

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
BOARD OF CONTRACT APPEALS
WASHINGTON, D.C.

In the Matter of:

KENNETH LANGE,

Respondent.

HUDBCA No. 92-A-7594-D56
Docket No. 92-1862-DB

For the Respondent:

Kenneth Lange, Pro Se



For the Government:

Georjan Overman, Esq.
U.S. Department of Housing and
Urban Development
Room 10251
Washington, D.C. 20410

DETERMINATION BY ADMINISTRATIVE JUDGE DAVID T. ANDERSON

October 23, 1992

Statement of the Case

By letter dated April 14, 1992, Arthur J. Hill, Assistant Secretary for Housing-Federal Housing Commissioner for the U.S. Department of Housing and Urban Development ("HUD," "Government," or "Department") notified Kenneth Lange ("Respondent") that consideration was being given to debar him from participating in covered transactions with the Department and other agencies throughout the Executive Branch of the Federal Government. The letter also stated that pending final determination of the proposed debarment, Respondent was suspended "from further participation in such transactions and contracts." The proposed debarment was to be effective for three years, and was based on Lange's conviction in the United States District Court for the District of Colorado for making false statements to the Department. The letter superseded a June 24, 1991 notice

from the Assistant Secretary which suspended Respondent as a result of an earlier information arising from this criminal conduct.

Respondent timely filed a request for a hearing on the proposed debarment on May 19, 1992. The Government filed its brief in support of debarment on August 5, 1992, and a reply brief was filed by Respondent on September 1, 1992. This determination is based on the submissions of the parties, as Respondent is 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, Respondent was a loan closer responsible for closing mortgage loans for the U.S. Mortgage Company ("USM") in Denver, Colorado. USM was an approved direct endorsement lender in the HUD single-family mortgage insurance program. John LaGuardia was USM's President, and Beverly Snodgrass was USM's Loan Underwriter. (Govt. Exh. 1, Resp. Exh. 2)
2. Under the single-family mortgage insurance program, the Federal Housing Administration ("FHA") provides insurance protection to lenders who make mortgage loans to borrowers. If a borrower defaults on a loan, FHA reimburses the lender for its losses and pays the balance of the loan. Under the Direct Endorsement program, approved private lenders may underwrite and close FHA-insured mortgage loans without prior HUD approval. (Govt. Exh. 1)
3. To implement the Direct Endorsement program, HUD has issued guidelines and regulations setting forth the requirements which borrowers and lenders must meet in order to qualify for FHA insurance. Once a direct endorsement lender has determined that a borrower has met those requirements, a Certificate of Commitment is issued which binds HUD to insure the property. (Govt. Exh. 1)
4. One of HUD's requirements under the mortgage insurance program is that an "investor-borrower", i.e., a borrower who does not intend to reside in the property, can receive a maximum insurable loan in the amount of 85% of the property's appraised value. An investor-borrower must make a 15% investment in that property to insure that he or she maintains a financial stake in the property. In addition, all borrowers, whether "owner-occupiers" or investors, must submit to HUD, through their direct endorsement lender, an Application for Commitment for Insurance. This application is designed to show that the borrower possesses sufficient financial resources to both make the minimum investment and meet the monthly payments under the mortgage. (Govt. Exh. 1)
5. Pertinent regulations also require that a buyer submit to HUD, through the direct endorsement lender, a Settlement Statement showing the amount paid by the buyer at closing. The Settlement Statement provides assurance to HUD that the buyer has made the

necessary investment in the property. The buyer must certify that the Settlement Statement and all other information supplied to HUD is true and accurate. (Govt. Exh. 1)

6. Lange was hired by USM in November, 1985. In early 1986, LaGuardia assigned Lange to work as a loan closer for USM's investor loans. In his role as loan closer, Lange's duties included reviewing title company commitments, surveys and homeowner's insurance policies, and preparing loan closing figures and loan closing documents such as Deeds of Trust, Certificates of Commitment and Settlement Statements. (Resp. Exh. 2)

