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

In the Matter of:	HUDBCA No. 88-4411-D15
	Docket No. 88-1313-DB
Robert E. Martin,	
Respondent	

For the Respondent:

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DETERMINATION BY ADMINISTRATIVE JUDGE JEAN S. COOPER

September 7, 1989

Statement of the Case

By letter dated July 27, 1988, Robert E. Martin was notified by the Atlanta Regional Office of the U.S. Department of Housing and Urban Development ("HUD") that a Limited Denial of Participation ("LDP") was being imposed on him for irregularities in his conduct as a closing attorney under a HUD contract with David L. Martin, P.C. On October 24, 1988, the LDP was affirmed by Raymond A. Harris, HUD Regional Administrator. Respondent Robert Martin made a timely request for a hearing on the propriety of the LDP.

By letter dated January 18, 1989, Respondent was notified that HUD intended to debar him from participation in departmental programs for a period of three years from the date of imposition of the LDP, based on alleged irregularities of a serious nature

arising from performance of his duties as a closing agent for the sale of properties owned by HUD. He was charged with having failed to wire-transfer the proceeds of nine sales to HUD, in violation of the requirements of the contract between David Martin, P.C. and HUD. He was also charged with wiring net proceeds in an untimely fashion in other sale closings under the contract, and making unauthorized disbursements of funds from the HUD trust account in violation of the contract. HUD cited these irregularities as grounds for debarment pursuant to 24 C.F.R. §§24.305(b), (e), and (f) (53 FR 19171, et seq. (May 26, 1988), to be codified at 24 C.F.R., Part 24. All citations in this decision refer to the regulation in the form it will be codified.). Pending determination of debarment, Respondent was suspended pursuant to 24 C.F.R. §405 (a)(2).

On February 17, 1989, Respondent made a timely request for a hearing on the suspension and proposed debarment. By virtue of 24 C.F.R. §24.613, a suspension supercedes an LDP. The Government moved to dismiss the LDP action on the ground that it was superceded by the suspension. The motion to dismiss the LDP was granted.

On May 15, 1989, the Government filed a Motion for Leave to Amend Complaint, citing two additional causes for debarment, based on newly discovered evidence that Respondent was not presently responsible. The Motion to Amend the complaint was granted after discussion of it during a telephone pre-hearing conference on May 17, 1989. It was granted, despite the short time before the hearing in which it was made, because it involved two discreet factual allegations that could be simply presented, as stated by counsel for both parties who participated in the pre-hearing conference. The additional charges alleged that Respondent violated the terms of his suspension and was guilty of a conflict of interest by virtue of his employment with the Federal government, citing 24 C.F.R. §24.305 (b) and (d) as the regulatory causes for debarment.

A hearing was held May 31 through June 2, 1989 in Atlanta, Georgia. The Government presented no evidence on the charge of untimely wiring of sale proceeds. The charge concerning conflict of interest was dismissed at the close of the Government's case in chief. (Transcript at 232-235.) This decision is based on the record considered as a whole concerning the remaining charges.

Findings of Fact

1. Robert Martin is an attorney licensed to practice law in the State of Georgia since 1977. From 1980 to approximately September 1986, he was employed as an attorney-examiner and administrative judge by the United States Merit Systems Protection Board (MSPB). He is also a partner in the law firm of Martin & Martin, formed in 1984 with his brother, David Martin. In addition, Robert Martin performed legal services on behalf of

David L. Martin, P.C., a professional corporation established by David Martin in approximately 1980 for the practice of law. (Exh. G-9; Tr. 236-237, 239, 243.)

2. On September 6, 1984, HUD issued an Invitation For Bids ("IFB") on a contract for closing agent services to close single-family real estate sales in the State of Georgia. The law firm of Martin & Martin requested a bid package from HUD. Robert Martin and David Martin attended the prebid conference, signing the attendance sheet for the conference as representing Martin & Martin. Thereafter, Robert Martin conferred with his superiors at the MSPB to determine whether it would be permissible for the law firm of Martin & Martin, in which he was a partner, to bid on the contract. He was told that it would not be appropriate to do so. David L. Martin, P.C. submitted a bid on the contract, listing Robert Martin as one of eleven professionals who would assist as "resources" in performance of the contract. That listing contained no reference to Robert Martin's association with either Martin & Martin or the MSPB. On at least one occasion during the prebid period, Robert Martin participated in an effort to recruit a closing agent "resource" for the contract bid. (Exh. G-1, G-2, G-3, G-9, G-10; Tr. 271, 279.)

