

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

In the Matter of:

WILLIAM D. LUNDAY,

Respondent

HUDBCA No. 93-G-D31

Docket No. 93-1983-DB

For the Respondent:

James G. Butler, Jr., Esq.
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For the Government:

Walter E. Warren, Esq.
Office of General Counsel
U.S. Department of Housing
and Urban Development
Room 10251
Washington, D.C. 20410

DETERMINATION BY ADMINISTRATIVE JUDGE TIMOTHY J. GRESZKO

June 25, 1993

Statement of the Case

By letter dated February 5, 1993, William D. Lunday ("Respondent"), was notified by James E. Schoenberger, Associate General Deputy Assistant for Housing for the U.S. Department of Housing and Urban Development ("Government," "Department," or "HUD"), that HUD proposed to debar him from further participation in primary covered transactions or lower tier covered transactions as either a participant or principal at HUD and throughout

the Executive branch of the Federal government and from participating in procurement contracts within HUD for an indefinite period of time. This proposed debarment was based on Respondent's conviction for bank fraud in violation of 18 U.S.C. §§ 1344 and 2.

The notice further provided that pending the outcome of the proposed debarment, Respondent was suspended from participation in the above-mentioned transactions and contracts. On February 19, 1993, Respondent appealed the suspension and proposed debarment. The proposed debarment is based solely on a conviction; therefore, a hearing is limited to the consideration of briefs and documentary evidence. 24 C.F.R. § 24.313 (b)(2)(ii).

Findings of Fact

1. During the period May, 1984 through October, 1987, Respondent was the Executive Vice President and part-owner of Tomahawk Mortgage Co., Inc. ("Tomahawk") located in Blue Springs, Missouri. Tomahawk was engaged in the business of generating and servicing single-family mortgages, including FHA-insured mortgages. (Govt. Exh. 4, Indictment, paragraph a; Resp. Br. dated May 27, 1993, admission, p.6.)

2. Tomahawk, by and through Respondent, entered into agreements with various banks to provide Tomahawk with lines of credit secured by the mortgage loans generated at Tomahawk. To secure a line of credit, Tomahawk pledged as security and delivered to the banks the promissory notes and mortgages executed by the loan recipient customers of Tomahawk. Tomahawk sold the mortgages pledged as security in the secondary mortgage market with the permission of the banks, and, upon receipt of the proceeds from the sales, was required to repay the credit secured by the respective mortgages in accordance with the line of credit agreements. Upon receipt of the proceeds, the banks would release the mortgage documents which were being held as security on the Tomahawk lines of credit. (Govt. Exh. 4, Indictment, paragraphs b, c.)

3. Beginning in 1984, and continuing through 1987, Tomahawk entered into a line of credit agreement, as outlined above, with Centerre Bank of Kansas City, Missouri. (Govt. Exh. 4, Indictment, paragraph b.)

4. On September 14, 1987, Respondent sold the mortgage of Tomahawk customer ██████████ Charles for \$42,526.03. At that time, Respondent had obtained funds through the line of credit from Centerre Bank. Respondent directed employees of Tomahawk to retain these proceeds, to apply the proceeds to debts secured by other mortgages, and to conceal these facts from Centerre Bank. (Govt. Exh. 4, Indictment, counts four through twelve, paragraphs 1 - 4.)

5. In October, 1990, a twelve-count indictment was issued by the United States District Court for the Western District of Missouri, charging Respondent with twelve counts of bank fraud. Reciting the above facts, count four of the indictment alleged that Respondent

fraudulently retained and misapplied the proceeds of the sale of the mortgage of ██████████ Charles. (Govt. Exh. 4, Indictment, counts four through twelve, paragraphs 1 - 3.)

6. On December 26, 1990, Respondent pleaded guilty to count four of the indictment, and the remaining eleven counts were dismissed. On September 4, 1991, Respondent was sentenced to two years imprisonment, with initial confinement for three months. Execution of the sentence was suspended for the final twenty-one months, and Respondent was placed on probation for a period of two years, beginning upon his release from imprisonment. No fine was imposed because of Respondent's "exceptional eff[or]ts to reduce the losses incurred." (Govt. Exh. 3, Judgment entered in U.S.A. v. William D. Lunday, dated September 4, 1991.)

7. Respondent argues as mitigation that: his conviction of bank fraud was one of technicality; Respondent's activities were discovered initially by Respondent himself, after which Respondent immediately informed the banks; Respondent sacrificed for over a year to make restitution to all the parties before being involved in any criminal process; Respondent received no direct benefit from the diverted funds; Respondent cooperated in a lawsuit by the trustee in bankruptcy for Tomahawk against Freddie Mac; and no FHA loans were left uninsured or affected adversely by the demise of Tomahawk. (Resp. Brief, pp. 4-6). These alleged mitigating circumstances are not supported by documentary evidence.

Discussion

HUD may not apply the sanctions of suspension or debarment unless the individual or entity to be sanctioned is a "participant" or "principal", as defined by the applicable Departmental regulations at 24 C.F.R. §§ 24.105(m) and (p). Lunday 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 obtained mortgage loan guarantees from the Government on behalf of his employer, Tomahawk. 24 C.F.R. § 24.105(m).

