



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

In the Matter of: :
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 WAYNE D. TURNER, :
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 Respondent :
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HUDBCA No. 91-5903-D49
Docket No. ~~92-1873-DB~~
 91-1646-DB

For the Respondent:

Mr. Wayne D. Turner, Pro Se
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For the Government:

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Washington, D.C. 20410

DETERMINATION BY ADMINISTRATIVE JUDGE TIMOTHY GRESZKO

May 11, 1993

Statement of the Case

By letter dated January 24, 1991, Wayne D. Turner ("Respondent"), was notified by Arthur J. Hill, then Acting Assistant Secretary for Housing for the Department of Housing and Urban Development ("Government", "Department", or "HUD") that HUD proposed to debar him from further participation in primary covered or 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 for a period of five years. This proposed debarment was based upon Turner's conviction for equity skimming in violation of 12 U.S.C. §1709-2.

The notice further provided that pending the outcome of the proposed debarment, Turner was suspended, pursuant to 24 C.F.R. §24.110(a), from participation in the above-mentioned transactions and contracts. On February 19, 1991, Turner appealed the suspension and proposed debarment, but requested that the debarment proceedings be postponed until his release from Federal prison. The Board granted Turner's request on May 2, 1991, and dismissed Turner's case without prejudice on July 26, 1991.

Following Turner's release from prison, the Board reinstated the case on September 24, 1992. Turner timely submitted his answer to HUD's notice of proposed debarment on December 23, 1992. The Government filed a brief in support of debarment on February 12, 1993 and a reply brief was filed by Turner on March 15, 1993.

The proposed debarment is based solely on a conviction; therefore, a hearing is limited by regulation to the consideration of briefs and documentary evidence. 24 C.F.R. §24.313(b)(2)(ii). This determination is based on the written submissions of the parties.

Findings of Fact

1. From February 1988 through March 1989, Turner assumed the mortgages on six San Antonio homes that were either insured under HUD's FHA program or guaranteed by the VA. (Govt. Brief dated Feb. 12, 1993, Resp. Answer dated Mar. 10, 1993)

2. After purchasing the homes, Turner rented the homes to tenants and collected monthly rents which he applied to his own use, as opposed to applying them towards payment of the mortgages. (Govt. Brief dated Feb. 12, 1993, Resp. Answer dated Mar. 10, 1993)

3. In January 1990, a five-count indictment was issued by a grand jury convened by the United States District Court for the Western District of Texas, charging Turner with mail fraud and equity skimming in connection with the six San Antonio properties. (Govt. Exh. 1). Reciting the above facts, count five of the indictment alleged that Respondent with an intent to defraud, failed to make payments under the mortgage and willfully applied and authorized the application of the rents from the homes for his own use. This action was alleged to be in violation of 12 U.S.C. §1709-2. (Govt. Exh. 1)

4. On March 23, 1990, Turner pleaded guilty to count five of the indictment and the remaining four counts were dismissed. Turner was sentenced to two years' imprisonment, to be followed by three years of parole, and ordered to pay a total of

\$161,768.91 in restitution to HUD and the VA. (Govt. Exh. 2). The order to pay restitution was rescinded on April 20, 1993, in response to a motion by Turner. (Govt. Exh. 4)

Discussion

HUD may not apply the sanctions of suspension or debarment unless the individual or entity to be sanctioned is a "participant" or "principal", as defined by the applicable Departmental regulations at 24 C.F.R. §§24.105(m) and (p). Turner is a "participant" in a covered transaction with the Department because he has previously entered into a covered transaction with the Department and may reasonably be expected to do so in the future. 24 C.F.R. §§24.105(m) and 24.110(a)(1)(i). Specifically, Turner participated in government programs as an individual investor in government-insured properties. He is also a "principal" because he was a purchaser of a HUD-insured property and a borrower under a program established by the Department. 24 C.F.R. §§24.105(p)(6) and (7).

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

- (1) [c]ommission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;

* * *

- (4) [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[;]

or for:

- (d) [a]ny other cause of so serious or compelling a nature that it affects the present responsibility of a person. 24 C.F.R. §24.305(a)(1), (3), (4) and (d).

The Government bears the burden of demonstrating by a preponderance of the evidence that cause for suspension and debarment exists. When the suspension and proposed debarment are based on an indictment and conviction, that evidentiary standard is deemed to have been met. 24 C.F.R. §§24.405(b) and 24.313(b)(3). However, existence of a cause for debarment does not automatically require imposition of a debarment. In gauging whether or not 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). The Respondent bears the burden of proving the existence of mitigating circumstances. 24 C.F.R. §24.313(b)(4).

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.C. 1980). A debarment shall be used only for protecting the public and not for purposes of punishment. 24 C.F.R. §24.115(d).

