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

In the Matter of: DAVID F. GRACIANO, Respondent.	HUDALJ 95-5069-DB Decided: February 28, 1996

Steven A. Allen, Esquire
For the Respondents

Walter E. Warren, Esquire
For the Government

Before: Robert A. Andretta
Administrative Law Judge

INITIAL DETERMINATION

Statement of the Case

Procedure

This case arose as a result of a notice of immediate suspension and proposed debarment of the Respondent, David F. Graciano, for a period of five years, based upon his conviction on April 3, 1995, for violation of 18 U.S.C. § 371, Conspiracy To Commit An Offense Against The United States. Respondent has requested a hearing. However, because this action is based upon a conviction, this proceeding is limited to submission of documentary evidence and written briefs. *See* 24 CFR § 24.313(b)(2)(ii).

On February 13, 1995, HUD's Director of Public Housing in the Baltimore Office, notified the respondent that he was being issued a Limited Denial of Participation (LDP), excluding his participation in any program functions of HUD within the jurisdiction of the Baltimore, Maryland, Field Office, which includes all of the state of Maryland, except Montgomery and Prince George's Counties. This LDP was based upon a criminal

information filed against Respondent Graciano, charging him with violation of 18 U.S.C. § 371. The respondent did not contest the LDP.

On April 17, 1995, HUD's General Deputy Assistant Secretary for Housing sent Respondent a letter notifying him that he was suspended from participation in programs throughout the executive branch of the federal government and from procurement contracts with HUD. This suspension, based upon the same criminal information, superseded the LDP, and the Respondent did not contest it.

On July 6, 1995, the General Deputy Assistant Secretary sent Respondent a letter notifying him that consideration was being given to debar him from participation in programs throughout the executive branch of the federal government and from procurement contracts with HUD for a period of five years. This proposed debarment is based upon the conviction of Respondent Graciano, on April 3, 1995, for violation of 18 U.S.C. § 371. The notice letter also informed him of the continuation of his suspension from the described activities pending the outcome of the debarment action. (G 1)[1].

By letter dated August 1, 1995, Respondent's counsel requested a hearing on behalf of his client, and on August 10, 1995, I issued a Notice Of Hearing And Order in which I noted that the hearing would be limited to the submission of documentary evidence and written briefs. The Order required HUD to file its brief and supporting documents by September 11, 1995, and that Respondent file a reply brief and supporting documents within 30 days of the submission of the government's brief. On August 15, 1995, Respondent filed an unopposed Motion For 30 Day Extension Of Time. On August 16, 1995, I issued an Order extending the time for filing of the government's brief to October 11, 1995, and extending the time for the respondent to file his brief to 30 days from the filing of the government's brief.

On December 15, 1995, counsel for the government filed a Motion For Leave To File A Reply Brief by December 29, 1995. The Motion included a request that Respondent be permitted to file a Response Brief. On December 18, 1995, before this forum could respond to the Motion, all personnel of the Office of Administrative Law Judges, and most of the other employees of the department, were furloughed to and including January 10, 1996, for lack of funding and authority to conduct the department's business.

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[1] Exhibits submitted by the respondent are designated with an R and a sequential number. Those submitted by the government are designated G and a number.

On January 11, 1996, counsel for the government filed a new Motion, requesting leave to file a Reply Brief by January 25, 1996, and further, that counsel for the respondent be granted leave to respond by February 1, 1996. On January 12, 1996, the federal government in Washington, D.C., was closed because of foul weather, and it was not reopened until January 16, 1996. The Motion was granted on that date. Subsequently, as a result of further motions, the government was required to file its Reply Brief by February 1, 1996, and the respondent was required to file his Response Brief by February 12, 1996. These deadlines were met by timely filing of the Briefs, and thus, this matter became ripe for decision on the last-named date.

Subsequently, the government filed a Motion to dismiss Classic Contractors, Inc., an affiliate of the respondent and co-respondent in this case. Classic had been debarred on June 16, 1995, as an affiliate of its president, and in the same action as its president, on the same set of facts as obtain in this case. Accordingly, the Motion was granted, and the record was closed on February 26, 1996.

