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

In the Matter of:	AUG 3 1 2022
Housing and Redevelopment Insurance Exchange,	HUDOHA: 22-AF-0004-OH-001
Respondent.	

ORDER ON SECRETARIAL REVIEW

On June 10, 2022, the Housing and Redevelopment Insurance Exchange ("Respondent") filed an Appeal to the Secretary of the United States Department of Housing and Urban Development ("HUD") of the Ruling on Respondent's and Government's Dispositive Motions and Initial Decision ("Initial Decision") issued by Administrative Law Judge ("ALJ") Alexander Fernández-Pons. The Initial Decision, issued on May 13, 2022, ordered that Respondent's approval as a Qualified PHA-owned Insurance Entity (QPIE) shall be revoked.

Upon review of the entire record in this proceeding, Respondent's Appeal is **DENIED** and the ALJ's Decision is **AFFIRMED** for the reasons set forth below.

BACKGROUND

The Annual Contributions Contract ("ACC") between Public Housing Agencies ("PHAs") and HUD requires that PHAs maintain specified insurance coverage for property and casualty losses that would jeopardize the financial stability of the PHAs. *See* 24 C.F.R. § 965.205(a). The insurance coverage is required to be obtained under procedures that provide "for open and competitive bidding." *Id.* The HUD Appropriations Act for Fiscal Year 1992 provided that a PHA could purchase insurance coverage without regard to competitive selection procedures when it purchases it from a nonprofit insurance entity owned and controlled by PHAs and approved by HUD in accordance with standards established by regulation. 42 U.S.C. § 1436c. Congress instructed HUD to promulgate regulations to specify such standards. *See Id.*

In response, and after notice and comment, HUD promulgated the 1993 regulation setting standards for QPIEs at 24 C.F.R. § 965.205. Among other requirements, the regulation specifies that an eligible QPIE must: (1) be created by PHAs; and (2) limit participation to PHAs (and to

nonprofit entities associated with PHAs that engage in activities or perform functions only for housing authorities or housing authority residents). 24 C.F.R. § 965.205(a) & (c). If an insurance entity meets these and other regulatory criteria, then a PHA may obtain insurance from that entity without being subject to the competitive bidding requirements. *See* 24 C.F.R. § 965.205. However, HUD may revoke its approval of a nonprofit insurance entity under the regulation when the QPIE no longer meets the requirements of this section. *See* 24 C.F.R. § 965.205(e).

On February 24, 1989, HUD notified Respondent that it was approved to forego normal competitive bidding procedures when offering insurance to PHAs. *See* Respondent's Answer to Complaint, Exhibit 1; *see also* Appeal at p. 2. On or about July 1, 1995, Respondent began insuring non-PHA municipalities and their political subdivisions. *Id.* From 1996 through 2000, HUD and Respondent engaged in communication on this issue. *See* Respondent's Answer to Complaint, Exhibits 1-9. A letter, dated October 10, 2000, from Regina McGill, in the HUD Funding and Financial Management Division, to Respondent's CEO, states, "based upon information you sent to [HUD] on September 15, 2000, HUD is withdrawing the pending non-approval of HARIE as a PHA-owned insurance organization that qualifies as complying with 24 C.F.R. § 965." *Id.*, Exhibit 10.

This matter lay dormant until February 2017, when HUD inquired about the status of certain financial filings and whether Respondent complied with the regulation's requirement limiting approval for the bid exemption to non-profit entities associated with PHAs that engage in activities or perform functions only for housing authorities or housing authority residents. Respondent and HUD exchanged letters regarding Respondent's compliance with the regulation throughout 2017 and 2018. *See* Answer, Exhibits 11-14. During the exchange, HUD offered Respondent two options to come into compliance with the regulation. HUD advised Respondent to either create a distinct entity to legally separate Respondent's Public Housing from non-Public Housing business lines, or, alternatively, request a waiver of the requirement that limits participation to PHAs. *See* Answer, Exhibit 15. To support the waiver, Respondent "would need to establish good cause and provide evidence that [it] . . . mitigated financial and legal risk to the PHA component of Respondent's business, which at a minimum would require submission of financials, actuaries, as well as opinions from counsel that there is not cross liability between the Public Housing business line and other business lines." *See id.* However, Respondent did not pursue either option.

