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

In the Matter of: **JOSEPH A. STRAUSS,** **THE PHOENIX ASSOCIATES, LTD.** Respondents	HUDBCA No. 95-G-113-D11 Docket No. 95-5021-DB

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DETERMINATION BY ADMINISTRATIVE JUDGE TIMOTHY J. GRESZKO

May 19, 1995

Statement of the Case

By letter dated November 8, 1994, Michael B. Janis, General Deputy Assistant Secretary, U.S. Department of Housing and Urban Development, ("HUD", "Department", or "Government"), notified Joseph A. Strauss ("Strauss" or "Respondent") and his affiliate, The Phoenix Associates, Ltd. ("Phoenix"), that, based on the conviction of Respondent for violation of 18 U.S.C. §§ 371 and 1001, the Department was considering debarring Respondent and Phoenix from participating 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 an indefinite time period from the date of Respondent's suspension, August 23, 1993. That suspension was imposed upon Respondent and Phoenix upon Respondent's indictment in the United States District Court for the District of Columbia charging

Respondent with violations of 18 U.S.C. §§ 371, 1621 and 1001. The notice also informed Respondent and Phoenix that their temporary suspension was continuing pending final determination of the issues in this matter.

By letter dated December 9, 1994, Respondent and Phoenix requested a hearing in regard to the proposed debarment pursuant to 24 C.F.R. §§ 24.313 and 24.314. The Government filed a brief in support of debarment on February 6, 1995. Respondent filed an answer in the nature of a brief on January 10, 1995, and a reply to the Government's brief on March 1, 1995. 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. HUD, an agency and department of the United States, was created by Act of Congress to administer Federal programs that provide assistance for housing and the development of the nation's communities. One such program administered by HUD was the Section 8 Moderate Rehabilitation program, which was enacted by Congress to improve and preserve the nation's housing stock for low-income families by authorizing HUD to offer rental subsidies to the owners of rental properties on behalf of low-income tenants, provided that the owners agreed to rehabilitate their properties to make them decent, safe, and sanitary. Under the Section 8 Moderate Rehabilitation Program, HUD would award funds to state and local public housing authorities (PHA's), which in turn would enter into contracts with owners and developers of properties that were suitable for rehabilitation as low-income rental housing. Under these contracts, the PHAs would promise to pay rental subsidies, for a period of fifteen years, to owners and developers who agreed to rehabilitate their properties. These rental subsidies would commence upon satisfactory completion of the rehabilitation. (Statement of Facts, ¶¶ 1-3, Criminal No. 93-298-HHG, United States District Court for the District of Columbia, dated April 13, 1994 ("Statement of Facts"), Resp. Exh. 3).

2. Respondent was employed at HUD as a Special Assistant to the Secretary of HUD, Samuel R. Pierce, Jr., from on or about May 6, 1981, to on or about May 27, 1983. In the position of Special Assistant to the Secretary, Respondent served on the staff of the Secretary and, among other things, advised the Secretary on policy matters and performed a variety of assignments for the Secretary and the Executive Assistant to the Secretary, but did not have authority to approve HUD funding or applications. (Govt. Exh. C, Criminal Information, para. 7; Statement of Facts, ¶ 4, Resp. Exh. 3).

3. In late 1982, [redacted] Rojo, a housing developer in Rio Piedras, Puerto Rico, took steps to acquire the Gran Bahia hotel and housing complex (the "Gran Bahia Project"), located in San Juan, Puerto Rico, and to convert it into low-income rental housing. At about this same time, Rojo retained Carlos A. Figueroa as a consultant to assist Rojo with the acquisition and financing of the Gran Bahia Project. Beginning in early 1983, Rojo sought

rental subsidies from HUD under the Section 8 Moderate Rehabilitation Program for the Gran Bahia Project. The Puerto Rico Housing Finance Corporation, a PHA located in San Juan, Puerto Rico, had agreed to finance the rehabilitation on the condition that Rojo receive from HUD, among other things, sufficient Section 8 Moderate Rehabilitation rental subsidies to cover the project's financial needs. In early 1983, Figueroa contacted a close friend, [redacted] Capo, who at the time was serving as Deputy Legal Counsel in the Office of the Vice President of the United States. Capo subsequently arranged a luncheon meeting attended by himself, Figueroa and Respondent. Respondent informed Figueroa that Respondent would be leaving HUD and setting up his own consulting business. At or about this time, Respondent was assigned by a HUD official the task of assisting the Gran Bahia application. (Statement of Facts, ¶¶ 6-8, Resp. Exh. 3).

