UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF HEARINGS AND APPEALS

In the Matter of: **FRED CONLEY** Respondent	HUDOHA No. 15-AM-0046-DB-003 HUDOGC No. 14-0053-DB March 23, 2016

Appearances:

For Respondent:
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For the Government:
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FINDINGS OF FACT AND RECOMMENDED DECISION

BEFORE: H. Alexander MANUEL, Administrative Judge

Statement of Jurisdiction

On February 24, 2015, the Debarring Official of the U.S. Department of Housing and Urban Development ("HUD" or the "Government") referred this debarment proceeding to the Office of Hearings and Appeals for fact-finding in accordance with 2 C.F.R. § 180.845(c). The Referral Order was duly docketed and set for hearing in accordance with 2 C.F.R. § 180.840. A one-day hearing in this matter was held on June 18, 2015.

The administrative judges of this Office are authorized to serve as hearing officers for the purpose of issuing findings of fact for consideration by the Debarring Official. 2 C.F.R. § 2424.842. These findings of fact are issued after consideration of the entire administrative record, including the pleadings, exhibits, sworn testimony, and arguments of counsel.

Procedural History

On July 24, 2014, Respondent Fred Conley ("Respondent") received a Notice of Proposed Debarment ("Notice") accusing him of failure to disclose apparent conflicts of interest to HUD and to the Omaha Housing Authority ("OHA"), where he served as a Commissioner. Specifically, HUD alleged that Respondent did not inform HUD or OHA of Respondent's status as a director of the Collateral Guarantee Fund, Inc. ("CGFI"). He also did not inform either HUD or OHA that he occupied office space in a building owned by the Davis Companies. HUD asserts that Respondent's association with CGFI and the Davis Companies is inappropriate because CGFI has a contractual relationship with OHA, and one of the Davis Companies is Davis Insurance Agency ("Davis Insurance"), which is OHA's insurance broker. Respondent's connections to with both companies are therefore alleged to constitute "an impermissible conflict of interest" in violation of Section 19(A)(2) of the HUD/OHA Annual Contributions Contract ("ACC") and various sections of the Nebraska Housing Act. The Notice seeks to debar Respondent from participation in all procurement and non-procurement transactions with the federal government for a period of ten years.

On August 12, 2014, Respondent filed a timely request for a hearing to contest the proposed debarment. HUD referred the matter to this Office for findings of fact on February 24, 2015. Respondent maintains that the facts do not support his debarment. Specifically, he asserts that he was not aware of the lease between CGFI and the OHA, and that OHA and HUD were aware of Respondent's links to the Davis Companies. As a result, Respondent contends that neither of the two alleged conflicts of interest actually existed and, if they did exist, were properly disclosed.

This Court issued a *Notice of Hearing and Order* on March 12, 2015 and a hearing was held on June 18, 2015, pursuant to 24 C.F.R. Part 26, Subpart A. The Government filed its *Post-Hearing Brief* on August 10, 2015. Respondent filed his *Post-Hearing Brief* on August 17, 2015. The case is now ripe for initial fact-finding.

Applicable Law

A. HUD Debarment Regulations

Pursuant to 2 C.F.R. §§ 180.800(b) and (d), HUD may debar a respondent for:

> (b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program such as —
>
> > (1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;
> >
> > (2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or
> >
> > (3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction;

(d) Any other cause of so serious or compelling a nature that it affects [Respondent's] present responsibility.

The burden rests with HUD to establish the cause for debarment by a preponderance of the evidence. 2 C.F.R. § 180.855(a). If met, the burden then shifts to the respondent to demonstrate to the Debarring Official that the respondent is presently responsible and that debarment is not necessary. 2 C.F.R. § 180.855(b). Even if a cause for debarment does exist, the Debarring Official is not obligated to impose the requested sanction. Instead, the Debarring Official may consider the seriousness of the respondent's acts or omissions and may take into account any of the aggravating or mitigating factors set forth in 2 C.F.R. § 180.860.

