

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

In the Matter of:

JOSEPH E. BERRIGAN, JR. and
BERRIGAN, DANIELSON,
LITCHFIELD & OLSEN,

Respondents

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: HUDBCA No. 84-894-D46
: Docket No. 84-950-DB
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For the Government

DETERMINATION

Statement of the Case

By letter dated July 6, 1984, Joseph E. Berrigan, Jr., ("Berrigan") was notified that the U.S. Department of Housing and Urban Development ("HUD") intended to debar him and his affiliate, the law firm of Berrigan, Danielson, Litchfield & Olsen ("the firm"), for a period of three years from the date of Berrigan's suspension on June 3, 1982. The proposed debarment is based on Berrigan's conviction for violation of 18 U.S.C. §3. The firm's temporary suspension in 1982 as Berrigan's affiliate was effectively terminated pursuant to an agreement with the HUD New Orleans Area Office. Berrigan requested an opportunity to submit a brief and documentary evidence on the proposed debarment of him and the firm.

Berrigan contends that neither debarment is warranted, but that in any event the firm should not be sanctioned. Berrigan cites, in particular, an agreement between the HUD New Orleans Area Office ("Area Office") and the Housing Authority of the City of New Orleans ("HANO") that the firm could continue to perform services under HANO contracts through Frederick L. Olsen, Jr.

Esquire, of the firm, so long as neither Berrigan nor Michael H. O'Keefe would participate in any way in matters arising under those contracts. That agreement arose out of the May 12, 1982 modification of a Temporary Denial of Participation ("TDP") of Berrigan and the law firm of O'Keefe, O'Keefe and Berrigan, the predecessor firm to Berrigan, Danielson, Litchfield, & Olsen by the Area Office.

The Government rejects Berrigan's position, arguing that debarment of both Berrigan and the firm is necessary to protect the public interest. The Government contends that the firm effectively breached the agreement between the Area Office and HANO by distributing a partnership share to Berrigan that included proceeds from the HANO contracts. It is not alleged that Berrigan has participated in any matters arising under the HANO contracts since his TDP.

Findings of Facts

1. Berrigan is an attorney licensed in the State of Louisiana. In 1978, he was a partner in the firm of O'Keefe, O'Keefe & Berrigan in New Orleans, Louisiana. He was also a member of the Board of Directors of Liberty Bank and Trust Company from November 1, 1972 until at least February, 1982. (Resp. Answer and Supporting Memorandum; Govt. Exh. D.)
2. In the fall of 1978, Berrigan entered into a contract with HANO to provide legal representation and advice to HANO in relation to its management and operation of various public housing projects. HANO receives HUD funds for some of its projects. The contractual relationship between Berrigan and HANO continued until June, 1982, to the complete satisfaction of both parties. (Resp. Exh. 1.)
3. In 1975, Berrigan had purchased a parcel of land with a number of investment partners, including his law partner and friend, State Senator Michael H. O'Keefe, ("O'Keefe"). At the time of the purchase, Berrigan entered into two financial agreements: a \$1,550,000 mortgage loan from Liberty Bank and Trust Company to purchase the property and a counter letter. The counter letter stated that Berrigan would transfer ownership of the property to O'Keefe and his other investment partners, provided that upon such transfer Berrigan would be absolved of liability on the mortgage loan. The counter letter was not recorded. Berrigan believed that the counter letter, as used in this transaction, was proper and not in violation of law. (Resp. Answer and Supporting Memorandum.)
4. In January, 1978, Berrigan applied to Liberty Bank and Trust Company for renewal of the loan but did not indicate on the financial statement, submitted to the bank with the loan renewal application, the existence of the counter letter with O'Keefe and

his investment partners. The loan was kept current and was paid off in a timely manner. (Govt. Exh. D; Resp. Exh. 3.)

5. At the time Berrigan applied for renewal of the loan, the Federal Deposit Insurance Corporation ("FDIC") was encouraging local banks to cut back on loans in which O'Keefe had an interest. The record is not clear whether Berrigan was aware of the activities of the FDIC at the time he applied for renewal of the loan. He contends that he was not aware. (Resp. Answer and Supporting Memorandum.)

