

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

In the Matter of:

Wakefield Housing Commission,

Petitioner.

20-AF-0063-AO-011

April 3, 2020

BEFORE: Alexander FERNÁNDEZ, Administrative Law Judge

DECISION AND ORDER

This matter is before the Court upon a request for hearing filed by Wakefield Housing Commission (“WHC” or “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 WHC 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 December 6, 2019, WHC, through counsel, submitted a request for hearing concerning the alleged debt, supported by six 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 January 23, 2020, WHC submitted a position letter and an affidavit from its attorney, Timothy M. Dean, attesting to the truth of the statements in the hearing request and the authenticity of the attached exhibits. On February 12, 2020, HUD submitted the Administrative Record in this matter, along with a position statement from Danielle Bastarache, HUD’s Deputy Assistant Secretary for Public Housing and Voucher Programs. The record is now closed.

FACTUAL BACKGROUND

WHC is a small public housing authority in Wakefield, Michigan. WHC receives an annual subsidy from HUD through the agency’s Public Housing Operating Fund Program. 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 annual subsidy helps WHC cover expenses including the cost of utilities for its public housing projects.

Sheri Graham began working as Director of WHC in 2009. She quickly determined that WHC's electricity costs, which are billed to WHC by the city of Wakefield, appeared high. Ms. Graham pursued the issue with the city for many years while simultaneously taking steps to reduce WHC's energy usage. Thanks to her efforts, in August 2018, the city admitted that, from 2000 to 2018, it had overbilled WHC for electricity by an amount exceeding \$80,000 due to an error in its software billing program.¹

WHC immediately notified HUD's Detroit field office of the overbilling and inquired whether WHC needed to obtain HUD's approval before suing or entering into a settlement with the city of Wakefield. WHC's housing attorney, Mr. Dean, also began discussions with Wakefield's counsel regarding recovery of the overbilled amounts. Ultimately, WHC and the city reached a proposed agreement whereby the city would pay WHC \$31,256.23 to reimburse it for six years' worth of overbilling; WHC acknowledged that Michigan's six-year statute of limitations applicable to unjust enrichment claims barred any further recovery. *See* Mich. Comp. Laws § 600.5813; *Lake Bluff Motel, Inc. v. S. Haven Charter Twp.*, No. 323766, 2015 Mich. App. LEXIS 2184 (Mich. App. Nov. 19, 2015); *Trudel v. City of Allen Park*, No. 304507, 2013 Mich. App. LEXIS 1855 (Mich. App. Nov. 14, 2013). HUD informed Mr. Dean that it did not need to approve the settlement because no lawsuit had been initiated. Accordingly, on November 30, 2018, the city of Wakefield tendered a check in the amount of \$31,256.23 to WHC in exchange for a release of claims.

Meanwhile, on November 20, 2018, HUD's Detroit field office had sent a demand letter asserting that WHC had received \$83,004.59 in overpayments of operating subsidy from January 1, 2000 to June 30, 2017, and demanding that WHC remit payment immediately. HUD stated its intent to initiate collection of the alleged debt "by other administrative means," including referral to the Department of the Treasury's offset program, if payment were not received within 30 days. HUD also indicated that it would consider a repayment agreement.

On December 14, 2018, WHC responded with a letter explaining that it was prepared to reimburse HUD in the amount of \$31,256.23, but that this was the maximum amount it was able to recover for the overbilling due to Michigan's six-year statute of limitations. On January 2, 2019, WHC remitted \$31,256.23 to HUD via wire transfer.

On February 4, 2019, a HUD employee within the Detroit field office emailed Ms. Graham acknowledging receipt of the wire transfer but stating that WHC must remit the remaining balance of \$51,748.38, or, if repayment would cause hardship, provide a plan to satisfy the indebtedness. On February 28, 2019, Ms. Graham responded with an email asserting that she had collected the full amount allowed, which HUD would never have otherwise received or been aware of, and attaching a timeline explaining the chain of events that had led to the city of Wakefield's admission of overbilling.

