 U.S.C. § 201(g) (1982), which prohibits public officials from accepting anything of value for or because of official work. (HUD Brief, Ex. 3). After Respondent pleaded guilty to this charge, a United States District Judge suspended Respondent's sentence, placed him on a three-year probation, fined him $1,000, ordered him to perform 200 hours of community service, required him to pay a Special Assessment of $50.00 and dismissed the previous indictment. (HUD Brief, Ex. 4).

Discussion

As authority for the proposed debarment, the Department relies upon 24 C.F.R. § 24.6(a)(1), (4), (5) and (9) (1987). Respondent does not deny that he is a contractor or grantee within the meaning of the regulation; however, Respondent argues that 24 C.F.R. § 24.6(a)(1) (1987) [3] is inapplicable to this debarment because he "neither attempted to obtain a contract for his own benefit, nor was involved in the performance of any such contract." (Respondent's Brief at 2). Clearly, subsection

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2. In his brief, Respondent states that he permitted "his daughter to accept a Bat Mitzvah gift from a family friend who personally traveled from Maryland to Massachusetts with his wife and daughter to attend the Bat Mitzvah." (Respondent's Brief at 3). Because this assertion is unsubstantiated, either by affidavit or other credible evidence, it cannot be sustained as a finding of fact.

3. Subsection (a)(1) provides in pertinent part: "[T]he Department may debar a contractor or grantee in the public interest for . . . [c]onviction for commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract, or subcontract thereunder, or in the performance of such contract or subcontract." 24 C.F.R. § 24.6(a)(1) (1987).

(a)(1) requires that the conviction be in connection with the procurement or performance of a contract or subcontract. Because the record contains no evidence of such a contract or subcontract, this subsection cannot form the basis for this debarment.

Respondent argues that subsection (a)(4) [4] cannot form the basis for his debarment because the offense for which he was convicted "is one of the more minor offenses within Section 201 and, moreover, does not require a specific criminal intent." (Respondent's Brief at 2). Respondent argues, in essence, that since a violation of the illegal gratuity statute can be proven regardless of whether he intended to commit a criminal act, United States v. Evans, 572 F.2d 455, 480-81 (5th Cir. 1978), his conviction under this statute does not affect his responsibility within the meaning of the regulation. This argument blurs the distinction between "responsibility" and "criminality." 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). Criminality reflects societal condemnation of particular acts. Acts calling into question a contractor's integrity, honesty or ability to perform need not rise to the level of criminality to trigger debarment because debarment is not penal; it is relevant only to the maintenance of a responsible business relationship with the government. See, Cooper Plumbing & Heating Co. v. Campbell, 290 F.2d 368 (D.C. Cir. 1961). Therefore, even though Respondent's conviction may not demonstrate that he acted with criminal intent, his actions may be cause for debarment.

Respondent's conduct is, in fact, cause for debarment under 24 C.F.R. § 24.6(a)(4) (1987). The debarment regulations implement the Department's policy of protecting the public interest by insuring that "grants and contracts awarded by the Department and by those entities with whom it does business be made only to those contractors and grantees which can demonstrate that Government funds will be properly utilized." 24 C.F.R. § 24.0 (1987). Respondent pleaded guilty to illegally asking, accepting and receiving money because of an official act he performed or might have performed. By criminalizing this activity, Congress sought to deter conduct which inherently places a government official in a position "to provide conscious or unconscious preferential treatment [to] the donor . . ., or

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4. This subsection provides in pertinent part: "[T]he Department may debar a contractor or grantee in the public interest for . . . [a]ny other cause of such serious compelling nature, affecting responsibility, as may be determined by the appropriate Assistant Secretary, to warrant debarment." 24 C.F.R. § 24.6(a)(4) (1987).

the inefficient management of public affairs." Evans, 572 F.2d at 480. By accepting this gratuity, Respondent compromised his position as Executive Director of the TMRA by giving the appearance of impropriety by placing himself in the position of consciously or unconsciously facilitating the distribution of UDAG funds in question to an individual based on the receipt of a gratuity rather than on the merits of any proposal. Therefore, Respondent's conduct is of such seriously compelling nature to warrant debarment.