Determining present responsibility requires an assessment of the current risk that the Government might be injured by doing business with the Respondent. Turner's conviction for acting "with intent to defraud" and "willfully engag[ing]" in equity skimming raises serious questions concerning his "probity, honesty and uprightness." 48 Comp. Gen. 769 (1969). In mitigation, Turner argues that he should not be debarred because a disabling car accident "was a primary factor which resulted in [his] offensive conduct and criminal conviction." (Resp. Answer dated Mar. 10, 1993). In addition, Turner argues that he did not know he was committing a crime, he made every effort to avoid foreclosure, and his debarment is not necessary to protect the public. For the reasons stated below, I do not find this line of reasoning substantially mitigating.

Turner attempts to rationalize his improper actions by claiming that the underlying cause of his conviction was a 1987 car accident which rendered him unable to work and therefore unable to meet his financial obligations. Turner claims that he did not realize he was violating the law by keeping the rent payments on the properties for his own use, while making no payments on the mortgages. He states that at the time he bought the properties, he believed that his condition would improve, thus enabling him to make the past-due payments on the mortgages and avoid foreclosure of the properties. In support of his argument, Turner submitted a series of medical reports detailing his injuries from the car accident and various correspondences informing Turner of employment opportunities. (Resp. Exh. 1-2). Although these documents support Turner's contention that he was unable to work as a result of his accident, they do not diminish the gravity of the charge of equity skimming for which he was

convicted. In light of the fact that the disabling accident occurred before Respondent purchased the properties, I do not find the accident mitigating, in any respect. Respondent has proffered no evidence in support of his assertion that he entered into the transactions at issue upon the belief that his condition would improve. In addition, Turner's assertion that he did not know he was violating the law does not change the fact that he pleaded guilty, and he may not collaterally attack his conviction in this proceeding. Jose M. Ventura Alisis, HUDBCA No. 87-2956-D6 (Sept. 22, 1988).

Turner also goes to great lengths to emphasize that he did not act "as an egregious criminal misfit" (Resp. Answer dated Mar. 10, 1993), but attempted in good faith to cure the deficiencies in the mortgages and that he made every effort to avoid foreclosure, including an attempted sale of one of the properties. In support of this contention, Turner submitted several documents, including: letters from the VA notifying Turner that his loan was in default and offering assistance in reinstating the loan; registered letters from Turner to various officials of the VA and to various mortgage companies asking for assistance in formulating a new repayment plan; a copy of the statement of R.J. Vogel, Chief Benefits Director, Veterans Administration before the Committee of Veterans' Affairs, June 17, 1987 outlining VA efforts toward improving delinquent loan servicing and commenting on the VA's policies and practices with regard to forbearance; and an advertisement and residential listing agreement for the sale of one of the homes. (Resp. Exh. C-F).

Even accepting Turner's version of the events as true, I do not find his lack of malice sufficient evidence of mitigation, and neither, apparently, did the Federal judge who upheld the sentence. A participant need not act out of greed or malignance to be subject to the Department's administrative sanctions. Barbara Elaine King, HUDBCA No. 91-5881-D38 (Jul. 3, 1991). The documents submitted by Turner are insufficient to rebut the presumption of Turner's lack of present responsibility which flows from his conviction.

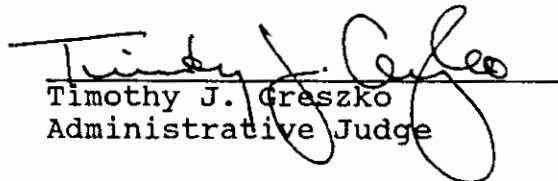
Finally, Turner states he had committed no serious crime prior to his misconduct in 1988. Though not stated in affidavit form, I have no reason to question the accuracy of this statement; however, I find it inadequate evidence in mitigation of the proposed debarment. Turner also states that his debarment is not necessary to the protection of the public interest. Without supporting evidence attesting to Turner's present responsibility or fitness to conduct business with the Department, Turner's statement is irrelevant to a determination of his present responsibility and therefore cannot be considered as mitigating. Richard Ira Hailey, et al; supra; see also

Kenneth M. Choseed, et al., HUDBCA No. 88-2985-D7 (Feb. 26, 1988).

A period of debarment is generally not to exceed three years, but it is also to be commensurate with the seriousness of the causes on which the debarment is based. Where circumstances warrant, a longer period of debarment may be imposed. 24 C.F.R. §24.320(a)(1). Turner has made no showing that he is presently responsible or financially capable of now doing business with HUD, nor has he expressed any desire to restore lost sums to HUD. This fact coupled with the recent and egregious nature of his crime leads me to conclude that the public would be at risk if it did business with Turner. Therefore, in the absence of substantially mitigating evidence, it is my determination that a lengthy period of debarment is necessary to afford HUD and the public sufficient protection from Turner's misconduct. 24 C.F.R. §§24.115(d), 24.314(a), and 24.320(a).

Conclusion

Based on the record in this case I find that a five-year debarment of Turner is warranted and necessary to protect HUD and the public. It is therefore **ORDERED** that Wayne D. Turner shall be debarred from this date until January 23, 1996, credit being given for the time during which Respondent has been suspended from eligibility to participate in HUD programs.


Timothy J. Graszko
Administrative Judge