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

In the Matter of:	
Shirl Hauck,	HUDBCA No. 90-4826-D3
	Docket No. 90-1399-DB
Respondent	

For the Respondent:

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DETERMINATION BY ADMINISTRATIVE JUDGE TIMOTHY J. GRESZKO

June 22, 1990

Statement of the Case

By letter dated August 16, 1989, James E. Schoenberger, the General Deputy Assistant Secretary, U.S. Department of Housing and Urban Development ("Department", "Government," or "HUD"), notified Shirl L. Hauck ("Respondent"), that, pursuant to 24 C.F.R. § 24.305(c)(2), the Department was proposing to debar her from further participation in primary covered transactions and lower tier covered transactions, as either a participant or principal at HUD and throughout the Executive Branch of the Federal Government, and from participation in procurement contracts with HUD for a period of two years. The proposed debarment was based on Respondent doing business with her husband, Douglas A. Hauck, who had been suspended and later debarred from participation in HUD programs. Respondent was temporarily suspended pending a final determination of the debarment action.

On September 25, 1989, Respondent filed a timely appeal and requested a hearing on the proposed debarment. This determination is based upon written submissions of the parties, as Respondent waived her right to an oral hearing in this matter.

Findings of Fact

1. At all times relevant to this case, Douglas A. Hauck and Respondent were husband and wife, licensed real estate agents in Colorado, and participants in HUD programs. (Stipulation of Facts 1).

2. By letter dated April 1, 1988, Thomas T. Demery, Assistant Secretary for Housing, notified Douglas A. Hauck of his suspension and proposed three year debarment under 24 C.F.R. §§ 24.6(c)(3), (12) and (13) for making false statements during his participation in HUD's Single Family Mortgage Insurance Program. (Govt. Attach. 1).

3. By letter dated April 26, 1988, Douglas A. Hauck requested a clarification of the scope of the temporary suspension. The following questions were raised in that letter:

a. Does the temporary suspension of Mr. Hauck prevent him from purchasing HUD-owned properties with the use of other than FHA financing?

b. Is Mr. Hauck now prevented from receiving commissions upon the sale of houses presently under contract where an existing FHA loan will be assumed by the buyer?

c. Is Mr. Hauck now prevented from receiving commissions upon the sale of houses not yet under contract where an existing FHA loan would be assumed by the buyer?

(Govt. Attach. 2).

4. By letter dated June 23, 1988, Patricia M. Black, Assistant General Counsel of HUD, responded to Douglas A. Hauck's request for clarification. The letter stated, inter alia, that:

> The temporary suspension of Mr. Hauck does not prevent him from purchasing HUD-owned housing units that are offered for all-cash sale without qualification at public sale. See 24 C.F.R. § 24.3(a)(3).
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> * * *
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> Where an existing FHA loan would be assumed by the buyer, Mr. Hauck is not prevented from receiving commissions upon the sale of property that is either under contract or not

under contract on the date of notice of the suspension, namely April 1, 1988.

Mr. Hauck is prevented from receiving a commission if there is any involvement by the parties in a new or increased FHA-insured mortgage.

* * *

Mr. Hauck is, in fact, excluded from all participation, direct or indirect, in any HUD program, with the exceptions set forward above. 24 C.F.R. § 24.19(b)(6)(i).

(Govt. Attach. 4).

5. Respondent had actual knowledge of the April 1, 1988 suspension of Douglas A. Hauck. (Resp. Reply in Opp. to Govt. Brief, page 1).

6. On or about June 29, 1988, Douglas A. Hauck told Respondent that he received written permission from HUD to participate in certain covered transactions provided: i) an existing FHA loan was assumed by the buyer, and ii) that the seller did not intend to purchase another property to be financed by a new or increased FHA-insured mortgage. (Stip. 11).

7. In September of 1988, Respondent was the real estate agent for Douglas A. Hauck in his offers to purchase four properties subject to non-qualifying, freely-assumable, FHA-insured mortgages. Three of the four properties were purchased by Douglas A. Hauck through his assumption of the FHA-insured mortgages. Respondent received commissions on these sales, but not on the fourth property which was not sold. (Stip. 13, 14, 17, 18; Govt. Attach. 6, 7, 8, 9).

8. On March 8, 1989, Douglas A. Hauck entered into a settlement agreement with HUD in which he voluntarily agreed to a three-year debarment. (Govt. Attach. 10).

Discussion

Suspension and debarment sanctions are to be used to protect the public, and not for punitive purposes. Gonzales v. Freeman, 334 F.2d 570, 577 (D.C. Cir. 1964); 24 C.F.R. § 24.115(d). The public interest is protected by ensuring that the Federal Government only does business with responsible persons. 24 C.F.R. § 24.115(a). Responsibility is a term of art in Government contract law, defined to include not only the ability to perform a contract satisfactorily, but also the honesty and integrity of the contractor. Roemer v. Hoffman, 419 F. Supp. 130 (D.C. D.C. 1976); Paul Grevin, HUDBCA No. 85-930-D16 (July 10, 1986). Responsibility, as used in the Department's regulations,

connotes probity, honesty, and uprightness. Arthur H. Padula, HUDBCA No. 78-284-D30 (June 27, 1979). Although the judicially imposed test for debarment is present responsibility, it is well established that 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); Stanko Packing Co. v. Bergland, 489 F.Supp. 947, 949 (D.C. D.C. 1980). The burden is on the Government to prove by a preponderance of the evidence that cause for debarment exists. 24 C.F.R. §§ 24.313(b)(3), (4); James J. Burnett, HUDBCA No. 80-501-D42, 82 BCA ¶ 15,716.

