

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

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In the Matter of .
HAROLD LEE SELLERS . HUDALJ 84-982-DB
Respondent .
.

H. Jack Holmes, Esquire
For the Respondent

Joan Saloschin, Esquire
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 ("the Department" or "HUD") to debar Harold Lee Sellers ("Respondent") from participating in all Departmental programs for a period of two (2) years. HUD's action is based on Respondent's conviction, following a jury trial, of violating 18 U.S.C. §§ 1014 and 2. 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 Department 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 was working as a real estate broker in a HUD-insured mortgage transaction at the time of his criminal conduct. 1/

1/ The record contains no evidence regarding the scope of Respondent's experience and training in the real estate industry except the un rebutted assertion in Respondent's Brief in Opposition of Debarment ("Brief") that "he has been a broker for many years" and that "prior to his conviction, he did not have a previous record of any type of violation of the law."

On May 11, 1984, a Federal Grand Jury returned a three (3) count indictment charging Respondent with violations of 18 U.S.C. §§ 1001, 1014, 371 and 2. The indictment alleged that from September 1983 to November 1983, Respondent had wilfully and knowingly combined, conspired, confederated and agreed with others named as co-conspirators, but not as defendants therein, to make false statements of land overvaluation to HUD and a federally insured savings and loan in order to facilitate a real estate sales transaction. The indictment alleged that such false statements of overvaluation were made by Respondent for the purposes of inducing Leader Federal Savings and Loan Association of Jackson, Tennessee ("Leader") to approve a larger mortgage loan to two co-conspirators purchasing a property and inducing HUD to insure the mortgage loan in an amount higher than what would have been approved had the true sales price been stated. Furthermore, the indictment alleged that as part of the conspiracy, Respondent and a co-conspirator arranged for the sellers of the property to pay the purchaser-co-conspirators an amount, being the approximate difference between the true sales price and the amount of the loan received by the purchasers from the lender and insured by HUD. 2/

Respondent pleaded not guilty to all three counts of the indictment. 3/ Pursuant to a jury verdict filed in the United States District Court for the Western District of Tennessee, Western Division on August 9, 1984, Respondent was found not

2/ The following depiction of Respondent's participation in the conspiracy resulting in his indictment and conviction is unrebutted:

Respondent had been approached by buyers who wished to purchase real estate without any down payment. Respondent located the ... property, offered for sale at \$15,000. The parties agreed to the sale at \$15,000 and decided to execute a sales agreement reciting a purchase price of \$23,700. The buyers applied for a loan in the amount of \$22,000 from Leader Respondent told the buyers that they would receive a check for approximately \$5,000 (approximate difference between loan proceeds and the sales price) after the closing Thus, the lender and insurer relied upon erroneous information, and accordingly, exposed their funds to unnecessary risks. Over \$5,000 was loaned and insured, purportedly as part of a home mortgage, when in fact, it was a direct cash payment to the buyers.

Department Brief at p.6.

3/ The Department's Brief in Support of Debarment ("Brief") at p.3 incorrectly states that Respondent pleaded guilty. The Department also fails to note that a jury trial was convened pursuant to the three count indictment.

guilty as to count 1, but was found guilty as to counts 2 and 3 of the three count indictment. Counts 2 and 3 charged Respondent with making false statements to Leader in connection with an application for an FHA loan. In violation of 18 U.S.C. §§ 1014 and 2, the false statements allegedly misrepresented an inflated sales price which influenced Leader to approve the loan. 4/

On August 23, 1984, the District Court entered its Judgment and Probation Order. On counts 2 and 3, Respondent received a suspended sentence and was placed on probation for an eighteen (18) month period. In addition, Respondent was fined \$1,000.00 and was ordered to serve thirty (30) consecutive days in county jail.

On October 30, 1984, Respondent received notification from the Assistant Secretary for Housing of his immediate temporary suspension and his proposed two-year debarment from October 2, 1984.

The evidence proffered by the Department in support of its proposal to debar Respondent from further participation in HUD programs consists, primarily, of Respondent's conviction 5/ and subsequent admissions of making false statements as contained in both his initial and supplemental responses to the Complaint. The Department's documentary evidence includes copies of Respondent's Indictment as returned by the Federal Grand Jury, the jury Verdict as filed in Federal District Court and the Judgment and Probation Order filed by the District Court.

Respondent admits in his Answer to Complaint ("Answer") and Brief that he made the false statements alleged in counts 2 and 3. 6/ However, Respondent states in his Answer that he

4/ Counts 2 and 3 of the indictment charged, respectively, that on two separate occasions, the first on or about September 9, 1983, and the second on or about November 30, 1983, Respondent falsely represented to an employee of Leader that the sales price of the property for which the loan was requested was, respectively, \$25,000.00 and \$23,700.00 when Respondent knew on both occasions that the actual sales price was \$15,000.00.

5/ The Department also offers as evidence Respondent's purported plea of guilty. See, n.2. I assume the Department intended to offer the jury verdict of guilty delivered as to counts 2 and 3 of the indictment after trial in Federal District Court.

6/ Respondent clearly admits to making the false statements in his Answer and Brief by euphemistically "acknowledging" that he "made a mistake."

"denies that he is irresponsible and feels that to debar him for two years would be unfair and unjust" and that "he acknowledges that he made a mistake and that he is very remorseful for what happened and ... request[s] the [Department] to impose a less severe penalty." Respondent reiterates in his Brief his belief that he is not irresponsible and that a two-year debarment is unfair and unjust.