On March 18, 2019, the Detroit field office sent a letter acknowledging Ms. Graham's position but stating that WHC must provide a written explanation why it was unable to pay the remaining balance of the debt, which must include an attorney's estimate "on how much such litigation would cost" (presumably, the letter was referring to litigation to recover the remainder

¹ WHC's electricity bill is calculated based on usage times a multiplier. The correct multiplier is 40. The city admitted it had erroneously applied a multiplier of 80 for a number of years, then had switched to 60 for several more years before finally correcting the error.

of the debt), as well as a discussion of the statute of limitations. The letter further stated that WHC should identify which of the following six justifications for debt forgiveness was being asserted: (1) discharge in bankruptcy; (2) HUD's inability to collect any substantial amount; (3) excessive collection costs; (4) inability to locate the debtor; (5) inability to substantiate the debt; or (6) lack of merit or unenforceability of the debt due to the statute of limitations.

On March 20, 2019, WHC, through counsel, responded with a letter reiterating its inability to collect the remainder of the debt from the city of Wakefield due to the applicable statute of limitations. As for the costs of litigation, WHC asserted that litigation would be pointless because any lawsuit to collect the balance would be time-barred. Accordingly, WHC asked HUD to forgive the balance of the debt.

On September 5, 2019, HUD's Deputy Assistant Secretary for Public Housing and Voucher Programs, Ms. Bastarache, sent WHC a letter stating that HUD had considered the request for debt forgiveness but determined it must be denied "because it does not meet the Department of Treasury's regulatory criteria ... for forgiveness and HUD does not have the authority to waive the Department of Treasury's regulations." After enumerating the six criteria for debt forgiveness previously set forth in HUD's March 18 letter, Ms. Bastarache stated that the statute-of-limitations criterion was inapplicable "because this applies to a debt owed by a debtor (WHC) to HUD, rather than WHC's ability to collect the amount overpaid from the City," and "WHC's debt to HUD is not time barred."

After further discussions between the parties during which HUD informed WHC that any appeal of the debt would need to be made to this Court, on December 6, 2019, WHC filed the hearing request that initiated the instant proceeding.

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), (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

WHC asks this Court to reverse HUD's denial of debt forgiveness in this case and order HUD to write off the \$51,748.38 balance of the debt. WHC argues that, under the unique circumstances of this case, recovery of the overpayment of operating subsidy would be against equity and good conscience. WHC asserts that it is without fault and that repayment would cause undue hardship. WHC further suggests that HUD may have waived its right to recover when it agreed WHC could settle its dispute with the city of Wakefield for less than the full amount of the debt.

HUD acknowledges that WHC has acted in good faith and as a conscientious steward of public funds in this matter and indicates that the government is sympathetic to its request for debt forgiveness. However, HUD maintains that the criteria for debt forgiveness established by the Department of the Treasury ("Treasury") have not been met in this case.

For the reasons discussed below, the Court concludes that a past-due, legally enforceable debt exists and denies WHC's request for debt forgiveness due to lack of jurisdiction. However, the Court opines that the appropriate official within HUD who holds settlement authority in this case should strongly consider discharging the remaining unpaid balance of the debt pursuant to 31 U.S.C. § 3711(a)(2), as discussed in greater detail in subsection II below.

I. A debt exists that is past due and legally enforceable.

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), (c). HUD claims that a debt exists arising from HUD's overpayment of WHC's operating subsidy from January 1, 2000 to June 30, 2017.

Pursuant to HUD's regulations governing the Public Housing Operating Fund Program, a public housing authority ("PHA") such as WHC 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), 990.200. The expenses the subsidy is intended to cover include the PHA's cost of providing utilities such as electricity to its housing projects. Id. §§ 990.110(a)(3), 990.115, 990.170.

