

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


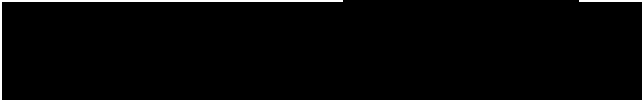
In the Matter of:

DAVID L. TOWNSEND,

Appellant

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HUDBCA No. 83-755-D3

David L. Townsend 


Mark M. Eisenstadt, Esquire
Office of General Counsel
U. S. Department of Housing
and Urban Development
Washington, D. C. 20410

DETERMINATION

Background

By letter dated July 30, 1982, Philip Abrams, General Deputy Assistant Secretary for Housing, notified David L. Townsend ("Appellant") that the U. S. Department of Housing and Urban Development ("HUD") proposed to debar him and his affiliates "from further participation in HUD programs for an indefinite period of time, but not less than five years." The letter stated that Appellant's conviction in the U. S. District Court for the Central District of Illinois for the violation of 18 U.S.C. §641 was cause for debarment. Pending a final determination of the issues involved in this matter, the Appellant was advised that he and his affiliates would be temporarily suspended from participation in HUD programs.

By letter dated September 20, 1982, Appellant advised Abrams that he received the July 30th letter of notification on September 16, 1982 and that he was requesting a hearing in accordance with 24 C.F.R. §24.5(c) (2) and §24.7(b) (1). Pursuant to 24 C.F.R. §24.5(c) (2), the appeal of the proposed debarment is

limited to the submission of documentary evidence and written briefs. The record before me contains no explanation of the delay in Appellant's alleged receipt of the Abrams' letter of notification, and the issue of the timeliness of Appellant's request for a hearing has not been raised. There is no indication that the debarment of the Appellant was imposed during this interval or during the pendency of this proceeding.

Appellant admits committing the acts which led to his conviction, but contends that during such relevant time, he was suffering from a medical illness which affected his ability to make rational decisions. The Government asserts that the egregious and willful nature of Appellant's criminal conduct, nonetheless, warrants a debarment of indefinite duration.

Findings of Fact

1. Appellant was the Executive Director of the Moline Housing Authority ("MHA") located in Moline, Illinois from October, 1965 through September, 1981. In 1977, MHA made application to HUD for 100 units of Rental Assisted Housing under the Department's Lower-Income Rental Assistance Program as authorized by Section 8 of the U. S. Housing Act of 1937, as amended by P. L. 93-383 (App. Exh. B).

2. In April, 1979, MHA received from HUD approximately \$22,000 as an administrative fee for administering the Section 8 Program. Appellant was directed by the MHA Board of Commissioners to place this sum in a special account for use by MHA to purchase sites or to rehabilitate MHA properties. Appellant deposited the funds received by MHA from HUD into a special account at the Uptown National Bank of Moline (App. Exh. B).

3. Beginning on April 27, 1979, Appellant began drawing checks on the MHA special account at the Uptown National Bank of Moline and redepositing these checks into his private business account at the Moline National Bank without the knowledge of the MHA Board of Commissioners. From this date until August 29, 1981, the Appellant periodically withdrew varying amounts of additional funds received by MHA from HUD for administering the Section 8 program from the MHA special account and redeposited these amounts into his private business account. The redeposited money was then used by the Appellant for a variety of personal expenditures (App. Exh. B; Govt. Exh. C).

4. On September 1, 1981, the Appellant left Moline, Illinois with some of the funds previously deposited into the MHA special account and relocated to South Beloit, Illinois, adopting an assumed name and profession (App. Exh. B). On September 16, 1981, Warren Thiesen, Acting Executive Director of the MHA, notified the Federal Bureau of Investigation of the disappearance of Appellant and the discovery of missing MHA funds. It was

subsequently determined that Appellant had written 67 checks in embezzling a total of \$188,299.87 from the MHA special account at the Uptown National Bank of Moline. On February 18, 1982, Appellant was arrested in South Beloit, Illinois. Only \$11,500 of the embezzled funds were recovered at the time of his arrest (Govt. Exh. F).

