

UNITED STATES OF AMERICA

before the

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

In the Matter of:

ROBERT S. PENNINGTON

Respondent

Docket No. 80-724-DB

RECOMMENDED DECISION ON
REQUEST FOR REINSTATEMENT

Statement of the Case

On August 19, 1980, a letter signed by the Hon. Lawrence B. Simons, then Assistant Secretary for Housing - Federal Housing Commission, was sent to Robert S. Pennington (hereinafter respondent) advising him that consideration was being given to debarring him and his affiliates from further participation in HUD programs for a period of one year, commencing on August 19, 1980. The reason stated for the proposed debarment was respondent's criminal conviction for wire fraud in the United States District Court for the Middle District of Florida. Respondent was advised in the letter of his right to contest the debarment by requesting that opportunity within ten days from receipt of the letter proposing his debarment.

On October 7, 1980, Assistant Secretary Simons issued a Final Determination debarring respondent and his affiliates for one year commencing on August 19, 1980 and ending August 18, 1981. The Final Determination noted that the registered letter sent to respondent on August 19, 1980 had been returned to sender marked "unclaimed."

On October 20, 1980, respondent wrote a letter to Assistant Secretary Simons acknowledging receipt of the Final Determination of October 7, 1980 debarring him and his affiliates for one year, but stating that he had never received notice of the proposed debarment, i.e., Assistant Secretary Simons' letter of August 19, 1980. Respondent requested a hearing.

On October 28, 1980, a letter was sent to respondent by Jon Will Pitts, Esq., Director, Participation and Compliance

Division, in the Office of the Assistant Secretary for Housing advising respondent that both the letter, dated August 19, 1980, proposing his debarment, and a copy of the Final Determination, dated October 7, 1980, debarring him, were sent to respondent at the same address. 1/ Respondent had not received the first letter, however, but had received the second. Mr. Pitts, citing 24 C.F.R. §24.7(a)(3), advised respondent that since the letter proposing debarment had been sent by registered mail to respondent's address, legal notice of the proposed debarment had been furnished him. Mr. Pitts went on to state, however, that respondent's letter of October 20, 1980, would be treated as a Motion for Reinstatement and the regulation 2/ which provides that an application for reinstatement can be made no earlier than six months after the imposition of the sanction of debarment would be waived in respondent's case.

On October 30, 1980, I was appointed Hearing Officer in this matter, and by letter, dated November 19, 1980, advised respondent and counsel for the Department that hearings on debarments based on criminal convictions were limited to the submission of documentary evidence and briefs. I directed counsel for the Department to submit its brief in support of debarment by December 12, 1980 and directed respondent to file its opposition brief by January 12, 1981. The letter to respondent was sent by certified mail - return receipt requested, and a receipt was returned reflecting delivery of the letter on November 17, 1980.

Counsel for the Department timely filed its brief and supporting documentary evidence. Since I had not received respondent's brief, I sent a second letter, dated January 19, 1981, to respondent by certified mail - return receipt requested, advising respondent that I had not received his brief, which had been due January 12, 1981, and gave respondent until January 30, 1981 in which to file his brief or have the matter determined by me on the existing record. A return receipt reflected delivery of this letter on January 21, 1981. Respondent has not filed a brief or documentary exhibits or requested an extension of time in which to do so.

1/ It is noted that the letter proposing debarment and the Final Determination debarring respondent were each sent to respondent at [redacted] Oaks Manor, Jacksonville, Florida 32211. Respondent's letter of October 20, 1980, reflected that his address was [redacted] Atlantic Boulevard, Jacksonville, Florida 32207. Respondent never stated that the Oaks Manor address was not his address. All correspondence to respondent subsequent to October 20, 1980 was sent to respondent at the Atlantic Boulevard address.

2/ 24 C.F.R. §24.11(a).

