

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of:

RUDOLPH JAMES HYMER,

Respondent

AND

K&R INDUSTRIES, INC.
AND GUNDAKER BETTER
HOMES AND GARDENS
REALTORS, INC.

Affiliates.

HUDALJ 90-1552-DB

Decision issued: March 14, 1991

Rudolph James Hymer, *Pro se*

Bruce S. Albright, Esq.
For the Department

Before: William C. Cregar
Administrative Law Judge

INITIAL DETERMINATION

Statement of the Case

This proceeding arose as a result of a proposal by Arthur J. Hill, acting Assistant

Secretary for Housing, on behalf of the Department of Housing and Urban Development ("the Department" or "HUD") dated August 31, 1990, to debar Rudolph James Hymer, and his affiliates, K & R Industries, Inc.,¹ and Gundaker Better Homes and Gardens Realtors, Inc.,² from further participation in primary covered transactions and lower tier covered transactions as either participants or principals at HUD and throughout the Executive Branch of the Federal Government and from participating in procurement contracts with HUD for an indefinite period from that date. 24 C.F.R. Sec. 24.110(a)(1). The Department's actions are based upon Respondent's conviction in the United States District Court for the Western District of Oklahoma for violating 18 U.S.C. Secs. 371, 1010, and 2. Respondent and his affiliates were also temporarily suspended on August 31, 1990, pending final determination of the issues in this matter. They have appealed both the temporary suspension, and the proposed debarment. Because the proposed action is based upon a conviction, the hearing was limited under Departmental regulation to submission of documentary evidence and written briefs. 24 C.F.R. Sec. 24(b)(2)(ii).

Respondent's appeal is dated September 10, 1990. By order dated September 20, 1990, the Department and Respondent were ordered to file briefs on, respectively, October 22, 1990, and November 23, 1990. In his brief Respondent avers that he has been subject to a Limited Denial of Participation ("LDP") for the same conduct. He further states that there was a hiatus between the termination of the LDP and the imposition of the proposed debarment and temporary suspension. The parties were required to file additional evidence and argument on or before December 12, 1990, on the effect, if any, of any hiatus on the issue of Respondents' present responsibility. The parties filed timely responses to this second order. On January 17, 1991, the Department supplemented its response. There was no objection to the latter submission. Accordingly, this case is ripe for decision.

Findings of Fact

At the time of the events upon which his conviction is based, Respondent Hymer was a licensed real estate broker engaging in the purchase, repair and sale of real estate in Norman, Oklahoma. He was also the owner and president of K & R Industries, Inc.

Respondent Hymer pleaded guilty to an information and was convicted in the United States District Court for the Western District of Oklahoma on March 5, 1990, of

¹Mr. Hymer states that K & R has not operated since 1986 and, accordingly, has no objection to the imposition of sanctions against it. Res. Answer, p. 2.

²Gundaker Better Homes and Gardens Realtors, Inc. was added to the complaint through inadvertence. Govt. Brief, p. 1. Accordingly, the sanctions taken against it have been vacated in this Initial Determination.

one count of conspiracy to defraud the United States and one count of conspiracy to make false statements for the purpose of obtaining a loan, aiding and abetting, in violation of 18 U.S.C. Secs. 371, 1010 and 2. These offenses occurred on or about June and July 1986. Govt. Exs. 2, 4. He was sentenced to be committed to the custody of the Attorney General for three years on each of the counts, which were to run concurrently. He was to have been confined for four months followed by probation for three years from the date of his release. His sentence began to run on April 2, 1990. On May 2, 1990, his sentence was modified to end his imprisonment on May 21, 1990. The modification also placed him on probation for three years, with a requirement that he serve three months beginning on May 22, 1990, at the Halfway House, Oklahoma City, Oklahoma.

Respondent was found guilty of the following specific acts: 1) On July 31, 1986, he submitted three settlement statements regarding three separate real estate transactions which falsely stated that each purchaser had made a \$500 down payment to purchase property, and 2) on June 25, 1986, he falsely stated on a "Request for Verification of Deposit" that a purchaser, Brenda Ferguson-Argo, had a balance of \$18,057.22 in an account at the Tinker Credit Union, Tinker Air Force Base.

Mr. Hymer knew both of these statements to be false and these statements were made to induce the Department to issue mortgage insurance commitments on these properties.

The Government's uncontested Factual Proffer, accompanying the information, alleges in general terms that he and his co-conspirator, Kirby Lynn Abney, 1) forged signatures, including those of bank officials and employers, 2) made false entries on various documents including Requests for Verification of Deposit, Request for Verification of Employment, Settlement Statements and Certificates of Commitment in order to inflate bank balances and employee earnings, and 3) created bogus leases containing the signatures of fictitious tenants.

