

UNITED STATES OF AMERICA  
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
BOARD OF CONTRACT APPEALS  
Washington, D. C.

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| In the Matter of: | : |                        |
|                   | : |                        |
| TED DALTON,       | : | HUDBCA No. 90-5246-D23 |
|                   | : | Docket No. 90-1437-DB  |
| Respondent        | : |                        |
|                   | : |                        |

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For the Respondent:

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For the Government:

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Washington, D. C. 20410

**DETERMINATION BY ADMINISTRATIVE JUDGE DAVID T. ANDERSON**

January 14, 1991

**Statement of the Case**

By letter dated January 2, 1990, C. Austin Fitts, the Assistant Secretary for Housing-Federal Housing Commissioner, U.S. Department of Housing and Urban Development ("Department", "Government" or "HUD"), notified Ted Dalton ("Respondent"), that the Department proposed to suspend him from further participation 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 participation in procurement contracts with HUD pending the resolution of his indictment for violations of 18 U.S.C. §§ 371, 1010 and 2. By letter dated April 23, 1990, Assistant Secretary Fitts notified Respondent that the Department was proposing a three year debarment of Respondent based on Respondent's conviction in the United States District Court for violations of 18 U.S.C. §§ 1010 and 2. Respondent was advised that his suspension from further participation in HUD programs would be continued "pending final determination of the issues in this matter . . . ."

By letter dated January 25, 1990, Respondent's counsel advised HUD of Respondent's conviction and requested a review of Respondent's suspension and the anticipated proposed debarment of Respondent. By order dated March 19, 1990, Respondent's answer to the complaint incorporated in the Assistant Secretary's notification of suspension, was deemed a sufficient answer to the complaint incorporated in the Assistant Secretary's subsequent notification to Respondent of his proposed debarment. This Determination is based upon the consideration of the written submissions of the parties, as Respondent is not entitled to an oral hearing in this matter. 24 C.F.R. § 24.313(b)(2)(ii).

### Findings of Fact

1. A grand jury indictment was issued on August 23, 1989, alleging in Count XIII that on or about June 24, 1985, Respondent falsely represented the income, assets, and down payments of buyers on the HUD/FHA Application for Commitment for Insurance under the National Housing Act. The indictment also included additional charges of conspiracy and misrepresentation allegedly occurring during certain months from 1984 through 1986. (Govt. Exh. 3/Indictment). However, these charges were later dismissed. (Govt. Exh. 3/Plea Agreement, at 2).

2. During pertinent months from 1984 through 1986, Respondent "was a real estate speculator involved in purchasing and selling real estate" in Kansas. (Govt. Exh. 3/Indictment, at 3).

3. Respondent entered into a plea bargain in which he agreed to cooperate fully in return for a reduced sentence and the payment of certain sums as restitution. (Govt. Exh. 3/Plea Agreement). Respondent subsequently entered a plea of guilty on November 9, 1989 and was convicted by the United States District Court for the District of Kansas for making false statements in violation of 18 U.S.C. §§ 1010 and 2. Respondent was placed on probation for a period of 3 years, ordered to serve "a period not to exceed 90 days" in the Topeka Halfway House under P.L. 91-492, and assessed a \$50 fine to be paid to the Criminal Victims Fund. (Govt. Exh. 4).

4. Respondent has more recently been employed for three years by Rinehart Roofing Company, Inc. ("Rinehart Roofing"), performing non-HUD related services involving roofing, renovation, remodeling, and the restoration of residential and commercial buildings. Counsel for Respondent represents in his brief that during the pertinent months in 1984 through 1986, Respondent "was involved in the acquisition and resale of residential property for profit. [He] is now exclusively an employee of Rinehart Roofing . . .," a company in which he has no proprietary interest. Respondent's affidavit "adopt[s] as correct statements of fact which are referred to in [his counsel's] brief." Respondent was not employed at Rinehart

Roofing when Respondent's criminal conduct occurred, nor was Rinehart Roofing involved in Respondent's criminal acts. (Respondent's Affidavit; Affidavit of Guy M. Rinehart).

5. Respondent attests in his affidavit, inter alia, that (1) he has not knowingly participated in any HUD-related programs since imposition of the sanctions in January of 1990, (2) he has gained an understanding of the harm caused by his past conduct, and (3) his increased respect for HUD regulations will insure that he will not violate any HUD laws or regulations in the future. Furthermore, Respondent contends that his responsibilities as a divorced father of an eight-year old daughter presently motivate him to maintain employment and conduct himself with both personal and business integrity. (Respondent's Affidavit).

6. Guy M. Rinehart, president of Rinehart Roofing, and David M. Lines, president of David M. Lines Consulting Services, Inc., essentially characterize Respondent as a responsible, knowledgeable, trustworthy, and highly respected individual in the construction industry. Rinehart also avers that Rinehart Roofing and its other employees would suffer without Respondent's quality work if the debarment sanction is imposed. (Affidavit of Guy M. Rinehart; unsworn letter of David M. Lines).

