UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF THE SECRETARY

In the Matter of:	)	
	)	Case No. 13-VH-0073-AO-002
	)	Claim No. 7-207075350A
NCR Funding, Inc.,	)	
	)	
Petitioner,	)	April 16, 2014

For the Petitioner:	James Brody, Esq. American Mortgage Law Group
For the Department:	Ana I. Fabregas, Esq. Matthew C. Foreman, Esq. U.S. Department of Housing and Urban Development

ORDER ON SECRETARIAL REVIEW

On January 17, 2014, counsel for Petitioner, NCR Funding, Inc. ("Petitioner") submitted an Appeal to Secretary Regarding Decision and Order Upon Reconsideration ("Appeal"), appealing the December 18, 2013, Decision and Order Upon Reconsideration ("Decision") issued by Administrative Judge Vanessa Hall ("AJ"). In the Decision, the AJ found that the debt owed by Petitioner to the Department was past due and legally enforceable in the amount of $423,247.68, as claimed by the Government. The Appeal asks the Secretary to determine that Petitioner does not owe the debt claimed by the Government and order that the stay of referral of the matter to the U.S. Department of Treasury for administrative offset be made permanent. On January 31, 2014, before the Department filed a reply, and before I considered the underlying issues in the case, I ordered the parties to submit briefs on whether I had jurisdiction to hear an appeal of this type of administrative offset case. Petitioner filed its brief on jurisdiction on February 14, 2014. The Government submitted its brief on February 21, 2014.

Upon review of the briefs, case law, and applicable regulatory and statutory provisions, I

find that Petitioner may not avail itself of a Secretarial review as a matter of right. Therefore, I DISMISS the Petitioner's Appeal.

BACKGROUND

On January 7, 2013, Petitioner was notified, pursuant to 31 U.S.C. §§ 3716 and 3720A, that the Secretary of the U.S. Department of Housing and Urban Development ("HUD," "Department," "Government") intended to seek administrative offset of federal payments due to Petitioner in satisfaction of an allegedly delinquent debt owed to HUD.

On January 15, 2013, Petitioner filed a Petition in Opposition of Referral contesting the existence and enforceability of the alleged debt. Pursuant to 24 C.F.R. § 17.77, the AJ stayed the referral of the alleged debt to the U.S. Department of Treasury pending the outcome of a written decision. On May 17, 2013, the Government filed the Government's Response to Petition in Opposition to Referral. The AJ reviewed the record and by Decision and Order, dated July 31, 2013, ("First Decision and Order") concluded that Petitioner did not owe the subject debt as claimed by the Government thereby, making permanent the Order imposing the stay of referral of this matter to the U.S. Department of Treasury for administrative offset.

On August 30, 2013, the Department filed a Motion for Reconsideration ("Motion") of the First Decision and Order. Petitioner filed its Response to the Department's Motion on September 12, 2013. The Department's Motion was granted. On December 18, 2013, the AJ issued Decision and Order Upon Reconsideration ("Decision"), finding that the debt owed to the Department was past due and legally enforceable in the amount of $423,247.68, as claimed by the Government. In the Decision, the AJ vacated the First Decision and Order and vacated the Order imposing the stay of referral of this matter to the U.S. Department of Treasury for administrative offset. The AJ also stated that pursuant to 24 C.F.R. § 26.26, Petitioner had the right to appeal the Decision to a the Secretaryial Review of the Decision.

On January 17, 2014, counsel for Petitioner submitted its Appeal. In its Appeal, Petitioner asked that the Secretary to determine that it does not owe the debt claimed by the Government and order that the stay of referral of the matter to the U.S. Department of Treasury for administrative offset be made permanent. Petitioner argued that it was not given its full statutorily permitted response time to the Department's Motion, which prejudiced Petitioner's rights. Further, Petitioner alleges that the AJ mistakenly ruled that the indemnification agreement negated the full-credit bid issued by Wells Fargo for the underlying loan.

On January 31, 2014, without considering the underlying issues in the case and before the Department filed its response to Petitioner's Appeal, I ordered the parties to brief me on whether I had jurisdiction to hear an appeal of this type of administrative offset case. Petitioner filed its brief on jurisdiction on February 14, 2014 ("Pet. Brief"). The Government submitted its brief on February 21, 2014 ("Gov't Brief").

