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

In the Matter of:	
HOWARD L. PERLOW,	HUDBCA No. 92-7131-D5 Docket No. 92-1750-DB
Respondent.	

For the Respondent:

Carl A.S. Coan, Jr., Esq.
Sheila S. Coan, Esq.
Coan & Lyons
1100 Connecticut Avenue, N.W.
Suite 1000
Washington, D.C. 20036

For the Government:

Georjan Overman, Esq.
U.S. Department of Housing and
Urban Development
451 Seventh Street, S.W.
Washington, D.C. 20410

DETERMINATION BY ADMINISTRATIVE JUDGE DAVID T. ANDERSON

December 3, 1992

Statement of the Case

By letter dated August 22, 1991, Arthur J. Hill, Assistant Secretary for Housing of the U.S. Department of Housing and Urban Development ("Government" or "HUD") notified Howard Perlow ("Respondent") that HUD was proposing to debar him from further participation in primary covered or lower-tier covered transactions as a participant or principal at HUD and throughout the Executive Branch of the Federal Government and from participating in procurement contracts with HUD. The proposed debarment was based upon Perlow's conviction for violation of Maryland State Criminal Code, Article 27, Section 132 (fraudulent misappropriation by a fiduciary). This proposed debarment was for a three-year period commencing from the imposition of a Limited Denial of Participation issued by HUD against Respondent on November 6, 1990. The notice further provided that "pending final determination of the issues in this matter," Perlow was

suspended from participation in the above-mentioned transactions and contracts.

On September 23, 1991, Perlow, pursuant to 24 C.F.R. 24.313, requested an opportunity for a hearing on the Government's decision to debar him. Since this suspension and proposed debarment are based solely upon a conviction, the hearing in this matter 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.

Finding of Facts

1. In 1979, Perlow, in cooperation with [redacted] Resnick, opened the Bay State Title Company ("Bay State"), with principal offices located in Baltimore, Maryland. Perlow and Resnick also practiced law together from 1980 to 1989. The business of Bay State and the law firm was conducted as though the two concerns were a single entity; the employees of Bay State were also employees of the law firm. In 1985, [redacted] Sopher joined both the law firm and the title company as a principal. The law firm was renamed Resnick, Sopher and Perlow. (Resp. Brief, at 8 and 9; Affidavit of [redacted] Perlow, at ¶ 4).

2. From 1985 until February, 1989, Perlow served as president of Bay State, which became one of the largest title companies in Maryland. Bay State conducted thousands of real estate settlements and title searches each year. (State of Maryland v. Perlow, Statement of Facts, at 1; Affidavit of Howard Perlow, at ¶ 3).

3. Bay State's work was underwritten by the Chicago Title Insurance Company ("Chicago Title"). In the course of its real estate business, Bay State acted as trustee of escrow accounts through which monies connected with the settlements were collected, deposited, and disbursed. The accounts often had total balances in the millions of dollars. (State of Maryland v. Perlow, Statement of Facts, at 1 and 3).

4. In March, 1988, Perlow was asked by Bay State's accountant whether he had improperly diverted funds for his own personal use. Perlow then admitted to his partners that he had been improperly diverting money. At that time, he promised to cease diverting company funds. Perlow did not keep his promise, and continued his diversion of funds until July 23, 1988, when he was confronted by Sopher. (Resp. Brief, at 9; Affidavit of Howard Perlow, at ¶¶ 5 and 6).

5. Audits revealed that Bay State's "books were not in very good shape," that Bay State's "internal controls were inadequate and [that Bay State's] settlement account had not been fully reconciled for almost two years." Due to shoddy financial

oversight, questionable lending practices, and the "floating" of money held in a fiduciary capacity, Bay State's settlement and escrow accounts were faced with a severe shortage of funds. This shortage was covered in substantial part by Chicago Title. Subsequently, Chicago Title audited Bay State and discovered Perlow's illegal activities. (Resp. Brief, at 9-10; State of Maryland v. Perlow, Statement of Facts, at 2-3, and Defendant's Statement of Facts, at 9).

