UNITED STATES OF AMERICA

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

BOARD OF CONTRACT APPEALS

Washington, D.C.

In the Matter of:	
KENNETH R. CLARK,	HUDBCA No. 81-647-D46
	(Activity No. 81-790-DB)
Appellant	

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DETERMINATION

Statement of the Case

By letter dated August 19, 1981, the Assistant Secretary for Housing notified Appellant that he and his affiliates were suspended from participating in Department of Housing and Urban Development (HUD) programs because of an Information filed in the United States District Court for the Western District of Kentucky at Louisville charging him with violating 18 U.S.C. §1012. By letter dated September 4, 1981, the Assistant Secretary notified Appellant that HUD proposed to debar him and his affiliates for five years because of a subsequent conviction of this charge. The letter continued the earlier suspension pending a final determination of this matter, and advised that Appellant could file documentary evidence and briefs with a Hearing Officer if he so requested, as authorized under 24 C.F.R. §§24.5(c)(2) and 24.7.

Appellant's request for consideration by a Hearing Officer, dated September 9, 1981, was received by the Office of the Administrative Law Judge on September 22, 1981. The Government and Appellant filed briefs and exhibits in support of their positions on October 23, 1981, and November 4, 1981, respectively. By Order dated November 5, 1981, the Government was directed to respond, in writing, to specified issues raised by Appellant's brief regarding the existence of mitigating factors in this case. The Government's

reply brief was filed on December 11, 1981. Appellant filed a reply brief, and the Government filed comments thereon, on December 30, 1981.

Findings of Fact

Section 8 of the Housing and Community Development Act of 1974, as amended, 42 U.S.C. §1437(f) et seq., authorizes the HUD Secretary to provide housing assistance payments for lower-income families through contractual arrangements with local public housing agencies. The payments, which are subject to program restrictions, are actually made by the local agencies under contracts with owners of existing dwelling units and others specified by the statute.

Since 1976, Appellant, a landlord, has provided rental housing for low income tenants under the Section 8 program through Housing Assistance Payments (HAP) Contracts with the Jefferson County Housing Authority (Appellant's brief, page 1; Government's reply brief, Exhibit 4). Part I of these contracts, which are printed on HUD forms, set forth the monthly rent subsidy payable to Appellant and the rent payable by the particular family. Under applicable statutory requirements, the subsidy to Appellant amounted to the difference between not less than fifteen nor more than twenty-five percent of the eligible family's income and its fair market rent. (Government's brief, page 2). 1/ Part II of the HAP Contracts required Appellant to notify the housing agency "... promptly of any change of circumstances which would affect the amount of the monthly payment and that he will return any payment which does not conform to the changed circumstances ..." (Government's reply brief, Exhibit 4E).

On June 3, 1981, the U.S. Attorney for the Western District of Kentucky filed a one count Information in U.S. District Court which charged that Appellant "from on or about the 1st day of August, 1978, to on or about the 31st day of October, 1980 ... with the intent to defraud the Department of Housing and Urban Development, a Department of the United States, and with the intent to defeat its purposes, did knowingly, wilfully and unlawfully receive approximately $11,602.00 in excess of the rent authorized by the Section 8 Housing Assistance Payments Program, Existing Housing, of the said Department. In violation of Section 1012, Title 18, United States Code" (Government's reply brief, Exhibit 1).

On July 21, 1981, Appellant pleaded "not guilty" to the charge. However, on August 7, 1981, pursuant to a plea agreement, he changed his plea to "guilty." (Appellant's brief, page 4; Government's brief, Exhibit 1). Accordingly, on that date, he was found guilty as charged and placed on one-year probation. The District Court

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1/ Section 8(c)(3) of the Housing and Community Development Act of 1974, as amended, 42 U.S.C. §1437(f)(c)(3). The amount of income has since been changed by §322(e)(3) of the Omnibus Budget Reconciliation Act of 1981, 95 Stat. 402.

Judge required, as a special condition of probation, restitution of $3,502 to specified tenants, which has since been made. (Appellant's Exhibit H.) $7,714 in charged overpayments had previously been paid by Appellant to the housing agency. (See infra.)

