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

In the Matter of:	*	
BARBARA GOMEZ,	*	**DOCKET NO. 07-3454-DB**
Respondent.	*	

DEBARRING OFFICIAL'S DETERMINATION

INTRODUCTION

By Notice dated September 17, 2007 ("Notice"), the Department of Housing and Urban Development ("HUD") notified Respondent BARBARA GOMEZ 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 the proposal to debar her was in accordance with the procedures set forth in 24 CFR part 24[1]. In addition, the Notice informed Respondent that her proposed debarment was based upon her acts and omissions while she was the Director of the City of Miami Department of Community Development ("MCDC").

In brief, the Notice alleges that Respondent allowed a recipient of HUD grant funds, Spanish American Basic Education & Rehabilitation ("SABER"), to continue receiving funding during the time she was the Director of MDCD and her son, Ruben Santana, Jr., was employed by SABER. The Notice further alleges that Respondent falsely represented to HUD her son's employment status in seeking a conflict of interest exception for him. Respondent's actions, the Notice charges, violated HUD's conflict of interest provisions and are cause for her debarment.

A hearing on Respondent's proposed debarment was held in Washington, D.C. on April 23, 2008, before the Debarring Official's Designee, Mortimer F. Coward. Respondent was present at the hearing along with her attorney, Leigh Poltrock, Esq.

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[1] HUD published a final rule on December 27, 2007(72 FR 73484) that relocated and recodified 24 CFR part 24 as 2CFR part 2424. HUD's December 27, 2007, rule stated that the rule "adopts, by reference, the baseline provisions of 2 CFR 180 "the government-wide rule published by OMB on August 31, 2005 (70 FR 51863) setting forth guidance for agencies with respect to nonprocurement debarment and suspension. However, because this matter arose before publication of HUD's final rule, for the convenience of the reader, references herein will be to the regulations in their former location at 24 CFR part 24.

Brendan Power, Esq. appeared on behalf of HUD. The parties filed several submissions and the record closed on July 29, 2008.

Summary

I have decided, pursuant to 2 CFR part 180, to dismiss the proposed debarment. My decision is based on the administrative record in this matter, which includes the following information:

(1) The Notice of Proposed Debarment dated September 17 2007.
(2) A letter dated October 16, 2007, from Respondent's then-attorney, Teri Guttman Valdes, requesting a hearing in this matter.
(3) The Government's Brief in Support of Three-Year Debarment filed January 10, 2008 (including all attachments and exhibits thereto).
(4) Respondent's Brief in Opposition to Three-Year Debarment filed February 26, 2008 (with exhibits).
(5) Government's Request for Leave to File Supplemental Documents filed March 12, 2008, with Exhibits 9 and 10 attached.
(6) Respondent Barbara Gomez's Supplemental Brief in Opposition to Proposal for a Three-Year Debarment filed March 25, 2008.
(7) Government's Reply Brief in Support of Three-Year Debarment filed April 17, 2008, with Exhibit 11 attached.
(8) Respondent Barbara Gomez's Second Supplemental Brief in Opposition to Proposal for a Three-Year Debarment filed May 13, 2008, with attachments, including Respondent's Affidavit.
(9) Government's Unopposed Request for an Extension to File Reply to Respondent's Second Supplemental Brief in Opposition to Proposed Three-Year Debarment filed June 17, 2008.
(10) Government's Reply to Respondent's Second Supplemental Brief in Opposition to Proposed Three-Year Debarment filed June 27, 2008.
(11) Respondent Barbara Gomez's Request for Leave to File Supplemental Document, filed July 24, 2008.
(12) Government's Request for Leave to File Reply to Respondent's Supplemental Document, filed July 29, 2008.

Government Counsel's Arguments

Government counsel argues that Respondent is subject to HUD's debarment regulations at 2 CFR part 180. Respondent, from 1998 to June 2006, was the director of MCDC, a City of Miami agency that received HUD funds and then disbursed those funds to other agencies. Such disbursements are covered transactions, and Respondent, as director of MCDC, was a participant in covered transactions.