In its brief, the Petitioner asserts that the Secretary has jurisdiction over its appeal. To support its assertion, the Petitioner relies on the AJ's Notice of Docketing, which that states "the Hearing proceedings shall be conducted in accordance with 24 C.F.R. § 17.69 & Part 26 Subpart

A." See Pet. Brief at p. 3. Petitioner argues that the regulations and case law relied upon by the AJ in coming to a final decision on this matter are in conflict. Id at p. 2. Specifically, Petitioner asserts that either the Secretary has jurisdiction to hear its appeal or the First Decision should stand. Id. at p. 6. Further, Petitioner contends that if 24 C.F.R. § 17.73 controls and the AJ's decision was the final agency decision, then the AJ did not have the authority to reconsider her First Decision and Order. See id. at p. 5.

The Government asserts that 24 C.F.R. § 17.73 controls this matter and does not provide a right to Secretarial review. The Government argues that in light of the language of Section 704 of the Administrative Procedures Act ("APA") and the Supreme Court's interpretation of its purpose, the use of the term "final agency decision" in this section of the regulation indicates that HUD chose not to exercise its ability to require an appeal to a "superior agency authority." See Gov't Brief at p. 3 (citing Darby v. Cisneros, 509 U.S. 137 (1993)). The Government also argues that the Secretary has the prerogative to reconsider a final agency decision or grant a request for review. See id. at p. 5. Finally, the government argues that the AJ's footnote allowing for regarding a Secretarial review was a clerical error and the AJ does not have the power to create a right to Secretarial review that does not exist in the regulations. See id. at p. 8.

DISCUSSION

I. The Petitioner May Not Avail Itself of Secretarial Review as a Matter of Right.

The Department brought the administrative offset claim at issue in this case pursuant to 24 C.F.R. §§ 17.65 – 17.79. Under 24 C.F.R. § 17.69, a debtor who receives notice of intent to offset pursuant to section 17.65 has 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. Upon timely submission of the evidence by the debtor, the Office of Appeals (OA) will review the evidence submitted by the Department that show all or part of the debt is past due and legally enforceable. 24 C.F.R. § 17.69. The AJ will make a determination and issue a written decision. 24 C.F.R. § 17.73. The decision concerning the debt *is the final agency decision* with respect to the past due status and the enforceability of the debt. Id. [emphasis added]. If the decision affirms the past due debt and its legal enforceability, HUD must refer the matter to the Treasury after issuance of the written determination and notification of appropriate HUD officials. Id. The question now is whether Petitioner has a right to Secretarial Review of the Decision. If Petitioner does not have a right to Secretarial Review, the question is whether the AJ had a right to reconsider the First Decision and Order.

A. The regulations that govern the procedures for administrative offset cases establish the AJ's decision as the final agency action.

It is axiomatic that an agency has the discretion to decide not to allow an appeal from an AJ's decision to a superior agency authority unless required by statute to do otherwise. In this instance, the Department exercised its discretion in administrative offset cases by promulgating a rule that provides that the AJ's decision concerning whether a debt is past due and legally enforceable is the "final agency action." 24 C.F.R. § 17.73. Based on the plain language of this provision, we find that Petitioner may not avail itself of a Secretarial review as a matter of right.

As the Government points out in its response brief, the term "final agency action" is a term of art that signals the exhaustion of administrative remedies. The term has its genesis in a provision in the APA. The Supreme Court considered section 704 of the APA, which states that an agency decision is deemed final, and therefore immediately subject to judicial review, despite the possibility of any form of reconsideration or appeal, unless an appeal is mandatory or "require[d] by rule" where the rule also makes the agency decision "inoperative" pending the outcome of the appeal. See Darby, 509 U.S.at 143. In other words, non-mandatory appeals need not be exhausted prior to judicial review because the agency action is already deemed "final" by 5 U.S.C. § 704.[1] Once final, an agency decision may be enforced or subjected to judicial review, which further buttresses the point that the decision is final.

