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

In the Matter of: **RONALD A. JACKSON,** Respondent	HUDBCA No. 95-A-106-D5 Docket No. 95-5007-DB

For the Respondent:

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DETERMINATION BY ADMINISTRATIVE JUDGE DAVID T. ANDERSON

June 7, 1995

Statement of the Case

By letter dated September 30, 1993, Burton Bloomberg, Acting Regional Administrator, U.S. Department of Housing and Urban Development ("HUD," "the Department," or "the Government"), issued a notice of Limited Denial of Participation ("LDP") to Ronald A. Jackson ("Respondent"), stating that he would "be denied the right of direct or indirect participation in all [HUD] programs within the geographical jurisdiction of the New York Regional Office...." The LDP was based on an indictment for two counts of "Bribe Receiving in the Third Degree" in violation of New York State Penal Law. Pursuant to 24 C.F.R. § 24.712, Respondent requested an informal conference regarding the imposition of the LDP. On November 23, 1993, Herbert Galler, Director, Office of Operational Support, New York Regional Office, issued a written decision affirming the

imposition of the LDP. Respondent filed a timely appeal of that decision in accordance with 24 C.F.R. § 24.713.

By letter dated March 10, 1994, Michael B. Janis, HUD General Deputy Assistant Secretary, notified Respondent that HUD was suspending him from participating in primary covered transactions and lower tier covered transactions as either a participant or a principal at HUD and throughout the Executive Branch of the Federal Government, and from participating in procurement contracts with HUD pending resolution of the subject matter of the indictment and any legal, debarment or Program Fraud Civil Remedies Act proceedings which may ensue. The suspension was initiated pursuant to 24 C.F.R. § 24.405(b), and was based on the same indictment for two counts of "Bribe Receiving in the Third Degree." By letter dated March 28, 1994, Respondent requested a hearing pursuant to 24 C.F.R. § 24.413.

By letter dated October 20, 1994, Janis notified Respondent that the Department was considering debarring Respondent from participating in primary covered transactions and lower-tier covered transactions as either a participant or a principal at HUD and throughout the executive branch, and from participation in procurement contracts with HUD for a five-year period commencing on September 30, 1993, the date the Department issued the Notice of Limited Denial of Participation to Respondent. The notice also informed Respondent that the previously imposed suspension was continuing pending a resolution of the issues related to the proposed debarment. The proposed debarment was based on Respondent's conviction in Westchester County Court of the State of New York of one count of "Attempted Bribe Receiving in the Third Degree" on June 15, 1994. By letter dated October 31, 1994, Respondent filed a timely appeal of this proposed debarment. The LDP having been superseded by the suspension pursuant to 24 C.F.R. § 24.713, Respondent's consolidated appeals shall be heard and determined as an appeal of the suspension and proposed debarment. Inasmuch as these sanctions are based on a criminal proceeding, this determination considers only the written submissions of the parties, as Respondent is not entitled to an oral hearing in this matter. 24 C.F.R. § 24.313(b)(2)(ii).

Findings of Fact

Respondent is a Commissioner of the White Plains Housing Authority ("WPHA"), and has served in that capacity for fourteen years. WPHA has seven commissioners, five of whom are appointed by the mayor of White Plains and two of whom are elected by the tenants of WPHA. Respondent is one of the two commissioners elected by the tenants. (Affidavit of Ronald A. Jackson, April 7, 1994).

On June 9, 1993, the Grand Jury of the County of Westchester issued a two- count indictment against Respondent, charging Respondent with two counts of "Bribe Receiving in the Third Degree," a class D felony. Specifically, the indictment stated that Respondent "did solicit and agree to accept a benefit from another person upon an agreement and understanding that his vote, opinion, judgment, action, decision and exercise of discretion as

a public servant would thereby be influenced." (Govt. Brief in Support of Debarment, Exh. B). On June 15, 1994, Respondent was convicted in Westchester County Court for the State of New York on one count of "Attempted Bribe Receiving in the Third Degree," a class E felony. (Govt. Brief in Support of Debarment, Exh. C). On that same day, Respondent resigned his position as a Commissioner for the WPHA. (Affidavit of Ronald A. Jackson, June 17, 1994).