A suspension may be imposed when "cause for debarment under [24 C.F.R.] § 24.305 may exist." 24 C.F.R. § 24.405(a)(2). 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;

* * *

fraudulently retained and misapplied the proceeds of the sale of the mortgage of June R. Charles. (Govt. Exh. 4, Indictment, counts four through twelve, paragraphs 1 - 3.)

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- (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, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, or obstruction of justice; 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[;]

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

Determining present responsibility requires an assessment of the current risk that the Government might be injured by doing business with the Respondent. Lunday's conviction is based on fraud, and raises serious questions concerning his "probity, honesty and uprightness." 48 Comp. Gen. 769 (1969). Lunday not only committed bank fraud himself, he also directed other Tomahawk employees to fraudulently retain and misdirect the proceeds from the sale of the mortgage loan and to conceal this information from Centerre Bank. In mitigation, Lunday argues that he did not benefit directly from the diverted funds, he notified the banks which he had defrauded, and before his conviction, he made restitution to these banks. Lunday apparently believes that he has paid his debt to society through his efforts to make restitution. He states that these efforts show him to be a man of integrity and honesty.

(Resp. Brief, at 7). The U.S. District Court judge in Lunday's criminal proceeding determined that no fine need be imposed on Lunday in light of his "exceptional eff[or]ts to reduce the losses incurred." (Gov't. Exh. 3). However, Lunday's acts to ameliorate the impact of his criminal conduct were made, to a significant degree, under threat of prosecution. Moreover, Lunday has submitted no affidavits or documentation of any kind to support his arguments with respect to the other alleged mitigating circumstances set forth by Lunday. I, accordingly, find Lunday's evidence in mitigation insufficient to rebut the presumption of a lack of present responsibility which flows from his conviction for bank fraud.

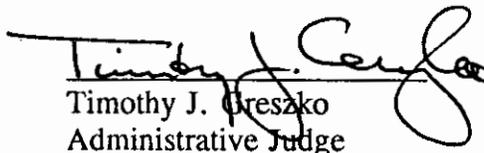
Applicable HUD regulations provide that the period of debarment for convictions should not exceed three years, and that where circumstances warrant, a longer period of debarment may be imposed. 24 C.F.R. § 24.320(a)(1). The Government argues that an indefinite debarment should be imposed because of Lunday's pattern and practice of wrongdoing. I disagree because the evidence before me fails to establish a pattern and practice, the cause for debarment is Lunday's conviction on one count of bank fraud, and that fraud occurred over six years ago. If HUD seeks to indefinitely debar Lunday based on the eleven counts of bank fraud that were dismissed, as HUD now wishes to do, or upon any other causes, then HUD should have filed an amended complaint charging Lunday with those counts and other causes. 24 C.F.R. § 26.12(a)(1). As HUD failed to do so, I must make my determination based upon consideration of Lunday's present responsibility in light of the inferences arising from the criminal conduct defined by the single charge for which Lunday stands convicted. While the offense of bank fraud is indeed quite serious, especially in light of the fact that Lunday directed other Tomahawk employees to conceal the wrong-doing from Centerre Bank, the record in this case, when compared with the facts considered in analogous decisions by this Department's judicial officers, does not support a need to impose a debarment in excess of five years. See Solomon Sylvan, HUDBCA No. 87-2432-D40 (Apr. 13, 1988), citing Marvin B. Awaya, HUDBCA No. 84-834-D6 (May 8, 1984) (where Respondent was debarred from a period of three years after pleading guilty to five counts of fraud); Robert H. Vogue and Richard Campbell, HUDBCA No. 85-946-D23 (July 2, 1986) (where Respondents were debarred for a period of three years for pleading guilty to two counts of fraud in order to obtain a larger HUD-insured mortgage loan); David M. Cunningham HUDBCA No. 84-874-D33 (January 23, 1985) (petition for reinstatement denied where Respondent was debarred for a period of five years after pleading guilty to 16 counts of embezzlement); and Jay D. Morrow, HUDBCA No. 86-1612-D17 (August 15, 1986) (where Respondent was debarred for a period of five years after pleading guilty to a variety of criminal conspiratorial acts including fraud and bribery).

Lunday is presently employed by Reliance, a HUD-FHA approved mortgagee. (Govt. Exh. 9). As such, and in the absence of evidence to the contrary, I find it reasonably likely that he will handle HUD-FHA guaranteed mortgage loans in covered transactions. The arguments submitted by Lunday are insufficient to rebut the strong presumption of Lunday's lack of present responsibility which flows from his conviction. Moreover, Lunday's direction to Tomahawk employees to conceal his crime establishes a wilful and egregious act

sufficient to support a period of debarment in excess of three years. Therefore, in the absence of more substantial mitigating evidence, it is my determination that a five year period of debarment is necessary to afford HUD and the public sufficient protection from Lunday's misconduct. 24 C.F.R. §§ 24.115(d), 24.314(a), and 24.320(a).

Conclusion

For the foregoing reasons, it is hereby **ORDERED** that William D. Lunday shall be debarred from this date until February 5, 1998, credit being given for the time during which Respondent has been suspended from eligibility to participate in HUD programs.


Timothy J. Greszko
Administrative Judge