

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
BOARD OF CONTRACT APPEALS

Washington, D. C.

In the Matter of:

LAWRENCE C. SHANK

HUDBCA No. 82-724-D43

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DETERMINATION

Statement of the Case

By letter dated June 3, 1982, Philip Abrams, General Deputy Assistant Secretary for Housing notified Lawrence C. Shank ("Appellant") that the Department of Housing and Urban Development ("HUD") proposed to debar him and his known affiliate, Executive Center of America, from further participation in HUD programs for a period of five years. The letter stated that his conviction in the United States District Court for the Central District of Illinois for the violation of 18 U.S.C. §1012 was cause for debarment. Pending final determination of the issues involved in the proposed debarment, Appellant was advised that he and Executive Center of America would be temporarily suspended from participation in HUD programs. By letter dated June 18, 1982, counsel for Appellant requested an opportunity to submit documentary evidence and written briefs pursuant to 24 C.F.R. 24.5(c)(2) and 24.7; the appeal of this proposed departmental action is limited under 24 C.F.R. 24(c)(2) to the consideration of such submissions.

Findings of Fact

1. Lawrence C. Shank was an employee of Executive Centers of America, Inc. ("ECA") from May 1971 until the liquidation of ECA in March of 1980. During this period, the Appellant served as Treasurer and as Vice President-Finance of ECA.

2. In 1977 and 1978, ECA was engaged in the conversion of St. Mary's Hospital, located in Galesburg, Illinois, into St. Mary's Square, a residential home and treatment center for the care and treatment of mentally retarded adults. The financing for the conversion was insured under Section 232 of the National Housing Act which provides for assistance in the construction or rehabilitation of nursing and intermediate care facilities.

3. ECA established a wholly owned subsidiary corporation named St. Mary's Square, Inc., the mortgagor and developer of the St. Mary's Square project. Appellant served as Secretary of St. Mary's Square, Inc. and was responsible for the processing of forms and invoices submitted by contractors and suppliers providing materials, equipment and labor in connection with the St. Mary's Square project.

4. On March 25, 1977, Appellant and [REDACTED] Cafano, President of both ECA and St. Mary's Square, Inc., executed on behalf of the mortgagor an Agreement and Certification (FHA Form No. 3305) with the mortgagee, Queen City Federal Savings and Loan Association, and with the authorized agent of the Secretary of HUD as required for the insurance of advances from mortgage proceeds (Government's Brief, Exhibit F). Under the terms of this Agreement and Certification, St. Mary's Square, Inc. was obligated to "maintain and keep adequate records of all costs." During the course of the conversion of St. Mary's Hospital, St. Mary's Square, Inc. was required to submit accurate records of costs to the mortgagee to substantiate payments from mortgage proceeds. Bills and invoices indicating amounts which had been expended in the construction or rehabilitation of the project were forwarded to the appropriate HUD officials through the HUD approved mortgagee "for the purpose of obtaining a HUD certificate approving the insurance of certain amounts to be paid by the mortgagee." (Government's Brief, p. 2.)

5. On or about July 21, 1977 Appellant, acting on the order of President Cafano, processed three invoices of Sutton Contract Furnishings for payments totalling \$37,960.87 for the purchase of equipment and furniture for St. Mary's Square. Appellant submitted to the mortgagee these invoices for HUD certification and payment knowing that the items purchased for the benefit of St. Mary's Square were for a price substantially less than \$37,960.87, that many of the purchased items were not delivered to St. Mary's Square, and that some of the items purchased for St. Mary's Square were delivered to other properties owned and operated by ECA.

6. In September of 1978, ██████████ Cafano committed suicide. After the death of Cafano and "before the government's investigation into this matter was commenced," Appellant "met with the ECA Board of Directors and their counsel, and advised them that certain items which had been invoiced to St. Mary's Square had been delivered to other ECA properties." (Appellant's Brief, p. 2.)