By notice, dated September 14, 2018, HUD informed Respondent of its proposed revocation of Respondent's approval as a QPIE under 24 C.F.R. § 965.205. *See* Answer, Exhibit 15. By letter dated, September 20, 2018, Respondent requested a hearing to contest the proposed revocation. *Id.* at Exhibit 16. HUD acknowledged Respondent's request for a hearing by letter dated September 28, 2018. *Id.* at Exhibit 17. Further, HUD indicated the case would be forwarded to HUD's Office of Appeals. *Id.* HUD also informed Respondent that it would take no action on the revocation until a decision was rendered by the Hearing Officer. *Id.* Separately, in a letter dated September 28, 2018, HUD notified the Pennsylvania Public Housing Agency Executive Directors that HUD had initiated a process to revoke Respondent's approval under 24 C.F.R. § 965.205(e); that Respondent had requested a hearing; and pending the outcome of the hearing, HUD's approval of Respondent remains intact. *See* Answer, Exhibit 18. HUD took no

further action to revoke Respondent's approval under 24. C.F.R. § 965.205 until September 2021.

PROCEDURAL HISTORY

On September 24, 2021, the Department of Housing and Urban Development ("HUD", "Department" or "Agency") issued a Superseding Notice of Withdrawal to Respondent, withdrawing approval of Respondent as a QPIE, pursuant to 24 C.F.R. § 965.205(e). On October 6, 2021, Respondent requested a hearing pursuant to 24 C.F.R. § 965.205(e) to challenge HUD's decision to withdraw Respondent's approval as a QPIE. On October 21, 2021, the ALJ set this matter for hearing to commence on March 16, 2022. On November 5, 2021, HUD filed a Complaint outlining HUD's basis for revoking Respondent's approval as a QPIE. The Complaint alleged two independent bases for revocation: Respondent is not exclusively owned and controlled by PHAs (Count 1); and Respondent does not limit participation to PHAs (Count 2). On December 3, 2021, Respondent filed an Answer raising several affirmative defenses.

On January 24, 2022, HUD filed a Motion to Strike Respondent's Affirmative Defenses. On February 1, 2022, Respondent filed a Response to the Motion to Strike. On February 23, 2022, the ALJ issued a Ruling on Government's Motion to Strike Affirmative Defenses, granting in part and striking Respondent's defenses that the regulation exceeded statutory authority as a failure to state a claim; and denying in part and not striking Respondent's defenses as to deprivation of due process, waiver, ratification, and estoppel.

On April 22, 2022, Respondent filed a Motion to Dismiss asserting HUD failed to state a claim upon which relief can be granted because: (1) HUD had not promulgated a regulation requiring exclusivity in ownership or control; (2) Congress had not enacted a statute requiring QPIEs to be exclusively owned or controlled by PHAs; (3) the terms of ownership and control are not defined by the relevant regulation or statute; and (4) Respondent is not in violation of the regulation or statute because it "insures municipalities and their political subdivisions as the same exclusively and solely provide essential services to PHAs and housing authority residents including but not limited to water services, sewer services, police protection, fire protection, waste collection, public education, etc."

HUD filed a Motion for Summary Judgment on April 22, 2022, asserting (1) there is no genuine issue of material fact remaining; (2) Respondent does not limit participation to PHAs and entities only serving PHAs because it insures municipalities and their subdivisions; (3) Respondent is not solely owned and controlled by PHAs because the majority of its voting members are non-PHAs, and one of Respondent's board members represents a non-PHA member; and (4) Respondent's affirmative defenses of estoppel, ratification, and denial of due process fail as a matter of law and fact.