6. On December 15, 1988, Chicago Title canceled Bay State's authority to issue title policies and to conduct settlements. In February, 1989, Bay State ceased doing business. (State of Maryland v. Perlow, Statement of Facts, at 5).

7. Perlow claims to have "repaid all income I had diverted to which my partners were entitled" by October 14, 1988. As part of his settlement with Chicago Title, Perlow agreed to make full restitution on Chicago Title's losses arising from his improper use of Bay State funds, resolving all matters with Chicago Title by September, 1989. (Affidavit of Howard Perlow, at ¶¶ 8 and 12).

8. In 1989, the Maryland Attorney General's Office began an investigation into Perlow's activities. As a result of its investigation, the office concluded that Perlow had misappropriated $1,625,000 from January, 1986, through October, 1988. (State of Maryland v. Perlow, Statement of Facts, at 1). In September, 1990, Perlow reached a plea bargain agreement with the Maryland Attorney General's Office. As part of the agreement, Perlow agreed, inter alia, to plead guilty to an Information charging him with fraudulent misappropriation by a fiduciary and to consent to a voluntary disbarment from the practice of law. (Plea Agreement dated Sept. 7, 1990; Criminal Information dated Sept. 11, 1990; Affidavit of Howard Perlow, at ¶ 13).

9. The Statement of Facts filed by the state alleged that Perlow had committed the following acts:

a) "loaning" large amounts to third parties, including parties in which he constructively held a financial interest;

b) "loaning" large amounts to himself, occasionally on an unsecured basis with no interest payments required;

c) using proceeds from Bay State settlement checks to defray personal expenses by substituting his creditors for the correct payees;

d) taking money outright by devious means;

e) falsifying settlements by exaggerating the premium

charged by Bay State and pocketing the excess;

f) diverting $140,000 in settlement checks to his own accounts. (State of Maryland v. Perlow, Statement of Facts, at 3 and 4).

10. On October 3, 1990, Perlow entered a guilty plea. (State of Maryland v. Perlow, State's Rebuttal to Defendant's Statement of Facts, at 1). In the Defendant's Statement of Facts, Perlow claimed that he misappropriated only $304,600. (State of Maryland v. Perlow, Defendant's Statement of Facts, at 1). Nevertheless, he admits to a series of fraudulent checkwriting using Bay State checks, falsifying entries on Bay State settlement sheets, and sundry misappropriations for personal items, clothing, jewelry, home maintenance and other personal expenses. (Id., at 7-8; State of Maryland v. Perlow, Statement of Facts, at 3, line 17, through 5, line 6).

According to Perlow, the additional $1,320,400 the state alleged he had converted was not misappropriated, but instead was prudently invested through loans that had paid a considerable return to Bay State's beneficiaries. Perlow claims that he pled guilty only to those transactions which involved the diversion of fees and other income from his partners. (Affidavit of Howard Perlow, at ¶ 14; State of Maryland v. Perlow, Defendant's Statement of Facts, at 1, and 4-8.) Perlow considered other questionable manipulations of funds in escrow and settlement accounts to be investments, some beneficial to Bay State, regardless of the party to whom certain loans were made or whether a payment of interest was required. (State of Maryland v. Perlow, State's Rebuttal to Defendant's Statement of Facts, at 2-5).

11. By letter dated November 6, 1990, the Manager of HUD's Baltimore Field Office issued a one-year Limited Denial of Participation ("LDP") against Perlow based upon the Information issued against him. (Govt. Exh. 7).

