In the Matter of:	:	
	:	
PHILIP D. WINN,	:	HUDBCA No. 95-G-108-D6
PDW and ASSOCIATES,	:	Docket No. 95-5015-DB
PHILIP D. WINN and ASSOCIATES,	:	
WINN GROUP	:	
	:	
Respondents	:	
	:	

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DETERMINATION BY ADMINISTRATIVE JUDGE TIMOTHY J. GRESZKO

June 9, 1995

Statement of the Case

By letter dated October 20, 1994, Michael B. Janis, General Deputy Assistant Secretary, U.S. Department of Housing and Urban Development, ("HUD", "Department", or "Government"), notified Philip D. Winn ("Winn" or "Respondent") and his affiliates, PDW and Associates, Philip D. Winn and Associates, and PDW Group, that, based on the conviction of Respondent for violation of 18 U.S.C. § 371, the Department was considering debarring Respondent and his affiliates from participating in primary covered transactions and lower-tier covered transactions as either a participant or principal at HUD and throughout the Executive Branch of the Federal Government, and from participating in procurement contracts with HUD, for an indefinite time period from the date of Respondent's suspension, March 2, 1993. That suspension was imposed upon Respondent and his affiliates upon the issuance of an Information in the United States District Court for the District of Columbia charging Respondent with violation of 18 U.S.C. § 371. The notice also informed Respondent and his affiliates that their temporary suspension was continuing pending final determination of the issues in this matter.

By letter dated November 10, 1994, Respondent and his affiliates requested a hearing in regard to the proposed debarment pursuant to 24 C.F.R. §§ 24.313 and 24.314. Both Respondent and the Government filed briefs in this matter. This determination is based on the written submissions of the parties, as Respondent is not entitled to an oral hearing. 24 C.F.R. § 24.313(b)(2)(ii).

Findings of Fact

1. From March of 1981 through March of 1982, Respondent was HUD's Assistant Secretary for Housing-Federal Housing Commissioner. After leaving office at HUD, Respondent became involved in HUD's programs as a member of various real estate partnerships, known as the "Winn Group," that were formed for the purpose of acquiring housing projects and then obtaining HUD subsidies for such projects. (Govt. Exh. C, Statement of Facts dated February 9, 1993, United States District Court No. CR 93-0052, ("Statement of Facts"), ¶¶ 2, 4, 5).

2. The HUD Section 8 Moderate Rehabilitation Program authorized the use of federal funds "[f]or the purpose of aiding lower-income families in obtaining a decent place to live and of promoting economically mixed housing...." 42 U.S.C. § 1437f. Under this program, HUD would make rental assistance payments for 15 years to the owners of low income rental properties, provided that the owners agreed to upgrade the properties to make them "decent, safe, and sanitary." 42 U.S.C. § 1437f. (Statement of Facts, ¶ 5).

3. At all times relevant, HUD distributed Moderate Rehabilitation funds by awarding them to state or local public housing authorities ("PHAs"). The PHAs in turn would enter into contracts with the subsidy recipients, who were owners or developers of rental properties. For the period from January 1985 through October 1987, the requests for Moderate Rehabilitation funds from PHAs and property owners and developers far exceeded the funds available for distribution by HUD. (Statement of Facts, ¶ 6).

4. From February 1981 through December 1986, Silvio J. DeBartolomeis served as a public official at HUD. From in or about December 1983 to in or about April 1986, DeBartolomeis served as Deputy Assistant Secretary for Multifamily Housing. From April 1986 to December 1986, DeBartolomeis served as General Deputy Assistant Secretary for Housing and Acting Federal Housing Commissioner. From December 1983 through December 1986, DeBartolomeis had within his program responsibilities HUD's Moderate Rehabilitation Program. On or about December 16, 1986, DeBartolomeis terminated his employment at HUD, returned to Denver, Colorado, and entered into various business relationships with entities owned in whole or in part by Respondent. (Statement of Facts, ¶¶ 7,8).

5. From October 1986 to January 1989, Thomas T. Demery served at HUD as the Assistant Secretary of Housing-Federal Housing Commissioner. During that time period, Demery had within his program responsibilities HUD's Moderate Rehabilitation Program. (Statement of Facts, ¶ 9).