7. A five-count information (date illegible) was subsequently filed by the Assistant United States Attorney for the District of Colorado against Lange. The information charged that Lange, with the intent to defraud, made false statements to the Department on Settlement Statements in connection with the sale of five properties in Denver, Commerce City, and Arvada, Colorado. According to the information, Lange, "as a settlement agent" for USM, falsely stated that he caused or would cause a cash down payment to be collected from borrowers with respect to each of the five properties, in violation of 18 U.S.C. § 1012. (Govt. Exh. 2)

8. A separate 124-count indictment (undated) was also filed in the U.S. District Court for the District of Colorado against Lange and twelve other defendants. That indictment charged Lange with generally the same criminal conduct set forth in the information. (Govt. Exh. 1)

9. Respondent entered into a plea agreement (undated) with the U.S. Attorney's Office and was convicted on all of the charges contained in the information. The plea agreement contained a stipulation of facts which states that the loan closings for each of the five sales occurred in two locations. The real estate portion of the loan closings occurred at the offices of Fidelity Escrow Services, where the warranty deed, bill of sale, and real estate settlement statements were signed by the buyer and seller. Lange would not attend these closings, but did oversee the signing of loan closing documents at the offices of USM. Lange would sign the HUD-1 Settlement Statements at the offices of USM, attesting therein that "he had caused or would cause the funds described in the settlement sheet to be disbursed in accordance with the settlement statement. Kenneth Lange did not confirm that down payment funds, required to be received from the borrower, were ever provided the seller as indicated on the settlement sheet." (Govt. Exh. 6)

10. Lange was sentenced to five years' probation on each count, with each sentence to run concurrently. He was also ordered to perform 100 hours of community service, and to pay \$125 as a Special Assessment and \$2,400 in restitution to the Department. Judge Zita Weinshienk of the U.S. District Court for the District of Colorado, the presiding judge in the criminal proceeding, stated in the sentencing order dated December 16, 1991, that she saw "no reason why [Lange] should not be eligible for rehire with [the] FDIC [or the] Resolution Trust Corporation." (Govt. Exh. 7)

11. USM ceased operations in April, 1987. Lange submits, in unsworn allegations set forth in his brief, that in 1988 he went to work for the Federal Deposit Insurance Corporation as a Legal Case Management Technician. In April 1990, he transferred to the Resolution Trust Corporation, where he held a similar position. At both the FDIC and RTC, Lange was responsible for maintaining the legal case database, and, inter alia, providing the legal staff with statistical, financial and budgetary information. He received an "Employee of the Month" award in 1989 as well as two "special cash service awards" during his employ. Lange has not been involved in any aspect of the mortgage lending business since 1987. (Resp. Reply Brief, at 7)

12. Lange has submitted a copy of an unsworn letter dated December 6, 1991 which he wrote to Judge Weinshienk explaining the circumstances surrounding his misconduct. He has also submitted a copy of a letter written by Judge Weinshienk dated January 16, 1992 addressed "To Whom It May Concern" in which she states her belief that Lange did not act with the intent to defraud the Department, that Lange appeared to have been the victim of other more culpable parties, and that Lange "is a responsible, hard working man." She also expressed her confidence that Lange would abide by the law in the future. (Resp. Exhs. 2, 4)

Discussion

Lange 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). 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;

* * *

- (3) [c]ommission of embezzlement, theft, forgery, or bribery . . .;

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

As a preliminary issue, I do not find that Lange's misconduct was part of a "conspiracy", as the Department contends (Govt. Brief, at 2-3). Nowhere in this record is there any indication that Lange was specifically charged with such an offense, and the Government's repeated use of the word "conspiracy" in its Brief is misleading. For similar reasons, the Government's arguments which reference the heinous and egregious conduct, and subsequent convictions, of Donald Dean Austin and James Grandgeorge (Govt. Exh. 5, Govt. Brief, at 3) are irrelevant to this proceeding. The charges contained in the separate indictment filed against Lange and twelve other defendants in the United States District Court for the District of Colorado cannot properly be considered in this proceeding, because the charges contained in that separate indictment are not the basis for the proposed debarment. The notice of proposed debarment contained in the April 14, 1992 letter from Assistant Secretary Hill states, "[t]his Department has been informed that you were convicted in the United States District Court for the District of Colorado for violation of Title 18, Section 1012, United States Code Commission of [this offense] is evidence of irresponsibility and is cause for debarment under 24 C.F.R. §§ 24.305(a)(1), (3), (4) and (d)." It is this conviction, not the separate indictment referred to above, which is the basis of the Assistant Secretary's action.