Government counsel states that MCDC received HUD grant funds, including Housing Opportunities for Persons with AIDS (HOPWA) funds. On October 7, 2005,

HUD signed a HOPWA 2005 Formula Grant Agreement, which provided the City of Miami, as grantee, grant funds for the fiscal year October 1, 2005, to September 30, 2006. The disbursement of the HOPWA funds to eligible project sponsors is governed by HUD regulations at 24 CFR part 574 and other laws and regulations. MCDC, as a grantee of HOPWA funds, agreed to ensure that each project sponsor acted in accordance with applicable HUD regulations, including 24 CFR 574.625(a), which, among other things, prohibits an employee of a grantee or project sponsor from obtaining a financial interest or benefiting from any assisted activity either for herself or for a family member.

On August 4, 2005, the City of Miami and SABER entered into a contract by which SABER would be eligible to receive HOPWA grant funds for use during the 2006 fiscal year. SABER employed Respondent's son, Ruben Santana, Jr., from October 1, 2005, to May 31, 2006. The HOPWA contract empowered the City of Miami to take a range of actions against SABER, including withholding cash payments, terminating the current funds awarded, and withholding further grants, if SABER failed to comply with any term of the contract.

In a letter to HUD dated November 10, 2005, Respondent requested an exception for her son from the conflict of interest provisions of 24 CFR 574.625. In her letter, Respondent stated that her son had been offered a position as a housing specialist by two MDCD-funded agencies. HUD denied Respondent's request for an exception in a letter dated December 12, 2005. Government counsel argues that Respondent misrepresented the facts to HUD because, at the time she wrote the letter to HUD, her son was already employed by SABER since October 1, 2005.

Government counsel argues that Respondent committed a willful violation of the HOPWA Agreement, which required her, as Director of MCDC, to ensure that SABER complied with the requirements of 24 CFR part 574.[2] Counsel casts doubt on Respondent's claim in her request for a hearing that she did not know, at the time she wrote her November 10, 2005, letter to HUD, her son was already employed by SABER. First, counsel argues that Respondent's claim is unsupported by any evidence. As counsel sees it, although Respondent claims to have instructed SABER to remove her son from the payroll immediately but SABER refused, she does not identify anyone at SABER with whom she spoke, nor provide any documentation or correspondence that would corroborate her claim. Counsel argues that the "evidence presented indicates that it is more probable than not that Respondent was aware that her son was working for SABER at the time that the November 10, 2005, letter was submitted to HUD."[3]

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[2] 24 CFR 574.625(a) provides that "in addition to the conflict of interest requirements in OMB Circular A-102 and 24 CFR 85.36(b)(3), no person who is an employee, agent, consultant, officer, or elected or appointed official of the grantee or project sponsor and who exercises or has exercised any functions or responsibilities with respect to assisted activities, or who is in a position to participate in a decision making process or gain inside information with regard to such activities, may obtain a financial interest or benefit from the activity, or have an interest in any contract, subcontract, or agreement with respect thereto, or the proceeds thereunder, either for himself or herself or for those with whom he or she has family or business ties, during his or her tenure or for one year thereafter."

[3] *See* Government's Reply Brief in Support of Three-Year Debarment (hereinafter Gov't Reply Brief) at 9.

Counsel also stresses that three submissions were made on Respondent's behalf in this matter, yet "no sworn testimony has been produced that supports Respondent's claim that she did not know her son was working for SABER until she had a telephone conversation with a SABER representative in December 2006." Counsel further dismisses Respondent's statement in her affidavit with respect to her actions following her receipt of HUD's December 12, 2005, denial letter as "glaringly inadequate."[4] Moreover, Respondent's son remained in SABER's employ for another five months until May 31, 2006.[5]

Counsel dismisses Respondent's contention that she had no control over her adult son's actions by asserting that Respondent could have invoked any of the remedies for a violation under the HOPWA contract, including withholding any further disbursements or recapturing funds already received by SABER. Counsel asserts in the Government's Reply Brief that "the record demonstrates that [Respondent] never took any action to authorize, recommend, or otherwise implement the suspension or termination of SABER's HOPWA funding during the time that her son was working for SABER."[6] Counsel also dismisses as inaccurate Respondent's further claim that SABER received its funding in May 2005, and "no funding was provided after her son began to work for SABER." Counsel points out that the August 4, 2005, contract between SABER and the City of Miami authorized SABER to receive up to $585,000.00 for the period October 1, 2005, to September 30, 2006, disbursable in monthly increments upon SABER's written request. For that reason, and in light of the fact that Respondent's son was paid a salary by SABER from October 1, 2005, to May 31, 2006, "Respondent could have prevented MCDC from reimbursing SABER for its monthly expenses because she knew that SABER was not in compliance with HUD regulations."