The circumstances surrounding the false statement of the amount in the Tinker Credit Union account are that Mr. Hymer temporarily deposited a worthless check in the amount of \$12,500 into an account belonging to a purchaser, Brenda Ferguson-Argo, without her knowledge. Respondent knew that the amount would be immediately credited to her account. Before the worthless check could clear, either Respondent or his co-conspirator, Mr. Abney, visited the Credit Union and requested and received a Verification of Deposit Form showing a false balance of 18,057.22. Respondent was aware that the check was worthless and took advantage of the Credit Union's practice of immediately crediting the check to the account in order to facilitate the sale of the property and induce the HUD insurance commitment.

During the period of the conspiracy, nine "strawbuyers" purchased eighteen properties. Mr. Hymer and Mr. Abney paid each "strawbuyer" \$1,000 for each property they purchased.

On May 15, 1989, the Oklahoma City Office of the Department issued a Limited Denial of Participation for one year. The bases for the LDP were the same acts for which Mr. Hymer was later convicted. The LDP expired on May 14, 1990. Between the date the LDP expired and August 31, 1990, the date of the proposed debarment and temporary suspension, Respondent was under no restrictions and was again active in some HUD programs. Res. Answer to Request for Additional Information. There is no evidence in the record regarding any misconduct by Respondent subsequent to his conviction.

Discussion

The Department's brief, relies upon the cause stated in 24 C.F.R. Sec. 24.305 (a) (3).³ This regulation provides for debarment upon conviction of a crime involving forgery, falsification, or false statements. HUD also contends that a debarment for an indefinite period is necessary to protect the public interest and to deter misconduct by other participants in HUD programs.

In his brief, Mr. Hymer admits having committed the violations which he refers to as an "isolated mistake". He has submitted numerous letters from business associates, clients, and fellow realtors vouching for his reputation. Of particular note is a letter dated August 1, 1990, from Robert E. Walters, U.S. Probation Officer, Office of the Probation Office for the U.S. District Court, who concludes, "He appears remorseful for his actions and I do not believe he will intentionally violate the law again." Respondent points out that the actions took place over four years ago, he has since dealt with HUD without incident, and he concludes that no further purpose would be served by debaring him.

³The letter proposing the debarment and imposing the temporary suspension also relies upon 24 C.F.R. Sec. 305(a)(4) and (d). These subsections provide that debarment may be imposed for "any other offense" indicating a lack of business integrity or business honesty that seriously and directly affects the responsibility of a person. Since the enumeration in subsection (a)(3) appears to include all of the misconduct upon which this action is based, and since the Department has not relied upon these additional grounds in its brief, it is unnecessary to determine whether grounds for taking the action exist under subsections (a)(4) and (d).

Respondent also claims that he engaged in these illegal practices for "a month or so" before he "realized" that what he had done was wrong.⁴ Following his epiphany, he claims that he reported the improper transactions to his superior and to Jerry Priest, the Chief of Mortgage Credit in the HUD Oklahoma City Office, that he made efforts to correct the problem and that HUD lost no money.

Mr. Priest has submitted an affidavit which casts substantial doubt on the reason advanced by Respondent for reporting the transactions. According to Mr. Priest, it was he who uncovered the scheme as a result of his comparison of the amount of FHA insurance on a property with the actual value of that property. After making this comparison, he learned that the property was overinsured. A visit to the site and interview with the tenant disclosed a fraudulent lease agreement, and overstated rental income used to qualify the mortgagor for the loan. His discovery of this situation led to the discovery of other improper loan originations. He then complained to the mortgagee about the improper practices. Although there is no direct evidence that Respondent was told of the discovery of the wrongdoing by employees of the mortgagee, the fact that it was only after Mr. Priest complained to the lender that Mr. Hymer contacted Mr. Priest and admitted his wrongdoing, circumstantially establishes that Respondent's disclosure was made after he learned that he had been found out.

Debarment is a sanction which may be invoked by HUD as a measure for protecting the public by ensuring that only those qualified as "responsible" are allowed to participate in HUD programs; *Stanko Packing Co. v. Bergland*, 489 F.Supp. 947, 949 (D.D.C. 1980); *Roemer v. Hoffman*, 419 F. Supp. 130, 131 (D.D.C. 1976). "Responsibility" is a term of art used in government contract law. It encompasses the projected business risk of a person doing business with HUD. This includes his integrity, honesty, and ability to perform. The primary test for debarment is present responsibility although a finding of present lack of responsibility can be based upon past acts. *Schlesinger v. Gates*, 249 F.2d 111 (D.C. Cir. 1957); *Roemer, supra*. The debarment sanction may also be justified on the basis of its deterrent effect on those who do business with the government.⁵

⁴Respondent claims that his innocence of the impropriety of these forgeries and falsifications was so complete that he involved his friends, their parents, and even his mother in the scheme. Res. Brief p. 2.