### Discussion

It is uncontested that Respondent was a participant in a covered transaction under HUD's nonprocurement programs and was a principal as defined in 24 C.F.R. § 24.105(p). Under applicable HUD regulations, at 24 C.F.R. § 24.305, a debarment may be imposed for:

(a) Conviction of or civil judgment for:

\* \* \*

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, or obstruction of justice; . . .

The burden is on the Government to prove by a preponderance of the evidence that cause for debarment exists. 24 C.F.R. §§ 24.313(b)(3), (4); James J. Burnett, HUDBCA No. 80-501-D42, 82 BCA ¶15,716. If the debarment is based upon a conviction, a civil judgment, or debarment by another Federal agency, this evidentiary standard shall be deemed to have been met. 24 C.F.R. § 24.313(b)(3). This evidentiary standard has clearly been met under the circumstances of this case.

Underlying the Government's authority not to do business with a person is the requirement that agencies only do business with "responsible" persons and entities. 24 C.F.R. § 24.115. The term "responsible," as used in the context of suspension and debarment, is a term of art which includes not only the ability to perform a contract satisfactorily, but the honesty and integrity of the contractor as well. 48 Comp. Gen. 769 (1969). The test for whether a debarment is warranted is present responsibility. It is well established that a lack of present responsibility may be inferred from past acts. Schlesinger v. Gates, 249 F.2d 111 (D.C. Cir. 1957); Stanko Packing Co. v. Bergland, 489 F.Supp. 947, 949 (D.C. D.C. 1980). Under the debarment standard of present responsibility, the existence of a cause for debarment does not necessarily require that the contractor be debarred; the seriousness of the contractor's acts or omissions and any mitigating factors must be considered in making a debarment determination. See 24 C.F.R. §§ 24.314(a), 24.320(a).

Respondent's conviction is based on Respondent's false statements regarding certain facts relating to buyers seeking to obtain FHA-insured mortgage loans. This conviction is evidence that Respondent lacked "probity, honesty and uprightness" and connotes lack of responsibility. See 48 Comp. Gen. 769 (1969). Counsel for the Government is quite correct in his assessment that "Respondent was guilty of a serious breach of trust and committed serious violations of HUD regulations and criminal laws of the United States." However, Respondent contends that the events which led to his conviction occurred "many years ago during a period of time in which [he] did not have the family and job stabilizing influences that he currently has." This excuse cannot justify Respondent's resort to criminal activity.

This Board has viewed as a mitigating circumstance a substantial passage of time following the improper conduct which leads to the imposition of Departmental sanctions. ARC Plumbing and Heating Corporation, HUDBCA No. 88-3459-D68 (Feb. 2, 1990); Spencer H. Kim and Kamex Construction Corporation, HUDBCA No. 87-2468-D58 (June 21, 1988). Here, the proposed debarment of Respondent is based on criminal conduct which occurred in 1985; no allegation has been submitted that Respondent has engaged in irresponsible conduct since that time, except for the Government's contention that Respondent is currently participating in lower tier covered transactions in contravention of his January, 1990 suspension. The Government cites the letter from counsel for Respondent dated January 25, 1990 as evidence that Respondent violated 24 C.F.R. § 24.110(a)(ii) by participating in HUD programs during his current employment with Rinehart Roofing. This letter states:

Mr. Dalton is employed as a roofer, contractor, supervisor, appraiser, inspector, and estimator for a roofing and contracting company which he has no ownership interest in

and which he is not an officer or shareholder in the corporation. In the course of his employment, Mr. Dalton does act as an employee dealing with HUD business houses and/or prospective HUD houses in these capacities. (Govt. Exh. 5).

This statement is later mollified in Respondent's Reply Brief, at 9-10, in which counsel for Petitioner states:

Currently Dalton remains employed by Rinehart Roofing but is not knowingly participating in or being involved with any HUD projects even as an employee with Rinehart Roofing pending determination of the limits and scope of any debarment/suspension.

\* \* \*

The Government's conclusions and arguments [that Respondent is participating in lower tier covered programs] are the probable result of a misunderstanding of what Dalton proposes he should be able to do under that law in the exercise of the judges discretion and what he is actually doing pending the determination by the judge in the exercise of his discretion.

While Respondent's "misunderstanding" of the law and HUD regulations is no excuse for improper conduct, the Government has simply not offered any evidence which proves that Respondent is, in fact, participating in lower tier covered programs in contravention of a suspension notice. Respondent, conversely, has offered a sworn affidavit in which he avers "[s]ince receipt of the notices of suspension and debarment by HUD, I have not knowingly participated in HUD-related activities with my employment" with Rinehart Roofing. Even if the Government had amended its complaint to include the allegation of Respondent's improper conduct while suspended as a basis for the proposed debarment, this allegation would still fail for lack of proof based on the ambiguous and inconclusive representations on this issue in the record before me. I find that there is insufficient evidence in this record to establish that Respondent has not complied with the Assistant Secretary's notice of suspension.

