

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

In the Matter of:

ROBERT M. BAUMSTEIN
BELLTEX PARTNERS

Respondents

HUDALJ 91-1643-DB
Date Decided: July 12, 1991

Robert M. Baumstein, *pro se*

Christopher S. Kinnear, Esquire
For the Department

Before: ALAN W. HEIFETZ
Chief Administrative Law Judge

INITIAL DETERMINATION

Statement of the Case

This proceeding arose pursuant to 24 C.F.R. section 24.100 *et seq.* as a result of an action taken by the Acting Assistant Secretary for Housing-Federal Housing Commissioner of the U.S. Department of Housing and Urban Development ("the Department" or "HUD") on February 8, 1991, proposing to debar Robert M. Baumstein ("Respondent Baumstein") and his named affiliate, Belltex Partners, from participating in covered transactions as either participants or principals at HUD and throughout the Executive Branch of the federal Government and from participating in procurement contracts with HUD. The action was based on Respondent Baumstein's conviction for violation of 18 U.S.C. sections 2 and 1010. HUD proposed to debar Respondent Baumstein for three years from the issue date of a limited denial of participation ("LDP") imposed on Respondent Baumstein d/b/a Belltex Partners on April 19, 1990, by the Manager of HUD's Houston Office. Respondent Baumstein and Belltex Partners were also suspended pending the outcome of any hearing on the proposed debarment. The suspension superseded the LDP.

Respondent Baumstein requested a hearing on the proposed suspension and debarment by a letter to HUD's Office of Program Enforcement dated February 18, 1991. Because the action is based solely 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 March 22, 1991, established a schedule for the filing of briefs. In

compliance with that schedule, on April 22, 1991, the Department filed its brief, and Respondent Baumstein submitted his answer on May 13, 1991. As the Department failed to submit a response to Respondent Baumstein's reply brief, this matter is ripe for decision.

Findings of Fact

1. In 1984 and 1985, Respondent Baumstein was a broker doing business primarily in Houston, Texas. During this period, he operated a business named Belltex Partners with Louis H. Arky.¹ See Government's Brief in Support of Suspension and Debarment ("Department's Brief") at 1 and attached Exhibit 8, unnumbered page 1.

2. On May 28, 1986, Respondent Baumstein and Belltex Partners, as an affiliate, were suspended from participation in HUD programs pending completion of an investigation by the Department's Office of Inspector General. The investigation examined information presented to HUD concerning two Federal Housing Administration ("FHA") insured loans. Specifically, the information obtained by HUD indicated that Respondent Baumstein, as a broker of Belltex Partners, had submitted "false certifications. . .to HUD concerning the required mortgagor minimum investments, bonafide intent to occupy or purchase as a landlord and disbursement of loan proceeds for these two loans."² Department's Brief at 2 and attached Exhibit 4, unnumbered page 1.

3. On October 10, 1989, the Assistant Secretary for Housing-Federal Housing Commissioner, issued a letter to Respondent Baumstein and Belltex Partners stating that the suspension pending the investigation had expired.³ The letter further stated that

¹ The Department, in an *ipse dixit*, alleges that Belltex Partners "is an affiliate as defined at 24 C.F.R. section 24.105(b)." Government's Brief in Support of Suspension and Debarment at 6. Respondent Baumstein claims Belltex Partners, actually Belltex, is merely a name under which he did business. See Respondent's Answer at 1. He also offers evidence that he has withdrawn his right to use the name Belltex in the future. See *Id.* at 1 and attached Exhibit 1. The Department has adduced no evidence in response to show that Belltex Partners is a legal entity still in existence. See 24 C.F.R. section 24.105(b), (n). Furthermore, there is no evidence that Respondent Baumstein "controls, or has the power to control" Belltex Partners. *Id.* section 24.105(b). Therefore, there is insufficient evidence upon which to base a finding of affiliation as between Respondent Baumstein and Belltex Partners.

² On June 16, 1986, Respondent Baumstein requested a hearing on the suspension. A Notice of Hearing and Order was issued on June 30, 1986, which required Respondents to file an answer to the Government's complaint by August 18, 1986. Having received no answer by the due date, on August 27, 1986, the Government filed a Motion to Dismiss for Failure to Prosecute. That motion was granted on September 9, 1986. See Department's Brief at 2 and attached Exhibit 6.

