

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

In the Matter of: JOHN H. SIKKING, Respondent

HUDALJ 91-1616-DB

Decided: April 25, 1991

John H. Sikking, *pro se*

John J. Cahill, Esquire
For the Department

Before: ALAN W. HEIFETZ
Chief Administrative Law Judge

INITIAL DETERMINATION

Statement of the Case

This proceeding arose as the result of an October 26, 1989 suspension, effective immediately and pending resolution of any debarment, issued pursuant to 24 C.F.R. section 24.405(b), by the U.S. Department of Housing and Urban Development ("the Department" or "HUD") against John H. Sikking ("Respondent Sikking") and his named affiliate Spartan Realty ("Respondent Spartan") prohibiting participation in nonprocurement activities throughout the executive branch of the federal government and in procurement activities with HUD. The suspension was based on an indictment against Respondent Sikking charging violation of 18 U.S.C. sections 371, 1001 and 1002. Based on an ensuing conviction for violation of 18 U.S.C. sections 1001 and 1002, HUD proposed by letter dated December 11, 1989, to debar Respondents for a period of three years starting from the date of the suspension, and to continue the suspension pending final determination of the issues in this matter, pursuant to 24 C.F.R. sections 24.305(a)(1), (3), and (d).

Respondent Sikking requested a hearing on the proposed debarment by a letter dated December 17, 1990, to the HUD Office of Program Enforcement. Because the proposed action is based upon a conviction, the hearing in this case is limited under 24 C.F.R. section 24.313(b)(2)(ii) to submission of documentary evidence and written briefs. Respondent Sikking by letter dated February 15, 1991, stated that he did not intend to file a brief, but rather that the December 17th letter, which offered mitigating factors, be considered as a response to the debarment action. The Department filed its brief on

February 25, 1991, to which Respondent Sikking replied by correspondence received by this tribunal on March 6, 1991. The Department, in turn, answered Respondent Sikking's letter on March 28, 1991. Having received no further submissions by the parties, this matter is ripe for decision.

Findings of Fact

1. At the time the events occurred which are the subject of Respondent Sikking's guilty plea and conviction, he was a real estate broker licensed in New Jersey. He also was the owner of Spartan Realty. See Exhibits A and B attached to the Government's Brief in Support of Debarment (Feb. 25, 1991) ("Department Brief").

2. On August 2, 1988, Respondent Sikking was indicted by the grand jury in the United States District Court for the District of New Jersey for nine counts of criminal violation of 18 U.S.C. sections 371, 1001 and 1002. See Department Brief, Exhibit B.

3. On February 16, 1990, Respondent Sikking was convicted of making and using false statements to defraud the government in violation of 18 U.S.C. sections 1001 and 1002. More specifically, Respondent Sikking falsified a contract of sale "to make it appear that [prospective homebuyers] were financially qualified for a HUD-insured mortgage by listing a deposit by them . . . [for] the purchase of property . . . when [Respondent] well knew that the statement and entry relied upon for the granting of said mortgage loan was [sic] false and fraudulent." Department Brief, Exhibit B at 9. See *also id.*, Exhibit A.¹

4. Based primarily on the conviction, the New Jersey Real Estate Commission ("the Commission") on October 29, 1990, revoked Respondent Sikking's broker's license for a period of three years, retroactive to July 17, 1990, thus prohibiting him from applying for a broker's license until July 17, 1993. The Commission's order, however, permitted him to apply for a salesperson's license after January 17, 1991. See Attachment to Sikking Response.

5. As of January 24, 1991, Respondent Sikking has been licensed as a real estate salesperson with Respondent Spartan, under the direction of Mary L. Sikking, broker of record at the company. See Letter from Respondent Sikking to Chief Administrative Law Judge (Feb. 27, 1991) ("Sikking Letter").

¹ Respondent Sikking does not dispute the fact of his conviction. See Letter from Respondent Sikking to Debarment Docket Clerk (Dec. 17, 1990) at 1 ("Sikking Response").

