

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

.
In the Matter of .
DAVID L. HAMILTON .
Respondent .
.

Docket No. 82-827-DB

John J. Murphy, Esq.
For the Respondent
Laurence H. Gold, Esq.
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 (hereinafter "the Department" or "HUD") to debar David L. Hamilton (hereinafter "Respondent") and his affiliates from participation in all Departmental programs for a period of five years from the date of his suspension. 1/ HUD's action is based on Respondent's conviction following a plea of guilty for violating 18 U.S.C. § 1012. Respondent was duly notified of the proposed debarment and thereafter filed a timely request for a hearing. Because the proposed action is based on a conviction, the hearing was limited under Departmental Regulation 24 C.F.R. § 24.5(c)(2) to submission of documentary evidence and written briefs. Upon the record submitted, I make the following findings and conclusions:

FINDINGS OF FACT

Respondent has been licensed to sell real estate in the State of Michigan since 1971 and has actively pursued his profession since that date.

1/ Although the Deputy Assistant Secretary's notification of Respondent's proposed debarment temporarily suspended Respondent pending the final determination of this proceeding, both parties orally stipulated that in fact Respondent has been suspended since September 17, 1981.

On August 20, 1981, a Federal Grand Jury returned a nine (9) count indictment charging Respondent with violating 18 U.S.C. §§ 2, 1010, and 1014. The indictment alleged that Respondent aided, abetted, counseled, and induced prospective purchasers of HUD-owned properties willfully and knowingly to make and publish false statements to HUD. Respondent was also charged with aiding, abetting, counseling, and inducing a prospective mortgagor to make a materially false statement in an application for a mortgage loan to a bank whose deposits were insured by the Federal Deposit Insurance Corporation.

Pursuant to a plea agreement, the indictment against Respondent was dismissed, and Respondent pleaded guilty to a two-count Information charging him with making false statements to HUD with the intent to defraud in violation of 18 U.S.C. § 1012. Specifically, the Information alleged that Respondent, in his capacity as a real estate broker in HUD's program for the sale of HUD-owned properties, willfully and knowingly counseled two prospective purchasers to make false representations in connection with "Owner Occupant Affidavits" to the effect that each would occupy such properties for the required minimum period of twelve (12) consecutive months. In fact, those individuals had no intention to occupy the properties for the stated minimum period. Nevertheless, because they submitted their bids as those of prospective owner-occupants, they received a preference over all investor bidders. The Information further charged Respondent with having unlawfully received compensation from the Department in the form of a broker's commission for these services.

On February 2, 1982, Respondent was convicted on both counts in the United States District Court for the Eastern District of Michigan, Southern Division. He received a suspended sentence and was placed on probation for a three-year period. In addition, Respondent was fined \$2,000 and ordered to perform 200 hours of community service.

Respondent has submitted undisputed photocopies of twenty-two (22) letters, originally submitted to the United States District Court, written by clients and numerous prominent individuals in the community, and attesting to his character in and service to the community. Those letters were written with full knowledge of Respondent's involvement in the matters underlying his conviction. A review of the letters clearly indicates that Respondent is highly regarded in the community.

In further mitigation of his criminal conviction, Respondent states in his brief that his plea of guilty to the charges summarized above was based upon the fact that he knew, or should have known, that the individual buyers involved in the criminal action contemplated reselling the properties within a year to a Mr. Absalom, for whom Respondent claims to have acted as a sales representative. Respondent denies having shared in any profits resulting from the sale of the subject properties. Respondent

further asserts that at such time as he became aware that his activities on behalf of his clients may have been criminal in nature, he immediately ceased representing Mr. Absalom. Finally, Respondent states that since his conviction, he has been faithfully executing the terms of his probation and notes that the activities underlying the criminal action are no longer unlawful based upon current HUD bidding regulations. 2/

The sole evidence submitted by the Department in support of its position that Respondent and his affiliates should be debarred is that of Respondent's conviction. Neither the Department's proposal nor its Brief In Support of Debarment specifically names any affiliates, and no evidence was submitted to support the debarment thereof.

DISCUSSION

Debarment is a sanction which may be invoked by HUD as a measure for protecting the public by insuring that only those qualified as "responsible" be allowed to participate in HUD programs. 24 C.F.R. §24.0; Stanko Packing Co. v. Bergland, 489 F. Supp. 947, 949 (D.D.C. 1980); Roemer v. Hoffman, 419 F. Supp. 130, 131 (D.D.C. 1976). "Responsibility" is a term of art in government contract law which speaks to the projected business risk of a contractor or grantee, including his integrity, honesty, and ability to perform. See Roemer v. Hoffman, *supra*; 49 Comp. Gen. 139 (1969); 39 Comp. Gen. 468 (1959). The primary test for debarment is present responsibility, although a finding of a present lack of responsibility can be based on past acts. Schlesinger v. Gates, 249 F.2d 111 (D.C. Cir. 1957); Roemer v. Hoffman, *supra*. Integrity is central to a contractor's responsibility in performing a business duty toward the Government. 39 Comp. Gen. 468 (1959).

