

**UNITED STATES DEPARTMENT OF AGRICULTURE**  
**BEFORE THE SECRETARY OF AGRICULTURE**

In re:	)	DNS-RMA Docket No. 08-0115
	)	
Dolphus Lamar DeLoach, Anthony B. Fair,	)	
DeFair Farms, LLC, and	)	
DeFair Farms, General Partnership	)	
	)	
Respondents	)	<b>Decision and Order</b>

This decision and order is issued pursuant to 7 C.F.R. § 3017.890 that governs appeals of debarment and suspensions under 7 C.F.R. §§ 3017.25-.1020, the regulations that implement a governmentwide system of debarment and suspension for the United States Department of Agriculture’s nonprocurement activities. The purpose of the regulations is stated at 7 C.F.R. § 3017.110:

- (a) To protect the public interest, the Federal Government ensures the integrity of Federal programs by conducting business only with responsible persons.
- (b) A Federal agency uses the nonprocurement debarment and suspension system to exclude from Federal programs persons who are not presently responsible.
- (c) An exclusion is a serious action that a Federal agency may take only to protect the public interest. A Federal agency may not exclude a person for the purposes of punishment.

Respondents have appealed the April 3, 2008 decision of Eldon Gould, Debarring Official for the Risk Management Agency (“RMA”), United States Department of Agriculture, to debar each of them from participation in government programs for three years. Respondents argue that the decision should be reversed and vacated because: (1) the Debarring Official relied on unproven allegations taken from a dismissed indictment

rather than limiting his determination to the factual basis of the felony conviction that his prior letter of proposed debarment stated would be the basis for debarment and that precluded respondents from making any factual challenge; (2) the fact that Respondents Deloach and Fair were allowed by RMA to participate in its crop insurance program from 2000 through 2007 was a de facto determination by RMA that they were “presently responsible” for each of those years which the Debarring Official did not credibly overcome when he determined they were not presently responsible in 2008; (3) Respondents’ exclusion from government programs was in fact punishment prohibited by 7 C.F.R. § 3017.110(c); (4) the Debarring Official failed to properly consider mitigating or aggravating factors as set forth in 7 C.F.R. § 3017.860; (5) the Debarring Official failed to properly assess Respondents’ present responsibility by focusing on their present business responsibility, but instead considered only their past conduct; and (6) the length of the debarment is excessive.

My functions as the appeal officer in this proceeding are set forth at 7 C.F.R. § 3017.890:

(a) ...The assigned appeals officer may vacate the decision of the debarring official only if the officer determines that the decision is:

- (1) Not in accordance with law;
- (2) Not based on the applicable standard of evidence; or
- (3) Arbitrary and capricious and an abuse of discretion.

(b) The appeals officer will base the decision solely on the administrative record.

In exercise of those functions I have considered the Debarring Official’s decision, the underlying administrative record and the arguments of the parties, and affirm the three-year debarment of the Respondents as being in accordance with law, fully

supported by the administrative record and the applicable standard of evidence, and not arbitrary, capricious or an abuse of discretion.

### **Findings and Conclusions**

**1. The Debarring Official did not, as alleged, rely on unproven allegations taken from a dismissed indictment, instead he based his determination to debar Respondents on their conviction for an offense indicating lack of business integrity or honesty. He also properly considered admissions by Respondents in their plea agreements and in their meeting with him to determine whether they should be excluded from federal programs for not being presently responsible.**

Before beginning his presentation at the January 23, 2008 meeting with Eldon Gould, the Debarring Official, Respondents' attorney, William Penn, asked whether the proposed debarment was based on the allegations in the underlying indictment or on the conviction. Mr. Gould responded:

MR. GOULD: It's based on the conviction.

(Tr. at 23)

Moreover, at pages 2 and 3 of the debarment letter sent to Respondent Deloach (the four letters are similar but for convenience, all page references shall be to the one sent to Deloach), Mr. Gould fully addressed this issue:

As stated at the January 23, 2008, meeting, your debarment is based on your conviction. Under 7 C.F.R. § 3017.800, a person may be debarred for '(a) Conviction of or civil judgment for...(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects your present responsibility.' In any debarment action, the government must establish the cause for debarment by a preponderance of evidence. See 7 C.F. R. § 3017.850(a). If the proposed debarment is based upon a conviction or civil judgment, the standard of proof is met. See 7 C.F.R. § 3017.850(b).