5. On March 10, 1982, Appellant was indicted by a Federal Grand Jury in Springfield, Illinois and charged with 67 counts of violating 18 U.S.C. §641 (Embezzlement of Government property) (Govt. Exh. C). On April 14, 1982, the Appellant pled guilty to all counts and on June 16, 1982 was given concurrent sentences of ten years imprisonment on each of the 67 counts by the U. S. District Court for the Central District of Illinois. (Govt. Exh. E.)

Discussion

Pursuant to the causes listed in 24 C.F.R. §24.13(a)(iii), the indictment and conviction of Appellant provide a clear basis for his suspension from participation in the programs of this Department. Furthermore, 24 C.F.R. §24.6(a)(9) provides that a conviction of a contractor or grantee for the commission of the offense of embezzlement is a cause to warrant imposition of a debarment in the public interest. Appellant, as Executive Director of the MHA which was a recipient of HUD funds, falls within the definition of a "contractor" or "grantee" as set forth in 24 C.F.R. 24.4(f). See In the Matter of Ben Lesniak, Jr., Docket No. 76-448-DB (March 22, 1977). Cf. In the Matter of Lawrence C. Humphrey, HUDBCA No. 81-640-D41 (December 21, 1981), and In the Matter of The Mayer Company, Inc. and Carl A. Mayer, Jr., HUDBCA No. 81-544-D1 (December 1, 1981) (where officers of private corporations involved in HUD programs were deemed to be within the scope of the definition of 24 C.F.R. §24.4(f)). Appellant does not dispute that his conviction for violation of 18 U.S.C. §641 is a ground for his debarment, but disagrees with the position taken by the Government that he is not presently responsible.

Debarment is not to be used as a punitive measure, but to provide a means by which the Government can effectuate its statutory obligation to protect the public. See L. P. Steuart & Bros., Inc. v. Bowles, Price Administrator, et al., 322 U.S. 398, 406 (1944); Gonzales v. Freeman, 334 F. 2d 570, 577 (D.C. Cir. 1964). The purpose of debarment is to assure the Government that it does business with only 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.C. D.C. 1976); 49 Comp. Gen. 139 (1969); 34 Comp. Gen. 86 (1954); 39 Comp. Gen. 468 (1959); Old Dominion Dairy Products,

Inc. v. Secretary of Defense, 631 F. 2d 953 (1980). 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 inferred from past acts. Old Dominion Dairy Products, Inc. v. Secretary of Defense, *supra*, at 957; Stanko Packing Company, Inc. v. Bergland, 489 F. Supp. 947, 949 (D.C. D.C. 1980); 46 Comp. Gen. 651, 658-59 (1967).

Appellant asserts that prior to April 1979, he was medically diagnosed at Lutheran Hospital in Moline, Illinois as suffering from [REDACTED] which was "aggravated [sic] and caused by continuing emotional problems created by ... divorce, poor diet, heavy drinking habits and the constant anxiety brought on by tax problems." (App. Brief, p. 2.) Appellant claims that due to his [REDACTED], [REDACTED], and excessive consumption of alcohol, he suffered an impairment of judgment and intellectual ability, and underwent a personality change. Appellant states that his affliction with [REDACTED] coupled with "pressure" from the Internal Revenue Service led to his embezzlement of the MHA funds to pay taxes, and that he left Moline to regain his health in order that he could later surrender to the appropriate authorities. Appellant admits that during the time preceding and during this embezzlement, he was not responsible, but "... submits that he is actually responsible in every sense of the word now, and will remain so in the future." (App. Brief, p. 3.)

The Government asserts that the "aggravated nature" of Appellant's criminal conduct justifies his debarment for an indefinite period of time. 24 C.F.R. §24.4(a) states in pertinent part:

"Debarment" means, exclusion from a participation in HUD programs for a reasonable, specified period of time commensurate with the seriousness of the offense ... generally not to exceed five years. However, the hearing officer may exclude a party for an indefinite period because of egregious and willful improper conduct.

