In the Matter of Docket No. 93-115-DA

The Proposed Debarment of

MARCUS KATZ

DECISION OF GOVERNMENTWIDE DEBARMENT

FROM FEDERAL NONPROCUREMENT TRANSACTIONS

This **DECISION** is issued by the United States Department of Education (Department) pursuant to 34 CFR § 85.314. I have jurisdiction to act in this matter by virtue of a Delegation of Authority from the Secretary to me to act as the Department's Designated Deciding Debarment and Suspension Official. The regulations, 34 CFR Part 85, and the Nonprocurement Debarment and Suspension Procedures mailed with the notice of proposed debarment govern this proceeding.

On May 20, 1992, Marcus Katz, President of U.S. Education Corporation of Atlanta, Georgia, doing business as the Georgia School of Bartending (school), was issued a "Notice of Proposed Governmentwide Debarment from Federal Nonprocurement Transactions" pursuant to 34 CFR § 85.312. The proposed debarment was based upon three violations of Title IV regulations at the school which were imputed to him pursuant to 34 CFR § 85.305(b) and (d). These violations were: failure to refund guaranteed student loan (GSL) funds to lenders when students withdrew, 34 C.F.R. § 682.607; disbursement of GSL funds to students who were not enrolled, 34 C.F.R. § 682.604(b)(2); and, improperly signing student's signatures to GSL checks. Mr. Katz was also given notice of his right to submit information and argument in opposition to the proposed debarment.

On July 17, 1992, and October 19, 1993, I held hearings on this matter in Washington, D.C. At the first hearing, Mr. Katz appeared pro se while the Department's Notice Official was represented by Carol S. Bengle, Esq., of the Office of the General Counsel. At the second hearing, Mr. Katz was represented by Leigh M. Manasavit, Esq., and George Francis Bason, Jr., Esq., while Russell B. Wolff, Esq., represented the Department. The hearings were recorded by a court reporter and a transcript was made and provided to both sides. The parties were given an opportunity to file post-hearing briefs, which they did.

At the second hearing, the Department withdrew the allegations concerning the disbursement of funds to students not enrolled and the signing of student signatures on GSL checks. It chose to proceed on only the issue of the improper refunds of GSL loans. I find that there are no disputes as to material facts. The parties stipulated that there were approximately $240,000 of refunds that were not made as required. Mr. Katz argued that the only reason refunds were not made in a timely manner was the school had a serious cash flow problem and, with the limited funds available, he chose to pay his operating expenses such as rent and salaries, in an attempt to keep the school operational, and thereby attempt to generate the income necessary to make all the payments. The Respondent also argued that the debarment proceeding is barred by the provisions of §525 of the Bankruptcy Act, 11 U.S.C. §525. He referred to Perez v. Campbell, 402 U.S. 637 (1971), and claimed that, since he had filed a petition in bankruptcy, the debarment action constituted a prohibited form of discrimination against him.

The Department argued that the debarment action was not prohibited by §525. They point out that Mr. Katz had raised the same argument when he sought a stay of the debarment action from the U.S. Bankruptcy Court for the Northern District of Georgia. His Motion was denied by the Bankruptcy Judge and that decision, by a Court with jurisdiction over the matter, should be accepted by me and should not be susceptible to a collateral attack. The Department also argued that the violations are serious and Mr. Katz, as president and signatory of the participation agreement with the

Department, knowingly and intentionally did not pay the refunds as required and, therefore, should be debarred.

Based on the presentations of the parties and evidence submitted, I find that the debarment action does not violate the automatic stay provisions of 11 U.S.C. §525. Specifically, I find that I am bound by the decision of the Bankruptcy Judge in this matter and, even if I weren't, I would find that the debarment action does not constitute prohibited discrimination under §525 of the Bankruptcy Act. Next, I find that Mr. Katz actively participated in the violation of Title IV of the Higher Education Act of 1965, as amended, 20 U.S.C. § 1070 et seq. It is abundantly clear that these violations were substantial and resulted in the loss of program funds. I note as significant, that the failure to pay refunds in the Title IV Program can now lead to criminal penalties. 20 U.S.C. § 1097(a). Consequently, I find that the Department has established, by a preponderance of the evidence, that Mr Katz is subject to debarment under 34 C.F.R. §85.305 (b) and (d).

