



Board of Contract Appeals
 U.S. Department of Housing and Urban Development
 Washington, D.C. 20410-0001

In the Matter of:	:	
	:	
	:	
RICHARD IRA HAYLEY, and	:	HUDBCA No. 91-5364-D90
H & E PROPERTIES, Affiliate,	:	Docket No. 90-1556-DB
	:	
Respondents.	:	
	:	

Edward F. Canfield, Esq.
 Casey, Scott, Canfield and Heggstad
 The Southern Building
 815 Fifteenth Street, N.W., Ste. 600
 Washington, D.C. 20005

For the Respondents

Bruce S. Albright, Esq.
 Office of General Counsel
 U.S. Department of Housing
 and Urban Development
 451 Seventh Street, S.W., Rm. 10266
 Washington, D.C. 20410

For the Government

DETERMINATION BY ADMINISTRATIVE JUDGE JEAN S. COOPER

September 4, 1991

Statement of the Case

By letter dated August 13, 1990, Assistant Secretary C. Austin Fitts suspended Richard Ira Hayley ("Hayley") and his affiliate, H & E Enterprises ("H&E") (collectively "Respondents") from participating in covered transactions with the United States Department of Housing and Urban Development ("HUD," "Department," or "Government") and the Executive Branch of the Federal Government. Respondents' suspension was issued pursuant to 24 C.F.R. § 24.110(a), and was based on an indictment charging Hayley with violating 12 U.S.C. § 1715z-4(b) (current version at 12 U.S.C. § 1715z-19). Respondents filed a timely request for a hearing on the suspension. On October 3, 1990, Hayley pled guilty to the charge in the indictment.

A stay of proceedings was issued by this Board on November 9, 1990, allowing the Department to initiate a debarment proceeding against Respondents.

In a letter dated November 8, 1990, Arthur J. Hill, Acting Assistant Secretary for Housing-Federal Housing Commission, notified Respondents that the Department was proposing a three-year debarment of Hayley and H&E. A motion to consolidate the suspension and debarment proceedings was granted by this Board on November 15, 1990.

Respondents have requested that an oral hearing be held in this case, despite the fact that this suspension and debarment action is based solely on Hayley's indictment and conviction. They contend that an oral hearing is necessary to present mitigating evidence. Since the suspension and proposed debarment are based on an indictment and conviction, a hearing is exclusively limited by regulation to the consideration of briefs and documentary evidence only. 24 C.F.R. § 24.313(b)(2)(ii). Mitigating evidence, which must be considered in any sanction case, must likewise be presented in documentary form when the cause for the sanction is established by an indictment or conviction. There is no exception provided in the regulations to this limitation. This Determination is based on the written submissions of the parties. The request for a hearing is denied.

Findings of Fact

1. At all times relevant to this case, Hayley was the owner of the LaSalle apartment project ("LaSalle"). LaSalle was financed with a HUD-insured mortgage. Hayley formed H&E to manage the LaSalle complex. Margaret Edwards, a former HUD employee, served as H&E's president. (Resp. Exh. 9).

2. Hayley owned a number of other apartment complexes and companies. From September 1, 1985 through October 31, 1987, Hayley authorized Edwards to transfer funds from LaSalle to his other companies, in an effort to stabilize the financial condition of as many companies as possible. Hayley authorized these fund transfers, knowing that such a transfer of funds derived from HUD-insured projects at that time was prohibited by the Department. (Resp. Exhs. 3, 9).

3. Hayley, through Edwards, transferred a total of \$281,453.58 from LaSalle to other Hayley-owned companies that was never returned to the LaSalle account. (Govt. Exh. 3).

4. Hayley filed for Chapter 11 protection for his businesses, including H&E, under the U.S. Bankruptcy Code on October 6, 1986. An order confirming Hayley's reorganization plan was issued by the U.S. Bankruptcy Court on May 3, 1989. Under the reorganization plan, HUD's secured claim to the LaSalle project will be repaid upon LaSalle's sale by Hayley. (Resp. Exh. 1).

