



**Board of Contract Appeals**

U. S. Department of Housing and Urban Development  
Washington, D.C. 20410-0001

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In the Matter of: :  
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 RODERICK NIELSON, : HUDBCA No. 99-C-107-D6  
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 Respondent :  
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Mr. Roderick Nielson Respondent Pro se  
[Redacted]

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RECOMMENDED DECISION

By Administrative Judge Jean S. Cooper  
August 31, 1999

Statement of the Case

By letter dated February 16, 1999, Respondent Roderick Nielson filed a request for reinstatement to eligibility to participate in programs of the U.S. Department of Housing and Urban Development (HUD). Respondent has been debarred by HUD for an indefinite period beginning November 21, 1989. This case was referred to this Board to hear this case as "Hearing Official Designee." The Board docketed the case on April 28, 1999 as a referral to make findings of fact, conclusions of law, and a recommended decision for the final determination by the debarring official as to whether Respondent's period of debarment should be reduced. The regulations governing this proceeding are those relating to a request for the reversal of a debarment decision or the reduction of a period of debarment in effect in 1989, 24 C.F.R. § 24.320. The applicable regulation does not provide for an oral hearing.

The parties filed written submissions, supported by documentary evidence, in support of their positions. Respondent's submission was entitled "Application for Relief." He also filed an additional affidavit in response to the Government. This recommended decision is based upon the preponderance of the evidence in the record, considered as a whole.

### Findings of Fact

1. By letter dated November 21, 1989, from Austin Fitts, then Assistant Secretary for Housing, Respondent was notified that HUD intended to debar him for an indefinite period for serious irregularities in his business with HUD as president of Mountain View Mortgage Company (MVMC). The proposed debarment was based on information contained in an audit by HUD's Office of Inspector General (IG) dated June 27, 1989, that MVMC was either not remitting one-time mortgage insurance premiums (OTMIPs) to HUD or was remitting them late without paying late charges because MVMC was having cash flow problems and did not have adequate quality controls in place. The notice stated that Respondent, as an officer of MVMC responsible for its management and operation: 1) failed to remit OTMIPs for 121 mortgages in the amount of \$348,007.79; 2) incorrectly reported 47 mortgage closing dates in order to avoid payment of penalty and interest charges; 3) failed to pay \$17,701.11 in penalties as of February 28, 1989, on 168 OTMIPs not paid or where incorrect closing dates were reported to HUD; and 4) failed to pay \$35,756.39 in interest as of February 28, 1989, on 407 OTMIPs not paid, paid late, or where incorrect closing dates were reported to HUD. Respondent was suspended pending determination of debarment. (Government Exhibits 1, 2.)

2. Respondent did not request a hearing on the proposed debarment or suspension. A Final Determination was issued on January 18, 1990, debarring Respondent from further participation in HUD programs for an indefinite period beginning November 21, 1989. From that date, he was excluded from participation in covered transactions throughout the Executive Branch of the Federal Government and excluded from participation in procurement contracts with HUD. (Gov't. Exh. 3.)

3. Respondent's Application for Relief, requesting reinstatement from debarment, states that the OTMIPs listed in the IG audit were subsequently paid to HUD, except for six cases. Of those six cases, three were loans that were "quickly paid in full," and, with respect to the remaining three listed, there were typographical errors on the case numbers. He further states that MVMC no longer exists. Respondent states that at the time he discovered the

shortage, he notified Trust America Mortgage, an MVMC investor, and made arrangements to have the OTMIPs paid by Trust America Mortgage. Respondent and his father each deeded their homes to Trust America Mortgage, and Respondent's father also gave \$100,000 toward payment of the OTMIPs. Respondent also states that he has trained himself to be a better businessman and employer than he was ten years ago, and he would do nothing to harm the public or HUD programs if he were allowed to again participate in HUD programs. Respondent submitted persuasive documentary evidence that the OTMIPs had been paid, a quit claim deed from Respondent and his wife deeding their home to Trust America Mortgage, and two affidavits of persons familiar with Respondent's business practices and personal character, which support Respondent's averments in the Application for Relief, that he now conducts his business in a professional and ethical manner. From 1992 to 1996, Respondent had a computer consulting business, and he also obtained a law degree. (Respondent's Exhibits.)

4. The Government admits that all of the OTMIPs listed in the IG audit have been paid and that future commissions earned by MVMC were surrendered in order to pay some of the outstanding OTMIPs. The Government further admits that the reasons for Respondent's debarment were mitigated by the payment of the OTMIPs, the closing of MVMC, the transfers of property by Respondent and his father to Trust America, Inc. to partly cover the debt, and the surrender of future commissions, which "demonstrate the Respondent's honesty and present responsibility." The only question raised by the Government was whether other investors who helped to pay the outstanding OTMIPs, which were Cal Federal Mortgage Company, Countrywide Home Loans, Inc., Fleet Mortgage Corporation, Liberty Mortgage Co., Inc., Resource America Mortgage, Inc., and Florida Group, Inc., had also "been made whole." In response to the Government's query, Respondent provided an Additional Affidavit of Roderick Nielson, dated July 27, 1999, in which he states that neither he nor MVMC are indebted to any of the mortgagee investor companies listed by the Government for any of the OTMIPs paid by those companies (Govt. Exh. 4; Gov't. Brief; Affidavit dated July 27, 1999.)