4. Sometime thereafter and prior to his departure from HUD, Respondent was promised, and agreed to accept, future compensation to be paid by Rojo over time, contingent upon the occurrence of certain events, before or after Respondent left HUD, including the funding of the Gran Bahia project and the project's syndication. Both before and after the agreement was reached, Respondent took actions, in his position as a Special Assistant to the Secretary of HUD, to help obtain a HUD Section 8 Moderate Rehabilitation subsidy for the Gran Bahia project. (Statement of Facts, ¶ 9, Resp. Exh. 3)

5. On May 27, 1983, Respondent resigned from HUD and subsequently formed Phoenix, a private consulting company which he owned and controlled. On approximately June 15, 1983, after agreeing with Rojo concerning the amount of compensation to be received in accordance with the agreement set forth above, Phoenix billed Rojo for the first of two $25,000.00 payments, referencing the Gran Bahia project. On or about June 23, 1983, Rojo wrote a $25,000.00 check payable to Phoenix which was deposited by Phoenix on July 8, 1983. On April 2, 1984, Phoenix billed Rojo for the second $25,000.00 payment, again referencing the Gran Bahia project. On April 12, 1984, Rojo sent Phoenix the second $25,000.000 payment by check written against the Gran Bahia Investment Group checking account, which Phoenix deposited. (Statement of Facts, ¶¶ 22-24, Resp. Exh. 3; Criminal Information No. 93-298-HHG, Resp. Exh. 5).

6. On May 19, 1986, Phoenix received a subpoena from a grand jury sitting in the United States District Court for the District of Columbia for any "and all records regarding any HUD or HUD related or prospective HUD project. . .," referencing "possible violations [of] 18 U.S.C. § 207." Shortly thereafter, Respondent called Rojo and informed him (1) that Respondent's attorneys would be writing to Rojo asking Rojo to cooperate with Respondent's attorneys, and (2) that Respondent would be traveling to Puerto Rico to meet with Rojo personally to discuss the investigation. Respondent did travel to Puerto Rico and met with Rojo. They discussed the fact that the existing Phoenix invoices referenced the Gran Bahia project and agreed that false invoices omitting any reference to Gran Bahia would be created and substituted in their place, which was subsequently done by Rojo and his secretary. They also agreed to tell anyone who might ask that the two $25,000.00 payments were unrelated to the Gran Bahia project. At or about this time, Respondent directed an

employee of Phoenix to make certain that copies of all the Gran Bahia invoices were removed from the Phoenix client files. (Statement of Facts, ¶¶ 29-30, Resp. Exh 3).

7. On July 3, 1986, Respondent's former attorneys submitted to the U.S. Attorney's Office for the District of Columbia, which was conducting the investigation, a memorandum captioned "Application of 18 U.S.C. § 207 to the activities of Joseph Strauss," which stated on behalf of Respondent that, while employed at HUD, Respondent "had no involvement whatsoever, in any manner, with regard to general or specific matters before the agency in connection with HUD's Section 8 Mod Rehab programs . . . ." (Statement of Facts, ¶ 32, Resp. Exh. 3).

8. During the Spring and Summer of 1989, the Subcommittee on Employment and Housing of the Committee on Government Operations of the House of Representatives of the United States Congress (the "Lantos Committee"), held hearings to investigate allegations of abuse, favoritism, and mismanagement in the administration of HUD programs, including the administration of the Section 8 Moderate Rehabilitation program, during the tenure of HUD Secretary Samuel R. Pierce, Jr. A material part of that investigation was to determine how HUD's Section 8 Moderate Rehabilitation program was administered, and whether, to what extent, and in what respects Respondent, in his former position as a Special Assistant to the Secretary of HUD, had been involved in the administration and operation of that program. (Statement of Facts, ¶ 37, Resp. Exh. 3).

9. On June 23, 1989, Respondent testified before the Lantos Committee, and in that testimony he concealed the fact that, while employed by HUD as a Special Assistant to the Secretary, he had had substantial involvement in a Section 8 Moderate Rehabilitation project, specifically the Gran Bahia project, and, that he had taken substantial steps in his capacity as a Special Assistant to the Secretary to help obtain a HUD Section 8 Moderate Rehabilitation subsidy for that project. ((Statement of Facts, ¶ 38, Resp. Exh. 3).

