

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
BOARD OF CONTRACT APPEALS
WASHINGTON, DC

In the Matter of:

DOUGLAS A. HAUCK,

Respondent.

:
:
:
:
:
:
:
:
:
:

HUDBCA No. 92-A-7582-D49

Docket No. 92-1847-DB

Mr. Douglas A. Hauck

Pro Se

Robin E. McMillan, Esq.
U.S. Department of Housing and
Urban Development
451 Seventh Street, S.W.
Washington, DC 20410

For the Government

DETERMINATION BY ADMINISTRATIVE JUDGE DAVID T. ANDERSON

August 11, 1993

Statement of the Case

By letter dated March 17, 1992, Arthur J. Hill, Assistant Secretary for Housing - Federal Housing Commissioner of the U.S. Department of Housing and Urban Development ("HUD," "Government," or "Department") notified Douglas A. Hauck ("Respondent") that HUD was proposing his debarment for a period of five years from the commencement of a previously imposed Limited Denial of Participation, based upon his conviction for conspiracy to defraud the United States in violation of 18 U.S.C. §§ 371 and 1010. The letter stated that the commission of certain criminal conduct was "cause for debarment under 24 C.F.R. Sections 24.305(a)(1), (a)(3), (a)(4), and (d)." The letter also stated that pending a final determination of the proposed debarment, Respondent's suspension since August 6, 1991, which was based upon his indictment for this criminal conduct, would continue. Respondent timely appealed this proposed debarment.

The hearing in this matter is limited 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, including the Government's Reply to Respondent's Response to the Government's Brief in Support of Debarment.

Findings of Fact

1. Respondent participated in HUD's Single Family Mortgage Insurance Program from September of 1985 until March of 1987. During that time, he was licensed by, and doing business in, the State of Colorado as a real estate broker in his own name and on behalf of Re/Max South and RAM Marketing, Inc. During that time, Hauck and others knowingly made false statements to various mortgage companies for the purpose of obtaining HUD/FHA insured mortgage loans. Respondent made downpayments on behalf of investor clients on HUD/FHA insured properties using his commissions from the sale of the properties, and made false statements on "HUD Form 1" settlement sheets indicating that investors had made the downpayments from their own funds, when, in fact, they had not. In addition, Hauck induced investors to enter into fraudulent contracts, made fraudulent HUD/FHA loan applications, and prepared false documents regarding investor qualifications to obtain FHA mortgage insurance. (Govt. Exh. 4, Indictment, Count I, pp. 1-12; Govt. Exh. 7).

2. By letter dated April 1, 1988, Thomas Demery, Assistant Secretary for Housing-Federal Housing Commissioner, notified Respondent that HUD was suspending him and was proposing his debarment for a period of three years because of specific "irregularities of a serious nature in [his] business dealings with the Government... pertaining to [his] conduct as a realtor participating in HUD's Single Family Mortgage Insurance Program." (Govt. Exh. 1). Six FHA-insured properties were listed as properties involved in these irregularities. Respondent requested a hearing on this Departmental action and the matter was docketed before the HUD Board of Contract Appeals. HUD and Respondent subsequently settled this matter and entered into a Settlement Agreement. On March 8, 1989, the matter of Douglas Hauck, HUDBCA No. 88-3433-D43, was dismissed with prejudice and the terms of a Settlement Agreement were incorporated by reference within the Order of Dismissal. The Settlement Agreement, which Respondent and HUD executed respectively on February 22, 1989, and March 3, 1989, stated, in relevant part:

2. The Respondent voluntarily agrees to a debarment from participation in HUD programs for a period of three years, to begin with the date of the notice of suspension and to end on March 31, 1991.

3. Any breach of the terms and conditions of this Agreement by the Respondent shall constitute independent grounds for administrative sanctions pursuant to 24 C.F.R. Part 24.

4. The Respondent agrees to cooperate with HUD in any further investigation or proceeding relating to HUD's investigation of the sale of properties located in and around Colorado Springs, Colorado. However, the Department agrees that it will not initiate or file any additional administrative sanctions against Respondent, pursuant to 24 C.F.R. Part 24, based on:

a. Any of the findings alleged in the Inspector General's audit report, number 88-TS-221-1017, issued on May 25, 1988; or

b. The Respondent's real estate transactions during the period of his suspension and prior to January 25, 1989.

5. This Agreement does not waive any actions under the False Claim Act or any rights or responsibilities that any other Federal or State agency may have to investigate or initiate actions pursuant to its lawful authority arising from the facts underlying the suspension and debarment notice dated April 1, 1988.

