

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
Washington, D.C.

In the Matter of:

BERNARD J. MOROSCO,

Respondent.

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DOCKET NO. DEC-18-09555-DB

DEBARRING OFFICIAL'S DETERMINATION

INTRODUCTION

By Notice of Proposed Debarment dated March 26, 2018 ("Notice"), the Department of Housing and Urban Development ("HUD") notified Respondent BERNARD J. MOROSCO that HUD was proposing his debarment from future participation in procurement and nonprocurement transactions as a participant or principal with HUD and throughout the Executive Branch of the Federal Government for a ten-year period from the date of final determination of the proposed action. The Notice advised Respondent also that his proposed debarment was in accordance with the regulations at 2 C.F.R. parts 180 and 2424 and was based on his participation in HUD programs after he was debarred from participation, which provided cause for his debarment pursuant to 2 C.F.R. § 180.800(b) and (d).

A telephonic hearing on Respondent's proposed debarment was held in Washington, D.C. on October 2, 2018 before the Debarring Official's Designee, Mortimer F. Coward, Esq. Respondent appeared *pro se*. Stanley E. Field, Esq. appeared on behalf of HUD.

SUMMARY

I have decided, pursuant to 2 C.F.R. § 180, to debar Respondent from future participation in procurement and nonprocurement transactions, as a participant, principal, or contractor with HUD and throughout the Executive Branch of the Federal Government, for a period of 18 months from the date of this Determination. My decision is based on the administrative record in this matter, which includes the following information:

- (1) The Notice of Proposed Debarment dated March 26, 2018.
- (2) The Department's Pre-Hearing Brief in Support of a Ten-Year Debarment of Respondent filed August 27, 2018 (including all exhibits and attachments thereto).
- (3) Respondent's Pre-Hearing Brief Against an Additional Ten-Year Debarment filed September 19, 2018.
- (4) An email dated October 2, 2018 from Respondent with correspondence attached.
- (5) An email dated October 16, 2018 from Government counsel with attachments.¹
- (6) Respondent's October 17, 2018 email response to the Government's October 16, 2018 email.

GOVERNMENT COUNSEL'S ARGUMENTS

Government counsel states that Respondent previously was debarred for a period of five years starting on October 31, 2013, based on his conviction for conspiracy in violation of 18 U.S.C 371. Respondent's misconduct occurred during his employment with the Chelsea Housing Authority as a consultant and HUD-certified Real Estate Assessment Center ("REAC") inspector. While still serving his debarment, Respondent was employed as a project manager by a management agent for a multifamily property (Michael Walsh Apartments) that was covered by a Section 8 Housing Assistance Payment (HAP) contract.

Counsel argues that Respondent, as an agent of a HUD contractor, was a participant in covered transactions. Also, because Respondent formerly conducted inspections for a housing authority (Chelsea Housing Authority) for submission to REAC, he was a participant in covered transactions. Additionally, Respondent is a participant because, after his hiring on June 12, 2017 as a co-manager of the Michael Walsh Apartments, Respondent applied for and received an "M-number" from HUD. Respondent, thus, is able to use HUD's Enterprise Income Verification (EIV) system to qualify tenants for Section 8 benefits. Accordingly, as a participant in covered transactions, Respondent is subject to debarment. *See* 2 C.F.R 180.150 and 180.980.

In arguing for Respondent's debarment, counsel notes that Respondent's continuing to participate in HUD programs during his debarment shows that "he lacks present responsibility and cannot be trusted to act in compliance with agency regulations." In this regard, counsel notes that,

¹ The record closed on October 28, 2018, accompanying email was a Notice.

in the Notice of Final Determination issued November 10, 2015, Respondent was advised that he was “excluded from procurement and nonprocurement transactions, as either a principal or participant with HUD” Respondent’s actions, described here, demonstrate, counsel asserts, not just negligent or reckless conduct, but a willful violation of his current debarment. Counsel concludes that HUD needs to be protected from Respondent and a ten-year term of debarment is justified and warranted under 2 C.F.R. § 180.800(d).