The federal government only conducts business with responsible persons. 2 C.F.R. § 180.125(a). Compliance with this provision serves to protect the public interest by ensuring the integrity of federal programs. The term "presently responsible," as used in the context of administrative sanctions such as the one in this case, is a term of art that encompasses not only the ability to perform a contract satisfactorily, but the honesty and integrity of the participant as well. William D. Muir and Metro Cmty. Dev. Corp., 00-2 BCA ¶ 31.140, HUDBCA No. 97-A-121-D15 (Nov. 6, 1997) (citing 48 Comp. Gen. 769 (1969)). "Present responsibility" is a term of art that applies to a respondent's conduct with respect to "covered transactions," involving HUD programs. See, e.g., 2 C.F.R. § 180.200(a)-(b); 2 C.F.R. § 180.985. Determining "present responsibility" requires assessing the risk that the government will be injured in the future by doing business with a respondent. Benjamin J. Roscoe and Geraldine M. Roscoe, HUDALJ 93-2007-DB (June 26, 1995). Debarment is a serious sanction that should only be utilized for the purposes of protecting the public interest and may not be used as punishment. 2 C.F.R. § 180.125(c). Although the test for determining whether a proposed sanction is warranted is "present responsibility," that determination may be inferred from past acts. Schlesinger v. Gates, 249 F.2d 111 (D.C. Cir. 1957); Ŝtanko Packing Co. v. Bergland, 489 F. Supp. 947, 949 (D.D.C. 1980).

B. HUD Conflict of Interest Regulations

Title 24 of the Code of Federal Regulations states at Section 982.161 that:

> (a) Neither the [Public Housing Authority] nor any of its contractors or subcontractors may enter into any contract or arrangement in connection with the tenant-based programs in which any of the following classes of persons has an interest, direct or indirect, during tenure or for one year thereafter:
>
> (1) Any present or former member or officer of the PHA (except a participant commissioner);
>
> (2) Any employee of the PHA, or any contractor, subcontractor, or agent of the PHA, who formulates or who influences decisions with respect to the programs;

(3) Any public official, member of a governing body, or State or local legislature, who exercises functions or responsibilities with respect to the programs, or;

(4) Any member of the Congress of the United States.

(b) Any member of the classes described in paragraph (a) of this subsection must disclose their interest or prospective interest to the PHA and HUD.

(c) The conflict of interest prohibition under this section may be waived by the HUD field office for good cause.

C. Applicable Nebraska Law

The Nebraska Housing Agency Act ("NHAA") prohibits state housing officials from owning or holding an interest in any contract or property or engaging in any business, transaction, or professional or personal activity that would be or appear to be in conflict with the official's duties. Neb. Rev. Stat. § 71-1572, et seq. Further, the NHAA provides that if an official becomes involved in such activity, he or she must immediately disclose the conflict to the relevant housing authority's board of commissioners. Specifically, the NHAA states that:

> If (1) a housing official becomes involved in any activity, or through inheritance or other involuntary cause or circumstance, acquires an interest that violates any provision of Section 71-15,149 to 71-15,157, such housing agency or local government official shall immediately and fully disclose in writing to the housing agency's board of commissioners the circumstances that give rise to the conflict of interest. Neb. Rev. Stat. § 71-15,151.

Findings of Fact

Background

1. OHA is the public housing authority for the City of Omaha, Nebraska, and is authorized to enter into, execute, and perform contracts. Gov. Ex. 1.

2. In 1996, the OHA, through its Board, entered into an Annual Contributions Contract with HUD, under which HUD provides annual funding to the OHA. Gov. Ex. 2.

3. The ACC requires OHA officers and policymakers to disclose any current or prospective conflicts of interest to both the OHA and HUD. The interests may be direct or indirect. Gov. Ex. 2, Section 19.

4. The ACC does not define the term "interest."

5. The NHAA also requires OHA officials to disclose any current or potential conflicts of interest to its Board of Commissioners ("Board"). Neb. Rev. Stat. § 71-15,151.

6. OHA's Procurement Policy prohibits its employees, officers, or agents from participating in the selection or award of a contract when real or apparent conflicts of interest exist. Gov. Ex. 1.

7. Respondent served as a Commissioner on OHA's Board from 2009-2013. Tr. 93:9.

8. Sometime in 2010, Respondent was named Chair of OHA's Procurement Committee. Tr. 210:11-15.

9. On March 24, 2011, Respondent was elected Chairman of the Board by a vote of 5-1. He remained Chairman until his tenure with the Board ended in 2013. Tr. 144:16-18.

