

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

In the Matter of:

CLARENCE CHARLES WHITE

Respondent.

HUDALJ 91-1710-DB
Dated: January 2, 1992

Stanley R. Kirk, Esquire
For the Respondent

Lisa Wright, Esquire
For the Secretary

Before: THOMAS C. HEINZ
Administrative Law Judge

INITIAL DECISION

Statement of the Case

This proceeding arose pursuant to 24 C.F.R. Sec. 24.100 *et seq.* as a result of action taken by the Assistant Secretary for Housing and Urban Development ("the Department" or "HUD" or "the Government") on July 2, 1991, in a letter suspending and proposing to debar Respondent from participating in covered transactions as either a participant or a principal at HUD and throughout the Executive Branch of the Federal Government and from participating in procurement contracts at HUD for a period of three years beginning July 2, 1991. The action was based on Respondent's conviction for violation of 26 U.S.C. Sec. 7206(1) - Filing False Income Tax Return. Respondent has appealed the July 2, 1991, action and requested a hearing. Because this case is based solely on a conviction, the evidence is limited to documents submitted into the record by the parties. (24 C.F.R. Sec. 24.313(b)(2)(ii))

Findings of Fact

On October 16, 1990, Respondent was indicted by a Grand Jury for the United States District Court for the Eastern District of Michigan in a six-count Indictment charging Respondent with violations of 26 U.S.C. Secs. 7203 and 7206(1). (GX.1)¹

¹The following reference abbreviations are used in this decision: "GX." for "Government's Exhibit; and "RX." for "Respondent's Exhibit."

On March 28, 1991, Respondent was convicted of Count 2 of the Indictment on the basis of a guilty plea. His sentence requires, *inter alia*, 18 months incarceration with all but four months suspended, probation for two and a half years to begin upon release from confinement, restitution to the Internal Revenue Service for all taxes and penalties owed with \$30,000 to be paid within 60 days, and a \$2,000 fine. (GX.3)

Subsidiary Findings and Discussion

The purpose of debarment is to protect the public interest by precluding persons who are not "responsible" from conducting business with the federal government. 24 C.F.R. Sec. 24.115(a) *See also Agan v. Pierce*, 576 F. Supp. 257, 261 (N.D. Ga. 1983); *Stanko Packing Co., Inc. v. Bergland*, 489 F. Supp. 947, 948-49 (D.D.C. 1980). The debarment process is not intended to punish; rather, it is designed to protect governmental interests not safeguarded by other laws. *Joseph Constr. Co. v. Veterans Admin.*, 595 F. Supp. 448, 452 (N.D. Ill. 1984). In other words, the purpose of debarment is remedial, not punitive. *See* 24 C.F.R. Sec. 24.115.

In the context of debarment proceedings, "responsibility" is a term of art that encompasses integrity, honesty, and the general ability to conduct business lawfully. *See* 24 C.F.R. Sec. 24.305. *See also 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 Col., Inc. v. U.S. Dep't of Defense*, 800 F.2d 334, 338 (3rd Cir. 1986). That assessment may be based on past acts, including a previous conviction that occurred several years before the assessment. *See Agan*, 576 F. Supp. 257; *Delta Rocky Mountain Petroleum, Inc. v. U.S. Dep't of Defense*, 726 F. Supp. 278 (D. Colo. 1989).

Cause Exists to Debar Respondent

Respondent is subject to the Department's debarment regulations codified at 24 C.F.R. Part 24 because he was an administrative housing development coordinator for the Detroit Housing Authority, which receives a substantial amount of its funding from HUD. He exercised substantive control over federal funds and therefore meets the definition of a "participant" involved in "covered" transactions within the meaning of 24 C.F.R. Secs. 24.105(m) and 24.110(a).

Under 24 C.F.R. Sec. 24.305, the Department may debar a participant or principal based on, *inter alia*:

(a) Conviction or civil judgment for:

* * *

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

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 evidence of a conviction. Since the record shows Respondent has been convicted of filing a false tax return, which is unquestionably a false record or statement, the Government has satisfied its burden to prove cause for debarment.² However, a debarment cannot stand simply and solely on evidence sufficient to establish cause for debarment. Debarment is discretionary. It is therefore necessary to consider what the evidence shows about the seriousness of Respondent's conduct as well as any evidence in mitigation. (See 24 C.F.R. Sec. 24.115)

Out of six counts, Respondent pleaded guilty only to count two of the Indictment. Count two charged Respondent with willfully underreporting his income for 1985. However, Respondent submitted evidence into the record that shows Respondent underreported his income for four years, 1983 through 1986, thereby cheating the Government out of \$49,529 in personal income taxes. (RX. E, F) With additional penalties of \$40,740, Respondent owed the Internal Revenue Service more than \$90,000 at the time of his sentencing. Exactly how much more he owed cannot be determined on this record because we do not know how much Respondent owed in corporate income taxes in addition to personal income taxes. But whatever the total, the sentence (reflecting his plea agreement with the Government) requires payment of the entire debt to the Internal Revenue Service.³ (GX.2) When unlawfully incurred, a debt of this magnitude must be deemed serious.