Counsel argues that Respondent's actions constitute cause for debarment under 2 CFR 180.800(b)(3). She willfully violated the conflict of interest regulations at 24 CFR 574.625(a) by serving as MDCD Director at the same time her son worked for SABER, a subgrantee receiving HOPWA federal funds. Additionally, Respondent's alleged misrepresentation of her son's employment status, counsel charges, along with her violation of HUD's conflict of interest regulations, demonstrates a lack of business integrity or business honesty that seriously affects her present responsibility. *See* 2 CFR 180.800(d). Further, counsel argues that based on Respondent's familiarity with HUD's conflict of interest regulation and her position as MDCD Director, her conduct clearly constitutes a willful failure to perform in accordance with the terms of one or more public agreements or transactions and a willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction. *See* 2 CFR 180.800(b)(1) and (b)(3). Counsel also argues that Respondent's wrongdoing detailed here warrants her

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[4] *See* Government's Reply to Respondent's Second Supplemental Brief in Opposition to Proposed Three-Year Debarment at 6.

[5] Government counsel cites a *Miami Herald* article of June 28, 2007, in which the head of the SABER program reportedly said, according to the article, that Respondent's son "was not under pressure to resign but left on his own."

[6] *See* Gov't Reply Brief at 6.

debarment in order to protect the public interest. Counsel concludes that a three-year debarment is appropriate for Respondent's misconduct.

Respondent's Arguments

Respondent argues that her actions with respect to her son's employment with SABER, contrary to the Government's assertions, belie the Government's claim that her conduct was willful, thus in violation of 2 CFR 180.800(b)(1) and (3). Respondent argues that as soon as she learnt from a third party that her son was offered a job at SABER (which was shortly after the HOPWA contract was approved), she wrote the City Attorney seeking an opinion on whether her son's employment by SABER presented a conflict of interest. Because the City Attorney concluded that a conflict of interest could arise under HUD's regulations, Respondent sought advice from the local HUD office, eventually seeking an exception in her November 10, 2005, letter to HUD. After receiving HUD's denial in a letter dated December 12, 2005, Respondent states that she informed SABER that it could not hire her son. According to Respondent, it was then that she learnt for the first time that her son was employed by SABER since October 2005.

Respondent contends that she told SABER to fire her son or forego additional funding. In January 2006, according to Respondent, she met with SABER's Executive Director (ED) and reiterated her position that if her son continued working for SABER she would not recommend SABER for further funding. Respondent claims that she was assured that her son would be fired. Respondent's son's employment with SABER ended in May 2006. It is Respondent's belief that her "demands and threats" led to her son's separation from SABER. Respondent states that, after her son's departure from SABER, she sought advice from Miami city officials as to whether she could retroactively disallow payments to SABER to the extent they represented her son's salary from SABER. According to Respondent, she was advised that a retroactive disallowance was not necessary because a conflict of interest no longer existed.

Based on this background, Respondent argues that HUD "has not and cannot show that [Respondent] violated [2 CFR 180.800(b)(1)], willfully or otherwise." Respondent takes issue with Government counsel's assertion that Respondent violated the HOPWA Grant Agreement because it "required her, as Director of MDCD, to ensure that SABER, the project sponsor, complies with the requirements of 24 CFR 574." Respondent argues that Government counsel is "distorting the words of the contract," because the HOPWA Agreement required only that MCDC "ensure that each project sponsor agrees to (1) operate the program in accordance with the requirements of the applicable HUD regulations." (Emphasis supplied by Respondent.) Respondent argues that "MCDC complied with the requirement by including in the HOPWA Contract the requirement (which SABER agreed to) that SABER comply with the applicable provisions of 24 CFR part 574." Respondent further argues that the provisions of the HOPWA Agreement cited by Government counsel do not require MCDC or Respondent "to police SABER's compliance with its contractual promise."

