

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

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In the Matter of:	:	
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ALLEN GRIFFEY	:	HUDBCA No. 90-5349-D89
	:	Docket No. 90-1548-DB
Respondent	:	
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For the Respondent:

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For the Government:

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DETERMINATION BY ADMINISTRATIVE JUDGE JEAN S. COOPER

March 14, 1991

Statement of the Case

By letter dated August 8, 1990, C. Austin Fitts, the Assistant Secretary, U.S. Department of Housing and Urban Development ("HUD"), notified Allen Griffey ("Respondent"), that, pursuant to 24 C.F.R. § 24.305(a)(3) and (d), the Department was proposing to debar him 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 three years. The proposed debarment was based on Respondent's conviction in the United States District Court for the Eastern District for violation of 10 U.S.C. §§ 371, 1001 and 2. Respondent was temporarily suspended pending a final determination of the debarment action.

By letter dated September 6, 1990, 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 is not entitled, under applicable HUD regulations, to an oral hearing in this matter. 24 C.F.R. § 24.313(b)(2)(ii).

### Findings of Fact

1. From April 1984 through May 1985, Respondent worked as a licensed real estate agent and a sales representative for Michaelson Properties, Inc./Murray Marketing Services ("Michaelson Properties"). During that time, he was involved in the sale of condominium units at the Carlton Apartments located in Arlington, Virginia. (Govt. Exh. 2, pp. 1 and 4).

2. In the Fall of 1985, Respondent left Michaelson Properties and joined Pulte Homes as a sales representative for three condominium communities. As a sales representative, Respondent sold over 350 condominiums. Respondent was promoted to general sales manager in January 1988. In this position, Respondent was responsible for over 500 sales transactions. Respondent is presently employed as a marketing manager with Builders Marketing, Inc. ("BMI"). There have been no allegations of impropriety in any of Respondent's business transactions arising after the Fall of 1985. (Respondent's Brief, pp. 19-20 and Attachment A - Respondent's Affidavit, para. 3).

3. An indictment issued on December 19, 1989 charged Respondent with conspiracy to execute a straw-man sale of a Carlton condominium unit and with making false statements on the HUD Certificate of Commitment, in violation of 18 U.S.C. §§ 371, 1001 and 2. The Certificate of Commitment specified that the purchaser was to be an owner/occupant of the unit when in fact the unit was being purchased by another individual solely as an investor. The straw-man mechanism was used to reduce the down payment to 5% of the purchase price as a owner/occupant from the 15% down payment required of an investor. (Govt. Exh. 2).

4. Respondent was convicted by the United States District Court for the Eastern District of Virginia for making false statements in violation of 18 U.S.C. §§ 371, 1001 and 2. Respondent was subsequently sentenced on May 4, 1990 to fourteen months imprisonment on each of two counts to run consecutively, followed by two years of supervised release. Respondent was also required to pay a fine with a special assessment in the amount of \$7,100. (Govt. Exh. 3).

5. By letter dated April 18, 1990, Respondent informed HUD of his conviction and accepted a voluntary suspension from participation in FHA financing programs "for a period the Secretary believes is warranted." (Govt. Exh. 5; Respondent's Brief, Attachment M).

6. Respondent attests in his affidavit, inter alia, that he is deeply remorseful; that he has been involved in over 700 transactions in which no misconduct or irresponsibility has been alleged; that the single transaction underlying his conviction was not intentionally criminal, corrupt or unethical; that he is more cautious in his professional and private dealings; and that he now has a great incentive for "reproving his character and integrity." (Respondent's Brief, Attachment A - Respondent's Affidavit).

7. Respondent has offered an affidavit from ██████ Anderson who is a real estate broker, member of the Northern Virginia Board of Realtors, and chairman of the Virginia Association of Realtors. ██████ Anderson attests to Respondent's long-standing reputation for being a "very responsible, moral and ethical individual." ██████ Anderson also states that he believes Respondent's improper behavior consisted of an isolated incident, that Respondent took corrective action by leaving employment with Michaelson Properties, and that, in the context of Respondent's career, it is not in the public interest to debar Respondent from participation in HUD programs. (Respondent's Brief, Attachment I).

8. Respondent has also offered numerous letters from friends, relations and business associates praising Respondent for his integrity, experience and business achievements. The business associates attest to his reliability and honesty in his professional dealings, particularly in the period since 1985. (Respondent's Brief, Attachments B-H, J and K).

### Discussion

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

(a) Conviction of or civil judgment for:

\*                      \*                      \*

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, or obstruction of justice; . . .

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). If the debarment is based upon a conviction, a civil judgement, or debarment by another Federal agency, this

evidentiary standard shall be deemed to have been met. 24 C.F.R. § 24.313(b)(3). However, existence of a cause for debarment does not automatically require debarment. There are numerous factors to be weighed in deciding whether debarment in a given case is necessary. 24 C.F.R. § 24.115(d).

Underlying the Government's authority not to do business with a person is the requirement that agencies only do business with "responsible" persons and entities. 24 C.F.R. § 24.115. The term "responsible," as used in the context of suspension and debarment, is a term of art which includes not only the ability to perform a contract satisfactorily, but the honesty and integrity of the contractor as well. 48 Comp. Gen. 769 (1969). The test for whether a debarment is warranted is present responsibility, although a lack of present responsibility may be inferred from past acts. Schlesinger v. Gates, 249 F.2d 111 (D.C. Cir. 1957); Stanko Packing Co. v. Bergland, 489 F.Supp. 947, 949 (D.C. D.C. 1980). In gauging whether to debar a person, all pertinent information must be assessed, including the seriousness of the alleged acts or omissions, and any mitigating circumstances. 24 C.F.R. §§ 24.115(d), 24.314(a), 24.320(a). A debarment shall be used only to protect the public interest and not for purposes of punishment. 24 C.F.R. § 24.115(b).