On May 2, 2022, HUD and Respondent filed their respective response to the Motion to Dismiss and Motion for Summary Judgment. On May 13, 2022, the ALJ issued the Initial Decision, denying Respondent's Motion to Dismiss on Counts 1 and 2. The ALJ found Respondent had "not identified any factual gap to serve as a basis for dismissal of Count 2." *See*

Initial Decision at p. 3. As to Count 1, the ALJ held that a motion to dismiss [or motion for judgment on the pleadings] must identify a legal or factual deficiency in the pleadings. *Id.* at p. 4. The ALJ found the Respondent only challenged a matter of legal interpretation; and therefore, did not show it was entitled to judgment in its favor on the pleadings. *Id.* The ALJ denied HUD's Motion for Summary Judgment as to Count 1, finding HUD "had not established every material fact regarding the ownership and control of Respondent." *Id.* at p. 11. However, the ALJ granted HUD's Motion for Summary Judgment as to Count 2, finding HUD demonstrated material facts were not in dispute and material facts support Count 2 because Respondent does not limit participation to PHAs. *Id.* at p. 16. Respondent admitted that it provides insurance to municipalities and other local government subdivisions. Appeal at p. 2. Further, the ALJ noted a QPIE must meet all eligibility requirements in order to be approved or retain approval as a QPIE. Initial Decision at p. 10. Therefore, if Respondent fails to meet one of the requirements, HUD will prevail. *Id.* Consequently, the ALJ dismissed Count 1 of the Complaint without prejudice as moot and in the interest of judicial economy, and ordered revocation of Respondent's approval as a QPIE. *Id.* at 16.

On June 10, 2022, Respondent timely filed its Appeal of the ALJ's Initial Decision. In its Appeal, Respondent contends the ALJ erred when denying its Motion to Dismiss and in granting HUD's Motion for Summary Judgment as to Count 2 of its Complaint. Respondent asserts the pertinent issue is whether HUD exceeded its authority, provided by Congress, in the promulgation of 24 C.F.R. § 965.205. Respondent also contends HUD is barred from revoking Respondent's bid exemption on the basis of failure to follow due process, ratification, and estoppel. Lastly, Respondent contends the ALJ erred by: (1) allowing HUD to supplement its privilege log and denying Respondent's Motion to Compel; and (2) ordering dispositive motions be filed prior to the close of discovery.

On June 30, 2022, HUD timely filed its Opposition, in which HUD contends the ALJ correctly: (1) granted summary judgment to HUD on Count 2; (2) denied Respondent's Motion to Dismiss; (3) struck Respondent's affirmative defenses; and (4) denied Respondent's Motion to Compel. In addition, HUD asserts Respondent waived its objection to the discovery schedule by not raising it earlier in the proceedings.[1]

[1] The original deadline to issue the written determination in this matter was July 10, 2022. However, due to the delay in obtaining the hearing record from the Office of Hearings and Appeals, on July 5, 2022, I issued an Extension of Time for Written Determination extending the time to issue a written determination by 60 days. The extended deadline is September 8, 2022.

DISCUSSION

I. The ALJ correctly denied Respondent's Motion to Dismiss and correctly granted HUD's Motion for Summary Judgment as to Count 2 of the Complaint.

In its Appeal, Respondent asserts the ALJ erred by denying Respondent's Motion to Dismiss and granting HUD's Motion for Summary Judgment as to Count 2 of its Complaint. *See* Appeal at p. 5. Respondent states the pertinent issue is "whether HUD exceeded its authority provided by Congress, in the promulgation of 24 C.F.R. § 965.205." *See Id.* Respondent also contends "nonprofit entities associated with PHAs that engage in activities or perform functions only for housing authorities or housing authority residents do not exist whatsoever. As such, the regulation is inconsistent with the Congressional spirit and intent of the law as it requires mutual exclusivity in limiting participation only to PHAs and attempts to "expand" eligibility approved under the regulation through the inclusion of nonprofit entities that do not exist." *Id.* at p. 8.

