

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

In the Matter of:

JAMES WEBB,

Respondent.

HUDBCA No. 92-G-7709-D60
Docket No. 92-1873-DB

For the Respondent:

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DETERMINATION BY ADMINISTRATIVE JUDGE TIMOTHY GRESZKO

October 1, 1992

Statement of the Case

On May 20, 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 James T. Webb ("Respondent") that consideration was being given to debar him from participation in covered transactions with the Department and other agencies within the Executive Branch of the Federal Government. The proposed debarment was to remain in effect for three years, and was based on Webb's conviction in the United States District Court for the Eastern District of North Carolina for violation of 18 U.S.C. §§ 1010 and 2(b). The letter also advised Respondent that he was temporarily suspended pending determination of the proposed debarment.

A Final Determination upholding the proposed debarment was issued on June 30, 1992. On July 6, 1992, the Department received a letter dated June 24, 1992 in which

Respondent requested a hearing on the proposed debarment. On July 21, 1992, the Department rescinded the Final Determination. The Government filed a brief in support of debarment on September 8, 1992. Respondent's initial submission shall be considered as his reply brief, at the request of Respondent's counsel. This determination is based on the written 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, Webb's occupation was that of purchasing and renovating homes in Wilmington, North Carolina. Webb would purchase condemned homes in the inner-city of Wilmington, renovate them, and then sell or rent the homes to low-income families. (Webb. Affid. dated Aug. 11, 1992, at 1)

2. On or about June 16, 1986, Webb purchased a house at [REDACTED] S. Front Street in Wilmington ("the Front Street property"), and in connection with that purchase, certified that he would be an "owner-occupier" and not an "investor"; this certification was made on a Certificate of Commitment form for a HUD-insured mortgage. Webb purchased the home in this manner because he was informed that he could obtain better financing terms than if he were to obtain an investor loan to purchase the property. (Webb. Affid., at 1)

3. A nine-count indictment was issued by a grand jury convened by the United States District Court for the Eastern District of North Carolina, charging Webb with making a false statement in 1986 in connection with the purchase of the Front Street property. Reciting the above facts, count two of the indictment alleged that Webb had no intention of residing in the Front Street property, despite his certification as an "owner-occupant" on the Certificate of Commitment. This certification was alleged to be in violation of 18 U.S.C. §§ 1010 and 2(b). (Govt. Exh. A)

4. On November 21, 1992, Webb pleaded guilty to count two of the indictment, and the remaining eight counts were dismissed. Webb was sentenced to two years' imprisonment, with all but four months of the sentence suspended. He was also placed on probation for three years and was ordered to pay a fine and special assessments totalling \$550. (Govt. Exh. 2; Resp. Exh. A)

5. Webb has submitted a letter of support from Louis Brown, Jr., Mayor of Narvassa, North Carolina, as well as a copy of his curriculum vitae and numerous "before and after" photographs detailing his renovation work. The letter from Mayor Brown attests to Webb's professional capabilities and his commitment to aiding members of his community. Respondent has also submitted a sworn affidavit in which he "confesses his mistake" and states that his debarment would not serve the public interest. (Attachments to Resp. letter of Aug. 11, 1992)

Discussion

Webb 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). He is also a "principal" because he was a purchaser of a HUD-insured property and a borrower under a program established by the Department. 24 C.F.R. §§ 24.105(p)(6) and (7).

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 . . . ;
- (4) [c]ommission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a person[;]

or for:

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

The Government bears the burden of demonstrating by a preponderance of the evidence that cause for suspension and debarment exists. When the suspension and proposed debarment are based on an indictment and conviction, that evidentiary standard is deemed to have been met. 24 C.F.R. §§ 24.405(b) and 24.313(b)(3). However, existence of a cause for debarment does not automatically require imposition of a debarment. In gauging whether or not to debar a person, all pertinent information must be assessed, including the seriousness of the alleged acts or omissions, and any mitigating circumstances. 24 C.F.R. §§ 24.115(d), 24.314(a) and 24.320(a). The Respondent bears the burden of proving the existence of mitigating circumstances. 24 C.F.R. § 24.313(b)(4).

Underlying the Government's authority not to do business with a person is the requirement that agencies only do business with "responsible" persons and entities. 24 C.F.R. § 24.115. The term "responsible," as used in the context of suspension and debarment, is a term of art which includes not only the ability to perform a contract satisfactorily, but the honesty and integrity of the participant as well. 48 Comp. Gen. 769 (1969). The test for whether a debarment is warranted is present responsibility, although a

lack of present responsibility may be inferred from past acts. Schlesinger v. Gates, 249 F.2d 111 (D.C. Cir. 1957); Stanko Packing Co. v. Bergland, 489 F.Supp. 947, 949 (D.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).