Therefore, to impose a debarment, the person:

- (1) Must have been convicted or a civil judgment rendered;
- (2) The crime convicted of must be an offense indicating a lack of business integrity or business honesty; and

(3) Must not be presently responsible.

On December 29, 2006, you pled guilty to Misprision of a Felony. In accordance with 7 C.F.R. § 3017.925, a conviction means ‘A judgment or any other determination of guilt of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or plea, including a plea of *nolo contendere*’. Therefore, you have been convicted for the purposes of 7 C.F.R. § 3017.800(a)(4).

In that plea, you admit that you knew that a person (Warren Holland) had committed a felony by making a material false statement in a tax return and associated Form 1099. You also admit that you did not report the fraud to the authorities and you concealed the felony by knowingly receiving the Form 1099 and using it in the preparation of your own tax return. Misprision of a Felony for failing to report a person that you knew was falsely providing financial information on their tax documents, concealing the false information and reporting it into your own tax documents certainly indicates a lack of business integrity or business honesty.

The last element is present responsibility. You admit in your plea agreement and in the meeting with me that you knew of the false statements made by Mr. Holland on his applications, claims, and receipts from crop insurance for the 2000, 2001, 2003 and 2004 crop years. You acknowledge that these acts are relevant to the charged offense and were taken into consideration by the Court at your sentencing. Even though you did not plead guilty to any crime for the 2001, 2002, 2003 and 2004 crop years, you acknowledge in your plea agreement that you knew of these false statements for each of these years and there is no evidence that you took any action to notify anyone at FCIC, the approved insurance provider, or anyone else in authority of these false statements. Since you admitted to these facts in your plea agreement, they can be used in determining your present responsibility.

The Administrative Record shows that the Debarring Official understood the legal standards that apply and the evidence he could and could not consider before debarring Respondents based upon their conviction by a United States District Court for Misprision of a Felony in violation of 18 U.S.C., Section 4. Contrary to Respondents’ contentions, the Debarring Official limited himself to considering their convictions, and the admissions made in their plea agreements and those made when they met with him. The

Debarring Official's resulting actions were therefore consistent with the governing regulations and within his authority.

**2. The fact that Respondents were allowed by RMA to participate in its crop insurance program from 2000 through 2007 was not a de facto determination by RMA that Respondents were presently responsible for each of those years, and did not preclude the Debarring Official from finding, in 2008, that Respondents were not then presently responsible.**

The Debarring Official completely answered contrary contentions by Respondents.

As explained at pages 3 and 4 of the debarment letter to Respondent Deloach, though USDA's Federal Crop Insurance Corporation (FCIC) was aware that there was an ongoing investigation of Respondents activities, it continued to allow participation in its crop insurance program while awaiting the outcome of the investigation. FCIC chose, as the more prudent course, not to seek Respondents' debarment until after criminal conviction. This benefited Respondents by allowing them to participate in the crop insurance program until grounds for their debarments were firmly established through the conviction.

For Respondents to now argue this forbearance amounted to approval of them as presently responsible and precluded their subsequent debarment, is not tenable. It is contrary to the intent and wording of 7 C.F.R. § 3017.800 which provides for debarment for a number of reasons which include conviction of an offense indicating a lack of business integrity or business honesty that seriously and directly affects present responsibility (7 C.F.R. § 3017.800(a)(4)), and any other cause of so serious or compelling a nature that it affects present responsibility (7 C.F.R. § 3017.800(d)). The regulation offers choices that may not be interpreted in a manner so as to nullify the

effective intent or wording of the regulation. *Pettibone Corp. v. United States*, 34 F. 3d 536, 541 (7<sup>th</sup> Cir. 1994). Therefore, FCIC acted within its discretion when it chose to withhold action to debar Respondents pending criminal conviction, and the Debarring Official was not precluded by this forbearance from debarring Respondents for not being presently responsible.