Respondent contends that "the facts set out above" prevent a finding of willful conduct based on the standard enunciated in *In re Passanesi*, HUDALJ 92-1835-DB, 1995 WL 12567435 (December 16, 1992), a decision cited by Government counsel. Respondent cites *Passanesi* for the proposition that

> Conduct is "willful" when the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow . . . "willful behavior" must be distinguished from "mere mistake resulting from inexperience, excitement or confusion, and . . . mere thoughtlessness or inadvertent or simple inattention

Respondent concludes that the facts in this case, such as her raising the issue of a potential conflict of interest, first with the City Attorney, then with HUD, her contacting SABER in December 2005 after receiving HUD's denial letter, and her December 2005 call to SABER in which she advised SABER to fire her son or lose its funding, "preclude any finding of willful misconduct under [the *Passanesi*] standard." For that reason, Respondent contends that HUD is unable to meet its burden of proving the required willful violations of the conflict of interest regulations.

Respondent next argues that HUD "has no proof that [she] knew before December 2005, that her son had been hired by SABER because she did not know." (Emphasis in original.)

Respondent then argues that HUD's entire case for debarment is predicated on Government counsel's assertion that she violated 2 CFR 180.800(b)(1) and (b)(3). Respondent states that, contrary to Government counsel's position, she was not responsible for "authorizing disbursements" under the HOPWA Contract. Additionally, Respondent contends that, even if she had the discretionary power to suspend funding under the Contract, HUD has cited no "authority for the proposition that [she] was required to exercise this supposed authority as opposed to addressing the issue in other ways." (Emphasis in original) Respondent adds that Government counsel produced no evidence that Respondent was informed that she was "required to invoke any particular provision of the HOPWA Contract and refused to do so."[7]

Respondent argues that Government counsel's position ignores the "moral and political ramifications" with respect to suspending SABER's funding while searching for a replacement organization to service SABER's 325 clients. Respondent rhetorically asks whether HUD "seriously mean[s] to suggest that [Respondent] was required to take actions that would have resulted in the termination of critical housing services for 325 AIDS clients, including for some of them, eviction?" Respondent contends that, contrary to HUD's position, she "acted responsibly and with sensitivity to all interested parties in attempting to resolve a conflict of interest situation that was not of her making." Respondent supports her argument by asserting that not only did she demand her son's firing, but during his employment with SABER, SABER was the only AIDS agency for

[7] *See* Resp. Supp. Br. at 8.

which she did not recommend supplemental funding.[8] Also, Respondent asserts that, during this time, she initiated a search for a replacement agency for SABER to avoid the abandonment of SABER's 325 AIDS clients to the streets. Accordingly, Respondent argues that even if she is held to have violated 2 CFR 180.800(b)(1) by not suspending payments to SABER, HUD cannot show that the violation was willful, nor, for the same reasons, can HUD show that she willfully violated 2 CFR 180.800(b)(3).

Respondent argues that HUD has failed to meet its burden of proving that she is not presently responsible. First, there was no misrepresentation by her with respect to her son's working with SABER when she requested the exception in her November 10, 2005, letter to HUD. Additionally, HUD has presented no evidence of her dishonesty or lack of integrity, whereas the "undisputed evidence shows that [Respondent] attempted scrupulously to comply with applicable regulations regarding conflicts of interest."[9] Respondent contends that her conduct in attempting to resolve the situation involving her son's employment with SABER "are not the acts of a dishonest person who is trying to conceal a conflict of interest."[10] Respondent next argues that debarment would not be appropriate and should not automatically be imposed, even if HUD could prove the violations with which the Department has charged her. Respondent argues, as before, that her actions demonstrate that she endeavored to prevent a conflict of interest. When the conflict did arise because of the actions of her adult son (with whom she had a strained relationship) and SABER, she demanded that SABER fire her son. At worst, she can be faulted, in hindsight, for not taking steps that HUD insists she "might have been able to take after she learned of the conflict of interest."[11] In this regard, Respondent cites dictum from *Passanesi* that

> [A] debarment cannot stand simply and solely on the evidence sufficient to establish cause for debarment. Debarment is discretionary. It is therefore necessary to consider what the evidence shows about the seriousness of Respondent's conduct, as well as any evidence or investigation.