Discussion

1. Respondent's Conviction Constitutes Cause for Debarment

Respondent Sikking as a real estate salesperson and broker engaged in HUD-insured mortgage transactions is considered a "participant" and "principal" in "covered transactions" 24 C.F.R. sections 24.105 (m) and (p), 24.110(a)(1). Respondent Sikking formerly possessed a broker's license with and owned Respondent Spartan, and is currently a salesperson at the firm; thus he was and is in a position to exercise some "control" over the company.² Accordingly, Respondents were and are affiliates of each other, 24 C.F.R. section 24.105(b), and are subject to HUD's debarment regulations, 24 C.F.R. section 24.110. Pursuant to 24 C.F.R. section 24.305 (a)(1) and (3), HUD may institute debarment proceedings based on a conviction for (1) "fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction" or (2) "embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, or obstruction of justice." In addition, debarment may be based on "[a]ny other cause of so serious or compelling a nature that it affects the present responsibility of a person." 24 C.F.R. section 24.305(d). The Department finds its debarment on these preceding grounds.

Section 24.313(b)(3) of 24 C.F.R. provides that cause for debarment must be established by a preponderance of the evidence, a standard deemed met by proof of a conviction. Further, while the Department has the burden of establishing the cause for debarment, Respondents have the burden of establishing any mitigating circumstances. 24 C.F.R. section 24.313(b)(4). As Respondent Sikking was convicted of making a false statement resulting in homebuyers obtaining a HUD-insured mortgage, the Department has satisfied its burden that cause for debarment exists. See 24 C.F.R. section 24.313(b)(3). The inquiry, however does not end here.

The existence of a cause for debarment does not necessarily require that a respondent be debarred. HUD must also determine whether debarment is necessary to protect the public interest. See 24 C.F.R. sections 24.115(a), (b) and (d). The debarment process is not intended as a punishment, rather, it protects governmental interests not safeguarded by other laws. *Joseph Constr. Co. v. Veterans Admin.*, 595 F. Supp. 448, 452 (N.D. Ill. 1984). These governmental and public interests are safeguarded by precluding persons who are not "responsible" from conducting business

² Respondent Sikking's relationship with Mary L. Sikking is not a matter of record.

with the federal government. See 24 C.F.R. section 24.115(a). See also *Agan v. Pierce*, 576 F. Supp. 257 (N.D. Ga. 1983); *Stanko Packing Co., Inc. v. Bergland*, 489 F. Supp. 947, 948-49 (D.D.C. 1980).

"Responsibility" is a term of art which encompasses business integrity and honesty. See 24 C.F.R. section 24.305. See, e.g., *Gonzalez v. Freeman*, 334 F.2d 570, 573 & n.4, 576-77 (D.C.Cir. 1964). Determining "responsibility" requires an assessment of the current risk that the government will be injured in the future by doing business with a respondent. See *Shane Meat Co., Inc. v. U.S. Dep't of Defense*, 800 F.2d 334, 338 (3d Cir. 1986). That assessment may be based on past acts, including a previous criminal conviction. See *Agan v. Pierce*, 576 F. Supp. at 261; *Delta Rocky Mountain Petroleum*,

Inc. v. U.S. Dep't of Defense, 726 F. Supp. 278 (D.Colo. 1989). Moreover, a debarment based on past acts is not necessarily invalid despite existing evidence that tends to indicate a present ability to perform one's contract with the government.³ See *Joseph Constr.*, 595 F. Supp. 448.

The Department in its brief considers the issue of present responsibility. The Department notes that Respondent Sikking's conviction relates to his participation in HUD's single family mortgage insurance program, a program whereby HUD provides mortgage insurance to commercial lenders to finance housing and construction. To obtain a HUD-insured mortgage, a prospective homeowner must make a minimum investment and have an adequate gross income. 24 C.F.R. sections 203.19, 203.33 and 203.34. Upon default by the mortgagor, HUD accepts either an assignment of the mortgage or a conveyance of the property. 24 C.F.R. sections 203.350 and 203.355. Thus, the financial ability of the mortgagor and evidence of an initial investment directly impact HUD's risk.

