

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

In the Matter of:

JOSEPH YOUNG,

Respondent.

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: HUDBCA No. 91-5792-DZ6
: Docket No. 91-1587-DB
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For the Respondent

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For the Department

DETERMINATION BY ADMINISTRATIVE JUDGE TIMOTHY J. GRESZKO

March 11, 1991

Statement of the Case

By letter dated September 28, 1990, Anna Kondratas, Assistant Secretary for Community Planning and Development, U.S. Department of Housing and Urban Development ("Department," "Government," or "HUD"), notified Joseph Young ("Respondent"), that, pending resolution of the subject matter of the indictment against him and any legal, debarment, or Program Fraud Civil Remedies Act proceedings which may ensue, he was excluded from 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 participating in procurement contracts with HUD.

Respondent's exclusion is in the nature of a suspension, and is based upon Respondent's indictment in the Superior Court of New Jersey, Monmouth County, Law Division (Criminal). The indictment charges Respondent with violations of Section 2C:30-2 of the New Jersey Statutes. 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) (1990).

Findings of Fact

1. Respondent was employed, at all relevant times, by the Monmouth County (New Jersey) Planning Board ("the County") and its Housing Improvement Program as a Senior Cost Estimator. In this capacity, Respondent was required to provide objective inspections of work performed by other contractors and to prepare fair and accurate cost estimates for the rehabilitation of structures. The cost of these rehabilitation projects was underwritten by HUD. (Govt. Exh. 1; Resp. Exh. B).

2. Before his employment as a cost estimator, Respondent had experience in the contracting business. Respondent's son is a contractor and Respondent would occasionally perform construction work on his son's projects on weekends. On a particular weekend in 1986, after Respondent began his job as a cost estimator, Respondent agreed to his son's request to install windows at a job which the son had undertaken in Matawan, New Jersey. Respondent was paid for the work by his son. The Matawan improvement job was financed by the County, and hence was ultimately financed by HUD. Respondent was not the cost estimator for this job. (Resp. Exh. G, Initial Decision, Young v. Monmouth County Planning Board, State of New Jersey Office of Administrative Law, OAL DKT.NO. CSV 6106-90, October 12, 1990.

3. Respondent's supervisor subsequently learned of this specific weekend activity. Respondent was cautioned that his employment as a cost estimator with the County while he performed actual work for compensation at sites approved by the County would subject him to criticism. Respondent informed his supervisor that so long as the activity he performs on his own weekend time was not illegal, he would continue to engage in such work despite the criticism he may receive. (Resp. Exh. G).

4. In the early Spring of 1989, Respondent was the cost estimator on another job supported through the County, on the home of [REDACTED] Vaughn. The primary contractor for this job could not locate a window contractor. Respondent provided the contractor with the names of several window subcontractors, one of whom was his son. Respondent's son was engaged as the window subcontractor. The son then asked Respondent to assist him on weekends to install windows on the property on this job. Respondent did so, and was paid by his son for work on this project, notwithstanding the fact that Respondent had done the cost estimate for the County. (Resp. Exhs. B, G).

5. On July 11, 1989, Robert W. Clark, Director of the Monmouth County Planning Board, instructed Respondent, in writing, that he should not perform any County job function on jobs in which his son's or son's employer was involved, and that

Respondent should not perform any work on any home involved in the Housing Improvement Program. (Resp. Exh. A).

6. In the late Summer of 1989, [REDACTED] Vaughn filed a complaint with the County regarding Respondent's work on his home. As a result, the County charged Respondent with: (1) conduct unbecoming a public employee; (2) engaging in unauthorized financial activities involving public funds; and (3) misconduct. After a hearing was conducted, Respondent was suspended, without pay, between August 21 and November 20, 1990. Respondent appealed the ninety day suspension to the New Jersey Merit System Board and a hearing was scheduled for May 9, 1990. Respondent's appeal to the New Jersey Merit System Board was placed on the inactive list pending disposition of criminal charges subsequently filed against him. (Govt. Exh. 1, Final Administrative Action of the New Jersey Merit System Board dated December 21, 1990; Resp. Exhs. B, G).