10. Respondent, who holds a law degree from Creighton University, was familiar with the conflict of interest rules in the ACC, the NHAA, and the Procurement Policy. Tr. 88:21-22; 123:6-13; 178:15-179:3.

11. Prior to 2012, Respondent's only e-mail address was Fred.Conley@daviscompanies.com.[1] Tr. 118:4-7.

Respondent's Relationship with the Davis Companies

12. Respondent was employed by the Davis Companies as an insurance salesman between 1981 and 1985. Tr. 102:16-25.

13. The Davis Companies are owned by Mr. Dick C.E. Davis. Tr. 101:24-25.

14. Respondent and Mr. Davis are former high school classmates and remained friends at least through the date of the hearing. Tr. 152:4-5.

15. Respondent has maintained office space in buildings owned by the Davis Companies since approximately 2000. Tr. 190:9-19.

16. Sometime in 2004, Mr. Davis asked Respondent to join CGFI's Board of Directors. Tr. 105:15-22. Respondent received no financial compensation associated with this position.

17. CGFI is a non-profit 501(c)(3) corporation, incorporated in the state of Nebraska on May 30, 2002. Tr. 172:20-23.

18. CGFI has no employees or physical offices. Tr. 112:17-25.

[1] An April 2, 2010, e-mail from OHA employee Murphy Knight listed Respondent's e-mail address as fconley@daviscompanies.com. During the June 18, 2015, hearing, his e-mail address was also occasionally identified as FredConley@daviscompanies.com. Neither party has offered definitive evidence of Respondent's actual e-mail address at the time, though it is undisputed that the address used the "@daviscompanies.com" domain extension.

19. Respondent was a Director of CGFI from 2004 until its dissolution in 2011. Tr. 105:12-25.

20. Other members of the CGFI Board of Directors have included Lisa Laday-Davis and George Achola. Res. Ex. 8.

21. Mrs. Laday-Davis is Mr. Davis' daughter-in-law, and is also the Chief Executive Officer of Davis Insurance. Tr. 103:22-24. Mrs. Laday-Davis was a Director of CGFI in 2002 and was replaced by Mr. Achola. Res. Ex. 8. Mrs. Laday-Davis served as an Officer of CGFI from 2002 until the corporation's dissolution in 2011. Res. Ex. 8.

22. Mr. Achola is now OHA's legal counsel. He was a Director of CGFI from 2002-2004 and was replaced by Respondent. Res. Ex. 8.

23. Mr. Davis formed a 501(c)(3) corporation named the North Omaha Foundation for Human Development ("NOFHD") in 1980 and served on its Board of Directors as Chairman/President until January 1, 2012. Res. Ex. 9.

24. NOFHD is the current fiscal agent for the annual Omaha Blues, Jazz and Gospel Festival. Tr. 118:18-19.

25. Respondent replaced Mr. Davis as Board Chairman/President of NOFHD on January 1, 2012. Tr. 114:6-10.

26. Respondent also served as NOFHD's Project Manager for the jazz festival and was on its Program, Finance, and Legal/CPA Committees as of January 1, 2012. Tr. 115:5-24. Respondent was not compensated for his work with NOFHD. Tr. 116:19-21.

27. NOFHD leased office space from the Davis Insurance Agency. The lease included a cubicle, a desk, an e-mail address, and WiFi and landline telephone access. The lease did not include a cellular phone. Tr. 145:25.

28. Respondent used the leased space to conduct business on behalf of the jazz festival. Tr. 117:24-25.

<u>OHA's Interactions with CGFI</u>

29. On June 15, 2010, CGFI signed a lease with OHA to install 11 AM radio towers on the roofs of buildings owned by OHA. Jnt. Ex. 5.

30. The lease was signed by Mr. Davis on behalf of CGFI. Jnt. Ex. 5.

31. The lease agreement called for CGFI to pay OHA either $400 or $456 per month[2] per tower for two years, with four extensions of either two or five years. The value of the

[2] The ambiguity in rental payments and terms stems from typographical errors in the lease itself. The lease reads, "The rental fee shall be paid monthly in advance, and shall be Four Hundred ($456.00) per month/per tower...." Later, the lease agreement reads, "Lessee may have four (4) successive five (2) year options to extend the term of the Lease."

lease agreement using the lower of the two indicated rental rates was $105,600 over the two-year period.[3] Jnt. Ex. 5.