Courts have found that a decision is a "final agency action" when legal consequences flow from the decision. See DRG Funding Corp. v. Sec. of HUD, 76 F.3d. 1212, 1215 (D.C. Cir. 1996). In this case, the Department identified the significant legal consequences that would flow from an AJ's final decision in an administrative offset case. Specifically, pursuant to section 17.73, if the AJ's decision affirms that all or part of the debt is past due and legally enforceable, the agency is required to notify the U.S. Department of Treasury after the determination is issued. In this matter, the AJ determined that Petitioner's debt is past due and legally enforceable and therefore referred the matter to the Treasury. Thus, the AJ's determination completes HUD's administrative process for matters involving administrative offsets.

In addition, the lack of any reference to Secretarial review procedures in the regulatory scheme applicable to administrative offset cases completely undercuts the conclusion that Petitioner may avail itself of a Secretarial review as a matter of right. In cases where Secretarial review is available as a matter of right, the Department is clear with respect to its intent to provide for review. For example, the Department provides a clear process for reviewing a hearing officer's determination in cases involving wage garnishments. Pursuant to 24 C.F.R. § 17.81, any hearing must be in accordance with Part 26, thus creating a right to a review by a "superior agency authority" – the Secretary. Without adopting such a rule for administrative offset matters, the AJ's determination becomes the final agency decision and judicial review can be sought at that time.

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[1] The term "final" within section 704 of the APA means the agency's action is "sufficiently direct and immediate" and has a "direct effect...on day-to-day business." DRG Funding Corp. v. Sec. of HUD, 76 F.3d. 1212, 1214 (D.C. Cir. 1996). Under HUD's regulations in effect at the time of the DRG Funding decision, the administrative process reached the stage of "final agency action" only when a deputy assistant secretary made a "determination of indebtedness" in a "written decision which includes the supporting rationale for the decision." Id. at 1215. The Court determined that the interim decision by the Secretary's designee affirming the ALJ's decision that HUD had authority to effect offsets and directing the ALJ "to proceed with the administrative process in accordance with HUD's regulations" was not a "final agency action within the meaning of section 704" because there were no legal consequences on the parties as a result of the designee's decision. Id. at 1215. Therefore, the district court dismissed the suit on the ground that the administrative review of the corporation's challenge was not yet final. Id. at 1215. The Court held that "if the corporation is unhappy with the outcome of that [administrative] process once it has ended, it may seek judicial review then. Id. at 1216.

B. The AJ had the inherent authority to reconsider her opinion.

The Petitioner contends that the concepts of reconsideration and Secretarial review are the same and if there is a right to reconsideration, there must also be a right to Secretarial review. See Pet. Brief at p. 5. As the Court in Darby points out, Petitioner's argument misses the point because it conflates the concept of exhaustion of administrative remedies and the doctrine of finality. See Darby, 509 U.S. at 144-145 (quoting Williamson County Regional Planning Comm'n v Hamilton Bank of Johnson City, 473 U.S. 172, 193 (1985) the Court noted: "The finality requirement is concerned with whether the initial decision maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision..."). Here, the Petitioner is questioning whether the AJ may reconsider one of her decisions, which has nothing to do with the concept of exhaustion of administrative remedies. In other words, contrary to Petitioner's assertion, the AJ's power to reconsider her decision is not dependent on the right to Secretarial review. See id. Therefore, an AJ may have the authority to reconsider her decision without the parties to an action having a right to a review by a superior agency authority. For the reasons discussed below, we find that the AJ had the authority to reconsider her decision and that authority to reconsider her opinion does not create a right to a Secretarial review.

It is generally accepted that in the absence of a specific statutory limitation, an administrative agency has the inherent authority to reconsider its decisions. See Macktal v. Chao, 286 F.3d 822, 825 (2002). However, the inherent authority to reconsider its decisions is not unlimited. The agency may not reconsider its own decision if to do so would be arbitrary, capricious, or an abuse of discretion. Id. Additionally, it should be noted that the "final agency action" is not rendered non-final by the filing of a petition for reconsideration. See Darby, 509 U.S. at 142 (1993).

Under the applicable statutory framework for debt collections by Treasury offset, there is no statutory limitation against reconsideration. In this matter, upon motion by the Government, the AJ reconsidered the First Decision and Order. Subsequently, the AJ issued the Decision on December 18, 2013, concluding that she had erred in the First Decision and Order by finding that Petitioner's debt was not legal and unenforceable. See Decision at 6-7. Because there was no statutory limitation on reconsideration, the AJ had authority to reconsider her First Decision and Order.