10. On July 28, 1993, a Grand Jury for the United States District Court for the District of Columbia returned a six count Indictment against Respondent, charging Respondent with violations of 18 U.S.C. § 371, Conspiracy, 18 U.S.C. § 1001, Concealing a Material Fact, and 18 U.S.C. § 1621, Perjury. (Govt. Exh. A). On November 17, 1993, a Superseding Indictment was returned against Respondent which was substantially the same as the Indictment, except that another defendant, [redacted] Figueroa was added. (Govt. Exh. B). Subsequently, Independent Counsel Arlin Adams entered a two count Criminal Information in the District Court, charging Respondent with violations of 18 U.S.C. § 371, conspiracy to violate Section 1001 by concealing material facts, and 18 U.S.C. § 1001, concealing a material fact. (Govt. Exh. C).

11. On April 15, 1994, Respondent pleaded guilty to the two count criminal information. A sentencing hearing was conducted on October 14, 1994. In return for Respondent's guilty pleas, the Office of Independent counsel withdrew the previous indictments. Respondent expressed remorse at the hearing on his sentence, admitting that he

"made a very serious mistake," and accepting "responsibility for [his] wrongdoing." The Office of Independent Counsel filed a motion with the court, pursuant to 18 U.S.C. § 3553 (e) and § 5K1.1 of the United States Sentencing Guidelines, in which it asserted that Respondent had provided the Office of Independent Counsel with substantial assistance in the investigation or prosecution of others involved in criminal activities. For that reason, the Office of Independent Counsel asked the court to consider a downward departure in Respondent's sentence. Respondent's sentence included a $100.00 special assessment, a $20,000.00 fine, a three year period of probation, and 200 hours of community service. In announcing Respondent's sentence, U.S. District Judge Harold Greene stated that "there is no reason that I can see, to the extent anyone can make a prediction, of a repetition." Judge Greene also stated that "because of the difficulty of no prior record and so on, I have decided that incarceration is not necessary." The Judge also took into consideration that Rojo and Figueroa "got off, so to speak, in the vernacular." (Resp. Exhs. 3-4, 6-10).

12. A number of individuals wrote letters to Judge Greene, attesting to numerous acts of public service and certain charitable acts performed by Respondent. Respondent is described therein, as a "valuable and energetic member of his community who is dedicated to assisting the underdog [or] the down and out." Respondent is also credited with hiring local people to work on his farm. One letter indicates, that in 1991, during Operation Desert Storm, Respondent traveled to Saudi Arabia, at his own expense, and assisted in the environmental clean-up of beaches in the Persian Gulf. Another letter indicates that in August, 1992, Respondent arranged and paid for the transportation of bottled water and other equipment to South Florida to assist the victims of Hurricane Andrew. He also spent 9 weeks in South Florida assisting in the relief effort. Other letters indicate that Respondent has donated equipment to the police and fire departments in Petersburg, West Virginia, where he lives, and that he has received awards for acts of community service. Respondent is described in a number of these letters as a dedicated parent and husband, and a responsible individual who made one mistake in life that will probably not be repeated. Respondent also states that he has paid most of the fine assessed by the court. (Resp. Exhs. 11, 12, 13, 14, 15, 16, 17).

Discussion

Respondent admits that he is a "participant and principal," under HUD's regulations, in that he participated, as a consultant, in "covered transactions" in the past. *See* 24 C.F.R. §§ 24.105(m), 24.105(p); 24.110(a)(ii)(C)(11). Respondent also admits that Phoenix is his affiliate. *See* 24 C.F.R. § 24.105(b).

Applicable regulations provide that debarment may be imposed for:

(a) Conviction of or civil judgement 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;

* * * * *

(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously affects the present responsibility of a person.

* * * * *

(d) Any 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 (4).

Although cause for debarment must be established by a preponderance of the evidence, if the debarment is based upon a conviction, the evidentiary standard is deemed to be met. 24 C.F.R. § 24.313(b)(3). Respondent's conviction is cause for his debarment under 24 C.F.R. §§ 24.305(a)(1), (a)(4) and (d), quoted above. The existence of a cause for debarment does not automatically require imposition of an administrative sanction. On gauging whether to sanction a person, all pertinent information must be assessed, including the seriousness of the acts or omissions, and any 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 person as well. 48 Comp. Gen. 769 (1969). "Responsibility" connotes probity, honesty, and uprightness." *Arthur H. Padula*, HUDBCA No. 78-284-D30 (Jun. 27, 1979). 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 v. Bergland*, 489 F.Supp. 947, 949 (D.D.C. 1980). Although the test for debarment is present responsibility, a lack of present responsibility may be inferred from past acts. *Schlesinger v. Gates*, 249 F.2d 111 (D.C. 1957), *cert. denied*, 355 U.S. (1958). Debarments shall be used to protect the public and not for the purpose of punishment. 24 C.F.R. § 24.115(b).