Findings of Fact

On January 17, 1995, David F. Graciano waived indictment in a plea agreement with the U.S. Attorney for the District of Maryland. (G 3). A Statement of Fact (G 4) and an Information (G 5) were subsequently filed in the U.S. District Court for the District of Maryland. The illegal activity complained of took place between approximately November of 1990 and May of 1993. During that period, Respondent Graciano conspired with one [redacted] Wilson to pay money and other consideration to one [redacted] Dutkevich for the purpose of illegally influencing [redacted] duties as an employee in the Housing Authority of Baltimore City (HABC) to the advantage of Graciano and his company, Classic Construction, Inc. (G 4, 5). HABC received federal funding from HUD during each of the years in which the illegal activity took place. (G 5).

During all times relevant to this proceeding, Classic Construction had its headquarters in Pittsburgh, Pennsylvania. David Graciano and his family owned the company, and he was a controlling employee of it. (G 4). Thus, he was a principal and an affiliate of Classic Construction, and it was his affiliate, under the definitions that are codified at 24 CFR § 24.105(b) and (p).

In about November of 1990, Graciano and Wilson, the president of Classic, agreed with others to respond to a solicitation from Dutkevich and pay money and other things of value to him. (G 4). Classic had successfully bid on a contract to provide structural repairs, renovations and site modifications at the George B. Murphy Homes, a housing project of HABC. (G 5). Dutkevich was the HABC project manager for this contract. Graciano and Wilson agreed to pay Dutkevich for his cooperation. (G 5).

In addition to the Murphy Homes contract, Classic obtained several new contracts from HABC between 1990 and 1993 for which Dutkevich was the project manager. Dutkevich assisted Classic in obtaining the new contracts and in getting lucrative change orders to them. (G 5).

Graciano and Wilson devised a procedure whereby they drew certain checks payable to Mellon Bank and designated in Classic's books as interest payments. These checks were taken to the bank and exchanged for cashier's checks made payable to Graciano. Graciano then cashed the checks and gave the cash to Dutkevich. (G 5). A total of at least $18,000 in cash was paid to Dutkevich by Graciano and Wilson during the period of November, 1990, through May, 1993. (G 4, 5). In addition, Graciano and Wilson took Dutkevich on a golfing weekend to the PGA National Resort in Palm Beach Gardens in January, 1991, where they spent at least $1,031.53 on his expenses. (G 4, 5).

In accordance with the previously-described plea agreement, Judgment was imposed upon Graciano on April 3, 1995, in the U.S. District Court for Maryland. *United States v. David F. Graciano*, Case No CR S-94-0493. (G 2). In the judgment, Graciano was found guilty of conspiracy. He was sentenced to imprisonment for a year and a day, and ordered to pay a special assessment of $50.

Discussion

The government contends that Respondent is a participant subject to debarment because of his controlling interest in the company; that Graciano's admission of guilt to, and conviction of a felony, is a conclusive basis for debarment; and that the seriousness of the conduct involved requires that the debarment be for a five-year period. Respondent does not contest the basis for debarment, but argues that the period of debarment should not be greater than three years because the government has failed to meet its burden of showing that the circumstances of the case are extraordinary, and, furthermore, that the debarment should be for less than three years -- he suggests only 18 months -- because of mitigating circumstances.

Respondent Is Subject To Debarment

The regulations that are codified at 24 CFR § 24.110(a) and (b) provide in pertinent part that HUD's regulations apply to those who have participated, are currently participating, or may reasonably be expected to participate in transactions under federal

procurement and nonprocurement programs. For purposes of HUD's regulations, the term, "participant," is defined by 24 CFR § 24.105(m) as:

> Any person who submits a proposal for, enters into, or reasonably may be expected to enter into a covered transaction. This term also includes any person who acts on behalf of or is authorized to commit a participant in a covered transaction as an agent or representative of another participant.

Respondent Graciano bid on contracts on behalf of Classic Construction, Inc., and the company performed work under these contracts. These contracts were at least partially funded by HUD through HABC. Therefore, he is a participant as defined by the regulation quoted above.

