

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

In the Matter of:

JAMES J. WANNEMACHER,

Appellant

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HUDBCA No. 81-585-D14

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INITIAL DETERMINATION

Statement of the Case

By letter dated January 9, 1980, James J. Wannemacher (hereinafter "Wannemacher" or "Appellant") was notified that the Ohio Area Office of the Department of Housing and Urban Development (hereinafter "HUD" or "Department") had issued a one-year temporary denial of participation ("TDP") in the Department's programs in Ohio against him, beginning upon the date of his receipt of that letter. After expiration of that TDP period, HUD informed Appellant by a letter dated March 9, 1981, that it proposed to debar him and his affiliates from HUD programs for one year from the date of that letter. Appellant, however, was not advised that he was suspended. In each instance, the HUD action was based on Appellant's plea of nolo contendere to a violation of 18 U.S.C. §1012, and his conviction thereunder. Wannemacher requested a hearing which, because the action is based on a conviction, is limited under 24 C.F.R. §24.5(c)(2) to submission of documentary evidence and briefs.

The Government's Brief with attached documentary evidence was filed on June 18, 1981. The documentary evidence consists of records of interviews and documents compiled by Special Agent ██████████ Federle of the Federal Bureau of Investigation. It includes copies of the complaint executed by Federle, the misdemeanor information filed by the U.S. Attorney and the Magistrate's judgment. It does not include any offer to purchase or other documents actually used in the subject transaction. Appellant's Brief was filed on July 9, 1981. Attached in support thereof was an affidavit of James J. Wannemacher and a photocopy of two May 18, 1981, newspaper notices to home buyers of HUD acquired properties for sale. Motions of the parties to permit filing out of time were filed and are hereby granted. This case has been determined upon the submitted record, considered as a whole.

Findings of Fact

On October 1, 1978, Appellant entered a plea of nolo contendere in the United States District Court for the Southern District of Ohio to a charge of making a false statement to the Department with the intent to defraud (18 U.S.C.A. §1012). The Magistrate entered a judgment of guilty and fined Appellant \$500.

The misdemeanor information, a copy of which is attached to the Government's brief as Exhibit I, charged "That on or about the 21st day of January, 1978 ... [Appellant] did knowingly and willfully, and with intent to defraud, make a false statement to ... [HUD], to wit: that James J. Wannemacher certified on HUD bidding Form 9551 that he would be the 'owner-occupant' of property located at ██████████, Dayton, Ohio, well knowing at the time that he would not be the 'owner-occupant', and did, with the intent to unlawfully defeat the purposes of HUD, receive reward of priority consideration over all other 'investor' bidders."

As further disclosed by the records of an FBI investigation attached to the Government's Brief, including the copy of the complaint signed by Special Agent Federle which appears to be part of the court record and which is attached to the Government's Brief as Exhibit G, Appellant had purchased a HUD owned property at ██████████ in Dayton, Ohio, on March 22, 1978. In his successful bid for that property, Appellant certified on the HUD Form 9551, "Offer To Purchase and Broker's Tender" dated January 21, 1978, that he intended to be an owner-occupant of the property. HUD's Bulk Sale Program at that time allowed a competitive advantage to owner-occupants, who, as a result of such status, could bid on HUD owned properties before other investors and who could make smaller downpayments than were required of other purchasers. Appellant, however, never lived in that property and, instead, rented it to third persons. Appellant was convicted for making the false statement that he

intended to be an owner-occupant of this property (HUD Exh. C, E, F, G and H).

The FBI investigation disclosed additional violations by Appellant of HUD's owner-occupant requirements in bidding to purchase other HUD-owned properties. Viewed as a whole, I find that evidence of these violations establishes a pattern of behavior which proves Appellant's knowledge of the illegality of his conduct. It also establishes that his conduct was part of a plan or practice, rather than an isolated incident. This investigation showed that from May or June, 1976, until about October, 1977, Appellant and his wife, [REDACTED] Hinkle, lived at [REDACTED] Burbank Street in Middletown, Ohio, which had been bid in April, 1976, and purchased in June, 1976, from HUD in the name of [REDACTED] Hinkle. Appellant and his wife then moved to [REDACTED] Main Street, Middletown, Ohio. (HUD Exh. E.) While living at [REDACTED] Burbank Street, Appellant or his wife bid as intended owner-occupants, on properties at [REDACTED] Omaha in Middletown (June 1976); [REDACTED] Kiefaber in Dayton (January 1977); and [REDACTED] Boltin Street in Dayton (January 1977) (HUD Exh. C).