Reconsideration of a decision is distinctly different from a party's right to appeal a final decision to a superior authority. The AJ's subsequent issuance of the Decision does not negate the fact that any determination issued by the administrative judge in such matters constitutes the final agency decision. As discussed above, for purposes under the APA, the term final decision is used to define the point at which no further agency action is required to make the decision operable. See DRG Funding Corp., 76 F.3d at 1214. The concept of exhaustion of administrative remedies, however, turns on whether there are any further mandatory or required appeal rights promulgated by statute or agency rule before the decision is subject to judicial review. Here, in administrative offset cases pursuant to 24 C.F.R. § 17.73, there are no further appeal rights of the final agency decision available to the parties. Thus, although the AJ may

there are no further appeal rights of the final agency decision available to the parties. Thus, although the AJ may reconsider her Decision, because there is no statutory limitation against reconsideration of administrative offset cases, in this case, her Decision is the final agency decision and ripe for judicial review.

II. The AJ's Citations to Regulatory Provisions that are not Applicable to Administrative Offset Cases Did Not Create a Right to a Secretarial Review.

In the First Decision and Order, the AJ indicated in the "Applicable Law" section that "this hearing shall be conducted in accordance with the procedures set forth in 24 C.F.R. § 17.73, and 31 C.F.R. § 285.11, as authorized by 24 C.F.R. § 17.81(a). See First Decision and Order. Although, the AJ correctly cited to § 17.73, she cited to 31 C.F.R. § 285.11 and 24 C.F.R. § 17.81 (a). Those two provisions relate to administrative wage garnishments. In the Decision, the AJ again cites to the regulations for administrative wage garnishment and noted that the "decision will become final unless a party timely appeals the determination in accordance with 24 C.F.R. § 26.26." See Decision at 1. However, this is an administrative offset matter, not an administrative wage garnishment, and 24 C.F.R. §§ 17.65-17.79 control this type of matter. As previously discussed, the regulations covering administrative offset matters do not provide for a right to Secretarial Review.

A. The AJ does not have the power to create a right to Secretarial Review.

We agree with the Government's assertion that the AJ does not have the power to modify Part 17 procedures in order to create a right to a Secretarial review that does not exist in the regulations. The scope of a hearing officer's powers are set forth in 24 C.F.R. § 26.2(c). These powers are limited to the extent that the hearing officer shall conduct a fair and impartial hearing, administer oaths, issue subpoenas, order discovery, rule upon motions, make and file determinations, and any other authority as is necessary to carry out the responsibilities of the hearing officer under Subpart A. See 24 C.F.R. § 26.2(c). The hearing officer's powers do not reach beyond the proceedings over which the hearing officer presides. They do not apply to procedures concerning Secretarial review. Therefore, the AJ's reference in her orders to a party's right to Secretarial review does not create a right to Secretarial review.

Further, 24 C.F.R. § 26.1 limits the applicability of Part 26 to matters that are not inconsistent with these regulations. Under 24 C.F.R. § 17.73(a), the AJ's decision on whether the debt is legal and enforceable is the final decision and does not give the AJ authority to modify the finality of a decision or to create a right to Secretarial review where one does not exist. This would be inconsistent with section 17.73. Accordingly, I believe any reference the AJ made to the applicability of Part 26, Subpart A, was an administrative error.

B. This case does not present a reason to exercise discretionary review.

A court or administrative agency has the discretion to relax or modify its procedural rules... when in a given case the ends of justice require it. See Am. Farm Lines v. Black Ball Freight Serv., 397 U.S. 532, 539 (1970). However, the action is not reviewable except upon a showing of substantial prejudice to the complaining party. See id.

While I may have the discretion to review the AJ's Decision under the general principle that an agency can modify its procedures when justice requires it, I am not exercising that discretion in this case because there is no indication of substantial prejudice.

CONCLUSION

Upon review of the partial record in this proceeding, and based on analysis of the applicable law, the Petitioner's *Appeal to Secretary Regarding Decision and Order Upon Reconsideration* is hereby DISMISSED.

IT IS SO ORDERED.

Dated this 16 day of April, 2014

Nealin Parker
Secretarial Designee