Another indication of the seriousness of Respondent's offense is the fact that he was sent to jail for four months, even though he apparently had a previously clean record. The District Court judge clearly did not think his crime was minor.⁴ Nor do I. Respondent has been convicted of a serious crime involving moral turpitude demanding serious consequences. However, determining the appropriate length of a debarment requires consideration of any mitigating evidence as well as evaluation of the seriousness of the cause for debarment. (See 24 C.F.R. Sec. 24.115(d).)

The record shows several mitigating factors to be considered in Respondent's favor: (1) He apparently cooperated with the Government during the investigation of his case; (2) his conviction rests on a guilty plea rather than a verdict or finding after trial; (3) he apparently is in the process of making restitution to the Internal Revenue Service; and (4) he apparently has served his jail sentence.

²There is no basis for Respondent's contention that he has not been "convicted" because he agreed to plead guilty. The District Court's "Judgment and Probation/Commitment Order" reads in part: "Defendant has been convicted as charged of the offense of Filing False Income Tax Return, as to Count Two, in violation of 26:USC:7206(1)."

³Respondent reduced the debt by \$30,000 in May, 1991, as required by his sentence. RX.G.

⁴However, it is impossible to determine all of the reasons for the District Court's sentence, since copies of the transcript of the District Court's sentencing hearing, the pre-sentencing report, or any written findings of the Court have not been submitted into the record in this proceeding.

Respondent cooperated with the Government in the District Court case and pleaded guilty. Although it may be plausibly argued that Respondent cooperated only out of a desire to reduce his sentence, it is equally plausible that Respondent's cooperation and guilty plea signify a variety of commendable motives, such as remorse, a desire to make amends for past transgressions, a sense of public duty, or other feelings suggesting "responsibility," as that concept is used in debarment proceedings. Whatever the motivation, it is in the public interest to reward Respondent in this proceeding for his cooperation and plea of guilty in the District Court proceeding.

In the absence of evidence to the contrary, we must assume Respondent is obeying the Court's order and is in the process of paying the balance of the amount he owes the Internal Revenue Service. Unless the record shows otherwise, making restitution for one's crimes should be viewed as evidence of responsibility.

Respondent has served a four-month jail sentence. Incarceration presumably has a deterrent effect. It is therefore reasonable to conclude that Respondent is now less likely to engage in "irresponsible" conduct than he was before he went to jail. Accordingly, Respondent's period of debarment should be shorter than it would be if he had not served the jail sentence.

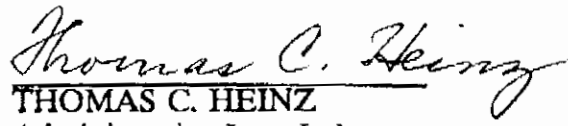
Absent creditable mitigating evidence, Respondent's crime was serious enough to warrant debarment for three years. The crime was so serious that it created a very strong inference that Respondent would remain "irresponsible" for several years thereafter. A three-year sanction would be, in the language of 24 C.F.R. Sec. 24.320(a), "commensurate with the seriousness of the cause." That Respondent apparently conducted himself properly while on the job does not mean that he is now "presently responsible." Rather, Respondent's satisfactory employment history with the Detroit Housing Authority merely indicates that he was not totally corrupt during the time he was cheating on his income taxes. In a "Notice of Hearing and Order" dated August 2, 1991, Respondent was explicitly invited to explain his position by filing a sworn statement into the record in this proceeding.⁵ He did not. The failure to file a statement subject to perjury penalties persuades me that Respondent is not yet "presently responsible," that he is not yet a person who can be fully trusted to act honestly and forthrightly with the Government. Nevertheless, mitigating factors require a reduction in the period of Respondent's debarment from 36 to 30 months. Because a suspension was imposed upon Respondent on July 2, 1991, the period of debarment will begin on that date, pursuant to 24 C.F.R. Sec. 24.320(a).

Conclusion and Determination

Upon consideration of the public interest and the entire record in this matter, I conclude and determine that good cause exists to debar Respondent Clarence Charles

⁵The Notice of Hearing and Order issued herein on August 2, 1991, invited Respondent to support his argument with "documentary evidence, including affidavits or depositions."

White from participating in covered transactions as either a participant or a principal at HUD and throughout the Executive Branch of the Federal Government and from participating in procurement contracts at HUD for a period of 30 months beginning July 2, 1991.


THOMAS C. HEINZ
Administrative Law Judge

Dated: January 2, 1992