Moreover, as part of the plea agreement entered into by Lange, the Government specifically agreed "to move to dismiss all counts of the Superseding Indictment . . . against Lange, and to pursue no further criminal prosecution against [him] for matters set forth in the Superseding Indictment in this case." (Govt. Exh. 6) Thus, it is quite clear that the charges set forth in the group indictment were neither the basis for Lange's conviction, nor the grounds for the proposed debarment. It is, therefore, not relevant to this proceeding.

Lange's conviction is based on submitting false statements to the Department, and raises the reasonable presumption that Respondent lacks the "probity, honesty and uprightness" necessary to conduct business with the Department. 48 Comp. Gen. 769 (1969). While it is undeniable that Respondent's conviction is sufficient cause for the imposition of a debarment, the existence of cause alone does not mandate the imposition of a debarment if sufficient mitigating circumstances exist which indicate that Lange is presently responsible. 24 C.F.R. § 24.115(b); see also Louis Ferris, Jr., HUDBCA No. 92-G-7590-D54 (Sep. 1, 1992), and cases cited therein.

In mitigation of his misconduct, Lange argues that he did not intend to defraud the Department, and that his business record prior to and since the conviction demonstrate that his debarment is not necessary to protect the public. Lange states that his misconduct was minimal and inadvertent. According to Lange, it was the industry practice for title or escrow companies to collect the borrower's closing funds and the lender's loan proceeds. The title company would then make disbursements to the borrower and lender according to the terms of the settlement statement. In accordance with this practice, Lange states that he relied on the good faith of certain employees of Fidelity Escrow Services and Security Title Company. The employees of these two companies apparently never indicated to Lange that their companies did not receive the requisite closing funds, and Lange wrongfully assumed that, through their acquiescence, the two companies had received these funds in conformance with industry practice. He states in his Brief, at 2, that:

It had always been my experience as a loan closer; that the title company, or their representative, would collect the borrower's closing funds and the lender's loan proceeds. In turn they made disbursements to the seller and others. Consequently, it never dawned on me to ask Sandy [Forehand, the loan closer for Fidelity Escrow Services,] or Security Title if they had received the borrower's closing funds.

I do not find these explanations comforting. Respondent's blind reliance on the representations or acquiescence of employees of other companies, or on "industry practice," is absolutely no excuse for subjecting Federal programs to financial vulnerability. Even if he failed to attend the closings, he should have verified that the requisite funds had actually been received and properly disbursed by the responsible parties before executing the HUD-1 Settlement Statements. Not to have done so suggests that Respondent had insufficient regard for the critical importance of his signature on the HUD-1 Settlement Statements, a signature which caused HUD to assume substantial financial risk.

Lange states that he became suspicious that "something might be wrong because so many of these loans were closing so fast." He approached Beverly Snodgrass, USM's Loan Underwriter, and expressed his concerns to her. Lange states that he was informed by Snodgrass that she had consulted with FHA authorities and that, "everything was fine." Lange avers that he also communicated his concerns to Joan LaGuardia, USM President, who also told him that all was well with the loans he was closing. As a result, Lange states

that he did not know that his involvement in the five loan transactions was unlawful until late in 1986, when USM's mortgage approval was suspended by the HUD Mortgagee Review Board (MRB).

Lange has recited this version of the events surrounding his conviction to Judge Weinshienk. In her letter, a copy of which has been submitted into this record, Judge Weinshienk states that:

Mr. Lange worked for U.S. Mortgage as a loan closer and signed numerous settlement sheets with the understanding that monies were being distributed in accordance with representations made to him by others. He should not have relied on these representations since the funds were not being distributed as he believed. However, I am satisfied that he did not consciously scheme to defraud the Government. It appeared to me that he also was a victim of the more culpable parties. I feel he has learned a significant lesson and will be wiser in the future.