5. On May 21, 1990, Hayley was indicted by a Federal Grand Jury for the Western District of Missouri for alleged violation of 12 U.S.C. § 1715z-4(b) (current version at 12 U.S.C. § 1715z-19), and 18 U.S.C. § 2, which is equity skimming against HUD. Hayley entered a plea of guilty to the indictment and on October 3, 1990, a conviction judgment was entered against him. He was sentenced to incarceration for two years and was fined \$2400.00 plus a special assessment of \$50.00. (Govt. Exhs. 3, 4).

6. Letters have been submitted which attest to Hayley's compassion and integrity. Hayley has also submitted an affidavit which details financial and physical hardship visited upon him prior to and resulting from this matter. Hayley states that he pled guilty to the charge against him to accept responsibility for the fund transfers. (Resp. Exhs. 4, 5, 6, 7, 9).

Discussion

Hayley is a "participant" in a covered transaction under the Department's nonprocurement programs because he has in the past entered into a covered transaction and may reasonably be expected to do so in the future. 24 C.F.R. § 24.105(m). Hayley is also a "principal" because he was the owner of H&E and exercised control over it in that capacity. 24 C.F.R. § 24.105(p). H&E is clearly Hayley's "affiliate," as defined at 24 C.F.R. § 24.105(b).

The applicable regulations provide that a suspension may be imposed when "cause for a debarment under [24 C.F.R.] § 24.305 may exist." 24 C.F.R. § 24.405(a)(2). A debarment may be imposed for conviction of or civil judgment for:

[c]ommission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a person.
24 C.F.R. § 24.305(a)(4).

The burden is on the Government to prove by a preponderance of the evidence that cause for the suspension and proposed debarment exists. 24 C.F.R. §§ 24.313(b)(3) & (4), 24.400(b). Since the suspension and proposed debarment are based on an indictment and conviction, this burden is deemed to have been met. 24 C.F.R. §§ 24.405(b), 24.313(b)(3). However, existence of a cause for debarment does not automatically require debarment. There are other 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 participant 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.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) and 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(d).

Hayley's presentence investigation report compiled by the United States District Court for the Western District of Missouri contains the following statement by Hayley:

[E]dwards explained to me that we were not supposed to withdraw funds from HUD projects until the end of the year and that we would have to reimburse the LaSalle account for any amount we took out. Because of that conversation, I was aware that these transfers were prohibited by HUD. I was not aware that they were a criminal offense . . . We intended to pay it all back, but we could never catch up.

I authorized Margaret Edwards to transfer funds as needed from the LaSalle account to whatever company needed the money. I didn't make most of the day to day transfers myself. That was done by Margaret or employees under her supervision . . . I accept full responsibility for [the false monthly reports to HUD]. Ultimately it was my obligation as owner of the LaSalle apartments to make sure that the reports to HUD were truthful and accurate. (Resp. Exh. 9, at 3-4, emphasis added).

This statement captures the severity of Hayley's wrongdoing. Hayley not only authorized the series of fund transfers, but did so with full knowledge of the Department's prohibition against misuse of project funds. The fund transfers were a flagrant diversion of money which was required to be used solely to cover LaSalle's operating expenses. For Hayley to knowingly authorize this arrangement indicates an appalling lack of business integrity that seriously and directly affected the interests of both HUD and the taxpaying public. A debarment is therefore necessary to protect the public.

Respondents' assertion that Hayley did not personally benefit from this arrangement is irrelevant to this determination. Even if Hayley did not seek enrichment from the fund transfers, that fact alone would not mitigate his misconduct. The regulations do not apply solely to individuals whose misconduct is motivated by greed. See Barbara Elaine King, HUDBCA No. 91-5881-D38 (Jul. 3, 1991).

