

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
Washington, D.C.

In the Matter of:

JAMES C. NISTLER,

Respondent.

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Docket No. 12-3803-DB

DEBARRING OFFICIAL'S DETERMINATION

Introduction and Background

By Notice of Proposed Debarment dated September 29 2011 ("Notice"), the Department of Housing and Urban Development ("HUD") notified Respondent JAMES C. NISTLER that HUD was proposing his debarment from future participation in procurement and nonprocurement transactions as a participant or principal with HUD and throughout the Executive Branch of the Federal Government for a period of ten years from the date of the final determination of this action. The Notice further advised Respondent that his proposed debarment was in accordance with the procedures set forth in 2 CFR parts 180 and 2424 and was based upon his conviction in the Circuit Court of the State of Oregon, Jackson County, for violation of Oregon Revised Statute 166.7209 [Racketeering], 591.135 [Fraud/Deceit Regarding Securities/Securities Business, and 164.507 [Aggravated Theft in the First Degree]. The Notice continued that Respondent specifically is accused of defrauding funds from investors based on false sales information to build a housing development project. The Notice charged that Respondent's actions are evidence of serious irresponsibility and are cause for debarment under the provisions of 2 C.F.R. §§ 180.800(a)(1),(3), and (4).

Respondent was found guilty and convicted after a jury trial of 17 felony counts, including racketeering, fraud/deceit regarding securities/securities business, and aggravated theft in the first degree. Respondent was sentenced to a 19-month term of imprisonment and two years of post-prison supervision. Additionally, Respondent was ordered to make restitution of \$257,611.88.

In response to the Notice, in a letter dated November 1, 2011, Respondent, through his attorney, requested a hearing. A telephonic hearing was held on March 2, 2012¹, before the Debarring Official's Designee, Mortimer F. Coward. Respondent appeared by phone *pro se*. Patrisha Tijerina, Esq. appeared on behalf of HUD.

¹ The hearing originally was set for February 7, 2012, but was rescheduled because the Scheduling Order was misdirected and did not reach Respondent.

Summary

I have decided, pursuant to 2 C.F.R. part 180, to debar Respondent from future participation in procurement and nonprocurement transactions as a participant or principal with HUD and throughout the Executive Branch of the Federal Government for a period of three years from the date of this Determination. My decision is based on the administrative record in this matter, which includes the following information:

1. The Notice of Proposed Debarment dated September 29, 2011.
2. A letter dated July 5, 2011, from the Real Estate Agency of the State of Oregon to Respondent informing him of the Agency's decision not to take action against him, if any, pending the outcome of Respondent's appeal of his criminal conviction.
3. A letter from Respondent's attorney dated November 1, 2011, addressed to the Debarment Docket Clerk, requesting a hearing in this matter.
4. The Declaration of James Nistler, with attachments, filed March 06, 2012.
5. The Government's Brief in Support of Ten-Year Debarment (including all exhibits and attachments thereto).
6. Respondent's Opening Brief filed with the Oregon Court of Appeals, appealing his criminal conviction.

Government Counsel's Arguments

Counsel states, as background information, that Respondent was an unlicensed salesperson and broker-dealer who engaged in a fraudulent real estate scheme designed to obtain money from investors for an alleged housing development. Respondent carried out his scheme over a period from March 1, 2006, to April 30, 2007. Specifically, Respondent, as charged in the Indictment, offered and sold securities without disclosing the purpose for and use of the more than \$1 million he collected from the defrauded investors. As a result of his actions, Respondent was indicted and convicted of eight counts of securities fraud, one count of racketeering, and eight counts of aggravated theft in the first degree. Respondent was sentenced as set forth above.

Counsel argues that, based on Respondent's past professional activities, he is subject to HUD's debarment regulations. Counsel reviews the relevant regulations in 2 C.F.R. part 180 in support of her position. In this connection, counsel points out that Respondent is a principal real estate broker and president of a real estate company. Respondent is, therefore, a principal in a covered transaction. *See* 2 C.F.R. § 180.970. Moreover, as a real estate broker and a real estate company president, Respondent is likely to engage in the future in a covered transaction as a participant or principal, citing, *inter alia*, 2 C.F.R. § 180.995. Counsel also notes that Respondent, as a former Deputy Assistant Secretary for Single Family Housing with a reputation as a leader in the real estate industry, is "likely to draw upon his knowledge . . . and reputation for his future career development." Gov't Brief at 6.