**3. Respondents' exclusion from participation in Federal programs was not punishment prohibited by 7 C.F.R. § 3017.110(c).**

Respondents' contention that the debarment was used as a means of punishment has been like other contentions in their appeal, fully addressed by the Debarring Official:

You also state that debarment is being used as a means of punishment. First, the regulations make it clear that debarment is solely to protect the Federal Government and not for purposes of punishment. See 7 C.F.R. § 3017.110. Further, the Supreme Court has stated that debarments are not considered punishment. See Hudson v. United States, 522 U.S. 93,104 (1997). The Court stated that even though debarment has a deterrent effect, the traditional goal of punishment, the presence of this purpose does not render debarment a punishment. Id. Another court stated, 'It is the clear intent of debarment to purge government programs of corrupt influences and to prevent improper dissipation of public funds. Removal of persons whose participation in those programs is detrimental to public purposes is remedial by definition. While those persons may interpret debarment as punitive, and indeed feel as though they have been punished, debarment constitutes the 'rough remedial justice' permissible as a prophylactic governmental action.' See United States v. Bizzell, 921 F.2d 263, 267 (10<sup>th</sup> Cir. 1990); United States v. Hatfield, 108 F.3d 67, 69-70 (4<sup>th</sup> Cir. 1997).

Page 4 of the debarring letter to Deloach.

After rejecting punishment as an appropriate goal, the Debarring Official examined the various factors specified by the regulations as mitigating or aggravating factors before making his determination to debar Respondents. Contrary to Respondents' contention, he acted in accordance with law, and it cannot be found that his purpose was to punish the Respondents. Instead, the Debarring Official employed the applicable

standard of law, and his determination does not qualify as arbitrary, capricious or an abuse of discretion.

**4. The Debarring Official properly considered the relevant mitigating or aggravating factors set forth in 7 C.F.R. § 3017.860.**

At pages 5-8 of the debarment letter to DeLoach, the Debarring Official reviewed each of the factors listed in 7 C.F.R. § 3017.860 that he considered relevant. His review is both comprehensive and logical. He fully addressed every contention Respondents assert in this appeal to urge that the Debarring Official ignored relevant evidence in reaching his determination. The debarment letter shows that he weighed the relevant evidence in considering each applicable factor. His review included the letters provided from persons claiming that Respondents are presently responsible, and the fact that Respondents paid the special assessments, fines and full restitution ordered by the United States District Court. His stated reasons for nonetheless debarring the Respondents meet the standards set forth in *Burke v. United States Environmental Protection Agency*, 127 F.Supp.2d 235, 239-240 (D.D.C.2001); and *Canales v. Paulson*, 2007 WL 2071709 (D.D.C. 2007).

The crime for which Respondents were convicted coupled with their admissions and failure to accept responsibility for either the wrongdoing or the seriousness of their misconduct outweighed, in his opinion, the mitigating factors. Specifically, DeLoach and Fair admitted knowing that Mr. Holland was defrauding the crop insurance program for at least four years by falsely claiming a 100 percent interest in crops on land that had not been rented to him by Respondents as Mr. Holland claimed and that the Form 1099 that he filed showed false rent payments. The Debarring Official, at page 8, concluded that despite the letters sent on behalf of the Respondents, he had no basis for finding that they would not again engage in dishonest conduct. It is not my function to second-guess him.

My role in this instance is equivalent to that of an Article 3 court reviewing an agency decision as recently described by the Supreme Court in *National Ass'n of Home Builders v. Defenders of Wildlife*, 127 S.Ct. 2518, 2529-2530 (2007):

Review under the arbitrary and capricious standard is deferential; we will not vacate an agency's decision unless it

'has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of the Debarring Official's expertise.' *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983).

'We will, however, 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.' *Ibid.* (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974)).

The Debarring Official's determination meets these criteria. He weighed all relevant evidence, considered all pertinent mitigating or aggravating factors, and his explanation for the determination is plausible based on his views and expertise.