6. By failing to disclose the counter letter at the time of the renewal application, Berrigan effectively prevented the bank from knowing that O'Keefe had an interest in the loan.

7. On February 12, 1982, O'Keefe, Berrigan and three others were indicted in United States District Court for the Eastern District of Louisiana for alleged violations of 18 U.S.C. §§2, 371, 1001, 1007, 1014 and 1341. Specifically, Berrigan was charged with obtaining loans purportedly for his own benefit, but which were actually for the benefit of O'Keefe and another defendant, Ben Daly Bridgeman. (Govt. Exh. B.)

8. On April 15, 1982, the Area Office issued a TDP against Berrigan and the firm, based upon Berrigan's indictment. In May, 1982, the Area Office conducted an informal reconsideration hearing on the TDP. Central to the reconsideration was a request from HANO that the firm be allowed to continue Berrigan's contracts through transfer of them to Frederick F. Olsen, Jr., ("Olsen") a member of the firm (Resp. Exh. 1). On May 12, 1982, the Area Office, through Area Manager Betsy H. Stafford, formally modified the TDP to allow the firm to continue its participation in the HANO contract through Olsen, and to allow HANO to enter into new contracts for litigation services with Olsen, "on the specific condition that neither Michael H. O'Keefe or Joseph E. Berrigan, Jr. will participate in any way in matters arising under the HANO contracts." (Govt. Exh. G).

9. Pursuant to the terms of the modified TDP, on June 3, 1982, the contracts between Berrigan and HANO were terminated and a new contract was entered into between HANO and Olsen. All existing HANO litigation contracts were transferred from Berrigan to Olsen. HANO was completely satisfied with the services rendered by Olsen and the firm under the contracts. (Resp. Exh. 1, Govt. Exh. H.)

10. By letter dated June 3, 1982, Philip Abrams, General Deputy Assistant Secretary of HUD, notified Berrigan that he and his affiliate law firm of O'Keefe, O'Keefe & Berrigan were temporarily suspended from participation in Departmental programs, based upon the indictment of February 12, 1982. The notice of suspension stated:

During this temporary period, bids and proposals for participation in Department programs will not be solicited from you, and if received, will not be considered for award unless determined by the Department to be in the best interest of the Government. (Govt. Exh. E.)

11. By letter dated June 11, 1982, the firm of O'Keefe, O'Keefe & Berrigan was informed by the Area Office that the notice of suspension from Philip Abrams dated June 3, 1982,

will not affect the arrangement approved by this Office for Frederick F. Olsen, Jr. to do certain legal work for the Housing Authority of New Orleans as described more fully in my letters of May 21, 1982 to you and May 12, 1982 to the Executive Director of the Housing Authority of New Orleans, a copy of which you received previously. (Govt. Exh. C.)

12. On February 1, 1984, O'Keefe withdrew from the firm of O'Keefe, O'Keefe & Berrigan. The firm's name was changed to Berrigan, Danielson, Litchfield & Olsen. (Govt. Exh. H.)

13. On March 1, 1984, a Bill of Information charging Berrigan with being an accessory after the fact to the making of a false statement to a Federally insured institution, in violation of 18 U.S.C. §3, was filed in the District Court, superseding the indictment of February 12, 1982. The Bill of Information charged that on January 1, 1978 Berrigan, attempting to protect O'Keefe and Bridgeman from discovery of their having made false statements, failed to disclose on a financial statement that he had executed a counter letter giving O'Keefe and others an interest in the property purchased with the \$1,550,000 loan under consideration for renewal. The Bill of Information did not specify the nature of the false statements alleged to have been made by O'Keefe or Bridgeman. (Govt. Exh. D.)

14. On March 1, 1984, Berrigan pled guilty to violation of 18 U.S.C. §3, as stated in the Bill of Information. On March 28, 1984, he was convicted as a result of his plea. Imposition of sentence was suspended and Berrigan was placed on two years probation. (Govt. Exh. D.)