3. The contract was awarded to David L. Martin, P.C. on October 22, 1984, for a period of two years, which was subsequently extended into 1987. The contract required that David L. Martin, P.C., represent HUD as its agent at single-family real estate closings throughout the State of Georgia. Paragraph 5.1.3 of the contract required that net proceeds from the sale closings must be wire-transferred to the U.S. Treasury on the date of closing or the next bank day, in accordance with HUD Notice 84-12, incorporated into the contract by reference. HUD Notice 84-12 contained detailed and express instructions for submitting funds by wire-transfer. Acknowledgements of wire-transfers from the bank were required to be attached to the closing statement for each sale closing and forwarded to the HUD Field Office within two working days of the closing. The contractor was also obligated pursuant to Article 2, Paragraph 2.1.1 of the contract, to maintain accounting records and give answers to any questions relative to operation of the contract. Monthly accounting reports were required. (Exhibit G-1; Tr. 52.)

4. From June, 1987 through December, 1987, HUD performed an audit of the contract records to determine whether all of the sale proceeds due HUD had been wired in accordance with the contract and whether disbursements made under the contract were appropriate. The audit covered the period from October, 1984 through July 30, 1987. The auditor found that the files and documents relevant to the HUD contract were kept in an extremely disorganized fashion. As a result, there were many instances in which no documentation could be found for either wire-transfers of sale proceeds or for disbursements for expenses and services. There were also instances of duplicate and triplicate wiring of sale proceeds that were almost impossible to sort out because of

the state of the files. The problem was compounded by an accounting system that the HUD auditor described as "very sloppy." The auditor concluded that, out of 1153 cases closed under the contract, the sale proceeds had not been wired to HUD in 89 cases. He also found that certain disbursements could not be supported by any documentation to establish that they were allowable contract disbursements. (Tr. 96-98, 106-107, 114, 119-120, 135, 139, 146.)

5. Between March 9, 1985 and August 5, 1986, Robert Martin performed at least nine closings in which he represented HUD as the closing attorney under the contract awarded to David L. Martin, P.C. For each closing, he signed a HUD-1 Settlement Statement, in which he certified that certain amounts had been paid at the closing. Each HUD-1 also lists the fee received by the closing attorney. I find that Robert Martin was compensated for each of the nine closings he performed that are at issue in this case. (Exh. G-5.)

6. The net proceeds from the nine sale closings in which Robert Martin acted as closing attorney were never received by the U.S. Treasury or HUD. There is no evidence that those net proceeds were transmitted by wire-transfer, as required by the contract. I find that the net proceeds from the nine closings effected by Robert Martin on HUD's behalf were not wire-transferred, as required by the contract, nor were they sent by any other means in compliance with the contract. (Tr. 100, 106-107, 133-134, 250-251.)

7. Robert Martin testified that he only did closings under the contract at the request of David Martin. Robert Martin did not prepare the closing packages, which were given to him by David Martin or David Martin's secretary before he attended the closings. Subsequent to closing, Robert Martin would return the closing package to David Martin or David Martin's secretary, together with any checks or money orders collected at the closing. He did not wire-transfer the sale proceeds, as directed by the contract, nor was he asked to do so by David Martin. Robert Martin stated that he assumed that all of the proceeds collected by him were being wire-transferred in accordance with the contract. He did not verify that the sale proceeds were wire-transferred for any of the nine closings at issue, nor did he keep any records concerning any of the closings he performed under the contract. (Tr. 239-241, 244-246, 250, 283.)