32. On October 14, 2010, then-OHA Procurement Manager Steve Schrader and then-OHA Procurement and Finance Director Timothy Bohling sent an e-mail to OHA Executive Director Stanley Timm and Mr. Achola expressing concerns about the lease agreement. Gov. Ex. 3. The e-mail noted that Respondent was on the Boards of both OHA and CGFI. It also stated that any contract in excess of $20,000 required approval by the OHA Board, and any contract in excess of $100,000 required approval from HUD and formal solicitation.

33. Respondent was not included as a recipient of the e-mail. No one who received the e-mail forwarded it to Respondent or spoke to him about it.

OHA's Interactions with the Davis Companies

34. Davis Insurance is an insurance broker that has worked with OHA since approximately 1985.

35. On March 2, 2010, OHA issued a Request for Proposals to provide worker's compensation insurance. Res. Ex. 11.

36. Davis Insurance submitted a worker's compensation insurance proposal on March 16, 2010. Res. Ex. 11. Davis Insurance's proposal was selected, and Davis Insurance eventually brokered the worker's compensation insurance policy between OHA and Liberty Mutual Insurance Co.

37. Davis Insurance submitted another worker's compensation insurance proposal on March 18, 2011, again in response to a Request for Proposals from OHA. Res. Ex. 24.

38. The Davis Insurance proposal was the only bid received. OHA's Human Relations Director opined that the proposal was competitive. Jnt. Ex. 3.

39. During an OHA Board meeting on March 24, 2011, the Board voted unanimously to accept the Davis Insurance proposal. Jnt. Ex. 3.

40. Respondent, having been named Board Chairman at that meeting, participated in the vote. Jnt. Ex. 3.

OHA's Knowledge of Respondent's Connections to the Davis Companies

41. On November 19, 2009, during an OHA Board meeting, Respondent and Mr. Achola engaged in a conversation regarding Mr. Achola's concern that Respondent's e-mail address constituted a potential conflict of interest. Tr. 96:5-18.

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[3] $400 per month per tower x 11 towers x 24 months = $105,600.

42. During the meeting, Respondent stated that he was aware of Nebraska's conflict of interest rules, and that his association with the Davis Companies did not represent a conflict. Jnt. Ex. 3.

43. Mr. Achola drafted a letter for Respondent to sign, seeking a legal opinion from the Nebraska Accountability and Disclosure Commission ("NADC") regarding Respondent's potential conflict of interest.

44. Mr. Achola presented the letter to Respondent during the November 19, 2009, meeting, but Respondent refused to sign it. Jnt. Ex. 3.

45. Then-Board Chairman William Begley also noted during the meeting that Respondent's e-mail addressed raised a "red flag" because it was associated with Davis Insurance. Jnt. Ex. 3.

46. Mr. Achola never independently requested a legal opinion from NADC regarding Respondent's possible conflict of interest.

47. Several days after the meeting, Respondent spoke with NADC Executive Director Frank Daley regarding Mr. Achola's conflict concerns. Tr. 162:14-21.

48. Mr. Daley could not recall whether he told Respondent that his connections with the Davis Companies constituted a conflict of interest. Res. Ex. 16.

49. Respondent did not officially inform anyone at OHA about his connections with the Davis Companies, including his use of office space in a Davis Companies building. Tr. 205:17-20.

50. OHA officials were aware in 2009 that Respondent used a @daviscompanies e-mail domain extension.

51. Mr. Achola was aware that Respondent served on the Board of CGFI prior to receiving Mr. Schrader and Mr. Bohling's e-mail. Mr. Timm was aware of Respondent's status at least as of October 14, 2010, the date he received the e-mail.

HUD's Knowledge of Respondent's Connections to the Davis Companies

52. In April 2012, HUD sent a six-person team to conduct a comprehensive, on-site review of OHA. Tr. 44:15-18.

53. Respondent's e-mails to the HUD team were sent from his @daviscompanies e-mail account. Tr. 46:6-12.

54. The HUD team discussed Respondent's e-mail address with him and noted that it could be a conflict of interest. Tr. 46: 19-23.

55. Sometime around August 2012, Respondent changed his e-mail address from Fred.Conley@daviscompanies.com to Fred.Conley@NOFHD.org.[4] Tr. 100:14-22.

