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

In the Matter of:	*	
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OFORI & ASSOCIATES, PC,	*	
CHARLES N. OFORI,	*	**HUDOHA No.: 15-AM-0032-DB-001**
OTIS OFORI,	*	
CURTIS OFORI,	*	**HUD DOCKET NO.: 14-0054-DB**
	*	
Respondents.	*	
	*	

ORDER DENYING RESPONDENTS' MOTION FOR RECONSIDERATION OF THE DEBARRING OFFICIAL'S ORDER OF DECEMBER 11, 2015

1. Background

This matter is before the undersigned official on *Respondents' Motion for Reconsideration of the Debarring Official's Order of December 11, 2015*, which granted the Government's September 15, 2015 *Motion to Strike Respondents' Purported Affirmative Defenses of Personal Animus and Bias, Government Misconduct and Bad Faith, Abuse of Process, and Malicious Prosecution (Motion to Strike)* that had been raised in *Respondents' Amended Answer* filed on September 11, 2015. The Office of Hearings and Appeals, to which this debarment matter had been referred pursuant to 2 C.F.R. §180.845(c), in an interlocutory order dated October 14, 2015 ruled that Respondents could plead the challenged affirmative defenses, whereupon the Government filed its petition with this official for review of the interlocutory order. The parties' filings, as briefly referenced here, culminated in the afore-mentioned December 11, 2015 Order, which is the subject of today's ruling.

2. The Parties' Arguments

In their Motion for Reconsideration, Respondents argue that the December 11, 2015 Order failed to interpret correctly the regulatory language in 2 C. F. R. §180.860, including § 180.860(s). And, in fact, without regard to the alleged misinterpretation of the regulation language, the regulatory language actually undermines the conclusion in the Order granting the Government's September 22, 2015 Motion to Strike the disputed defenses raised in Respondents' September 11, 2015Amended Answer. Respondents argue further in their Motion for Reconsideration that the December 11, 2015 "Order, by indiscriminately barring all evidence of personal animus, bias, and bad faith now sets a precedent that makes it not just difficult, bit literally impossible, for a respondent to establish that the government pursued a particular exclusion based on the impermissible goal of punishment or for other improper reasons."

Additionally, according to Respondents, "the failure to allow Respondents to pursue their affirmative defenses at a hearing is also flatly inconsistent with well-established standards of federal practice." Respondents also find support for their position in 2 C.F.R. §180.845(b)(2), which, they claim, allows the debarring official to "consider an unbounded range of [mitigating] factors" and does not, as the December 11, 2015 Order concluded, restrict the Debarring Official to considering "only other unspecified factors 'relating to the conduct of the [respondent']." Respondents view this conclusion as an error that required a "departure from the fundamental rule of statutory construction to create a regulatory rule of statutory construction not supported by the relevant text." Respondents argue further that the Government provided no explanation why the challenged defenses were not appropriate for consideration in a debarment action. Respondents also see the December 11, 2015 Order as inconsistent with the purpose of debarment – to protect the public interest – and with the proscription in 2 C.F.R §180.125 of excluding a person for the purpose of punishment.

Accordingly, Respondents request that the December 11, 2015 Order be vacated and the October 14, 2015 Order of the Office of Hearings and Appeals allowing Respondents to assert the challenged affirmative defenses be reinstated and affirmed and that Respondents be allowed to introduce at the hearing all evidence regarding the defenses.

In its *Opposition to Respondents' Motion for Reconsideration of the Debarring Official's Order of December 11, 2015* ("*Opposition to Respondents' Motion for Reconsideration*"), the Government notes that "[a]lthough it is improper for Respondent to use a Motion for Reconsideration to revisit arguments that have already been addressed, and to raise new arguments that could have been raised prior to the issuance of the [December 11, 2015 Order]," the Government would, nevertheless, address each of Respondents' arguments. First, as a general observation, the Government notes that, in attempting to dismiss the analysis in the December 11, 2015 Order, Respondents present no new fact or legal authority to rebut the holding in the Order that Respondents' affirmative defenses are irrelevant to the determination of (1) whether cause for debarment exists and (2) whether Respondents are presently responsible.

