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

In the Matter of:	:	
MICHAEL E. IPAVEC	:	HUDBCA No. 95-A-128-D19
	:	Docket No. 95-5041-DB
Respondent	:	

Michael E. Ipavec
[redacted]

Pro se

Scheryl C. Portee, Esq.
Office of General Counsel
Department of HUD, Rm. 10251
Washington, D.C. 20410

For the Government

DETERMINATION BY ADMINISTRATIVE JUDGE DAVID T. ANDERSON

February 21, 1996

Statement of the Case

By letter dated February 6, 1995, Michael E. Ipavec ("Ipavec" or "Respondent") received a notice of suspension and proposed debarment from Nicolas P. Retsinas, Assistant Secretary for Housing-Federal Housing Commissioner for the United States Department of Housing and Urban Development ("HUD," "Department" or "Government"). The letter stated that HUD intended to debar Respondent from further participation in primary covered transactions and 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 with HUD for a five year period, based upon his conviction for violation of one count of 18 U.S.C. § 371, conspiracy to commit bank and mail fraud. The letter also stated that Respondent was being temporarily suspended from participation in HUD's programs pending a final determination of the debarment action.

Respondent made a timely request for an opportunity to submit a brief and documentary evidence. A hearing in cases of debarment and suspension based solely upon a

conviction are limited to the submission of briefs and documentary evidence. 24 C.F.R. § 24.313 (b)(2)(ii). This determination is based upon the written submissions of the parties.

Findings of Fact

1. Respondent was an attorney and licensed to practice law in New Hampshire between March 1983 and October 1993. (Resp. Answer, at 1). Between July 1, 1987 and August 9, 1988, Respondent represented sellers/developers of residential condominiums in New Hampshire. To attract home buyers, Respondent and others falsely represented to federally insured financial institutions the buyer's cash deposit or lack of deposit held by the sellers/developers to obtain Federal Housing Authority ("FHA") approved mortgages. Respondent continued the fraud by not making full disclosures of secondary financing to lending institutions. These practices allowed Respondent and others to sell residential condominiums for little or no money down. (Govt. Exh. A). Respondent also "signed closing documents which he knew to contain false statements concerning down payments and the non-existence of secondary financing." (Govt. Exh. A, at 6).

2. In 1993, the U.S. Attorney's Office for the District of New Hampshire conducted a criminal investigation involving Respondent's fraudulent real estate practices. Respondent cooperated fully with the investigation. The period of time scrutinized by the criminal investigation was July 1987 to August 1988. Respondent's cooperation with the U.S. Attorney's Office led to six other indictments. On October 19, 1993, Respondent signed a Plea Agreement, pleading guilty to one count of conspiracy to commit mail and bank fraud in violation of 18 U.S.C. § 371. (Govt. Exhs. B and C).

3. On October 19, 1993, Respondent voluntarily resigned from the New Hampshire Bar Association and informed the State Supreme Court of New Hampshire that Respondent pled guilty in the U.S. District Court for the District of New Hampshire to conspiracy to commit bank fraud. On October 20, 1993, the State of New Hampshire Supreme Court ordered the suspension of Respondent from the practice of law in New Hampshire. (Resp. Exh. 3).

4. On December 30, 1994, the U.S. District Court sentenced Respondent to 6 months of incarceration, of which 3 months were home confinement with electronic monitoring, 500 hours of community service, and a financial penalty assessment fee of $50.00. (Govt. Exhs. A, B, and C).

5. On April 10, 1995, the State of New Hampshire Supreme Court acknowledged receipt of Respondent's judgment of the U.S. District Court for the District of New Hampshire indicating that Respondent pled guilty and had been sentenced for one count of conspiracy to commit bank fraud. Respondent was ordered to show cause on or before May 10, 1995, why Respondent should not be disbarred from the practice of law in New Hampshire. (Resp. Exh. 4).

6. In mitigation, Respondent filed three letters of support from various professional and personal colleagues directed to the Board, and copies of thirty-eight letters sent to the sentencing judge, Hon. Joseph DiClerico, Chief Judge, U.S. District Court for the District of New Hampshire. (Resp. Exh. 1, Composite Exh. 2, and Joseph H. Young letter dated May 31, 1995).

Discussion

24 C.F.R. §24.305, provides that 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 affects 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. § 24.133 (b)(3).

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 111 (D.C. Cir. 1957); Stanko Packing 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 he is not a "principal" or "participant" because the "effect of [his] suspension and disbarment is to render it impossible for [Respondent] to practice law and thereby hold the position that once made [Respondent] a "principal" or "participant" under the regulations." (Resp. Reply Brief, p. 4) Respondent, thus, suggests that the pertinent HUD regulations relating to debarment are in some way inapplicable to him.

24 C.F.R. § 24.105(m) defines a "participant" as "any person who ... reasonably may be expected to enter into a covered transaction." 24 C.F.R. § 24.105(p) defines "principal" as:

> a person who has critical influence on or substantive control over a covered transaction, whether or not employed by the participant. Persons who have a critical influence or substantive control over a covered transactions are:
>
> (13) Accountants, consultants, investment bankers, architects, engineers, attorneys and others in a business relationship with participants in connection with a covered transaction under a HUD program: ...
>
> (22) Employees or agents of any of the above.