Counsel argues that cause for Respondent's debarment exists pursuant to 2 C.F.R. §§ 180.800(a)(1) and (3) by virtue of his conviction for fraud and theft, respectively. Additionally, cause for debarment of Respondent is found in 2 C.F.R. §§ 180.800(a)(4), counsel contends, based on his conviction for racketeering. Counsel notes that

Respondent's racketeering conviction involved his "misuse of . . . three businesses to commit criminal acts [which] clearly demonstrates a lack of business integrity or business honesty that seriously and directly affects Respondent's present responsibility." *Id.* at 8. Counsel argues further that, by Respondent's unlicensed sale of unregistered securities and other illegal activities, he "betrayed the investors' trust and exploited them for his personal gain" and his criminal misconduct "demonstrates his disregard for private citizens and the real estate industry," and "presents a significant risk to HUD, to others in the real estate industry, and to the public at large that similar abuses may occur in the future." *Id.* at 10.

Counsel notes that during Respondent's former service as Deputy Assistant Secretary for Single-Family Housing, he participated in enforcement cases as a witness in which HUD sought to penalize offenders for abusing HUD's programs. This knowledge, however, did not deter Respondent from exploiting innocent investors for personal gain. Respondent's actions, as counsel sees it, demonstrate that he lacks the "requisite responsibility" to participate in Federal programs. For that reason, counsel argues that Respondent poses a risk to the Government and public and he is not a person with whom the Government or public should do business.

In reviewing the aggravating and mitigating factors in 2 C.F.R. § 180.860, which the Debarring Official may consider in determining the appropriateness and period of debarment, if any, Counsel observes that Respondent has not asserted any defenses or identified specific facts that contradict the statements in the Notice. *See* 2 C.F.R. § 180.825(a)(1). As an aggravating factor, counsel argues Respondent's actions resulted in actual harm to his victims as evidenced by the sentencing court's ordering him to make restitution of \$257,611.88 to the defrauded elderly investors. In addressing the factor with respect to frequency and duration of Respondent's fraudulent scheme, counsel observes that the scheme took place over a period of a year and involved at least eight security sale transactions. Similarly, Respondent planned the scheme in that he knowingly and willfully deceived his investors and worked with three other business entities to carry out the fraud and thefts which led to his conviction. Counsel maintains that there is no evidence that Respondent recognizes the seriousness of his wrongdoing, nor has he made restitution or paid the costs of investigating his criminal conduct or cooperated with the Government. With respect to the kind of positions held by Respondent that are relevant in these proceedings, Respondent had substantial control and responsibility over the entire scheme and formerly served the Department as the DAS for Single-Family Housing. There is no evidence that Respondent brought the offense to the attention of any government authority, and Respondent has provided no evidence that mitigates the need for his debarment.

Counsel concludes that based on the seriousness and extent of Respondent's crimes, his lack of integrity and present responsibility, and the factors set forth in 2 C.F.R. § 180.860, Respondent should be debarred for ten years to protect the Government and to serve the public interest.

Respondent's Arguments

Respondent testified that he did not sell securities, as the Government charged. The enterprise started out as a joint venture and the losses that were incurred resulted from the builder's inability to complete construction of the houses because of a devastated

housing market. Respondent stated there is a “lot of evidence to show that [the criminal case now on appeal] will go away.” Respondent expressed his regret that he had “to go through this sorrow,” because not only did he lose money in the venture but his wife did as well. Respondent testified further that it was not fair for the state to bring criminal charges against him and that the “state needs to fix the definition of a security.”

In his Declaration, Respondent requests that the proposed debarment be set aside pending the outcome of the criminal case. Respondent states that he and his family are broke, but currently he is a licensed real estate broker, which provides him the opportunity to earn commissions from his real estate sales. Respondent offered that were he to be debarred he would “lose his ability to obtain a commission on a sale of real estate which may involve matters within the purview” of HUD. Respondent argues that it would not be “appropriate to prevent [him] from participating in transactions involving HUD pending the outcome of [his] appeal, considering [his] considerable devotion and dedicated service for more than 5 years.” Respondent notes that HUD has never received any complaints with respect to his real estate professional services for clients.

In further support of his request for a stay in this proceeding, Respondent cites a letter from his defense attorney that questions the admission of certain evidence in Respondent’s criminal appeal. Respondent also refers to a letter from the Oregon Real Estate Agency which agreed not to proceed with any administrative action against Respondent while the appeal of his criminal conviction is pending. Also, Respondent finds support for his position in the Memo Regarding Stay of Execution of Sentence and Release Pending Appeal and Order on Motion for Stay of Execution of Judgment and Release of Defendant Pending Appeal and Brief Supporting Motion for Judgment of Acquittal as to Securities Counts. The issues raised in these two filings, as Respondent sees it, are favorable to his appeal. The Amended Notice of Appeal, again according to Respondent, shows the significant errors committed by the trial court in his criminal matter. Respondent believes that any one of the issues raised in these filings, if reversed by the Court of Appeals, is sufficient to vacate his conviction.

