

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

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<b>In the Matter of:</b>	*	
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	*	<b>Docket No. 11-3692-DB</b>
<b>PENNY LANE ELLINGSON,</b>	*	
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	*	
<b>Respondent.</b>	*	
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**DEBARRING OFFICIAL'S DETERMINATION**

**INTRODUCTION**

By Notice of Proposed Debarment dated October 28, 2010 ("Notice"), the Department of Housing and Urban Development ("HUD") notified Respondent PENNY LANE ELLINGSON that HUD was proposing her 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 three-year period from the date of the final determination of this action. The Notice further advised Respondent that her proposed debarment was in accordance with the procedures set forth in 2 CFR parts 180 and 2424. In addition, the Notice informed Respondent that her proposed debarment was based upon her conviction in the Wilkin County District Court of Minnesota for violating Minnesota Statute § 469.009, subd. 3 (Conflict of Interest). Respondent was fined \$500.00 for her conviction.

A telephonic hearing on Respondent's proposed debarment was held in Washington, D.C. on March 15, 2011, before the Debarring Official's Designee, Mortimer F. Coward. Respondent was represented by Samuel S. Johnson, Esq. Joe Kim, Esq. appeared on behalf of HUD.

Summary

I have decided, pursuant to 2 CFR part 180, to debar Respondent from future participation in procurement and nonprocurement transactions, as a participant, principal, or contractor 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 October 28, 2010.
2. The complaint issued December 7, 2009, along with the finding of probable cause that Respondent engaged in a conflict of interest when she entered into a contract in which

she had a personal financial interest with her husband in her official capacity with the Breckenridge Housing and Redevelopment Authority (BHRA).

3. The Register of Actions recording, among other things, the entry of Respondent's guilty plea to the conflict of interest charge and the court's Sentencing Order.
4. The Government's Brief in Support of Debarment filed February 11, 2011 (including all exhibits and attachments thereto).

### Government Counsel's Arguments

Government counsel states that Respondent was the executive director of BHRA when she hired and paid her husband for repair work on housing units owned by BHRA. Respondent's actions led to her being charged with violating Minnesota Conflict of Interest statute - - Contract with Spouse. On February 16, 2010, Respondent pleaded guilty to the charge and was convicted and sentenced in the Wilkin County District Court.<sup>1</sup>

Counsel argues that Respondent was the Executive Director for almost ten years at the BHRA, a housing authority that received HUD funds. In that position, Respondent would have gained knowledge in administering HUD and other community development initiatives. Accordingly, it is reasonable to expect Respondent to continue using that knowledge in future employment that may involve her controlling HUD funds. As such, Respondent may be expected to be a principal in a covered transaction pursuant to 2 CFR § 180.850 and is subject to the debarment regulations.

Counsel adds further that debarment may be imposed for conviction of "commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects [a respondent's] present responsibility." See 2 CFR § 180.800(a). By virtue of Respondent's conviction for conflict of interest, the cause for debarment is established and the requisite standard of proof, preponderance of the evidence, is met in accordance with 2 CFR § 180.850. Counsel points out "Respondent admitted that the State had sufficient evidence to convict her for misusing her official position by steering BHRA contracts to her spouse." Counsel also notes that Respondent cannot contest the merits of the conviction in this forum, thus her arguments attacking her conviction in this proceeding are irrelevant.

Counsel states that conflict of interest statutes deal with a person's business integrity, honesty, and responsibility. It is reasonable to conclude, counsel argues, that Respondent's conviction for engaging in a conflict of interest as the executive director of BHRA seriously and directly affects Respondent's present responsibility. Counsel argues further that Respondent's abuse of her public position gives HUD no assurance that she currently has the honesty and integrity to protect public funds. HUD can only ensure the integrity of Federal programs by conducting business with responsible persons. See 2 CFR §§ 180.125(a). Respondent's conviction shows that she lacks the necessary honesty and

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<sup>1</sup> As recited in the Statement of Probable Cause, Respondent hired her husband and paid him \$3,175.00 for work to be performed on BHRA units. Three checks were issued to Respondent's husband dated February 13, 2007, March 12, 2007, and May 29, 2007, in the amounts of \$1,900.00, \$1,075.00, and \$200.00, respectively. A "statement was taken from the defendant [i.e., Respondent] and the defendant admitted that she had contracted with her spouse to provide repair services or remodeling services in units in Breckenridge in Wilkin County, Minnesota."

integrity to do business with the Federal Government. Consequently, counsel urges that Respondent be debarred from further participation in Federal programs to protect the public interest.