Respondent maintains that, in his present job with Rinehart Roofing, he is no longer involved with the acquisition, purchase or sale of houses, and, therefore, imposition of a debarment is not necessary to protect the Government. The interests of the Government can be sufficiently protected where an individual or entity, which has been barred from doing business with the Government as a result of the imposition of an administrative sanction, is no longer engaging in similar potentially detrimental conduct. See Dennis W. Plunk, HUDBCA No. 85-915-D6, at 4-5 (July 1, 1985) (attorney's suspension from the bar made debarment unnecessary); Norma Coleman, HUDBCA No. 88-3432-D42

(Feb. 15, 1990)(suspension of a real estate agent's license by a state real estate licensing agency afforded sufficient protection to the Government). Respondent's present duties for Rinehart Roofing appear to have eliminated the possibility that Respondent could again falsely represent information on a HUD Application for Commitment For Insurance and to provide a significant degree of protection to HUD and to the public that Respondent will not be able to engage in the type of conduct which led to his criminal conviction. The affidavit of Rinehart and the letter of Lines bespeak Respondent's present responsibility in that they find him trustworthy, knowledgeable and capable in his business dealings. I consider the sworn affidavit of Rinehart and the corroboration found in the letter of Lines to be persuasive indicators of Respondent's current business conduct. Cf. John M. Fitzpatrick, HUDBCA No. 89-4503-D43 (Feb. 7, 1990). The evidence before me convinces me that Respondent is now conducting himself responsibly.

The Government contends that Respondent's lack of remorse is evidenced by his defiance of HUD's prohibition against participation in lower tier covered programs of the Department, a "defiance" which I have concluded is not substantiated by the record in this case. In his affidavit, Respondent exhibits both remorse and an understanding of the harm caused by his false statements. Respondent states:

After my indictment, I learned and realized that the harm that is created through a violation of HUD laws is substantial in its effect upon the public, my family, and myself. With my greater understanding of HUD laws and regulations and with my increased respect for these laws and regulations, I will not violate any law or regulation in the future.

Sworn statements indicating remorsefulness and a recognition of the seriousness of past acts are evidence of mitigation. Cf. Chesley J. Doak, HUDBCA No. 89-4364-D12, at 7 (May 24, 1989); Bruce Haltom, HUDBCA No. 87-264-D62, at 3 (June 13, 1988). Respondent's current views of his family responsibilities and his employment with Rinehart Roofing also appear to have created strong incentives for Respondent to uphold his personal and professional integrity. Consequently, I conclude that the Government simply has not demonstrated an absence of "remorse" by Respondent for his criminal activity.

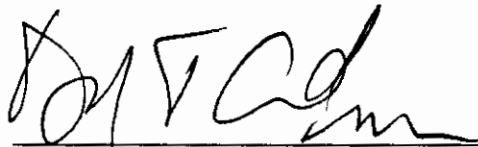
The Government asserts that the deterrent effect of Respondent's debarment is necessary to allow the Government to carry out its mandate of protecting the public interest. The Government relies on the holding in Theodore A. Hummel, HUDALJ No. 84-929-DB (June 1, 1984), to support this proposition. In that case, HUD Administrative Law Judge Alan Heifetz stated: "the deterrent effect of debarment cannot be overlooked as a means to assure [the protection of the public interest]." However, the

Hummel decision can also be cited as supporting the Department's obligation to view a violation of a Department regulation by a HUD principal in its totality, i.e., consider, as Judge Heifetz did, all mitigating factors in weighing the propriety of a proposed debarment. In fact, Judge Heifetz recommended a reduction of the period of debarment of Hummel and his affiliates from four years to two years based on mitigating evidence submitted by Respondent. Even where a debarment is found to be warranted, and even where the deterrent effect of a debarment is fully appreciated, the length of the sanction proposed by the debarring official could still be excessive. I cannot conclude, based on the evidence in this case, that Respondent's present conduct demonstrates so serious a business risk to HUD as to justify a debarment for a period of three years.

Counsel for Respondent proposes that, in lieu of imposing a debarment sanction which would prohibit Respondent from participating as either a participant or principal in HUD programs and in programs throughout the executive branch of the Federal Government, Respondent should merely be excluded from selective HUD activities. Granting any of these modified sanctions is not within the scope of authority of a HUD judicial officer and is a matter which is appropriately within the debarring official's discretion to impose a lesser sanction or to enter into settlement agreements. A HUD judicial officer's authority under the Department's debarment regulations is limited to a review of the propriety of the sanction proposed by the debarring official.

### Conclusion

For the foregoing reasons, I find that a debarment of Respondent is warranted under the circumstances of this case and that Respondent's debarment shall be limited to a period from January 2, 1990 to the date of this Determination. Respondent shall be debarred from participation in HUD programs through January 14, 1991, credit being given for the period of Respondent's suspension.



David T. Anderson  
Administrative Judge