In its Opposition, HUD contends the ALJ correctly granted summary judgment to HUD on Count 2 and denied Respondent's Motion to Dismiss. Specifically, HUD asserts the ALJ "was correct to strike Respondent's collateral attack on the regulation because HUD's promulgation and interpretation is reasonable and consistent with the statute, and Respondent's is not." *See* Opposition at p. 7.

Courts must defer to an agency's regulatory interpretation of an authorizing statute if: (1) the statute vests the agency with the power to regulate the disputed issue; (2) the agency promulgates its regulation after notice and comment; and (3) the regulation is reasonable, i.e., neither contrary to statute, nor arbitrary and capricious. *See* Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843 (1984); Meyer v. Holley, 537 U.S. 280, 288 (2003) (deferring to HUD's regulatory interpretation of the Fair Housing Act); In re Navajo Housing Auth., 14-JM-0121-IH-002, at 72 n. 33 (Dec. 14, 2015). In addition, the Supreme Court has repeatedly said "the power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 165 (2007).

Upon review of the regulatory history of 24 C.F.R. § 965.205(c), the parenthetical, "and to nonprofit entities associated with PHAs that engage in activities or perform functions only for housing authorities or housing authority residents," appears to have been included in response to a suggestion from the public during notice and comment and considered in the Final Notice of 1993:

> *Comment*: Organizations other than PHAs should be able to obtain coverage from QPIEs. In many cases, an organization may have been created solely to provide certain services for a PHA or its residents, e.g., a child care center, a resident management corporation, or a food service organization. The rule should be broadened to permit this.
>
> *Response*: The Department agrees that certain organizations that perform functions for a housing authority should be able to obtain coverage from the nonprofit insurance entity.

> Consequently, the final rule provides that approval will be given to a nonprofit self-funded insurance entity created by PHAs that limits participation to PHAs (and to nonprofit entities associated with PHAs that engage in activities or perform functions only for housing authorities or housing authority residents).

HUD contends the statutory language directing HUD to "establish standards," in addition to HUD's implementation of the regulation after notice and comment rulemaking, is conclusive evidence that HUD's interpretations must be afforded deference. *See* Opposition at p. 9. I agree with HUD's contention. As HUD stated in its Opposition, the regulation does not impose a contradictory set of requirements on insurers. *See id.* at p. 10. Instead, the regulation sets the boundaries for eligibility to PHAs only. Further, the parenthetical notes entities that are eligible for coverage, in addition to the PHAs. *Id.* Therefore, to adhere to the requirements of the regulation, insurers may only insure entities that are PHAs or are qualifying nonprofits. To be exempt from the competitive bidding process, the insurer cannot exceed these regulatory boundaries by insuring entities that are not PHAs or qualifying nonprofits.

In the Initial Decision, the ALJ notes "to the extent Respondent argues the regulation is arbitrary and beyond statutory authority, those arguments have already been rejected in the Ruling on Motion to Strike, and remain rejected by the law of the case." *See* Initial Decision at p. 11, fn. 6. In the Ruling on Government's Motion to Strike Affirmative Defenses, the ALJ held even accepting as true Respondent's assertion that "nonprofit entities associated with PHAs that engage in activities or perform functions only for housing authorities or housing authority residents do not exist whatsoever," Respondent failed to articulate a basis on which the regulation exceeds the authorization under the statute. *See* Opposition, Exhibit 7, Ruling on Government's Motion to Strike Affirmative Defenses, p. 3. Further, Respondent has not shown the regulation or HUD's interpretation of the regulation is arbitrary, capricious or manifestly contrary to the statute. *See id.* at p. 3-4.

Here, I defer to the agency's regulatory interpretation of the authorizing statute, 42 U.S.C. § 1436c. Congress instructed HUD to promulgate regulations to allow certain nonprofit PHA-owned and controlled insurance entities to offer insurance to PHAs without regard to competitive bidding requirements normally applicable to PHAs. Following the proper notice and comment period, HUD included the additional category of nonprofit entities associated with PHAs as eligible to receive insurance from QPIEs, which expanded the universe of insureds. Respondent's contention that no such nonprofits exist is not relevant, as Respondent can continue to limit its insurance to PHAs only. The regulation as implemented is reasonable and Respondent failed to present any evidence supporting its contention that the regulation is contrary to statute or is arbitrary or capricious.

