

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

In the Matter of:

LISA BURNS,

Respondent.

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Docket No. 10-3617-DB

DEBARRING OFFICIAL'S DETERMINATION

Introduction and Background

By Notice of Suspension and Proposed Debarment dated October 20, 2009, ("Notice"), the Department of Housing and Urban Development ("HUD") notified Respondent LISA BURNS of her immediate suspension along with 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 five years from the date of the final determination of this action. The Notice further advised Respondent that her suspension and proposed debarment were in accordance with the procedures set forth in 2 CFR parts 180 and 2424 and were "based upon information indicating alleged irregularities of a serious nature in [Respondent's] business dealings with the Government." The alleged irregularities, the Notice recited, involved Respondent's "acts and omissions as an employee and underwriter . . . for a HUD/FHA direct endorsement and lender insurance mortgage." The Notice alleged that the irregularities further detailed in the document involved fifteen FHA-insured mortgage transactions.

In a letter dated November 18, 2009, from her attorney, Respondent requested a hearing in accordance with the Notice. Pursuant to Respondent's request, the Debarring Official's Designee on January 15, 2010, issued an Order Setting Hearing Date and Submission Deadline. In the interim, the parties had filed a Joint Motion for Referral to an Administrative Law Judge for Fact Finding, asserting, *inter alia*, that "there will be many issues of disputed facts in these proceedings." The Debarring Official granted the motion in an Order issued February 17, 2010. Subsequently, the Debarring Official issued the Referral Order on February 26, 2010, which, pursuant to 2 C.F.R. § 180.245(e), allows the "debaring official to refer disputed material facts to another official for findings of fact." Administrative Judge H. Alexander Manuel on December 29, 2011, issued an Initial Decision and Order.

Discussion

In the Initial Decision of December 29, 2011, the Administrative Judge, in addition to making findings of fact pursuant to 2 C.F.R. § 180.845(c), recommended that "no period of debarment be imposed in this case and that the debarring official impose a period of suspension not longer than 28 months from the date of the Notice of Proposed Debarment in this case," i.e., October 20, 2009. Pursuant to the terms of reference governing the referral of this case to the AJ, as pronounced in 2 C.F.R. 180.845(c)

The debarring official may refer disputed material facts to another official for findings of fact. The debarring official may reject any resultant findings, in whole or in part, only after specifically determining them to be arbitrary, capricious, or clearly erroneous.

I have carefully read the Initial Decision, including the exhaustive treatment by the AJ of the disputed facts. Along with making findings of fact, the AJ made conclusion of law as well as recommending that Respondent suffer no period of debarment. Further, as recited above, the AJ recommended that I not impose a period of suspension longer than 28 months from the date of the Notice.

There is no authority in the debarment regime specifically authorizing an AJ to make conclusions of law or to recommend, or not, debarment or appropriate terms of debarment. Accordingly, while an AJ's recommendation with respect to final action on a proposed debarment may be treated with deference, a debarring official, because the regulation confers on him the exclusive power to debar, or not, a respondent, is not at liberty to cede this regulatory grant of power to an AJ.¹ For that reason, a debarring official, when faced with an unsolicited recommendation in an Initial Decision, must treat the recommendation as a gratuitous superfluity. The debarring official, in fealty to the regulations, must determine *de novo* or independently an appropriate period of debarment, if any, notwithstanding the AJ's recommendation.

As noted above, the facts as established by the AJ are cogently presented and well supported by the evidence. In several of the 15 transactions in which Respondent was alleged to have violated HUD's guidelines, the facts, as found by the AJ, did not support the Government's position. In some instances in which the AJ found that some of Respondent's actions were in violation of HUD's guidelines, he opined that the violations were minor. In general, although I have reservations with respect to the AJ's characterization of some of the violations as minor, I will not disturb his conclusions with respect to those disputed loans. Nonetheless, the AJ, in his exordial remarks, though noting that "many alleged violations were minor and do not warrant debarment" affirmed that "where Respondent's acts or omissions may have increased the risk of default to HUD, I find that sanctions may be appropriate. Initial Decision at 20.

¹ The grant of the power to debar, or not to debar, is to be found at 2 C.F.R. § 180.845(a), which provides that the "debarring official may debar you" etc.