15. By letter dated July 6, 1984, Berrigan was notified by HUD Assistant Secretary Maurice L. Barksdale that HUD proposed to debar Berrigan and his affiliate firm from participation in Departmental programs for a period of three years from the date of Berrigan's suspension on June 3, 1982. The proposed debarment was based on Berrigan's conviction for violation of 18 U.S.C. §3. The notice of proposed debarment stated that pending final determination of debarment, "you and your affiliate continue to be temporarily suspended from further participation in HUD

programs." (Govt. Exh. A.) Despite the language of the notice of proposed debarment, there is no evidence that the firm was not allowed to continue its participation in the HANO contracts through Olsen, as it had after the issuance of the notice of suspension under the exemption granted in accordance with the Area Office's letter of June 11, 1982, or that a modification of that exemption was actually intended.

16. On August 9, 1984, the Louisiana State Bar Association Committee on Professional Responsibility declined to take any sanction against Berrigan as a result of his criminal conviction. In its written decision, the Committee concluded that,

... the crime of which you were convicted, did not constitute a serious crime, as defined under Section 8 of Article XV of the Articles of Incorporation of the Louisiana State Bar Association. (Resp. Supplemental Exh.)

DISCUSSION

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. Debarment is not to be used for punitive purposes but to protect the public. 24 C.F.R. §24.5(a). It is not disputed that Berrigan is a "contractor or grantee" within the scope of the Department's regulation applicable to debarment because he was an attorney in a business relationship with HANO, which is a direct recipient of HUD funds. 24 C.F.R. §24.4(f).

The cause for debarment relied upon by the Government is that Berrigan's conviction for violation of 18 U.S.C. §3 constitutes a "cause of such serious compelling nature, affecting responsibility, as may be determined by the appropriate Assistant Secretary to warrant debarment." 24 C.F.R. §24.6(a)(4). It is the Government's position that Berrigan's failure to disclose the counter letter giving O'Keefe and others interest in the property ostensibly owned by Berrigan not only made him an accessory after the fact to O'Keefe's and Bridgeman's allegedly criminal acts, but, more seriously, constituted a breach of Berrigan's fiduciary duty to Liberty Bank and Trust Company. The Government contends that, as a member of Liberty's Boards of Directors, Berrigan had a duty of complete disclosure to the bank, which he knowingly and willfully failed to exercise.

The nature of the counter letter itself colors the debate between the parties. Under Louisiana law, as distinct from Federal law, the counter letter was not an illegal instrument. The use to which it was put by Berrigan, O'Keefe and the other investors did not violate State law. La. Civil Code Article 2239. Berrigan was unaware that the counter letter could or would be construed as an instrument violative of Federal law. The eventual criminal charge to which he pled guilty did not turn

on the nature of the counter letter but the fact that Berrigan did not list it on the financial statement he submitted to Liberty Bank and Trust Company for renewal of the loan. His criminal act was as an accessory after the fact, helping to conceal alleged false statements made by O'Keefe and Bridgeman, by omitting any reference to the counter letter in his financial statement. Any concealment of criminal activity raises serious questions of responsibility, be the criminal activity that of the concealer or others.

The Government relies on the breach of fiduciary duty to the bank implicit in Berrigan's failure to list the counter letter in his financial statement as evidence of a serious and compelling lack of responsibility warranting debarment. 24 C.F.R. §24.6(a)(4). In this I must agree. As a member of the Board of Directors of the bank, he had, if anything, a greater duty of full disclosure. Even though the counter letter was not recorded, it was considered an obligation by Berrigan, O'Keefe and the other investors. Berrigan's failure to disclose its existence to the bank was not inadvertent. It was a deliberate decision to hide the true nature of his, O'Keefe's and the other investors' interest in the property from the bank. Furthermore, Berrigan's argument that the counter letter did not have to be reported because it was not recorded is merely a convenient rationalization. Berrigan's concealment of the counter letter may not have violated the letter of the state law but it gave a false picture of Berrigan's true financial standing. Therefore, I find that cause for debarment has been established pursuant to 24 C.F.R. §24.6(a)(4).