6. The Respondent agrees to waive, release, and remit any and all claims he may have against HUD for damages or other relief arising out of the suspension and proposed debarment issued by the Department. (Govt. Exh. 2; emphasis added).

3. On November 29, 1990, Respondent was indicted along with three other individuals in the U.S. District Court for the District of Colorado for conspiring to make false statements to various mortgage lenders in order to obtain HUD mortgage insurance, and for actions resulting in the falsification of certain documents in order to influence the actions of HUD/FHA in violation of 18 U.S.C. §§ 371, 2, and 1010. This criminal conduct occurred between approximately September 1, 1985, and March 4, 1987, and involved 39 properties. (Govt. Exh. 4, Indictment, Count I, pp 1-12).

4. By letter dated February 28, 1991, the HUD Denver Regional Office issued a one year Limited Denial of Participation ("LDP") against Respondent pursuant to 24 C.F.R. § 25.705(b) based upon Respondent's indictment in the U.S. District Court. (Govt. Exh. 3).

5. By letter dated August 6, 1991, Hill notified Respondent that he was suspended from participation in HUD programs pending resolution of the subject matter of the indictment or other related proceedings pursuant to 24 C.F.R. § 24.405. The letter stated:

[t]he charges in the indictment go substantially beyond the irregularities cited in the May 25, 1988 audit report and occurred prior to your suspension of April 1, 1988. Thus, the scope of the charges exceed the protection from action granted by the Settlement Agreement. (Govt. Exh. 5).

The notice of suspension superseded the LDP in accordance with 24 C.F.R. § 24.713.

6. On December 16, 1991, Respondent was convicted of violations of 18 U.S.C. §§ 371 and 1010 after a jury trial in the U.S. District Court for the District of Colorado. (Govt. Exh. 7).

7. Respondent appealed his conviction to the U.S. Court of Appeals for the Tenth Circuit. The appellate court subsequently affirmed the district court's decision. United States v. Hauck, 980 F.2d 611 (10th Cir. 1992).

8. The loss sustained as a result of claims paid by HUD on 28 of 39 of the properties listed in the Indictment was \$1,054,952.57. (Govt. Exh. 8).

9. The audit report referred to in the Settlement Agreement concerns an investigation of "First Union Mortgage Corporation ["First Union"] (formerly Cameron-Brown Company)" and was submitted to the HUD Mortgagee Review Board by the HUD Office of Inspector General. "Cameron-Brown Mortgage Corporation" is named in the Indictment as one of several mortgage lenders "induced" to make loans as part of the conspiracy in which Respondent was involved. The audit report is identified as No. 88-TS-221-1017 and is dated May 25, 1988. Advanced copies of the draft finding of this audit report were available at an exit conference on March 29, 1988. Respondent's name does not appear in the report in any context. (Govt. Exhs. 4 and 9).

10. In addition to listing 45 specific improper loans, the report stated:

Finding 2 - Inadequate Internal and Quality Controls
Over Loan Originations

The Mortgagee allowed its Denver Branch Office, Builder Loan Division, to originate HUD insured loans in an environment with significant internal control weaknesses, and Quality Control reviews of the Division's loans failed to identify the serious noncompliance discussed in Finding 1. The result is the \$78.03 million of loans which are questionable as acceptable insurance risks for HUD. (Govt. Exh. 9, at 5) (emphasis added).

The report listed the following recommendations:

B. Recommendations.

We recommend that the Mortgagee Review Board require the Mortgagee to:

- 1A. Indemnify HUD for any losses resulting from the 45 improperly originated loans insured for \$3,129,013.
- 1B. Hire an independent party to review the 1,016 (1,061 minus 45) questionable originations by the Denver Builder Loan Division under the former manager; certify to HUD that the reviewed loans were properly originated, including compliance with minimum cash investment requirements; and/or indemnify HUD for any losses resulting from improperly originated loans.
- 2A. Provide explanations and evidence of improvements to internal and quality control programs so as to conform to prudent lending practices and HUD requirements.

The above recommendations pertaining to indemnification should extend to uninsured loans in GNMA Pools. (Govt. Exh. 9, at 9) (emphasis added).

There is no way to determine from the report the extent of Respondent's involvement, if any, in the "45 improperly originated loans," or the extent of his involvement, if any, in the "1,016 (1,061 minus 45) [loans of] questionable originations...." made by First Union.