Respondent goes on to cite in his favor the recent renewal of his broker’s license by the Oregon Real Estate Agency as evidence that he “should be allowed to pursue [his] chosen profession pending the outcome of [his] appeal.” Respondent believes also that because his co-venturer was not prosecuted for his involvement in the failed real-estate development project demonstrates “the lack of understanding of the state prosecutors and jury in finding that one participant in this project violated the law and that the other participant’s actions were found without fault. The unfairness and lack of logic of this outcome show that [his] appeal is likely to be successful.”

Respondent addresses the mitigating factors in 2C.F.R. § 180.600 and asserts that he “did not sell securities of any kind [but that he] merely arranged for loans, the proceeds of which were used to build houses.” According to Respondent, his wrongdoing occurred in connection with only one project and he is no longer involved with that project. Respondent states that he doesn’t dispute that he was involved in obtaining the “loans,” as Respondent characterizes the funds received from the lenders. Respondent argues that the lenders knew what they would receive as a result of making the loans. The lenders also knew that if the real-estate market failed, he would not be able to repay the loans.

Respondent emphasizes that there was no deception on his part at any time. Respondent insists that it is difficult for him to accept responsibility for wrongdoing when he does not believe his actions were wrong. Respondent, however, says that he is remorseful about not being able to repay the loans but he does not have the means to do so now. Respondent also states that he is not obligated to make any payments arising from the criminal matter until the appeal has been decided. Respondent claims that he cooperated fully in the investigation.

Respondent urges the Debarring Official to consider that his debarment at this time would not serve to protect the public or HUD. His debarment, Respondent claims, would only inhibit his “ability to support [him] and [his] family as a licensed real estate broker,” the only license he now holds. Respondent states that the situation that led to his conviction will not recur because he no longer has a relationship with his former joint venturer, he is financially unable to engage in development work, and he voluntarily surrendered his mortgage broker’s license. Respondent adds that “[i]t is appropriate that [his proposed] debarment be set aside and this proceeding be abated pending the completion of his appeal.” Respondent concludes by requesting that the record in this matter remain open until he submits a copy of his appellate brief to the “Oregon Court of Appeals no later than March 31, 2012.”² In his appellate brief, Respondent assigns numerous errors arising from his criminal trial. In particular, Respondent argues that the transactions in which he engaged that led to his conviction do not constitute investment contracts under certain legal tests recognized by the Oregon courts.

Findings of Fact

1. Respondent was at all relevant times a licensed real estate broker and mortgage broker.
2. Respondent collected funds from various investors to be used in the development and construction of several houses.
3. The builder with whom Respondent was associated was unable to complete construction of the homes.
4. The investors suffered financial losses as a result of the failed development.
5. Respondent was not a licensed securities or broker-dealer.
6. Respondent was indicted on two counts of racketeering, eight counts of securities fraud, and eight counts of aggravated theft in the first degree related to his efforts to raise funds for construction of the housing development.
7. Respondent was convicted in a jury trial of 17 of the 18 felony counts and was sentenced to 19 months in prison and ordered to make restitution of \$257,611.88 to his victims.

² In response to Respondent’s request, the record was held open until the near expiration of the 45-day deadline after the close of the record for the issuance of the Determination. The brief was received in this office on April 12, 2012, a few days before the deadline for issuance of the Determination. Pursuant to 2 C.F.R. § 180.870(a), and in an effort to ensure that, as provided in 2 C.F.R. § 180.120(a) “all information” is considered by the Debarring Official, the deadline was extended “for good cause.” *See also* 2 C.F.R. § 180.835(a) (“Debarment proceedings are conducted in a fair and informal manner. The debarring official may use flexible procedures to allow you as a respondent to present matters in opposition. In doing so, the debarring official is not required to follow formal rules of evidence or procedure in creating an official record.”)

8. Respondent's criminal conviction is on appeal.
9. Respondent has not made any payments towards the court-ordered restitution.
10. Respondent is a former HUD Deputy Assistant Secretary for Single-Family Housing.