The Notice Official argues that the proper standard to apply in a debarment case is that officials in responsible positions, like Mr. Katz here, are subject to debarment when violations occur at schools under their control which are sufficiently serious so as to constitute causes for termination of the school's eligibility. I note, however, that 34 C.F.R. § 85.325(b)(2), which is cited by the Department as a basis for attributing the wrongdoing at the school to Mr. Katz, provides that the fraudulent, criminal, or other seriously improper conduct of the participant (School) may be imputed to any officer, who participated in, knew of, or had reason to know of that conduct. In contrast, I note that 34 C.F.R. § 668.86 (a), which governs termination of eligibility of institutions, provides that the eligibility of an institution to participate in Title IV programs may be terminated for the violation of any Title IV provision.

A comparison of the bases for debarment with the bases for terminating the participation of an institution in any Title IV program reveals that the tests for each are dramatically different, i.e. "fraudulent, serious, or other seriously improper conduct," as opposed to violation of "any" provision of Title IV. As such, I cannot agree with the position of the Notice Official as to the degree of culpability necessary to debar an individual. The proper standard is that the conduct imputed to an individual so as to constitute grounds for debarment must be fraudulent, criminal, or other similarly serious, improper conduct.

The debarment of an individual has extremely serious consequences. The individual is precluded from initiating, conducting, or otherwise participating in any covered transaction under the nonprocurement programs and activities of any Federal agency, and is not eligible to receive any Federal financial and nonfinancial assistance or benefits from any Federal agency under nonprocurement programs and activities. Also, such individual may not act on behalf of any person in connection with any covered transaction.

As stated in 34 CFR § 85.115, the policy of the Federal Government is to conduct business only with responsible persons. It seems clear that in order to support the governmentwide debarment from federal nonprocurement transactions of an individual, a greater degree of personal culpability than what the Notice Official argues is appropriate must be shown. Merely establishing the violation of program regulations which could constitute the violation of the fiduciary status conferred upon Title IV participants and thereby lead to termination of eligibility is not sufficient.

Applying the correct standard, my review of the facts and circumstances in this case reveals the seriousness of the violations and the degree of personal wrongdoing envisioned by the debarment process has been established. Mr.Katz was directly responsible for the failure to properly account for federal funds. This adversely affects whether he is a responsible person so as to be eligible to participate in federal programs. See generally Sellers v. Kemp, 749 F.Supp. 1001 (W.D.Mo. 1990).

In light of the foregoing, I find that the Department has met its burden of proof and persuasion that the debarment of Mr. Katz is warranted. Under the provisions of 34 C.F.R. § 85.320, the period of debarment is to be commensurate with the seriousness of the cause(s) of debarment, generally not to exceed three years. Based upon the circumstances here, I have determined that the period of debarment shall be three years.

I order that Marcus Katz be DEBARRED from initiating, conducting, or otherwise participating in any covered transaction under the nonprocurement programs and activities of any Federal agency, and is ineligible to receive Federal financial and nonfinancial assistance or benefits from any Federal agency under nonprocurement programs and

activities. He may not act as a principle, as defined in 34 C.F.R. § 85.105(p), on behalf of any person in connection with a covered transaction. This debarment is effective for all covered transactions unless an agency head or authorized designee grants an exception for a particular transaction in accordance with 34 C.F.R. § 85.215.

ERNEST C. CANELLOS,
Deciding Debarment and
Suspension Official

Dated: January 18, 1994

[Notice to reader: On August 2, 2001, Department of Education counsel for the Notice Debarment Official requested the Office of Hearings and Appeals to append the following language to the original decision:

"OHA has been advised that on August 2, 1994, this matter was the subject of a settlement agreement that withdrew the imposition of the debarment."]