Discussion

The Assistant Secretary's letter dated September 4, 1981 cites 24 C.F.R. §24.6 as regulatory authority for the proposed debarment. Under that provision, HUD "... 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, or subcontract thereunder, or in the performance of such contract or subcontract.
>
> * * *
>
> (5) Violation of any law, regulation, or procedure relating ... to the performance of obligations incurred pursuant to a grant of financial assistance ...
>
> * * *
>
> (9) ... Conviction for any other offense indicating a lack of business integrity or honesty, which seriously and directly affects the question of present responsibility.
>
> * * *

18 U.S.C. §1012, under which Appellant was convicted, states:

> Department of Housing and Urban Development transactions
>
> Whoever, with intent to defraud, makes any false entry in any book of the Department of Housing and Urban Development or makes any false report or statement to or for such Department; or
>
> Whoever receives any compensation, rebate, or reward, with intent to defraud such Department or with intent unlawfully to defeat its purposes;
>
> * * *
>
> Shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The Government asserts (brief, pages 1 and 3) that Appellant was convicted because of false statements made to HUD in which he certified "that he had collected only the amount of rent specified in his contract with the housing authority when, in fact, he had

collected rent exceeding those terms," in violation of the first paragraph of the above statute. Appellant (brief, page 3) states that he "has never made any such certification."

The Government, in support of its position, has submitted copies of several HAP Contracts signed by Appellant, the most persuasive of which is a contract dated November 5, 1980, executed on behalf of Jacqueline Lewis, and which states:

> "* * *
>
> 5(a) The Owner [Appellant] shall be paid under this Contract ... the Owner agrees that the endorsement on the check:
>
> * * *
>
> (2) shall constitute certification by the Owner that
>
> * * *
>
> (ii) the amount of the payment is the correct amount due under this Contract,
>
> (iii) the Owner has not received and will not receive any payments or other consideration from the family, the PHA [housing agency], HUD, or any other public or private source for the unit beyond that authorized in this Contract and the Lease ..." (Reply brief, Exhibit 4D.)

Since this HAP Contract is dated November 5, 1980, it presumably was not part of the charges upon which Appellant's conviction was based. The Information by its terms limits its scope to activities occurring "from or on about the 1st day of August, 1978, to on or about the 31st day of October, 1980." The other HAP Contracts submitted by the Government, while signed within the time frame specified in the Information, do not include this specific provision, which was added by HUD in September, 1980. (Id.)

I find that the Government is incorrect in construing Appellant's conviction as being based upon the first paragraph of the statute, prohibiting false statements. Rather, the language of the Information, supra, and the Court's Judgment and Probation/Commitment Order 2/ make clear that the conviction is based upon a violation of the second paragraph, prohibiting receipt of compensation with intent to defraud or defeat HUD's purposes.

2/ The Judge's Order states that Appellant has been convicted of "Fraud against the U.S. Government - Department of Housing and Urban Development in violation of Title 18, U.S.C., Section 1012 (misdemeanor) as contained in the single count of the Information." (Government's brief, Exhibit 1.)

This conviction both constituted and established cause to debar under 24 C.F.R. §24.6(a)(1), (5), and (9). See also §24.6(b)(2) and (3). Further, Appellant is a "contractor or grantee" subject to the regulations, since he is a recipient of HUD funds under §24.4(f).

Appellant does not dispute that authority to debar exists in this case (brief, page 5). However, he argues that no debarment should be imposed despite this authority, taking specific exception to the Government's statement that the conviction "demonstrates a lack of present responsibility, honesty and integrity necessary to participate in HUD programs." (Id.; Government's brief, page 4.)

Under the debarment standard of present responsibility, a contractor or grantee may be excluded from HUD programs for a period based upon projected business risk. Roemer v. Hoffmann, 419 F.Supp. 130, 131 (D.D.C. 1976); Stanko Packing Company, Inc. v. Bergland, 489 F.Supp. 947, 949 (D.D.C. 1980). Since the determination of risk is inherently speculative, an Assistant Secretary should be allowed reasonable administrative discretion in making this projection, so long as the period of debarment proposed is in the best interests of the Government and is commensurate with the seriousness of the offense or violation. See 24 C.F.R. §24.4(a); cf. §24.6(b)(1). In this regard, a finding that a contractor or grantee is not presently responsible may be based upon past acts. Schlesinger v. Gates, 249 F.2d 111 (D.C. Cir. 1975); Stanko Packing Company, Inc. v. Bergland, supra; 46 Comp. Gen. 651, 658-659 (1967). On the other hand, where present responsibility is the only applicable standard, any alleged mitigating circumstances affecting responsibility must be considered (Roemer v. Hoffmann, supra) and the debarment must be lifted if the affected participant can demonstrate that it no longer constitutes a business risk. Cf. 24 C.F.R. §24.0.