In arguing for an appropriate period of debarment for Respondent, counsel reviews what he sees as the aggravating factors in this case. *See* 2 CFR § 180.860. Counsel states that Respondent held the highest position in BHRA, “thus the most culpability for the wrongdoing.” Secondly, Respondent used her position in BHRA to plan, initiate, or carry out the wrongdoing. Further, Respondent’s wrongdoing was not an isolated incident because Respondent made three separate payments to her spouse over several months. *See* Government’s Brief at 9.

Counsel concludes that for all the foregoing reasons a three-year debarment of Respondent is necessary to protect HUD and the public interest.

### Respondent’s Arguments

Respondent’s attorney contends that the description of events by Government counsel is not accurate because Respondent never admitted to any of the activities Government counsel described.<sup>2</sup> Respondent, according to her attorney, did not admit any of the allegations in the complaint and entered an *Alford* plea.<sup>3</sup> Respondent’s attorney argued that it was speculation Respondent had knowledge of the funds paid to her husband, but the allegation was not proven in court. It is speculation based on facts not proven. Counsel contends that the distribution of funds was co-signed by the BRHA chairman and authorized by the board and the accounting department. Counsel concluded that because of the erroneous assumptions by the Government, the case fails and should be dismissed.<sup>4</sup>

### Findings of Fact

1. Respondent was at all relevant times the executive director of BHRA, a public housing authority that received HUD funds.
2. Respondent hired and paid her husband to perform work on BHRA housing units.

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<sup>2</sup> In his oral presentation, Government counsel stated that Respondent admitted to hiring her husband over a three-month period and to do work for BHRA for which he was paid.

<sup>3</sup> There is no evidence in the record that Respondent entered an *Alford* plea. Respondent’s attorney complained at the hearing that he only received a certified copy of Respondent’s Sentencing Order at 4:36 p.m. the day before the hearing. Respondent’s attorney requested that he be given until May 1, 2011, to file a post-hearing submission. The Debarring Official’s Designee granted the request. To date, the Debarring Official’s Designee has not received any submissions from Respondent or her attorney.

<sup>4</sup> Although Respondent’s counsel insisted that the Government’s case was based on “speculation” and “erroneous assumptions,” counsel proffered no credible facts or evidence to substantiate his characterization of the Government’s case. Assuming *arguendo* that Respondent did enter an *Alford* plea, Respondent’s counsel, at least in this proceeding, would have been free to cite facts from the prosecutor’s proffer of the factual basis for the *Alford* plea to challenge the Government’s putative “erroneous assumptions” or “speculation.” That, of course, Respondent’s counsel did not do. *See* 2 CFR § 180.835. *Cf.* ¶9 at 4 of this Determination.

3. Respondent was charged with a conflict of interest violation, pleaded guilty, and was fined \$500.00.<sup>5</sup>
4. Respondent expressed no remorse for her criminal conduct and challenges the factual basis of her criminal conviction.

### Conclusions

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

1. BHRA was a participant in covered transactions by virtue of its receiving HUD funds. *See* 2 CFR §§ 180.200 and 180.970(a).
2. Respondent as executive director of BHRA at all relevant times was an agent or representative of the housing authority.
3. As an agent or representative of BHRA and in a position to control the use of HUD funds provided to the housing authority, Respondent was a principal in covered transactions pursuant to 2 CFR 180.980 and 995.
4. As a principal in covered transactions, Respondent is subject to HUD's debarment regulations. *See* 2 CFR §§ 180.120 and 180.150.
5. Respondent's criminal conviction serves as the basis for her debarment.
6. Pursuant to 2 CFR 180.800(a)(4), a conviction for an "offense indicating a lack of business integrity or business honesty that seriously and directly affects [a respondent's] present responsibility" is a cause for debarment.
7. Respondent's conflict of interest conviction inherently calls into question Respondent's business honesty and business integrity and casts serious doubt on her present responsibility.
8. Respondent's attempt to challenge her criminal conviction in this debarment proceeding finds no support in the law. Respondent cannot collaterally attack her conviction and her arguments are irrelevant in this proceeding. *See, e.g., In the Matter of Frank Moscato*, HUDBCA No.94-A-127-26, 1994 HUD BCA Lexis 8 (August 1, 1994). *See also, In the Matter of Richard Scarborough*, HUDBCA NO. 90-4885-D5, 1990 HUD BCA Lexis 4 (February 13, 1990) and *In the matter of Robert F. Hayter*, HUDBCA No. 82-697-D25, 1983 HUD BCA LEXIS 19 (March 23, 1983). In *Hayter*, it was held that "[S]ince it is axiomatic that [the administrative judge is] without authority to consider any challenge to the validity of the conviction itself, . . . it [is] inappropriate and futile to consider contentions in mitigation to the extent that their acceptance would be necessarily premised upon impeachment of the validity of [Respondent's] conviction."
9. Respondent's claim that she entered an *Alford* plea, though unsupported in the record, even if true, does not change the fact of her criminal