12. On March 3, 1991, the Circuit Court for Baltimore City, Criminal Division, sentenced Perlow based upon his guilty plea to misappropriating $304,600 of "fee income due to Bay State and to the law firm." (fraudulent misappropriation by a fiduciary). The court sentenced Perlow to five years in the state penitentiary, with all but one year suspended, followed by five years of probation. Perlow was also required to perform 3,000 hours of community service, to be performed at 30 hours per week. The court indicated that this amount of community service could be "reduce[d] ... if employed". (Govt. Exh. 6; Resp. Exh. 3; State of Maryland v. Perlow, Defendant's Statement of Facts, at 7-8).

13. Several letters have been submitted by Perlow which attest to his character. The majority of these letters were

submitted by individuals who have had business or continue to do business with Perlow. These letters generally tend to substantiate that his misappropriation of the funds was an aberration and not representative of his character. The writers of these letters also indicate that they have confidence in his ability to comply with legal practices, because they feel Perlow is remorseful for his actions and will act responsibly in the future. (Resp. Exhs. 6-26).

Discussion

The sanction of debarment is brought under the provisions of 24 C.F.R. Part 24. Section 24.110(a) of Title 24 C.F.R. provides that:

> (a) These regulations apply to all persons who have participated, are currently participating or may reasonably be expected to participate in transactions under Federal nonprocurement programs.

The applicable regulations under 24 C.F.R. Part 24 define "participant" as:

> Any person who submits a proposal for, enters into, or reasonably may be expected to enter into a covered transaction. This term also includes any person who acts on behalf of or is authorized to commit a participant in a covered transaction as an agent or representative of another participant. [24 C.F.R. 24.105(m)]

A "principal" is defined as an:

> Officer, director, owner,partner, key employee, or other person within a participant with primary management or supervisory responsibilities; or a person who has critical influence on or substantive control over a covered transaction....Persons who have critical influence on or substantive control over a covered transaction are:
>
> * * *
>
> (17) Title companies;
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> * * *
>
> (22) Employees or agents of any of the above. [24 C.F.R. 24.105(p)]

As a threshold issue, it must first be determined whether Respondent is, in fact, a participant or principal as defined by the pertinent HUD regulations, and is thus subject to the sanctions of this Department. There is nothing explicit in the

record in this case which would show the nature and extent of Perlow's involvement in HUD-related business. Despite being specifically ordered to do so, the Government has clearly failed in its Response to Court Order, filed on October 9, 1992, to show by documentary evidence that Respondent was in fact a "principal" or "participant" in HUD programs. The Government has submitted immaterial documentary evidence which fails to show that Respondent was a "participant" in even a single covered transaction. No credible evidence was submitted with the Government's Brief in Support of Debarment or with its Response to Court Order on which a finding could be made that Respondent is a participant or principal, and, consequently, subject to Departmental sanctions.

Only through a close examination of Respondent's submissions can some indication of Respondent's involvement in HUD programs as a participant and as a principal be gleaned. For example, Respondent's Affidavit (Resp. Exh. 1) states, at ¶ 16: "Since the issuance of the LDP, I have not knowingly participated in any HUD-related activities, except in connection with winding up matters that may have been in existence at the time the LDP was issued." [redacted], of Mack & Mack, Inc., states in his letter (Resp. Exh. 11): "Howard [Perlow] has participated in over 1,000 settlements of individual homes I built and whose mortgages were insured by FHA...."

Without question, Respondent has extensive experience in complex real estate transactions, experience gained particularly during the period from 1979 to 1988. Nowhere in Respondent's submissions is there a denial of substantial involvement as a principal and as a participant in the programs of HUD. In Respondent's Brief in Opposition to Debarment, at 29, Respondent states that during 1988 to 1990, he "continued...to engage in general title company functions, such as title searches and loan closings, including many FHA-insured loans." Consequently, it can reasonably be inferred that Respondent was a participant in real estate transactions in which FHA-insured loans were involved, that he "reasonably may be expected to enter into a covered transaction" with the Department, and that he was a principal in his role as president of Bay State at the time his improper offenses were committed. By his own admission, Perlow "continued" his involvement in transactions involving "many FHA-insured loans" after leaving Bay State. Thus, the provisions of 24 C.F.R. Part 24 which relate to Departmental sanctions can properly be applied to Perlow.