56. Respondent did not officially inform HUD of his connections with the Davis Companies. Tr. 205:10-18.

57. At least one member of HUD's six-person team was aware, in 2012, that Respondent used a @daviscompanies e-mail domain extension.

DISCUSSION

This discussion provides findings of fact and conclusions of law necessary to determine the legal basis for the proposed debarment in this case.[5]

The Government argues that Respondents' failure to apprise OHA and HUD of his connections with the Davis Companies and CGFI violated the conflict of interest rules referred to in the ACC and the NHAA. To counter, Respondent contends that his relationship with the Davis Companies was already known to both agencies. Additionally, he insists that he could not have disclosed a conflict related to CGFI because he was unaware that OHA had contracted to lease roof space to CGFI. Respondent also disputes HUD's allegation that he received free office space or other benefits from the Davis Companies.

A. Respondent Violated State and HUD Regulations

The preponderance of the evidence demonstrates that Respondent's long relationship with the Davis Companies created a perceived, if not actual, conflict of interest. Respondent therefore had a duty to disclose the circumstances of that relationship to OHA and to HUD. He failed to do so in a complete and forthright manner, as contemplated by the applicable regulations.[6] Respondent did not, however, have a duty to disclose his relationship with CGFI. In reaching this determination, the Court has assessed the credibility of both the Government's witnesses and Respondent's own testimony, and has considered the totality of the record in this case, including the hearing exhibits, the testimony of the witnesses, the pleadings, and arguments by Counsel.

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[4] During the hearing, Respondent also identified the new e-mail address as Fred.Conley@NOFHD.com. It is not immediately clear which address is correct.

[5] Suspension and debarment cases typically involve the determination of mixed questions of law and fact. See Canales v. Paulson, 2007 WL 2071709 at 5 (D.D.C. 2007) (providing that debarring officials must ensure that debarment proceedings are "fair and accurate," and that debarment is warranted under the circumstances. The debarring official must consider "'mitigating factors' that are relevant"). See generally, Restatement (Third) of Torts § 8 (2012) ("[b]ecause this is a matter of the law's evaluation of the legal significance of the actor's conduct, such a question could be characterized as a question of law that should be decided by the court. More precisely, it can be characterized as a mixed question of law and fact").

[6] "If a housing official becomes involved in any activity, or through inheritance or other involuntary cause or circumstance, acquires an interest that violates any provision of Section 71-15,149 to 71-15,157, such housing agency or local government official shall immediately and fully disclose in writing to the housing agency's board of commissioners the circumstances that give rise to the conflict of interest. Neb. Rev. Stat. § 71-15,151. HUD's own conflict of interest regulation states that any covered individual "must disclose their interest or prospective interest to the [public housing authority] and HUD." 24 C.F.R. § 982.161(b).

Respondent's Alleged Conflict re: the Davis Companies

There is little question that Respondent had pervasive ties to Mr. Davis and the Davis Companies. Respondent is a long-time acquaintance of Mr. Davis, going back to their days as high school classmates. Respondent was employed by Davis Insurance for four years, selling property casualty insurance. He has maintained office space in Davis Companies' buildings for the better part of two decades, and openly used an e-mail featuring the @daviscompanies domain extension. He has served on the Boards of CGFI and NOFHD, both companies that were created by Mr. Davis. In fact, Respondent joined the CGFI Board at the express request of Mr. Davis, and served alongside Mr. Davis' daughter-in-law for much of his tenure there. When he wished to use CGFI as a fiscal agent for purposes of putting on the annual jazz festival, he turned to Mr. Davis. He also replaced Mr. Davis as Chairman/President of NOFHD, which he also used as a fiscal agent for the jazz festival. Finally, the cubicle rented for his use as an NOFHD volunteer is in a building owned by the Davis Companies. During much of this period, Davis Insurance was the insurance broker for OHA while Respondent sat on OHA's Board and on its Procurement Committee. Indeed, one of Respondent's first orders of business after his ascendance to Chairman of OHA's Board was the approval of the worker's compensation contract brokered by Davis Insurance. Respondent's substantial ties to the Davis Companies created legitimate concern for HUD because of Respondent's leadership position on the Board. As chairman of OHA's Board and its Procurement Committee, Respondent was well-positioned to influence OHA decisions for the benefit of Davis Insurance, potentially at the expense of OHA and its residents.