**5. The Debarring Official properly assessed the Respondent's present responsibility.**

Respondents assert that the Debarring Official failed to properly assess Respondents' present responsibility by focusing on their present business responsibility, but instead considered only their past conduct. Review of the Debarring Official's determination fails to support this contention. The reasons why he concluded debarment is warranted are set forth at page 8 of the debarment letter sent to Respondent Deloach:

I find that you have been convicted of an offense indicating a lack of business integrity or business honesty that seriously and directly affects your present responsibility under 7 C.F.R. § 3017.800(a)(4). After reviewing your information and arguments, reviewing the entire official record for the proposed debarment

action and the factors listed above, I do not believe you have satisfactorily demonstrated that you are presently responsible and debarment is not necessary.

While there are many letters attesting to your character, most express surprise that you would be involved in criminal conduct. However, you were involved. You admit to knowing that Mr. Holland was defrauding the crop insurance program for at least four years. For each of the relevant years you knew that Mr. Holland was claiming a 100 percent interest in the tobacco crop, which you admit was false. You knew that you and ... (the other Respondent) had not leased Mr. Holland the acreage to which he claimed a 100 percent interest in the crop and that the Form 1099 that purported to be for rent was false. This conduct continued even after you claim FCIC had conducted its investigation and knew of the facts in early 2002. You have not fully taken responsibility for your actions or cooperated with the investigation or the court. Therefore, contrary to the letters, I have no basis to conclude that this conduct will not occur again. Therefore, to protect the interest of the government, debarment is warranted.

Page 8 of the debarment letter to Deloach.

The Debarring Official's analysis is consistent with the evidentiary requirements of the regulations. Under 7 C.F.R. § 3017.855(b):

Once a cause for debarment is established, a respondent has the burden of demonstrating to the satisfaction of the debarring official that he or she is presently responsible and that debarment is not necessary.

As the Debarring Official explained, the Respondents failed to meet their burden of persuasion.

**6. The length of the debarment is not excessive.**

The Debarring Official has discretion to impose a period of debarment consistent with the circumstances after considering aggravating and mitigating factors. For the reasons previously stated, I have found and concluded his evidentiary review and consideration of aggravating and mitigating factors to be legally sufficient and in compliance with the controlling regulations. I do not find the period of debarment to be arbitrary or unsupported by the Administrative Record which is the limit of my responsibility in this review proceeding. *See Burke, supra*, at 127 F. Supp.2d 241-242.

*Burke*, at 127 F. Supp.2d 242, upheld the imposition of a five year period of debarment based on:

The seriousness of Burke's criminal conviction, his failure to take personal responsibility for his offense, and his direct control of and involvement with ACMAR and the Landfill each provided an independent basis for EPA's conclusion....

Similarly, the Debarring Official in the instant proceeding has given valid reasons for imposing a three year period of debarment. He recognized and considered the fact that Respondents had been previously suspended for one year. He cited the number of years that DeLoach and Fair knew false documents were being provided to obtain crop insurance and the payment of improper claims, and the fact that the conduct continued after the investigation had begun. The Debarring Official considered the fact that neither DeLoach nor Fair took any personal responsibility for the wrongdoing or the seriousness of their misconduct. Moreover, the Debarring Official considered all of the relevant aggravating and mitigating factors set forth in 7 C.F.R. § 3017.860. The Debarring Official in *Burke* was upheld in his imposition of a five year period of debarment. Here, the Debarring Official has imposed a lesser three year debarment. As in *Burke*, his determination must be given deference and upheld as meeting all of the requirements of the controlling regulations and law, being adequately supported by the administrative record, and not being arbitrary, capricious or an abuse of discretion.

Accordingly, the following Order is being entered.

**Order**

The decision of the Debarring Official is affirmed.

This Order shall take effect immediately. This decision is final and is not appealable within USDA. 7 C.F.R. § 3017.890(d).

Copies of this Decision and Order shall be served upon the parties.

Dated: \_\_\_\_\_

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Victor W. Palmer  
Administrative Law Judge