6. At various times during the years 1985 and 1986, Respondent communicated with DeBartolomeis, regarding the maximization of Moderate Rehabilitation funding for a housing project owned by a partnership in which Respondent had a financial interest. (Statement of Facts, ¶ 10).

7. During the years 1984 through 1986, and while an official at HUD, DeBartolomeis was the sole owner and shareholder of a small private business located in Rehoboth, Delaware, known as Eastern Standard, Inc. In 1985, DeBartolomeis exhausted all of his available sources of financing for Eastern Standard, Inc. and was unable to

secure additional sources of financing. In April, 1985, DeBartolomeis spoke with Respondent regarding a HUD project located in Broken Arrow, Oklahoma, known as Indian Springs apartments, in which Respondent had a financial interest. During that same period of time, DeBartolomeis discussed with Respondent his inability to obtain the necessary financing for Eastern Standard, Inc. In the course of that conversation, Respondent and DeBartolomeis agreed that a family member of DeBartolomeis would apply for a $20,000.00 loan at a banking institution in Denver, Colorado, of which Respondent was a member of the Board of Directors, and that the family member would then provide the proceeds of that loan to DeBartolomeis for use by Eastern Standard, Inc. Following that conversation, a family member of DeBartolomeis applied for the loan, but the bank refused to approve the loan. (Statement of Facts, ¶111-13).

8. In May, 1985, DeBartolomeis transmitted an official HUD notice, via facsimile, to the HUD Field Office in Tulsa, Oklahoma. The HUD notice informed the Director of the HUD Field Office that HUD was granting a waiver to the Indian Springs apartments project. The effect of the waiver was to approve exception rents, thereby increasing the amount of Moderate Rehabilitation subsidies that HUD would pay for that project. (Statement of Facts, ¶ 14).

9. During the period May and June 1985, Respondent and DeBartolomeis had one or more conversations regarding DeBartolomeis' inability to obtain the loan for Eastern Standard, Inc. Respondent again offered to help DeBartolomeis obtain a loan in the amount of $20,000.00. Respondent and DeBartolomeis agreed that a family member of DeBartolomeis would apply for a $20,000.00 loan at a Denver, Colorado private financial institution, the owners of which were acquaintances and business associates of Respondent. In June, 1985, the family member applied for the loan, but the loan was turned down. Thereafter, Respondent asked the lender to provide a loan to the family member, using monies that Respondent would provide as a loan to the lending institution. On June 11, 1985, Respondent loaned the financial institution $20,000.00 to fund the loan, the loan was approved on June 14, 1985, and delivered to the family member in the form of a check. On June 19, 1985, the family member wired funds in the amount of $19,000.00 to a bank account at a Delaware banking institution that was owned by Eastern Standard, Inc. and controlled by DeBartolomeis. (Statement of Facts, ¶¶ 15-20).

10. During the time the loan was arranged by Respondent, he was seeking a decision from HUD with regard to the Moderate Rehabilitation funding subsidies for the Indian Springs apartments project, an area within the jurisdiction of DeBartolomeis. (Statement of Facts, ¶ 21).

11. During the period from 1986 through October 1987, Respondent communicated with a number of HUD officials, including Demery, regarding the allocation of Moderate Rehabilitation funding for housing projects owned by business entities and partnerships in which Respondent had a financial interest. In June 1987, Demery, who was then HUD's Assistant Secretary of Housing and before whom matters involving Respondent were then or would soon be pending, had a conversation with Respondent in which they discussed Respondent making available for Demery's use in late December 1987 and early January 1988, a vacation condominium in Vail, Colorado, and a private automobile, owned by

Respondent. Respondent and Demery entered into an agreement with respect to Demery's use of the automobile and condominium without charge. Demery never paid Respondent for his use of the automobile and the condominium. (Statement of Facts, ¶¶ 24-30).