11. None of the 45 properties listed in the audit report involve loans on which monetary losses are claimed in Govt. Exh. 8. Mortgage loans on 7 of the 45 properties specifically listed in the audit report are also listed in the Indictment as mortgage loans in which Respondent's criminal acts were involved. The extent of Respondent's criminal conduct set forth in the Indictment cannot be determined as it relates to actions involving First Union or as it relates to actions involving other mortgage lenders. (Govt. Exhs. 4, 8, and 9).

Discussion

HUD may not apply the sanction of debarment unless the individual or entity to be sanctioned is a "participant or principal" as defined by 24 C.F.R. § 25.105 (m) and (p). Hauck is a "participant" because he has participated in, or may reasonably be expected to enter into, covered transactions for the sale of HUD-insured properties while participating in HUD's Single Family Mortgage Insurance Program. 24 C.F.R. § 24.105(m). Hauck is also a "principal" because he would have "substantive control over a covered transaction" either as a realtor licensed in the state of Colorado, or as an employee or agent of various enumerated persons "who have a critical influence on or substantive control over a covered transaction...." 24 C.F.R. §§ 24.105(p)(11) and (22).

Underlying the Government's authority not to do business with a person or entity is the requirement that agencies only do business with "responsible" persons and entities. 24 C.F.R. § 24.115. Debarment is a discretionary action that is an appropriate means to ensure that the Federal Government is conducting business with "responsible" persons or entities. 24 C.F.R. § 24.115(a). The term "responsible," as used in the context of 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).

Respondent's principal argument is that, based on the 1989 Settlement Agreement, HUD has waived its right to propose this debarment, because Respondent's conviction was based upon real estate transactions, including several specifically listed in the Inspector General's audit report referred to in the Agreement, which are protected from Departmental sanctions because they occurred during a time period specified in the Agreement. Respondent contends that because his criminal conduct also occurred within this time period, the Government is precluded from imposing the sanction of debarment.

The Government submits that Respondent's conviction is a new fact or circumstance for the purpose of the proposed five year debarment, and relies primarily upon the holding in Wellham v. Cheney, 934 F.2d 305 (11th Cir. 1991), which the Government characterizes as "[a] recent case of first impression." In Wellham, the United States Court of Appeals for the Eleventh Circuit upheld the Defense Logistics Agency's ("DLA") debarment based on a conviction of a contractor who had previously been debarred and was subsequently convicted based on the same actions. The appellate court held that the "[c]ontractor's conviction for making false statements in connection with defense contracts was a 'new fact or circumstance' for purpose of ... further debarment...."

The appellate court's decision in Wellham is instructive to administrative agencies seeking a second debarment of a person or entity doing business, or seeking to do business, with the Federal government. The court found that Wellham, like Hauck in the instant case, was convicted for criminal conduct not specifically identified in the circumstances surrounding his first debarment. Wellham, also like Hauck in the instant case, argued basically that "his first debarment in 1985 'encompassed all of [his] improper conduct in contracting with the Government during 1982-1983.'" The court, in examining Wellham's conviction, noted:

Wellham's false statements about contracts...were not "facts or circumstances upon which the initial debarment was based." In the memorandum accompanying Wellham's 1985 debarment, the DLA explained that he was being debarred for supplying non-conforming materials on purchase orders...and for submitting "fraudulent test reports or certificates of conformance." In 1989, the memorandum accompanying the debarment explained that Wellham was being debarred for submitting false statements in connection with contracts.... Since these particular wrongful acts were never specifically mentioned as grounds for the initial debarment, the DLA acted reasonably in finding that they were new facts, justifying the 1989 debarment. Id. at 309.

The court continued by noting that:

A debarment based on a conviction or civil judgment is not based solely on the same facts or circumstances as a debarment based on a "violation of the terms of a Government contract" or "any other cause of [a] serious or compelling nature." Id. at 309.

Clearly, the conclusions of the court in the Wellham case are well-founded and useful to Federal agencies like HUD, particularly when the public interest cries out for protection after a criminal proceeding discloses criminal acts not previously known to the affected agency.

Nevertheless, the Wellham case is not on all fours with the circumstances of this case. The facts in Wellham are distinguishable because in the Wellham case, while concerning an initial debarment followed by a second debarment based upon a conviction, there did not exist a prior settlement agreement in which the Government agreed not to impose further administrative sanctions based on (1) real estate transactions which occurred prior to a specific date, and (2) findings of widespread improprieties by an Office of Inspector General. The Settlement Agreement clearly states that HUD "will not initiate or file any additional administrative sanctions" against Hauck which are based upon his "real estate transactions during the period of his suspension and prior to January 25, 1989," or based upon "any of the findings alleged in the Inspector General's audit report...."