7. As a result of this meeting and on the advice of the ECA Board's counsel, Appellant directed the return to St. Mary's Square of most of the items improperly delivered to other ECA properties and arranged for the transfer of other office equipment and furniture from ECA corporate offices to St. Mary's Square. (Appellant's Brief, p. 2.)

8. On September 11, 1981, a Federal Grand Jury for the Central District of Illinois returned a four-count indictment charging Appellant and Robert C. Sutton with violation of 18 U.S.C. §371 and §1010. (Government's Brief, Exhibit B.) The Appellant was charged with submitting false statements to HUD, and with publishing and causing to be published false statements whereby Appellant and Sutton falsely represented to HUD that St. Mary's Square had purchased equipment and furniture in the amounts of \$14,788.55, \$13,137.23, and \$10,035.09 knowing that these amounts were substantially more than the costs of furnishings actually purchased for and delivered to St. Mary's Square.

9. On November 2, 1981, as part of a plea agreement, Appellant pleaded guilty to a three count Information charging violations of 18 U.S.C. §1012 (Making a False Statement to HUD). Under the provisions of the plea agreement, Appellant agreed "to cooperate fully and truthfully" with the Government in its investigation regarding federal criminal violations in the renovation of St. Mary's Square. (Government's Brief, Exhibit C.)

10. On January 19, 1982, the Court imposed a fine of one thousand dollars on Count 1 of the Information and placed Appellant "on probation for a period of Three (3) years on all Three Counts, to run concurrently." Additionally, Appellant was ordered by the Court to provide one hundred hours of "voluntary, uncompensated time per year for a public or not-for-profit organization...." (Government's Brief, Exhibit E.)

Discussion

Appellant contends that he is neither a contractor nor a grantee as these terms are defined by 24 C.F.R. Part 24 and as such, is not subject to sanction as proposed by the Department. While Appellant admits that he was an employee and officer of the corporation, St. Mary's Square, Inc., he asserts that since he exercised no decision-making authority nor directly or indirectly received HUD funds, the Department is in error in placing him in

the category of a contractor or grantee. Appellant submits that had the regulation [24 C.F.R. §24.4(f)] intended to include "mere employees" within the ambit of the definition of "contractor or grantee," it could have done so with explicit language. Appellant in effect argues that his status as a "mere employee" places him in a category which shields him from the application of the administrative sanctions set forth in 24 C.F.R. Part 24. The regulation, although drafted broadly to allow for flexibility in its administration, does not state that an employee who is merely "clothed with a title" as a corporate officer in a firm doing business with the Department and who has no independent decision-making responsibility is a "contractor or grantee," and, says the Appellant, the Department should not construe such a definition where none exists. (Appellant's Brief, p. 4.)

This argument lacks merit. 24 C.F.R. §24.4(f) includes in its definition of 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, ... those in a business relationship with such recipients including, but not limited to, all participants ... in programs where HUD is the grantor or insurer...." (Emphasis added). Appellant was a participant in a program where HUD was an insurer, and received HUD funds as an officer and employee of St. Mary's Square, Inc. which, as a corporate entity, had a direct business relationship with HUD. I find that Appellant falls well within the ambit of the regulation's definition of a "contractor or grantee," and, as such, is subject to the administrative sanctions set forth in 24 C.F.R. Part 24 if it is determined to be in the best interest of the public and the Department.

The indictment and the conviction of the Appellant provide a clear basis for the suspension of the Appellant pursuant to the causes listed in 24 C.F.R. §24.13(a). The basic issue before me is whether the Appellant is so devoid of present responsibility as to warrant his debarment and forfeiture of his right to participate in HUD programs for a period of five years as proposed by the Department. 24 C.F.R. §24.6(a) provides that a conviction of a contractor or grantee for the commission of a criminal offense in the performance of a HUD contract or subcontract is a cause to warrant imposition of a debarment. However, in proposing a debarment, the agency should exercise discretion in considering all pertinent evidence and mitigating factors, obviating any need for the Department to pursue the debarment if the contractor is found to be presently responsible.

