

In the Matter of:

RUSSELL G. BARAKAT, : HUDBCA NO. 96-B-131-D17  
Respondent : Docket No. 96-0072-DB

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U.S. Department of Housing and  
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451 7th Street, S.W., Room 10251  
Washington, D.C. 20401

FINDINGS OF FACT BY ADMINISTRATIVE JUDGE LYNN J. BUSH

August 6, 1996

Statement of the Case

By letter dated May 15, 1996, a notice of suspension and proposed debarment was sent to Russell G. Barakat (Barakat or Respondent) from Michael B. Janis, General Deputy Assistant Secretary for Public and Indian Housing, United States Department of Housing and Urban Development (HUD, Department of Government) The notice stated that HUD intended to debar Respondent from future participation in procurement and non-procurement transactions as either a participant, principal or contractor with HUD and throughout the Executive Branch of the federal government, for a three-year period from the date of the notice of suspension and proposed debarment. The notice further informed Respondent that he was immediately suspended from participation in transactions and contracts pending determination of debarment. The suspension and proposed debarment are based upon Barakat's conviction, in the United States District Court for the Southern District of Florida, of fraud and making false statements on an Individual Income Tax Return in violation of 26 U.S.C. § 7206(1).

Controlling regulations provide that within 30 days after receipt of the notice of proposed debarment, Respondent may submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment. 24 C.F.R. §24.313(a). Requests for a hearing must be made in writing within that same time period (24 C.F.R. §24.313(a)(3)). An oral hearing is permitted only where there exist issues of genuine material fact and where the administrative action is not based upon a conviction or civil judgment. 24 C.F.R. § 24.313(b)(1). In the instant case, since the action was based upon a conviction, the regulations (a copy of which was provided to Respondent) do not authorize an oral hearing.

Despite the fact that an oral hearing was not authorized,

HUD's notice of suspension and debarment offered Respondent the opportunity to submit a written argument or to request an informal hearing in opposition to the suspension and proposed debarment, provided such written opposition or hearing request was submitted to the Debarment Docket Clerk within 30 days of Respondent's receipt of the notice. Within that 30 day period, Respondent, through counsel, submitted to the debarment Docket Clerk a request for "an informal hearing" and reserved the right "to present both written and oral argument in opposition to the suspension and proposed debarment at that time."

By notice of assignment dated July 9, 1996, the debarring official referred this matter to the Board of Contract Appeals for a review of the Administrative Record and the issuance of appropriate findings. 24 C.F.R. §24.314(a) (1). The Administrative Record does not indicate that a hearing was held before the debarring official and no written submissions of Respondent in opposition to the suspension and proposed debarment were included in the Administrative Record prior to referral of the matter to this Board. The Administrative Record is now closed and no additional submissions or proceedings before the Board are authorized under the Department's regulations, as written. Board action is restricted to appropriate findings of fact based upon the Administrative Record. Id.

In debarment cases, the burden of proof rests upon the agency proposing debarment. 24 C.F.R. §24.314(c) (2). However, since the proposed debarment in this case is based upon a conviction, that standard is deemed to have been met. 24 C.F.R. §24.314(c) (1). The standard of proof in debarment actions requires that cause for debarment be established by a preponderance of the evidence. Id. I find, by a preponderance of the evidence, the below-listed facts.

#### Findings of Fact

1. At all times relevant, Barakat was the Broward Housing Authority Executive Director. The Broward County Housing Authority (Housing Authority) was created by the Florida state legislature to provide housing in Broward County for low to moderate income families and elderly, disabled and handicapped single persons. The Housing Authority was governed by five commissioners appointed by the Governor of Florida and approved by the Broward County Commission. Barakat was appointed to his position by the Housing Authority commissioners. (Administrative Record; Indictment, Ex. 1, at 1; Verdict, Ex. 2, at 1.)

2. The Broward County Commission also created the Broward County Housing Finance Authority (Housing Finance Authority) for the purpose of increasing the supply of housing for low and moderate income persons by financing the purchase and rehabilitation of affordable housing. The Housing Finance Authority was governed by five board members appointed by the Broward County Commission. Barakat was a board member of the Housing Finance Authority and served as its chairman from February, 1988 through January, 1989. (Administrative Record; Indictment, Ex. 1, at 2; Verdict, Ex. 2, at 1.)

3. By verdict rendered on May 6, 1996, a jury sitting for the United States District Court Southern District of Florida found Barakat guilty of one count of violation of 26 U.S.C. 7206 (1). The jury found that Barakat willfully signed and filed a false federal income tax return for tax year 1989, by falsely reporting "Other Income" of only \$1,000, when he knew that he had received other income in excess of the amount reported. (Administrative Record; Indictment, Ex. 1, at 6-7; Certificate of Trial Attorney, Ex. 1, at 8; Verdict, Ex. 2, at 1.)

4. As Executive Director of the Broward County Housing Authority and as a member of the board of the Broward County Housing Finance Authority, Barakat participated or would reasonably be expected to participate in HUD programs as a participant and/or principal as defined in 24 C.F.R. 24.105. (Administrative Record; Notice of Suspension and Proposed Debarment, Ex. 3, at 1; Cintron Ltr, Ex. 12, at 1.)

5. While a finding of present lack of responsibility may be inferred from past acts, the record in this case is insufficient to definitively draw such an inference. The record does not contain the sentencing report or judgment of conviction from the court to show how serious the court considered Barakat's crime. The record also fails to indicate whether Barakat's understatement of his income was by one dollar or by one million dollars. Finally, the record does not reflect that the criminal act committed by Barakat was performed in the course of his duties, but instead, involved his personal financial statements to the Internal Revenue Service, with no indication of the extent to which Barakat's criminal conduct might be expected to place the programs of the Department at risk. (Administrative Record; Indictment, Ex. 1, at 6-7; Verdict, Ex. 2, at 1.) The record does reflect, however, that the criminal act committed by Barakat took place over six years ago and there is no evidence of wrongdoing by Barakat before or since. (Administrative Record; Indictment, Ex. 1, at 6; Verdict, Ex. 2, at 1.)

6. Conspicuously absent from the Administrative Record is any statement on behalf of Respondent in opposition to, or in mitigation of, the suspension and proposed three-year debarment. Respondent, through counsel, very clearly stated a desire and an intention to oppose the suspension and proposed debarment (Administrative Record; Kay Ltrs., Exs. 4-5.) I find that, because of HUD's poorly drafted notice of suspension and proposed debarment and the restrictions of 24 C.F.R. §24.314(a) (1), which limit the hearing officer to a "review of the administrative record," Respondent appears to have been denied an opportunity to present argument and relevant documentary evidence in opposition to the suspension and proposed debarment. See Statement of the Case, supra. Thus, the evidence presented to this Board by HUD against Respondent stands unopposed.

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Lynn J. Bush  
Administrative Judge