The Government charges Perlow's violation of the following HUD regulations as cause for his suspension and proposed debarment:

(a) Conviction or civil judgement for:

> (1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;
>
> * * *
>
> (3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, or obstruction of justice; or
>
> * * *
>
> (d) Any other cause of so serious or compelling nature that it affects the present responsibility of a person. 24 C.F.R. 24.305(a)(1) and (3), 24 C.F.R. § 24.305(d).

Since the proposed debarment is based upon Perlow's conviction for fraudulent misappropriation by a fiduciary, the threshold for the existence of adequate cause for the imposition of debarment is deemed to have been met pursuant to 24 C.F.R. § 24.313(b)(3). However, the 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) and 24.314(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. 949, 949 (D.D.C. 1980). Debarment "shall be used only in the public interest and for the Federal Government's protection and not for purposes of punishment." 24 C.F.R. § 24.115(b).

Perlow has advanced several arguments in support of his position that a three-year debarment is not warranted. First, Perlow asserts that since the funds which he misappropriated were funds belonging to his partners or from moneys held by Bay State in its settlement account for its clients, neither the Department nor the public were ever at risk. This is a specious argument. "To protect the public, it is paramount that individuals who contract with the government are forthright and responsible in

their dealings....Without the assurance that those who do business with the government are honest and have integrity, there is no guarantee that government funds are being properly spent." In the Matter of Sidney Spiegel, HUDBCA No. 91-5908-D53, 91-5920-D62, (July 24, 1992). The fact that HUD was not harmed by the misconduct at issue is irrelevant, because the offense was one involving base dishonesty, which impacts directly upon the question of Perlow's present responsibility.

Second, Perlow argues that his settlement with Chicago Title and his partners prior to the imposition of criminal penalties should be considered mitigating. Despite this commendable act of restitution, I do not find Perlow's settlement with Chicago Title and his partners sufficiently overcomes the inference of a lack of responsibility when one views the seriousness of Perlow's misconduct. While restitution can be accepted as evidence of mitigation, the circumstances under which the restitution is made should also be scrutinized to ascertain how the act of restitution was undertaken. Restitutions, when facing the possibility of criminal penalties, can be self-serving and are often motivated by fear of even greater financial liability or possible incarceration. (See Melvin Smith, et al., HUDBCA No. 90-5320-D81 (October 2, 1992), where lighter criminal penalty received due to cooperation with Federal investigative authorities; see also PFG Mortgage Inc., and Robert Otto Potter, HUDBCA Nos. 92-G-7577-MR6 and 92-G-7598-D58 (October 9, 1992), where court stayed five-year jail sentence based upon payment of $1 million in restitution, but insufficient evidence of mitigation to avoid debarment since Respondent "failed to rectify... misconduct until much later when prosecuted...."; compare Lawrence C. Shank, 83-1 BCA ¶ 16,439, where Appellant took immediate steps to rectify his misdeeds after death of superior and before financial irregularities were discovered).

In any event, Respondent's restitution to Chicago Title was admittedly achieved, in part, by tendering funds which included a $1.3 million note secured by Perlow, Bay State, and his law firm. These arrangements to secure Chicago Title further bound Bay State and his law partners to Perlow's fate. While the record is not clear as to what agreements were made with his law partners, it is clear that his settlement with his law firm and law partners on October 14, 1988 included the execution of "[r]eleases and covenants not to sue ...." (State of Maryland v. Perlow, Defendant's Statement of Facts, at 9). While marginally mitigating, I do not consider Perlow's structured settlements with victimized parties under these deplorable circumstances to be valid indicia that Perlow is presently responsible.