8. Robert Martin was the only contract "resource" listed by David L. Martin, P.C., who had signature authority to draw funds from the trust accounts set up for contract performance. Between April 22, 1985 and December, 1986, Robert Martin signed three checks drawn on the trust accounts, totalling $3700, for disbursement to the Martin & Martin operating fund account. The checks were ostensibly for legal fees due and expenses incurred under the contract. Robert Martin signed the checks at the direction of David Martin. He did not question the purpose of the

disbursements or ask for documentation to support them. He testified that he would do whatever David Martin requested of him without asking questions. (Exhs. G-6, G-7, G-9; Tr. 242, 263-265.)

9. The HUD auditor determined that the three checks signed by Robert Martin constituted "unsupported disbursements" because the auditor was unable to relate the disbursements to any of the specific closings described in the HUD-1 Settlement Statements. The checks themselves lacked any documentation to link them to specific closings, and there was no other documentation to support the disbursements. The auditor concluded that these unsupported disbursements were inappropriate because of the lack of supporting documentation. Neither Robert Martin nor David Martin were able to respond to, or refute, this audit finding. (Tr. 119-122, 130, 133-134.)

10. After Robert Martin resigned from the MSPB in September, 1986, he worked as an attorney-partner at Martin & Martin. As a result, David Martin wrote the contracting officer for the HUD contract to request that the name of the contractor be changed from David L. Martin, P.C., to Martin & Martin because Robert Martin was no longer a Federal employee and it would be more convenient to have the contract in the name of Martin & Martin. There is no evidence that the name of the contractor was ever formally changed on the contract documents. (Tr. 144-1454, 172, 252.)

11. David L. Martin, P.C., and Martin & Martin have "shared" the same office space since 1984, with no distinction made between the two entities. They use the same telephone numbers. The two entities designated employees as being with David L. Martin, P.C. when the contract was awarded in that name, and then redesignated them as employees of Martin & Martin, "when we went back to Martin & Martin", in the words of Robert Martin. I find that Martin & Martin was formed in 1984 primarily for the purpose of bidding on the HUD contract. After Robert Martin discovered that this was unacceptable because of his Federal employment, Martin & Martin employees were redesignated as employees of David L. Martin, P.C., with the exception of Robert Martin, who was listed with no professional affiliations as a private practitioner "resource" in the bid documents.

The trust accounts opened for contract performance list Robert Martin as a "partner" for purposes of signature authority, which clearly refers to his status with Martin & Martin, not David L. Martin, P.C. This "partner" designation was used by Robert Martin, writing the title "partner" beside his name on a signature card made out on February 21, 1986, ostensibly for the use of David L. Martin, P.C. All but one of the nine HUD-1 Settlement Statements signed by Robert Martin list Martin & Martin as the closing attorney. More significantly, Martin & Martin is listed on three of the HUD-1's as the settlement or closing agent, as distinguished from the closing attorney. Disbursements under the

contract for both closing agent expenses and attorney services were made to Martin & Martin, not David L. Martin, P.C. In July, 1987, when it became necessary to consolidate funds from the various trust accounts, the contracting officer requested that an account be opened that would give the contracting officer signature authority. This was effected by a corporate resolution dated July 17, 1987, signed by Robert Martin as Secretary/Treasurer of David L. Martin, P.C. Robert Martin contended that he did not remember ever being an officer of David L. Martin, P.C. However, he stated that he signed the corporate resolution as an officer because David Martin asked him to do so. He placed no significance on signing the corporate resolution as an officer of David L. Martin, P.C. (Exh. G-11; Tr. 173, 252-255, 260, 262-263, 285.)

12. According to Robert Martin, he first became aware that there were serious problems with performance under the contract in early 1987. He did not know about the failures to wire-transfer sale proceeds until he saw the audit report. He also did not know that HUD considered some disbursements to be unallowable until that time. He went through the case files with David Martin, their attorney, and their accountant to try to respond to the audit and "straighten it out", but was unable to do so. (Tr. 240-241, 249, 251.)

13. On July 27, 1988, the HUD Regional Administrator in Atlanta imposed a Limited Denial of Participation (LDP) on Robert Martin, which he sustained, after an informal conference, on October 24, 1988. On January 18, 1989, Robert Martin was temporarily suspended by HUD pursuant to 24 C.F.R. §24.405 (a)(2) pending determination of this proposed debarment, which superceded the LDP. Robert Martin and David Martin attempted to have this matter enjoined by filing suit in Federal District Court. The Federal District Court declined to enjoin HUD from proceeding with this case. (Notice of LDP, Affirmation of LDP, Notice of Suspension and Proposed Debarment; Tr. 267-268.)

