



Findings of Fact

1. King is a resident of Mississippi who has worked as a real estate broker since 1979. (Respondent Exh. B).

2. On May 31, 1990, a one-count Information was filed in the United States District Court for the Southern District of Mississippi, charging King with violating 18 U.S.C. §§ 1012 and 2. The Information alleged that on January 22, 1987, King made a false statement on a settlement statement concerning a down-payment made by a mortgagor named ██████████ Smith to influence HUD to insure Smith's mortgage. Specifically, King was charged with causing a statement to be made to HUD that Smith had made a \$3,100 down-payment for purchase of a home with a mortgage insured by HUD, when, in fact, King knew that no such down-payment had been made. (Resp. Exh. A; and Govt. Exh. G).

3. On June 1, 1990, King pled guilty to and was convicted of violating 18 U.S.C. §§ 1012 and 2. King was subsequently placed on two years supervised probation and was ordered to make restitution to HUD in the amount of \$18,490.90. (Resp. Exh. B).

4. King was later subjected to disciplinary proceedings by the Mississippi Real Estate Commission, which on November 8, 1990, suspended her real estate broker's license for one year. The license suspension remains in effect until November 8, 1991. (Resp. Exh. C).

5. Numerous letters from friends and business associates attest to King's trustworthiness, contrition and professionalism. King also has alluded to the potential financial hardship which she would face as a result of a debarment, and believes that the one-year revocation of her real estate broker's license by the Mississippi Real Estate Commission is sufficient punishment for her wrongdoings. (Resp. Exhs. A, B).

Discussion

Respondent is a "participant" in a covered transaction in the Department's nonprocurement programs because she 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). The applicable regulation states that a debarment may be imposed for conviction of:

- (3) . . . forgery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, or obstruction of justice; 24 C.F.R. § 24.305(a)(3).

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) and (4). Since the proposed debarment is based on a conviction, this burden is deemed to have been met. 24 C.F.R. § 24.313(b)(3). However, existence of a cause for debarment does not automatically require that a debarment be imposed. 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(b).

King's submission of false statements to influence HUD's decision to insure Smith's mortgage raises serious questions about her fitness to conduct business with the Government. See 48 Comp. Gen. 769 (1969). King has submitted numerous letters from friends and colleagues who believe that her misconduct was an aberration. They contend that King is a person of tremendous integrity, compassion and professional capability who is genuinely remorseful for her illegal conduct and who only committed it to help another person, not for her own personal gain. I am particularly concerned with those letters which suggest that Respondent's desire to "help others" was the root of her misconduct, and that therefore she should not be debarred. Whether motivated by philanthropy or greed, submitting false statements to the Department to influence it to insure a mortgage is a serious violation against which HUD and the public must be protected. The requirement for a down payment is not frivolous or lacking in public purpose. HUD's mortgage insurance program is meant to help less financially able home-buyers; its requirements are not designed to discourage their participation, but to assure that they are financially responsible. King removed that protection to HUD and the tax-paying public with a false statement that the down-payment had been paid by Smith, when it had not.

However, it has been four and one-half years since King committed the acts on which her proposed debarment is based. 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). In cases in which the notice of proposed debarment was based on criminal conduct which occurred five years before and in which there was no allegation by the Government of irresponsible conduct since that time, such a passage of time was found to be a significant mitigating circumstance. Allen Griffey, HUDBCA No. 90-5349-D89 (March 14, 1991); Ted Dalton, HUDBCA No. 90-5246-D23 (Jan. 14, 1991). Here, the false statement was made by King in January, 1987, and there is no evidence that she has committed any wrongdoing since then. Furthermore, King was convicted for an illegal act in only one transaction, and it is that transaction only<sup>1</sup> on which the debarment is based. While that act is serious enough to warrant debarment, a three year debarment in this case appears to be unnecessary to protect the public interest, and therefore punitive.

The Board decisions upon which the Department relies to argue for a three year debarment are not analogous to the facts presented here. Marvin B. Awaya, HUDBCA No. 84-834-D6 (May 9, 1984) involved a Hawaii Housing Authority employee who was convicted on five counts of violations involving diversion of money from subcontractors of a public housing authority to the campaign funds of three politicians. While the Board in that case did uphold a three-year debarment, the stark contrast between Awaya's offense and King's offense indicates that a similar sanction would be inappropriate. Kenneth M. Choseed, and Choseed Development Corp., HUDBCA No. 88-2985-D7 (February 26, 1988), also cited by HUD, involved the three-year debarment of a contractor who was convicted on a one-count indictment for making false statements. In that case, however, the respondent had engaged in a consistent pattern of misconduct, the result of which were losses to HUD in excess of \$300,000, as compared to a single act of misconduct by King with far less financial impact. In addition, Choseed did not offer independent evidence in mitigation of his conviction.

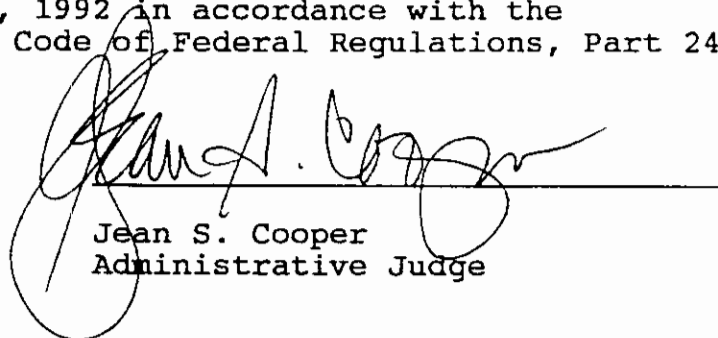
Based on the record before me, I find that a debarment is warranted, but that a three year debarment is not. Debarment is a prospective sanction and cannot be applied retroactively. King has been suspended since December 11, 1990. I find that a period of debarment up to and including December 11, 1992, credit being given for the time she was suspended, is adequate to protect the public interest and the interest of HUD in this case.

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<sup>1</sup> The Department also attempted to offer evidence of a Limited Denial of Participation (LDP) which was issued against King prior to the events in this matter. That matter was stricken from the Government's submission as outside the scope of the grounds for the proposed debarment.

Conclusion

Barbara Elaine King shall be debarred from this date up to and including December 11, 1992 in accordance with the limitations set out in 24 Code of Federal Regulations, Part 24.

A handwritten signature in black ink, appearing to read "Jean S. Cooper", is written over a solid horizontal line. The signature is stylized and cursive.

Jean S. Cooper  
Administrative Judge