Third, Perlow asserts that the passage of a substantial period of time since he committed the offense, coupled with the absence of recent misconduct, makes the imposition of a three-year debarment unwarranted. This Board has viewed a substantial

passage of time following 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 (April 12, 1991). However, the passage of time, ipso facto, does not establish present responsibility. Carl W. Seitz and Academy Abstract Company, HUDBCA No., 91-5930-D66 (April 13, 1992). The appropriate test for present responsibility does not focus merely on the number of years which have passed since Respondent's misconduct occurred, but rather on current indicia of Respondent's professionalism and business practice which the Government must consider before it again assumes the risk of conducting business with Respondent. Carl W. Seitz, Id. I find that the passage of four years since the misconduct occurred, without a showing by a preponderance of the evidence that Respondent is now presently responsible, insufficient to negate the inference of lack of present responsibility which flows from his conviction for fraudulent misappropriation by a fiduciary. The evidence submitted by Respondent in mitigation simply fails to make such a showing.

Fourth, Perlow asserts that he pled guilty to diverting only $304,600, rather than the $1.625 million which the Government contends was the basis of Respondent's guilty plea. Respondent submits that, in the absence of other bases for the proposed debarment, only the facts relevant to his guilty plea can be considered in this proceeding. This position is correct as a matter of law, and Respondent's interpretation of his guilty plea is supported by a letter from the sentencing judge (Resp. Exh. 3). As such, the Government cannot rely upon allegations not proven as a collateral basis for pursuing this sanction. Nevertheless, evidence of Perlow's abuse of Bay State by the misappropriation of fees due Bay State is well within the ambit of matters arising from his conviction. Some of the particulars of his abuse of Bay State are admitted in State of Maryland v. Perlow, Defendant's Statement of Facts, at 7-8, which was submitted into the record of this proceeding by Respondent. These ancillary matters can properly be considered in the instant proceeding as reflecting upon his present responsibility because they arise from the facts underlying his guilty plea. These matters include Perlow's repeated deception of his law partners, his misuse of the integrity, financial solvency, and reputation of Bay State through his misappropriation, and his role as a principal of Bay State which permitted lax financial controls, thereby enabling nefarious practices to take root. In any event, regardless of the amount of money involved, Perlow pled guilty to committing an egregious criminal act. His diversion of the smaller amount of money is not, per se, mitigating; the diversion of $304,600 in his fiduciary capacity is repugnant enough.

Fifth, Perlow has submitted a large number of letters from prominent individuals in the real estate industry and the public sector who submit that Perlow's criminal conduct was essentially

an aberration, that he is now a responsible person who has shown remorse, and that they believe that Perlow would not engage in criminal conduct in the future. I do not question the sincerity of the individuals whose supportive letters are part of this record, and it should be comforting to Respondent that so many of his current and former business associates think so highly of him that they would have no hesitation in continuing in a business relationship with him. However, these private declarations of confidence, some from individuals who have profited from doing business with Respondent in the past, do not persuade me that programs financed by the nation's taxpayers should be exposed to Respondent's participation at the present time. I find it difficult to accept the premise that a criminal pattern which continued for several years can be characterized as a mere aberration. When contrasted with the seriousness of Perlow's activities, these attestations simply do not convince me that Respondent is at present an individual with whom the Government should conduct its business.

Sixth, Perlow argues that the terms of his probation provide a significant degree of protection to HUD and to the public. However, unlike the facts in several of the cases cited by Respondent, the restrictions placed upon Respondent's business activity and the modifications to the conditions of Respondent's probation do not afford HUD adequate protections from his involvement in HUD programs. (See State of Maryland v. Perlow, State's Answer to Defendant's Motion to Modify or Clarify Special Conditions of His Probation). The Government argues correctly that these modifications do not preclude Perlow's involvement in HUD programs "personally as either a contract purchaser or seller." Moreover, the length of the probationary period itself could be affected should the sentencing judge, who is crediting Perlow's "work with charitable organizations ... towards the total number of hours of community service he is required to perform," decides to reduce the 5-year probationary period. (Resp. Exh. 3). In any event, this argument misses a crucial point. While Perlow's incarceration and the terms of the probation, including the 3,000 hours of community service, were fashioned by the sentencing judge for both punitive reasons and to assist Perlow in his rehabilitation, the regulations under 24 C.F.R. Part 24 are designed to protect the Department and the public prospectively. The Government apparently believes that the proposed sanction is warranted because the terms of Respondent's probation are an inadequate safeguard against potential activity by Respondent which could be injurious to the integrity of the programs of this Department. I tend to view this cautionary belief as well-founded.