After the close of the record, Respondent submitted a motion for Leave to File a Supplemental Document.[12] Attached to Respondent's motion was a letter dated

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[8] Government counsel makes light of this "self-serving claim [as] entirely without merit" because (1) Respondent has produced no evidence that SABER applied for or would have received supplemental funding; (2) Respondent fails to explain why any of the eleven agencies, including SABER, did not receive supplemental funding; (3) Respondent has produced no evidence that shows why she elected not to recommend SABER for supplemental funding, especially whether her election related to her son's employment by SABER; and (4) Respondent has provided no documentation or explanation of the MCDC internal process with respect to the withholding of supplemental funds nor what happens when Respondent elects to withhold funds from a subgrantee.

[9] *See* Resp. Supp. Br. at 9.

[10] *Id.* at 10.

[11] *Id.* at11.

[12] The Debarring Official's Designee, in the interest of justice and pursuant to 24 CFR 26.13(e) and 26.16, granted Respondent's Motion and the Government's Request for Leave to File Reply to Respondent's Supplemental Document.

April 3, 2007, from the Miami HUD CPD Director to Respondent. The HUD letter refers to an April 2, 2007, letter from an attorney for an organization receiving funding from the City of Miami. The attorney indicated that the City of Miami was cutting off funding to her client "as a result of the conflict of interest opinion from HUD."

In its April 3, 2007, letter, HUD responds that

> The funding of the program operated by Sunshine for All, Inc. should not be affected by the conflicts opinion. The clients and beneficiaries of the organization are likely to be harmed by the City of Miami cutting off funding because of a conflict of interest involving its Executive Director. We advise and strongly suggest the City of Miami not terminate a program receiving CDBG and HOWPA funds due to a conflict relating to a simple employee, its Executive Director.

Respondent argues that the April 3, 2007, response from the Miami CPD Director "rebuts the Government's contention that [she] should have (even assuming that she could have) pursued termination of HOWPA funding for SABER on discovering that her son was employed by the organization (instead of taking the action she did take by declining to recommend SABER for additional funding)."[13] (Emphasis in original.)

Respondent concludes that her "unblemished " record of administering government contracts, the absence of any claim that the government lost any money, and the uniqueness of the instant matter, which militates against its ever arising again, would make her debarment an abuse of discretion.

Findings of Fact

1. Respondent was the director of a City of Miami agency (MDCD) from 1998 to June 2007.
2. MCDC was a grantee of HUD funds, including HOPWA funds.
3. The City of Miami and HUD signed a HOPWA Grant Agreement on October 7, 2005, covering the funds granted to the city for the fiscal year October 1, 2005 to September 30, 2006.
4. HUD's regulations at 24 CFR part 574 govern the disbursement of HOPWA funds to eligible project sponsors.
5. SABER was a project sponsor to which MCDC disbursed HOPWA funds.
6. On August 4, 2005, SABER and the City of Miami entered into a contract under which SABER would be eligible to receive HOPWA funds from the city during the 2006 fiscal year

[13] Government counsel observes that "no information has been provided regarding the nature of the conflict of interest" referenced in the HUD CPD April 3, 2007, letter. Government counsel also argues that the fact the letter "was written long after the events which occurred in this case...underscores the fact that any probative connection between [the letter] and this case is tenuous, at best."

