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

In the Matter of:	:	
CARL W. SEITZ AND ACADEMY ABSTRACT COMPANY,	:	HUDBCA No. 91-5930-D66 Docket No. 91-1688-DB
Respondents.	:	

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DETERMINATION BY ADMINISTRATIVE JUDGE DAVID T. ANDERSON

April 13, 1992

Statement of the Case

On July 21, 1990, Harry Staller, Acting Regional Administrator for the United States Department of Housing and Urban Development ("HUD," "Government" or "Department") imposed a one-year Limited Denial of Participation ("LDP") against Carl W. Seitz ("Seitz") and Academy Abstract Company ("Academy") (collectively "Respondents"), based on Seitz's indictment by a Federal grand jury in Philadelphia. The grand jury charged Seitz with one count of conspiracy and eight counts of making false statements to the Department.

By letter dated September 24, 1990, Respondents were temporarily suspended by Arthur J. Hill, Acting Assistant Secretary for Housing - Federal Housing Commissioner. That suspension superseded the LDP. A motion for a stay of proceedings was granted by this Board on February 27, 1991, allowing the Department to initiate a debarment proceeding against Respondents.

On April 16, 1991, Seitz pled guilty to the conspiracy count and one count of making false statements. Based on this conviction, Acting Assistant Secretary Hill notified Respondents in a letter dated May 2, 1991, that consideration was being given to debar them for a five-year period from participating in covered transactions with the Department and throughout the Executive Branch of the Federal government. Respondents filed a timely request for a hearing on the proposed debarment on May 29, 1991. By Order dated June 11, 1991, the suspension and debarment proceedings were consolidated. The Government filed its brief in support of debarment on August 3, 1991, and a reply brief was filed by Respondents on September 24, 1991. This determination is based on the written submissions of the parties, as Respondents are not entitled to an oral hearing on this matter. 24 C.F.R. § 24.313(b)(2)(ii).

Findings of Fact

1. At all relevant times, Seitz owned and operated Academy, a real estate settlement and title insurance brokerage firm, located in Pennsylvania. (Govt. Exh. 2).

2. At all relevant times, the Federal Housing Administration ("FHA"), a part of HUD, administered the Single Family Mortgage Insurance Program. This program provides that when certain conditions are met, private mortgage loans will be insured by the FHA against default by a borrower. In order to qualify for this FHA program, a potential home-buyer must make a minimum investment equal to three percent of the property's acquisition cost. Applicable regulations at 24 C.F.R. §§ 203 and 221 require that a higher minimum investment must be made if the borrower does not intend to reside at the property, and also require that the funds used for the minimum investment may not be borrowed. (Govt. Exh. 2).

3. Under the FHA mortgage insurance program, mortgage companies are required to provide the FHA with complete and accurate information about a borrower's income, employment and credit history, assets, and liabilities in order to establish a borrower's qualification for an FHA-insured mortgage. The initial decision to insure the mortgage is made by the mortgage company.[1] This initial decision is contingent upon the utilization at the settlement of the information about the borrower provided by the mortgage company. (Govt. Exh. 2).

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[1]Until 1984, the decision to insure a mortgage under the FHA program was made by FHA. The decision to insure a mortgage is now made by certain mortgage companies under a delegation of authority by FHA known as "direct endorsement."

4. Mortgage insurance is issued subsequent to settlement. A settlement agent must prepare a settlement statement which describes the settlement transaction. At all relevant times, Academy was involved in preparing such settlement statements. (Govt. Exh. 2).

5. An indictment was filed in the U.S. District Court for the Eastern District of Pennsylvania which charged Carl Seitz with eight counts of making false statements to the Department, in violation of 18 U.S.C. §§ 1010 and 2, and one count of conspiracy, in violation of 18 U.S.C. § 371. The indictment charged that between April, 1983 and December, 1986, Seitz conspired with two other individuals, John Moscony and Thomas Cullen, Jr., to engage in a series of real estate transactions in which FHA insurance was improperly obtained for fourteen properties in and around Philadelphia, Pennsylvania. (Govt. Exh. 2 [document undated]).

6. At all relevant times, Moscony owned and operated a corporation involved in real estate brokerage of residential and commercial properties. This corporation ("Moscony Real Estate") conducted business under various names, including, among others, John P. Moscony, Inc. Real Estate; Moscony, Inc. Real Estate; and Moscony, Inc. Realtors. Cullen was employed by Moscony Real Estate as a real estate broker. (Govt. Exh. 2).

7. According to the indictment, Seitz would lend Academy funds to Moscony and Cullen. Using these funds, Moscony and Cullen would subsequently purchase properties in names other than their own. They then sold their newly acquired properties at increased prices to persons who acquired FHA-insured mortgages. Moscony and Cullen also falsified the amount of these new purchasers' investments by causing the submission of escrow letters to FHA which overstated the amount which the purchasers had placed on deposit at Moscony Real Estate. (Govt. Exh. 2).