Davis Insurance worked with OHA for more than a quarter century. The business relationship between the two entities would thus have been known to Respondent as soon as he assumed his position on the Board, if not before. Respondent is a law school graduate and acknowledges being well versed in conflict of interest laws. He therefore should have immediately recognized the implications of his ties to the Davis Companies.[7] Even if those implications were not readily apparent to him at the beginning of his tenure with the Board, they were made clear during the Board meeting on November 19, 2009. At that meeting, Mr. Achola specifically advised Respondent that his @daviscompanies e-mail address could create a perception of conflict. Even after being so advised, he did not change his e-mail address for almost three years, and declined to seek ethical guidance from the NADC about the potential conflict.

The Court is therefore convinced that even if there was no direct conflict of interest, Respondent was aware that the perception of such a conflict existed. He was thus obligated to disclose that conflict officially and in writing. The question at issue here is whether he did so.

Respondent admits that he never made an official disclosure to OHA or HUD regarding his relationship to the Davis Companies. However, he contends that he made implicit disclosures to both entities by openly communicating with them via his @daviscompanies e-mail address. HUD never directly addressed this "disclosure by way of e-mail address" theory.

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[7] The Davis Insurance Agency itself recognized the apparent conflict. Its 2011 Workers Compensation Insurance Proposal included a Relationship Disclosure Statement that specifically identified Respondent as "one individual ... who might rise to the level of OHA's threshold." However, the statement concluded that Respondent's relationship with the Davis Companies had been vetted and found to be appropriate.

It is undisputed that Respondent regularly e-mailed OHA personnel using the @daviscompanies e-mail address as early as 2009. Additionally, the minutes from OHA's November 19, 2009, Board meeting proves beyond doubt that the OHA Board knew of the potential conflict at that time. HUD was made aware of Respondent's e-mail address in 2012, when he e-mailed members of a HUD task force sent to conduct a review of OHA. The leader of the HUD team, Meghan Anderson, testified that she personally received e-mails from Respondent's @daviscompanies address. She also stated that, during the review process, members of the OHA staff made her team aware of a potential conflict involving Respondent and the Davis Companies. The team discussed the issue with Respondent, who changed his e-mail address to Fred.Conley@NOFHD.org during or soon after the review.

There is some merit to Respondent's rather novel disclosure argument. Both HUD's relevant conflict of interest regulation, 24 C.F.R. § 982.161, and the Annual Contributions Contract state that a covered individual is required to disclose any real or prospective interest to HUD and to the housing authority. They do not provide any guidance on what form the disclosure must take, when it must be made, or to whom it must be made.

Respondent's use of the @daviscompanies e-mail domain extension thus arguably complies with the letter of the HUD law, if not its spirit. The presence of the domain extension is, in and of itself, an open declaration of conflict to anyone who understands its connotations. Both Ms. Anderson and Mr. Achola, for example, quickly recognized it as such after receiving e-mails from Respondent. Individual OHA Board members, then, were clearly aware of the conflict in 2009. There is no evidence that Respondent took any action to conceal the conflict, in derogation of 24 C.F.R. § 982.161.

The NHAA is more specific, ordering that a covered individual must "immediately and fully disclose in writing to the housing authority's board of commissioners the circumstances that give rise to the conflict of interest." Neb. Rev. Stat. § 71-15,151. Even assuming Respondent's use of his e-mail address constituted an acceptable disclosure pursuant to the HUD regulation, it did not meet the requirements of the NHAA. Respondent never made any written disclosure "to the OHA Board." At best, he engaged in e-mail communications with individual OHA personnel, including perhaps members of the Board. But that is not what the NHAA requires. The first indication that the Board itself was made aware of the potential conflict was when the matter was raised in the November 19, 2009, meeting. Respondent did not make any written disclosure in that meeting; the minutes prove that the discussion was oral only. The Court finds no specific document that expressly informed the Board of his e-mail address,[8] and therefore finds that Respondent failed to disclose the conflict of interest per the NHAA.