Debarment is not penal in nature, but a means by the Government to effectuate its statutory obligation 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). The purpose of debarment is to assure the Government that it only does business with responsible contractors and grantees. 24 C.F.R.

§24.0. "Responsibility" is a term of art in Government contract law, defined to include not only the ability to successfully perform a contract, but also the honesty and integrity of the contractor. Roemer v. Hoffman, 419 F. Supp. 130 (D. D.C. 1976); 49 Comp. Gen. 139 (1969); 39 Comp. Gen. 468 (1959). The test for whether debarment is warranted is the present responsibility of the contractor or grantee. A finding of present lack of responsibility, however, can be based upon past acts. Roemer v. Hoffman, supra; Schlesinger v. Gates, 249 F. 2d 111 (D.C. Cir. 1959).

The Government in its Brief contends that "[t]he nature of Appellant's crime indicates a 'lack of business integrity or honesty' which seriously and directly affects Appellant's present responsibility as a participant in HUD programs." Clearly, the Appellant used his position as an officer and employee to perpetrate three fraudulent transactions and to obtain through deception the payment of false bills and invoices to Sutton Contractor Furnishings. Without HUD's approval of the false invoices and bills, the mortgagee would not have paid this supplier; as a result of Appellant's illegal conduct, this approval was secured.

Appellant, in mitigation, argues that although he knew of the overpayments and that some of the purchased items had not been delivered to St. Mary's Square but were delivered to other properties owned by ECA, he felt compelled to go along with the scheme since his superior, ██████████ Cafano, had ordered him to do so because "the company was under pressure due to cash flow problems." After the death of Cafano, Appellant states that he attempted to rectify his past dealings by remaining with the corporation and offering his services to correct any problems arising from the fraudulent transactions. Appellant arranged for the return of most of the furnishings which had been improperly delivered elsewhere to St. Mary's Square as well as the transfer to St. Mary's Square of other furnishings from ECA. Appellant asserts that he received no monetary compensation for his role in these transactions, nor did he initiate the illegal plan. As a result of these actions and other efforts on his part, Appellant claims that he succeeded in eliminating an imminent mortgage foreclosure by HUD on the St. Mary's Square project. At the time of Appellant's suspension, Appellant worked at the St. Mary's Square facility for a non-profit corporation other than St. Mary's Square, Inc. in a capacity not clearly defined in the record before me.

The Appellant served as Treasurer and as Vice President-Finance for ECA and as Secretary for St. Mary's Square, Inc. It is well established that a corporation can only function through its officers, directors, and shareholders. Warren Brothers Roads Co. v. United States, 355 F.2d 612, 616 (Ct.Cl. 1965), citing 39 Comp. Gen. 468, 471 (1959); Trap Rock Industries, Inc. v. Kohl, 284 A.2d 161, 166-67 (N.J. 1971); Lawrence C. Humphrey, HUDBCA

81-640-D41 (Dec. 21, 1981). "Holding a corporate contractor or grantee to a standard of 'responsibility' necessarily means, therefore, that those who control its activities ... have a special obligation to monitor the corporation's activities and may be required to account for any negligence or wrongdoing committed." Warren Brothers Roads Co. v. United States, supra. St. Mary's Square, Inc. undertook the noble commitment to rehabilitate an old structure to provide an adequate nursing facility for the care of mentally retarded adults. Yet, there can be no justification for officers or employees of this corporation, entrusted with the obligations of carrying out such a commitment, to violate that trust.