7. Under the HOPWA Contract, based on SABER's written request, the funds were payable to SABER on a monthly basis for services provided by SABER.
8. The HOPWA Contract required SABER to comply with 24 CFR 574.625 and empowered the city to take certain remedial measures for SABER's failure to comply with the Contract.
9. The remedies under the HOPWA Contract included the city's withholding cash payments to SABER pending correction of the deficiency, disallowing the use of funds for the cost of the activity not in compliance, partly suspend or terminate the current HOPWA funds awarded to SABER, withhold further grants, or take all other remedies that may be legally available.
10. MCDC was the city agency responsible for monitoring the operation of project sponsors in accordance with applicable HUD regulations.
11. HUD's regulation at 24 CFR 574.625(a) specifically prohibits a person who exercises any function with respect to assisted activities or who is part of the decision making process thereof to benefit from any contract for herself or her family related to those activities.
12. Respondent wrote a letter to HUD dated November 10, 2005, seeking an exception for her son from the conflict of interest regulation.
13. Respondent represented in the letter that her son had been offered a position by two agencies funded by MCDC.
14. HUD, by letter dated December 12, 2006, denied Respondent's request for an exception for her son.
15. Respondent's son was employed with SABER from October 1, 2005, to May 31, 2006, a period during which Respondent was still serving as the MDCD Director.
16. Respondent's son was already on SABER's payroll when Respondent wrote HUD that he was offered a job by two MDCD-funded agencies and requested an exception
17. Respondent's son's salary was paid by SABER with funds from the HOPWA Contract.

Conclusions

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

1. Respondent was a participant in a covered transaction as defined in 2 CFR part 180.
2. Respondent's son's employment with SABER while she was the Director of MDCD, the agency that funded SABER with federal funds, presented a clear conflict of interest and was in violation of the HOPWA Contract and 24 CFR 574.625(a).
3. The evidence is not clear that Respondent knew at the time she wrote her November 10, 2005, letter to HUD requesting an exception that her son had been employed by SABER since October 1, 2005. Accordingly, HUD has not proved by a preponderance of the evidence that Respondent's November 10, 2005, letter

misrepresented her son's employment status, thereby establishing that a cause for her debarment exists. *See* 2 CFR 180.850(a) and 180.855(a).

4. It is undeniable, however, reinforced by Respondent's own admission, that shortly after receipt of the HUD denial letter dated December 12, 2005, Respondent knew that her son was in SABER's employ.
5. Because HUD denied Respondent's son an exception, his continued employment at SABER while she was the incumbent director of MCDC violated the HOPWA Contract and 24 CFR 574.625(a).
6. In the usual case, a conflict of interest situation, as presented here, would be a cause for debarment, as urged by the Government, under 2 CFR 180.800(b)(1) and (3). Notably, these two regulatory provisions require a finding of "willfulness" as an element of a Respondent's wrongdoing. Here, the evidence does not support a finding a finding of willfulness in Respondent's actions with respect to her son's employment.
7. First, it is not to be argued that Respondent initiated action to bring the potential conflict to the attention of the City Attorney and HUD.[14] This is not the action of a person who is seeking to conceal a potential conflict. Similarly, Respondent's meeting with the Executive Director of SABER in January 2006, where she was assured that her son would be fired and in which she threatened not to recommend SABER for funding on the next round of contracts, is inconsistent with a conclusion that she acted with willfulness, nor that her "conduct [was] marked by a careless disregard" with respect to the conflict of interest situation. *See United States v. Murdock*, 290 U.S. 389 (1933).
8. It is undisputed that Respondent had the power under the HOPWA Agreement either to select or to recommend[15] any one of the remedies identified in Article 10 of the Agreement for SABER's continued employment of her son.
9. The only open issue is whether Respondent's actions between the time she met with the Executive Director of SABER in January 2006, and her son's separation from SABER in May 2006, are sufficient to vitiate a charge of willfulness with respect to her failure to invoke any of the Article 10 remedies.
10. First, the introductory sentence to Article 10, paras. 10.1.1 to 10.1.15 states that the "city may take" action under any of the above-cited paragraphs for a project sponsor's failure to comply with any term of the Agreement. The use of the remedial power by the city or its officers is therefore discretionary. Notwithstanding, however, the discretion granted to the city, Respondent, in her capacity as Director of MCDC, attempted to have SABER fire her son. It is indisputable that Respondent had no direct authority over SABER such that she could enforce her demand to have her son fired. Respondent's demand here satisfied para. 10.1.5, i.e., "Take all such other remedies that may be legally

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[14] Under 24 CFR 180.860(n), the Debarring Official may consider as a mitigating factor, the Respondent's bringing "the activity cited as a basis for the debarment to the attention of the appropriate government agency in a timely manner."