⁵For cases supporting the proposition that the sanction of debarment serves the goals of individual and general deterrence, see, e.g., *L.P. Stuart & Bro., Inc. v. Bowles*, 322 U.S. 398 (1944); *Janik Paving & Constr., Inc. v. Brock*, 828 F.2d 84 (2d Cir. 1987); *Copper Plumbing & Heating Co. v. Campbell*, 290 F.2d 368 (D.C. Cir. 1961).

A preponderance of record evidence demonstrates that Respondent and his affiliates are not presently responsible. HUD regulations provide that a conviction is deemed to satisfy the preponderance of evidence standard. 24 C.F.R. Sec. 313(b)(3). Respondent has been convicted of offenses involving moral turpitude. In addition, his submission casts considerable doubt on his claim that he no longer poses a risk to the public. His explanation that he willingly falsified documents, forged signatures, and engaged in a scheme to obtain a bogus bank balance from an unsuspecting financial institution "for a month or so" without realizing that these actions were illegal is, in a word, incredible. This is the type of assertion which, if honestly believed, establishes that Respondent poses a risk to the public resulting from a lack of competence. *In re Arnold K. Litman, et al.*, HUDALJ No. 89-1361-DB (October 3, 1989). However, the record does not establish that Respondent honestly believed that his actions were proper.⁶ Mr. Price's affidavit refutes Respondent's assertion that he brought his misconduct to HUD's attention as the result of a revelation. Rather the timing of Respondent's self-implication provides a strong inference that he made these disclosures after he learned that his schemes had been revealed. The timing of his attempt to furnish exculpatory evidence also provides the basis for a compelling inference that Respondent knew his activities were illegal. Respondent's lack of credibility, demonstrates that he continues to pose a significant risk to the public through further business dealings with the Department.

I have considered the matters alleged by Respondent to constitute mitigation. These include the hiatus between the termination of the LDP and the initiation of the present action, the length of time since the occurrence of the offenses, evidence that Respondent is unlikely to commit any offenses in the future, and the absence of evidence that HUD lost money as a result of his actions.

While the lapse of time between the expiration of the LDP and the imposition of the temporary suspension allowed Respondent a few months in which he could participate in HUD programs, this does not, by itself, establish a waiver on the part of HUD of its right to impose sanctions. HUD regulations provide its field offices with the authority to impose LDPs, while debarments and temporary suspensions require an action by the Assistant Secretary for Housing. The actions are independent of one another. The lapse of time merely reflects the processing time taken to forward and act upon information from the field office.

⁶I am bound by the finding of the District Court that Respondent's conspiracy to submit false statements and his false statement regarding the Ferguson-Argo account were done "knowingly." Govt. Ex. 2, pp. 4, 9; Govt. Ex. 4. The application of the principle of collateral estoppel precludes the relitigation of issues litigated and decided in a prior proceeding. See generally, 4 Davis, *Administrative Law Treatise*, Sec. 21.7 (2d Ed. 1983).

The serious of the acts for which Respondent has been convicted, his persistence in his belief in the innocence of his conduct at the time it occurred, and his insistence that his early decision to reveal his misconduct was not prompted by the discovery by others of his misconduct, establish circumstances warranting a debarment for a period in excess of three years. In addition to being serious, these circumstances establish that the passage of time has had no effect on the risk to the Department and the public posed by Respondent's business dealings. Thus, the record establishes that the risk to the public posed by Respondent's participation in HUD programs in the foreseeable future outweighs record evidence that 1) the operative events occurred over four years ago; 2) there was hiatus of approximately three months between the termination of the LDP, and the imposition of the present actions; 3) Respondent obtained numerous favorable references from business associates, clients, and the Office of the Probation Office; and 4) the absence of record evidence that HUD lost any money as a result of his illegal activities.

Conclusion and Order

Upon consideration of the public interest and the entire record in this matter, I conclude and determine that good cause exists to debar, Rudolph James Hymer and his affiliate, K & R Industries, Inc., from further participation in primary covered transactions and lower tier covered transactions as either participants or principals at HUD and throughout the Executive Branch of the Federal Government and from participating in procurement contracts with HUD for an indefinite period from August 31, 1990. The temporary suspension and proposed debarment of Gundaker Better Homes and Gardens and Gardens Realtors, Inc. are vacated.

William C. Cregar
Administrative Law Judge

Dated: March 14, 1991

CERTIFICATION OF SERVICE

I hereby certify that copies of this ORDER issued by WILLIAM C. CREGAR, Administrative Law Judge, HUDALJ 90-1552-DB, were sent to the following parties on this 14th day of March, 1991, in the manner indicated:

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