On June 23, 1994, Respondent was re-elected to his position as Commissioner of the WPHA for a two year term, beginning July 1, 1994. (Affidavit of Ronald A. Jackson, June 24, 1994). Respondent took the oath of office on July 8, 1994. (Attachment to Resp. letter, July 19, 1994). On September 7, 1994, Respondent was sentenced to five years probation, 250 hours of community service, and a fine of $155. (Govt. Brief in Support of Debarment, Exh. C).

Discussion

24 C.F.R. § 24.305 states that a debarment may be imposed for:

> (a) Conviction of or civil judgment 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;
>
> (4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly effects the present responsibility of a person;

The burden is on the Government to prove by adequate evidence that cause for suspension and debarment exists. 24 C.F.R. §§ 24.313(b)(3), (4); James J. Burnett, HUDBCA No. 80-501-D42, 82 BCA § 15,716. When the proposed debarment is based on a conviction, that evidentiary standard is deemed to have been met. 24 C.F.R. §§ 24.313(b)(3) and 24.405(b). However, existence of a cause for debarment does not automatically require imposition of a debarment. In gauging whether to debar a person or entity, 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 lack of present responsibility may be inferred from past acts. Schlesinger v. Gates, 249 F.2d 11 (D.C. Cir. 1957); Stanko Packing Co. v. Bergland, 489 F. Supp. 947, 949 (D.D.C. 1980). In gauging the adequacy of the evidence in favor of debarment, various factors must be considered, including how much information is available, the credibility of the evidence, whether or not the allegations have been corroborated, and what inferences may reasonably be drawn from the evidence. 24 C.F.R. §§ 24.400(c) and 24.410(c). A debarment shall be used only to protect the public interest and not for purposes of punishment. 24 C.F.R. § 24.115(b).

Respondent argues that the imposition of debarment would be improper because: (1) Respondent is not a "principal" or "participant" as defined by the pertinent HUD regulations and, therefore, is excluded from the application of HUD regulations governing covered transactions; (2) Respondent has sworn that the criminal conduct as charged in the indictment is untrue; and (3) the proposed debarment of Respondent would violate the due process and equal protection clauses of the United States Constitution because it would disenfranchise Respondent's constituents, depriving them of their right to be represented by the individual of their choice. Respondent also offers, as evidence of mitigation, his affidavit and the affidavit of his cousin, a letter to the sentencing judge, and a petition signed by his constituents.

24 C.F.R. § 24.105(p) defines a principal in a HUD program as an "[o]fficer, director, owner, partner, key employee, or other person within a participant with primary management or supervisory responsibilities . . . ." The term "person," as used above, includes governmental agencies such as public housing authorities. 24 C.F.R. § 24.105(n). By virtue of Respondent's "supervisory responsibilities" as a Commission of the WPHA, Respondent, as well as the WPHA, clearly falls within the definition of a principal.

Respondent also argues that he is not a participant. A participant is defined as someone who enters into or may reasonably be expected to enter into a covered transaction. 24 C.F.R. § 24.105(m). The regulations divide covered transactions into primary and lower tier covered transactions. 24 C.F.R. § 24.110(a)(1). A primary covered transaction is defined as "any nonprocurement transaction between an agency and a person, regardless of type, including . . . contracts of assistance . . . ." Because Respondent is a commissioner of a housing authority receiving assistance from HUD, Respondent, as well as the WPHA, clearly engages in primary covered transactions and falls within the definition of a participant. Therefore, Respondent is subject to the HUD sanctions set forth in 24 C.F.R. Part 24.

Respondent submits that the imposition of HUD sanctions upon him is contrary to law because the sanctions prevent him from carrying out his statutory duties as a Commissioner of the WPHA. Respondent argues that he should not be subject to these HUD sanctions

because "application of these regulations [by imposing the sanctions] would be prohibited by law," an argument which relies upon an exception for "[o]ther transactions where the application of these regulations would be prohibited by law." 24 C.F.R. § 24.110(a)(2)(vii). However, Respondent misconstrues the cited regulation. The relied upon regulation setting forth an exception relates to "other transactions" not falling within the definition of a covered transaction. See 24 C.F.R. § 24.110(a)(1). As a supervisory member of a housing authority, Respondent is a participant and a principal engaged in primary covered transactions. As such, Respondent is not relieved of the application of HUD's suspension and debarment regulations simply because of his duties as a Commissioner of the WPHA. See Nell Witt, Larry A. Carter, Charles Forbush, Agnes Cowan, and Charles Hager, HUDBCA Nos. 91-5954-D77, 91-6203-D92, 91-6204-D93, 91-6205-D94, and 91-6206-D95 (February 5, 1993).