The concept of responsibility is manifestly relevant to a real estate agent and broker who knowingly counsels prospective purchasers of HUD-owned properties to misrepresent their bidder status in order to benefit from the advantages HUD was providing to owner-occupants by established policy. Respondent does not dispute that he is a "contractor or grantee" within the meaning of 24 C.F.R. §24.4(f). Nor does he dispute that the conviction

2/ HUD's Bulk Sale Program at the time of Respondent's conviction allowed a competitive advantage to owner-occupants, who, as a result of such status, could bid on HUD-owned properties before other investors and who could make smaller downpayments than were required of other purchasers. Subsequent to the time of the activities precipitating Respondent's conviction, HUD changed its bidding practice and now all owner-occupant bidders and investor-bidders are pooled together and all properties are sold to the highest bidder.

precipitating this debarment action is governed by the regulatory authority relied upon by the Department. ^{3/} Rather, Respondent argues that the existence of "cause" does not compel debarment where mitigating circumstances militate against imposition of the sanction. This is correct. However, I am not persuaded that it is in the best interest of either HUD or the public to conclude that debarment in this case is unwarranted. Respondent's contention that the Department has abandoned the policy of favoring owner-occupants over investors in the disposition of HUD acquired properties does not alter the fact of fraudulent misrepresentation under the prior policy. Respondent was under an obligation to deal honestly and forthrightly with the Department. This he failed to do. Debarment is not a penalty but a way for the Government to execute its statutory obligations effectively to protect the public. Gonzales v. Freeman, 344 F.2d 570 (D.C. Cir. 1964). The deterrent effect of debarment cannot be overlooked as a means to assure that end. If governmental regulations are to have any validity, adherence to their requirements must be assured. To ignore or to make light of their breach is to condone such action and to encourage its repetition. That regulations may change in the face of dynamic public policy considerations does not excuse their violation or undermine the original justification for their promulgation.

^{3/} The Department relies upon the cause stated in 24 C.F.R. §24.6(a) as regulatory authority for the proposed debarment. Under that provision, HUD may debar a "contractor or grantee" for any of the following causes:

- (1) Conviction for commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract ...

* * *
- (4) Any other cause of such serious compelling nature, affecting responsibility, as may be determined by the appropriate Assistant Secretary, to warrant debarment.

* * *
- (6) Making or procuring to be made any false statement for the purpose of influencing in any way the action of the Department.

* * *
- (9) ... [C]onviction for any other offense indicating a lack of business integrity or honesty, which seriously and directly affects the question of present responsibility.

Accordingly, I conclude that debarment is appropriate and necessary in this case to insure that the seriousness with which HUD views Respondent's conduct will not be misconstrued by him, or any others doing business with the Department, and that the public will thereby be protected.

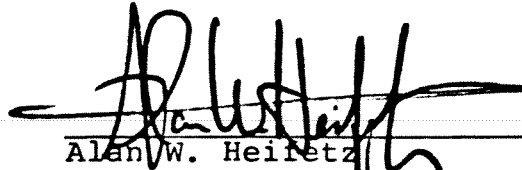
The Department has sought to impose a five-year period of debarment based on Respondent's conviction. But Respondent has suggested a number of un rebutted factors which appear to diminish the force of that conviction as an indication of his present responsibility. Despite the seriousness of the offense underlying Respondent's conviction, some twenty-two prominent individuals, including one state legislator and numerous members of Respondent's profession, submitted letters to the federal judge presiding over that matter attesting to Respondent's reputation for integrity in and service to the community. What is particularly impressive about these letters is that the authors clearly indicate that Respondent remains highly regarded in and about the community of Ypsilanti, Michigan, notwithstanding his involvement in the criminal matter. Furthermore, Respondent openly admits that he knew, or should have known, that the two buyers involved in the criminal action contemplated reselling the properties within a year and would, therefore, receive a competitive advantage over investor bidders in violation of the rules and regulations governing HUD's Bulk Sale Program. In addition to expressing remorse for his conduct, Respondent alleges that he immediately ceased representing his client once he became aware that his activities on behalf of those buyers constituted more than a mere technical violation of HUD's regulations.

Respondent has been suspended from participating in departmental programs since September 17, 1981. Since his conviction in February, 1982, Respondent has been faithfully executing the terms of his probation which required, in part, performance of 200 hours of community service. In view of the Department's failure to show the necessity of a five-year debarment period despite the foregoing evidence of mitigating factors, I find that protection of the public and the Government's interest will be served by a one-year period of debarment from the date of Respondent's suspension.

CONCLUSION

Upon consideration of the public interest and the entire record in this matter, I conclude and determine that good cause exists to debar Respondent, David L. Hamilton, from doing business with HUD for a period of one year from September 17, 1981, the date Respondent was suspended, through September 17, 1982. The Department's proposal to debar Respondent's affiliates

is dismissed pursuant to 24 C.F.R. §24.8(a), there having been no evidence presented in support thereof.



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Issued at Washington, D.C.
on August 2, 1982