

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

In the Matter of:

WILLIE STEWART, SR.

Respondent

HUDALJ 91-1638-DB

Decided: May 7, 1991

Arthur J. Thompson, Esquire  
For Respondent

Marc Rothberg, Esquire  
For the Department

Before: ALAN W. HEIFETZ  
Chief Administrative Law Judge

**INITIAL DETERMINATION**

**Statement of the Case**

This proceeding arose as the result of an October 15, 1990 suspension, effective immediately and pending resolution of any debarment, issued pursuant to 24 C.F.R. section 24.405, by the U.S. Department of Housing and Urban Development ("the Department" or "HUD") against Willie Stewart, Sr. ("Respondent") prohibiting participation in nonprocurement activities throughout the executive branch of the federal government and in procurement activities with HUD. The suspension was based on an indictment against the Respondent charging violation of 18 U.S.C. sections 371, 1014, 1163 and 1344. Based on an ensuing conviction for violation of 18 U.S.C. sections 371, 1014 and 1344, HUD proposed by letter dated January 16, 1991, to debar Respondent for a period of three years starting from the date of the suspension, and to continue the suspension pending final determination of the issues in this matter, pursuant to 24 C.F.R. sections 24.305(a)(3), and (d).

Because the proposed action is based upon a conviction, the hearing in this case is limited under 24 C.F.R. section 24.313(b)(2)(ii) to submission of documentary evidence and written briefs. An Order dated February 20, 1991, established a schedule for the filing of briefs. In compliance with that schedule, on March 22, 1991, the Department filed its brief, and Respondent submitted a reply brief on March 28th. As the Department declines to submit a response to Respondent's reply brief, this matter is ripe for decision.

### Findings of Fact

1. During the period of Respondent's indictment, he served as Secretary and then Chairman of the Crow Tribal Land Resources Committee for the Crow Tribe ("the Committee"). See Exhibit A at 2, attached to the Department of Housing and Urban Development's Brief (Mar. 22, 1991) ("Department's Brief").

2. Respondent continues to serve as Chairman on the Committee. See Respondent's Brief at 1-2 (Mar. 27, 1991), and attached Respondent's Affidavit (Mar. 27, 1991).

3. The Committee purchased tribal land financed with loans guaranteed by the Farmer's Home Administration ("FHA"). See Affidavit of ██████ Howe (Mar. 22, 1991), attached to the Department's Brief.

4. On September 21, 1989, Respondent was indicted by the grand jury in the United States District Court for the District of Montana for violation of 18 U.S.C. sections 371, 1014, 1163 and 1344. See Department's Brief, Exhibit A.

5. On October 16, 1990, Respondent was convicted of bank fraud, conspiracy to commit bank fraud, and making false statements in commission of these crimes in violation of 18 U.S.C. sections 371, 1014 and 1344. *Id.*, Exhibit C. Respondent made false statements and provided false documents, including correspondence on Committee letterhead, to federally insured financial institutions to assist a co-defendant in fraudulently acquiring loans. Specifically, Respondent falsely represented that the co-defendant would receive substantial monies from the sale of his property to the Committee when Respondent knew that the property was in foreclosure. *Id.*, Exhibit A at 10-16.

6. Respondent provided the co-defendant with Committee letterhead blanks, including one or more previously signed by Respondent. *Id.* at 12.

7. Respondent received \$1500 from the co-defendant from the proceeds of one of the fraudulently procured loans. *Id.*

### Discussion

#### 1. Respondent's Conviction Constitutes Cause for Debarment

As the Committee's land purchases were financed with loans guaranteed by the FHA, the Committee was a "participant" in "covered transactions". 24 C.F.R. sections 24.105 (m) and 24.110 (a)(1). Also, Respondent as Chairman and Secretary of the Committee is considered a "participant" and "principal" in these transactions and as such is subject to HUD's debarment regulations. 24 C.F.R. sections 24.105 (m) and (p), and 24.110. Pursuant to 24 C.F.R. section 24.305 (a)(3), HUD may institute debarment proceedings based on a conviction for "embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making

false claims, or obstruction of justice." In addition, debarment may be based on "[a]ny other cause of so serious or compelling a nature that it affects the present responsibility of a person." 24 C.F.R. section 24.305(d). The Department finds its debarment on these two preceding grounds.<sup>1</sup>

Section 24.313(b)(3) of 24 C.F.R. provides that cause for debarment must be established by a preponderance of the evidence, a standard deemed met by proof of a conviction. Further, while the Department has the burden of establishing the cause for debarment, Respondent has the burden of establishing any mitigating circumstances. 24 C.F.R. section 24.313(b)(4). As Respondent was convicted of bank fraud and other offenses, the Department has satisfied its burden that cause for debarment exists. See 24 C.F.R. section 24.313(b)(3). The inquiry, however, does not end here.