RESPONDENT’S ARGUMENTS

As background, Respondent challenges the Department’s allegation, also an issue in his criminal trial, that he rendered the REAC inspection process “ineffective” by his providing in advance lists of units to be inspected to housing authorities. According to Respondent, this was a policy change that HUD, through REAC, introduced in 2003. For this reason, Respondent asserts that his motives in making the lists available were “pure” and his “actions . . . did NOT violate HUD regulations.”² (Emphasis in original.) According to Respondent, the HUD official who testified on behalf of the government responded “no” when asked whether Respondent had violated any regulation by making advance lists of units available to housing authorities.

With specific reference to the current allegations in the March 26, 2018 Notice, Respondent asserts that, contrary to the statement in the Notice, he has never been an employee of Michael Walsh LLC, only an employee of PF Holdings LLC. Respondent notes that he fully disclosed his legal troubles to his would-be employer during the job interview. Later, according to Respondent, he applied for an “M” number with REAC-TAC, which originally was rejected because his old “M” number was still active. In a subsequent communication with REAC-TAC via email and phone regarding the “M” number, he was told that the Enforcement Center had “cleared the issue” and a new “M” number was issued, though with restricted system access.

Respondent also takes issue with the government’s representation of him as an agent of PF Michael Walsh LLC, arguing instead that he has “at best a limited agent authority.” In describing his limited authority, Respondent notes, among other things, that he does not have contract or engagement authority nor authority to sign checks or approve payments, enter TRACS or submit

² Respondent raises the issue in this proceeding because, he asserts, it could not be introduced in his criminal trial after the court granted the government’s motion to suppress it.

HAP vouchers, nor post HAP payments into the company's software. Respondent adds that the arrangement described above is not "normal," but was made to "allow [him] to work within the restrictions of the debarment term." Respondent states that the tasks he does perform include sign leases, run EIV reports, maintain residents' files, perform property maintenance and supervise one employee, collect rents from tenants, rooftop renters, the laundry vendor, and conduct unit inspections.

Respondent pleads that he not be debarred by describing the many efforts and activities in which he is engaged since his release from prison in 2016. Respondent first acknowledges that it is his "fault and responsibility" for his present predicament. Respondent explains that when he applied for his present position he did not "think that [he] would be violating [his] debarment particularly since [he] thought it was not inspection related work and [he] was not a contractor but an employee." Respondent also details his many efforts and accomplishments "to make life better for all the residents" in Michel Walsh Apartments.

Additionally, Respondent describes his community work, his long military service and awards, and his association and leadership in the religious community in his city.

FINDINGS OF FACT

1. Respondent was debarred at the time he was employed at Michael Walsh Apartments.³
2. Respondent contacted HUD, through REAC, in an attempt to determine his eligibility, during his debarment, for employment in a HUD-assisted property.
3. The record of Respondent's phone call with REAC is silent on the issue of Respondent's employability.
4. There is no record in the DEC of the DEC employee with whom Respondent may have spoken regarding the possibility of Respondent's employment by a HUD-assisted property during his debarment.
5. The property that Respondent managed consisted of 124 units of which 62 were HUD-assisted and the other 62 market-rate units.

³ It is not necessary to settle today the issue of whether Respondent was employed by Michael Walsh LLC or PF Holdings LLC, as Respondent claims. The issue is undisputed that the Michael Walsh Apartments received Section 8 funds, thus making it a covered transaction.

6. The arrangement under which Respondent worked limited his functions in an attempt to forestall any violation of the conditions of his debarment.
7. There is no record that the “arrangement” was submitted to HUD for its vetting.
8. Respondent’s current work reflects significant achievements that benefit the affected tenants, as attested to by the commendatory letters from tenants.
9. Respondent has accepted responsibility and expresses deep regret for his misconduct that led to his debarment.