* * *

The Government claims that Appellant's conduct was "egregious and willful" in view of Appellant's sizable and systematic withdrawals of public funds from the MHA special account during a period in excess of twenty-eight months and the conversion of such funds to Appellant's personal use. The Government suggests that the egregiousness and willfulness of Appellant's conduct is underscored by the trial Court's sentencing of Appellant to a period of incarceration of ten years.

While admitting the illegality of his acts, Appellant claims that his acts were neither "willful" nor "egregious" in nature or

intent as contended by the Government. Appellant submits that at no time did he engage in a "creative" or intentional crime, because his medical condition and the adverse circumstances of his life made him a "victim" beset with the inability to make sound judgments (App. Brief, p. 4). Appellant states that the factors affecting his judgment during his period of criminal conduct have been corrected or cured, that he does not currently suffer from the condition of [REDACTED], and that he is currently a member of Alcoholics Anonymous. Appellant requests that he not be debarred, or, in the alternative, that the period of debarment not exceed "two years, as originally requested by the Department" (App. Brief, p. 4). I find no evidence of any request by the Government for a two-year debarment in the record before me.

Mitigating circumstances affecting responsibility must be considered in deciding whether debarment is necessary to protect the public. In attempting to demonstrate such mitigating circumstances, Appellant has submitted laboratory reports and medical charts for the period of August 6, 1976 through July 19, 1978 as well as excerpts from medical literature as evidence that he was suffering from [REDACTED]. However, these submissions reveal only nine clinical visits by Appellant throughout this period involving a variety of complaints, and contain no confirmed diagnosis of, nor indication of treatment for, Appellant's alleged condition of [REDACTED]. Appellant's criminal acts commenced in April of 1979, yet there is no medical evidence of Appellant's impairment of judgment due to this alleged medical condition during the period of his criminal conduct. Conversely, there is no evidence of any criminal conduct by the Appellant from April 6, 1976 through July 19, 1978, the period of documented clinical visits during which Appellant avers that he was treated for this ailment. In any event, Appellant has failed to submit any conclusive, reliable or persuasive medical evidence demonstrating a direct causal relation between Appellant's medical condition and the criminal acts engaged in by Appellant from April, 1979 until his arrest in February, 1982. Appellant's submissions clearly fail to justify or excuse such irresponsibility based upon his alleged malady. Nor does Appellant's declaration that he no longer suffers from [REDACTED] substantiate Appellant's contention that he is presently responsible.

Appellant has acted despicably as the Executive Director of MHA and he has betrayed the public trust. His embezzlement of Government funds over an extensive period have amply demonstrated Appellant's dishonesty, lack of integrity, and total disregard of his fiduciary responsibility. Appellant claims that although the facts as presented by the Department are substantially true, "the majority of the funds involved were funds the Housing Authority received for the operation and administration of other programs, and were not a part of the Housing Authorities [sic] regular

operation" (App. Brief, pp. 1-2). This contention, even if true, is not germane to the issue before me and does nothing to convince me of Appellant's present rationality, sensibility, or good judgment.

Conclusion

Appellant's conduct in this case constituted an appalling and flagrant disregard for the law and contempt for the public interest. I find that Appellant has submitted insufficient evidence of mitigating circumstances to warrant a finding of present responsibility. I further find that Appellant's improper conduct in the circumstances of this case was "egregious" and "willful" and justifies an indefinite period of debarment pursuant to 24 C.F.R. §24.4(a).

It is my determination that Appellant be debarred from participation in the programs of this Department for an indefinite period of time, and that the debarment of Appellant shall not terminate prior to July 30, 1987, credit having been given for Appellant's suspension since July 30, 1982.



DAVID T. ANDERSON
Administrative Judge

Dated: This 14th day of October, 1983