The Government elaborates here that the cause for Respondents' proposed debarment is their submission of false information; therefore, "allegations of government misconduct would not negate the fact of Respondents' submission of false information to HUD."[1] In this regard, the Government notes that "the ability of Respondents to demonstrate irresponsibility or animus on the part of HUD employees does not prove responsibility on the part of Respondents." Moreover, Respondents have not shown in their filings how their allegations of HUD employees' animus towards them "would mitigate against the public interest in excluding from federal programs persons who submit false information to the Government . . . or how such personal animus would render Respondents responsible persons." Because there is no "nexus" between the two imperatives, there is no legal basis to pursue fact-finding on the challenged affirmative defenses, which, the Government asserts, is what the December 11, 2015 Order held.

The Government challenges Respondents' continuing to "press the rejected argument that the language of 2 C.F.R. § 180.860(s)" allows Respondents to assert the disputed affirmative

[1] For clarification, it should be pointed out that it has not been established at this time that the charge in the Notice of Proposed Debarment is a proven fact.

defenses. The Government disagrees with Respondents' argument that §180.860(s) allows the debarring official "to consider an unbounded range of factors." As the Government views it, §180.860 (s) is "bounded" by the first sentence of § 180.860 regarding mitigating and aggravating factors, by the language of paragraph (s) itself, and by the doctrine of *ejusdem generis.* The Government supports its argument thusly: first, unless something is "mitigating or aggravating" it cannot be a factor considered under 2 C.F.R. §180.860 and thus cannot fall within subsection (s) of 2 C.F.R. §180.860. Because the existence of personal animus cannot mitigate Respondents' lack of present responsibility, it is not properly considered under subsection (s)." Additionally, the Government states that because "allegations of government misconduct are, as a matter of law, unavailable as defenses to public enforcement actions, such defenses cannot possibly be 'appropriate' [pursuant to 2 C.F.R. §180.860(s)] for the debarring official to consider." The Government next argues that under the doctrine of *ejusdem generis*, "other 'appropriate' factors are only those that relate to the conduct of Respondents and are therefore determinative of whether Respondents are presently responsible."

The Government rejects Respondents' argument that, notwithstanding the Government's interpretation of 2 C.F.R. §180.860, "a host of other factors would still dictate that the Government's proposed interpretation be rejected." One of the factors Respondent alleges is the Government's failure to provide an explanation of why personal bias, bias, and bad faith are not appropriate factors to be considered in determining whether a respondent should be debarred. The Government's riposte is that "[t]his is simply not true, noting that in each of its filings it has described in great detail precisely why the affirmative defenses are not appropriate to consider in a debarment action." Similarly, the Government dismisses Respondents' argument with respect to the December 11, 2015 Order granting the motion to strike Respondent's affirmative defenses. The Government argues here that, because the affirmative defenses have "no possible relation to the controversy," the Order correctly decided this issue.

Respondents' third argument, which the Government notes they raise for the first time, posits that the December 11, 2015 Order is inconsistent with the purpose of 2 C.F.R. §180.125, which is to protect the public interest and does not countenance the exclusion of a person for the purpose of punishment. The Government argues that Respondents' critique of the Order is unfounded and results from Respondents' conflation of "two unrelated inquiries: (1) whether a debarment is necessary to protect the public interest . . .; and (2) whether a debarment proceeding was initiated . . . as a result of personal animus . . . an inquiry that is not authorized by the debarment regulations." In rejecting Respondents' argument, the Government observes that courts that have considered the issue generally are unsympathetic to a respondent's claim that his debarment has a punitive effect "because punishment is not determined from the defendant's perspective, as even remedial sanctions carry the sting of punishment." (Citation omitted) Accordingly, the Government finds Respondents' "inconsistency" argument unavailing to the extent it implies that Respondents should be allowed to introduce evidence of the Government's bias to "demonstrate that their debarment would be punitive." A proposed debarment, the Government argues, does not evidence a punitive intent of the Government employees involved, thus, courts "do not look at the subjective intent and motivation of individual agency employees."

The Government concludes that the December 11, 2015 Order striking the challenged defenses was correct because such defenses are not appropriate for consideration in a debarment

action and Respondents' arguments in support of reconsideration provide no basis for relief. Accordingly, the December 11, 2015 Order should be affirmed.