The debarment provisions of the regulation make no specific reference to the need for debarment of affiliates. Furthermore, the definition of "affiliates" in 24 C.F.R. §24.4(d) does not address the relationship between an individual and a business concern. However, in 24 C.F.R. §24.14(b)(3), for purposes of suspension, the conduct of an individual may be imputed to the organization with which he is connected when the impropriety involved "... was performed within the course of his official duty, or with knowledge or approval of the organization." Ibid. If a business entity is subject to debarment as an affiliate of an individual, the tests set forth in the suspension section are the most rational tests for determining whether the sanction is necessary for the business. In this case, the acts in question were not performed by Berrigan on behalf of the firm; they were performed in Berrigan's capacity as a private individual. There is no evidence that the firm as a corporate entity approved or was even aware of Berrigan's actions. Furthermore, there is no evidence that Berrigan has the power or authority to exercise control of the firm, although he is a partner. The HUD Area Office recognized the distinction between Berrigan and the firm when it modified the TDP to allow the firm to continue its work with HANO through the untainted Mr. Olsen. The firm has at no

time acted as less than a responsible contractor. Therefore, I cannot find a logical nexus or need for applying the debarment sanction to the firm in any event.

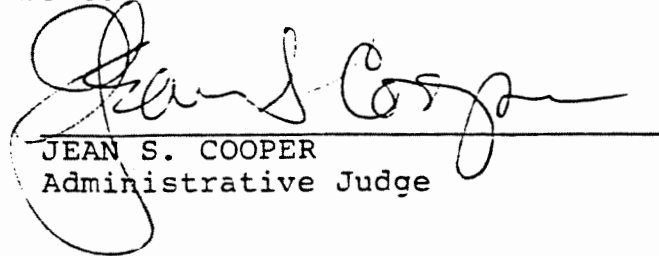
The Government contends that the firm violated the agreement with the Area Office because it distributed partnership profit shares to Berrigan that included profits from the HANO contracts. The distribution of firm profits to its partners, which included Berrigan, did not violate the letter or spirit of the agreement with the Area Office because Berrigan did not participate in any way in "matters arising under the HANO contracts." The purpose of that condition was to protect the Department and the public from any possible harm that could occur if Berrigan performed work under the HANO contracts. That condition was met. The Department cannot set up a financial "Chinese Wall" after the fact simply because it is annoyed that the partnership shares in this case distributed to Berrigan probably included in some part profit from the HANO contracts. The distribution of partnership shares has nothing whatever to do with either the express or implied purposes of either suspension or debarment.

The Government proposed the debarment of Berrigan from the date of his suspension on June 3, 1982, until June 3, 1985. That proposal was made slightly more than one year ago, on July 6, 1984. Essentially, the Government was proposing an eleven month debarment of Berrigan, taking into consideration the two years he had been temporarily suspended, but not the time he was under the TDP. Eleven months is an appropriate period for sanction of Berrigan in this case, based on his conviction as an accessory after the fact, particularly because Berrigan did not abuse his trust in his contractual relationship, which normally would be the major focus of a debarment. See 24 C.F.R. §24.6(a).

Berrigan has not been participating in HUD programs for the period of time requested by the Government by virtue of his suspension. That period has now elapsed. The public has received the protection it needed, although not through debarment. Even if cause for debarment is established, it need only be applied to protect the public and the best interests of the Government. 24 C.F.R. §24.b(1). Debarment is a prospective sanction, not to be applied retroactively. I find no present public purpose to be served in applying a debarment sanction prospectively in this case. For this reason, I conclude that even though cause for debarment of Berrigan was established, his debarment is not warranted at this time. Cause for debarment of the firm as an affiliate has not been established.

Conclusion

For the foregoing reasons, JOSEPH BERRIGAN and the firm of BERRIGAN, DANIELSON, LITCHFIELD & OLSEN, shall not be debarred at this time because it is not in the public interest. Furthermore, the temporary suspension shall be terminated as of this date.



JEAN S. COOPER
Administrative Judge

Issued at Washington, D.C.
This 12th day of July, 1985