

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF HEARINGS AND APPEALS

In the Matter of:

Housing Authority of the County of Kern,

Petitioner.

21-JM-0155-AO-026

December 23, 2021

BEFORE: J. Jeremiah MAHONEY, Chief Administrative Law Judge

DECISION AND ORDER

This matter is before the Court upon a request for hearing filed by Housing Authority of County of Kern (“Petitioner”) pursuant to 24 C.F.R. § 17.69(a) concerning an alleged debt that the United States Department of Housing and Urban Development (“HUD”) seeks to collect from Petitioner via administrative offset under 31 U.S.C. § 3716. In accordance with 24 C.F.R. §§ 17.69 and 17.73, the HUD Office of Hearings and Appeals has jurisdiction to conduct a hearing in this matter to determine, by a preponderance of the evidence, whether the alleged debt is past due and legally enforceable.

On May 24, 2021, Petitioner, through counsel, submitted a request for hearing concerning the alleged debt, supported by five documentary exhibits. Thereafter, the Court notified the parties that the hearing would be conducted on the basis of the written record unless the parties requested otherwise, and directed the parties to submit written evidence and argument. Neither party requested an oral hearing.

On September 30, 2021, Petitioner submitted a position statement and an affidavit from its executive director, Stephen Pelz, attesting to the truth of the statements in the hearing request and the authenticity of the attached exhibits. On October 22, 2021, HUD submitted the Administrative Record in this matter, along with a position statement. The record is now closed.

FACTUAL BACKGROUND

Petitioner is a public housing authority (“PHA”) in Kern County, California that serves approximately 20,000 residents. Petitioner receives an annual subsidy from HUD through the agency’s Public Housing Operating Fund Program (“the operating subsidy”). HUD operates this program under section 9(f) of the United States Housing Act of 1937, as amended, 42 U.S.C. § 1437g, which establishes a federally managed fund to provide assistance to local public housing authorities for the operation and management of public housing for low-income families. See Pub. L. No. 93-383, § 201(a), 88 Stat. 633, 666 (1974) (amending Pub. L. No. 75-412, § 9, 50 Stat. 888, 891 (1937)); see also 24 C.F.R. § 990.100. The operating subsidy helps a PHA cover expenses

including the cost of utilities for its public housing projects, referred to as Asset Management Projects (“AMPs” or “projects”).

The basic facts of this matter are not disputed by the parties. Since at least 2009, Petitioner has received the operating subsidy from HUD to assist it in operating public housing projects. The operating subsidy is calculated through a formula that takes into account, among other items, utility costs incurred at PHA-managed projects. This case involves the overpayment of operating subsidy funds for water and sewer service at nine of Petitioner’s projects. For each of these projects, Petitioner’s costs for water service are based on the level of consumption, while its sewer costs are charged at a flat rate that does not relate to consumption.

Petitioner also participates in a HUD program that helped it invest in water-saving improvements. Under this program, the operating subsidy to Petitioner is based not on its current level of water consumption but rather on the amount of water it used before the improvement, charged at the current rate per unit used. For several years, however, Petitioner calculated this rate based on its combined water and sewer costs, divided by its units of water (but not sewer) consumption. This inflated the per-unit cost and resulted in HUD paying Petitioner a higher operating subsidy than it should have received under the applicable regulations.

In addition, as part of federal energy policy, HUD financially supports PHAs in implementing conservation measures. Petitioner participates in one of these measures, known as an Energy Performance Contract (“EPC”). See 24 C.F.R. § 990.185. In an EPC, a third party pays the initial cost of an energy-saving improvement to benefit a PHA’s project, and the cost is repaid with the savings from reduced consumption following the improvement.

To encourage the use of EPCs, HUD has authorized the Frozen Rolling Base (“FRB”) incentive. Rather than using the ordinary rolling base calculation based on the previous three years, the FRB incentive freezes the rolling base amount at the level that existed before the improvements added under the EPC. See 24 C.F.R. § 990.185(a). The operating subsidy from HUD is then based on that amount, regardless of actual consumption, and all the savings accrue to the PHA, provided that it uses at least 75% of that amount to repay the debt used to finance the improvement. Id.

Each year, the PHA submits its utility costs and calculations using a standard form provided by HUD, Form HUD-52722 (“the UEL Form”), available in both electronic and printed formats. In practice, PHAs provide this data using a Microsoft Excel-based tool that is functionally and mathematically identical to the printed UEL Form but is pre-populated with most of the relevant information and automates the calculation steps. Both formats contain specific instructions as to the proper entry of flat-rate utilities.

