



Board of Contract Appeals
 Department of Housing and Urban Development
 Washington, D.C. 20410-0001

In the Matter of:

LOUIS FERRIS, JR.,

Respondent.

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HUDBCA No. 92-G-7590-D54
 Docket No. 92-1858-DB

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For the Government

DETERMINATION BY ADMINISTRATIVE JUDGE TIMOTHY J. GRESZKO

September 1, 1992

Statement of the Case

On March 24, 1992, Arthur J. Hill, Assistant Secretary for Housing-Federal Housing Commissioner of the U.S. Department of Housing and Urban Development ("HUD", "Government," or "Department") notified Lewis Ferris, Jr. ("Respondent") that consideration was being given to debar him from participation in covered transactions with the Department and other agencies within the Executive Branch of the Federal Government. The proposed debarment was to remain in effect for three years, and was based on Ferris' conviction of two counts of larceny in the third degree in the Superior Court of New London County, Connecticut. The letter also advised Respondent that he was temporarily suspended pending determination of the proposed debarment.

Respondent filed a timely request for a hearing on the suspension and proposed debarment on May 7, 1992. The Government filed a brief in support of debarment on June 26, 1992 and a reply brief was filed by Respondent on August 4, 1992. This determination is based on the written submissions of the parties, as Respondent is not entitled to an oral hearing on this matter. 24 C.F.R. § 24.313(b)(2)(ii).

Findings of Fact

1. Ferris is the president of Quality Homes, Inc. ("Quality Homes") and Ferris Realty Development Corporation ("Ferris Realty"). Quality Homes and Ferris Realty are located in New London, Connecticut and are involved in the development of single family homes. Ferris has been in this business since 1984. (Govt. Brief at 2; Resp. Brief at 2)

2. In 1989, Ferris entered into negotiations with Bradgate Corporation for the purchase of a parcel of land located in Montville, Connecticut. Bradgate had a option to purchase that land from A.A. Washton, a New London, Connecticut attorney. (Resp. Exh. 4)

3. At the same time that Ferris was negotiating to buy the parcel from Bradgate, he was entering into contracts to build single-family lots on the "Bradgate" parcel. Upon entering into the contracts with the buyers, Ferris would have the buyer sign a contract for the construction of the house and collect a down payment for a portion of the purchase price. The down payment usually ranged between \$800 and \$2000. One of Ferris' employees instructed potential purchasers to make certain down payment checks payable to herself. She deposited the checks into her own account and kept no record that the purchaser had entered into the contract. The employee subsequently disappeared. (Letter of Donald Hirsch, Resp. Exh. 5).

4. Ferris and Bradgate Corporation reached an agreement for the sale of the parcel; however, Bradgate failed to pay an option fee and lost its option to purchase the property from Washton. Ferris was then placed on notice of this development in order that he could purchase the parcel directly from Washton. After a lengthy period of negotiations, Ferris reached an agreement to purchase the land from Washton. (Resp. Exh. 4).

5. The individuals that had entered into contracts with Ferris complained to the Commissioner of Consumer Protection for the State of Connecticut that Ferris had offered to sell them lots in Montville, Connecticut when he had no control over or option on the land. (Resp. Exh. 3)

6. After discovering that his records did not correspond to the individuals who claimed to have entered into contacts, Ferris discovered the embezzlement by his employee. At this time Ferris took his available funds and put them in escrow with Himan Wilensky, a local attorney. Subsequently, Wilensky and Fagre, a loan broker and real estate and financial consultant disbursed almost \$28,000 to persons who felt they were aggrieved by the alleged activities of Ferris's Company. (Resp. Exh. 5).

7. On April 11, 1990, Ferris, Quality Homes, and Ferris Realty signed an Agreement Containing Order to Cease and Desist ("Consent Order"). The Consent Order provided that Ferris pay \$15,900 to the Commissioner to be distributed to the complaining consumers, and \$7500 to the Department of Consumer Protection. The Consent Order also provided that Ferris cease and desist from:

(1) offering to sell property which [he did] not own without first entering into a bond for deed or option to purchase the property from the rightful owner, unless the Respondent offering to sell such property is a licensed real estate broker;

and

(2) offering to sell property which [he did] not own unless such fact is fully disclosed to each prospective purchaser. (Govt. Exh. A, at p.4)

8. On March 21, 1991, Ferris was convicted in the Superior Court for New London County, Connecticut of two counts of larceny in the fourth degree, a misdemeanor, in violation of Conn. Gen. Stat. § 53(a)-125 (1991). Ferris was sentenced to one year imprisonment for each count, to run concurrently. The sentence was suspended provided that the respondent make full restitution. (Govt. Exh. B)

9. Ferris has submitted various letters of support from members of the community. Each letter states that Respondent has been an active member of the community and has always acted professionally and responsibly. (Resp. Exhs. 4-6)

Discussion

The parties agree that Ferris is a "participant" in a covered transaction with the Department because he has previously entered into a covered transaction with the Department and may reasonably be expected to do so in the future. 24 C.F.R. §§ 24.105(m) and 24.110(a)(1)(i). He is also a "principal" as defined at 24 C.F.R. § 24.105(p) because he owned, operated and exercised control over Quality Homes and Ferris Realty at the time the offenses were committed.

Applicable regulations state that a debarment may be imposed for conviction of or civil judgment for:

(1) [c]ommission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;

* * *

- (3) [c]ommission of embezzlement, theft, forgery or bribery . . . [or];
- (4) [c]ommission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a person. 24 C.F.R. §§ 24.305(a)(1), (3) and (4).