The existence of a cause for debarment does not necessarily require that a respondent be debarred. HUD must also determine whether debarment is necessary to protect the public interest. See 24 C.F.R. sections 24.115(a), (b) and (d). The debarment process is not intended as a punishment, rather, it protects governmental interests not safeguarded by other laws. *Joseph Constr. Co. 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. section 24.115(a). See also *Agan v. Pierce*, 576 F. Supp. 257 (N.D. Ga. 1983); *Stanko Packing Co., Inc. v. Bergland*, 489 F. Supp. 947, 948-49 (D.D.C. 1980).

"Responsibility" is a term of art which encompasses business integrity and honesty. See 24 C.F.R. section 24.305. See, e.g., *Gonzalez v. Freeman*, 334 F.2d 570, 573 & n.4, 576-77 (D.C.Cir. 1964). Determining "responsibility" requires an assessment of the current risk that the government will be injured in the future by doing business with a respondent. See *Shane Meat Co., Inc. v. U.S. Dep't of Defense*, 800 F.2d 334, 338 (3d Cir. 1986). That assessment may be based on past acts, including a previous criminal conviction. See *Agan v. Pierce*, 576 F. Supp. at 261; *Delta Rocky Mountain Petroleum, Inc. v. U.S. Dep't of Defense*, 726 F. Supp. 278 (D.Colo. 1989). Moreover, a debarment based on past acts is not necessarily invalid despite existing evidence that tends to indicate a present ability to perform one's contract with the government.<sup>2</sup> See *Joseph Constr.*, 595 F. Supp. 448.

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<sup>1</sup> In addition to these bases cited in HUD's proposed debarment letter, the Department's Brief attempts to assert sections 24.305(a)(1) and (4) of 24 C.F.R. as grounds for debarment. There is no need, however, to address these additional grounds.

<sup>2</sup> The United States Court of Appeals for the District of Columbia Circuit, stated in *dictum* that a "finding of present responsibility for performance of a particular contract does not preclude a contemporaneous finding that a contractor should be debarred." *Peter Kiewit Sons' Co. v. U.S. Army Corps of Eng'rs*, 714 F.2d 163, 167 n.18 (D.C.Cir. 1983). Further, the Third Circuit Court of Appeals upheld a debarment based on a prior conviction despite subsequent satisfactory contract performance. The court found that although the debarring official considered the satisfactory performance, he also noted that the company had not demonstrated any operational changes to preclude the recurrence of similar future criminal activity. *Shane Meat*, 800 F.2d at 338.

Respondent abused his position on the Committee to procure loans fraudulently for a co-defendant. He made false statements in his capacity as a Committee officer to promote the personal deceitful interests of individual co-defendants. He exploited the trust placed in him by the Crow Tribe. Also, he personally benefited by accepting \$1500 from the fruits of his and his co-defendants' malfeasance. Finally, he currently holds the position of Chairman on the Committee, and the record contains no evidence demonstrating that he is not in a position to engage in actions that may pose a risk to the government.

As the evidence supports a finding of a lack of present responsibility, debarment is an appropriate remedy. Because the conviction and its underlying facts justify debarment under 24 C.F.R. section 24.305(a)(3), there is no need to address the Department's other proposed ground, i.e., "[a]ny other cause . . . that affects the present responsibility." 24 C.F.R. section 24.305(d).

## 2. A Three-Year Period of Debarment is Appropriate

The seriousness of Respondent's actions, and any mitigating factors must be considered in any debarment determination. 24 C.F.R. sections 24.115(d), 24.300 and 24.320(a). Upon examination of these criteria, I find that a three-year period is appropriate. The seriousness of Respondent's actions indicating a lack of present responsibility justifies debarment and supports imposition of a three-year debarment period. *See supra*. After contemplating the mitigating factors offered by Respondent's submissions, I am not persuaded to the contrary.