In opposition to the suspension, Respondent contends that he has effectively rebutted the charges in the indictment by denying those charges. (Resp. Brief dated April 12, 1994 and attached undated affidavit of Ronald A. Jackson). In essence, Respondent has asked this Board to examine the alleged criminal conduct which supported the indictment and subsequent conviction. The regulations governing suspension expressly state that an indictment related to certain criminal conduct constitutes adequate evidence of cause for suspension. 24 C.F.R. § 24.405(b). Indictment for bribery is adequate evidence of a cause for suspension under the pertinent HUD regulations because bribery is an offense listed in 24 C.F.R. §24.305(a)(3). Administrative agencies will not "look behind the indictment to relitigate the relevant facts." Gaye Flood, HUDALJ 89-1395-DB (Dec. 21, 1989). Furthermore, the formalities attendant to issuing an indictment carry sufficient indicia of reliability to allow the Government to protect itself temporarily from doing business with someone accused of criminal acts. James A. Merritt and Sons v. Marsh, 791 F.2d 328, 330-1 (4th Cir. 1986); Joseph Young, HUDBCA No. 91-5792-D26 (March 11, 1991). In any event, Respondent's claim of innocence as it relates to this proceeding is now moot because a state court has found Respondent guilty of "Attempted Bribe Receiving in the Third Degree." Conviction of an offense listed in 24 C.F.R. § 24.305(a) is a cause for debarment, and bribery is listed as such an offense, as is commission of a criminal offense in connection with performing a public or private agreement. See 24 C.F.R. § 24.305(a)(1). Both of these causes for debarment fit within the acts for which Respondent was found guilty. Furthermore, inasmuch as Respondent's debarment is based upon a conviction, the standard of proof of cause for debarment is deemed to have been met. 24 C.F.R. § 24.313(b)(3).

Respondent argues that his suspension and debarment essentially disenfranchise his WPHA constituents, thereby violating the due process and equal protection clauses of the United States Constitution. Administrative law judges and the administrative judges of federal agency boards of contract appeals generally do not decide constitutional issues. Califano v. Sanders, 430 U.S. 99, 108 (1977); Schlesinger v. Gates, 249 F.2d 111 (D.C. Cir. 1957), cert. denied 355 U.S. 939 (1958); Gaye Flood, supra. The doctrine of "accepted ...constitutional principles" which Respondent asserts in support of his disenfranchisement argument is not evident in this case. An administrative judicial officer simply has no

jurisdiction to weigh the constitutionality of whether tenants of a housing authority are being denied due process and equal protection when their elected representative in that authority is precluded from voting on the distribution of federal funds.

Even if cause for both the debarment and suspension of Respondent is established, consideration of mitigating factors is required, and debarment need not be imposed even if cause for debarment is established. Respondent offers in mitigation the affidavit of Haywood Burns, Respondent's cousin, who is also an attorney, and a Dean and Professor of Law at City University of New York Law School. Burns states that Respondent's role as Commissioner of the WPHA is "extremely important" to Respondent, and that he is "convinced ... of [Respondent's] ability and intention to perform his duties as Commissioner in a responsible and dutiful manner." (Attorney's Affirmation of Haywood Burns, April __, 1994). Respondent has executed an affidavit stating that he was the recipient of an award for "outstanding service to the Slater Center." (Affidavit of Ronald A. Jackson, Dec. 22, 1994). In addition, Respondent has submitted a letter to the sentencing judge from Frank Williams, Jr., a deacon at Respondent's church and Deputy Director of the White Plains Youth Bureau, requesting leniency in Respondent's sentencing. The letter also attests to Respondent's involvement with the community. (Attachment to Resp. Letter, Sept. 10, 1994). Finally, Respondent has submitted a petition signed by his constituents expressing confidence in Respondent and requesting that the HUD sanctions imposed on Respondent be removed in order that they can be fully represented in the WPHA. (Attachment to Resp. Letter, Sept. 10, 1994).