Conviction Is Cause For Debarment

The regulation under which the government seeks to debar the respondent is found at 24 CFR § 24.305, which lists the causes for debarment, in part, as follows:

> (a) Conviction of or civil judgment for:
> (1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;
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> * * * * *
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> (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; or
> (4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a person.

The debarment of the respondent in this case is based upon his conviction for conspiracy to commit an offense against the United States; *i.e.*, agreeing with others to pay bribes to a public housing official to obtain certain contracts and change orders to contracts with the HABC.

Ordinarily, the government must establish cause for a debarment by a preponderance of the evidence. However, when a debarment is based upon a conviction,

this standard is deemed to have been met by the regulation that is found at 24 CFR § 24.313(b)(3). Thus, in this case, the standard has been met by the fact of Graciano's conviction. (G 2).

The Duration Of Debarment

HUD is responsible for protecting the public interest by keeping its programs honest and free from fraud and other abuses. To accomplish this goal, the department must be able to rely on the truthfulness and integrity of each program participant or contractor. Participants who demonstrate a lack of integrity and honesty may be debarred by HUD as a measure to protect the public by ensuring that only those qualified as responsible are permitted to participate in HUD or other federal government programs and HUD procurement contracts. *Stanko Packing Co. v. Bergland*, 489 F. Supp. 947, 949 (D.D.C. 1980); *Roemer v. Hoffman*, 419 F. Supp. 130, 131 (D.D.C. 1976).

For the purposes of the regulations and case law that are relevant to this proceeding, "responsibility" is a term of art that is widely used in government contract law. It encompasses the projected business risk of a person doing business with the federal government. This includes integrity, reliability, and the ability to perform. The primary test for debarment is whether the person in question is considered to have present responsibility. In this light, a finding that there is a lack of present responsibility can be based upon past acts. *Schlesinger v. Gates*, 249 F.2d 111 (D.C. Cir. 1057); *Roemer*, 419 F. Supp. 130.

The purpose of a debarment cannot be to punish a participant for past misconduct; as stated earlier, it is done to protect the interests of the federal government and, thereby, the public interest. While the regulations themselves specifically prohibit the imposition of debarment for punitive purposes (*see* 24 CFR § 24.115), the inadvertent punitive effect of debarment does not transform it into a purely punitive sanction. *Janik Paving and Construction, Inc. v. Brock*, 828 F. 2d 84, 91 (2nd Cir. 1987). Thus, deterrence may also be a legitimate purpose of debarment, and this effect should be considered when determining whether to debar a participant and for what period. *In re: Rudolf J. Hymer*, HUDALJ 90-1552-DB (Mar. 14, 1991).

Debarment should be for a period commensurate with the seriousness of the reason for the debarment and, generally, it should not exceed three years. 24 CFR § 24.320(a). However, a longer period of debarment may be warranted for extraordinary circumstances. 24 CFR § 23.320(a)(1). In this case, the debarring official decided that the respondent's criminal conduct in conspiring to pay bribes to a public housing official,

to obtain unfair advantages and unwarranted contract awards in public housing, constituted extraordinary circumstances. The government states in its brief that:

> By setting out to obtain, and obtaining, contract change orders and new contracts on the basis of special influence due to bribery over a prolonged period, the Respondents have shown immoral disdain for the law, as well as for those seeking honest contract work.
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> * * * * *
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> The Respondents' wrongful acts are considered by HUD's debarment official to be so serious, and the circumstances so extraordinary, as to require the administrative sanction of debarment for a period of five years to protect the public interest.

I do not agree with this conclusion.