Webb's conviction is based on making a false statement to the Department, and raises serious questions concerning his "probity, honesty and uprightness." 48 Comp. Gen. 769 (1969). The offense for which Webb was convicted is serious, and it exposed the Department to a heightened risk of financial loss. The higher investment requirement for an "investor" loan is designed to ensure that borrowers have a greater financial stake in the property they are purchasing, and to provide the Department with an increased degree of protection in the event of a borrower's default. In contrast, government assistance to those qualified to receive "owner-occupier" loans places the Department in a position of greater risk in the event of default. Even if Webb were financially secure, his false statement to secure an "owner-occupier" loan undermined the integrity of a Federal program and is not indicative of a responsible contractor. The sentence Webb received for his misconduct was also relatively severe. Webb's conviction, however, does not require imposition of the debarment proposed by the Department if sufficient mitigating factors exist. 24 C.F.R. § 24.115(d). In mitigation, Webb argues that his misconduct occurred over six years ago, that he has acted in a responsible manner since that time, and that his debarment would not serve the public interest.

The record in this case shows that Webb's misconduct occurred in 1986, and the record contains no evidence that subsequent episodes of misconduct have occurred or that this misconduct was part of an ongoing pattern or practice of misconduct. This Board has viewed a substantial passage of time as a mitigating factor in determining the length of an administrative sanction. ARC Plumbing and Heating Corp., HUDBCA No. 88-3459-D68 (Feb. 2, 1990). While the Government is correct in stating that the length of time which has passed is not, ipso facto, dispositive in determining an individual's present responsibility, the passage of time can diminish the probative weight which should be given to prior criminal conduct as that conduct relates to the issue of present responsibility. Spencer Kim and Kamex Construction Corp., HUDBCA No. 87-2468-D58 (June 21, 1988). Particularly when coupled with other evidence of mitigation, the passage of time can diminish the presumption of lack of present responsibility which flows from a conviction.

Webb has submitted a sworn affidavit in which he admits his mistake and states his belief that he has acted responsibly since the occurrence of his misconduct. Such an admission is a step in the right direction. Webb has also submitted evidence which shows that he has acted in a professional and competent manner since 1986. He has continued to renovate otherwise uninhabitable dwellings and has been able to provide affordable housing to the residents of inner-city Wilmington. As evidence of his recent accomplishments, Webb has submitted a letter from Louis Brown, Jr., Mayor of Narvassa, North Carolina. Mayor Brown's letter is both a testament to Webb's professional capabilities and integrity, and a

statement of considerable confidence in Webb as a talented and valuable member of his community. Mayor Brown states:

[t]he positive work [Webb] has done, providing housing for low income areas in out city and other cities in this area, is unsurpassed

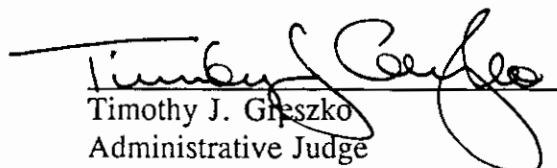
If he is allowed, I am sure that he will make HUD proud and will continue to make us proud of him. (Letter from Mayor Louis Brown dated Aug. 11, 1992)

I find Brown's letter an objective indicator that Respondent's misconduct was aberrational, and that Respondent has the capacity to serve the interests of HUD and the public in a responsible manner. See Ted Dalton, HUDBCA No. 90-5246-D23 (Apr. 14, 1991).

The evidence of mitigation submitted in this case, while substantial, is not sufficiently persuasive to negate the need for the imposition of a sanction. The record before me, however, does not support the period of debarment proposed by the Government. Respondent has produced substantial evidence of his current professional behavior, all of which leads me to conclude that the public interest would not be served by excluding Webb from Federal programs for a three-year period. Based on the aberrational nature of Webb's misconduct, the passage of time, and Webb's evidence of responsible behavior since the misconduct in question occurred, I find that a three year debarment is not necessary to protect the public. It is my determination that a six-month debarment will afford HUD and the public ample protection from Webb's misconduct. 24 C.F.R. §§ 24.115(d), 24.314(a) and 24.320(a).

Conclusion

For the foregoing reasons, I find that a six-month period of debarment of Respondent is warranted. It is therefore **ORDERED** that James T. Webb shall be debarred until November 20, 1992, credit being given for the time in which Respondent was suspended.


Timothy J. Gieszko
Administrative Judge