12. In February, 1993, an Information was issued by and through the Office of Independent Counsel Arlin M. Adams, alleging that in or about April, 1985, and continuing up to and including October, 1987, Respondent conspired to provide gratuities to DeBartolomeis and Demery in order to influence their decisions with respect to certain funding requests made by Respondent under the Department's Section 8 Moderate Rehabilitation program. (Govt. Exh. A, Criminal Information dated February 9, 1993, United States District Court for the District of Columbia, No. CR 93-0052).

13. On February 9,1993, Respondent pleaded guilty to the Information. On April 11, 1994, Respondent was sentenced to unsupervised probation for a term of two years, and was ordered to pay a fine in the amount of $981,975 at the time of sentencing. The Government recommended this fine, because it reflected the amount of the pecuniary gain related to the charge. Respondent was also ordered to pay a special assessment in the amount of $50.00. The Office of Independent Counsel filed a Sentencing Memorandum with the court, which stated, among other things, that "Respondent's cooperation has been exemplary in every way," and that the information and assistance provided by Respondent had led to the convictions of Demery, Deborah Gore Dean, another high-ranking HUD official, and certain other officials and real estate developers. Based on this cooperation, and upon Respondent's agreement to pay a substantial fine, the Office of Independent Counsel "did not oppose the position put forth by Respondent's attorneys with respect to sentence," and requested the judge to consider these factors when imposing a sentence. (Plea Agreement dated February 9, 1993, Respondent's Exh. B; Sentencing Memorandum of the Government dated April 8, 1994, Respondent's Attachment C).

14. Twenty-five individuals wrote letters, which were considered by United States District Judge Stanley H. Harris in determining Respondent's sentence. These letters attest to Respondent's good character, integrity, and numerous acts of public service. Respondent is described therein as an honorable, professional, kind, generous and caring person who has rendered significant service to the United States, including service as the United States Ambassador to Switzerland. The letter writers repeatedly make references to Respondent's integrity in various contexts. The letters allude to Respondent's generosity with his time and money to his family, to those less fortunate in the community and to numerous charities. Several writers refer to the advice and counsel that they have received from Respondent at critical junctures in their lives over the years; Respondent is described by some as a mentor and an inspiration. A number of letters go to great length in describing the high quality of life at certain low-income housing projects in which Respondent had a financial interest, and state that Respondent has insisted that public housing be more than just a home for residents. According to these letters, Respondent consistently strives to provide services and facilities to low-income housing tenants which improve the quality of their lives. Respondent is also described by a number of business

associates as an honorable and ethical businessman. (Respondent's Exhs. A-E).

15. A number of letters describe Respondent and DeBartolomeis as having a very close relationship dating back many years to a time when Respondent was Chairman of the Colorado Republican party, and DeBartolomeis was his driver. One letter describes Respondent as a father figure and mentor to DeBartolomeis. These letters essentially attribute Respondent's motivation in providing funds to DeBartolomeis to a desire to lend a helping hand to a close friend, as opposed to avarice. (Respondent's Exhs. B, E).

Discussion

Respondent admits that he is a "participant and principal," under HUD's regulations, as he has participated in "covered transactions" in the past. See 24 C.F.R. §§ 24.105(m), 24.105(p); 24.1 l0(a)(ii)(C)(l 1). Respondent admits that PDW and Associates, Philip D. Winn and Associates, and the Winn Group are his affiliates. See 24 C.F.R. § 24.105(b). As such Respondent and his affiliates are subject to Departmental sanctions such as suspension and debarment. Applicable regulations provide that debarment may be imposed for:

(a) Conviction of or civil judgement for:

(1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;

* * * * *

(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously affects the present responsibility of a person.

* * * * *

(d) Any other cause of so serious or compelling a nature that it affects the present responsibility of a person. 24 C.F.R. §§ 24.305(a)(l), (3), and (4).

Although cause for debarment must be established by a preponderance of the evidence, if the debarment is based upon a conviction, the evidentiary standard is deemed to be met. 24 C.F.R. § 24.313(b)(3). Respondent's conviction for conspiracy is cause for his debarment under 24 C.F.R. §§ 24.305(a)(1), (a)(4) and (d), quoted above. The existence of a cause for debarment docs not automatically require imposition of an administrative sanction. On gauging whether to sanction a person, all pertinent information must be assessed, including the seriousness of the acts or omissions, and any mitigating circumstances. 24 C.F.R. § 24.313(b)(4).