The Government argues that the debarment proposed in 1988 and the resulting Agreement were based on infractions with regard to "only six HUD/FHA insured properties and the activities contained in the [OIG] audit report," yet, Respondent's conviction was based upon transactions involving "over thirty HUD/FHA-insured properties." This fact, the Government submits, shows that the scope of charges set forth in the Indictment exceeds the number of improper actions protected under the terms of the Agreement. (Govt. Brief, at 9).

Noticeably missing, however, in the evidentiary record, in the Government's Brief, and in the Government's Reply to the Respondent's Response, is any denial: (1) that Respondent did not commit "[a]ny breach of the terms and conditions of this Agreement [which would] constitute independent grounds for administrative sanctions..." as stated in paragraph 3 of the Agreement; (2) that Respondent's criminal conduct, as it related to these "over thirty HUD/FHA-insured properties," did in fact, occur prior to January 25, 1989; (3) that paragraphs 4(a) and 4(b) of the Settlement Agreement apply to unspecified or unknown real estate transactions in which Respondent was involved prior to January 25, 1989; or (4) that, in addition to the loans on 45 properties specifically mentioned in the audit report, paragraph 4(a) of the Settlement Agreement applies also to Finding 2 and the Recommendations of the audit report as they relate to Respondent's possible involvement in any of the "1,061 loans totalling \$78.03 million [which were] questionable insurance risks to HUD."

Another interesting distinction between the facts in Wellham and those presented here is the plea agreement entered into by

Wellham which, in exchange for his cooperation and a limitation on the number of charges against him,:

explicitly provided that 'there is no agreement concerning the issue of debarment [sic] by any Government agency for Mr. Wellham's participating in any future Government contract or for any civil penalties.' Id. at 307.

While the plea agreement in Wellham explicitly limits the criminal charges without placing any restrictions upon administrative sanctions, the Settlement Agreement with Hauck explicitly limits the scope of administrative sanctions without placing any restrictions upon:

any rights or responsibilities that any other Federal or State agency may have to investigate or initiate actions pursuant to its lawful authority arising from the facts underlying the suspension and debarment notice dated April 1, 1988. (Govt. Exh. 2, at para. 5)

Assistant Secretary Demery's letter of April 1, 1988 was based upon "irregularities" involved in the sale of six FHA-insured properties. (Govt. Exh. 1). Yet, the terms of the Settlement Agreement clearly encompass far more than Respondent's improper conduct involving these six properties. In obtaining Respondent's voluntary debarment and cooperation, no limitation was suggested for any "Federal or State agency" investigating or initiating actions for criminal misconduct by Respondent relating to loans on any of the other 45 properties specifically listed in the audit report, the other 1,016 loans referred to in the audit report requiring "indemnification... or certification from an independent party," or with respect to loans on any of the 39 properties which were ultimately listed in the Indictment.

Although Assistant Secretary Hill was not a signatory to the Settlement Agreement, he states in his letter of August 6, 1991 to Respondent that the criminal conduct set forth in the indictment "exceed[s] the protection... granted by the Settlement Agreement." Certainly, in hindsight, HUD might now desire to interpret the broad language in the Settlement Agreement in such a manner. However, paragraph 5, paragraph 4(a), paragraph 4(b), and the first sentence in paragraph 4 of the Settlement Agreement all indicate that HUD recognized Respondent's possible involvement in criminal activity, some involving First Union, which was undiscovered at the time the Settlement Agreement was executed. Nevertheless, HUD granted Respondent broad protection from future HUD sanctions in exchange for his voluntary three-year debarment and future cooperation.