The Government argues that Respondent should be debarred for an indefinite period, because of the seriousness of his offenses and because he abused his position, as a Special Assistant to the Secretary, for personal gain. The Government also argues that the proposed indefinite debarment sanction should be imposed for its deterrent effect. Respondent argues that debarment is not warranted because of numerous mitigating factors, including Respondent's remorse and acceptance of responsibility, his demonstrated personal business integrity, his cooperation with the Government and the Independent Counsel, his youth at the time of the offense, his efforts to settle his debt to society, the fact that he has been suspended by HUD for over a year, his otherwise unblemished record of good citizenship, and other factors. Respondent's counsel also argues that it would be punitive to debar Respondent for the "deterrent effect." I agree with Respondent's counsel that it would be

improper to debar Respondent solely for the deterrent effect, as neither I nor HUD have the authority to punish Respondent, but only to determine if he is "presently responsible." *See Stratford Mortgage Corp.*, HUDBCA No. 92-G-7615-MR18 (June 1, 1994), citing *U.S. v. Bizzell*, 921 F.2d 263 (10th Cir. 1990); *U.S. v. Halper*, 490 U.S. 433, 448 (1989). However, for the reasons set forth below, I find that the Government has established cause for a five year debarment of Respondent and Phoenix.

The offenses which Respondent pleaded guilty to, and the facts underlying these offenses, raise serious questions with respect to Respondent's honesty and integrity. The facts surrounding Respondent's acceptance of a substantial sum of money from Rojo, pursuant to an agreement Respondent made with Rojo while Respondent was still a Special Assistant to Secretary Pierce, evidences a total lack of integrity. Although this lapse occurred in 1983, Respondent attempted, in 1986, to destroy or conceal the evidence of his involvement in the Gran Bahia project, and instructed employees to do the same. Respondent then concealed these facts in 1989, from the Lantos Committee, and was convicted in 1994 in the Federal District Court for doing so. These past acts, which demonstrate an appalling, consistent lack of integrity on multiple occasions over an extended period of time, are sufficient to create a strong inference of a lack of present responsibility.

There is substantial evidence in this case which establishes that Respondent is a generous, kind, civic-minded individual who takes good care of his family. Evidence of this nature is not compelling evidence of present responsibility, because it sheds little light on the integrity with which Respondent conducts his business affairs. *See Jose M. Ventura Alisis*, HUDBCA Nos. 87-2956-D6, 87-3403-D24 (Sep. 22, 1988), 1988 WL 100974. Other mitigating factors cited by Respondent, including his post-indictment cooperation with the Office of Independent Counsel, the passage of time since the offense, the absence of misconduct since the offense was committed, his expressions of remorse, the District Judge's remarks during sentencing, and the light sentence imposed by the District Judge, militate against the Government's argument that an indefinite period of debarment is necessary to protect the public interest. The judge's sentence was, in part, related to the judge's assessment that it was unlikely that Respondent would repeat his behavior. This is a factor which the Board considers in determining the amount of protection the public needs in assessing an appropriate period of debarment. *See, e.g., James A. Damaskos*, HUDBCA No. 932-C-D32 (Oct. 14, 1993), 1993 WL 411432. These factors do not, however, convince me that no period of debarment is necessary, because they shed insufficient light on Respondent's responsibility in the conduct of his business affairs, as a contractor, or as a program participant. Respondent has submitted no substantial evidence of his current business practices, such as affidavits from individuals or entities with whom he currently conducts business. Such evidence would be highly relevant to the issue of the Respondent's fitness to participate in programs of this Department. The offenses at issue are of a nature that is highly destructive of the public's confidence in important Government social policy programs, and raise doubts with respect to Respondent's honesty and integrity when monetary gain is involved. Under the facts and circumstances of this case, I find that a debarment for a period of five years is warranted in order to protect the public interest.

Conclusion

For the foregoing reasons, Respondent and Phoenix shall be debarred through August 1998, credit being given for the period of suspension. Respondent may request the arring official to reverse the debarment decision or to reduce the period or scope of the arment not earlier than six months after the debarment decision becomes final. *See* 24 .R. § 24.320(c).

Timothy J. Greszko
Administrative Judge