14. On March 1, 1989, while suspended from participation in HUD programs, Robert Martin acted as the closing attorney at the closing of a sale of a property purchased with a mortgage insured by HUD-FHA. He knew that to close such a case while he was suspended violated the terms of his suspension. He testified that he performed the closing because he needed the money, the opportunity arose, and he wanted to frustrate HUD's purpose in imposing the suspension, which he believed had been improperly applied to him. He further admitted that this closing was not the only instance in which he knowingly and willfully violated the terms of his suspension. (Exh. G-4, Tr. 243, 267-270, 281, 289.)

Discussion

The purpose of debarment is to ensure that the Government does business only with responsible participants. Debarment is

not to be used for punitive purposes, but to protect the public interest. 24 C.F.R. §24.115(b). Responsibility is a term of art in Government contract law. It refers not only to the ability to perform a contract satisfactorily but to the honesty and integrity of the contractor or grantee. 48 Comp. Gen. 769 (1969). Although the test for the need for debarment is present responsibility, a finding of lack of present responsibility may be based on past acts. Schlesinger v. Gates, 249 F. 2d 111 (D.C. Cir. 1975). Furthermore, even if cause for debarment exists, debarment may not be warranted. The seriousness of the acts or omissions and mitigating factors must be considered in making a debarment decision. 24 C.F.R. §§24.115(d) and 24.300.

Respondent has challenged the applicability of the HUD debarment and suspension regulations currently in effect. He contends that the appropriate regulation to apply to him is the regulation that was in effect on the date of award of the contract. Respondent's contention is without merit. The regulation presently in effect provides that "... this part shall apply to sanctions initiated after the effective date of these regulations (October 1, 1988) regardless of the date of the cause giving rise to the sanction." 24 C.F.R. §24.110(e). I have no authority to decline to apply the regulation, as written. Furthermore, Respondent is not charged with any action that would not also have been a cause for his suspension or debarment under the regulation in effect in 1984. See, 24 C.F.R., Part 24 (1977). The definition of "contractor or grantee" in the 1977 regulation and the definition of "participant" in the present regulation both encompass Respondent. I find as a matter of fact and law that Respondent is a "participant," as defined at 24 C.F.R. §24.105(m).

Respondent is charged with actions that are causes for debarment pursuant to 24 C.F.R. §§24.305(b), (d), (e) and (f). His temporary suspension is based on adequate evidence that a cause for debarment under 24 C.F.R. §24.305 may exist. 24 C.F.R. §24.305(b) provides that debarment may be imposed for

> (b) Violation of the terms of a public or private agreement or transaction so serious as to affect the integrity of an agency program, such as:
>
> (1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;
>
> (2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or
>
> (3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction.

Respondent also contends that 24 C.F.R. §24.305(b) is inapplicable to him because his contractual relationship was with David L. Martin, P.C., not HUD. He argues that privity of contract is necessary between HUD and him for this regulatory section to apply in this case. Respondent is incorrect. A "transaction" covered by the regulation includes both "primary" and "lower tier" transactions. 24 C.F.R. §24.110(a)(1). A lower tier covered transaction is defined to include "any procurement contract for goods or services between a participant and a person under a covered transaction, ... under which that person will have a critical influence on or substantive control over that covered transaction." Such persons are defined to include attorneys. 24 C.F.R. §24.110(a)(1)(ii)(c)(11). Whether an attorney actually exercises influence and control is immaterial, particularly when a failure to exercise the duties and powers inherent in the attorney's role results in nonperformance of contractual obligations and obligations of an attorney to his client.