The construction of the provisions of this Agreement which protect Respondent from certain administrative sanctions is clear. Standing independently, or as read together, there are three types of protected actions granted to Respondent: (1) those which are included in the audit report; (2) those committed during the period of the suspension [from April 1, 1988 until March 3, 1989]; and (3) those committed prior to January 25, 1989. The two time periods identified in paragraph 4(b) of the Agreement are not synchronous, and the parties to the accord included language which would clearly apply to Respondent's involvement in real estate transactions prior to the issuance of the April 1, 1988 letter. (See 3 West's Words and Phrases, Supp. 1992 at 162, citing Murphy v. Long Island Oyster Farm, Inc., 2 Dept., 491 N.Y.S. 2d 721, 722, 112 A.D. 2d 276, and also citing People v. Butler, 146 Cal. Rptr. 856, 857, 81 C.A. 3d Supp. 6, where disjunctive and less restrictive reading of "and" in lease provision and statute, respectively.) This time period is relevant to the counts in the Indictment which relate to Respondent's actions "[f]rom on or about September 1, 1985 and continuing thereafter until on or about March 4, 1987,...." (Govt. Exh. 4). Certainly, the activities embodied in the audit report occurred before March 29, 1988, the date that advanced copies of the audit report were available. In any event, there is no evidence in the record of this proceeding that the protections offered by HUD to Respondent were to be limited only to specific instances of improper or criminal conduct known to HUD at the time the Agreement was executed.

If these limitations were, in fact, intended, then counsel representing the Department should have insisted upon the inclusion of language in the Settlement Agreement which would have defined these limitations. The fact that there is no such language leads me to conclude that the limitations now suggested by HUD were not necessarily desired by the negotiating parties at the time of the settlement. I am not inclined to speculate as to what the negotiating positions of the parties to this accord might have been in early 1989.

'It is an elementary canon in interpreting a contract that the court should, where the language of the contract is unambiguous, ascertain and effectuate the intention of the parties as expressed by the language of the contract. In so doing the court should give the terms their usual and ordinary meaning even though the intention of one of the parties may have been different from that expressed.'

Hotpoint Co. v. United States, 127 Ct. Cl. 402, 406, cert. denied, 348 U.S. 820 (1954). When a contract is

clear on its face our task is to determine the intent of the parties at the time they contracted, as evidenced by the contract itself, without resort to extrinsic evidence. Greco v. United States, 852 F. 2d 558 (Fed. Cir. 1988). The subjective, unexpressed intent of one of the parties cannot overcome the plain meaning of the words used in an agreement. ITT Arctic Services, Inc., 207 Ct. Cl. 743, 752 (1975).

River City Contractors, Inc., DOTBCA No. 2073, 91-1 BCA ¶ 23,531; see also 4 S. Williston, A Treatise on the Law of Contracts §601 (3d ed. 1961 & Supp. 1991). The provisions utilized in the Agreement are the parties' own, and, in the absence of a legally sufficient reason to find that the Agreement is invalid, has been breached, or is otherwise deficient as a matter of law, the accord must be respected.

Respondent's actions were shocking, egregious, and deplorable, and resulted in a loss to HUD in excess of \$1 million. Without evidence of mitigation which would show that Respondent is presently responsible, this is certainly not the type of person with whom the Department should conduct its business. However, Respondent's conviction, which under normal circumstances would provide a separate and distinct basis for additional sanctions, does not, per se, invalidate the Settlement Agreement.

Debarment and suspension are serious actions which 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). The imposition of a debarment under the circumstances of this case and in light of a prior agreement would be punitive because HUD received Respondent's voluntary debarment, Respondent's promise to cooperate with HUD in any further investigation, and Respondent's release of "all claims he may have against HUD ... arising out of the [1988] suspension and proposed debarment". In return, HUD agreed to forbear the imposition of further sanctions for conduct related to Respondent's real estate transactions prior to January 25, 1989.

Because of the foregoing conclusions, there is no need to consider Respondent's argument that the Government is otherwise estopped from imposing administrative sanctions for the conduct described above. Respondent has also asserted that the use of his commissions as downpayments was not in violation of the HUD Handbook. This issue is irrelevant because it does not concern the basis of the proposed debarment.

Conclusion

For the foregoing reasons, I find that a debarment would be improper in this case because it would violate a written commitment by HUD not to impose an additional administrative sanction upon Respondent based on certain prior conduct. The Government has failed to show that Respondent should be debarred because of his conviction based upon real estate transactions not covered by the terms of the Settlement Agreement. Nor has the Government demonstrated that Respondent's conviction is a new fact that, notwithstanding the terms of the Settlement Agreement, can now support a debarment beyond Respondent's voluntary three-year debarment, the LDP, and the second suspension which have effectly excluded Respondent from participation in HUD programs from April 1, 1988 until today, a period in excess of five years.

Accordingly, it is my determination that Douglas Hauck shall not be debarred, and that the suspension imposed on August 6, 1991, was improper and shall be immediately terminated.



David T. Anderson
Administrative Judge