HUD relies on each PHA to provide accurate data to properly allocate subsidies. Beginning in 2014, Petitioner changed the way that it provided some of that information to HUD in the UEL Form for 14 of its AMPs. Because Petitioner’s submissions combined flat-rate costs with consumption-based costs in a single column, it calculated artificially high utility rates for 9 of the AMPs. The result was an artificially high Utility Expense Level (“UEL”) for the affected projects causing HUD payments in excess of Petitioner’s entitlements. (The remaining 5 AMPs received an underpayment of the operating subsidy, which has been credited against the debt amount.)

In 2019, HUD became aware of this error in one of Petitioner’s submissions and alerted Petitioner to the issue. Petitioner promptly changed the reporting for 2019 and future years, but HUD subsequently discovered that Petitioner had been similarly and incorrectly completing the UEL Forms for at least 14 AMPs from at least CY 2014 through CY 2018.

On March 26, 2021, HUD issued a demand letter to Petitioner (“the Demand Letter”) for the repayment of \$1,320,185.30 in subsidy that it should not have received during the 2014 to 2018 funding periods. The Demand Letter explained that the overpayment resulted from the incorrect combination of flat-rate and consumption-based utilities on the UEL Form, which led to an inflated average rate. It also identified two AMPs that required an adjustment to their Frozen Rolling Base rates. The Demand Letter included a table detailing the amounts of each overpayment by funding year and AMP. Finally, the Demand Letter demanded repayment of the debt within 30 days. If Petitioner failed to do so, the Demand Letter stated that HUD would initiate an administrative collection process and advised Petitioner of its rights under that process, including the right to petition this Court for a review of HUD’s determination regarding the past-due status and enforceability of the debt.

On May 24, 2021, Petitioner timely appealed HUD’s determination to this Court. On May 27, this Court issued a *Notice of Docketing, Order, and Stay of Referral*. Following two orders modifying the briefing schedule, Petitioner timely submitted its *Petition*, accompanied by a declaration and exhibits, on September 30. On October 22, 2021, HUD timely submitted its statement of position and the administrative record.

LEGAL FRAMEWORK

Pursuant to Chapter 37 of Title 31 of the United States Code, executive agencies such as HUD are authorized to collect debts owed to the United States government through means including administrative offset. See 31 U.S.C. § 3716. Before attempting to collect a claim by administrative offset, the agency must provide the debtor with notice of its intent to collect, as well as “an opportunity for a review within the agency of the decision of the agency related to the claim.” Id. § 3716(a)(1) and (3).

To satisfy this obligation, HUD provides the debtor with “the right to a review of the case and to present evidence that all or part of the debt is not past due or not legally enforceable” through a hearing before this Court. See 24 C.F.R. § 17.69(a). After allowing the debtor to submit evidence, the Court must determine, by a preponderance of the evidence, whether there is a debt that is past due and whether it is legally enforceable. Id. § 17.69(c). The Court then must issue a written decision that constitutes the final agency decision with respect to the past due status and enforceability of the debt. Id. § 17.73(a). Proceedings before this Court are conducted in accordance with the procedural rules set forth in 24 C.F.R. part 26, subpart A. See id. § 26.1 (applying part 26, subpart A to any case where a statute or regulation requires a hearing before a HUD hearing officer).

DISCUSSION

HUD asserts that Petitioner's receipt of the overpayment of the operating subsidy has created a debt to the Government, and that it is legally enforceable against Petitioner. HUD further asserts that, because of the pro-rated nature of the operating subsidy, Petitioner received funds that otherwise would have been properly received by eligible PHAs.

Petitioner acknowledges that it received funds through the operating subsidy to which it was not entitled. However, Petitioner asserts that the debt should not be enforced because: (1) HUD provided insufficient notice that it would be seeking to recover the overpayment and otherwise did not provide due process; (2) HUD's claim is not enforceable because of the applicable statute of limitations and the doctrine of laches; (3) the directions included in the UEL Form were insufficiently clear; and (4) repayment of the overpaid operating subsidy would prevent Petitioner from applying for other HUD programs to modernize its rental units. Petitioner further requests that this Court disallow the requirement that the savings from the EPC be applied to the EPC's project costs, and that Petitioner be granted a 30-day grace period to repay without any processing fees or penalties.

For the reasons discussed below, the Court concludes that a past-due, legally enforceable debt exists.

I. A debt exists that is past due.

As noted above, the Court's jurisdiction in this proceeding is limited to determining whether the preponderance of the evidence establishes the existence of a debt that is past due and legally enforceable. See 24 C.F.R. § 17.69(a) and (c). HUD claims that a debt exists arising from HUD's overpayment to Petitioner through the operating subsidy from the period 2014 through 2018.