Based on the foregoing, I find the ALJ correctly denied Respondent's Motion to Dismiss and granted HUD's Motion for Summary Judgment as to Count 2.

II. Respondent's affirmative defenses of due process, ratification and estoppel are not legally sufficient.

A. Due Process

An essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." Mullane v. Central Hanover Bank & Trust Co, 339 U.S. 306, 313 (1950). There is no due process violation without a concurrent deprivation of some substantive right. *See* Cleveland Board of Educ. v. Loudermill, 470 U.S. 532 (1985).

Respondent alleges it was denied due process when, in September 2018, HUD failed to adhere to its own regulatory mandate by not providing Respondent with a due process hearing in accordance with 24 C.F.R. § 965.205(e). On September 14, 2018, HUD issued a Notice to Respondent proposing to revoke Respondent's QPIE status. *See* Answer, Exhibit 15. By letter dated September 20, 2018, Respondent requested a hearing regarding the proposed revocation and HUD informed Respondent that its request for a hearing would be forwarded to HUD's Office of Appeals to schedule for hearing. *Id.* at Exhibit 16. However, no hearing was scheduled. On September 24, 2021, the present Superseding Notice was issued to revoke Respondent's approval as a QPIE. *See id.* at Exhibit 21 and Opposition, Exhibit 4. Respondent requested a hearing regarding the proposed revocation and this proceeding was initiated. *See* Answer, Exhibit 22.

Respondent asserts that not providing a prompt hearing in response to a request for a hearing, after the September 14, 2018, Notice, amounts to deprivation of due process. Respondent assertion is not legally sufficient. *See* Appeal at p. 8. Specifically, HUD took no further action against Respondent based on the 2018 Notice. Respondent's approval as a QPIE was never revoked. In the current proceeding, HUD issued a Superseding Notice to revoke Respondent's approval as QPIE; Respondent requested a hearing; and a hearing was scheduled. Respondent does not assert HUD deprived Respondent of due process in the current proceeding. HUD contends Respondent's claim of a due process violation is meritless because Respondent has not been harmed because no administrative action was taken against Respondent prior to this proceeding.

Upon review of the record, I agree with the ALJ's finding that Respondent has not identified any meaningful deprivation of due process or impingement upon any right of Respondent. *See* T.S. v. Indep. Sch. Dist. No. 54, 265, F.3d 1090, 1093 (10th Cir. 2001) (For a claim based on deprivation of a due process hearing and/or other procedures, to be cognizable, it must be linked with a consequent loss of substantive benefits). Although a hearing was never scheduled for the 2018 Notice, HUD took no further action and Respondent's QPIE approval was not revoked. Consequently, Respondent did not suffer a loss of substantive benefits. Rather, Respondent was able to continue operating as a QPIE for another three years.

Therefore, I find the ALJ properly struck Respondent's affirmative defense of deprivation of due process.

B. Ratification

Ratification is the affirmance by a person or a prior act which did not bind the person but which was done or professedly done on their account, whereby the act is given effect as if originally authorized. For ratification to be effective, a superior must: (1) have authority to contract, (2) have full knowledge of the material facts surrounding the unauthorized action of the subordinate, and (3) have knowingly confirmed, adopted or acquiesced to the unauthorized action of her subordinate.[2] *See* Leonardo v. United States, 63 Fed. Cl. 552, 560 (2005).

Respondent asserts "Courts have held that government knowledge and disregard of defendant's alleged misconduct could constitute a valid waiver/ratification defense." *See* Appeal at p. 9, 10, *citing* United States ex rel. Roby v. Boeing Co., 73 F. Supp. 2d 897 (S.D. Ohio 1999). Here, Respondent merely alleges that, decades after the October 10, 2000, correspondence from Reginal McGill, HUD seeks to revoke its QPIE status despite prior knowledge that Respondent insured municipalities and their political subdivisions. *See* Appeal at p. 10.