In this case, HUD explains that it funds WHC's utilities on a modified reimbursement basis under a formula that accounts for consumption and the rate charged by the utility company. WHC was overcharged for electricity for more than seventeen years. By passing those charges along to HUD, WHC accepted overpayments of its annual operating subsidy totaling \$83,004.59, giving rise to a debt of which \$51,748.38 remains unpaid. HUD's November 20, 2018 demand letter includes a spreadsheet explaining how HUD calculated the total amount of the debt.

WHC does not challenge the existence or amount of the debt. In fact, WHC has already voluntarily repaid a significant portion of the total claimed by HUD, in essence admitting that it owes a debt.

WHC suggests that HUD waived its right to collect by agreeing that WHC could settle its dispute with the city of Wakefield for less than the full amount of the overbilling. However, the record shows that although HUD was aware of the settlement and did not object to it or intercede, HUD also did not expressly approve it. Instead, the Detroit field office simply apprised WHC's legal counsel, after much back-and-forth, that HUD's approval was not required because litigation had not been initiated. In addition, the record shows that in October 2018, before WHC had executed the settlement, personnel from the Detroit field office notified WHC via email that they had met with HUD's Financial Management Division and determined that WHC may have received an overpayment of operating subsidy for 18 years, for which WHC would be obligated to reimburse HUD. Thus, WHC was on notice that HUD may attempt to recover the overpayments from it. For these reasons, the Court concludes that HUD did not waive its right to collect the debt by approving WHC's settlement with the city of Wakefield.

WHC has not raised any other challenges to the legal enforceability of the debt, instead arguing only that the debt should be forgiven. 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). Accordingly, the Court finds that WHC owes a debt arising from HUD's overpayment of annual operating subsidies that is past due and legally enforceable.

- II. This Court lacks authority to forgive the debt, but believes that HUD holds such authority and should strongly consider discharging the unpaid balance of the debt in compromise.

WHC asks the Court to reverse HUD's denial of debt forgiveness and order HUD to write off the debt. The Secretary of HUD is statutorily authorized either to reach a compromise with WHC with regard to the debt, or to suspend or end collection actions against WHC. 31 U.S.C. § 3711(a)(2), (3). However, the Secretary has not delegated this authority to the Office of Appeals. Rather, this administrative Court's jurisdiction is strictly limited to considering the existence, past-due status, and legal enforceability of the debt. See 24 C.F.R. § 17.69(c). The Court is not authorized to forgive or discharge indebtedness; to extend, recommend, or accept any settlement offer on behalf of HUD; or to establish a repayment schedule. See, e.g., In re Herrera, No. 12-M-CH-AWG27, 2012 HUD Appeals LEXIS 4, at *7 (HUDOA July 13, 2012). Accordingly, the Court cannot grant the relief requested by WHC.

That being said, after reviewing HUD's stated reasons for denying WHC's request for debt forgiveness, the Court believes that HUD may have more flexibility than it has yet recognized to forgive some or all of the unpaid balance of the debt by reaching a compromise with WHC pursuant to 31 U.S.C. § 3711(a)(2) and 31 C.F.R. § 902.2(a).

In assessing WHC's plea for debt forgiveness, HUD has cited six potential justifications for forgiveness. HUD asserts that these are the applicable criteria established by Treasury and they cannot be waived. However, the cited criteria actually apply to suspension or termination of collection actions, not to debt forgiveness. See 31 C.F.R. § 903.3(a). As explained by Treasury, suspension or termination of collection is not synonymous with discharge (i.e., forgiveness) of a debt. See 31 C.F.R. § 903.5(a). When an agency suspends or terminates collection, the debt remains delinquent and the agency may pursue further collection actions at a later date. Id. By contrast, when an agency discharges a debt, further collection is prohibited. Id. A debt, or

portion of a debt, that has been forgiven can be written off and the agency is no longer obligated to recover those funds.