Seventh, Perlow argues that the fact that he pled guilty, rather than forcing a lengthy jury trial, as well as the fact that he was incarcerated, should be considered mitigating factors. This argument is absolutely conjectural. With all due

respect to my learned colleague, I do not accept certain views regarding mitigation as articulated by the administrative law judge in Joseph W. Cirillo, HUDALJ 90-1525-DB (June 19, 1991), which is cited and extensively relied upon in Respondent's Brief, at 36-37. There is not one legal, sociological, or criminological study, or statistical analysis of recidivism, which is cited in the Cirillo decision which would support the conclusion that incarceration, per se, the length of incarceration, the motive of an accused in selecting a jury or a non-jury trial, or the willingness of an accused to enter into a plea agreement, are reliable indicia of mitigation appropriate for consideration in an administrative proceeding regarding the propriety of a suspension or debarment. Furthermore, only speculation and supposition constitute the rationale in the Cirillo decision which declares that an accused should, literally, be "rewarded" in a administrative action because he pleaded guilty in a criminal action to a reduced charge. No authority whatsoever is cited to support the proposition canonized in the Cirillo decision that "Respondent's period of debarment should be shorter than it would be if he had not served the jail sentence." To the contrary, the fact that one convicted of a crime was required to serve time in a penal institution might suggest that the perpetrator of the criminal activity was far more villainous than one whose conduct warranted a suspended sentence or no period of incarceration at all. In the instant case, Respondent's decisions relating to his criminal proceeding concern criminal trial strategy and the issue of reasonable punishment. Those pre-trial decisions are not relevant to the issue of whether Perlow is capable of being responsible in his future business dealings involving public funds.

Finally, Perlow asserts that the proposed debarment is not justified because HUD is seeking to sanction him for punitive reasons. While 24 C.F.R. § 24.115(b) prohibits imposition of debarment for punitive purposes, Respondent has advanced no persuasive legal argument nor submitted any evidence which would show that the sanction sought by the Government under the circumstances of this case is punitive. The purpose of debarment is to ensure that the public and the Department are protected from individuals who lack present responsibility. There are justifiable reasons for the Department to believe that it still requires some measure of protection from Perlow's involvement in public programs.

It should be noted that Perlow admits that Bay State's internal controls were "inadequate" and that its financial records were not being maintained in a generally acceptable manner based upon prudent accounting practices. These management deficiencies, which were present while Perlow was president of Bay State, were allowed to continue and clearly contributed to the fact that Perlow's misappropriations could proceed without immediate detection. Nowhere in Respondent's submissions does

Respondent explain, justify, or accept responsibility for these inadequate financial controls. I cannot conclude that Perlow has now demonstrated sufficient management and oversight ability which could provide assurance to HUD that the potential for derelict supervision of a business in the real estate sector under his management no longer exists. (See The Mayer Company, Inc. and Carl A. Mayer, Jr., 82-1 BCA ¶ 15,473, where debarment of company president warranted when improprieties resulted from inadequate supervision and control).

Conclusion

For the reasons set forth above, I find that a three-year debarment of Howard Perlow is warranted and is necessary to protect HUD and the public. It is my determination that Perlow shall be debarred from this date until November 6, 1993, credit being given for the time during which Perlow has 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