Underlying the Government's authority not to do business with a person is the requirement that agencies only do business with "responsible" persons and entities. 24 C.F.R. § 24.115. The term "responsible," as used in the context of suspension and debarment, is a term of art which includes not only the ability to perform a contract satisfactorily, but the honesty and integrity of the person as well.

48 Comp. Gen. 769 (1969). "Responsibility" connotes probity, honesty, and uprightness." Arthur H. Padula, HUDBCA No. 78-284-D30 (Jun. 27, 1979). The test for whether a debarment is warranted is present responsibility, although a lack of present responsibility may be inferred from past acts. Schlesinger v. Gates, 249 F.2d 111 (D.C. Cir. 1957), cert. denied 355 U.S. 939 (1958); Stanko Packing v. Bergland, 489 F.Supp. 947, 949 (D.D.C. 1980). Debarments shall be used to protect the public and not for the purpose of punishment. 24 C.F.R. §24.115(b).

The Government asserts that Respondent should be debarred for an indefinite period, because of the seriousness of his offense. In support of its position, the Government argues that Respondent, a former HUD Assistant Secretary, conspired with two HUD officials to unlawfully benefit from a program that he once had authority over; that this constituted a serious breach of trust; that there is no evidence which indicates that Respondent's ability to perform a contract with honesty and uprightness will improve in the future; and that the risk of injury from doing business with Respondent is great.

Respondent argues that this debarment is barred by Respondent's plea agreement; that an indefinite debarment constitutes punishment because it bears no reasonable relationship to the harm caused by his offense; that this debarment proceeding is barred by the Double Jeopardy Clause of the Constitution; and that no period of debarment is warranted due to the extenuating facts and circumstances. For the reasons set forth below, I find that a debarment for a period of four years is warranted.

The offense which Respondent pleaded guilty to, conspiring to give things of value to two HUD officials, for or because of official acts performed or to be performed by those officials, raises serious questions with respect to Respondent's honesty and integrity. The facts surrounding the offense show that the pecuniary gain related to this charge was $981,975.00. The circuitous method by which Respondent arranged the loan to DeBartolomeis tends to demonstrate that Respondent was aware of the questionable nature of this transaction, and the facts of this case demonstrate, at best, extremely poor judgement on the part of Respondent, and at worst, criminal intent. While Respondent's close personal relationship with DeBartolomeis is mitigating, there is little explanation for Respondent's actions with respect to Demery. These past acts, which occurred between 1985 and 1987, are sufficient to create an inference of a lack of present responsibility.

Respondent argues that HUD cannot debar him under the terms of the plea agreement, which provides, in pertinent part, that if Respondent completely fulfills all of his obligations under the agreement, neither the Office of Independent Counsel, nor any other law enforcement agency, will bring any additional charges against Respondent related to the subject matter of the information. I disagree with Respondent's interpretation of his plea agreement. There is no language in the plea agreement which bars HUD from bringing a debarment action against Respondent. Moreover, although HUD is an agency within the Executive Branch of Government, it is not a law enforcement agency. HUD, in bringing this action, is not acting in a "law enforcement" capacity, but is acting in its business capacity. There is no language in the plea agreement precluding this type of action. I find, accordingly,

that this debarment action is not barred by the terms of the plea agreement.

Respondent argues that HUD's proposed indefinite debarment constitutes punishment, because there has been no showing that the Government is at risk and because the sanction is overwhelmingly disproportionate to the damage Respondent caused. In support of this argument, Respondent cites the relatively mild sentence in the United States District Court, and the terms of the plea agreement. There has been no showing by Respondent that HUD is attempting to punish Respondent. Although Respondent was not sentenced to incarceration, he paid a large fine. Moreover, the crime in this case directly involved officials at the highest levels of the Department. The offense at issue is of a nature that is destructive of the public's confidence in important Government social policy programs, and it raises substantial doubts with respect to Respondent's business judgement when dealing with high-level program officials. The Department's utilization of Respondent's conviction of conspiracy to pay gratuities to high level HUD officials clearly constitutes an appropriate basis for a proposed debarment action, and establishes that the Department may be at risk in any future dealings with Respondent. The mere fact that the Department has proposed an indefinite debarment does not establish a punitive intent, and a proposed debarment does not constitute punishment. I find no merit in this defense.