[15] Respondent argued at the hearing that she did not have the authority to stop or suspend payments to SABER, as suggested by Government counsel, but only make recommendation for suspension. In the view the Debarring Official takes of this case, it is not necessary to determine Respondent's authority under Article 10, because, as the record shows, SABER continued to be funded during the time Respondent's son worked there.

available." Respondent maintains, and reiterates in her sworn affidavit, that she "selected the option that [she] felt, in [her] professional opinion, would be the least disruptive to SABER's clients: withholding [her] recommendation for further grants or loans to SABER."[16] Respondent's decision here properly invoked a remedy countenanced under para. 10.1.4, that is, "Withhold further grants and/or loans for the project sponsor [SABER]."[17]

11. Article 10 by its very language required only that Respondent "take one or more" remedial actions. Respondent cannot now be faulted, after the fact, for taking only one action, in light of the HOPWA Agreement's permissive language that countenances the taking of one action as sufficient to resolve a project's sponsor's failure to comply with the Agreement.
12. The Government's case rests, it would appear, on the premise that Respondent did not do enough or did nothing to ensure SABER's compliance. No doubt Respondent could have done more or pressed more vigorously for SABER to separate her son before his departure from SABER at the end of May 2006, five months after Respondent's meeting with SABER's executive director. Respondent's apparent failure to act with more dispatch in bringing the matter to an earlier resolution, does not, however, make her guilty of a willful violation of the HOPWA Agreement or willful violation of HUD's Conflict of Interest regulation for the HOPWA program.
13. It is clear from the evidence in this case that under the standard of *Passanesi*, *supra*, cited by government counsel in his brief, Respondent did not "intentionally [do] an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow." As alluded to earlier, Respondent's actions in attempting to, first, avoid a conflict and, subsequently, after being made aware of the conflict, taking appropriate action under the HOPWA Agreement negate a charge of willfulness in her conduct.

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[16] *See* Resp. Affidavit, appended to her Second Supplemental Brief in Opposition to Proposal for a Three-Year Debarment, Ex.1, ¶¶ 17 and 21. It is not unpersuasive that the HUD CPD Director, faced with a conflict of interest situation involving another Executive Director, advised Respondent not to terminate another program receiving CDBG and HOPWA funds because of "a conflict relating to a single employee, its Executive Director." Government counsel makes much of the fact regarding the paucity of information with respect to the nature of the conflict in the other matter. This may be true. It is undeniable, however, that the April 3, 2007, letter, on its face, provides enough information to conclude that (in light of the advice given in the April 3, 2007, letter) Respondent's action in not suspending funding to SABER was consistent with the approval enunciated by the CPD Director in an analogous situation, thus attenuating the Government's case for her debarment.

[17] Government counsel makes much of the fact that there is little, if any, documentary evidence to support Respondent's claim. *See* Government's Reply to Respondent's Second Supplemental Brief in Opposition to Proposed Three-Year Debarment at pp. 2 – 4. To the extent that is true, it also is undeniable that, as the record shows, Respondent made no recommendation for funding for SABER during the period June 16, 2005 (about the time the HOPWA Contract was approved by the city) to May 2006 (Respondent's son separated from SABER on May 31, 2006), although Respondent did recommend and the city did fund other recipients. The Debarring Official believes that it would have been an easier case had Respondent provided the documentation and explanation suggested by Government counsel. However, mere speculation or conjecture as to why some particular act or acts did or did not happen does not serve as evidence to rebut, as in this case, the reality of the act, i.e., SABER did not receive additional funds.

14. Accordingly, HUD has not established the cause for debarment by a preponderance of the evidence nor that a cause for debarment exists. *See* 2 CFR 180.850 and 855.

DETERMINATION

Based on the foregoing, including the Findings of Fact, Conclusions, and the administrative record, I have determined to dismiss the debarment action against Respondent proposed by HUD in its Notice dated September 17, 2007.

Dated: 9/16/08

Henry S. Czauski
Debarring Official