The only open question, therefore, is what is an appropriate period of debarment, if any, that should be imposed on Respondent. In answering the question, due consideration must be given to the AJ's finding that "five of those loans were found to have involved errors or omissions substantial enough to warrant debarment."² In short, the errors and omissions in these five loans, standing alone, and without regard to the violations recorded in the other ten loans, are cause for grave concern. The violations found by the AJ in the five loans are serious and, if unchecked, have the potential to subvert HUD's underwriting guidelines and the integrity of the direct endorsement program. In its Notice, HUD, as stated above, proposed a five-year debarment. The proposed period of debarment proffered was based on the unproven allegations leveled in the Notice. In light of the AJ's findings, which effectively dismissed or at least mitigated the seriousness³ of several of the allegations, the original basis for a five-year debarment, as urged by the Government, is clearly untenable. I also find untenable the AJ's recommendation that a period of exclusion not exceeding 28 months is appropriate in this case.

It is worth noting that 2 C.F.R. 180.125(c) prohibits an agency from excluding "a person . . . for the purposes of punishment." A lengthy period of exclusion here in the face of the AJ's findings of fact in the Initial Decision (incorporated herein by reference, but with the reservations as discussed) arguably could be construed as punishment. I find this case, insofar as the seriousness of the violations found in the five loans is concerned, fits squarely within the provisions of 2 CFR 180.865(a). In arriving at a debarment period here, I have given due consideration to the mitigating factors advanced by Respondent and their treatment by the AJ along with the arguments rejected by the AJ. I find that the seriousness of Respondent's wrongdoing indicates that she is not presently responsible. See 2 C.F.R. §§ 180.125(a) and (b).

² In the Mosser loan, the AJ found that "Respondent's decision to approve this loan provided a basis for debarment." Initial Decision at 23. In the Patterson loan, the AJ concluded that "Respondent's decision to approve this loan without adequate documentation from the borrower to be a violation of HUD guidelines that provides a basis for debarment." Also, with respect to this loan the AJ determined that "Respondent's failure to address the apparent gap in the borrower's employment to be a violation of HUD's guidelines that provides a basis for debarment." *Id.* at 24, 29. In the Lowe loan, the AJ found that "Respondent's failure to obtain explanations from the borrowers that sufficiently explained their derogatory credit to be a violation of HUD guidelines. Respondent violated HUD guidelines by failing to obtain explanations from the borrowers for the collection accounts and late mortgage payments listed on the borrowers' credit report. I find that Respondent's omissions provide a basis for debarment and resulted in an increased risk to HUD." *Id.* at 26. In the Delith Jackson loan, the AJ concluded that Respondent's violation provided a basis for debarment because of "Respondent's failure to obtain any documentation indicating that the borrowers were expected to receive stable, continuous income to be a violation of HUD guidelines. By crediting the borrowers with over \$1,000 of effective rental income without proper verification, Respondent seriously miscalculated the borrowers' income which increased the financial risk to HUD." *Id.* at 30. In the Basureo loan, "Respondent approved this loan in clear violation of the HUD debt-to-income ratios without the existence of adequate compensating factors". Accordingly, the AJ found that "these violations provide a basis for debarment." *Id.* at 36.

³ 2 C.F.R. 180.865(a) provides in pertinent part that "your period of debarment will be based on the seriousness of the cause(s) upon which your debarment is based. Generally, debarment should not exceed three years."

Conclusion

Accordingly, based on the administrative record in this matter, in particular the findings of fact set forth in the Initial Decision of December 29, 2011 (*In the Matter of Lisa Burns*, HUDOA No. 10-M-002-D2, unpublished decision), I have determined that Respondent's suspension, which commenced on October 20, 2009, shall terminate immediately. Further, Respondent is debarred from today's date until October 20, 2012, in accordance with 2 CFR §§ 180.870(b)(2)(i) through (b)(2)(iv). Respondent's "debarment is effective for covered transactions and contracts that are subject to the Federal Acquisition Regulation (48 C.F.R. chapter 1), unless an agency head or an authorized designee grants an exception."

Dated: _____

11/19/12



Craig T. Clemmensen
Debarring Official