Pursuant to HUD's regulations governing the Public Housing Operating Fund Program, a PHA such as Petitioner is eligible for a subsidy if its operating expenses exceed its revenue. See 24 C.F.R. § 990.110. If so, after obtaining financial data from the PHA, HUD applies a regulatory formula to determine the difference between the PHA's estimated expenses and income for the upcoming year, then supplies a subsidy to cover the difference. Id. §§ 990.110(a) and 990.200. The expenses the subsidy is intended to cover include the PHA's cost of providing utilities such as water and sewerage to its housing projects. Id. §§ 990.110(a)(3), 990.115, and 990.170.

In this case, HUD explains that it funds Petitioner's utilities on a modified reimbursement basis under a formula that accounts for consumption and the rate charged by the utility company. Petitioner provided incorrect information for 14 AMPs over a 5-year period, which resulted in HUD paying an incorrectly large operating subsidy to Petitioner in relation to 9 AMPs. The amounts paid exceeded the amounts to which Petitioner was entitled. Nonetheless, Petitioner accepted the overpayments and to date has retained them.

Petitioner accepted overpayments of its annual operating subsidy which remain unpaid. HUD's Demand Letter dated March 26, 2021 asserted that Petitioner owed \$1,320,185.30 on account of the overpayments, and provided three options to Petitioner: (1) repay the debt within 30 days; (2) make other arrangements with HUD for repayment of the debt; or (3) timely appeal the

determination of the debt to this Court, limited to presenting evidence that all or part of the debt is not past due or not legally enforceable.

Petitioner has not disputed the existence or amount of the debt. Further, it is now more than thirty days past the date of the Demand Letter, and it does not appear that Petitioner has made other arrangements for repayment of the debt. As such, Petitioner owes a debt that is now past due.

II. The debt is legally enforceable.

Petitioner does not challenge the existence or amount of the debt, but does present several arguments as to why the debt should not be enforced, which will be addressed in turn.

A. Petitioner has not been denied due process.

Petitioner broadly asserts that it has been denied due process and suggests that it should have been provided with earlier and/or additional notice that HUD intended to collect the debt. As discussed above, HUD's regulations lay out the due process rights to which Petitioner is entitled, and as discussed above, each of these has been satisfied. See 24 C.F.R. §§ 17.69 and 17.73 (promulgated in accordance with 31 U.S.C. § 3716(b)(2) and implementing 31 U.S.C. § 3716(a)); see also 24 C.F.R. part 26, subpart A. The Demand Letter provided Petitioner with notice of HUD's intent to collect and laid out Petitioner's options to respond, including the right to appeal to this Court. See 31 U.S.C. § 3716(a)(1) and (3). Petitioner appealed to this Court, and by this hearing was afforded the opportunity to present evidence as to the past-due status and enforceability of the debt. See 24 C.F.R. § 17.69(a). After allowing Petitioner to submit evidence, the Court must determine, by a preponderance of the evidence, whether there is a debt that is past due and whether it is legally enforceable. Id. § 17.69(c). The Court then must issue a written decision that constitutes the final agency decision with respect to the past due status and enforceability of the debt, which is this decision. Id. § 17.73(a). These proceedings before this Court have been conducted in accordance with the procedural rules set forth in 24 C.F.R. part 26, subpart A. See id. § 26.1 (applying part 26, subpart A to this proceeding). As such, Petitioner has not been denied due process, and the debt remains enforceable.

B. The statute of limitation and laches do not bar this claim.

Although HUD has been overpaying the subsidy since 2014, the problem was not identified until 2019. HUD sent the Demand Letter on March 26, 2021. Petitioner argues this delay violated the statute of limitations and/or the doctrine of laches.

There is no statutory limitation on the period within which HUD may attempt to collect the debt through administrative means. See 31 U.S.C. § 3716(e)(1). The statutory text of § 3716 shows Congress's intent to eliminate *any* time bar to administrative offset proceedings, as the previously effective statute did provide a ten-year period within which to collect. See Pub. L. 110-246, §14219 (June 18, 2008) ("Notwithstanding any other provision of law, regulation, or administrative limitation, no limitation on the period within which an offset may be initiated or taken pursuant to this section shall be effective"); compare Pub. L. 97-452 (Jan. 12, 1983) (authorization for administrative offset under § 3716 "does not apply to a claim under this subchapter that has been outstanding for more than 10 years").