Respondent is a "participant" and "principal" in a covered transaction because he was an attorney for sellers/developers involved with FHA-approved mortgages, and may reasonably be expected to do so in the future. Therefore, Respondent is subject to HUD regulations as defined in 24 C.F.R. §§ 24.105(m), and 24.105(p).

Respondent admits that,"back in 1987 and 1988, [he] made judgments that were wrong, and which constituted criminal acts." (Resp. Answer, p. 2). Respondent used his banking and legal expertise to falsely represent to banks the deposits received by the sellers/developers. The public was led to believe they could legally purchase a condominium with little or no money down. In order to effectuate this fraudulent scheme, Respondent flagrantly abused and disregarded the Government requirements for mortgage lending. During that time, Respondent states that he saw "no potential harm in pursuing this course of action." (Resp. Reply Brief, p. 2). Those acts represent a lack of responsibility as does Respondent's belief at that time in the innocence of his "course of action."

Respondent submits that he is currently unemployed and he is concerned that he could be employed in one or more industries which has ties to the federal government. (Resp. Reply Brief, p. 5). Respondent gives two specific examples: (1) he might work as an

administrator for a hospital or other medical services provider which relies upon federal Medicare or Medicaid payments; and (2) Respondent "hope[s] to buy ... [his] own home and finance that purchase with a traditional first mortgage." (Resp. Reply Brief, p. 5). Clearly, during a debarment period, Respondent may not work as an "[a]dministrator of nursing homes and projects for the elderly financed or insured by HUD." 24 C.F.R. § 24.110 a(1)(ii)(C)(18). However, if the current home of Respondent has a HUD mortgage, that mortgage would not be affected by debarment, although a subsequent mortgage may be affected. 24 C.F.R. § 24.200. However severe Respondent's financial problems and personal adversity may be, they do not mitigate the seriousness of his criminal conduct. It was entirely Respondent's decision to make "judgments that were wrong and which constituted criminal acts," and which subsequently caused his present unemployment. (Resp. Answer, p. 2).

In a debarment case, cause for debarment is established by a conviction, and those facts on which the conviction is based are deemed proven. 24 C.F.R. § 24.313(b)(3); Ronald Jackson, HUDBCA No. 95-A-106-D5 (June 7, 1995). Even if cause for both the suspension and debarment of Respondent is established, consideration of mitigating factors is required. The burden is on Respondent to demonstrate that he is presently responsible notwithstanding his conviction. Respondent offers in mitigation a letter from Michael J. Gunnison, Assistant U.S. Attorney, Office of the U.S. Attorney for the District of New Hampshire, written to the Board on Respondent's behalf. (Resp. Exh. 1). Gunnison, in his letter dated May 19, 1995, sets forth Respondent's "unhesitating cooperation" and assistance with the criminal investigations, and his belief that Respondent has a "genuine desire to do the right thing and has never attempted to avoid responsibility." Id. Gunnison further asserts that Respondent's probation officer believes Respondent to be "possibly the most genuinely contrite individual he has worked with in the course of his career." (Resp. Exh. 1). This persuasive letter and the many letters of strong support from professional colleagues and personal friends, lead me to believe, after careful consideration, that a five-year period of debarment of Respondent is not required.

While the evidence submitted by Respondent in mitigation shows that his act of conspiracy may have been an aberration, this evidence is sufficiently deficient in its probative value to convince me that Respondent does not presently poses some risk to the public. Respondent cooperated with the U.S. Attorney's investigation, yet this cooperation also facilitated a plea agreement which resulted in a period of incarceration of only six months. Respondent's cooperation with law enforcement officials was prompted only after Respondent was touched by the criminal investigation conducted by the office of the U.S. Attorney in 1993. Only then did he act to make amends for his criminal conduct which occurred between July 1987 and August 1988. Nevertheless, I do find that Respondent's cooperation with federal authorities is entitled to substantial consideration.

To support a five-year period of debarment the Government argues that the debarment will have a deterrent effect on Respondent and others who do business with the Federal Government. However, 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, 488 (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 passage of over seven years since the commission of the criminal acts, and evidence of Respondent's conduct since that time, are compelling mitigating circumstances, and in this case, are additional reasons to reduce the debarment period from the five year period of exclusion proposed by the Government. Respondent's understanding and acknowledgement of his past wrongful acts suggests that he is no longer inclined to repeat such conduct, and, certainly, Assistant U.S. Attorney Gunnison believes this to be the case. I am persuaded by this record in this case that HUD, and the public which it serves, will be secure in dealing with Respondent in the near future.

However, Respondent's past wrongful acts were of such a serious nature, that I am not convinced that he should not be debarred at all. A reasonable period of time should provide amble opportunity for Respondent to learn fully not only HUD's program requirements, but the underlying reasons for them as well. Had he been more aware of the reasons why HUD requires downpayments and limits the circumstances in which it will permit secondary financing of HUD-insured mortgages, he might not have acted as imprudently as he did. His course of conduct was not an innocent one, and I am not fully convinced that he understands why that is so, even if he is genuinely contrite. While I believe that Respondent will not again place the integrity of the Department's programs at risk, it is my determination that a debarment of two years is warranted in this case.

Conclusion

Based upon the record of this proceeding, it is my determination that Respondent be debarred for a period of two years in order to protect the Government and the public. Respondent shall be debarred from this date through February 5, 1997, credit being given for the time since February 6, 1995 during which Respondent has been suspended from participating in HUD programs.

David T. Anderson
Administrative Judge