It is uncontested that Respondent is a participant in covered transactions under HUD's nonprocurement programs and is a principal as defined in 24 C.F.R. § 24.105(p). Under 24 C.F.R. § 24.305(c)(2), a debarment may be imposed for:

> Knowingly doing business with a debarred, suspended, ineligible, or voluntarily excluded person, in connection with a covered transaction, except as permitted in § 24.215 or § 24.220; . . .

Respondent concedes that she had knowledge of Douglas Hauck's suspension, but asserts that her husband's explanation of the June 23, 1988 letter from Patricia Black justified her belief that, notwithstanding his suspension, he was eligible to assume existing FHA-insured mortgages because there was no increase in HUD's risk resulting from these transactions.

Respondent's argument raises the threshold issue of whether the June 23 letter granted an exception to the suspension, thus enabling Douglas Hauck to purchase property covered by FHA-insured mortgages. While the letter stated that Hauck could receive commissions in transactions where an existing FHA-insured mortgage is being assumed by the buyer, there was no exception granted to Hauck which would exempt his purchasing of property with FHA-insured, assumable mortgages.[1] The Black letter

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[1] The record is not clear whether Patricia Black had the authority, under 24 C.F.R. §§ 24.20 and 24.34 (Nov. 1987), to allow Hauck to receive commissions on sales of property with existing FHA-insured loans "not under contract on the date of notice of the suspension, namely April 1, 1988." 24 C.F.R. § 24.20(c) states: "Agencies and participants shall not renew or extend the duration of current agreements with any person who is suspended . . . except as provided in § 24.34." 24 C.F.R. § 24.34(b) requires "a written determination by the agency head or an authorized designee stating the reason(s) for deviating" and that exceptions "be granted only infrequently." There is no evidence in the record that Patricia Black is an "authorized designee."

addressed three specific questions raised in Hauck's letter of April 26, 1988, and did not specifically address assumption of FHA-insured mortgages by Hauck as a purchaser. The letter also referenced 24 C.F.R. § 24.19(b)(6)(i), which excludes participation in "any HUD program, including any program funded, guaranteed, or insured by HUD." (emphasis added). I accordingly find that the Black letter did not grant Hauck permission to assume existing FHA-insured mortgages during the period of his suspension.

Respondent's argument also raises an issue as to whether it was reasonable for Respondent to rely solely on her husband's representations of June 29, 1988 as to the scope of his suspension. On the basis of the evidence before me, I find that it was not reasonable for Respondent to rely solely on these representations. As a participant in the programs of this Department, Petitioner was duty bound to acquaint herself with the Department's rules and regulations which govern participation in these programs. 24 C.F.R. § 24.110 (as amended May 26, 1988). Inquiry by Respondent was further necessitated by ordinary prudence, given the fact of Hauck's suspension, the specific questions raised as to the scope of the suspension, and the respective response supplied by the Government. Had Respondent conducted a reasonable inquiry, the actual scope of her husband's suspension would have been readily apparent. Hence she is chargeable with all of the facts that a reasonable investigation would have disclosed. See D.C. Transit System v. U.S., 531 F.Supp. 808 (D.C. D.C. 1982) affd. 790 F.2d 964 (D.C. Cir. 1986). I find, accordingly, that the Government has established cause for debarment under 24 C.F.R. § 24.305(c)(2).

Under the debarment standard of present responsibility, the existence of a cause for debarment does not necessarily require that the contractor be debarred; the seriousness of the contractor's acts or omissions and any mitigating factors must be considered in making any debarment determination. See 24 C.F.R. §§ 24.314(a), 24.320(a). While the Government has established cause for Respondent's debarment, I am not persuaded, for several reasons, that the record in this case warrants a two-year period of debarment.

First, I am not persuaded that the record in this case, when compared with other decisions by the Department's judicial office, supports a need for a two-year debarment. Cf. Glen Edwards, HUDBCA No. 87-2305-D40 (Nov. 30, 1987)(Embezzlement conviction resulted in a two year debarment due to passive participation and a good probation report); John E. Signorelli, HUDBCA No. 86-1517-D8 (Sept. 30, 1986)(Two year debarment arising from the publication of false financial statements); William J. Smith, HUDBCA No. 86-1295-D6 (June 3, 1986)(One year debarment imposed for a conviction of tax evasion); Solomon Sylvan, HUDBCA No. 87-2432-D8 (April 13, 1988)(Proposed five year debarment for

false statement conviction converted to a two and a half year debarment based on a comparison of sanctions in analogous cases).

Second, there is no evidence in this record that Respondent either intentionally evaded the Department's regulations or committed any intentionally fraudulent acts with respect to the transactions in question.

Third, the evidence does not show that Respondent's conduct damaged HUD or its programs in any respect. The assumption of an existing mortgage by Hauck created no new risk for the Government because the loans in question had already been guaranteed. The record does not show that Hauck is in default or that retirement of these FHA-insured mortgages was planned.

I find that Respondent's conduct does not demonstrate so serious a business risk as to require protection of the public interest from Respondent's future conduct for the proposed two-year period. The record discloses no deliberate scheme to violate HUD regulations, and militates finding a violation based on either an omission or a failure to properly inform oneself.

Conclusion

For the foregoing reasons, it is my determination that a one-year debarment of Petitioner is warranted under the circumstances of this case. Respondent shall be debarred from participation in HUD programs for a period of one year from August 16, 1989 until August 15, 1990, credit being given for the period of Respondent's suspension.

Timothy J. Greszko
Administrative Judge