Respondent Sikking committed fraud in an attempt to obtain a HUD-insured mortgage for homebuyers who, not having made an initial investment, would not have otherwise been eligible. He purposely falsified a contract of sale in perpetration of his offense and knowingly and willfully misled those involved into believing that the mortgagors had made the appropriate investment and that they were financially competent. Consequently, his activities directly affected HUD's risk in the single family mortgage insurance program. Moreover, the fact that his actions would have necessarily resulted in receipt of a brokerage fee and benefited him to the detriment of the government demonstrates a lack of integrity and honesty. Finally, he fails to offer evidence to contradict a finding of present irresponsibility. See *infra* p. 5-6.

³ The United States Court of Appeals for the District of Columbia Circuit, stated in *dictum* that a "finding of present responsibility for performance of a particular contract does not preclude a contemporaneous finding that a contractor should be debarred." *Peter Kiewit Sons' Co. v. U.S. Army Corps of Eng'rs*, 714 F.2d 163, 167 n.18 (D.C.Cir. 1983). Further, the Third Circuit Court of Appeals upheld a debarment based on a prior conviction despite subsequent satisfactory contract performance. The court found that although the debarring official considered the satisfactory performance, he also noted that the company had not demonstrated any operational changes to preclude the recurrence of similar future criminal activity. *Shane Meat*, 800 F.2d at 338.

As the evidence supports a finding of a lack of present responsibility, debarment of Respondent Sikking is an appropriate remedy. Consequently, Respondent Spartan as an affiliate also is subject to debarment.⁴ Because the conviction and its underlying facts justify debarment under 24 C.F.R. sections 24.305(a)(1) and (3), there is no need to address the Department's other proposed ground, i.e., "[a]ny other cause . . . that affects the present responsibility." 24 C.F.R. section 24.305(d).

2. A Three-Year Period of Debarment is Appropriate

The seriousness of Respondent's actions, and any mitigating factors must be considered in any debarment determination. 24 C.F.R. sections 24.115(d), 24.300 and 24.320(a). Upon examination of these criteria, I find that a three-year period is appropriate. The seriousness of Respondent's actions indicating a lack of present responsibility justifies debarment and supports imposition of a three-year debarment period. See *supra* p. 4. After contemplating the mitigating factors offered in Respondent's letter of December 17, 1990, I am not persuaded to the contrary.

Respondent asserts that his crime occurred in 1983 and that "he has not been found to have engaged in any other criminal conduct" since then. He insists that he has "self-policed himself and in all ways conformed to the standards necessary to protect the public from further injury." Sikking Response at 1. Thus, he argues, he does not pose a threat to the public interest and debarment would be a punishment. See *id.* Also, he "disputes" the fact of his affiliation with Respondent Spartan in his December 17th response. He explains therein that he is no longer licensed to sell real estate in New Jersey pursuant to the Commission's order, thus he could not possibly be associated with the firm. See *id.* and attached letter.

The Department counters that the period of time between the commission of the crime and the debarment is irrelevant, maintaining that it does not otherwise preclude a finding of present irresponsibility. Also, the Department contends that this forum is unable to verify whether Respondent has actually "self-policed himself." Finally, the Department notes the failure to show any implementation of measures intended to prevent the recurrence of wrongful acts. See Department Brief at 6.

⁴ Even though Respondent Sikking was disassociated with the company for a period of time, see Sikking Response and attached notarized letter of Mary L. Sikking, by his own admission he currently is associated with the firm as a salesperson, see Sikking Letter. Thus, they are once again affiliates. While Mary L. Sikking's letter notes that Respondent Sikking was no longer "associated" with Spartan Realty "in accord with the real estate licensing laws of the State of New Jersey," information concerning whether at the time he maintained any interests in the company, financial or otherwise, is conspicuously missing from the correspondence.