In support of his attempt to mitigate his criminal conviction, Respondent points to what he refers to in his Brief as "past acts." According to Respondent, he has been a broker for "many years" and that prior to his conviction, he had no "record of any type of violation of the law." Thus, Respondent stresses that he was "convicted of making one mistake involving \$5,000.00 but that [it] is the only blemish on an otherwise good record" and is now "responsible and capable of providing competent services." Respondent asserts that he made the false statements based on "a misunderstanding of the facts involved at the time," and was placed on 18 months probation, fined \$1,000.00 and served as ordered 30 days in county jail. Respondent expresses remorse for his conduct and states that he realizes he made a "bad mistake." Respondent states that he has been married for twenty-two (22) years and has three children and that other realtors at his previous place of employment, while not condoning his actions, have supported him "throughout this entire ordeal because they feel that this conduct is out of nature for him and he has always dealt fairly with everyone." Finally, Respondent states that the Tennessee Real Estate Commission "imposed disciplinary action" by "downgrading his broker's license to that of an affiliate broker" and by requiring him to complete "three real estate courses." Respondent points out that the Commission did not revoke or suspend his license.

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 broker who knowingly makes false statements to

misrepresent the actual sales price of a property subject to a HUD-insured mortgage in order to benefit from the advantages provided by a federally insured savings and loan to its mortgage loan recipients.

Respondent does not dispute either 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 precipitating this debarment action is governed by the regulatory authority relied upon by the Department. ^{7/} 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 interests of either HUD or the public to conclude that debarment in this case is unwarranted. Respondent's unintelligible contention that the events leading up to his conviction occurred at a time when he "misunderstood the facts" does not alter the fact that Respondent fraudulently misrepresented a property purchase price in assisting a co-conspirator to obtain an FHA-insured mortgage loan from a federally insured savings and loan. Respondent was under an obligation to deal honestly and forthrightly with the lender and 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 make light of their breach is to condone such conduct and to encourage its repetition. Furthermore, Respondent's conduct may have resulted in direct harm to other

^{7/} The Department in its Complaint relies upon the cause stated in 24 C.F.R. § 24.6(a)(4) and (9) as regulatory authority for the proposed debarment. Under that provision, HUD may debar a "contractor or grantee" for any of the following causes:

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

* * *

(9) Conviction under the Organized Crime Control Act of 1970, 18 U.S.C. 1961 et. seq. or conviction for the commission of the offense of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, fraudulent use of the mail in connection with commission of such offenses, or conviction for any other offense indicating a lack of business integrity or honesty, which seriously and directly affects the question of present responsibility.

mortgage loan applicants seeking participation in the federal program. By falsifying the figures upon which the Department bases its determinations, it is possible that Respondent's actions resulted in a denial of assistance to more needy buyers who would otherwise have received the financing wrongfully made available to Respondent's co-conspirators.

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 by any others doing business with the Department, and that the public will thereby be protected.

The Department has sought a two-year period of debarment based on Respondent's conviction. Respondent states his belief that debarment is unwarranted, but states that if it is upheld, a shorter period is justified based on a number of factors which he considers to be mitigating circumstances. Respondent specifically requests that consideration be given to a debarment period of six months to one year.

As already stated, Respondent's vague assertion that he "misunderstood the facts" when he engaged in the conduct leading up to his jury trial and subsequent conviction does not excuse his intentional acts of admitted falsification and misrepresentation. As an indication of his present responsibility, Respondent has suggested a number of un rebutted factors which purportedly diminish the force of his conviction. According to Respondent, despite the seriousness of the offense underlying his conviction, this was the first time in his career as a real estate broker that he was involved in any illegal conduct. While this may be true, it does not absolve Respondent from the necessary consequences of his actions which are designed to assure a requisite level of present integrity, honesty and ability to perform in HUD programs.

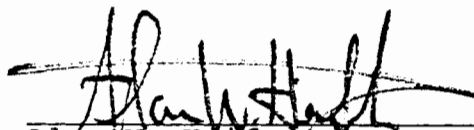
Respondent also describes the disposition of his case by the District Court judge and the disciplinary action taken by the Tennessee Real Estate Commission as mitigating evidence. Although not spelled out, I assume in presenting this argument Respondent intends to argue that the sanctions already imposed by these non-Departmental bodies are sufficient punishment for his conduct. This argument is erroneous on two grounds. First, sanctions imposed or not imposed outside the Department bear limited relation to a determination of Respondent's present responsibility. This debarment proceeding is an inquiry limited solely to Respondent's integrity, honesty and ability to perform in HUD programs. Second, even upon making a limited inquiry into the non-Departmental sanctions imposed on Respondent, it is important to note that the purpose of debarment is not to punish but to protect the public interest. Thus, because non-Departmental judicial or administrative proceedings and Departmental debarment proceedings serve related but distinct purposes, the sanctions imposed may but need not be identical.

Finally, in addition to expressing remorse for his conduct, Respondent describes, in general, his stable family status and the supportive stand taken by former co-workers. This, too, is insufficient to tip the scales in favor of mitigating Respondent's conviction so as to justify a shortened period of debarment.

Respondent has been suspended from participating in Departmental programs since October 2, 1984. In view of Respondent's failure to show mitigating circumstances justifying a debarment of less than two years, I find that protection of the public and the Government's interest will be served by a two-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, 8/ I conclude and determine that good cause exists to debar Respondent, Harold Lee Sellers, from doing business with HUD for a period of two years from October 2, 1984 to October 2, 1986.



Alan W. Heifetz
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Dated: March 25, 1985

8/ The Initial Determination in this case negates the need for a ruling on the Department's Request for Leave to File Response filed on March 22, 1985.