

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

In the Matter of:

STACI D. BILLINGS,

Respondent.

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Docket No. 11-3700-DB

DEBARRING OFFICIAL'S DETERMINATION

INTRODUCTION

By Notice of Proposed Debarment dated October 07, 2010 ("Notice"), the Department of Housing and Urban Development ("HUD") notified Respondent STACI D. BILLINGS 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 period of three years 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 Warren County Court for the State of New York for violation of New York State Penal Law § 155.35 (Grand Larceny in the Third Degree).

A telephonic hearing on Respondent's proposed debarment was held in Washington, D.C. on June 28, 2011, before the Debarring Official's Designee, Mortimer F. Coward. Respondent was present by phone, appearing *pro se*. Joseph J. Kim, Esq. appeared on behalf of HUD. The record closed on October 7, 2011.¹

¹ As indicated above, the Notice was issued on October 7, 2010, and, among other things, advised Respondent that her request for a hearing had to be "submitted within 30 days of [her] receipt" of the Notice. In a letter to Respondent dated December 30, 2010, the Department advised Respondent that because she "did not respond to the Notice within the required 30 days" her debarment had become final. Subsequently, it was determined that Respondent had timely requested a hearing but her request had been misdirected through no fault of hers. Consequently, the December 30, 2010, Determination effectively was vacated and the matter was reinstated and set for hearing originally on June 14, 2011, but thereafter continued to June 28, 2011. Post hearing submissions were received from the parties, including documentation from the prosecutor in Respondent's criminal matter, and the record closed October 7, 2011.

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 two 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 7, 2010.
2. A letter from HUD to Respondent dated December 30, 2010, advising Respondent that her proposed debarment had become final because of her failure to file a timely response to the October 7, 2010, Notice.
3. A letter from Respondent dated October 25, 2010, addressed to the Debarring Official's Designee requesting a hearing on her proposed debarment.
4. A letter from Respondent to the Debarring Official's Designee dated "2/3/2010 (sic)", explaining her timely actions with respect to this matter, and reiterating her request for a hearing.
5. A 17-page package of documents from Respondent e-mailed July 13, 2011, to the Debarment Docket Clerk, containing, *inter alia*, a letter from Respondent to the Debarring Official's Designee seeking answers related to HUD's alleged representations and role in her criminal conviction; Respondent's letter of May 16, 2011, to the sentencing judge, Judge Hall; a letter dated May 23, 2011, from the court attorney responding to Respondent's letter to Judge Hall; and a letter dated June 2, 2011, to Respondent from Jeffrey E. McMorris, Respondent's attorney at her sentencing, addressing the issue of HUD's declining to prosecute Respondent on apparently related federal criminal charges.
6. A copy of the transcript of the sentencing proceedings of February 6, 2009, received by HUD on August 23, 2011, from the Warren County District Attorney.
7. The Government's Response to Additional Documentation filed September 23, 2011.
8. The Government's Brief in Support of Debarment filed June 3, 2011 (including all exhibits and attachments thereto).

Government Counsel's Arguments

Government counsel states that Respondent was the Executive Director of the Adirondack Vets House, Inc. (AVH) for five years ending in 2007. AVH ran a transitional living program for homeless veterans that in 2007 received HUD funds under the Supportive Housing Program (SHP). In 2009, Respondent was charged in information that alleged Respondent, between October 2006 and May 2007 in her capacity as Executive Director of AVH, authorized or made personal purchases using an AVH-owned credit card or AVH's checking account. Respondent was alleged to have made a total of \$2, 980.20 in unauthorized purchases using AVH's credit card to which she had exclusive access. Allegedly also, items fitting the description of the unauthorized purchases were found in Respondent's home. The information further alleged that Respondent, also without authority, wrote checks totaling \$3,000.00 on AVH's checking account payable to the University of Albany, the institution from which she received her master's degree in 2007.

Respondent pleaded guilty in March 2009 and was convicted on one count of Third Degree Grand Larceny.

Counsel argues that Respondent was both a participant and principal in a covered transaction- the receipt of SHP funds by AVH – during a period when she served as Executive Director of AVH. Respondent’s involvement in a covered transaction brings her within the ambit of the debarment regulations and subjects her to exclusion as a “person who has been . . . a participant or principal in a covered transaction.” *See* 2 CFR §§ 180.150 and 180.940. Counsel continues that, pursuant to 2 CFR § 180.850, HUD has established the cause for Respondent’s debarment and met the required standard of proof by virtue of Respondent’s conviction. *See* 2 CFR § 180.850.