In the Court's view, WHC's actions in paying off a substantial portion of the debt and asking for forgiveness of the remaining balance did not amount to a request that HUD suspend or terminate collection activities pursuant to 31 U.S.C. § 3711(a)(3) and 31 C.F.R. § 903.3(a). Rather, WHC's actions amounted to a request that HUD agree to compromise the claim pursuant to 31 U.S.C. § 3711(a)(2) and 31 C.F.R. § 902.2(a) by accepting partial payment and discharging the remaining balance. Compromising a claim, unlike suspending or terminating collection activities, achieves a final and conclusive resolution to the claim and ends the accountable HUD official's liability for recovering the unpaid balance of the debt. See 31 U.S.C. § 3711(c). This is the outcome WHC is trying to reach in this matter.

Treasury's standards for compromising a claim are set forth in 31 C.F.R. § 902.2(a). These standards differ from the standards HUD has mistakenly cited as governing debt forgiveness (which, as noted above, are set forth in 31 C.F.R. § 903.3(a), and actually govern suspension and termination of collection, which are *not* equivalent to debt forgiveness). Section 902.2(a) lists the following four criteria for compromise: (1) the debtor will be unable to repay the debt in a reasonable amount of time; (2) the agency will be unable to collect the debt in a reasonable amount of time; (3) the cost of collection does not justify enforcing collection of the full amount; or (4) there is significant doubt regarding the government's ability to prove its case in court. 31 C.F.R. § 902.2(a). The Court believes that some or all of these factors are applicable to the instant matter and that the appropriate official within HUD who holds settlement authority under 31 U.S.C. § 3711(a)(2) should strongly consider compromising this matter with WHC, for the following reasons.

First, in this case, there is evidence that repayment of the debt within a reasonable time may be significantly burdensome to WHC. WHC is a small PHA. A spreadsheet created by HUD setting forth a potential repayment plan structure in this matter shows that the debt is significant to WHC both in terms of its average annual revenue (which was approximately \$99,000 over the past five years, or approximately \$162,000 if the HUD subsidy is included) and its reserves, which totaled less than \$80,000 as of 2019. HUD proposes that WHC repay \$30,167 of the debt immediately from its reserves, leaving just enough reserve funds for WHC to survive four months without income if necessary, and to repay the remaining balance over five years. It is unclear whether WHC has responded to this proposal. However, if WHC disagrees with the proposed repayment plan and presents evidence that it would be unduly burdensome, HUD should consider whether Treasury's criteria for compromise in 31 C.F.R. § 902.2(a)(1)-(2) are applicable.

In addition, the Court believes that HUD should consider the criteria in 31 C.F.R. § 902.2(a)(3)-(4) because, if HUD attempted to enforce its claim against WHC by initiating a collection action in an Article III court, the cost of such collection may be high, as doubts exist regarding HUD's ability to prevail on the action. This is because it is unclear what form of action or legal theory HUD would pursue against WHC to recover the subsidy overpayments in an Article III court.

In this Court's experience, debt collection actions initiated by HUD usually involve a clear-cut case of contractual liability. For example, the debtor has often signed a promissory

note or indemnification agreement, meaning that HUD would be able to prevail on a contract claim against the debtor in an Article III court. But in this case, HUD has not identified a source of contractual liability.

The Administrative Record contains copies of several contracts, including the applicable Annual Contributions Contract (“ACC”) and amendments under which HUD agreed to provide financial assistance to WHC. See 24 C.F.R. § 990.115 (describing role of ACCs in HUD’s Public Housing Operating Fund Program). However, none of these contracts appear to contain any provision that would definitively obligate WHC to repay HUD under the circumstances of this case. Even assuming a court of law were to determine that the ACC implicitly requires WHC to return subsidy overpayments to HUD, the court may find that it would be unreasonable to extend such a requirement eighteen years into the past when neither party was aware of or at fault for the overpayments and HUD took no steps to preserve its right to collect. Further, a court may find that there was no true “overpayment,” as HUD’s regulations indicate that it will calculate a PHA’s compensable utility expenses based on “actual average rate” and “actual utility cost,” and in this case the “actual” rates and costs were those charged by the city of Wakefield, regardless of whether the city was justified in charging them.