In its Opposition, HUD asserts Respondent has not pled facts sufficient to show a single element of the ratification defense. *See* Opposition at p. 13. Respondent did not identify a superior officer capable of waiving or ratifying a decision; and did not identify facts material to the ratification or who knew them. *See* id.

The ALJ held Respondent failed to identify or allege involvement of a person with authority to waive or ratify a waiver, and thus to bind HUD as to Respondent's QPIE status. *See* Initial Decision at p. 13. Instead, Respondent relies upon the October 10, 2000, letter to support its contention that waiver or ratification occurred. Specifically, Respondent relies upon the statement that "based upon the information you sent to HUD on September 15, 2000, HUD is withdrawing the pending non-approval of [Respondent] as a [QPIE]." *Id.* The ALJ, however, found this statement merely reflects the then-pending non-approval had been withdrawn. I agree with the ALJ that this language is not indicative of ratification of HUD's approval of Respondent as a QPIE. *Id.* Further, Respondent has not alleged any material facts known by the author of the letter, nor identified any knowing confirmation, adoption, or acquiescence to the October 10, 2000, letter. *Id.*

Respondent has failed to satisfy the aforementioned factors for ratification because Respondent has not identified a superior having authority to contract. Merely citing this October 10, 2000, letter and the signatory, Regina McGill, does not show that Ms. McGill has authority to contract. The other two factors require the superior to have full knowledge of the material facts surrounding the unauthorized action of the subordinate; and to have knowingly confirmed, adopted or acquiesced to the unauthorized action of her subordinate. Here, Respondent has not identified a superior, and even if it had identified a superior, Respondent has failed to demonstrate a superior had full knowledge of the material facts surrounding the unauthorized action of the subordinate, and knowingly confirmed, adopted or acquiesced to the unauthorized action of her subordinate. Thus, the three factors for ratification have not been met and Respondent has failed to allege facts that would make its assertion a valid defense to the action.

[2] For this third prong, Respondent cites to *United States ex rel. Spay v. CVS Caremark Corp.*, 875 F.3d 746 (3d Cir. 2017).

Based on the foregoing, I find the ALJ properly struck Respondent's affirmative defense of ratification.

C. Estoppel

To prove Estoppel, a party must prove (1) the opposing party made a misrepresentation, and (2) the party reasonably relied on that misrepresentation, (3) to its detriment. *See* Kennedy v. United States, 965 F.2d 413, 417 (7th Cir. 1992). It is well settled that the Government may not be estopped on the same terms as any other litigant. Heckler v. Cmty. Health Servs., Inc., 467 U.S. 51, 60 (1984). The party claiming estoppel must also plead that it will be seriously injured if the government is not estopped, and that estopping the government will not harm the public interest. *See* In re Navajo Housing Authority, No. 14-JM-0121-IH-002, 2015 HUD ALJ LEXIS 10, at *32 (HUDALJ Dec. 14, 2015) aff'd 2016 HUD ALJ LEXIS 2 (HUD May 2, 2016) *citing* Office of Pers. Mgmt. v. Richmond, 496, U.S. 414, 421 (1990). Further, in the limited circumstances where other courts have entertained an estoppel argument against the government, they have required an additional showing that the government engaged in affirmative misconduct. *See* Estate of James v. USDA, 404 F.3d 989, 995 (6th Cir. 2005).

Respondent contends the October 10, 2000, letter signed by Ms. McGill permitted Respondent to retain its status as a QPIE. *See* Appeal at p. 11. In addition, Respondent contends HUD had full knowledge that Respondent insured non-PHAs, including municipalities and their political subdivisions. *Id.* Lastly, Respondent asserts that had the October 10 letter indicated HUD wanted to revoke Respondent's QPIE status, Respondent would have worked with the Pennsylvania Insurance Department and HUD to determine an appropriate outcome for all parties. *Id.* HUD asserts Respondent "did not identify a false statement; did not identify reasonable reliance; did not identify affirmative misconduct; and did not explain why barring enforcement was in the public interest." *See* Opposition at p. 13.