Specifically, counsel argues Respondent is subject to debarment under 2 CFR § 180.800(a)(3) based on her conviction for larceny.² Further, counsel argues that Respondent’s “unlawful taking of AVH’s funds for her own personal purposes indicates a lack of business integrity or business honesty that seriously and directly affects her present responsibility,” citing 2 C.F.R. § 180.800(a)(4). Counsel characterizes Respondent’s actions as an abuse of her position of trust in that she used AVH’s funds to enrich herself. Counsel argues that Respondent’s conviction demonstrates that she lacks the necessary honesty and integrity to do business with the Federal government and that her debarment is necessary to protect the interest of the Government and the public.³

In the Government’s Response to Additional Documentation, Counsel rejects Respondent’s assertion that “her conviction was conditioned upon any written promise by HUD or any other federal authority not to pursue an administrative case against her.” Counsel adds, after reviewing Respondent’s submission, that all reference [in the documents in her submission] are made to *prosecution* [emphasis in original],” not to administrative action. Counsel also reviews the mitigating and aggravating factors in 2 C.F.R. § 180.860 in proposing an appropriate period of debarment to be imposed on Respondent consistent with 2 C.F.R. § 180.865(a).⁴ First, counsel argues that AVH suffered harm as a result of Respondent’s theft of nearly \$6,000.00 of AVH’s funds that could have been used to help homeless veterans. Respondent’s theft also harmed the public interest because AVH was a recipient of federal funds. Further, Respondent’s misconduct was not an isolated incident. Respondent had made several unauthorized purchases over several years in a scheme she initiated and planned. Counsel concludes that Respondent’s actions demonstrate that she is not presently responsible. Therefore, counsel argues that Respondent should be debarred for three years.

² Although 2 CFR § 180.800(a)(3) uses the term “theft,” not larceny, in identifying those offenses that provide a basis for a respondent’s exclusion, the two terms are used synonymously and for present purposes are indistinguishable in their meaning from each other.

³ *See* Government’s Brief in Support of Debarment at 7-9.

⁴ 2 C.F.R. § 180.865(a) provides that “the period of debarment will be based on the seriousness of the cause(s) upon which [the] debarment is based. Generally, debarment should not exceed three years. However, if circumstances warrant, the debarring official may impose a longer period of debarment.”

Respondent's Arguments

Respondent testified that when she was hired by AVH as a resident manager in 2002 there was no policy in place for the next 18 months, though she had requested that a policy be issued, on how funds were to be "administered." A year after she became the Executive Director of AVH, she approached AVH Board with her concerns that the treasurer was soliciting funds for his legal services. The Board told her not to do anything. Later, according to Respondent, she applied for a grant of continuing education funds to be made available to the staff and veterans. Respondent approached the Board with respect to her taking a course in conflict resolution and inquired of the staff whether any of them wanted to take continuing education courses. Further, Respondent testified that all the expenses were presented to the Board. Also, before she left AVH in May 2007, she met with the treasurer and new Executive Director to advise them of the purchases she had made.

Respondent continued to help AVH, she testified, even writing a Continuum of Care grant application for AVH. However, in July 2007 she received a letter from AVH advising her that AVH was questioning some of the expenses incurred by her during her service there. Respondent characterized the allegations against her by her successor as a "lie." Respondent argued that her accusers' claim that she was not authorized to incur the challenged expenses without approval of the Personnel Committee was baseless. First, the committee never met, thus there was no policy established against which her actions could be judged. Respondent charged that in pursuing her, the Board was attempting to "cover its tracks" because there were some questionable payments made to a lawyer who served on the Board.

Respondent testified that some time after she was charged, the county district attorney notified her attorney that "the case was going federal." For personal reasons, Respondent testified, she agreed to a plea deal. She was assured by the prosecutor that, in return for her guilty plea, the federal government could not "come after" her. The district attorney further assured her that the federal prosecutor would provide a letter to that effect to her attorney. The letter, according to Respondent, would state that "HUD was satisfied with the way things were done." The federal prosecutor never provided the promised letter.

Respondent testified that she does not believe the educational expenses charged to AVH by her were improper. The expenses, as she sees it, were part of the "continuing education system that had been established and were related" to her job. The treasurer would sign blank checks, Respondent recalls, and tell her also to sign the blank checks. Respondent admits that she made a mistake and showed poor judgment. Respondent concluded that she is a nine-year veteran and has had no gainful employment in the four years since she left AVH.

