

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

In the Matter of:

BARRY SILVER,

Respondent

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HUDBCA No. 84-859-D23
Docket No. 84-931-DB

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DETERMINATION

Statement of the Case

This is an action brought by the U. S. Department of Housing and Urban Development ("HUD" or "Department") to debar Barry Silver ("Respondent") for five years from February 27, 1984, based on his conviction on six counts of violating 12 U.S.C. §1715z-4(b)2, and 18 U.S.C. §§2 and 371. By letter dated February 3, 1984 from Maurice L. Barksdale, Assistant Secretary for Housing--Federal Housing Commissioner, HUD notified the Respondent that he was temporarily suspended and that the Department was considering debarment. The Respondent has requested a hearing on his proposed debarment. A hearing regarding a proposed debarment which is based upon a conviction is limited to the submission of documentary evidence and written briefs. 24 C.F.R. §24.5(c)(2).

The Government asserts that the Respondent's lack of present responsibility warrants a five year debarment. The Respondent contends (1) that he is not a "contractor" or "grantee" within

the meaning of HUD debarment regulations, and (2) that since the Respondent's conviction is presently being appealed, any administrative sanction is premature.

Findings of Fact

Shamrock Gardens is an apartment project in Chesapeake, Virginia (Govt. Exh. B). It was originally owned by Shamrock Gardens Partnership, subject to a mortgage held by the Government National Mortgage Association and insured by HUD under Section 221 of the National Housing Act (Govt. Exhs. B, C). In May 1976, the mortgage on Shamrock Gardens Apartments, which was in default, was assigned to HUD (Govt. Exh. B). In 1979, Shamrock Gardens was sold to new owners. (Govt. Exh. D.)

Between February 1977 and September 1980, Barry Silver was employed as comptroller for Norris Realty Company, the management agent for Shamrock Gardens Apartments (Resp. Answer; Govt. Exh. B). Between January 1977 and May 1978, Barry Silver also represented George Norris, managing general partner of Shamrock Gardens Partnership, in negotiations with HUD officials. These negotiations were purportedly an attempt by Shamrock Gardens Partnership to obtain a mortgage workout agreement on Shamrock Gardens Apartments with HUD. (Resp. Exh., partial transcript of trial proceedings of the U.S. District Court, E.D. Va., Docket No. CR-83-88N, Tr. 106-08; Govt. Exhs. B, D, E.)

On November 7, 1983, Barry Silver was convicted of five counts of willfully and knowingly using or authorizing the misuse of a total of over \$8,000 derived from Shamrock Gardens Apartments in violation of 12 U.S.C. §1715z-4(b)2 and 18 U.S.C. §2. These offenses occurred between November 7, 1978 and February 20, 1979. Silver was also convicted of one count of conspiring with George Norris to misuse funds between February, 1977 and April, 1979 in violation of 18 U.S.C. §371. Silver was sentenced to one year in jail and three years probation. (Govt. Exhs. A, B.)

Discussion

The Department is authorized to debar contractors or grantees who are not presently responsible when it is determined that such a measure is necessary to protect the public. 24 C.F.R. §24.5. The Department alleges that cause for debarment of the Respondent may be found under 24 C.F.R. §24.6(a)(9). This subsection permits the imposition of debarment for:

... conviction for the commission of the offense of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, ... or conviction for any other offense indicating a lack of business integrity or honesty, which seriously and

directly affects the question of present responsibility.

However, the Respondent contends that since he was not involved with HUD and Shamrock Gardens Apartments until after Shamrock Gardens had ceased to be a HUD-insured project, he is not a "contractor or grantee" within the scope of the HUD debarment regulations. The Respondent's argument is without merit.

24 C.F.R. §24.4(f) defines contractors or grantees as:

Individuals, state and local governments and public or private organizations that are direct recipients of HUD funds or that receive HUD funds indirectly through non-Federal sources including, but not limited to, borrowers, builders, mortgagees, real estate agents and brokers, area management brokers, management and marketing agents, or those in a business relationship with such recipients including, but not limited to, consultants, architects, engineers and attorneys; all participants, or contractors with participants, in programs where HUD is the guarantor or insurer; and Federally assisted construction contractors. (Emphasis supplied.)