That is not the end of the analysis, however. Respondent's use of the @daviscompanies e-mail is only one source of his alleged conflict. Respondent also had use of a cubicle in a building owned by Davis Insurance. He used that cubicle, and the office supplies associated with it, on behalf of NOFHD, a company created by Mr. Davis. An OHA business partner thus provided Respondent with the means to pursue his private social projects. Although his goals

[8] Notably, the NHAA requires immediate disclosure to the housing authority, but not to HUD. It is therefore of no moment that Respondent's first e-mail to HUD personnel occurred nearly three years after he joined the Board. A case could certainly be made that a delay of that length would violate HUD's own regulation. However, HUD has not made that argument. It argues instead that Respondent made no disclosure at all.

were admirable, they created a potential conflict that required disclosure. Respondent never disclosed to anyone at HUD or OHA that he made use of Davis Insurance's office space.

Respondent's Alleged Conflict re: CGFI

Both parties agree that Respondent served on the Boards of OHA and CGFI simultaneously. It does not follow, however, that a conflict of interest immediately arose as a result. A conflict occurs when there is an incompatibility between one's private interests and one's public or fiduciary duties. BLACK'S LAW DICTIONARY (10th edition, 2014). CGFI's stated purpose was to promote economic development opportunities for Omaha's minority small-business owners. The record does not show that OHA and CGFI had any business relationships prior to or other than the tower lease contract entered into in June of 2010. Consequently, a conflict between the two would not have been reasonably foreseeable. Respondent could therefore have pursued both interests without concern. In the present case, his status as a CGFI Board member became disclosure-worthy only when he became aware of CGFI's business relationship with OHA. Respondent maintains that he had no knowledge of the CGFI-OHA tower lease agreement until he was served with HUD's debarment notice. Accordingly, he contends, he had no reason to suspect that a disclosure was necessary.

HUD counters that Respondent chaired OHA's Procurement Committee, which handles the housing authority's contracts. Moreover, the contract was negotiated by CGFI's Board, of which Respondent was a member. Additionally, HUD claims the contract was unusually generous to CGFI, which indicates that Respondent influenced the negotiations in CGFI's favor. According to HUD, these facts render Respondent's denials not credible.

It is HUD's burden to prove that Respondent knew of a potential conflict. The Court finds that it has not done so with respect to the potential CGFI-OHA conflict of interest. HUD's conclusion that Respondent must have known about the CGFI-OHA contract due to his presence on the Boards of both entities is at odds with the record evidence. The contract was signed by Mr. Timm, OHA's Executive Director. It was not signed by any member of OHA's Procurement Committee. Notably, there is no mention of a radio tower lease in any of the Procurement Committee's meeting minutes in 2010. The meeting minutes are comprehensive, and include detailed discussions of OHA expenditures ranging from hiring cleaning services to purchasing new vehicles. Had the CGFI-OHA contract been brought before the Committee, it almost certainly would have been discussed, and so would have been recorded in the minutes. Its omission is therefore revealing.

An e-mail from Mr. Schrader and Mr. Bohling — sent four months after the contract was signed — is further evidence that the contract did not follow the normal procedural avenues.[9] The e-mail listed Mr. Schrader's and Mr. Bohling's "concerns" with the contract, including that it did not have the necessary approval from HUD and the OHA Board. The lack of Board approval suggests the Procurement Committee never considered the contract, and so never had

[9] Had Respondent received that e-mail, he would have become obligated at that point to reveal his association with CGFI. However, he was not included in the e-mail, and there is no evidence that it was ever forwarded to him or otherwise discussed with him. There is no indication that Mr. Timm or Mr. Achola took any actions to address the concerns raised in the e-mail.

the opportunity to forward it to the full Board. Accordingly, even though the Procurement Committee is charged with overseeing OHA's contracts, it appears it did not do so in this case.

Nor is there any evidence that the contract was actually negotiated by CGFI's Board, as HUD contends. The contract was signed by Mr. Davis on behalf of CGFI. He was not a member of CGFI's Board in 2010. No CGFI Board member signed the contract, and no CGFI meeting minutes make any reference to the contract. Indeed, there is no evidence at all directly linking the contract to the CGFI Board. No witness testified that Respondent was aware of the contract, either as part of the OHA Board, the CGFI Board, or through some other source. HUD has therefore not shown that Respondent knew of any conflict. He cannot be debarred for failing to disclose a conflict he did not know existed and could not reasonably have foreseen.