3. Applicable Law

For help in deciding today's issue, it is instructive to start with the principles, now well-established, enunciated through the decisions of courts that have ruled on motions for consideration. "Reconsideration, as stated by the Board in *In re. Cross*, 2004 HUD BCA LEXIS, March 31, 2004, "is discretionary with the Board and will not be granted in the absence of compelling reasons, e.g., newly discovered material evidence or clear error of fact or law. [Citations omitted] It is not the purpose of reconsideration to afford a party the opportunity to reassert contentions that have been fully considered and determined by the Board." (Citations omitted) Similar pronouncements were made by the Board in *In re. Johnson Management Group*, 2000-2 B.C.A. (CCH) p.31, 118, that "[a]s a general matter of law, a motion for reconsideration will not be granted if the decision to be reconsidered is adequately supported by the evidence and is not otherwise erroneous as a matter of fact or law. [Citations omitted] If the ground for reconsideration will not result in a change in the effect of the decision, the motion will be denied." Citations omitted. With the applicable principles fairly well stated, we turn now to an examination of the parties' positions in the context of the stated principles.

4. Discussion

Stated succinctly, the gravamen of Respondents' petition is that the December 11, 2015 Order "misinterpreted regulatory language and failed to address relevant case law and other authority." We treat the latter part of Respondents' conjunctive observation first, i.e., the alleged failure to address case law and other authority. Admittedly, the challenged Order did not present a legal treatise with copious citations of case law and other authority. The Order, nonetheless, addressed the critical issue of the relevance and materiality of the challenged affirmative defenses, i.e., government bias, misconduct, bad faith, abuse of process, and malicious prosecution, and concluded that they "are not appropriate factors to be considered in a debarment action." Order at 2. In passing, it should be noted that the Debarring Official had the benefit of the well written and extensively researched motions from the very able attorneys on both sides. As such, in addition to the independent legal research that went into preparing the Order, the Debarring Official was fully conversant with the applicable law and authorities that would inform him in arriving at the conclusion reached in the Order of December 11, 2015. Additionally, although not raised here as a justification for today's decision, the absence of citations to legal authorities in the Order, notwithstanding the clear reliance on applicable authorities, is not a cognizable reason to set aside a decision or to grant a motion for reconsideration.

In reviewing Respondents' Motion for Reconsideration, it is hardly worth disputing that the arguments raised now with respect to the interpretation of 2 C.F.R §180.860, and especially §180.860(s), are not dissimilar from those raised in their November 30, 2015 *Opposition to HUD's November 4, 2015 Petition for Review by the Debarring Official of a Certified Interlocutory Order.* Respondents' arguments today may be more expansive but they essentially "reassert contentions that have been fully considered and determined" in the December 11, 2015 Order. *In re. Cross, supra.* So it has been held that "unending alternative strategic arguments need not be considered in

a motion for reconsideration." *Pennsylvania Electric Co, v. United Foundry Co.*, 2009 U.S. Dist. LEXIS. Even after having given Respondents rehashed arguments full consideration on their merits, a different result will not obtain.

In short, when Respondents' arguments are stripped to their bare essentials, what Respondents assert is a misinterpretation of law and the applicable regulation is no more than Respondents' disagreement with the rationale in the December 11, 2015 Order for rejecting their attempt to use the challenged defenses.[2] Mere disagreement, without more, however, with the rationale supporting a decision, as opposed to a clear demonstration that the decision is "arbitrary, irrational, or contrary to law," is not a basis for granting a motion for reconsideration. *Guo v. Ashcroft*, 386 F.3d 556, 562 (3d Cir. 2004). And a "motion for reconsideration should be granted only if . . . a court has made an error not of reasoning but of apprehension." *Motorola v. Rodgers Mechanical Contractors*, 217 F.R.D. 581 (C.D Ariz. 2003). Respondents have not made that demonstration.

Respondents, for example, continue to assert that the Government provides no explanation for why the disputed defenses are not appropriate factors to consider in a debarment action. To the contrary, the Government, from the outset, has argued that "allegations of misconduct generally . . . are not appropriate to consider in a debarment action because such allegations are not probative of the ultimate determination of whether a party proposed for debarment is 'not presently responsible.'" See *Government's Petition for Review by the Debarring Official of a Certified Interlocutory Order*" at 1. *See also* the Government's Motion to Strike filed September 22, 2015. The Government elaborated on its arguments opposing Respondents' attempt to introduce the challenged affirmative defenses in its *Opposition to Respondents' Motion for Reconsideration,* at the same time rejecting Respondents' assertion that their debarment would be punitive. As the Government noted correctly, supporting its position with citation to appropriate regulatory authority and case law, when courts review agencies' debarment decisions, they "analyze whether the aggravating and mitigating factors concerning the respondent's conduct demonstrated that debarment was in the public interest; courts do not look at the subjective intent and motivation of individual agency employees." See the *Government's Opposition to Respondents' Motion for Reconsideration* at 12.