Respondent represented George Norris, general partner of Shamrock Gardens Partnership, in negotiations with HUD. At that time, he was employed by Norris Realty Company, the management agent of these apartments. His business relationships with George Norris and with Norris Realty Company clearly bring him within the ambit of the definition of "contractor" or "grantee" as set forth in the HUD debarment regulations. HUD debarment regulations are intended to apply to all parties which "have a direct or indirect impact on in HUD programs.... The enumerated examples of 'contractors or grantees' in the regulation are not exclusionary. The definition clearly states that the defined class is not limited to the cited examples." Sharon Helene Barrow, HUDBCA 79-409-D42 (March 31, 1981).

The fact that the Respondent's misdeeds were committed while the Shamrock Gardens Apartments was a HUD-acquired, and not a HUD-insured, property is irrelevant to the issue of the applicability of 24 C.F.R. §24.4(f) to the Respondent. Even as a HUD-acquired property, the Shamrock Gardens Apartments continued to be managed by the Respondent's employer, and the Respondent's criminal conduct would have similarly damaged the project had the offensive acts occurred before the project was assigned to HUD. In either circumstance, the Department's legal and financial interests in the Shamrock Gardens Apartments were continuous, and the Department's obligation to protect itself from the Respondent's criminal conduct was clearly independent of the assignment of the project to HUD. In a similar manner, the

Respondent's obligation to apply himself in a conscientious, honest, and responsible fashion with respect to this federally-assisted project was not nullified simply because the Shamrock Gardens Apartments was a HUD-acquired project during the period of Respondent's employment with the project's manager.

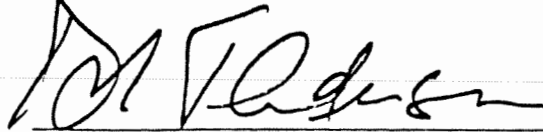
A lack of present responsibility may be inferred from past acts. Schlesinger v. Gates, 249 F. 2d 111 (D.C. Cir. 1957), cert. denied, 355 U.S. 939 (1958). The conviction of the Respondent for conspiring to misuse and knowingly authorizing the misuse of more than \$8,000 of funds belonging to Shamrock Gardens Apartments indicates a lack of business integrity, responsibility, and honesty in dealing with the Department and constitutes cause for debarment under 24 C.F.R. §24.6(a)(9). In Roemer v. Hoffman, 419 F. Supp. 130 (D. D.C. 1976), the Court required the consideration of mitigating factors offered by the contractor in evaluating his present responsibility. The Respondent in the case at bar, however, has failed to submit any documentation of mitigating evidence related to the question of his present responsibility. Without such evidence to rebut the inference to be drawn from his past conduct, I find the Respondent to be lacking in present responsibility.

The Department seeks to debar the Respondent for five years, the longest fixed term which may be sought for a debarment under HUD regulations. 24 C.F.R. §24.4(a). While the Respondent's criminal conduct is deplorable and indefensible, the length of the proposed sanction appears to be greater than is customary for comparable violations of this Department's regulations by irresponsible contractors. The Respondent was sentenced to one year in jail and three years probation, through November 3, 1986, because of his misconduct. While this sentence should serve to dissuade the Respondent from engaging in wrongful behavior in connection with HUD programs in the future, the purpose of debarment is not punitive. 24 C.F.R. §24.5(a). I find that the imposition of a four year debarment will adequately serve the purpose of the debarment regulations which is the protection of the public and the Department from contracting with an irresponsible contractor.

The Respondent argues that since this debarment action rests on the fact of Respondent's conviction, his debarment is premature because it is dependent upon the outcome of the pending appeal of the conviction. This is a fallacious argument. The Respondent cites no statutory or regulatory provision which prohibits the Department from imposing a debarment based upon a conviction simply because that conviction is on appeal before a higher court. If the Respondent prevails in the appeal of his conviction or possesses such other grounds as specified in the applicable regulations, he may apply for reinstatement in the manner provided at 24 C.F.R. §24.11.

Order

For the foregoing reasons, Barry Silver shall be debarred from this date up to and including February 3, 1988, credit being given from the date of his suspension.

A handwritten signature in black ink, appearing to read "D. T. Anderson", written over a horizontal line.

DAVID T. ANDERSON
Administrative Judge

December 11, 1984