While the evidence submitted by Respondent in mitigation shows that he is an active and involved public servant, this evidence is substantially deficient in its probative value to convince me that Respondent is not presently a serious risk to the federal fisc. I am not persuaded by the opinion of Respondent's cousin that Respondent will hereafter perform his duties as a "responsible and dutiful" person, and the leniency sought by Frank Williams, while well-meaning and intending to show Respondent's concern for the community, do not allay my concerns about Respondent's ethical deficiencies when tested by personal avarice. Nor am I convinced that those tenants who signed a petition on Respondent's behalf fully comprehend the adverse impact of Respondent's criminal conduct on the integrity of this federal housing program, notwithstanding Respondent's desire to represent them in the position of public trust to which he has been elected. Far too often our citizens see individuals, such as Respondent, elected or appointed to positions of public service only to see them abuse their fiduciary role by putting their self-interest ahead of the public good.

As aggravating factors in support of a five-year debarment, the Government first argues that the debarment will have a deterrent effect on Respondent and others in his position. When a civil action such as debarment is imposed for deterrence reasons, such a sanction is deemed to constitute punishment, contrary to 24 C.F.R. § 24.115(b). Stratford Mortgage Corp., HUDBCA No. 92-G-7165-MR18 (June 1, 1994), citing, U.S. v. Bizzell, 921 F.2d 263 (10th Cir. 1990), citing U.S. v. Halper, 490 U.S. 433, 448 (1989).

Deterrence, per se, is not an appropriate aggravating factor which would justify the imposition of a five-year debarment under the circumstances of this case.

The Government argues in its brief that the existence of a previous conviction of Respondent and a prior Limited Denial of Participation imposed by HUD upon Respondent are factors which should be considered as aggravating. (Sec. Brief, Exh A.) However, this prior conviction and sanction, and Respondent's conduct giving rise to them, are not cited in the Government's complaint as a basis for this debarment. This argument was not properly raised and cannot now be used to justify the imposition of a five-year debarment against Respondent. PFG Mortgage Inc., and Robert Otto Potter, HUDBCA No. 92-G-7577-MR6 and HUDBCA No. 92-G-7598-D58 (Oct. 9, 1992). If the Government desired these allegations to be considered as aggravating circumstances, it should have either cited these circumstances as a ground in the notice of proposed debarment which served as the Government's complaint, or moved to amend its complaint to include this previous conduct as an additional ground for debarment. In doing so, the Government would have provided Respondent with adequate notice of the allegations supporting its complaint, thereby providing Respondent with an opportunity to respond to such allegations. Yet the Government failed to do this. Therefore, despite their possible materiality, these prior circumstances, which were first raised in the Government's brief, cannot now be considered as aggravating circumstances to justify the imposition of a five-year debarment. 24 C.F.R. § 24.320 states:

> (a) Debarment shall be for a period commensurate with the seriousness of the cause(s). If a suspension precedes a debarment, the suspension period shall be considered in determining the debarment period.
>
> (1) Debarment for causes other than those related to a violation of the requirements of subpart F of this part generally should not exceed three years. Where circumstances warrant, a longer period of debarment may be imposed.
>
> * * *

While the Government has failed to show that a five-year debarment is warranted, Respondent has failed to convince me by persuasive mitigating evidence that a three-year debarment will provide the Department with sufficient protection from Respondent's lack of responsibility. Nowhere in the record of this case do I find any evidence of contrition, admission of wrongdoing, or desire by Respondent to atone for his misdeeds. "Rather, by affidavit, the Respondent has affirmatively denied any illegal or wrongful conduct." (Brief in Answer for Respondent, at 13). For these many reasons, I do not find Respondent to be a responsible person. Respondent's criminal actions were directly related to his position as Commissioner of the WPHA, a position in which he exercised authority over the operations of a public body. By being involved in a bribery scheme, he undermined the integrity of the WPHA, violated his oath of office, and committed a shameful disservice to his constituents.

Conclusion

Based on the record of this proceeding, and for the foregoing reasons, I find that Respondent's actions constitute evidence of a serious lack of present responsibility, and that a debarment of four years is warranted and necessary to protect the Government and the public interest. 24 C.F.R. 24.320(a)(1). It is my determination that Ronald A. Jackson shall be debarred through September 29, 1997, credit being given for the period of time since September 30, 1993 during which Respondent has been excluded from eligibility to participate in the programs of this Department. 24 C.F.R. §24.320(a).

David T. Anderson
Administrative Judge