Respondent also argues that subsection (a)(5) [5] is inapplicable because there "has been no suggestion that there was anything improper done with respect to any of the matters specified in [this subsection]." (Respondent's Brief at 2). Although Respondent was convicted of accepting an illegal gratuity for and because of an official act, the record contains no evidence that that official act was related "to the performance of obligations incurred pursuant to a grant of financial assistance." Therefore, Respondent's conviction, standing alone, is insufficient cause for debarment under 24 C.F.R. § 24.6(a)(5) (1987).

As he did with regard to subsection (a)(4), Respondent argues that subsection (a)(9) [6] cannot form the basis for his debarment because there is no evidence of criminal intent. (Respondent's Brief at 2). However, as previously noted, the illegal gratuity statute is designed to prevent conscious or unconscious preferential treatment in the administration of government funds and, therefore, does not require proof of criminal intent. Similarly, the debarment regulations do not require a showing of criminal intent to prove lack of present responsibility. And, although the test for debarment is present responsibility, a finding of a present lack of responsibility can be based upon past acts. See Roemer, Supra. Respondent's conviction for receiving an illegal gratuity necessarily calls

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5. Subsection (a)(5) provides in pertinent part that: "[T]he Department may debar a contractor or grantee in the public interest for any . . . [v]iolation of any law . . . relating . . . to the performance of obligations incurred pursuant to a grant of financial assistance . . . ." 24 C.F.R. § 24.6(a)(5) (1987).

6. Subsection (a)(9) provides in pertinent part: "[T]he Department may debar a contractor or grantee in the public interest for any . . . conviction for any other offense indicating a lack of business integrity or honesty, which seriously and directly affects the question of present responsibility." 24 C.F.R. § 24.6(a)(9) (1987).

into question his present responsibility, indicates a lack of business integrity and honesty, and substantially increases the Department's risk in any future dealings with him. Therefore, Respondent's conviction for accepting an unlawful gratuity is cause for debarment under 24 C.F.R. § 24.6(a)(9) (1987).

HUD regulations require that all mitigating factors be considered in the decision whether to debar a contractor or grantee. 24 C.F.R. § 24.6(b)(1) (1987). Respondent avers that the conviction was for permitting his daughter to accept a Bat Mitzvah gift. (Respondent's Brief at 3). However, not only is this allegation unsubstantiated, there also is no evidence concerning the size of the purported gift, nor of the nature, extent or duration of the relationship Respondent had to the donor. In the absence of such evidence, one cannot infer that there were mitigating circumstances surrounding the receipt of the illegal gratuity.

Respondent also argues in mitigation that the underlying transaction took place over five years ago and since then, he has had an unblemished record. In support, he offers numerous character references, including a letter from the Mayor of Taunton, Massachusetts, attesting to his character, family dedication and professionalism in conducting municipal activities, and a letter from his rabbi attesting to his integrity and his devotion to his family, his congregation and his community. (Attachments to Respondent's Brief).

A three-year period is normally proposed when debarment is based upon a contractor's conviction. However, Respondent's record and reputation in the five years since the incident and the fact that the sentencing judge did not impose the maximum penalty on Respondent, [7] mitigate the Department's risk in dealing with Respondent in the future. Nevertheless, the Department must be assured that Respondent and other public officials will conform their conduct to the standard of responsibility to which the debarment regulations speak. Therefore, I conclude that a one-year period of debarment is appropriate and necessary to insure that the seriousness with which the Department views Respondent's conduct will not be misconstrued and that the public trust and fisc will not be subjected to risk in the future.

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7. The maximum penalty for a violation of section 201(g) is two years imprisonment and a $10,000 fine. 18 U.S.C. § 201(i) (1982). The sentencing judge fined Respondent $1,000, ordered him to perform 200 hours of community service and placed him on three years probation.

Conclusion and Order

Upon consideration of the public interest and the entire record in this matter, I conclude and determine that good cause exists to debar Dennis I. Ackerman from doing business with HUD for a period of one year from August 24, 1987, the date of Mr. Ackerman's suspension.

Alan W. Heifetz
Chief Administrative Law Judge

Dated: February 26, 1988