The testimony at trial, and statements received by me in connection with his sentencing, indicate that he is a responsible, hard working man. I believe he could competently continue employment in his field and specifically with the Resolution Trust Corporation. I am confident that he will not again be involved with violation of the law. Therefore, I recommend that he be permitted to continue in his chosen field. (Resp. Exh. 4)

I find that this extraordinary letter containing these highly unusual statements of confidence by a presiding judge in a criminal case, is entitled to substantial weight, and am inclined to agree that Lange did not act with the intent to defraud the Department. See James Webb, HUDBCA No. 92-G-7709-D60 (Oct. 1, 1992). While HUD must rely on the honesty, efficiency, and vigilance of its program participants who expose HUD to significant financial risks, there is nothing in this record which would indicate that Lange "deliberately defrauded the Government," as asserted by the Department. Contrary to the Department's assertion, Lange does recognize the seriousness of his misconduct and has not displayed an "utter lack of contrition." His letter to Judge Weinshienk, although unsworn, should be given reasonable probative value. Lange specifically states in his letter that:

I am sorry I did not pursue my concerns further. I should have checked my procedures more carefully and made sure that all other procedures were being followed closely. I regret my involvement with these investor loans and I can only try to convince you that I would never have allowed myself to be a part of it if I had known of any illegalities. (Resp. Exh. 2)

I find this statement, despite its informality, to be a reliable and compelling indication that Respondent comprehends the gravity of his misconduct. Certainly, Judge Weinshienk, who received Lange's testimony under oath, believed that those representations were

credible. I do not doubt that Lange now recognizes the importance of strict adherence to Departmental regulations and the seriousness of signing a certification on a HUD form. Lange now seems to understand the perils of relying solely on other individuals to provide assurances that standards of propriety and legality are being met in the consummation of transactions to which the Department is a party. See Allen Griffey, HUDBCA No. 90-5349-D89 (Mar. 14, 1991).

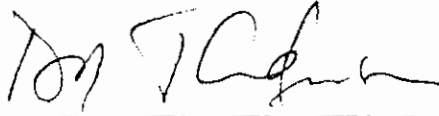
Lange's present employment activities also persuade me that Respondent has been comporting himself in a responsible manner since his misconduct occurred. He has worked for at least two government agencies since 1988, and has received recognition of his performance through an "Employee of the Month" award and two cash awards. Respondent has also not been involved in the mortgage lending business since the date of his misconduct. This Board has previously held that the interests of the Government can be sufficiently protected where an individual, who has been barred from doing business with the Government as a result of the imposition of an administrative sanction, is no longer engaging in similar potentially detrimental conduct. See Ted Dalton, HUDBCA No. 90-5246-D23 (Jan. 14, 1991). While Lange has not forsworn his re-entry into the loan closing business, his present occupation would appear to have eliminated the possibility that Lange could again make false statements to the Department on a settlement statement. However, even if Lange were to re-enter the mortgage lending business, this record indicates that Lange is now a responsible individual in whom HUD could place its trust. The circumstances of this case lead me to believe that Respondent will refrain from engaging in the type of misconduct which led to his conviction. Ted Dalton, supra. Four years have now passed since Respondent's improper conduct, years in which Respondent has conducted himself in a professionally honest and responsible manner. This passage of time can be viewed, under these circumstances, as another factor tending to show that HUD no longer needs to fear Respondent's participation in the programs of this Department. See ARC Plumbing and Heating Corp., HUDBCA No. 88-3459-D68 (Feb. 2, 1990).

Conclusion

Based on the record before me, I find that a debarment is not warranted in this case. Significant mitigating factors, including Respondent's statements of contrition and remorsefulness, the complete absence of a mens rea, the sentiments of Judge Weinshienk, a significant passage of time since Respondent's improper conduct, Respondent's favorable conduct since 1988, and Respondent's current professional behavior, indicate that Lange has learned from his misconduct and will comport to the right in the future. Lange is not an individual from whom HUD or the public now needs to be protected.

The record in this case does not support the debarment proposed by the Government. The time during which Respondent has been suspended from participation in HUD programs has already afforded the Government sufficient protection from this individual, even

assuming such protection had been warranted. Accordingly, it is hereby **ORDERED** that Kenneth Lange shall not be debarred, and that the suspension imposed on June 24, 1991 be terminated immediately.

A handwritten signature in black ink, appearing to read "D. T. Anderson", written over a horizontal line.

David T. Anderson
Administrative Judge