Robert Martin acted as the closing attorney in at least nine covered transactions. He signed each HUD-1 Settlement Statement to that effect. Martin contends that because all he did was collect the settlement package, attend the closing, and return the package, he had no influence or control over the transaction. He also contends that he was not acting as HUD's attorney at the closing, despite the fact that he was to be representing its interests. He argues that his client was David L. Martin, P.C. I disagree. The relationship between an attorney and client is a contractual matter that may be express or implied. I find that even though Robert Martin did not sign the contract with HUD, he was HUD's attorney for each and every closing he attended. When Robert Martin agreed to appear on HUD's behalf at the closings, received funds on HUD's behalf, and accepted a fee for his services after actually attending the closings, HUD was his client as to those funds. See, In Re Dowdy, 247 Ga. 488, 277 S.E. 2d 36 (1981). I find that Robert Martin participated as a principal in a covered transaction, and had "critical influence or substantive control" over that transaction by virtue of his role as closing attorney. 24 C.F.R. §24.205(p)(13).

I find that Robert Martin violated 24 C.F.R. §24.305(b)(1), (2), (3) and (f). He knew the requirements of the contract. He attended the prebid meeting, intended to bid on the contract as Martin & Martin, and performed a critical function under the contract. Throughout, he kept no records, made no accounting, and declined to carry out his obligations as a fiduciary and as an attorney. He used the excuse of brotherly loyalty to abandon his professional obligations. He refused to accept any personal responsibility for making sure that what he certified to on the HUD-1's had, in fact, occurred. He refused to accept any responsibility for following through to make sure that he accounted for the funds he collected and that they were wire-transferred. These actions constitute a willful failure to perform, a cause for debarment pursuant to 24 C.F.R. §24.305(b)(1). These willful failures occurred repeatedly,

establishing a history of failure to perform, a cause for debarment pursuant to 24 C.F.R. §305.(b)(2). The program requirements that the money be wire-transferred and that the HUD-1 be accurate were willfully violated by Robert Martin by virtue of his decision to have no part of them. This constitutes a violation of 24 C.F.R. §24.305(b)(3) and (f).

Respondent was also cited for contract violations that are a cause for debarment pursuant to 24 C.F.R. §24.305(e). 24 C.F.R. §24.305(e) provides that, "[d]ebarment of a contractor may be imposed for any of the causes in paragraphs (a), (b), and (d). For purposes of this section, 'agreement' is deemed to include contract or subcontracts." Privity of contract is also not relevant in this section because it, too, applies to subcontracts. More importantly, I find as a matter of fact and law that, for purposes of the contract with HUD, David L. Martin, P.C., and Martin & Martin were the same entity. I find that cause for debarment has been established pursuant to 24 C.F.R. §305(e).

The primary reason that the contract was bid by David L. Martin, P.C. was to obfuscate the participation of Robert Martin, who was then a Federal employee. The two entities, Martin & Martin and David L. Martin, P.C., were indistinguishable in contract performance. Martin & Martin was almost always listed as the settlement attorney, and sometimes as the settlement agent. Most, if not all payments were made to Martin & Martin for services under the contract for the nine closings performed by Robert Martin and for other services for which he wrote checks to the Martin & Martin account. The two entities were separate only on paper, and even then, their principals kept forgetting which entity was the contractor. Robert Martin signed a corporate resolution as Secretary-Treasurer of David L. Martin, P.C., of which he cannot "remember" being an officer or member. Likewise, he designated himself as a "partner" on a bank signature card for David L. Martin, P.C. as late as 1986, when the professional corporation was the named contractor on the HUD contract, and a professional corporation does not have partners, but shareholders and officers. The two entities were, in fact, one and the same for purposes of the HUD contract. They were located in the same place, had the same telephone number, and the same employees. It is not surprising that the staff kept placing the name of the wrong entity on the HUD-1's or that Robert Martin could not remember in what capacity he was performing. I find as a matter of fact and law that the designation of David L. Martin, P.C. as the contractor-bidder on the HUD contract was a sham at all times. This fact was all but admitted in the extraordinary request made to the contracting officer in 1986 to change the name of the contractor to Martin & Martin.

Under Georgia law, the courts permit "piercing a corporate veil"

> ... in situations where the parties involved have themselves disregarded the separations of legal entities

> by a commingling and confusion of properties, records, control, etc.... It is obvious that if the individual who is the principal shareholder or owner of the corporation conducts his private and corporate business on an interchangeable or joint basis as if they were one, then he is without standing to complain when an injured party does the same. Under such circumstances, the court may disregard the corporate entity." Bone Construction Co. v. Lewis, 148 Ga. App. 61, 63, 250 S.E. 2d 851 (1978).