³ Respondent Baumstein's June 16, 1986, hearing request (*see supra* note 2) was sent to HUD's Office of Program Enforcement and included a new mailing address to which Respondent Baumstein requested future correspondence be sent. See Department's Brief at 2 and attached Exhibit 5. That new address was

██████████
Houston, Texas 77227

In his Answer, Respondent Baumstein contends that he was unaware of the October 10, 1989, notice of the

Respondent Baumstein and Belltex Partners were "again eligible to participate in HUD programs." See Department's Brief at 2 and attached Exhibit 7, unnumbered page 1.

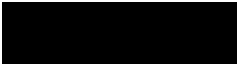
4. On November 20, 1989, the Federal Grand Jury for the Southern District of Texas, Houston Division returned a two-count indictment against Respondent Baumstein and Arky, d/b/a Belltex Partners, charging them with conspiracy, fraud, and the making of false statements to defraud HUD under 18 U.S.C. sections 2, 371, and 1010. See Department's Brief at 2 and 3 and attached Exhibit 8, unnumbered pages 4 and 5.

5. On April 19, 1990, the HUD Houston Office Manager issued a 12-month LDP against Respondent Baumstein, d/b/a Belltex Partners based on the November 20, 1989 indictment. See Department's Brief at 3 and attached Exhibit 2.⁴

6. On October 19, 1990, based on Respondent Baumstein's entry of a guilty plea as to Count 2 of the November 20, 1989, indictment, Respondent Baumstein was convicted on Count 2, "Fraud and False Statements: Department of Housing and Urban Development and Federal Housing Administration transactions, in violation of 18:1010 and aiding and abetting in violation of 18:2." The District Court's judgment specified that the date of the offense was June 1, 1984 to April 6, 1985, and that Count 1 of the indictment was dismissed on the motion of the United States. On that same date, Respondent Baumstein was sentenced to the custody of the Attorney General for two years, on the condition that four months be served in a community treatment facility, the remaining one year and eight months be suspended, and he be placed on probation with supervision for five years, to commence upon completion of the four month custodial sentence. As a special condition of probation, Respondent Baumstein was further ordered to perform 400 hours of community service and to pay a fine of \$5000 at the rate of \$100 per month beginning 60 days after release from confinement. See Department's Brief at 3 and attached Exhibit 3.

expiration of the suspension until he received the Department's Brief in the instant action. According to Respondent Baumstein, the notice was improperly sent to the old address. See Respondent's Answer at 2 and attached Exhibit 3.

The return address on the October 10, 1989, notice is


Houston, Texas 77027

Although the new address does not appear on any of the correspondence dated after June 16, 1986, that was submitted into evidence by *either* party, the Department has not contested Respondent Baumstein's assertion that he did not receive the October 10, 1989, notice at the time it was sent. Accordingly, I find that Respondent Baumstein did not receive the notice that the suspension had expired at the time it was sent, and was unaware of its existence until the instant action was brought by the Department.

⁴ For the same reasons articulated above, *see supra* note 3, I find that Respondent Baumstein did not receive the notice that the LDP had been imposed at the time it was sent, and was unaware of its existence until the instant action was brought by the Department.

Discussion

1. Respondent Baumstein's Conviction Constitutes Cause for Debarment

Respondent Baumstein, as a real estate broker engaged in HUD-insured mortgage transactions, is considered a "participant" and "principal" in "covered transactions." 24 C.F.R. sections 24.105 (m) and (p), 24.110(a)(1). Although Respondent Baumstein did business under the name of Belltex Partners, or Belltex, (*see* Respondent's Answer at 1), there is insufficient evidence upon which to base a finding of affiliation as between Respondent Baumstein and Belltex Partners. *See supra* note 1. Accordingly, for the purposes of the instant action, only Respondent Baumstein is subject to HUD's debarment regulations.

Pursuant to the Department's debarment regulations, HUD may institute debarment proceedings based on a conviction for the following causes:

- (1) Fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction. 24 C.F.R. section 24.305(a)(1).
- (2) Embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, or obstruction of justice. *Id.* section 24.305(a)(3).
- (3) Any other offense indicating a lack of business integrity or business honesty. *Id.* section 24.305(a)(4).

Additionally, a 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." *Id.* section 24.305(d). The Department bases its proposed debarment on these preceding grounds.

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. As Respondent Baumstein was convicted of fraud and making false statements resulting in the obtaining of HUD-insured mortgages, 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. *Id.* section 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).