CONCLUSIONS

1. Respondent is subject to the debarment regulations as a “person who has been, is, or may reasonably be expected to be, a participant or principal in a covered transaction.” 2 C.F.R. § 180.120(a). *See also* 2 C.F.R. §§ 180.150, 180.970, 180.980.
2. The Housing Assistance Payments (HAP) contract that covered the Michel Walsh Apartments, which employed Respondent, was a covered transaction. *See* 2 C.F.R. § 180.200(b).
3. Pursuant to the five-year debarment entered against Respondent effective October 31, 2013, Respondent was excluded from participation in covered transactions.
4. Specifically, 2 C.F.R. § 180.205(c) provides that “[a]s an excluded person, you may not be a participant or principal in the transaction” (except under certain circumstances not applicable here).
5. Respondent’s participation, among other things, during his debarment in the management of the Michael Walsh Apartments, a property receiving HUD funding, provides cause for his debarment. *See* 2 C.F.R. § 180.200(b).
6. The government has established the cause for Respondent’s debarment by a preponderance of the evidence. *See* 2 C.F.R. § 180.850(a).
7. The following were considered as mitigating factors pursuant to 2 C.F.R. § 180.860 - - Respondent’s efforts to get approval from HUD, through REAC for his employment at issue here, notwithstanding that REAC was not the proper authority to authorize an exception that would allow Respondent to occupy the management position with the Michael Walsh Apartments.

8. Respondent would have been well advised to seek permission to engage in covered transactions during his debarment, not from REAC but from the Departmental Enforcement Center (DEC). After all, the November 10, 2015 Notice of Final Determination was issued by the Director of the DEC. Notwithstanding this observation, I viewed favorably, in mitigation of his actions, Respondent's apparently sincere efforts to find a solution to his dilemma.
9. Similarly, the attempt to bifurcate Respondent's functions to limit them to tasks that would not violate his debarment, though unavailing, also was considered favorably.
10. I also viewed favorably the letters of support from tenants at the property Respondent managed, particularly their observations of the improvements in their living environment which they attributed to Respondent's commitment and efforts.
11. As a mitigating factor, I considered, too, Respondent's unqualified acceptance of responsibility and expression of regret for his misdeeds.
12. Respondent's community work as a volunteer, his willingness to help the less fortunate and his long military service were viewed favorably as mitigating factors.
13. As aggravating factors, I considered the seriousness of Respondent's actions, even if unintended, in engaging, without approval, in covered transactions during his debarment.
14. Undeniably, the overarching consideration in this matter is the fact that Respondent violated the terms of his five-year debarment. In the usual case, that fact, standing alone, provides a strong basis for imposing a debarment. Nonetheless, the regulation at 2 C.F.R. § 180.845(a) provides, in pertinent part, that "the official need not debar you even if a cause for debarment exists. The official may consider the seriousness of your acts or omissions and the mitigating and aggravating factors set forth as 2 C.F.R. § 180.860."
15. In determining a period of debarment, I carefully considered, in addition to the weight of the mitigating factors, the lack of evidence in the record of an intent by Respondent to violate the terms of his debarment. Arguably, proof of intent, in a matter like the one before me, is not a necessary element. Nevertheless, it is worthy of consideration where, as here, the evidence shows that Respondent attempted to hew a path that would not offend the restrictions imposed by his debarment.
16. The corollary of the immediately preceding observation is that Respondent was obliged to ensure that the cognizable official authorized the exception he sought. As it was,

Respondent was remiss in securing approval by the DEC Director of an exception⁴. See 2 C.F.R. § 180.135(a).