The ALJ held that Respondent failed to establish the government made any material representation or engaged in affirmative misconduct as it relates to Respondent's QPIE status. Further, the ALJ found Respondent did not reasonably rely upon any alleged misrepresentation. Respondent further failed to present any evidence that it relied upon the alleged misrepresentation to its detriment. *See* Initial Decision at p. 14.

Upon review of the record, I agree with the ALJ's findings. Respondent has failed to meet the requisite requirements to establish estoppel. Specifically, Respondent has not identified a misrepresentation or affirmative misconduct by HUD. Although HUD issued the October 10, 2000, letter withdrawing the pending non-approval of Respondent's QPIE status, this correspondence was not a misrepresentation. In addition, Respondent has not shown that it relied upon such misrepresentation to its detriment. Rather, Respondent has been able to continue operating with QPIE approval for over two decades and therefore, did not suffer any harm. Respondent has failed to allege facts that would make this argument a valid defense to the action. Therefore, I find the ALJ properly struck Respondent's affirmative defense of estoppel.

III. Respondent failed to preserve the ALJ's Ruling on the Motion to Compel for appeal and Respondent waived its objection to the notice of hearing.

Respondent contends the ALJ erred by allowing HUD to supplement its privilege log and subsequently denying Respondent's Motion to Compel with regard to the redacted emails that were not provided in HUD's initial privilege log to Respondent. *See* Appeal at p. 11. This issue is not addressed in the Initial Decision. On April 11, 2022, Respondent filed a motion to compel discovery responses from HUD, in part alleging that no privilege log had been provided in relation to certain documents produced in fully-redacted form in discovery. By Order dated April 12, 2022, the ALJ ordered HUD to produce a supplemental privilege log addressing any documents that were redacted and not included in the privilege log. Further, the ALJ issued a ruling, dated April 26, 2022, denying Respondent's Motion to Compel. *See* Opposition, Exhibit 2. The ruling, in part, found Respondent failed to make a good faith attempt to resolve the issue without the Court's intervention. *Id.* Moreover, the ALJ directed HUD to provide a supplementary privilege log and therefore, Respondent's Motion to Compel was granted in part. *Id.* at p. 2-3.

Pursuant to 24 C.F.R. § 26.27, a party seeking review of an interlocutory ruling must file a motion with the hearing officer within 10 days of the ruling requesting certification of the ruling for review by the Secretary. Upon review of the record, Respondent did not file such motion with the ALJ. Therefore, I find Respondent failed to comply with the applicable rule, and as a result did not preserve this issue on appeal.

Further, Respondent asserts the ALJ erred by ordering dispositive motions filed prior to the close of discovery. On January 25, 2022, the ALJ issued Second Notice of Hearing and Order ordering discovery completed by April 29, 2022, and dispositive motions filed no later than April 22, 2022. *See* Opposition, Exhibit 3. Respondent contends it was unable to include a deponent's testimony in its Motion to Dismiss because Respondent took her deposition on April 25, 2022, prior to close of discovery, but after the deadline for filing dispositive motions.

I find the Respondent waived its objection to the Second Notice of Hearing and Order, as this issue is not part of the Initial Decision and therefore, is not appealable here.

Conclusion

Upon review of the entire record of this proceeding, as well as applicable statutes and regulations, the Appeal is **DENIED** for reasons set forth above. Pursuant to 24 C.F.R. § 26.26, the ALJ's May 13, 2022, Ruling on Respondent's and Government's Dispositive Motions and Initial Decision is **AFFIRMED**.

Dated this 31 of August, 2022

Adrianne Todman
Secretarial Designee

CERTIFICATE OF SERVICE

I hereby certify on September 1, 2022, the ***Order on Secretarial Review***, issued by Adrianne Todman, Secretarial Designee, In the Matter of Housing and Redevelopment Exchange, HUDOHA: 22-AF-0004-OH-001, was served on the following parties in the manner indicated:

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