To demonstrate Respondent Baumstein's purported lack of responsibility, the Department relies not only on the October 19, 1990, conviction on Count 2 of the indictment, but on Count 1 as well, which was dismissed by motion of the United States. Clearly, the allegations contained in Count 1 cannot be considered in evaluating present responsibility. The dismissal of a count has a preclusive effect on making findings based on that count.

Nonetheless, Respondent Baumstein's conviction on Count 2, and the facts surrounding the conviction, demonstrate a lack of present responsibility. The conviction relates to his participation in the making of false statements on a HUD/FHA application for mortgage insurance. According to the indictment for Count 2, Respondent Baumstein represented that one ██████t Dear and one ██████l Klein were to pay approximately \$12,000 in cash to obtain a residence, when in fact the money was paid by Respondent Baumstein and Louis Arky. These statements were made for the purpose of obtaining HUD/FHA insurance. Because Dear and Klein applied for insurance as owner occupants, but never occupied the homes, HUD insured loans for amounts greater than it would normally where the purchaser is not the owner occupant. Thus, HUD's exposure to loss was greater than it would have been had the applications been truthful.

2. Respondent Baumstein Has Already Been Effectively Debarred for More than Three Years

If a suspension precedes a debarment, that period of suspension must be considered. 24 C.F.R. sections 24.300 and 24.320(a). The Department argues that a three-year period of debarment should be imposed, beginning on April 19, 1990, the date the LDP was imposed. Respondent Baumstein contends that by virtue of the suspension, which began on May 28, 1986, he has already been prevented from participating in HUD contracts, based on the acts for which he was subsequently convicted. Specifically, he notes that the May 28, 1986 suspension "has been honored. . .since it was invoked and [he has] not individually (nor as part of a group) attempted and/or been involved with (directly or indirectly) any HUD program or benefitted therefrom during the entirety of this time." He further asserts that the instant suspension and proposed debarment, as well as the LDP, "[are] designed to unfairly perpetuate [his] suspension ad infinitum for the same and single transaction in question occurring 1984-1985." (Emphasis added).

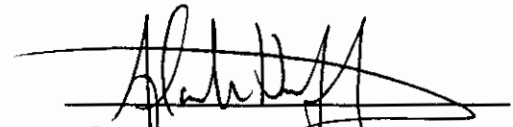
The Department has not contested Respondent Baumstein's assertion that the instant case flows from the same transactions that triggered the May 28, 1986, suspension. Moreover, the record evidence supports the finding that all the proceedings including the instant matter arose out of the same acts. In the October 28, 1986, suspension letter, Respondent Baumstein was informed that HUD had been advised of his making false statements involving two FHA-insured loans. Count 2 of the November 20, 1989, indictment also involved the same acts. Even if the acts were not identical, they occurred during the same time period and constitute the same type of transaction. Given the Department's failure to respond to Respondent Baumstein's allegation and the evidence at hand, I conclude that the transactions underlying the instant action are the same as those underlying the May 28, 1986, suspension.

Because the same transaction is involved, the period of suspension prior to the debarment must be taken into account, pursuant to 24 C.F.R. section 24.320(a). Accordingly, Respondent Baumstein has been effectively debarred since May 28, 1986. This is longer than the period of debarment the Department is currently seeking to impose on Respondent Baumstein. 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). The Department has failed to articulate any reason why Respondent Baumstein's May 28, 1986 suspension, and his effective five year debarment, are not sufficient to insure Respondent Baumstein's present responsibility. Conspicuously, the Department offers absolutely no evidence that the 1986 suspension was violated in any way over the course of the past five years.

Adding any additional period of debarment to the five year suspension already served by Respondent Baumstein would go far beyond the protective purpose of debarment and become unallowably punitive. *See* 24 C.F.R. section 24.115(b).

Conclusion and Determination

Upon consideration of the public interest and the entire record in this matter, I conclude and determine that although cause exists to suspend and debar Robert M. Baumstein from further participation in covered transactions and lower tier covered transactions (*see* 24 C.F.R. section 24.110(a)(1)), further suspension and debarment of Respondent Baumstein is not appropriate because, by virtue of his suspension from May 28, 1986, he has effectively been debarred for more than three years.


ALAN W. HEIBITZ
Chief Administrative Law Judge

Dated: July 12, 1991