With respect to mitigating circumstances, Appellant states:

> ... many rental properties, because of esthetics or location, are given a rental rating by HUD that is lower than the actual fair market rental. As a result of these distorted valuations, some tenants who are interested in bettering their lot have offered landlords additional rent in order to obtain quality housing that would not otherwise be available under the Section 8 program. While these arrangements technically violated certain regulations, they did further the Government's policy of improving the quality of housing for low income families. (Brief, page 2.)

Any implication that the tenants in question asked Appellant to accept more than their required rents is rebutted by the tenants themselves, in signed interviews with an official of the Jefferson County Housing Authority. (Government reply brief, Exhibit 2.) For example, when asked how he came to pay the extra rent, [redacted] McCoomer, one of the tenants, stated:

The way he explained it is that that's the way that me and my wife would have to do it to have the home. At the time we didn't have no place, and we didn't know for whether we were right or wrong. We thought that we would just go ahead and try it, and he said that that's what it would take us to get the home. So we just went along with it, and then my wife said that that doesn't seem right. Because if we are supposed to be on Section 8 we shouldn't have to pay this much money. Then I got to thinking about it too. At the time I guess I just didn't really think about what he was pulling us into, because we did want a house and we had looked at the house and everything, and that he had dealt with Section 8 and he knew all about it and everything was okay. The way he explained it to us, we just thought that that's what we were supposed to go along with to pay. He said that he had been dealing with Section 8 for so long that he knew exactly what to do and everything about the situation, so we just listened.

Q: Did you ever suggest to him or offer to pay extra money to him?

MR. McCOOMER: No, I didn't. (Government's reply brief, Exhibit 2B. See also interviews with [redacted] Waters and [redacted] Lewis, Exhibits 2A and 2C). 3/

Similarly, an affidavit by James Cordery, the housing agency official who conducted the tenant interviews, states that Appellant's practices were first investigated because of a complaint by another tenant, [redacted] Taylor, that she was paying Appellant excess rent under the Section 8 regulations. (Government's reply brief, Exhibit 3; see also Exhibit 2D.)

In view of this evidence, I find Appellant's suggestion that these "arrangements" furthered "the Government's policy of improving quality of housing for low income families" both disingenuous and presumptuous.

Appellant further states that he "has always admitted his actions and has cooperated completely with the Jefferson County Housing Authority. He returned $7,714.00 as requested by them and they continued him in the Section 8 Program with the full knowledge of local HUD officials." (Brief, page 5.) In this regard, Appellant has submitted a copy of a letter which he sent to the Jefferson County Housing Authority, dated September 16, 1980, which advises:

3/ Appellant's reply brief challenges the credibility of McCoomer's and Waters' statements on the ground that Appellant had previously instituted eviction proceedings against them. (Page 3.) However, any possible bias resulting therefrom does not offset the cumulative effect of these statements and those of Jacqueline Lewis and Myrtle Taylor, infra.

> I am currently receiving rent from three tenants which is in addition to the rent specified on my contract with your agency. Each of these tenants has offered to pay additional rental so that I would lease property to them which otherwise I would not be able to justify running through the Section 8 program. As I have discussed with you and other members of the staff, the Section 8 rent is less than the true rental market value on some of my houses. My attorney has suggested that I clear this procedure with you even though I can't find anything in the contract that prohibits this type of arrangement. (Exhibit A)

He has also submitted copies of checks made out to the housing agency in November and December of 1980, pursuant to negotiations with the agency prior to the filing of the Information in District Court. These checks, totalling $7,714, reflect refunds for over-charges to five Section 8 tenants. (Exhibits E and F.) 4/

The naivete suggested by Appellant's September 16th letter is less than convincing in view of the HAP Contracts signed by him which, on their face, showed the amounts which the tenants were supposed to have contributed toward the rents. 5/ Further, Appellant states in his brief that he is an experienced Section 8 participant. He therefore is presumed to have been aware of the basic and common sense prohibition of rental charges except as provided under the contracts.

Appellant's own exhibits reflect that the refunds made to the housing agency on behalf of the five tenants were only offered after the housing agency requested accounting sheets for the particular families. (Appellant's Exhibit B.) These payments were made not because of any moral insights on the part of Appellant, but simply because he was aware of an ongoing investigation and his attorney determined this course of action to be in his best interests. In this regard, Appellant's attorney wrote to the housing agency's attorney on November 6, 1980, as follows:

4/ The Government has stated that it has not verified that these payments were made. However, in the absence of evidence to the contrary, I will assume, for purposes of this decision, that Appellant tendered the five checks to the housing agency and that payments were made to the appropriate tenants.

