

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

In the Matter of: :
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 :
 LEONA C. MAZANY, : HUDBCA No. 80-456-D9
 : (Activity No. 79-659-DB)
 :
 Appellant :
 :

Ms. Leona C. Mazany
[REDACTED] Appellant, pro se

Marylea W. Byrd, Esq.
Office of General Counsel
Department of Housing and
Urban Development
Washington, D. C. 20410 For the Government

INITIAL DETERMINATION

By letter dated July 26, 1978, Leona C. Mazany, Appellant herein, was notified that the Department of Housing and Urban Development suspended her from participation in Departmental programs pursuant to 24 C.F.R. §24.13, pending resolution of an indictment against her for alleged violation of 18 U.S.C. §1010. Appellant was given ten days to request a hearing on the suspension (Exhibit G-1). No hearing was requested. Thereafter, by letter dated May 7, 1979, Appellant was notified that HUD intended to debar her pursuant to 24 C.F.R. §24.6(a)(1) for conviction of violation of 18 U.S.C. §1010. Again, Appellant was given ten days to request a hearing in accordance with 24 C.F.R. §§24.5(c)(2) and 24.7. (Exh. G-3). Appellant did not request a hearing on the proposed debarment and, by Final Determination dated June 21, 1979, she was debarred for a period of two years from November 7, 1978 to November 6, 1980 (Exh. G-5).

On July 10, 1979, HUD received a letter from Appellant stating that she did not receive the "pink slips" for the registered letter notifying her of her proposed debarment. (Exh. G-6). She included a copy of the envelope used by HUD that was mailed to the address of her former employer, Golden Rule Realty. Golden Rule Realty had indicated upon receipt of the registered notice that Appellant was "addressee unknown." (Exh. G-1). Appellant requested an opportunity for a hearing on the debarment. In response to Appellant's letter, HUD withheld the effect of the Final Determination and treated Appellant's request for a hearing as timely. Her temporary suspension remained in effect pending determination of debarment (Exh. G-7).

In cases of proposed 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). Written submission were filed by both Appellant and the Government. The Government contends that Appellant's actions, which resulted in her conviction for making false statements to influence HUD, demonstrate a lack of responsibility warranting a two-year period of debarment. Appellant contends that she was under great stress at the time of the making of the false statements, was not properly represented by counsel at the time of her conviction, and did not knowingly make false statements to influence HUD. Therefore, she contends she should not be debarred.

APPLICABLE REGULATION

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

§24.4 Definitions.

(f) "Contractors or grantees." Individuals ... that are direct recipients of HUD funds or that receive HUD funds indirectly through non-Federal sources including, but not limited to, ... real estate agents and brokers, ...

* * *

§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. (1) Conviction for commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract....

FINDINGS OF FACT

Leona C. Mazany is a real estate broker who was employed in 1973 at Golden Rule Realty, Inc. (Appellant's letter brief at 1). On or about June 11, 1973, Appellant submitted a "Request for Verification of Employment," HUD Form 2004-G, which contained false statements concerning the employment and earnings of an applicant for mortgage insurance. (Exh. G-2). In March, 1978, a Federal Grand Jury indicted Appellant on four counts of alleged violations of 18 U.S.C. §1010, two of which were based on the submission of the Request for Verification of Employment (Exh. G-2). On November 7, 1978, Appellant, through her attorney, pleaded nolo contendere to counts one and two of the indictment. Both counts charged her with knowingly, willfully and unlawfully making and causing to be made false and fictitious statements to HUD and FHA. Based on Appellant's plea of nolo contendere, the judge entered a verdict of guilty, dismissed the two remaining counts and placed Appellant on probation for three years. (Exh. G-4).

Appellant's letter brief expanded only slightly upon the evidence presented by the Government. She stated that the attorney who represented her was appointed by the court and he left it to Appellant to do the research and prepare her legal defense. Appellant has little or no independent recollection of the facts on which the indictment was based. However, she states that she is sure she did not know the information she submitted on the Verification of Deposit was false for the following reason:

If I knew all this I would not have gone ahead with the sale of the property. All I made on this deal was \$300.00--less taxes, expenses, etc. (App. letter brief at 3).

Appellant was under extreme personal pressure at the time of the transaction in question. Her young daughter ran away from home and Appellant was going through a divorce. She states those facts as the reason for her poor recollection of the sequence of events surrounding the submission of the Request for Verification of Employment (App. letter brief at 3). Her recollection concerning the false statements, as stated in her letter brief, is as follows:

... the only way that \$80.00 could have been put on that verification was if it was given to me and I went and got the office file to see what she made on the credit application that she told me at the time of applying for the home. At that time, the processors of the office handled all the paperwork and one of them must have asked me to fill it in. I swear I did not do it willfully and intentionally to defraud the Government. I would never have jeopardized my license that I worked so hard for.