17. The courts have held that debarment is a sanction that may be invoked by HUD as a measure of protecting the public by ensuring only those qualified as “responsible” are allowed to participate in HUD programs. *In re. Buckeye Terminix Co., Inc., citing Stanko Packing Co. v. Bergland*, 489 F. Supp. 947, 949 (D.D.C. 1980) and *Roemer v. Hoffman*, 419 F. Supp. 130, 131 (D.D.C. 1976).
18. The regulation at 2 C.F.R. § 180.125(a) provides that “[t]o protect the public interest, the Federal Government ensures the integrity of Federal programs by conducting business only with responsible persons.: Thus, it is well established that lack of present responsibility can be based upon past acts. See *In re Buckeye Terminix Co., Inc.*, HUDALJ 89-1402-DB (August 31, 1990), holding that “Responsibility encompasses the projected risk of a person doing business with HUD. This includes his integrity, honesty, and ability to perform. The primary test for debarment is present responsibility although a finding of present lack of responsibility can be based upon past acts.” (Citations omitted).
19. The regulation at 2 C.F.R. § 180.125(a) cautions that “[t]o protect the public interest, the Federal Government ensures the integrity of Federal programs by conducting business only with responsible persons.”
20. The regulation at 2 C.F.R. § 180.125(b), in pertinent part, states that a “Federal agency may not exclude a person or commodity for the purpose of punishment.” There is seemingly, therefore, as one reads the cited regulations above, in tandem with the language quoted from *Buckeye Terminix, supra*, an inherent tension between the two authorities. In mediating the tension, it would seem clear that, because the *raison d’être* of the debarment regulations is to “protect the public interest,” that interest primes all other considerations. Viewed in this light, if Respondent were to be excluded, it can be safely argued, that it is not” for the purpose of punishment,” but to “protect the public interest.”
21. The government, in its Notice, requested a period of debarment of ten years, A ten-year

⁴ “A Federal agency head or designee may grant an exception permitting an excluded person to participate in a particular covered transaction. If the agency head or designee grants an exception, the exception must be in writing and state the reason for deviating from the governmentwide policy in Executive Order 12549.”

debarment, for all the reasons discussed, would be *per se* “punitive,” thus, an offense to the cited regulation.

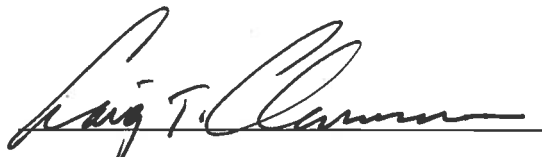
22. While the evidence does show that Respondent failed to follow the relevant regulation at 2 C.F.R. § 180.135(a), it does not support a finding that Respondent acted egregiously or willfully in failing to secure an exception.
23. Nonetheless, Respondent’s failure to pursue the relief he sought from his debarment until it was formally approved, if at all, is inconsistent with HUD’s standards of a “responsible person,” otherwise clearly exhibited, as the record shows, by Respondent, except in this instance.
24. A period of debarment is warranted, however, to impress upon Respondent that failure to follow applicable regulations implicates his status as a “responsible person” and “affects [his] present responsibility.” *See* 2 C.F.R. § 180.800(d).
25. HUD has a responsibility to protect the public interest and take appropriate measures against participants whose actions may affect the integrity of its programs.
26. HUD cannot effectively discharge its responsibility and duty to the public if participants in its programs or programs that it funds fail to act with honesty and integrity.

DETERMINATION

Based on the foregoing, including the Findings of Fact, Conclusions, and the administrative record, I have determined, in accordance with 2 C.F.R. §§ 180.870(b)(2)(i) through (b)(2)(iv), to debar Respondent for a period of 18 months from the date of this Determination. Respondent’s “debarment is effective for covered transactions and contracts that are subject to the Federal Acquisition Regulation (48 C.F.R. chapter 1), throughout the executive branch of the Federal Government unless an agency head or an authorized designee grants an exception.”

Dated: _____

2/1/19



Craig T. Clemmensen
Debarring Official

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of February, 2019, a true copy of the DEBARRING OFFICIAL'S DETERMINATION in the matter of Docket Number DEC-18-09555-DB was served in the manner indicated.



Tanya L. Domino
Debarment Docket Clerk

HAND CARRIED

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