

UNITED STATES OF AMERICA  
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
BOARD OF CONTRACT APPEALS  
Washington, D.C.

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In the Matter of:	:	
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NATHAN A. HICKS,	:	HUDBCA Docket No. 79-438-D51
	:	(79-672-DB)
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DETERMINATION

Statement of the Case

By letter dated August 16, 1979, Nathan A. Hicks (hereinafter "Appellant") was notified that the Department of Housing and Urban Development intended to debar him from participation in departmental programs for a period of five years pursuant to 24 C.F.R., Part 24, based on his conviction for violation of 26 U.S.C. §7203 (Government Exhibit #4). In cases of debarment based on a criminal conviction, a hearing is limited to submission of written briefs and documentary evidence. 24 C.F.R. §24.5(c)(2). Appellant made a timely request for a hearing on the proposed debarment (Gov't Ex. #5) and written submissions were filed on behalf of both Appellant and the Government. Appellant was temporarily suspended pending resolution of the proposed debarment.

Applicable Regulation

The departmental regulation applicable to debarment, 24 C.F.R., Part 24, provides in pertinent part as follows:

§24.3 Applicability.

- (a) This part applies to . . . (5) former HUD employees.

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§24.6 Causes and conditions applicable to determination of debarment.

Subject to the following conditions, the Department may debar a contractor or grantee in the public interest for any of the following causes:

(a) Causes.

- (9) . . . conviction for any other offense indicating a lack of business integrity or honesty, which seriously and directly affects the question of present responsibility.

Findings of Fact

Appellant was employed as Area Counsel in the Detroit Area Office of the Department of Housing and Urban Development until he resigned from that position in late 1975 (Gov't Ex. #3). On March 20, 1978, Appellant was charged in a three count Information with violation of 26 U.S.C. §7203 for failure to file Federal income tax returns. (Gov't. Ex. #1). On November 3, 1978, Appellant entered a plea of guilty to the charges of failure to file income tax returns for 1972, 1973 and 1974, in violation of 26 U.S.C. §7203. (Gov't. Ex. #2). Appellant was sentenced to two years probation, fined \$1,000, and required to perform work of community service for 200 hours under the supervision of the U.S. Probation Department (Gov't Ex. #2). Appellant states that he has satisfactorily completed his sentence and the terms of his probation (Appl. Brief at 1).

DISCUSSION

The purpose of debarment is to assure the Government that "awards be made only to responsible contractors. . ." and "shall be used for the purpose of protecting the public . . ."

24 C.F.R. §24.0, 24.5(a). The departmental regulation is expressly applicable to former HUD employees such as Appellant 24 C.F.R. §24.3(a)(5). Appellant contends that failure to file federal income tax returns is a misdemeanor and does not indicate sufficient "moral turpitude" to justify debarment pursuant to 24 C.F.R. §24.6(a)(9).

The debarment regulation addresses itself to acts indicating a "lack of business integrity or honesty, which seriously and directly affects the question of present responsibility." 24 C.F.R. §24.6(a)(9). "Responsibility" is a term of art in Government contract law. It is defined to include the concepts of integrity and honesty as much as ability to perform a contract. 34 Comp. Gen. 86 (1954); 39 Comp. Gen. 468 (1959); 49 Comp. Gen. 132 (1969). Although violation of 26 U.S.C. §7203 is not expressly enumerated in the regulation, commission of any crime that show a serious lack of business honesty and integrity is intended to be included within the scope of the causes for debarment. The regulation makes no distinction between felonies and misdemeanors.

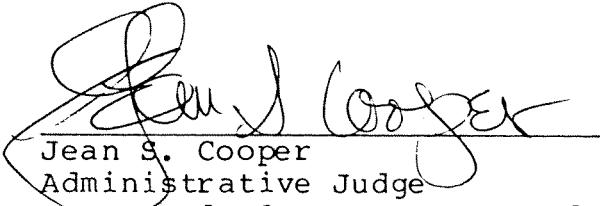
Appellant is an attorney and, as such, an officer of the court. He was fully aware that failure to file Federal income tax returns is a crime. Furthermore, as an employee of HUD, Appellant was bound by the departmental standards of conduct that require payment of all financial obligations in a timely manner, "especially one imposed by law such as Federal, State, and local taxes." HUD Standards of Conduct, §0.735-208. Thus, he violated a condition of his employment as a staff attorney by willfully flouting the standards of conduct attendant on his employment.

I find Appellant's conduct indicates a most serious lack of business integrity and responsibility because his legal training gave him the background to evaluate what he was doing and to understand its implications. Furthermore, Appellant did not violate the law once, but three times in succession. Federal programs are funded by income from tax returns. Appellant was cheating the Government of the very funds needed to implement the programs Appellant was charged with supporting. His actions were in the nature of business fraud and theft showing serious lack of responsibility. As such, they fall directly within the class of actions that are grounds for debarment. 24 C.F.R. §24.6(a). Thus, I find that willful failure to file income tax returns in violation of 26 U.S.C. §7203 is a ground for debarment within the scope of 24 C.F.R. §24.6(a)(9).

Appellant's actions took place between 1973 and 1975. The test for debarment is present responsibility, although past acts may be the grounds for a finding of present lack of responsibility. Schlesinger v. Gates, 249 F. 2d 111 (D.C. Cir. 1957). Debarment is not a penalty, Gonzalez v. Freeman, 344 F. 2d 570 (D.C. Cir. 1964), and even if a cause for debarment has been established, all mitigating factors may be considered in determining whether the sanction is warranted. 24 C.F.R. §24.6(b)(1). Appellant's public service as a condition of his probation is a factor in mitigation of present lack of responsibility. Furthermore, Appellant's last criminal act took place almost five years ago and no evidence has been submitted of further wrongdoing since 1975. I find that under the particular facts in this case, a period of three years debarment is warranted. Appellant has been suspended from participation in departmental programs since August 16, 1977, pending resolution of this debarment action. Debarment is a prospective sanction but Appellant will be given credit for the period of suspension in applying a period of debarment. Therefore, Appellant shall be debarred from this date up to and including August 16, 1982.

#### CONCLUSION

Based on the record considered as a whole and in the best interest of the public and the Government, Appellant shall be debarred from this date up to and including August 16, 1982.

  
Jean S. Cooper  
Administrative Judge  
HUD Board of Contract Appeals

Issued at Washington, D.C.  
January 7, 1980.