Appellant's letter brief is handwritten and was not notarized. It was the only evidence submitted by Appellant in support of her position. The Government has based its position solely on Appellant's conviction.

DISCUSSION

The purpose of debarment is to protect the public interest by insuring the proper expenditure of public funds by the Government. The cornerstone of this policy is that only "responsible" contractors and grantees will be awarded public contracts or otherwise be permitted to participate in Government programs. 24 C.F.R. §24.0 (1978). The Departmental regulation applicable to the debarment of HUD contractors and grantees states explicitly that debarment is not a penalty but a sanction that shall be applied for the purpose of protecting the public. 24 C.F.R. §24.5(a).

"Responsibility" and "responsible contractor" are terms of art in Government contract law. They have been defined by the Comptroller General to include not only the capability but the honesty, integrity and fitness of a contractor or grantee. 34 Comp. Gen. 86 (1954). Appellant is a "contractor or grantee" within the meaning of Section 24.4(f) of the HUD debarment regulation because she is an indirect recipient of HUD funds through a non-Federal source, namely, borrowers whose mortgages are insured by HUD-FHA. 24 C.F.R. §24.4(f).

Appellant's conviction for violation of 18 U.S.C. §1010 was based on a plea of nolo contendere. The Judgement form signed by the sentencing judge states that:

Defendent has been convicted of the offense(s) of knowingly, willfully, and unlawfully making and causing to be made false and fictitious statements to HUD, and its agency, FHA; in violation of Title 18 Section 1010, United States Code, as charged in counts 1 and 2.

It has been previously held that a conviction, even if based on a plea of nolo contendere, is a conviction within the meaning of Section 24.6(a) of the regulation and, as a matter of law, establishes a cause for debarment. Edward G. Venable, HUDBCA No. 77-232-D54 (June 30, 1980). In the instant case, the conviction was for an offense committed as an incident to obtaining or attempting to obtain a public contract for mortgage insurance, which is a cause for debarment pursuant to 24 C.F.R. §24.6(a)(1).

However, even if a cause for debarment is established, the regulation does not require that a contractor or grantee be excluded from departmental programs. The decision to debar must be made in the best interest of the Government after considering all mitigating factors. 24 C.F.R. §24.6(b)(1). Furthermore, the debarment action "shall be based upon all relevant facts." 24 C.F.R. §24.5(b).

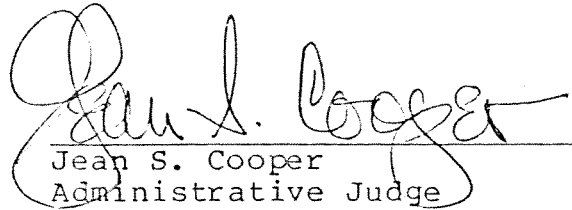
A "nolo contendere" plea neither admits nor denies any of the factual allegations of the criminal charges. Therefore, there are no facts about the specific acts alleged to have occurred which can be found, based on the indictment or conviction, standing alone. Independent evidence would necessarily have to be presented to establish the facts that led to the indictment and conviction. The Government has offered no such independent evidence. Appellant's letter brief, in effect, admits that the Request for Verification of Employment was submitted and did contain false statements. However, she maintains that she did not know the information was false and did not submit it with the intent to mislead the Government. There is no other evidence of any wrongdoing by Appellant, either prior to or subsequent to her conviction.

The purpose of the verification for employment requirement for FHA mortgage insurance is to assure FHA that the mortgage applicant has steady employment with a salary sufficient to make the mortgage payments as they come due. It is unclear why Appellant, as the broker, had any contact with the Request for Verification of Employment. The verification is to be completed by the employer and the information requiring verification is supplied by the mortgagor. It is the duty of the mortgagee to ascertain that the information submitted to HUD-FHA is correct. See, Mechanics National Bank, HUDBCA No. 77-195-M2 (March 6, 1979). The very fact that Appellant was handling the Request for Verification of Employment raises questions about her responsibility because such activity by a broker is prohibited by HUD-FHA. Mechanics National Bank, supra. She certainly should not have been transposing information onto the form without ascertaining its veracity.

Appellant has been suspended from departmental programs since July 26, 1978, a period of more than two years. This suspension was in accordance with 24 C.F.R. §24.13(c). However, in view of the very limited evidence related to the facts of her offense and the remoteness in time of the facts underlying the conviction, I find the record insufficient to support imposition of a two-year period of debarment. Whatever Appellant did was done more than seven years ago. Any protection of the public and Government interest will be more than served by a period of debarment from this date up to and including November 6, 1980.

CONCLUSION

For the foregoing reasons, Appellant Leona C. Mazany shall be debarred from participation in programs of the Department of Housing and Urban Development from this date up to and including November 6, 1980.



Jean S. Cooper
Administrative Judge
HUD Board of Contract Appeals

Issued at Washington, D. C.
October 28, 1980.