The FBI report also records interviews of two friends of Appellant, [REDACTED] Knollman and J [REDACTED] Pelzel. As nominees for Appellant, these men successfully bid as purported owner-occupants on HUD properties they never occupied or intended to occupy. Both told the agent they so acted as a favor to Appellant. They stated that they paid for the property with Appellant's money and then immediately deeded their respective interests in the properties to Appellant. Knollman successfully bid on property at [REDACTED] Ohio Street in Middletown, Ohio (October 1976), and [REDACTED] Pelzel successfully bid on two properties in Middletown, one at [REDACTED] Grenada (March 1977) and the other at [REDACTED] Grenada (August 1976). (HUD Exh. C, D and E.) These purchases also occurred while Appellant was living at [REDACTED] Burbank Street. Three houses were also successfully bid and purchased from HUD under the Bulk Sale procedure by [REDACTED] Hinkle, Appellant's father-in-law and business partner, during this same period: [REDACTED] Howe Road, Trenton, Ohio (May 1977); [REDACTED] Centennial, Middletown, Ohio (February 1976); and [REDACTED] Air Street, Dayton, Ohio (June 1977). (HUD Exh. C, E, F and J.) The unavoidable inference on this record is that [REDACTED] Hinkle did not himself occupy these houses. HUD's records confirm that these bids were made and that they were accepted by HUD (HUD Exh. C). The FBI Report shows that a total of fourteen houses were thus acquired by Appellant, his agent/nominees, or his father-in-law/business partner during this period, employing this device of false representation.

In his brief, Appellant does not contest these factual disclosures in the FBI Report, which was served upon him as exhibits to the Government's brief. However, he contends in his affidavit attached to his brief as Exhibit A that he did not fully appreciate the meaning and effect of the "owner-occupant"

certification, i.e., "I do intend to take occupancy myself" (HUD Exh. G). Appellant admits having been sensitive to this issue. The term "owner-occupant", is presented in the certification on HUD Form 9551, "Offer To Purchase and Broker's Tender", dated January 21, 1978, referred to and quoted in the complaint, in clear and unambiguous form. I am persuaded that the public information release revised February 1976, HUD Exh. D, among other possible sources, would have been conveniently available to Appellant to clarify further the meaning of the term.

Discussion

Appellant's knowing submission of a false certification to HUD with the intent to defraud the United States Government is a manifestly serious offense. Appellant could have been under no reasonable misapprehension in regard to the meaning and effect of his certification regarding owner-occupancy. Under the circumstances, he had a duty to ascertain what the requirements were. By falsely bidding as a purported owner-occupant under HUD's program for sale of HUD acquired properties, Appellant frustrated a Federal policy favoring owner-occupants over other bidders for HUD properties. By executing the false certification of intended owner-occupancy, Appellant was able to gain a significant and improper economic advantage in contracting to purchase a specified HUD-owned residential property for refurbishment and sale. He was able to make a smaller downpayment than the law required, and so to deprive the Federal Government of funds it should have received. His action may have increased the Government's risk connected with the transaction. And it deprived the Government of the social benefits of owner-occupancy, as opposed to investment or absentee ownership. His participation in the program brought Appellant within the definition of "contractors or grantees" in 24 C.F.R. §24.4(f).

The Government relies upon the cause stated in 24 C.F.R. §24.6(a)(11), "conviction for commission of a criminal offense incident to obtaining or attempting to obtain a public or private contract", in seeking Appellant's debarment. Appellant's present responsibility is in issue, because Appellant's conviction is for an offense which indicates exploitation by fraudulent means of a program intended to benefit only intended occupants of HUD properties. That issue is an aspect of the more fundamental question of whether debarment of Appellant would serve the public interest.

Debarment is a sanction which may be invoked by HUD to exclude or to disqualify "contractors or grantees" from participation in HUD programs as a measure for protecting the public. 24 C.F.R. §24.5(a). "Responsibility" is a term of art in the instant context which has been defined to include

integrity and honesty as well as ability to perform. See Roemer v. Hoffman, 419 F. Supp. 130 (D.D.C. 1976); 49 Comp. Gen. 139 (1969); 39 Comp. Gen. 468 (1959); 34 Comp. Gen. 86 (1954). The primary test for debarment is present responsibility, although a finding of a present lack of responsibility can be based on past acts. Schlesinger v. Gates, 249 F. 2d 111 (D.C. Cir. 1957); Roemer v. Hoffman, *supra*; Onofrio Vincent Bertolini, HUDBCA No. 79-390-D33 (Nov. 13, 1979). Integrity is central to a contractor's responsibility in performing a business duty toward the Government. 39 Comp. Gen. 468 (1959); 34 Comp. Gen. 86 (1954).