Respondents assert that several factors mitigate Hayley's misconduct and make a three-year debarment inappropriate in this case. Evidence submitted in mitigation must demonstrate that Respondents are presently responsible. See Allen Griffey, HUDBCA No. 90-5349-D89 (Mar. 14, 1991). Details of Hayley's financial, medical and marital problems are irrelevant to a determination of Hayley's present responsibility, and therefore cannot be considered as mitigating. Kenneth M. Choseed, et al., HUDBCA No. 88-2985-D7 (Feb. 26, 1988). Respondents have submitted letters from Hayley's colleagues which state that Hayley is a man of compassion. However, none attest to Hayley's present responsibility or his fitness to conduct business with the Department, which they must do in order to mitigate his conduct. Cf. Ted Dalton, HUDBCA No. 90-5246-D23 (Jan. 14, 1991).

Hayley terminated Edwards soon after the Department suspended him on August 13, 1990. Such efforts to chart a course of proper business conduct can be mitigating evidence. See ARC Asbestos Removal Co., Inc., HUDBCA No. 91-5791-D25 (Apr. 12, 1991). However, I find Edwards' dismissal insufficient to mitigate Hayley's misconduct, because Hayley and Edwards were equally culpable participants in the fund transfers. Edwards' departure does not convince me that Hayley is now an individual with whom the Department should conduct business.

Respondents point out that Hayley has never committed any wrongdoing in the past. While the record supports this assertion, it is also true that Hayley authorized what became a pattern and practice of transferring funds from a HUD project to other companies, exposing the Department to liability for LaSalle's expenses. The indictment charged that this transfer of funds occurred during the period from September 1, 1985 through October 31, 1987. To that extent, this is not an isolated incident, but an extended series of transactions knowingly conducted in violation of HUD program requirements. This makes Hayley's conduct far more serious in the context of a proposed debarment than a single incident, or lack of knowledge that such transactions were prohibited.

Respondents finally suggest that Hayley's debarment would not be in the public interest because it would undermine the bankruptcy plan which is designed, in part, to repay the Department. The plan approved by the Bankruptcy Court provides that HUD will receive the LaSalle funds it is owed. Whether

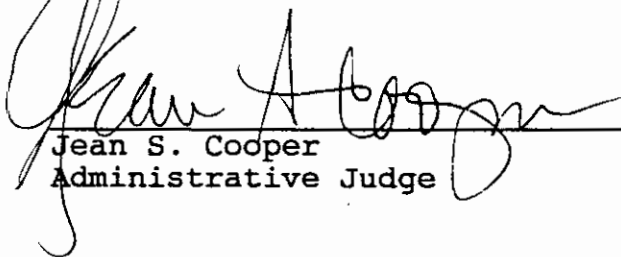
Hayley or someone else is LaSalle's manager is immaterial. I have no reason to believe that Hayley is a superior manager to others who could manage LaSalle if Hayley is debarred.

I cannot find sufficient mitigating evidence in this record to convince me that Hayley is presently responsible. His actions over a two year period were so lacking in responsibility and so lacking in respect or regard for HUD programs, that I find he presently still lacks responsibility, based on those past acts. I find no comfort in the prospect of him managing the LaSalle Apartments. Rather, this record leads me to the conclusion that HUD's desire not to do business with him is well-founded.

Debarment is a prospective sanction, and may not be applied retroactively. I find that a period of debarment of both Hayley and his affiliate, H&E Properties, from this date until August 13, 1993, is necessary and appropriate to protect the Department and the public. Hayley and H&E have been suspended since August 13, 1990. I have taken that period into consideration in setting the period of their debarment.

Conclusion

Based on the record in this case considered as a whole, Respondents Richard Ira Hayley and H&E Properties shall be debarred from this date until August 13, 1993, in accordance with the conditions set forth in 24 C.F.R. Part 24.


Jean S. Cooper
Administrative Judge