Where present responsibility is the applicable standard, mitigating circumstances pertaining to responsibility may also be considered. In addressing the issue of whether Appellant has established sufficient mitigating evidence to forego the period of time requested by the Department, I find that Appellant's submissions, including the letters dated in November of 1981 to U.S. District Court Judge Robert D. Morgan from various individuals and written prior to the imposition of a notably lenient sentence which did not direct the incarceration of the Appellant, address the issue of present responsibility and justify giving close scrutiny to the proposed debarment. I am persuaded by the fact that Appellant took immediate steps to rectify his misdeeds following the death of his superior and was instrumental in guiding a troubled nursing care facility through difficult financial straits. Appellant's efforts appear to have saved a worthwhile project which may well have defaulted and created an even greater financial burden upon the Government but for Appellant's skills and management tactics which made the project more financially sound. While I reject Appellant's contention that he was under no obligation to minimize the financial burdens of ECA or St. Mary's Square, Inc. after the death of ██████████ Cafano, it should be noted that Appellant did assume the duties of the chief executive officer of the corporations and apparently performed them quite well. Such actions constitute credible evidence of responsible behavior subsequent to illegal conduct.

The Government's Brief fails to set forth the rationale for a five year debarment period to protect the public interest other than the bare fact of Appellant's conviction. If I were to accept the Government's argument in its totality, there would be no reason to consider any mitigating factor, e.g., the Appellant's conduct after September of 1978, which relates to the issue of present responsibility. However, 24 C.F.R. §24.6(b) permits the consideration of "all mitigating factors ... in deciding whether the Administrative Sanction is warranted."

The Government in its Brief reminds me that "a finding of a lack of present responsibility can be based on past acts," yet disregards the significance of any of the actions of Appellant

after his misdeeds in July of 1977. I find that Appellant's conduct after the death of ██████ Cafano in terms of prudent and conscientious financial management is remarkably characteristic of the conduct of responsible contractors whose participation in HUD programs is not only permitted, but actively encouraged. Appellant's activities between September 1978 and the present are also "past acts" which I am bound by departmental regulation to consider, and which can support, just as rationally, a finding of present responsibility.

The Government filed nothing to rebut the influential and effectual post-conviction letters written in November of 1981 to Judge Morgan, particularly those of Donald Fike, General Manager of St. Mary's Square Living Center, Chris Traicoff, Esq., former legal counsel to ECA and Appellant's present counsel, and Jerry Banwart, C.P.A., which state in commendatory language that the Appellant had conducted himself admirably and responsibly in a policy-making position at the St. Mary's project after September of 1978. The uncontroverted evidence as set forth in these letters buttresses the conclusion that the present strong success and expansion of the St. Mary's Square project is singularly attributable to the activities of the individual that the Department seeks to debar. I concur completely with the position of the Government that the Appellant acted with a serious lack of responsibility in July of 1977. However, the Government does not argue, as it should if the lack of present responsibility is at issue, that Appellant has not conducted himself in a responsible manner as a participant in a departmental program over a subsequent period of nearly four years. Nor does it refute the preponderance of affirmative evidence of Appellant's responsible conduct following the death of ██████ Cafano.

Recognizing fully that Appellant's role in the fraud is unjustifiable, I find that the lengthy administrative sanction being proposed by the Government, when viewed in consideration of Appellant's conduct since September of 1978, is in the nature of a penalty. Such a penal use of an administration sanction is proscribed by 24 C.F.R. §24.5(a) which states in pertinent part: "These measures shall be used for the purpose of protecting the public and are not for punitive purposes." (Emphasis added). I further conclude that Appellant's actions after September of 1978 with respect to St. Mary's Square constitute sufficient mitigating factors as to obviate any need for a debarment to protect the public. I am persuaded by the record before me that a debarment of the Appellant will not be for the purpose of protecting the Department's or the public's interest and cannot be substantiated under current departmental regulations or under prevailing case law.

It is my determination that Appellant not be debarred from participation in the programs of this Department and that the present suspension of the Appellant prohibiting his participation in the programs of this Department be lifted immediately.



David T. Anderson
Administrative Judge

Dated: April 15, 1983.