It is worth reiterating that the vice in Respondents' arguments is that, even if it can be proven that HUD employees' acted improperly, thus leading to Respondents' proposed debarment, that does not impeach the charges in the Notice of Proposed Debarment. Neither in Respondents' Opposition to HUD's November 4, 2015 Petition for Review by the Debarring Official of a Certified Interlocutory Order nor in their Motion for Reconsideration have they discussed or raised how an allegedly improper HUD employee action resulted in the conduct for which Respondents are now proposed for debarment. Briefly, Respondents' arguments at issue here all relate to the admissibility of evidence of allegedly improper conduct by HUD employees. That, however, is different and distinct from arguing that but for the alleged misconduct of HUD employees, Respondent would not have committed the offenses charged in the Notice of Proposed Debarment. As the regulations make clear at 2 C.F.R. §180.600, "[w]hen Federal agency officials receive

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[2] As Respondents clearly observe, "the language of 2 C.F.R. 180.860 is not ambiguous," though that observation is followed by the non-sequitur "and requires that Respondents be permitted to pursue the affirmative defenses at issue." Respondents' Motion for Reconsideration at 2.

information from any source concerning a cause for suspension or debarment, they will promptly report it and the agency will investigate" and refer it to the debarring official. Clearly, with respect to its efforts in this proceeding, Respondents have not shown how alleged misconduct of HUD employees mitigates Respondents' commission of the offenses charged. Accordingly, Respondents are unpersuasive in their arguments that the challenged affirmative defenses should be properly considered under 2 C.F.R § 180.860.

It is also well to note here that Respondents' argument that the Order's barring all evidence of the challenged affirmative defenses makes it impossible for a respondent to establish that the Government pursued a debarment for the impermissible goal of punishment. The short answer here is that debarment is not punishment nor is a proposed debarment punishment. Admittedly, as an incident of debarment, a debarred person may suffer unintended hardships, but that does not negate the fact that debarment principally is ameliorative and is intended to protect the public interest, not to punish a miscreant. *See, e.g., U.S. v. Bizzell*, 921 F,2d 263 (10th Cir. 1990), holding that "the penalty of debarment is strictly remedial. . . . While [debarred] persons may interpret debarment as punitive, and indeed feel as though they have been punished, debarment constitutes the 'rough remedial justice' permissible as a prophylactic governmental action," quoting *U.S. v. Halper*, 490 U.S. 435 (1989).

In weighing the arguments and supporting rationale of the parties, the December 11, 2015 Order, as does today's Order, considered the Government's position the more persuasive and sounder one and, thus, ruled accordingly.

5. Conclusion

Respondents' Motion for Reconsideration of the Debarring Official's Order of December 11, 2015 is DENIED and the Order of December 11, 2015 is AFFIRMED.

Dated: 3/16/16

Craig Clemmensen
Debarring Official

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of March, 2016, a true copy of the ORDER was served in the manner indicated.

Tanya L. Domino
Debarment Docket Clerk
Departmental Enforcement Center-Operations

HAND CARRIED
Mortimer F. Coward, Esq.
Debarring Official's Designee

ELECTRONIC MAIL AND INTEROFFICE MAIL
HUD Office of Hearings and Appeals
451 7th Street, SW, Room B-133
Washington, DC 20410
OA.OA@hud.gov

ELECTRONIC MAIL AND FIRST CLASS MAIL
Amy Glassman
Constantinos G. Panagopoulos
Theodore Flo
Ballard Spahr, LLP
1909 K Street, NW, 12th Floor
Washington, DC 20005
CGP@ballardspahr.com
GlassmanA@ballardspahr.com
FloT@ballardspahr.com

Donald M. Temple
Temple Law Offices
1101 15th Street, NW
Suite 910
Washington, DC 20005
dtemplelaw@gmail.com

ELECTRONIC MAIL AND HAND DELIVERED
Nilda M. Gallegos, Enforcement Technician
HUD Office of General Counsel
Office of Program Enforcement
1250 Maryland Ave., SW, Suite 200
Washington, DC 20024
nilda.m.gallegos@hud.gov

ELECTRONIC MAIL
Jennifer R. Lake
Brian A. Dupre
Ana I. Fabregas
Government Counsel
U.S. Department of Housing and Urban Development
1250 Maryland Ave., SW, Suite 200
Washington, DC 20024
jennifer.r.lake@hud.gov
ana.i.fabregas@hud.gov
brian.a.dupre@hud.gov