

In the Matter of The Proposed Debarment of KERRY L. MURDOCK  
Docket No. 94-67-DA

DECISION OF GOVERNMENTWIDE DEBARMENT  
FROM FEDERAL NONPROCUREMENT TRANSACTIONS

This DECISION is issued by the United States Department of Education (Department) pursuant to 34 C.F.R. Part 85. I have jurisdiction in this matter by virtue of a Delegation of Authority from the Director, Office of Hearings and Appeals, to me to act as the Designated Deciding Debarment and Suspension Official. The regulations, 34 C.F.R. Part 85, and the Nonprocurement Debarment and Suspension Procedures mailed with the notice of the proposed debarment govern this proceeding.

On March 1, 1994, Mr. Kerry L. Murdock was issued a "Notice of Proposed Governmentwide Debarment from Federal Nonprocurement Transactions" pursuant to 34 C.F.R. . 85.312. The proposed debarment alleged there were irregularities in his business practices which seriously reflected on the propriety of further federal government dealings with him. The Notice refers to the fact that on November 24, 1992, he pleaded guilty to two counts of misapplication of bank funds, in violation of 18 U.S.C. .. 657 and 2, which alleged that on February 3, 1987, and on March 23, 1987, he knowingly and willfully misapplied, and caused to be misapplied, a total of \$133,390 in bank funds, including program funds authorized under Title IV of the Higher Education Act of 1965, as amended. Mr. Murdock was informed that this conviction constitutes cause for debarment under the provisions of 34 C.F.R. . 85.305 (a), (b), and (d). Subsection (a) addresses conviction of fraud, embezzlement, false statements and other offenses indicating a lack of business integrity; subsection (b) addresses a violation of a public agreement or transaction which affects the integrity of an agency program; and subsection (d) addresses "[a]ny other cause of so serious or compelling a nature that it affects the present responsibility of a person."

Mr. Murdock exercised his right to oppose this proposed debarment in accordance with the provisions of 34 C.F.R. . 85.313 and was represented in this matter by Mr. Saul L. Moskowitz. The Department's Notice Official was represented by Mr. Edmund J. Trepacz, II, of the Office of the General Counsel. In his written presentation Mr. Murdock explained that the transferred funds which were the subject of his conviction were funds which belonged to the First America

Savings Bank (FASB) where he, at age 26, was hired in December, 1985, as Assistant Controller. He was promoted to the position of Controller in December 1986. While employed at FASB, Mr. Murdock worked for Mr. John J. Hilliard, who was not only President and CEO of FASB, but also a director and major stockholder of the holding company/parent of FASB, National Savings Bank Corporation of Colorado (NSB). On February 3, 1987, Mr. Murdock, at the direction of Mr. Hilliard, transferred \$98,100 in FASB funds characterized as deferred taxes from its general operating account to another bank owned by NSB to satisfy loans in Mr. Hilliard's name. Mr. Murdock, on March 23, 1987, again transferred \$35,290 from FASB's general operating account to the NSB to satisfy loans owned by Mr. Hilliard.

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Although it appears he was under no duty to do so, prior to executing these two transactions, Mr. Murdock sought approval from the Federal Home Loan Bank Board (FHLBB) for these fund transfers on the grounds that they represented deferred tax liabilities of FASB for which NSB would ultimately be required to make payment. The FHLBB representative told Mr. Murdock this would constitute an impermissible loan by FASB to NSB and the transfers should not be made. The FASB board of directors discounted this "advice." Mr. Murdock was apparently still concerned enough to consult a respected accounting firm about the propriety of such a transfer before he carried out Mr. Hilliard's request. After being informed by the accounting firm that there were no tax or accounting limitations, Mr. Murdock caused the funds to be disbursed in accordance with the directions from Mr. Hilliard. Apparently still not convinced of the propriety of these transactions, Mr. Murdock consulted with a national law firm in the summer of 1987 and that firm, too, informed him they disagreed with the FHLBB limitations.

The FHLBB, and its successor, the Resolution Trust Corporation, pursued criminal prosecution of Mr. Murdock and his superior, Mr. Hilliard. On November 6, 1992, Mr. Murdock pleaded guilty to the two offenses and was sentenced on January 11, 1993. From July 1992 to the present, Mr. Murdock has acted as an agent for an entity controlled by Sumitomo Bank of California (SBC) to oversee the administration by Unipac Service Corporation of a portfolio of approximately \$17

million in Federal Family Education Loan Program loans held by SBC.

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The Department does not dispute any of these facts. It relies solely upon the record of conviction before the United States District Court, District of Colorado, for proof that Mr. Murdock, by his conviction of the aforementioned offenses, has demonstrated that he is not a responsible person. On this basis it argues he is one who should be precluded from conducting any business with the Federal Government.

Mr. Murdock defends himself in this proceeding with the argument that debarment is a serious action that should be used sparingly. He also points out that, according to the regulation, the existence of a cause for debarment does not necessarily require that a person be debarred. 34 C.F.R. . 85.300. The regulations provide that debarment should be used only in the public interest and for the Federal Government's protection, and it should not be used as punishment of the individual. 34 C.F.R. . 85.115(b). His primary argument is that there are a number of mitigating factors which should be considered which militate against his debarment on this occasion. Specifically, he points out to his youthful age at the time of the offense, age 26; the fact he misapplied the money at the direction of his employer, and that Mr. Murdock did not profit from either of the transactions. He points out his receipt of advice of an accounting firm prior to the transfer which appears to have authorized such a transfer. In several places in his written opposition there is evidence of the assistance and contributions he provided toward the indictment of Mr. Hilliard; and there is his statement that he has been employed as an agent for an entity controlled by Sumitomo Bank of California since July 1982, four months

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before he pleaded guilty to the misapplication offenses. Furthermore, it should not go unnoticed that it has been seven years since the offenses were committed, and a year and a half since his conviction.

No matter how much mitigation there may exist, one cannot overlook the fact that Mr. Murdock engaged in criminal misconduct which resulted in a federal conviction. Immediately

after that misconduct, the Department had a strong case for debarment which has been slowly eroded with the passage of time and an apparent lack of subsequent misconduct on his part. Despite these factors, I believe the Department has met its burden of proof and persuasion that the debarment of Mr. Murdock is appropriate. In reaching this determination, I find that his civil conviction for misapplication of bank funds constitutes a cause for debarment under 34 C.F.R. . 85.305 and this misconduct is serious enough to warrant that he be debarred. Under the provisions of 34 C.F.R. . 85.320, the period of debarment generally should not exceed three years; however, I believe the mitigating facts set out above and the absence of any subsequent misconduct warrant a shorter period of debarment in this instance. Recognizing that the purpose of a debarment is to protect the public interest, rather than punish

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Mr. Murdock, I have determined the period of debarment shall be one year.

I order that Mr. Kelly L. Murdock 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 as agency head or authorized designee grants an exception for a particular transaction in accordance with 34 C.F.R. . 85.215.

RICHARD F. O'HAIR,  
Deciding Debarment and Suspension Official  
Dated: May 12, 1994