

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

In the Matter of:

ROBERT M. KANE

Respondent.

HUDALJ 92-1874-DB

Decided: January 25, 1994

Robert M. Kane, *Pro Se*

Dane M. Narode, Esq.
For the Department

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

INITIAL DETERMINATION

Statement of the Case

This proceeding arose pursuant to 24 C.F.R. 24.100 *et seq.* as result of an action taken by the Assistant Secretary for Housing-Federal Housing Commissioner of the U.S. Department of Housing and Urban Development ("HUD") on May 18, 1992, proposing to debar Robert M. Kane. If debarred, Respondent Kane would be prohibited from participating in primary covered transactions and lower-tier covered transactions as either a participant or principal at HUD and throughout the Executive Branch of the Federal Government and from participating in procurement contracts with HUD. HUD proposed to debar Respondents for a period of five years from the date of the notice of proposed debarment, May 18, 1992.

Pursuant to an Order, HUD issued a Complaint and Respondent Kane filed an Answer. There were then numerous and extensive delays, at the requests of the parties, so the parties could pursue settlement. Apparently these attempts were unsuccessful.

On June 23, 1993, pursuant to 24 C.F.R. § 26.20, HUD sent, via Federal Express, Governments First Request for Admissions to Respondent Kane. Respondent Kane did not respond to this Request for Admissions within the 15 days required by HUD's regulations. HUD, at that time filed a motion to have the admissions deemed

admitted. Pursuant to a conference call, the Court stayed the proceeding to see if settlement could be reached by the parties.

During a subsequent conference call, the Court, in response to a question by HUD counsel, stated that discovery should be answered forthwith. On September 9, 1993, HUD counsel, via facsimile, sent Respondent Kane a letter stating that discovery was long over due. HUD requested answers to the request for admissions no later than September 17, 1993. Respondent did not respond to HUD's Request for Admissions.

On September 22, 1993, HUD filed a Motion For An Order Deeming Admitted Government's First Request For Admissions. Respondent Kane filed no opposition to this motion. Accordingly, an Order issued on October 5, 1993, stating that each requested admission set forth in the Government's First Requested For Admissions were deemed admitted.

On November 3, 1993, HUD filed a Motion for Summary Judgement upon the grounds that there are genuine issues of material fact. An Order was issued on November 1, 1993, ordering Respondent Kane to respond to the Motion for Summary Judgement by December 1, 1993. Respondent Kane has filed no response to the Motion for Summary Judgement.

In light of the foregoing, including that the requested admissions are all deemed admitted and that Respondent Kane did not make any showing as to why summary judgement should not be granted, there appears to be no genuine issue of material fact and, therefor, HUD's Motion For Summary Judgement is hereby **GRANTED**.

Findings of Fact

The facts of this case are set in the Government's First Request For Admissions, each of which, as discussed above, are deemed admitted. The Government's First Request For Admissions is marked Attachment A, is attached hereto, and is made a part hereof.

Discussion and Conclusions of Law

1. Respondent Kane is subject to debarment under 24 C.F.R. Part 24.

At material times Respondent Kane was President of Mid-Valley Mortgage Corporation (Mid-Valley) and, as part of his duties, was responsible for the submission of Mortgage Insurance Premiums (MIP) to HUD and was responsible to oversee that mortgagor payments for FHA mortgages were not misappropriated by Mid-Valley.

Attachment A, ¶¶ 1, 2, and 3. Accordingly, Respondent Kane is subject to debarment because, in his capacity as president of Mid-Valley, he is a participant and principal in "covered transactions." 24 C.F.R. § 24.105(m) and (p); and 24 C.F.R. § 24.110(a)(1).

2. Respondent Kane is responsible for Mid-Valley's failure to remit the MIPs to HUD and Mid-Valley's failure to remit the mortgagors' monthly payments to the servicing mortgagee on FHA mortgages.

It is undisputed that Mid-Valley failed to remit some 17 MIPs to HUD with respect to FHA-insured loans. Attachment A ¶¶ 4-20; 24 C.F.R. § 203.280. It is also undisputed that Mid-Valley failed to remit mortgagors' monthly payments to the servicing mortgagee for FHA mortgages on 18 occasions. Attachment A ¶¶ 21-38.

It is undisputed that Respondent Kane, as President of Mid-Valley, was responsible for the submission of the MIPs to HUD and was responsible for overseeing that the mortgage payments were not misappropriated by Mid-Valley. Attachment A ¶¶ 2-3; 24 C.F.R. § 24.325(b)(1).