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<sup>5</sup> The Register of Actions submitted as Ex. E of the Government's Pre-Hearing Brief records that on 2/16/10 Respondent entered a plea ("Conflict of Interest -Takes part in forbidden conflict") and was sentenced the same day. The plea is not further described, i.e., there is no indication it was an *Alford* plea, and there is no plea agreement in the record. It is indisputable, however, that Respondent was convicted of a criminal offense. And as indicated above, 2 CFR § 180.800 only requires a conviction for committing certain enumerated offenses or misconduct associated therewith (as obtained in Respondent's case) to trigger a debarment action.

conviction. *See, e.g., U.S. v. Vinton*, 631 F.3d 476, 480, holding that “It is well established that ‘an *Alford* plea, like other guilty pleas, results in a conviction,’ and . . . *Alford* pleas are indistinguishable from other guilty pleas. . . . [I]t is not important whether the . . . conviction was the result of a traditional guilty plea, an *Alford* plea, or conviction by a judge or jury; what matters is the fact of the conviction itself” (internal citations omitted).

10. Respondent does not accept responsibility for her criminal conduct and expresses no regret for her wrongdoing. *See* 2 CFR § 180.860(g).
11. The Government has met its burden of demonstrating that cause exists for Respondent’s debarment based on Respondent’s conviction. *See* 2 CFR 180.850 and 855.
12. Respondent’s actions that led to her criminal conviction raise grave doubts with respect to her business integrity and personal honesty.
13. Respondent has raised no mitigating factors nor are there any evident in this case to the Debarring Official.
14. The seriousness of Respondent’s criminal conduct acts as an aggravating factor justifying a period of debarment.
15. HUD has a responsibility to protect the public interest and take appropriate measures against participants whose actions may affect the integrity of its programs.
16. HUD cannot effectively discharge its responsibility and duty to the public if participants in its programs or programs that it funds fail to act with honest and integrity.

#### DETERMINATION

Based on the foregoing, including the Findings of Fact, Conclusions, and the administrative record, I have determined, in accordance with 2 CFR 180.870(b)(2)(i) through (b)(2)(iv), to debar Respondent for a three-year period 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: \_\_\_\_\_

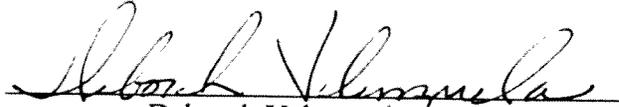
6/7/11



Craig T. Clemmensen  
Debarring Official

CERTIFICATE OF SERVICE

I hereby certify that on this 13<sup>TH</sup> day of June 2011, a true copy of the DEBARRING OFFICIAL'S DETERMINATION was served in the manner indicated.



Deborah Valenzuela  
Debarment Docket Clerk

**HAND-CARRIED**

Mortimer F. Coward, Esq.  
Debarring Official's Designee

Geoff Patton, Esq.  
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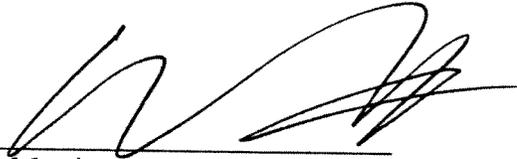
CONCURRENCE:

In the Matter of:

**PENNY LANE ELLINGSON – DOCKET NO. 11-3692-DB**

Dated: \_\_\_\_\_

*May 27, 2011*



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Mortimer F. Coward  
Debarring Official's Designee