Conclusions

Based on the above Findings of Fact, I have made the following conclusions:

1. As a licensed real estate broker, pursuant to 2 C.F.R. § 180.120(a), Respondent "may reasonably be expected to be a participant or principal in a covered transaction," thus making him subject to the debarment regulations in 2 C.F.R. part 180.
2. Respondent's conviction for fraud and theft, which are offenses specifically identified in the regulations, provides cause for his debarment under 2 C.F.R. §§ 180.800(a)(1) and (3), respectively.
3. Respondent's conviction for racketeering, an offense not specifically enumerated in the regulations, but which is clearly "an offense indicating a lack of business integrity or business honesty that seriously and directly affects [his] present responsibility" provides further cause for his debarment. *See* 2 C.F.R. § 180.800(a)(4).
4. The Government has established the cause for debarment by a preponderance of the evidence, the requisite standard of proof, because "the proposed debarment is based upon a conviction." 2 C.F.R. §§180.850(a) and (b).
5. Respondent, pursuant to 2 C.F.R. §180.855(b), has "the burden of demonstrating to the satisfaction of the debarring official that [he is] presently responsible and that debarment is not necessary." *See also*, 2 C.F.R. §180.125(a).
6. Respondent has adduced no evidence in this proceeding that would demonstrate that he is presently responsible. I have, however, considered the relative leniency of the sentence imposed by the court in determining an appropriate sentence.
7. Respondent relies heavily, and has requested a stay of these proceedings, on the fact of the appeal of his criminal conviction and on his assertion of the relevance of the issues raised therein to the instant matter.
8. It is well settled that the criminal conviction on which a debarment is based cannot be collaterally attacked nor relitigated in this forum, and "the decision is binding on this forum, unless and until it is overturned." *See In the Matter of James E. McFrederick*, HUDBCA No. 92-G-7585-D52, 1992 HUD BCA LEXIS 10 (October 7, 1992).
9. The debarment regulations make no provision for a stay of the debarment proceedings pending disposition of the appeal of the criminal conviction on which the debarment is based.
10. It is well settled that "an appeal of a conviction does not preclude the imposition of a debarment." *In the Matter of Frank Moscato and City Construction Development, Inc.*, HUDBCA No. 94-A-127-D6, 1994 HUD BCA LEXIS 8 (August 1, 1994) (Citations omitted).

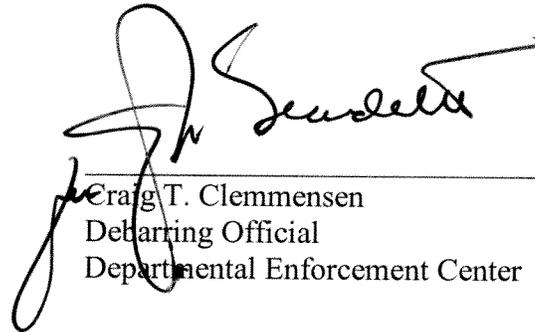
11. Although Respondent has expressed some remorse for the plight of his victims, Respondent does not acknowledge any wrongdoing on his part, and makes it plain that he does not accept responsibility for the consequences of his actions.
12. Respondent's actions set forth above, and in the record as a whole, raise grave doubts with respect to his business integrity and personal honesty.
13. HUD has a responsibility to protect the public interest and take appropriate measures against participants whose actions may affect the integrity of its programs.

Determination

Based on the foregoing, including the Findings of Fact, Conclusions, and the administrative record, I have determined, in accordance with 2 C.F.R. §§180.870(b)(2)(i) through (b)(2)(iv), to debar Respondent for a period of three years from the date of this Determination. Respondent's debarment is effective for covered transactions from the date of this Determination. Respondent's "debarment is effective for covered transactions and contracts that are subject to the Federal Acquisition Regulation (48 CFR chapter 1), throughout the executive branch of the Federal Government unless an agency head or an authorized designee grants an exception."

Dated: _____

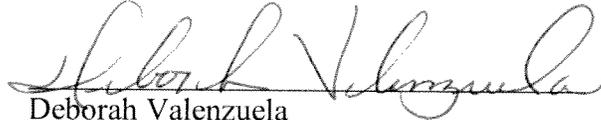
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Craig T. Clemmensen
Debarring Official
Departmental Enforcement Center

CERTIFICATE OF SERVICE

I hereby certify that on this 18TH day of April, 2012, a true copy of the DEBARRING OFFICIAL'S DETERMINATION was served in the manner indicated.



Deborah Valenzuela
Debarment Docket Clerk
Departmental Enforcement Center (Operations)

HAND-CARRIED

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FIRST CLASS MAIL

James C. Nistler