5/ As noted, supra, in November, 1980, after writing this letter, Appellant specifically certified that he was not receiving any rental payments from [redacted] Lewis. Ms. Lewis is one of the tenants Appellant admitted having overcharged and with respect to whom he submitted a refund to the housing agency. (Appellant Exhibit E.) The record is unclear, however, whether any of these overcharges were received after Appellant's certification.

> ... even though I agree that the overpayments are not proper and I have advised Ken accordingly, he still does not believe that he did anything wrong.
>
> Whatever agreement we reach concerning repayment of funds, and frankly I have little position from which to bargain, Ken has assured me that he will promptly comply. ... (Id.)

Moreover, the $7,714 refunded did not cover all of Appellant's overcharges. As noted, the U.S. District Court Judge ordered Appellant to make additional restitution to nine Section 8 tenants 6/ in the amount of $3,502.

The payments made by Appellant and his cooperation with the Jefferson County Housing Authority under these circumstances do not make a compelling case for mitigation. With respect to the assertion that Appellant was allowed to participate in the Section 8 program "with the full knowledge of local HUD officials" after restitution of the initial $7,714, I note that neither the unidentified HUD officials nor the housing agency would have had any basis for prohibiting his participation in the absence of administrative action such as the present suspension and proposed debarment. Further, any acquiescence on the part of local officials, whether state or Federal, would not bind the Assistant Secretary who, under HUD's Part 24 regulations, is the only official authorized to suspend or debar. Cf. Atlantic Gulf & Pacific Co. of Manila, Inc., 207 Ct. Cl. 995 (1975).

Appellant also argues that his case warrants leniency because the offense for which he was convicted is a misdemeanor rather than a felony. However, regardless of how it is characterized from a criminal standpoint, where the underlying misconduct constituting cause for debarment raises issues of personal integrity and was perpetrated by an experienced HUD participant in connection with a HUD-related activity, an Assistant Secretary is entitled to be circumspect in assessing present business risk. This is particularly true in the instant case, in view of the pattern of wrongdoing involved and the serious questions of credibility raised by Appellant's brief. Appellant's undocumented assertion that he entered into "voluntary arrangements" for extra rent is defeated both by the record and plain common sense. Appellant, in reality, knowingly and wilfully milked the very people that the Section 8 program was intended to help, who could least afford being victimized by his fraud. Further, the portion of Jacqueline Lewis' HAP Contract quoted supra 7/ contrasts rather glaringly with Appellant's contention that he has never certified

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6/ Two of these tenants were the subject of earlier refunds by Appellant. (Appellant's Exhibit G.)

7/ Although, under the Assistant Secretary's September 4th letter, this contract is not relevant in determining cause for the proposed debarment, it nonetheless can be considered in evaluating present responsibility.

that he only collected the rental amounts specified in the contract. This language did not merely constitute "constructive notice" that he should not receive additional rental payments from Section 8 tenants, as Appellant asserts. (Reply brief, page 1.)

Appellant states that, if he is debarred, "all of his Section 8 tenants ... will be required to move during the next 9 months." (Reply brief, page 4.) If this is so, then the debarment will have an unfortunate and unintended impact on innocent parties, which hopefully can be minimized. However, given the present record, Appellant's future participation in HUD programs may have a worse impact on these parties, and on the general public.

Finally, Appellant's brief does not reflect an appreciation of or remorse for the wrongs committed. His position, quite understandably, is that he has suffered enough for these wrongs. He evidently still believes, however, as he did when tendering refunds to the Jefferson County Housing Authority, that he acted properly.

In view of this record, no basis exists for mitigating the five years of debarment proposed by the Assistant Secretary, which I find to be reasonable and authorized under 24 C.F.R. §24.4(a). I further find that Appellant's suspension pending administrative resolution of the proposed debarment was proper under 24 C.F.R. §24.13(c).

CONCLUSION AND ORDER

The present suspension and proposed debarment of Appellant are sustained. In determining the period of debarment, Appellant shall be credited with the period of time during which he has been suspended.

Accordingly, Appellant is hereby debarred from participating in HUD programs under 24 C.F.R. Part 24 through August 18, 1986.

Steven Horowitz
Administrative Judge

Dated: January 5, 1982