The Georgia Supreme Court further stated as a matter of law that, "We cannot allow a corporate veil to hang from the cornices of professional corporations which engage in the law practice." First Bank & Trust Company, et al. v. Zagoria, et al. 250 Ga. 844, 302 S.E. 2d 674, 676 (1983).

In this case, the "corporate veil" of David L. Martin, P.C. is pierced, not to reach an individual within that entity, but to find that for purposes of this contract, Martin & Martin and David L. Martin, P.C. were alter egos, and Martin & Martin was the true contractor. It was a mere subterfuge to list David L. Martin, P.C. as the contractor. See 18 Am. Jur. 2d Corporations, §56. See also, Cornwell v. Williams Bros. Lumber Co. 139 Ga. App. 773, 229 S.E. 2d 551 (1976) and Hale v. Parmenter Ins. Agency, Inc., 150 Ga. App. 76,256 S.E. 2d 623 (1976) for facts that will determine whether corporations and other entities are alter egos of each other. Under the facts and circumstances of this case, I find that Robert Martin was never really an individual "subcontractor" with David L. Martin, P.C., but was a partner-contractor responsible for proper performance of the contract.

As an attorney in the State of Georgia, Robert Martin had a duty to render accounts to HUD, a duty not to commingle HUD's funds with his own or that of his law firm, and to return the net proceeds of the sales to HUD. In re Dowdy, supra. He did none of these things. Acting in his professional capacity as an attorney, Robert Martin distributed proceeds from the sale of HUD properties to the bank account of Martin & Martin, of which he was a partner-owner. He failed to account to HUD for these distributions, providing neither a description of the services for which payment was due nor any other identification to link the services to specific transactions under the contract. This constitutes commingling of a client's funds with that of the attorney's own. Because Robert Martin received and transferred the funds as a fiduciary for HUD, he breached his professional obligations to HUD in connection with the funds he transferred to the Martin & Martin account at the direction of David Martin. Matter of Harrison, 225 Ga. 77, 335 S.E. 2d 564 (1985). Matter of M.C. Mykel, 249 Ga. 406, 291 S.E. 2d 524 (1982). Even if HUD was not Robert Martin's client, because he performed legal services, he was acting in a professional capacity and the standards of professional conduct apply. Matter of Brooks, 249 Ga. 556, 292 S.E. 2d 686 (1982).

I find that Robert Martin failed to perform legal services under the contract in accordance with the standards required of a Georgia attorney. Matter of Baldwin, 246 Ga. 344, 271 S.E. 2d 626 (1980). It was inappropriate and unprofessional for him to have hidden behind the excuse that he was merely following his brother's directives. An attorney has a professional duty to ascertain necessary facts and evaluate those facts in relation to professional obligations before carrying out any directives from whatever source. Robert Martin forgot his professional duties or chose to ignore them, to HUD's detriment. He must now accept the responsibility for the breaches of the contract that would not have occurred if he had carried out his obligations as an attorney representing HUD's interests at the time. HUD has every right to protect itself from an attorney who chooses not to perform in a responsible, professional manner. I therefore find ample and compelling evidence to establish cause for debarment. Likewise, there was adequate evidence that grounds for debarment existed to impose a suspension pursuant to 24 C.F.R. §24.405(a)(2).

The so-called mitigating circumstances in this record are not compelling. Robert Martin's insulation of himself from acceptance of professional obligations caused the contract breaches and regulatory breaches as much as if he had intended those results. While I do not find from the record before me that he actively engaged in a scheme to deny HUD proceeds of sales that were due under the contract, I do find that Robert Martin's "defenses" are evidence of his present lack of responsibility, rather than mitigation of the seriousness of his failures as an attorney, principal, and participant in a HUD program.