The relevant regulation is codified at 24 CFR § 24.300, and identifies specific offenses for which debarment may be imposed. Conviction for bribery is one of the named offenses. 24 CFR § 24.300(a)(3). In another case decided by this forum, the administrative law judge stated that, "The regulations clearly contemplate that in the ordinary case no more than three years of debarment is appropriate, and that only drug and other extraordinary cases warrant longer sanctions." *In The Matter Of Joseph W. Cirillo*, HUDALJ No. 90-1525-DB (June 19, 1991). In this regard, the regulation codified at 24 CFR § 24.320 provide explicit guidance:

> (a) Debarment shall be for a period commensurate with the seriousness of the cause(s) ... (1) Debarment for causes other than those related to a violation of the requirements of Subpart F of this part [requiring a drug free work place] generally should not exceed three years. Where circumstances warrant, a longer period of debarment may be imposed.

See also, In The Matter Of Thomas J. Joy, HUDALJ No. 93-1906 (Nov. 1, 1993).

Where the government seeks to impose a debarment for a period in excess of three years, it has the burden of proving that the respondent's conduct was such as to justify increasing the standard three-year debarment period. *In The Matter Of John Orr*, HUDALJ No. 92-1861-DB (Nov. 10, 1993). The government must show that the nature and circumstances of the specific acts of bribery were of an "extraordinary nature."

The government's case for a debarment of greater than three years' duration was found inadequate *In the Matter of Cirillo*, HUDALJ No. 90-1525-DB (June 19, 1991). Cirillo had been convicted for submission of false documents. The government argued that Cirillo should receive a five-year period of debarment because his conduct was "intentional," "willful," "flagrant," and "egregious." The Administrative Law Judge rejected that argument, and held that the offending conduct must truly be extraordinary to support a debarment of more than three years. He stated:

> That argument has no merit. Section 24.305 of 24 C.F.R. contains a long list of causes for debarment, including fraud, embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, and other crimes involving moral turpitude. By definition such crimes are "willful" and "intentional." Moreover, other subsections of 24 C.F.R. § 24.305 expressly cite different forms of "willful," non-criminal conduct as possible causes for debarment. (See 24 C.F.R. §§ 24-305(b)(1) and (3)). Therefore, to say that Respondent's conduct was "intentional" and "willful" does not make it extraordinary. Nor does offending conduct become extraordinary just because it was punished with a jail sentence; nearly all of the crimes listed as causes for debarment in 24 C.F.R. § 24.305 are punishable by incarceration. Further, even if a respondent engaged in proscribed conduct on more than one occasion, that fact standing alone would not remove the case from the three year category .... In short, notwithstanding the Government's argument to the contrary, the record shows nothing about Respondent's criminal conduct that was so "flagrant" or "egregious" or extraordinary that debarment for five years would be appropriate.

In arguing in the instance case for a debarment period of greater than three years, the government states as follows:

> In considering the seriousness of the Respondents' conduct, it is fair to look at the totality of the intended conduct. By setting out to obtain, and obtaining contract change orders and new contracts on the basis of special influence due to bribery over a prolonged period, the Respondents have shown immoral disdain for the law, as well as for those seeking honest contract work.
> It is highly risky and clearly undesirable for the Government to do business with the respondents.

I agree with the government statement. However, the files are full of cases in which contractors were involved in offending activity of a nature similar to that committed by

Graciano, and they received three-year or shorter debarments. For example, *In the Matter of Ulis Gaines*, HUDALJ 91-1632-DB (June 7, 1991), the respondent was convicted of conspiracy to bribe a public official, the Deputy Executive of the Housing Authority of New Orleans, and the government argued for a greater-than-three-year debarment. Even though there was no mitigating evidence, Gaines was debarred for the three-year period provided in the regulations.[2] Thus, while the government's argument certainly supports an imposition of debarment, it fails to show the extraordinary circumstances necessary to support a debarment for greater than three years by demonstrating that the respondent is likely to continue a lack of present responsibility for longer than three years.

Respondent claims that he has demonstrated "substantial mitigating circumstances" and that he has shown that he can be trusted to act honestly and forthrightly in his dealings with the government in the future. Respondent states that he:

> ... has demonstrated contrition and remorse, an understanding of the nature of his conduct, a genuine resolve to conduct himself responsibly and properly in the future, and has fully explained the circumstances which led to his illegal conduct. He has accepted responsibility for his behavior and has learned from his mistakes.