The concept of responsibility is manifestly relevant to an individual whose primary occupation is purchasing, remodeling, and renting properties, largely acquired from HUD, particularly if he has certified that he would be an owner-occupant of houses in order to benefit from the advantages it was HUD's policy to provide to certified prospective owner-occupants. Appellant was under an obligation to deal honestly and forthrightly with the Government. This he has flagrantly and calculatedly failed to do. Indeed, in his affidavit, he admits that there were a substantial number of instances other than that on which his conviction was based in which similar misrepresentations were made. It is clear on this record that Appellant did not commit an isolated act or engage in a course of conduct of whose impropriety he was not aware. Why else, after admittedly inquiring regarding the owner-occupant restrictions, would he have used nominees to acquire properties, especially nominees who obviously would not have occupied the properties they acquired?

A major issue in this case is whether Appellant currently possesses the requisite responsibility for participation in Government programs. Debarment is not a penalty, but a way for the Government to execute its statutory obligations effectively to protect the public. See, L.P. Steuart & Bros. v. Bowles, 322 U.S. 398 (1944); Gonzales v. Freeman, 344 F. 2d 570 (D.C. Cir. 1964). A debarment regulation has been found not to be punitive in nature where it "... is a regulation for effectuating compliance, and furthering the policy represented by the ... congressional acts." Copper Plumbing and Heating Co. v. Campbell, 290 F. 2d 368, 372 (D.C. Cir. 1961). Notwithstanding the fact that Appellant's conviction is based on a plea of nolo contendere, the record of conviction for a serious violation involved in this matter, the extensive supplemental evidence, including the FBI investigation which comprises most of the documentary evidence and the Appellant's affidavit, supply comprehensive corroboration of the charge and establish it as an element of a continuing pattern and practice. Such considerations would normally warrant the imposition of a substantial period of debarment in the best interests of the Government and the public, notwithstanding the one-year temporary denial of participation previously imposed. Such a debarment

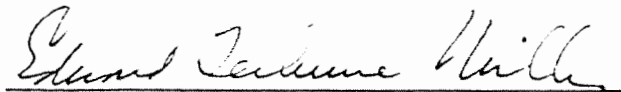
would help insure that the seriousness with which HUD views Appellant's conduct would not be misconstrued by Appellant, or others aware of his conduct, and that HUD and the public will be protected for the duration. HUD, however, has sought to impose a debarment period of only one year.

This minimal sanction is particularly troubling, since it shows a marked disparity in the treatment of similarly situated persons against whom debarment action has been recently taken and indeed, for no apparent reason, seems to favor what appears to be the comparatively egregious conduct of this Appellant. Compare Winnie Faye Owings, HUDBCA No. 80-468-D16 (Jan. 22, 1981). This is not a record which is bare of evidence establishing facts and circumstances underlying the conviction based on a plea of nolo contendere. Compare Willie J. Hope, Docket No. 80-712-DB (Final Determination by the Secretary, May 4, 1981). Even without such evidence supplementing the record of the conviction, it is now established that a conviction based on a plea of nolo contendere is sufficient to establish a cause for debarment under 24 C.F.R. §24.6(a). Willie J. Hope, supra; Edward J. Venable, HUDBCA No. 77-232-D54 (June 30, 1980). The deterrent purpose of debarment is especially important in cases such as this one in which the conviction precipitating the debarment action involves fraudulent practices in connection with HUD programs.

The record in this case does not disclose impressive factors in mitigation. Appellant's suggestion of ignorance or naivete is neither credible nor reasonable. Nor is Appellant's suggestion persuasive that his improper conduct might have some social justification, in that it has resulted in refurbishment of dilapidated houses. See Virginia Fried, HUDBCA No. 79-362-D18 (Apr. 17, 1979). Appellant's contention that the Department has abandoned the policy of favoring owner-occupants over investors in the disposition of HUD acquired properties does not alter the fact of fraudulent misrepresentation under the prior policy. Appellant's simple declaration that he now understands the requirements of the statutes and administrative rules, without more, should be viewed as merely self-serving. There is no particular showing of remorse or appreciation of the wrongfulness of his actions, other than the business inconvenience he has suffered. Nevertheless, because the Government has elected to rely solely upon the conviction based upon the plea of nolo contendere, which restricts the hearing to the written record, and because it has notified Appellant that debarment action contemplates a period of debarment that is not in excess of one year, I feel constrained to limit the determination of an appropriate period of debarment of this Appellant to one year.

Conclusion

Upon consideration of the public interest and the entire record in this matter, it is hereby determined that Appellant, James J. Wannemacher should be debarred from doing business with HUD for one year from the date of this determination, through December 2, 1982.



Edward Terhune Miller
Administrative Judge
HUD Board of Contract Appeals

Issued at Washington, D.C.
December 2, 1981.