Respondent also argues that this debarment proceeding is barred by the Double Jeopardy Clause of the 5th Amendment of the U.S. Constitution. In support of his argument, Respondent argues that the debarment issue should have been brought before the District Court; that any claim the Government had to debarment was waived upon execution of the plea agreement; and that the Government is seeking to impose additional punishment which is disproportionate to the damages caused. I disagree. A civil sanction, such as a debarment, will be deemed to be punishment in a constitutional sense "only if the sanction may not be fairly characterized as remedial, but only as a deterrent or retribution." (italics in original). See U.S. v. Halper, 490 U.S. 435, 448 (1988). Whether a sanction appears excessive, in relation to its non-punitive purpose, is relevant to the determination of whether the sanction is civil or criminal. Halper, Id., citing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 169 (1963). The Government's proposed indefinite debarment was based solely upon Respondent's conviction for a serious offense. There is no evidence that the debarring official was aware of any mitigating factors at the time he proposed this debarment. In the absence of any mitigating factors, a conviction for an offense of this nature would clearly provide a reasonable basis for a substantial period of debarment. Based upon the evidence before me, I cannot conclude that the debarring official's proposed debarment was excessive at the time the debarment was proposed. I find this defense unpersuasive. Respondent also argues that the mitigating factors in this case establish that no debarment is warranted. See, e.g., Shane Meat Co., Inc. v. U.S. Dept. of Defense, 800 F.2d 334 (3d Cir. 1986); Roemer v. Hoffman, 419 F. Supp. 130 (D.D.C. 1976) (all mitigating factors should be weighed when determining an appropriate period of debarment); Carl Seitz & Academy Abstract Co., HUDBCA No. 91-5930-D66 (Apr. 13, 1992), HUD BCA LEXIS 3 (the passage of time may be a mitigating factor when considered together with other mitigating factors). The sentence imposed by the court is also a relevant

consideration in assessing both the need for a debarment and an appropriate period of debarment. See, James A. Damaskos, HUDBCA No. 93-C-D32 (Oct. 14, 1993), 1993 WL 411432. Based upon all of the mitigating factors set forth by Respondent, I find that an indefinite period of debarment is not warranted in this case.

I am not convinced, however, that Respondent should not be debarred for a substantial period of time. There is insufficient explanation in the record from Respondent with respect to the bad judgment which he exercised in his dealings with DeBartolomeis and Demery. While I find Respondent's mitigating evidence sufficient to establish that Respondent has many good qualities and a laudable record of accomplishment, I am troubled by the fact that, despite these qualities and accomplishments, Respondent was unable to act lawfully when seeking a determination from this Department that ultimately involved almost one million dollars in funds from this Department. Although Respondent has submitted evidence relating to his personal relationship with DeBartolomeis, this evidence is not compelling, because it is merely speculation from third parties with respect to Respondent's motives. There is no testimony from Respondent to explain his motives. Respondent's mitigating evidence does not convince me that the Department would be free from risk in dealing with Respondent in the immediate future. Considering Respondent's background and extensive experience in both business and Government, he clearly should have known better. The method by which he provided funds to DeBartolomeis indicates that he did. Applicable Departmental regulations provide that debarments generally should not exceed three years, and that a longer period of debarment may be imposed, where circumstances warrant. 24 C.F.R. § 24.320. The seriousness of the offense and the lack of compelling mitigating circumstances with respect to that offense, warrants a period of debarment in excess of three years. I find that the Government has established the necessity for the debarment of Respondent for a period of four years.

Conclusion

For the foregoing reasons, Respondent and his affiliates shall be debarred through March 7, 1997, credit being given for the period of suspension. Respondent may request the debarring official to reverse the debarment decision or to reduce the period or scope of the debarment not earlier than six months after the debarment decision becomes final. See 24 C.F.R. § 24.320(c).

Timothy J. Gresko
Administrative Judge

June 9, 1995