The Government bears the burden of demonstrating by a preponderance of the evidence that cause for suspension and debarment exists. When the suspension and proposed debarment are based on an indictment and conviction, that evidentiary standard is deemed to have been met. 24 C.F.R. §§ 24.405(b) and 24.313(b)(3). However, existence of a cause for debarment does not automatically require imposition of a debarment. In gauging whether or not to debar a person, all pertinent information must be assessed, including the seriousness of the alleged acts or omissions, and any mitigating circumstances. 24 C.F.R. §§ 24.115(d), 24.314(a) and 24.320(a). The Respondent bears the burden of proving the existence of mitigating circumstances. 24 C.F.R. § 24.313(b)(4).

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 participant as well. 48 Comp. Gen. 769 (1969). The test for whether a debarment is warranted is present responsibility, although 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.D.C. 1980). A debarment shall be used only to protect the public interest and not for purposes of punishment. 24 C.F.R. § 24.115(b).

Ferris' conviction is based on larceny, and raises serious and troubling questions concerning his "probity, honesty and uprightness." 48 Comp. Gen. 769 (1969). In mitigation, Ferris argues that he did not act with malice, that he pled guilty out of convenience, that his conviction was for a misdemeanor and not a felony, that he has committed no wrongdoing prior to or since his conviction, and that his debarment would contribute to the economic decline of his community.

According to Ferris, he did indeed sell land to which he did not hold title; however, he states that he intended to purchase the property from the Bradgate Corporation, who in turn had an

option to purchase that land from a Connecticut attorney named A.A. Washton. Ferris avers that Bradgate failed to pay its option fee to Washton, and as a result, never owned the property which Ferris intended to purchase from it. Ferris further states that he eventually was able to purchase the land directly from Washton. In describing these events, Respondent goes to great lengths to emphasize that he did not act maliciously. Even accepting Ferris' version of these events as true, I do not find his lack of malice sufficient evidence of mitigation. A participant need not act out of greed or malignance to be subject to the Department's administrative sanctions. Barbara Elaine King, HUDBCA No. 91-5881-D38 (Jul. 3, 1991). Ferris' conviction for larceny raises serious questions as to whether Respondent possesses the honesty and trustworthiness sufficient to conduct business with the Department.

Ferris states that he pled guilty in order to avoid harsher sentencing and the costs associated with a full public trial. That Ferris may have pled guilty in order to save his time and that of the Connecticut judicial system is of no relevance in determining his present responsibility. It is also no answer to state, as Respondent does, that he was convicted of a misdemeanor and not a felony. HUD's debarment regulations do not make that distinction.¹ The regulations state that conviction of or commission of "embezzlement, theft [or] forgery" is adequate cause for debarment. 24 C.F.R. § 24.305(a)(3). The regulations also define a "conviction" as

[a] judgment of conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, including a plea of nolo contendere. 24 C.F.R. § 24.104(e).

Nowhere in these regulations is the distinction made between felony and misdemeanor convictions, and it does not necessarily follow that a misdemeanor conviction will result in the imposition of a relatively shorter term of debarment than a felony conviction. Harold Farrell, HUDBCA No. 85-950-D29 (May 30, 1986). To the contrary, misdemeanor larceny is also serious in the context of this proceeding, because the crime of larceny at either level reflects a lack of trustworthiness and honesty by the person committing the act. It is precisely this lack of trustworthiness against which the Department and the public must be protected. Chesley J. Doak, HUDBCA No. 89-4364-D12 (May 24, 1989).

¹Respondent's reliance on the requirements of the Previous Participation Certificate (HUD-2530) is misplaced. The felony-misdemeanor distinction employed on that form and the penalties associated with a false certification on that form are not relevant to this proceeding.

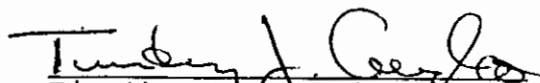
Ferris asserts that he had committed no wrongdoing prior to his misconduct in 1991. He further states that no misconduct has occurred since that time. Though not stated in affidavit form, I have no reason to question the accuracy of these statements; however, I find them insufficient evidence in mitigation of the proposed debarment. The record in this case contains no written statements of contrition, remorse or even explanation by Ferris. In fact, counsel for Respondent states in his brief that, "it is highly debatable whether the sale of land which one does not own, but which one has a reasonable expectation of obtaining . . . constitutes a criminal offense." (Resp. Brief, at 6). This, coupled with the lack of any indication that Respondent understands the gravity of his misconduct or that he will abide by HUD regulations in the future, amply support the debarment proposed by the Government. Carl Seitz and Academy Abstract Co., HUDBCA No. 91-5930-D66 (Apr. 13, 1992).

The letters of support submitted by Respondent are also insufficient to rebut the presumption of Ferris' lack of present responsibility which flows from his conviction. While each letter is a favorable testament to Ferris' contribution to his community, none of the letters properly addresses Ferris' current business and professional behavior. Such letters must address Respondent's present responsibility or fitness to conduct business with the Department in order to mitigate his misconduct. Richard Ira Hailey and H & E Properties, HUDBCA No. 91-5364-D90 (Sept. 1, 1991).

Respondent finally states that his debarment would not serve the public interest because his exclusion from HUD programs would adversely impact the economic climate of his community. However, this assertion, even if true, is irrelevant to a determination of Ferris' present responsibility and therefore cannot be considered as mitigating. Richard Ira Hailey, et al., supra; see also Kenneth M. Chosed, et al., HUDBCA No. 88-2985-D7 (Feb. 26, 1988).

Conclusion

For the foregoing reasons, I find that a three-year debarment of Ferris is warranted by the record in this case. It is therefore **ORDERED** that Louis Ferris, Jr. shall be debarred through March 24, 1995, credit being given for the time during which Respondent has been suspended.


 Timothy J. Greszko
 Administrative Judge