Further, even if a court were to find that the ACC creates a repayment obligation, the contract was entered into between HUD and “the CITY OF WAKEFIELD, acting by and through the Wakefield Housing Commission.” Thus, a court may find that HUD does not have a contractual right of action against WHC because privity of contract lies with the city of Wakefield, rather than directly with WHC.

If a court were to find that HUD does not have a contractual right of action against WHC, HUD would likely be left to pursue its claim against WHC under an equitable theory of quasi-contract or unjust enrichment. A court may give weight to WHC’s arguments that requiring WHC to repay the debt would be against equity and good conscience in this case, and may find that any enrichment that occurred was not “unjust” in light of the fact that WHC did not retain any benefit, is not at fault, and is barred from recovering the full amount of the overbilling from the city of Wakefield.

Finally, even if HUD considers all of Treasury’s criteria for compromise of debt collection claims under 31 C.F.R. § 902.2(a) and finds that none of them justify settlement of its claim against WHC, the Court is unaware of any legal authority mandating that this list of criteria is exhaustive or prohibiting HUD from considering other factors where it is reasonable to do so.² In the Court’s opinion, in addition to considering the four criteria listed in § 902.2(a), HUD’s decision whether to settle a claim should also account for basic considerations of equity, fairness, and public policy.

² At least one federal agency has promulgated regulations allowing it to consider broader criteria when compromising claims of indebtedness. The Department of Education (“DOE”) generally applies Treasury’s standards for the compromise of such claims, see 34 C.F.R. § 30.70(a)(1), but has created its own special standard for the compromise of debts arising from a DOE grant recipient’s expenditure of funds in an impermissible manner, see id. § 30.70(b), in which case DOE has authorized the appropriate official to settle the debt where, among other things, collection would not be in the public interest, see id. § 81.36. In addition, the DOE regulation that makes the Treasury standards applicable expressly states that its provisions are not intended to preclude a DOE contracting officer “from exercising his authority under applicable statutes, regulations, or common law to settle disputed claims relating to a contract.” Id. § 30.70(g)(1).

In this case, HUD acknowledges that WHC has acted in good faith and as a conscientious steward of public funds. WHC noticed its electricity bill was high, persistently and diligently followed up on the issue until it was resolved, was forthright with HUD about the overbilling, and recovered \$31,256.23, which it immediately remitted to HUD. Neither HUD nor WHC are at fault here, and both are attempting to serve the same public policy goals set forth in the United States Housing Act of 1937, as amended. Under the circumstances, HUD should consider whether it is in the public interest to require WHC to bear the full cost of Wakefield's overbilling. In the Court's view, it makes more sense for HUD to write off some or all of the unpaid balance of the debt, especially considering that a write-off likely would not significantly impact HUD's budget, as HUD is a large federal agency whose loss in this case was spread over an 18-year period during which it paid subsidies without expecting to re-capture any of the expended funds, whereas WHC is such a small PHA that repayment of the debt may have an outsized impact on its financial state and interfere with its ability to fulfill its public housing mission.

In other words, the Court believes that the unique circumstances of this case support forgiveness of some or all of the unpaid balance of WHC's debt. However, the authority to forgive the indebtedness does not reside with this Court.

CONCLUSION AND ORDER

For the reasons discussed above, the Court concludes that WHC owes HUD a debt that is past due and legally enforceable.

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 WHC.

SO ORDERED,
ALEXANDER
FERNANDEZ

Digitally signed by: ALEXANDER FERNANDEZ
DN: CN = ALEXANDER FERNANDEZ C = US
O = U.S. Government OU = Department of
Housing and Urban Development, Office of the
Secretary
Date: 2020.04.03 00:05:18 -04'00'

Alexander Fernández
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 on Remand*, and shall be granted only upon a showing of good cause.