7. On January 5, 1990, Respondent was indicted by a Monmouth County Grand Jury for official misconduct arising out of his job as a cost estimator. The indictment alleges that Respondent illegally performed weekend construction work for compensation at sites requiring approval by the County. It appears that the conduct underlying the indictment is the same conduct for which Respondent was suspended by the County in 1989. The indictment alleges a "second degree" crime in New Jersey, carrying a maximum sentence of ten years imprisonment and a fine of up to \$75,000. (Govt. Exh. B, Indictment No. 90-01-0041 dated January 5, 1990; Resp. Exhs. E, G).

8. On January 19, 1990, Respondent was arraigned and entered a plea of not guilty. On or about January 24, 1990, Respondent's attorney in the criminal matter submitted an application on behalf of Respondent in the Superior Court of New Jersey for admission of Respondent into the Pre-trial Intervention Program. (Resp. Brief, Exh. F).

9. Theodore R. Britton, Manager of HUD's Newark, New Jersey Office, notified Respondent by letter dated April 20, 1990 that, based upon his indictment in the Superior Court of New Jersey, a twelve month Limited Denial of Participation ("LDP") was being imposed upon him by HUD. Respondent continued to work in contravention of the terms of the LDP. (Govt. Exh. 1, Certification of Counsel dated January 21, 1991; Govt. Exh. C, LDP Notice dated April 20, 1990).

10. By letter dated May 16, 1990 Respondent's attorney in the criminal matter was informed by the Monmouth County Prosecutor that an objection to Respondent's participation in the Pre-trial Intervention Program was lodged by Robert W. Clark, Director of the Monmouth County Planning Board. The letter stated that it was the position of the County that, as a

condition, Respondent should resign immediately from his position with the County and agree not to seek any future public employment. The letter further stated that the Monmouth County Prosecutor's Office would consent to the pre-trial diversion of Respondent providing that the stated conditions were met. Respondent would not agree to these conditions and did not enter the Pre-trial Intervention Program. (Resp. Brief; Resp. Exh. G).

11. On or about June 21, 1990, the County received formal notification of Respondent's LDP. Earlier notice of the LDP had not been transmitted beyond Respondent's supervisor. The notice advised the County of a withdrawal of funding for Respondent's position and required the County to seek reimbursement for funds paid to Respondent subsequent to the imposition of the LDP on April 20, 1990. The County suspended Respondent from work as a County employee for an indefinite period, pending resolution of the criminal charges and the LDP. (Govt. Exh. 1, Certification of Counsel dated January 21, 1991).

12. Respondent's suspension from employment with the County was appealed by Respondent to the New Jersey Office of Administrative Law. On October 12, 1990, a state administrative law judge ("ALJ") directed that Respondent's suspension be lifted, having found that the suspension was improper under New Jersey law, as it was not based on Respondent's indictment, but was based on the imposition of the LDP by HUD. On December 21, 1990, the New Jersey Merit System Board reversed the ALJ's determination and held, inter alia, that Respondent's suspension was in fact based on his indictment, which includes "serious allegations of official misconduct." The Merit System Board also found that Respondent's conduct:

directly affects the integrity of the [County's] programs and the public interest . . . [and] that the [Respondent's] indefinite suspension is proper under the "necessary to maintain the effective direction of public services standard enunciated in N.J.A.C. 4A:2-2.7." (Govt. Exh. 1, Final Administrative Action of the New Jersey Merit System Board dated December 21, 1990).

13. Respondent asserts in mitigation that: (1) he is innocent; (2) there would be no material adverse effect on the public interest if he were not suspended; (3) he is fit for his job and poses no hazard to others; (4) the County took no action against him and permitted him to continue his job for six months after the indictment was issued, and as such, no harm would result if he continued work for the County; (5) the County wrongfully interfered with his attempt to enter the Pretrial Intervention Program under which the criminal charges against him would have been dismissed; (6) his suspension by the County is

now under appeal in the Appellate Division of the New Jersey Superior Court. (Resp. Brief in Opposition to Suspension dated February 4, 1991, Exhs. A-G).

Discussion

Under applicable HUD regulations, an indictment constitutes "adequate evidence" of suspected criminal conduct and may be the basis for the suspension of a "participant" in a "covered transaction" in the public interest. 24 C.F.R. §24.405(b). The sufficiency of an indictment, per se, as the basis for a suspension has long been upheld. Alexander v. Alexander, Ltd., HUDBCA No. 82-727-D46, 83-1 BCA ¶16,228 and cases cited therein.

