

Legal Opinion: GPC-0002

Index: 8.915

Subject: Administrative Offset Against Future IRP

November 20, 1991

MEMORANDUM FOR: Gains E. Hopkins, Managing Attorney, Multi-Family Mortgage Division, GHM

FROM: Peter S. Race, Assistant General Counsel
Program Compliance Division, GPC

SUBJECT: Settlement of Inspector General Audit Finding
RIGA Audit 87-NY,103-0801
Starrett City - HUD Project No.012-35-NI

We have reviewed your October 25, 1991 memorandum, together with the background memoranda attached thereto and offer the following advice in connection with the contemplated administrative setoff against future Interest Reduction Payments (IRP) to recover the amount of IRP made with respect to undisbursed mortgage proceeds.

A threshold question is whether the Department may collect by administrative offset at all. Under 31 U.S.C. 3716(a) the Department is authorized to collect a claim from a person (emphasis added) after trying to collect the claim by other means. However, under 31 U.S.C. 3701(c) "person" does not include an agency of a state government or of a unit of general local government. Without other information, we would conclude that the New York State Housing Finance Agency (HFA) is a state agency and therefore immune to collection through administrative offset.

The exclusion of state agencies from the definition of "person" found in 3701(c) applies also to the collection of interest and other charges on a debt owed by a state agency. Although the offset issue, to our knowledge has not been litigated, the charging of interest has been, and the result has been adverse to the Federal Government. Moreover, one of those cases arose in New York and was appealed to the Second Circuit. (*Perales v. United States*, 598 F.Supp. 19 (S.D.N.Y.), aff'd. 751 F.2d 95 (2d Cir. 1984).

If, however, the HFA can be found not to be an agency of the state government or as indicated in the third paragraph of your memorandum, the IRP contract obliges the Secretary to make payments to the mortgagor, then an administrative offset may be available.

There are three basic criteria for implementing an administrative offset: 1. The claim must be certain in amount; 2. collection must be feasible; and 3. collection must not be

prohibited by law. The first criterion does not appear to present an issue, and the third has been discussed.

The feasibility criterion contains three subsidiary criteria. In determining feasibility the Department must consider the debtor's financial condition, whether offset best serves all the interests of the United States and whether offset would substantially interfere with or defeat the purposes of the program authorizing the payments against which the offset is contemplated. See 24 CFR 17.100(b). Our view is that feasibility need not be represented by a formal written finding, though that would be desirable for purposes of an administrative record. We have insufficient information with respect to the debtor's financial condition and the overall interests of the United States but raise the question as to whether the contemplated offset would interfere with program purposes. That is a decision that the program office, with your advice, must make.

If the criteria for offset can be satisfied, we would then want to confer with you on the merits of the Department's claim, perhaps including the Office of Litigation in that conference to benefit from any experience it might have had in litigation of this or similar issues. If you require additional information or wish to discuss this matter further, please contact Sam Rothman at 708-4184.