#### DISCUSSION

The regulation applicable to the reversal or reduction of the period or scope of debarment that was in effect in 1989, 24 C.F.R. §24.320<sup>o</sup>, applies to this case. It provides as follows:

- (c) The respondent may request the debarring official to reverse the debarment decision or to reduce the period or scope of debarment. Such a request shall be in

writing and supported by documentation. The debarring official may grant such a request for reasons including but not limited to:

- (1) Newly discovered material evidence;
- (2) Reversal of the conviction or civil judgment upon which the debarment was based;
- (3) Bona fide change in ownership or management;
- (4) Elimination of other causes for which the debarment was imposed; or
- (5) Other reasons the debarring official deems appropriate.

Respondent has been debarred since November 1989, a period of almost ten years. In that time, he eliminated the main cause for which the debarment had been imposed, the failure of MVMC to remit OTMIPs for 121 mortgages. Respondent arranged to have all of the outstanding OTMIPs paid that were listed in the IG audit. He did this by deeding his home to an investor mortgagee, surrendering future mortgage commissions owed to MVMC to cover the shortfall on the OTMIPs and selling mortgages to investor mortgagees who would pay the balance of the OTMIPs not covered by Respondent's home, his father's home, \$100,000 paid by Respondent's father to cover the debt, and the future commissions due MVMC. Respondent owes no unpaid debt to the various investor mortgagees who helped pay the outstanding OTMIPs. Respondent also furthered his education by going to law school and running a computer consulting business from 1992 to 1996. He now seeks to work in a mortgage company but his debarment prevents him from doing so.

I find that this record presents a picture of a man who has taken responsibility for past mistakes by righting the wrongs that were committed at MVMC in regard to remitting OTMIPs to HUD. He has done this at great personal cost to him and his family. He also learned from his experience to be more responsible and ethical in his business dealings. These are compelling reasons to reduce the period of Respondent's debarment.

Ten years is an extraordinarily long period of debarment. The period of a debarment generally should not exceed three years, but where circumstances warrant, a longer period of debarment may be warranted. 24 C.F.R. § 24.320(a). An indefinite debarment is unlimited, and should only be used in the very most egregious cases. What happened at MVMC was indeed egregious, and Respondent was its President. However, the payment of the OTMIPs listed in the IG audit, on which the debarment was based, mitigates the continued need of HUD or the public to be protected from Respondent.

In terminating the indefinite debarment of the Petitioner in Charles Kirkland, HUDBCA No. 90-5285-D57 (January 14, 1990), the Board stated:

It is well established that a significant passage of time since the commission of the improper conduct can be a mitigating factor in determining whether the debarment of a contractor is necessary to protect the public. Cf. ARC Plumbing and Heating Corporation, HUDBCA No. 88-3459-D68 (Feb. 2, 1990); Spencer H. Kim and KameX Construction, HUDBCA No. 87-2468-D58 (June 21, 1988). While present responsibility can be inferred from past acts, the passage of time diminishes the probative weight which should be given to prior criminal conduct as that conduct relates to the issue of present responsibility. Solomon Sylvan, *supra*, citing John Seravalli, Jr., HUDBCA Nos. 84-880-D37 and 84-881-D38 (May 30, 1985) and Paul Grevin, HUDBCA No. 85-930-D16 (July 10, 1986). Under the circumstances of this case, Petitioner's debarment from HUD programs for over ten years would appear to have provided sufficient protection to the Government, particularly since the record in this case discloses no interim violations which would warrant the continuation of Petitioner's debarment. Quite the contrary, the evidence in this case persuades me that Petitioner is conducting his professional affairs in a responsible manner. The Government has offered not a scintilla of evidence which could be relied upon to reach an opposite conclusion.

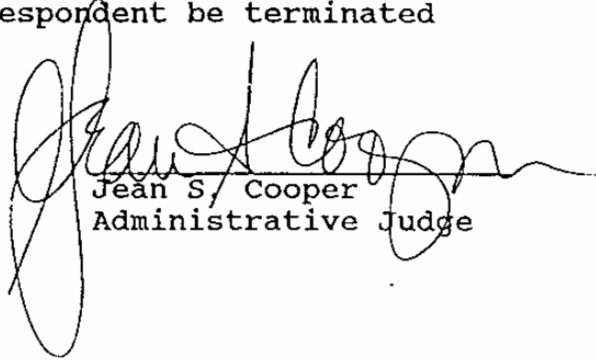
I believe that the same rationale articulated by the Board in Kirkland should be applied in the case presently before me. (See also Lawrence C. Shank, HUDBCA No. 82-724-D43 (April 15, 1983), where Respondent's multiple and conscientious acts of mitigation over a 3-1/2 year period following the death of his superior with whom he had engaged in criminal conduct were sufficient to find that no debarment was warranted).

HUD's regulatory policy on debarment and suspension expressly states that "Debarment and suspension are serious actions which shall be used only in the public interest and for the Federal Government's protection and not for purposes for punishment." 24 C.F.R. § 24.115(b). An indefinite debarment that is continued long after the acts on which it is based have been mitigated or corrected is punitive, because it no longer serves the purpose of protecting the Federal Government. Present responsibility is the test of whether a debarment should be imposed. 24 C.F.R. §24.115; Schlesinger v. Gates, 249 F.2d 111(D.C. Cir. 1957). It is an equally reasonable test for reducing a period of debarment. I find that Respondent is presently responsible,

and his indefinite debarment should be terminated at this time.

CONCLUSION AND RECOMMENDED DECISION

Respondent is presently responsible and the primary causes for which the indefinite debarment was imposed no longer exist. Given the circumstances of this case, the continuation of this debarment after almost ten years would be punitive. Based upon the record of this proceeding, I find insufficient evidence to support the continuation of this debarment, and conclude that neither the public nor the Federal Government needs further protection from doing business with Respondent. It is my recommendation that the indefinite debarment of Respondent be terminated immediately.



Jean S. Cooper  
Administrative Judge