Respondent's activities as a cost estimator and employee of a county housing authority which is a recipient of HUD assistance renders Respondent a participant in covered transactions and a principal within the meaning of 24 C.F.R. §§ 24.105(m) and (p), and 24.110(a)(1)(i). As such, Respondent is subject to the sanction of suspension if application of the sanction is otherwise determined to be in the public interest and is otherwise effected in conformity with the law. John P. Moscony, HUDBCA No. 89-4444-D17 (May 24, 1989), and cases cited therein.

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(a). 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 suspension is warranted is present responsibility, but 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 suspend a person, all pertinent information must be assessed, including the seriousness of the alleged acts or omissions, and any mitigating circumstances. See 24 C.F.R. § 24.400 - § 24.410.

The indictment which underlies this matter charges Respondent with using his office as a state civil servant for improper gain, and the charges in question are directly related to Respondent's involvement in the programs of the Department. The charges in the indictment involve serious allegations of official misconduct, a "second degree" crime under New Jersey law, and serve as the basis of Respondent's indefinite suspension from public employment pending resolution of the subject matter of the indictment. These allegations clearly raise serious concerns with respect to Respondent's fitness to participate in the programs of this Department. John P. Moscony, supra.

In opposition to the suspension, Respondent maintains that he is innocent of the underlying charges. In James A. Merritt and Sons v. Marsh, 791 F.2d 328, 330-31 (4th Cir. 1986), the United States Court of Appeals ruled that the formalities attendant to issuing an indictment carry sufficient indicia of reliability to allow the Government to protect itself against future dealings with someone accused of criminal acts. Thus, Respondent's contention that he is innocent is irrelevant for purposes of this proceeding, because the Board is not the proper forum for the determination of Respondent's guilt or innocence with respect to the criminal charges against Respondent in Monmouth County.

Respondent maintains that there is no evidence of material adverse effect on the public interest if Respondent is not suspended, and that Respondent is fit for his job. In support of this assertion, Respondent cites the County's failure to suspend Respondent or take disciplinary action for more than six months after the issuance of the indictment, and then only after the Department issued the LDP. This argument is specious and without merit. The County's failure to immediately suspend Respondent upon issuance of the indictment is not presumptive evidence that the County believed during this six month period that Respondent was responsible or fit for his job. Moreover, the findings of the New Jersey Merit System Board squarely reject this argument.

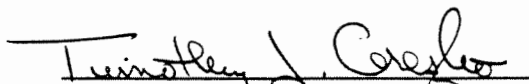
Respondent also maintains that if the County had not "wrongfully" interfered with his attempt to enter into a pretrial intervention program, the charges against him would have been dismissed. Respondent bases his argument on certain guidelines of the New Jersey Pre-Trial Intervention Program, which provide that any steps to bar participation in the Pre-trial Intervention Program solely on the basis of guilt or innocence would be an unwarranted discrimination. I have no jurisdiction to review the propriety of prosecutorial actions in the State of New Jersey. In any event, whether or not the County wrongfully prevented Respondent from entering the program is irrelevant to a determination of the propriety of HUD's suspension of Respondent for the alleged criminal misconduct. The severity of a criminal penalty in a state criminal proceeding is not an issue which need be considered here.

The evidence in this record shows, at best, that Respondent has demonstrated a high degree of insensitivity to actual and apparent conflicts of interest in programs of this Department, and, at worst, a blatant disregard of the public trust resulting in deliberate criminal activity. I find no evidence in this record that Respondent has sufficient possession or understanding of the ethical concepts expected of a public servant in order to avoid such improper conduct in the future. None of Respondent's arguments in mitigation rebut the presumption of lack of present responsibility which flows from Respondent's indictment. I find

on the evidence before me that the Department has shown adequate cause for the suspension of Respondent, and that the suspension has been properly imposed in the public interest.

Conclusion

For the foregoing reasons, it is my determination that the suspension of Respondent is warranted. Respondent shall remain suspended pending resolution of the subject matter of the indictment and any legal or debarment proceedings that may ensue. 24 C.F.R. § 24.415.


Timothy J. Greszko
Administrative Judge