Respondent's conviction is based on the making of false statements on the HUD Certificate of Commitment and setting up a straw-person buying scheme to permit his client to avoid paying the 15% down payment required by HUD regulations for investor purchases. This conviction raises serious doubts as to Respondent's "probity, honesty and uprightness" and connotes lack of responsibility at the time of the wrongdoing. See 48 Comp. Gen. 769 (1969). Respondent asserts that, despite his conviction, he is presently responsible based on his business and personal conduct both before and after the single incident of improper conduct in 1985.

This Board has viewed a substantial passage of time following the improper conduct which leads to the imposition of Departmental sanctions as a mitigating circumstance. ARC Plumbing and Heating Corporation, HUDBCA No. 88-3459-D68 (Feb. 2, 1990); Spencer H. Kim and Kamex Construction Corporation, HUDBCA No. 87-2468-D58 (June 21, 1988). Where, as here, the proposed debarment was based on criminal conduct which occurred in 1985 and there was no allegation by the Government that Respondent had subsequently engaged in irresponsible conduct, five years was found to be a substantial passage of time and, thus, a significant mitigating circumstance. Ted Dalton, HUDBCA No. 90-5246-D23 (Jan. 14, 1991).

Sworn statements indicating sincere remorsefulness and a genuine recognition of the seriousness of past acts are also evidence of mitigation. Ted Dalton, supra, at 6; Cf. Chesley J.

Doak, HUDBCA No. 89-4364-D12, at 7 (May 24, 1989); Bruce Haltom, HUDBCA No. 87-264-D62, at 3 (June 13, 1988). Respondent's affidavit evidences Respondent's remorse, genuine understanding of his improper conduct, and his intention to conduct his business and personal activities in a responsible manner. Moreover, the affidavit of Larry Anderson, combined with the corroborating letters from other business associates, are persuasive indicators of Petitioner's current business conduct. See, Ted Dalton, supra, at 6; Charles Kirkland, HUDBCA No. 90-5285-D57, at 4 (January 14, 1990). The Government has submitted no evidence to rebut this evidence of Respondent's present responsibility. It rests its case entirely on Respondent's conviction for events that occurred over a half decade ago.

This Board has held that Governmental interests can be sufficiently protected without a debarment where an individual is otherwise precluded from exercising detrimental conduct. See Dennis W. Plunk, HUDBCA No. 85-915-D6, at 4-5 (July 1, 1985) (attorney's suspension from the bar made debarment unnecessary); Norma Coleman, HUDBCA No. 88-3432-D42 (Feb. 15, 1990) (suspension of a real estate agent's license by a state real estate licensing agency afforded sufficient protection to the Government). Respondent's counsel states that Respondent has voluntarily surrendered his Virginia associate broker's license, and I find nothing in the record to contradict this information. Therefore, it appears that Respondent will not be in the position in the foreseeable future to violate HUD's regulations as a real estate broker.

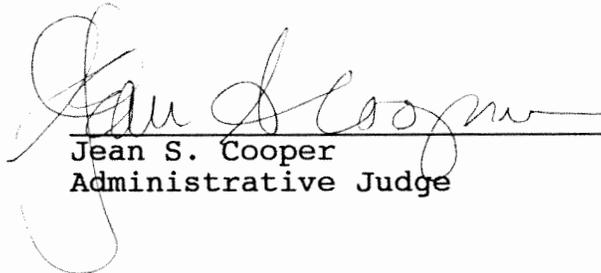
While the Government has established cause for Respondent's debarment, I am not persuaded that the record in this case warrants a three-year period of debarment. Under the debarment regulations, debarments for causes other than violations of the Drug-Free Workplace Act of 1988 are generally not to exceed three years unless special circumstances warrant. 24 C.F.R. § 24.320(a)(1). Therefore, only serious and recent violations of law or appalling irregularities should be the cause for a debarment of three years or greater. 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 three years. The irresponsible conduct occurred 5 1/2 years ago, it was limited to one transaction, and there is no evidence of any wrongdoing by Respondent since 1985. Furthermore, Respondent removed himself from the business in which the irregularities occurred. The wrongdoing, although serious, must be balanced against Respondent's record of professional conduct since 1985. The evidence in this case convinces me that Respondent is presently responsible.

Respondent has been voluntarily suspended since April 8, 1990. I find that an additional period of debarment is not

necessary to protect the public interest at this time. In fact, to continue Respondent's exclusion from participation in HUD programs would appear to be punitive, based on the facts in the record, and thus would be contrary to the purposes of debarment. 24 C.F.R. § 24.115(b). Inasmuch as debarment is a prospective sanction, it is not appropriate to apply it retroactively. The voluntary suspension of Respondent will not be converted to a debarment retroactively. The suspension may now be terminated as no longer necessary to protect the public or HUD.

### Conclusion

For the foregoing reasons, I find that a debarment of Respondent for three years until August 8, 1993 is not warranted under the circumstances of this case. Respondent's exclusion from participation in Departmental programs from April 8, 1990 to the present has afforded the public and HUD a sufficient degree of protection based on the record in this case.



Jean S. Cooper  
Administrative Judge