Findings of Fact

1. Respondent was at all relevant times employed by AVH and served as its Executive Director.
2. AVH was a recipient of federal funds.
3. Respondent's position gave her access to and control of AVH credit card and funds.
4. Respondent, by her own admission, used AVH funds to pay for her educational expenses.
5. Respondent also used AVH funds to pay for personal expenses.
6. The record indicates that AVH had no settled policy regarding use of funds for employee continuing education.
7. The record also indicates that none of the challenged expenses incurred by Respondent were authorized by AVH Board.
8. Respondent had signatory authority on AVH's checking account.
9. Respondent pleaded guilty and was convicted of grand larceny and sentenced to twelve weekends in jail, five years' probation, and ordered to make restitution of \$11,600.00.
10. As an incident to Respondent's plea agreement, it was discussed among the parties that the federal government would not seek further prosecution in this matter and the federal prosecutor involved in the case would provide a letter to that effect to Respondent's attorney.
11. According to the court records and information from interested parties privy to the discussion,⁵ no letter was provided by any federal authority.⁶

Conclusions

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

1. As the executive director of an entity that received federal funds through HUD, Respondent was a participant and principal in covered transactions and is subject to HUD's debarment regulations. *See* 2 C.F.R. § 180.120(a).
2. Respondent's conviction for grand larceny provides cause for her debarment. *See* 2 C.F.R. § 180.800(a)(1).
3. HUD has met its burden to prove a cause for debarment of Respondent exists. *See* 2 C.F.R. § 180.850(b).
4. Although there is no evidence in the record disputing Respondent's claims that her expenses were reviewed monthly by the Board, thus she believed there was nothing improper in her actions, Respondent's criminal conviction precludes a *de novo* examination here of her claim. As indicated above, if the proposed debarment is based on a conviction,

⁵ See the relevant letters in Respondent's 17-page submission referred to in para. 5 of the "Summary" *supra*.

⁶ The term "federal authority" is used here to cover and refer to any entity of the U.S. government. It is not quite clear from Respondent's submissions and from her actual testimony which agency, i.e., HUD or the U.S. Attorney's Office (the federal prosecutor) would provide the letter.

ipso facto the agency has established the cause for debarment by a preponderance of the evidence – the applicable standard of proof. *See* 2 C.F.R. § 180.850.

5. The debaring official is without authority to examine the *bona fides*, if any, of a respondent's claim that his/her conviction is unsupportable based on some putative defect in the underlying criminal proceedings. Any attempt to do so would amount to an attempt to relitigate the criminal matter in the informal hearing, *See, e.g., In the Matter of Richard Scarbrough*, HUDBCA No. 90-4885-DS, 1990 HUD BCA Lexis 4 (February 13, 1990), holding that the "Department's regulations do not permit a collateral attack upon a conviction in the absence of newly discovered evidence. An assertion of inconsistency in a jury's findings does not comprise such evidence. If Petitioner's conviction is reversed on appeal, he may immediately petition for reinstatement [internal citations omitted]."
6. Respondent has represented that, because the federal prosecutor did not provide the letter as mentioned above, and because HUD has brought this debarment action against her, she may move to withdraw her guilty plea and seek a new trial. In the first place, even if the failure of the federal prosecutor to provide the letter can be viewed as an "inconsistency" in the criminal matter, thus leading to the withdrawal of Respondent's guilty plea, if permitted, it is not the equivalent of "newly discovered evidence" nor a "revers[al] on appeal". *Scarbrough, supra*. Moreover, it is not evident from the documents submitted by Respondent, which speak to a "prosecution" by federal authorities, that an administrative action such as a debarment would be subsumed under the agreement not to bring federal charges. In short, although the federal prosecutor may not have followed through with the agreement, if any, to provide the referenced letter, it seems fairly certain that a prohibition on HUD's moving forward with a debarment action was not within the contemplation of, nor in the discussions among, the parties.⁷ Accordingly, a fair reading of the documents submitted by Respondent weighs heavily in favor of the conclusion that the discussions and any inchoate promises were limited to a federal criminal prosecution, not to any HUD administrative action.
7. In considering an appropriate period of debarment, if any, that should be imposed on an errant respondent, the regulations at 2 C.F.R. §§ 180.845, 180.860, and 180.865, and relevant case law provide substantial guidance. In pertinent part, 2 C.F.R. § 180.865(a) states that "[g]enerally debarment should not exceed three years" and paragraph