B. Debarment is Warranted

Having found that Respondent did not fully disclose his relationship with the Davis Companies, the Court must now examine whether this misconduct merits a ten-year debarment. After establishing that a cause for debarment exists, the burden shifts to the respondent to demonstrate "to the satisfaction of the debarring official that [Respondent is] presently responsible and that debarment is not necessary." 2 C.F.R. § 180.855(b). In determining whether debarment is an appropriate sanction, "[t]he debarring official bases the decision on all information contained in the official record. The record includes ... [a]ny further information and argument presented in support of, or in opposition to, the proposed debarment." 2 C.F.R. § 180.845(b)-(b)(1).

Debarment is a serious sanction, and is not to be handed down lightly. It is invoked only when necessary to protect the public interest. 2 C.F.R. § 180.125(c). There are valid grounds to debar Respondent here. Specifically, at all relevant times, he maintained a close business, if not personal, relationship with Mr. Davis and the Davis Companies. As a law school graduate and long-time public servant, Respondent knew or should have known that those relationships posed a conflict of interest with his duties at OHA. Additionally, the record demonstrates that Respondent failed to accept the import of his conduct over a period of at least three years. During his testimony, he remained somewhat intransigent and failed to fully acknowledge that his legal judgment was simply wrong. Based on the evidence of record, I therefore find that Respondent is not presently responsible as a contractor with the federal government.

However, the Government has not proffered a substantial basis to support a ten-year debarment. [10] Respondent is no longer a member of OHA's Procurement Committee or its Board, though he does remain active elsewhere in Omaha's public affairs. If he is currently a risk to the public interest, HUD has not elaborated on it. It is thus difficult to ascertain how a debarment would benefit the public. Given that there is no significant concern or protective rationale proffered by the Government, a lengthy debarment would only be for purposes of punishment. As such, it is inappropriate. 2 C.F.R. § 180.125(c).

Moreover, even though Respondent was remiss in not disclosing his relationship with the Davis Companies, HUD has not shown that the relationship actually resulted in any harm to

[10] By regulation, a debarment should normally not exceed three years. 2 C.F.R. § 180.865(a). Here, HUD seeks an almost unprecedented ten-year debarment. It offers no explanation why Respondent's alleged misconduct warrants a debarment period more than three times longer than the standard sanction.

OHA or its residents. Liberty Mutual was already OHA's worker's compensation insurance provider. It therefore was already in the best position to secure the new contract. Its proposal was the only one received, and was deemed commercially competitive by OHA's human resources director. The Board approved the proposal unanimously, with almost no discussion. The minutes of that meeting show that Respondent did not champion the proposal. Rather, the motion to approve the proposal was raised by Ben Gray and seconded by Nell Winford. The Court finds no evidence that Respondent asserted any undue influence to ensure passage of the proposal. The Government instead relies on the mere fact of his presence to imply an influence.

Finally, Respondent's failure to disclose his conflict was not the product of recklessness or disregard for the rules. His nondisclosure was not intended to conceal his actions, and he made no attempt to deceive anyone at HUD or OHA. To the contrary, it appears Respondent held a good-faith belief that disclosure was not necessary. His decision may have been ill-advised, but it was not entirely without justification. Respondent testified that he sought the professional opinion of NADC Director Frank Daley, who told him that his connections to the Davis Companies did not constitute a conflict of interest. Mr. Daley stated via affidavit that Respondent had sought such opinions from him "on several occasions," though he could not state definitively that they had spoken about the issues in question here. Regardless, Respondent's informal inquiries with Mr. Daley met neither the letter, nor spirit, of the NHAA, which required express written disclosure of the conflict to OHA. Of course, Respondent could have avoided any ambiguity by simply signing the letter Mr. Achola drafted, or requesting a written opinion from Mr. Daley independently. He chose not to do so. Although it is certainly fair to question Respondent's judgment in this matter, the Court finds no reason why a single poor decision should warrant a ten-year debarment.

RECOMMENDED DETERMINATION

The Court finds that HUD has shown by a preponderance of the evidence that Respondent had a duty to disclose his relationship with the Davis Companies and did not fully do so. It has not shown, however, that he had a duty to disclose his status as a CGFI Board member. HUD has also failed to show that a ten-year debarment is an appropriate sanction. Accordingly, I find that Respondent is not presently responsible. As a result, I recommend that debarment be imposed for a period of one year.

SO ORDERED.

H. Alexander Manuel
Administrative Judge