For these reasons, Graciano argues that he has carried his burden of demonstrating present responsibility to the point that the appropriate period of debarment should be no more than eighteen months. That is a stretch.

In a debarment case, the Respondent has the burden of proving mitigating circumstances in accordance with the regulation codified at 24 CFR § 24,313(b)(4). Unsworn and unsubstantiated declarations are not effective to do so. *In re James M. Woods*, HUDALJ 95-5061-DB (December 11, 1995). Respondent has failed to prove any justification for a reduction of the ordinary three-year debarment period set forth in the regulations.

One reason for this conclusion is that Respondent claims that he made a decision to stop the bribery payments regardless of the consequences because he realized he had "made a terrible mistake." However, the record shows nothing regarding any such realization until the Respondent became aware of the investigation into the offending

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[2] *See also, In the Matter of Richard G. Belin*, HUDALJ No. 94-0058-DB (July 29, 1994) (Conviction for attempted extortion); *In the Matter of Raymond Farroni*, HUDALJ No. 87-1160-DB (October 9, 1987) (Conviction for bribery of public officials). In both cases, the period of debarment was limited to three years in spite of the government's argument for a longer period.

activity. Indeed, his realization then of having made a mistake must have been profound. Even had Graciano realized his illegal ways and determined to halt them totally on his own, it is unclear why this should be considered in mitigation. The mere stopping of illegal activity does not mitigate the circumstances under which it was committed.

Respondent Graciano has also submitted exhibits which purport to show his present responsibility. However, attestations which expound generally on the respondent's virtues as a social companion, family man, and professional do not fulfill his burden of showing mitigating circumstances surrounding the offending activity of which the government complains. At most, it may lend the government some comfort concerning the fact that Respondent will be free to deal with it again after the three-year debarment.

Finally, Graciano claims that his recognition of wrongdoing and remorse should be taken in mitigation of his debarment period. He quotes himself from the transcript of his sentencing hearing, in which he stated, "I am the responsible party at my company, and what I did I had a chance to say no to and didn't." That someone knows what he is doing is wrong, and that he nonetheless commits the wrongdoing in spite of having the chance to "say no" fails utterly as a circumstance in mitigation of commission of the activity. If anything, it bolsters the government's view that Respondent should be debarred from doing business with it for some time. Thus, the respondent has failed in his attempt to show that his present responsibility can be presumed intact in less than three years' time.

As stated above, deterrence is a legitimate effect of debarment, and it should be used appropriately in cases of criminal violations. *See In re Richard G. Belin*, HUDALJ 94-0058-DB (July 29, 1994). If it were to become widely known that mere admissions of guilt and responsibility, expressions of remorse, and declarations against repeated criminal activity will be accepted as reasons to reduce the period of debarment, then, presumably, more people would commit these crimes while preparing their statements in mitigation and of *mea culpa*.

In the *Belin* case, the administrative law judge said:

> If Respondent were to escape debarment or suspension in this case, he as well as others could conceive HUD to condone his actions, and they may be led to believe that HUD's lack of forceful action means that HUD itself does not consider Respondent's prior actions to be serious. Respondent's criminal actions are indeed serious, and it is imperative that a strong message be sent to Respondent and the public ....

In this light, I see no difference between considerations of whether to debar and considerations of whether to reduce the period of debarment.

This line of reasoning causes me to conclude again that matters in mitigation of the debarment period must be substantial mitigating circumstances of the activity itself; not later statements made to ease the burdens that are the consequences of one's illegal activities. Respondent has failed to prove that the period of debarment should be made less than the ordinary three years. Therefore, given the record as a whole, a three-year period of debarment is commensurate with the seriousness of Respondent's conduct, and there are no circumstances on which to base a reduction of that amount of time.

Conclusion and Determination

I conclude and determine that good cause exists to debar David F. Graciano from participating in covered transactions as 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 July 6, 1995. I also conclude and determine that good cause existed to suspend the respondent from engaging in such activities during the pendency of this debarment proceeding.

ROBERT A. ANDRETTA
Administrative Law Judge

Dated: February 28, 1996.