As concerns Respondent Sikking's affiliation with Spartan Realty, the Department submitted an affidavit demonstrating a present relationship between both Respondents. See Affidavit of John J. Cahill (Feb. 25, 1991) attached to Department Brief. After submission of this affidavit, Respondent Sikking notified this tribunal that he is now again affiliated with Respondent Spartan as permitted by the Commission order, attached to his earlier December 17th response. The order allowed him to apply for a sale's license after January 17, 1991. He did so and is currently a salesperson for Spartan Realty, working under the direction of Mary L. Sikking, the company's broker of record. He further states that his current affiliation does not "alter the truthfulness of [his] December 17, 1990 [response]," i.e., he never concealed the fact that he was able to reapply for a sales license in January of this year. Sikking Letter at 1.

Where debarment is based on a conviction, the regulations provide that the period of debarment "generally should not exceed three years" 24 C.F.R. section 24.320(a)(1).⁵ Respondent would have this tribunal reduce the suspension and revoke the debarment based on the fact that his crime occurred approximately seven years ago. However, the fact that he committed an offense some years ago does not necessarily preclude a finding of present irresponsibility. Cf. *Shane Meat Co.*, 800 F.2d 334 (The court upheld a debarment based on offenses over five years old). The test of responsibility does not hinge on the passage of time, but rather whether there are indications of a respondent's integrity and honesty such that the government will not face a risk if it does business with respondent in the future. See generally *Delta Rocky Mountain*, 726 F. Supp. 278. On this score, the discussion pertaining to Respondent's lack of responsibility need not be repeated. Further, the Department is correct that it is impossible to conclude affirmatively that Respondent has successfully "self-policed himself." In fact, Respondent's conduct evinces that he has not "in all ways conformed to the standards necessary to protect the public."

While I stop just short of labeling Respondent's failure to disclose his current relationship with Spartan Realty as "blatantly dishonest," at a minimum, it reflects on his integrity and lack of present responsibility. Respondent Sikking failed to disclose a material fact. There is a difference between being able to apply for a license (which was never concealed) and actually applying for one, an affirmative act that Respondent should have voluntarily disclosed considering the posture of this proceeding. As he initially informed this tribunal that he was not associated with Respondent Spartan, he had a duty

⁵ The regulations also provide that "[i]f a suspension precedes a debarment, the suspension period shall be considered in determining the debarment period." 24 C.F.R. section 24.320(a). The Department's proposed debarment period runs from imposition of the suspension, and therefore, complies with the regulation.

to correct the record concerning this matter.⁶ His failure to do so is further evidence of present irresponsibility.

Finally, as the Department indicates, the record is barren concerning whether remedial measures exist to prevent a recurrence of Respondent's offenses. This absence of remedial measures also exhibits a present irresponsibility. See *supra* note 3. Considering the recent affiliation of Respondents Sikking and Spartan, the scarcity of such measures is a significant deficiency.

Conclusion and Determination

Debarment of Respondents Sikking and Spartan is appropriate based on Respondent Sikking's conviction and the seriousness of his actions. There are no mitigating factors demonstrating otherwise. His failure to correct the record concerning his affiliation with Respondent Spartan is further evidence of his lack of present responsibility. Upon consideration of the public interest and the entire record in this matter, I conclude that good cause exists to debar Respondents Sikking and Spartan from further participation in primary covered transactions and lower tier covered transactions (see 24 C.F.R. section 24.110(a)(1)), as either participants or principals at HUD and throughout the executive branch of the federal government, and from participating in procurement contracts with HUD for a period of three years from October 26, 1989.

ALAN W. HEIFETZ
Chief Administrative Law Judge

Dated: April 25, 1991

⁶ It is hard to believe that at the time that he filed his response, i.e., one month prior to applying for his license, he did not know that he would be taking such action. And as such, he should have notified all parties of his intentions forthrightly in his December response.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION ORDER issued by ALAN W. HEIFETZ, Chief Administrative Law Judge, HUDALJ 91-1616-DB, were sent to the following parties on this 25th day of April, 1991, in the manner indicated:

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