⁷ Although not necessary to a resolution of this issue, it is nonetheless worth mentioning that, even giving deference to Respondent's claims, it is highly unlikely that a federal prosecutor would unilaterally assert jurisdiction in an area in which HUD has exclusive jurisdiction. It should be noted also that there is no evidence in the record of HUD's involvement in the discussions among the parties related to the issue of not instituting a federal criminal prosecution of Respondent. The usual rules of comity among federal agencies, and especially between a federal prosecutor contemplating a prosecution involving a matter arising from a HUD program (or from any other agency's program for that matter), would require prior consultation with HUD, for practical and other reasons, before a final determination is made on an administrative matter that is solely within the purview or jurisdiction of HUD.

(b) of that section in relevant part states that “the debarring official may consider the factors in § 180.860.” Consistent with these regulatory provisions, I have reviewed both the aggravating and mitigating factors in this matter.

8. I considered, among other things, Respondent’s executive position in AVH and the trust placed in her and her betrayal of that trust to which she admitted in her criminal conviction. Respondent’s wrongdoing, to which she admitted and to which she pleaded guilty, visited a financial harm and loss on AVH which AVH has yet to recoup from Respondent. Respondent has not made the court ordered restitution, which would compensate AVH for her improper purchases on AVH’s credit card and her other personal expenditures incurred during her tenure as AVH’s executive director.
9. In Respondent’s favor, I considered in mitigation of her actions the apparent absence of clear policies related to the expenditure of AVH funds for employee tuition and job training. I viewed favorably Respondent’s acceptance of responsibility for her misconduct which occurred over four years ago. I considered under 2 C.F.R § 180.860(s), which allows the debarring official to consider “[o]ther factors that are appropriate to the circumstances of a particular case,” the relative leniency of the sentence imposed on Respondent by the court for her criminal actions (12 weekends in jail), her nine-year military service, and her apparent clean record since her departure from AVH over four years ago.
10. In a weighing of the factors, however, it cannot be said in this case that the mitigating factors outweigh the aggravating factors.
11. As provided in 2 C.F.R. § 180.125(a), “[t]o protect the public interest, the Federal Government ensures the integrity of Federal programs by conducting business only with responsible persons.” The “test for whether a debarment is warranted is present responsibility,” *In the Matter of Kay Yarbrough*, HUDBCA No. 92-C-7514-D33, 1992 HUD BCA LEXIS 15 (October 28, 1992), and a finding of a lack of present responsibility may be based on past irresponsible acts. *See Schlesinger v. Gates*, 249 F.2d 111 (D.C. Cir. 1957), *cert. den.* 355 U.S. 939 (1958).
12. There is nothing in the record, except Respondent’s apparently clean record that has already been considered, that unambiguously supports a finding that Respondent is present responsibility. Respondent not being gainfully employed over the past four years, as she testified, clearly deprived her of the opportunity to work in a business environment. For that reason, it is readily recognized that Respondent would be at a serious disadvantage in demonstrating a post-AVH record of achievement and of honesty and integrity - - factors that help to sustain a finding of present responsibility.
13. For all the foregoing reasons, I conclude that Respondent’s misconduct warrants her debarment for two years to protect the public interest.
14. HUD has a responsibility to protect the public interest and take appropriate measures against participants whose actions may affect the integrity of its programs.

15. 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 honesty 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 period of two years 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."

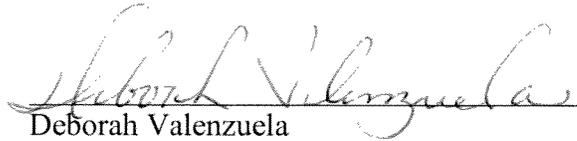
Dated: 11/18/11



Craig T. Clemmensen
Debarring Official

CERTIFICATE OF SERVICE

I hereby certify that on this 18TH day of November 2011, 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

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

Joseph J. Kim, Esq.
Melissa Silverman, Esq.
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Government Counsel

FIRST CLASS MAIL

Staci D. Billings



CONCURRENCE:

In the Matter of:

STACI BILLINGS— DOCKET NO. 11-3700-DB

Dated: Monday 4, 2011



Mortimer F. Coward
Debarring Official's Designee