8. The indictment also stated that Moscony and Cullen would encourage these subsequent purchasers to use Academy as the settlement agent for these transactions. Thereafter, Seitz would prepare settlement statements which failed to indicate that Moscony and Cullen improperly provided these purchasers with money at settlement which these purchasers were obligated to furnish themselves. (Govt Exh. 2).

9. Seitz also concealed, according to the indictment, the amount of proceeds gained from the properties which Moscony and Cullen sold to subsequent purchasers. The indictment charged that settlement agents employed by Academy would distribute the sale proceeds by way of checks made payable to fictitious persons. Seitz then caused some of these checks to be cashed by Academy employees, and this cash was then returned to Moscony and Cullen. After settlement, Seitz also allegedly received money

which represented interest on the loans made to Moscony and Cullen. In total, Seitz allegedly obtained over $100,000 as a result of this conspiracy. (Govt. Exh. 2).

10. Seitz also allegedly caused the ownership of properties by Moscony and Cullen, in fictitious names, not to be reflected in public title records. (Govt. Exh. 2).

11. The indictment further charged that Seitz made false statements to the Department with respect to the sale of eight properties. Seitz allegedly concealed or caused to be concealed the fact that a seller had made certain payments which were required to be made solely by the buyer. (Govt. Exh. 2).

12. Seitz subsequently entered into a plea agreement. (Govt. Exh. 3 [document undated]). On April 16, 1991, Seitz entered a plea of guilty to the conspiracy count and to one count of making false statements to the Department. Seitz was placed on five years probation, including one year in a work release program, and was ordered to pay a fine of $100,000 and $87,000 in restitution to the Department. (Govt. Exh. 1).

13. Respondents have submitted affidavits by [redacted] Razzi, an Academy employee, [redacted] Coyle, Sr., a Philadelphia real estate broker, and [redacted] Gallagher, a loan officer, all of whom essentially aver that Seitz and Academy are both sufficiently responsible to conduct business with the Department. (Affidavit of Razzi, Sept. 23, 1991; Affidavit of Coyle, Sept. 23, 1991; Affidavit of Gallagher, Sept. 23, 1991).

Discussion

Seitz 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). He is also a "principal" as defined at 24 C.F.R. § 24.105(p) because he owned, operated and exercised control over Academy at the time the offenses were committed. Because of Seitz's ownership of and control over it, Academy is an "affiliate" as defined at 24 C.F.R. § 24.105(b).

Applicable regulations state that a 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,
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> * * *

(3) [c]ommission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements . . . or,

(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. 24 C.F.R. §§ 24.305(a)(1), (3) and (4).

The Government bears the burden of demonstrating by a preponderance of the evidence that cause for suspension and debarment exists. When the proposed suspension and 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 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).

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

Respondents' claims that their activities with HUD were not "covered transactions" are without merit. The Government is correct when it argues that Respondents' participation in HUD's mortgage insurance programs is "participation in a 'covered transaction,' as that term is defined in 24 C.F.R. § 24.110(a), which includes 'loan guarantees' and 'insurance'." (Govt. Brief, at 4). It is uncontested that Respondents were involved in these types of activities with the Department.

Seitz's conviction is based on false statements which he made or caused to be made to the Department, and on his participation in a criminal conspiracy to obtain FHA mortgage insurance for buyers who would otherwise not qualify for that insurance. His conviction raises serious questions concerning his "probity, honesty and uprightness" and raises a reasonable

presumption that he lacks present responsibility. 48 Comp. Gen. 769 (1969). Seitz acknowledges the seriousness of his crimes, but asserts that a substantial period of time has elapsed since his misconduct, and that imposition of a five-year debarment in this case is not warranted.

This Board has viewed a substantial passage of time following an individual's misconduct leading to the imposition of an administrative sanction as being a potentially mitigating factor. ARC Asbestos Removal Co., Inc., HUDBCA No. 91-5791-D25 (Apr. 12, 1991). Seitz asserts that his misconduct occurred over five years ago and that no subsequent episodes of wrongdoing have occurred. However, this passage of time, unmarked by wrongdoing, is, per se, insufficient to demonstrate that Seitz is presently responsible. Respondents correctly argue that the appropriate test for present responsibility does not focus merely on the number of years which have passed since the misconduct occurred, but rather on current indicia that the Government would face undue risk if it conducts business with a specific individual. (Respondents' Reply Brief, at 2). However, their statement that "[HUD] can point to no indications . . . to show that Mr. Seitz and his company will put the Government at risk now" misconstrues the basis upon which a responsibility determination is made. Id. "The agency proposing debarment has the burden of [proof] to establish cause for debarment. The respondent has the burden of proof for establishing mitigating circumstances." 24 C.F.R. § 24.313(b)(4) (emphasis added).