Respondent first notes that his conviction is on appeal. Second, he asserts that his sentence is much less severe than that imposed on his co-defendants because his role in the offense was "extremely minimal" compared to that of the other participants. Also Respondent contends that he continues to be an "exemplary employee" and that he still serves as Chairman on the Committee. In short, he argues that he "maintains [his] reputation and the positions of responsibility he held prior to conviction." Respondent's Brief at 1 and 2. Finally, his affidavit states that he "has conducted himself as a responsible and law-abiding citizen."

The fact that his conviction is on appeal is of no import at this time. HUD's regulations provide for imposition of suspension upon indictment. There is no mechanism for delaying the process pending the outcome of a trial to determine whether a conviction, and consequently a debarment, are imminent. To do so may place the government at unnecessary risk by permitting a person demonstrated by indictment to be irresponsible to continue to deal with the government until matters are resolved - - an untenable situation considering that the purpose of suspension and debarment is protection of public and governmental interests, *see supra p. 3*. Correspondingly, there is

no provision for delay of debarment proceedings pending appeal of a conviction for similar reasons.<sup>3</sup>

In giving due consideration to the underlying basis for Respondent's reduced sentence - - the district court's determination that he was a "minimal participant" in the offenses (*see* Sentencing Transcript at 85 ("Tr."), attached to Respondent's Brief), I must also weigh other countervailing determinants. While under certain circumstances minimum participation in a misdeed may argue for abatement of the debarment period, this is not the case here. Although Respondent's involvement may have been "minimal" compared to others, his role was key in effectuating the schemes. Respondent's false statements communicated in his capacity as a Committee representative were an essential element in the fraud. Also the court found that Respondent had not accepted responsibility for his actions. Tr. at 88. Finally, Respondent personally profited from his actions.

The testimony of the president of the college where Respondent works confirms that Respondent is an "exemplary employee." *See* Tr. at 93-94. However, even though Respondent was similarly employed during the time of his malfeasance (*see* Respondent's affidavit), his occupation failed to deter participation in bank fraud. Therefore, there is no reason why it would tend to prevent him from further engaging in fraudulent activity in the future. Concerning Respondent's current chairmanship on the Committee, while this was advanced as a mitigating factor, I view it as evidence of existing potential risk because Respondent remains in a position to represent the Committee in any dealings that it may have with the government.

Respondent offers his praiseworthy reputation even subsequent to conviction, as a mitigating factor. It was this notability, however, that placed him in positions of trust that allowed him to perpetrate his crimes. Accordingly, Respondent should not now be allowed to use his reputation as a mitigating factor to reduce the three-year debarment period. Respondent also asserts that he is "a responsible and law-abiding citizen." There is no evidence, however, to verify his conduct since commission of the offense.<sup>4</sup> Where debarment is based on a conviction, the regulations provide that the period of debarment "generally should not exceed three years." 24 C.F.R. section 24.320(a)(1).<sup>5</sup> The Department has requested imposition of a three-year period of debarment and I agree.

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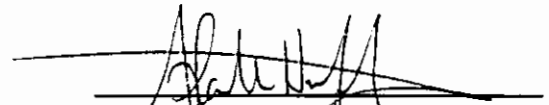
<sup>3</sup> As opposed to delaying these proceedings, assuming his conviction is overturned, there are other avenues available to Respondent if he is so inclined to pursue them in the future. *See, e.g.*, 24 C.F.R. section 24.320(c).

<sup>4</sup> While the sentencing transcript contains testimony from two character witnesses, they primarily only confirm Respondent's status as a model employee. Tr. 90-94.

<sup>5</sup> The regulations also provide that "[i]f a suspension precedes a debarment, the suspension period shall be considered in determining the debarment period." 24 C.F.R. section 24.320(a). The Department's proposed debarment period runs from imposition of the suspension, and therefore, complies with the regulation.

### Conclusion and Determination

Respondent's debarment is appropriate based on his conviction and the seriousness of his actions. There are no mitigating factors demonstrating otherwise. He exploited his position and abused the trust placed in him by the Committee and the Crow Tribe. He personally gained from his deceit at the expense of federally insured financial institutions. Finally, he remains in a position of authority on a Committee that may have dealings with the government in the future, and thus may pose further risk to the government. Upon consideration of the public interest and the entire record in this matter, I conclude that good cause exists to debar Willie Stewart, Sr. from further participation in primary covered transactions and lower tier covered transactions (*see* 24 C.F.R. section 24.110(a)(1)), 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 for a period of three years from October 15, 1990.



ALAN W. HEIFETZ  
Chief Administrative Law Judge

Dated: May 7, 1991