Discussion

Whether this case is treated as a request for reinstatement under 24 C.F.R. §24.11, where the burden of proof would be on respondent, or as an initial determination as to whether respondent should be debarred, where the burden of proof would be on the Department, is of no consequence considering the circumstances of this case.

Respondent's conviction of wire fraud in Federal Court, which was based on his plea of guilty, establishes the grounds for respondent's debarment beyond a reasonable doubt. 3/

I find as a matter of fact that respondent was indicted by a grand jury in a nine count indictment returned in the U. S. District Court for the Middle District of Florida in Crim. No. 75-162. The indictment, a copy of which was attached as an exhibit to the Department's brief, charged respondent and others with violations of 18 U.S.C. §§1962, 1343, and 2314.

I find as a matter of fact that respondent pled guilty to Count 3 of the aforementioned indictment which charged him with wire fraud, which is a felony, in violation of 18 U.S.C. §1343. That section carries a potential maximum sentence of a fine of \$1,000.00 and imprisonment for five years. I find as a matter of fact that respondent, on January 27, 1976, was sentenced to six months imprisonment at the Federal Prison Camp, Eglin Air Force Base, Florida, and the remainder of his sentence of two years imprisonment was suspended, and he was ordered placed on probation for three years to commence upon his release from prison.

The third count of the indictment, to which respondent pled guilty, charged him with transmitting by wire, as part of a scheme to defraud, \$31,000.00 from an account of the Bell Mortgage Corporation in a bank in Delaware to the account of the Capital Planning Corporation in Jacksonville, Florida. The course of conduct which led to respondent's indictment and conviction was as follows: Respondent, an employee of the Capital Planning Corporation and associated with the Bell Mortgage Corporation, and others, conspired to defraud the Womens Federal Savings and Loan Association (hereinafter Association) of Cleveland, Ohio.

3/ 24 C.F.R. §24.6 details the grounds for debarment and provides, in pertinent part, as follows;

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

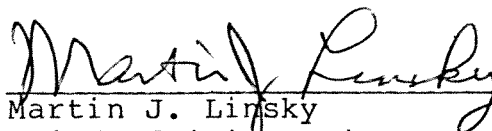
The Association was a federally insured lending institution engaged in, among other things, the business of purchasing mortgage loans. As part of their scheme to defraud the Association, respondent and his co-defendants purported to sell to the Association promissory notes and mortgages of the Bell Mortgage Corporation which had been previously sold to other Savings and Loan Associations. In addition, as part of this scheme to defraud, false statements were made to the Association and forged and falsely made securities were transported in interstate commerce. The criminal acts leading to respondent's indictment and conviction took place in 1974 and 1975.

Respondent has not contested the fact of his indictment and conviction, nor has he presented any evidence of mitigating factors. Accordingly, no grounds have been advanced warranting any reduction in his one-year debarment which commenced on August 19, 1980, some six months ago, and ends August 18, 1981. The violation of federal criminal law to defraud a federally insured savings and loan association in connection with its purchase of mortgages is a most serious matter justifying debarment. As the Department's brief reflects, the short duration of the debarment in this case is based on the fact that there was a hiatus of several years between the 1976 conviction and the proposed debarment in 1980. It is noted that 24 C.F.R. §24.4 provides that periods of debarment normally do not exceed five years. Debarment is a sanction imposed upon persons who are deemed to be not presently responsible. Present responsibility is a term of art used to determine the present business risk of a party based on its moral integrity and honesty, as well as its capacity to perform. Roemer v. Hoffman, 419 F. Supp. 130 (DC 1976). Past acts may be considered in determining present responsibility. Schlesinger v. Gates, 249 F.2d 111 (D.C. Cir. 1957), cert. denied, 355 U.S. 939 (1958).

Recommendation

It is my recommendation that respondent remain debarred for the remainder of the term of his debarment.

Issued at Washington, D.C.
on March 2, 1981



Martin J. Linsky
Chief Administrative Law Judge
U.S. Department of Housing and
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