Perhaps the most serious aspect of this case is the intentional and deliberate violations by Robert Martin of his suspension. His actions make a mockery of the principle that the Government should only do business with responsible persons, and destroy the purpose of sanctions, making them just so much bureaucratic surplusage to be ignored. Martin's testimony that he breached the terms of his suspension because he needed the money, the opportunity arose, and he knew it would frustrate HUD's purposes would be sufficient cause for debarment. It is, indeed, morally repugnant that these were the words and deeds of an attorney sworn to uphold the law, and a former Federal administrative judge who had the authority to sanction and compel Federal employees to conduct themselves responsibly.

The Government has cited 24 C.F.R. §24.305(d) as the cause for debarment for Robert Martin's wanton and reckless violation of his suspension. That regulatory provision includes as causes for debarment,

> (d) Any other cause of so serious or compelling a nature that it affects the present responsibility of a person.

(1) These causes include but are not limited to:

(i) Failure to comply with Title VIII of the Civil Rights Act of 1968 or Executive Order 11063, HUD's Affirmative Fair Housing Marketing regulations or an Affirmative Fair Housing Plan;

(ii) Violation of Title VI of the Civil Rights Act of 1964, section 100 of the Housing and Community Development Act of 1973 section 504 of the Rehabilitation Act of 1973, or the Age Discrimination Act of 1973;

(iii) Violation of any law, regulation, or agreement relating to conflict of interest;

(iv) violation of any nondiscrimination provisions included in any agreement or contract.

HUD contends that, although willful violation of the terms of a suspension is not enumerated at 24 C.F.R. §24.305(d)(1), it is properly to be included within the scope and intent of the regulation because it is a cause as serious or compelling, affecting present responsibility, as the enumerated causes at (d)(1)(i)-(iv). Respondent disagrees, arguing that it is inapplicable to him, as written, because he violated no civil rights statutes or conflict of interest rules by violating his suspension.

Although the specific examples of causes for debarment expressed within 24 C.F.R. §305(d) substantially limit the meaning of the broader phrase "include but are not limited to" at (d)(1), In the Matter of Wayne C. Sellers and Sellers & Company, HUDBCA No. 89-3484-D1 (August 2, 1989), they do not restrict the regulation's applicability to violations of civil rights and conflicts of interest laws. Rather, a common thread or unifying element must be found in the grouping of two seemingly disparate grounds to determine if that unifying or common element also includes willful violation of a suspension. At first blush, violations of civil rights and conflicts of interest have almost nothing in common. However, the purpose of the regulations as a whole is to (1) assure the Government that it only does business with responsible participants, and (2) to protect the sanctity of Government programs and, by so doing, protect the public interest. Civil rights and conflicts of interest are matters of public policy and morality enforced through law or regulation. The introduction of unlawful discrimination or conflicts of interest into the business of Government so tears at its foundation that they are, per se, destructive of Government business. That is the common thread that appropriately unites these two causes for debarment. In that vein, willful and wanton violation of a sanction imposed in accordance with law to protect the public interest and further the goal of responsibility, also falls within the scope of 24 C.F.R. §24.305(d)(1) because it is so serious and compelling, and cuts to the very heart of the purpose of the

sanction program. For this reason, I find that a willful and wanton violation of a sanction falls within the scope of 24 C.F.R. §24.305(d)(1).

I find that a three year period of debarment is warranted and necessary because Respondent's concept of responsibility and obligation has deteriorated rather than improved since the suspension was imposed on him. The notice of suspension and proposed debarment stated that the three years would begin to run from the date of Respondent's LDP, July 27, 1988. Inasmuch as Respondent deliberately breached the terms of his suspension on more than one occasion, I will not credit him with the time he has been suspended between March 1, 1989, until this date. I not only received no assurances from him that violations of his suspension would cease, but, to the contrary, was led to believe by Respondent's attitude that they would continue. For this reason, it is not in the public interest or the interest of HUD to allow Respondent to receive credit for time served under a sanction that was not, in fact, served. Debarment is a prospective sanction, and cannot be applied retroactively. Therefore, Respondent shall be debarred from this date up to and including January 27, 1992.

CONCLUSION

For the foregoing reason, ROBERT E. MARTIN, Respondent, shall be debarred from participation in all programs of the Department of Housing and Urban Development and the United States from this date up to, and including, January 27, 1992.

Jean S. Cooper
Administrative Judge