The defense of laches likewise does not bar HUD's claim. As a threshold matter, "a laches defense may not be asserted against the government." Lee v. Spellings, 447 F.3d 1087, 1090 (8th Cir. 2006). But even were laches available, the facts here do not support such a defense. Laches "requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." Kansas v. Colorado, 514 U.S. 673, 687 (1995) (internal citation omitted). HUD's failure to discover the overpayment until 2018 was not due to lack of diligence or otherwise unreasonable; HUD relies on the accuracy of submissions and certifications from program participants who receive funding. Petitioner acknowledges that, as soon as HUD discovered the issue, it promptly informed Petitioner, which then corrected its reporting going forward. Petitioner has not offered any other evidence or argument suggesting prejudice, aside from its alleged detrimental reliance in planning to use the funds that it received because of its own error, which is addressed in section D, below

C. The directions in the UEL Form are sufficiently clear.

Petitioner argues that the UEL Form does not make clear that utilities of flat and per-unit costs should not be combined into a single column. Petitioner also asserts that it had a personnel change at around the same time that it began reporting data incorrectly. Petitioner implies that such challenges are a basis to not enforce the debt here.

As a preliminary matter, the clarity of the instructions in the UEL Form is not relevant to the enforceability of the debt. However, even if it were relevant, the UEL Form's instructions are sufficiently clear for the reporting of per-unit water and flat-rate sewer utilities. The UEL Form includes a specific statement as to the proper reporting of flat-rate expenses separately from per-unit expenses under a relatively prominent heading. Petitioner has not presented any evidence to suggest that a PHA with a professional accounting staff and administering tens of thousands of units would not have been able to follow these instructions.

Furthermore, Petitioner's personnel are its responsibility to train. The error in this case was Petitioner's, seemingly as a result of Petitioner's failure to appropriately train and supervise. As such, the debt is not unenforceable on this basis.

D. Petitioner's intended use of improperly received funds is not relevant to the enforceability of the debt.

Petitioner asserts that it would not be able to implement planned improvements for its residents if not permitted to retain the overpayment. However, Petitioner has not established any detrimental reliance or other basis for estoppel such that it is now worse off than it would have been had it not received and retained an overpayment through the operating subsidy. Although it is understandably inconvenient to have prospective plans thwarted, there has not yet been reliance and therefore there has not been detrimental reliance. It is also noted that the pro-rated nature of the operating subsidy means that there are other PHAs which would have properly received the funds that Petitioner instead received because of its improper submissions. As such, even if Petitioner's intended use were relevant, there is no factual basis for Petitioner to avoid repayment.

III. This Court lacks jurisdiction to disallow the requirements of the EPC or to modify processing fees or penalties.

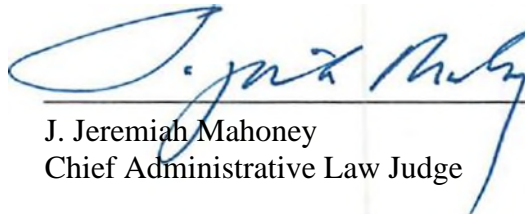
Petitioner asks this Court (1) to disallow the requirement that the savings from the EPC be applied to the EPC's project costs, and (2) to grant a 30-day grace period to repay the debt without processing fees or penalties. However, this Court's jurisdiction is limited to determining whether a debt exists that is past due and legally enforceable. See 24 C.F.R. § 17.69(a). The Court lacks authority to disallow or otherwise modify the requirements of an Energy Performance Contract, processing fees, or penalties. Accordingly, the Court must deny Petitioner's requests.¹

CONCLUSION AND ORDER

For the reasons discussed above, the Court concludes that Petitioner owes HUD a debt that is past due and legally enforceable. Furthermore, this Court does not have authority to disallow the requirements of an Energy Performance Contract or to disallow processing fees or penalties, as this Court's authority is limited in this matter to determining the past-due status and enforceability of the debt. See 24 C.F.R. § 17.69(a).

The stay of the referral of this matter to the U.S. Department of the Treasury is hereby **VACATED**. It is **ORDERED** that the Secretary is authorized to seek collection of the outstanding debt by means of administrative offset of any federal payment due Petitioner.

SO ORDERED,



J. Jeremiah Mahoney
Chief Administrative Law Judge

Finality of Decision. Pursuant to 24 C.F.R. § 17.73(a), this decision constitutes the final agency decision with respect to the past due status and enforceability of the debt.

Review of Decision. A motion for reconsideration of this decision, specifically stating the grounds relied upon, may be filed with the undersigned Judge of this court within 30 days of the date of this *Decision and Order*, and shall be granted only upon a showing of good cause.

¹ This Court's decision establishes only that Petitioner owes a legally enforceable debt to HUD. The parties may agree, if they are permitted and so choose, to repayment in a manner other than administrative offset.