3. Respondent Kane's conduct constitutes cause for debarment.

24 C.F.R. § 24.305 provides that debarment may be imposed 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 the present responsibility of a person.

* * *

(f) In addition to the causes set forth above, HUD may debar a person from participating in any programs or activities of the Department for material violation of a statutory or regulatory provision or program requirement applicable to a public agreement or transaction including applications grants, financial assistance, insurance or guarantees, or to the performance of requirements under grant assistance award or conditional or final commitment to insure or guarantee.

* * *

Respondent Kane, as President of Mid-Valley, failed to ensure the payments of the MIPs which Mid-Valley had collected for the 17 FHA mortgage loans that were sold to investor mortgagees. Respondent Kane's failure to ensure the payment of the MIPs to HUD is a violation of the terms of a public agreement or transaction so serious as to affect the integrity of HUD's mortgage insurance programs, and is cause for debarment under 24 C.F.R. § 24.305(b).

Respondent Kane's failure to ensure that the MIPs were paid to HUD is a cause of so serious and compelling a nature that it affects his present responsibility and is a cause for debarment under 24 C.F.R. § 24.305(d).

Respondent Kane's failure to ensure that the MIPs were paid to HUD is a material violation of the program requirements of the single family mortgage insurance program and is cause for debarment under 24 C.F.R. § 24.305(f).

Respondent Kane, as President of Mid-Valley, failed to ensure the payment of mortgage payments which Mid-Valley collected from mortgagors on the 18 loans that were sold to mortgagee investors. Respondent Kane's failure to ensure that the mortgage payments were remitted to the servicing mortgagee is a violation of the terms of a public agreement or transaction so serious as to affect the integrity of HUD's mortgage insurance programs, and is cause for debarment under 24 C.F.R. § 24.305(b).

Respondent Kane's failure to ensure that the payments which were paid by the mortgagors were remitted to the servicing mortgagee is a cause of so serious and compelling a nature that it affects the present responsibility of Respondent Kane and is

cause for debarment under 24 C.F.R. § 24.305(d).

4. A five year period of debarment is warranted.

The existence of cause does not necessarily require that a respondent be debarred. Debarment is a discretionary action and it must be determined whether a respondent's conduct is serious, whether debarment is necessary to protect the public interest, and whether there are mitigating factors. See 24 C.F.R. 24.115(a), (b), and (d). The respondent has the burden of proof for establishing mitigating circumstances. *Id.* at 24.313(b)(4). The period of debarment must be commensurate with the seriousness of the cause(s) and, if suspension precedes debarment, the suspension period shall be considered in determining the debarment period. *Id.* at 24.320(a).

The debarment process is not intended as a punishment, rather, it protects governmental interests not safeguarded by other laws. *Id.* at 24.115(b); See also *Joseph Constr. 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 with the Federal Government. See 24 C.F.R. 24.115(a).

"Responsibility" is a term of art which encompasses business integrity and honesty. *Id.* at 24.304; see also *Gonzalez v. Freeman*, 334 F.2d 570, 573 & n.4, 576-77 (D.C. Cir. 1964). Determining "responsibility" requires an assessment of the risk that the government will be injured in the future by doing business with a respondent. See *Shane Meat Co. v. U.S. Dep't of Defense*, 800 F.2d 334, 338 (3rd Cir. 1986). That assessment may be based on past acts, including a previous criminal conviction. See *Agan v. Pierce*, 576 F. Supp. 257, 261 (N.D. Ga. 1983); *Delta Rocky Mountain Petroleum Inc. v. U.S. Dep't of Defense*, 726 F. Supp. 278 (D. Colo. 1989).

The nature and extent of the conduct engaged in by Respondent Kane demonstrates such a lack of "responsibility" that a five year debarment is appropriate to protect the public interest and to permit Respondent Kane to establish his responsibility.

Conclusion and Determination

Upon consideration of the public interest and the record in this matter, I conclude and determine that cause exists to debar Robert M. Kane from participation in primary covered transactions and lower-tier transactions as either a principal or participant at HUD and throughout the Executive Branch of the Federal Government and from participating in procurement contracts with HUD for a five year period from the date of his suspension on

May 18, 1992.

SAMUEL A. CHAITOVITZ
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this ORDER issued by SAMUEL A. CHAITOVITZ, Administrative Law Judge, in HUDALJ 92-1874-DB were sent to the following parties on this 25th day of January, 1994, in the manner indicated:

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