

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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: :

JOHN LESKY, :
: HUDBCA No. 80-491-D33

Appellant :
: (Activity No. 80-695-DB)
: :
: :

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DETERMINATION

Statement of the Case

By letter dated January 17, 1980, John Lesky, "Appellant" herein, was notified that the Department of Housing and Urban Development intended to debar him and his affiliates from participation in Departmental programs for a period of one year, based on his conviction for violation of 26 U.S.C. §7206(1). Appellant was temporarily suspended, pending final determination of debarment (Govt. Ex. #3). Appellant filed a timely request for a hearing pursuant to 24 C.F.R. §24.7 (Govt. Ex. #4).

In cases of proposed debarment based on a conviction, a hearing is limited to submission of written briefs and documentary evidence. 24 C.F.R. §24.5(c)(2). Submissions have been filed on behalf of Appellant and the Government in support of their positions on whether Appellant shall be debarred for filing a false Federal income tax return in 1971.

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.

* * *

§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 under the Organized Crime Control Act of 1970 ... or conviction for the commission of the offense of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, fraudulent use of the mail in connection with commission of such offense, or conviction for any other offense indicating a lack of business integrity or honesty, which seriously and directly affects the question of present responsibility.

(b) Conditions. (1) The existence of any of the causes set forth in paragraph (a) of this section does not necessarily require that a contractor or grantee be excluded from departmental programs. In each instance, whether the offense or failure, or inadequacy of performance, be of a criminal, fraudulent, or other serious nature, the decision to debar shall be made within the discretion of the Department and shall be rendered in the best interest of the Government. Likewise, all mitigating factors may be considered in determining the seriousness of the offense, failure or inadequacy or performance, and in deciding whether the Administrative Sanction is warranted.

Findings of Fact

Appellant was an employee of the Detroit Area Office of HUD from January 26, 1960 to November 25, 1974, when he resigned. At the time of his resignation, he was a HUD Loan Management Officer. On October 30, 1974 a Superseding Indictment was returned by a Grand Jury in the United States District Court for the Eastern District of Michigan, charging

Appellant with three counts of alleged violations of 26 U.S.C. §7206(1) for filing false Federal income tax returns in 1971, 1972, and 1973. On March 13, 1975, Appellant entered a plea of guilty to one count of violation of 26 U.S.C. §7206(1). The plea involved filing a false income tax return for the year 1970 in 1971 (App. Brief at 2). The income which Appellant failed to report came from payment to Appellant and his sons for performing labor on property of a HUD contractor (App. Brief at 2, Govt. Ex. #1). He was sentenced to one year in prison and fined \$1,000. (Gov't. Ex. #2).

Appellant's Brief states that he has not violated the law since his conviction and has otherwise "paid for that mistake" by serving a penal sentence and paying a fine (App. Brief at 3). The Government offered no evidence of wrongdoing on the part of Appellant other than his plea to a criminal act committed nine years ago. Although the indictment charged Appellant with violations in 1972 and 1973, the Government offered no proof as to these charges and rested its debarment action solely on the plea to the 1971 act.

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 regulation applicable to debarment expressly provides that it applies to former HUD employees. 24 C.F.R. §24.3(a). Section 24.6 further provides that HUD may debar a contractor or grantee for conviction for an offense "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).

Appellant has been convicted of filing a false income tax return. The money he failed to report apparently was received from a HUD contractor while Appellant was a HUD employee. Although filing a false income tax return is not expressly enumerated as a ground for debarment, commission of any crime showing a serious lack of business integrity and honesty is included within the scope of 24 C.F.R. §24.6(a)(9). Appellant's actions were in the nature of business fraud and theft. He was cheating the Government, his employer, of the

very funds used to implement the programs Appellant was charged with supporting as a HUD employee. As such, the filing of false income tax returns falls within the class of activities set forth in 24 C.F.R. §24.6(a)(9) as grounds for debarment. In the matter of Nathan A. Hicks, HUDBCA No. 79-438-D51 (Jan. 7, 1980); In the Matter of Louis Johnson, HUDBCA No. 79-342-D34 (Nov. 26, 1979).

The purpose of debarment is not to impose a penalty on Appellant. Rather, HUD must determine whether Appellant is presently a responsible person with whom the Government can entrust the public's business. L. P. Steuart & Bros., Inc. v. Bowles, 322 U.S. 398 (1944). Appellant's criminal act was committed nine years ago. The Government has offered no evidence of the reason why it waited almost five years after Appellant's conviction to propose debarment. Although the concept of laches is not generally applied to the Government, the substantial time lapse between Appellant's conviction and this debarment action raises the issue of whether debarment is presently warranted or necessary to protect the public.

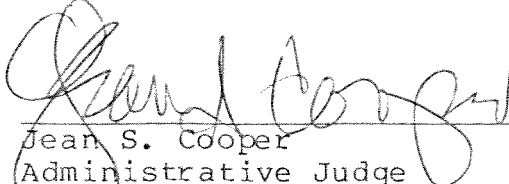
The test for debarment is present responsibility, although a finding of lack of responsibility may be based on past acts. 24 C.F.R. §24.6(a)(9); Schlesinger v. Gates, 249 F. 2d 111 (D.C. Cir. 1957). As a matter of jurisdiction, the regulation presently in effect is controlling because it is the present responsibility of Appellant upon which a determination of debarment will be made. In the Matter of Leonard Brisco/Ben Morrison, HUDBCA No. 76-435-DB (Nov. 21, 1977); In the Matter of Louis Johnson, supra. Therefore, it is not an ex post facto regulation as applied to Appellant.

Appellant has been suspended for approximately four months.^{1/} Although grounds for debarment clearly existed in 1975, Appellant's adherence to the law in the substantial period of time since he originally demonstrated a serious lack of responsibility mitigates against the necessity for imposition of debarment at this time. Any public or Government interest in proscribing Appellant's participation in departmental programs has been satisfied by the four month suspension Appellant has served. I find that Appellant is presently responsible and, as such, debarment is not warranted.

^{1/} The departmental regulation provides that a criminal conviction is adequate evidence to warrant imposition of a suspension pending debarment. 24 C.F.R. §24.13(c).

CONCLUSION

Upon consideration of the entire record in this matter, it is not in the public interest that Appellant be debarred. His temporary suspension shall therefore be terminated as of this date.



Jean S. Cooper
Administrative Judge
HUD Board of Contract Appeals

Issued at Washington D. C.
April 14, 1980.