It is well-established that a lack of present responsibility can be inferred from past acts. Schlesinger, Stanko Packing, supra. Clearly, given the facts in this case, such an inference of a lack of present responsibility is well-founded. To buttress his assertion that he is presently responsible, Seitz has offered as mitigating evidence three unsworn statements from colleagues and a current Academy employee. Each suggests that Seitz is a man of honesty and substantial business acumen. While relevant, these statements do not describe Seitz's present professional conduct, nor do they convince me that Seitz is a person with whom the Department can now conduct business with a minimum of risk. Rather, they are merely the opinions of three individuals who appear to have only limited knowledge of Seitz's current business activities. Significantly, Seitz has not submitted any self-authored statements which indicate that he understands the gravity of his misconduct, or that he will abide by all applicable regulations should he be allowed to participate in HUD programs. Cf. Ted Dalton, HUDBCA No. 90-5246-D23 (Jan. 14, 1991).

Respondents further concede the seriousness of Seitz's crimes, but state that "[these crimes] are surely far from the most serious crimes the Government has seen in this area . . . ." (Respondents' Reply Brief, at 2). This type of explanation

offered by Respondents is troubling, indicates a lack of contrition, and seems to argue the fairness of a five-year debarment. The propriety of the length of a sanction has been reviewed by this Board with respect to sanctions imposed by HUD for analogous criminal conduct by HUD contractors. "The purpose of reviewing the length of a proposed sanction is to ensure that the sanction is not used in a punitive manner." Charles Kirkland, HUDBCA No. 90-5285-D57 (Jan. 14, 1990), at 5. However, there has been no showing that Seitz's criminal conduct does not warrant the sanction proposed by HUD as compared with sanctions imposed by HUD for similar violations of this Department's regulations. See Solomon Sylvan, HUDBCA No. 87-2432-D40 (Apr. 13, 1988), at 4. Nor has it been suggested that the sanction is being imposed for punitive purposes. Seitz's participation in an egregious scheme to obtain FHA insurance under false pretenses and his submission of false statements to the Department exposed HUD to substantial financial risk. His criminal conduct was contemptible and reprehensible, evinces a clear lack of honesty, and provides a compelling basis for a five year debarment. Given the totality of Seitz's mitigating evidence, I find his submissions insufficient to rebut the reasonable inference that he lacks present responsibility.

Respondents also contend that a debarment would be inappropriate because:

> [i]t was only in February, 1991 that [HUD] saw fit to notify approved mortgagees . . . of the perils of accepting mortgage arrangements in which the borrower might have received a rebate of some portion of the down-payment from the seller.

This argument is unpersuasive. A delay in the issuance of a remedial warning by HUD to mortgagees against providing rebates to borrowers is not a valid defense to the proposed debarment, nor evidence of mitigation, nor a justification for Respondents' schemes. Respondents, in making this argument, seem to be rationalizing the seriousness of their misconduct based on an alleged change in HUD policy. Even if the alleged change had been substantiated in the record of this proceeding, I would still find this argument to be without merit.

Finally, Academy asserts that it should not be subject to debarment because, unlike Seitz, it was not charged with any acts of illegality. This argument is flawed because applicable HUD regulations specifically provide that a "debarment action may include any affiliate of the participant that is specifically named and given notice of the proposed debarment and an opportunity to respond." 24 C.F.R. § 24.325(a)(2). There is no question that Academy was and remains Seitz's affiliate. 24 C.F.R. § 24.105(b). In instances where a company's debarment is based upon its affiliate status and the misdeeds of its owner or

one of its employees, that company must demonstrate that it is presently responsible. See Irving Winter, Colony Realty Company, HUDBCA No. 90-5909-D54 (Nov. 5, 1991). The most compelling evidence which a company with affiliate status could provide would be proof that the transgressors who committed the wrongful acts have since left the company or have otherwise been sufficiently "walled off" from the company's operations. Such evidence would indicate that the risk of a company's involvement in its employee's misconduct has been all but eliminated. Novicki v. Cook, 743 F.Supp. 11 (D.D.C. 1990), rev'd, 1991 U.S. App. LEXIS 23720 (Oct. 15, 1991). Academy has not presented any evidence which proves or even suggests that Seitz and Academy have parted company. There is nothing in this record which shows that Seitz has terminated his status as an owner or employee of Academy. Academy has simply not demonstrated that it is a company in whom the Department should place its trust.

Conclusion

Based on the record in this matter, and for the foregoing reasons, I find that a five-year debarment of Carl Seitz and Academy Abstract Co. is necessary to protect the public. It is my determination that Respondents shall be debarred from this date until July 21, 1995, credit being given for the time during which Respondents have been suspended, from eligibility to participate in HUD programs, i.e., from the date of the imposition of the LDP.

David T. Anderson
Administrative Judge