



**Office of Appeals
U.S. Department of Housing and Urban Development
Washington, D.C. 20410-0001**

In the Matter of:

Emilo Enrique Oliva,

Petitioner

HUDOA No. 10-M-NY-AWG118
Claim No. 721004846

Emilo Enrique Oliva
6720 Mesa Grande Avenue
El Paso, TX 79912

Pro Se

Julia Murray, Esq.
US Department of Housing and
Urban Development
Office of Assistant General Counsel
for New York/New Jersey Field Offices
26 Federal Plaza, Room 3237
New York, NY 10278

Counsel for the Secretary

DECISION AND ORDER

On August 30, 2010, Petitioner requested a hearing concerning a proposed administrative wage garnishment relating to a debt allegedly owed to the U.S. Department of Housing and Urban Development ("HUD"). The Debt Collection Improvement Act of 1996, as amended (31 U.S.C. § 3720D), authorizes federal agencies to use administrative wage garnishment as a mechanism for the collection of debts owed to the United States Government.

The administrative judges of this Office have been designated to determine whether the Secretary may collect the alleged debt by means of administrative wage garnishment if the debt is contested by a debtor. This hearing is conducted in accordance with the procedures set forth at 31 C.F.R. § 285.11, as authorized by 24 C.F.R. § 17.170. The Secretary has the initial burden of proof to show the existence and amount of the debt. 31 C.F.R. § 285.11(f)(8)(i). Petitioner, thereafter, must show by a preponderance of the evidence that no debt exists or that the amount of the debt is incorrect. 31 C.F.R. § 285.11(f)(8)(ii). In addition, Petitioner may present evidence that the terms of the repayment schedule are unlawful, would cause a financial hardship to Petitioner, or that collection of the debt may not be pursued due to operation of law. *Id.*

Pursuant to 31 C.F.R. § 285.11(f)(4) and (f)(10), on September 1, 2010, this Office stayed referral by HUD of this matter to the U.S. Department of the Treasury for issuance of an administrative wage garnishment order until the issuance of this written decision.

Background

On February 7, 2006, Petitioner executed and delivered to the Secretary a Partial Claims Promissory Note ("Note") in the amount of \$9,150.00 in exchange for foreclosure relief being granted by the Secretary. (Secretary's Statement ("Sec'y Stat."), filed October 1, 2010, ¶ 2, Ex. A.) The Note provides that the loan becomes due upon the occurrence of certain events or conditions. (*Id.* at ¶ 3, Ex. A.) One such condition is when the borrower pays the primary note in full. (*Id.*, Ex. A.) On or about October 30, 2006, the FHA mortgage insurance on Petitioner's primary note was terminated when the lender informed the Secretary that the primary note was paid in full, thus making the Note due. (*Id.* at ¶¶ 4-5; Ex. B, Declaration of Brian Dillon, Director, Asset Recovery Division, HUD Financial Operations Center ("Dillon Decl."), dated September 24, 2010, ¶ 4.)

The Secretary has attempted to collect the amounts due under the Note, but Petitioner remains delinquent. (*Id.* at ¶ 7.) The Secretary has filed a Statement with documentary evidence in support of his position that Petitioner is indebted to HUD in the following amounts:

- (a) \$5,753.06 as the unpaid principal balance as of September 9, 2010;
- (b) \$0 as the unpaid interest on the principal balance at 4% per annum through September 9, 2010; and
- (c) interest on said principal balance from September 10, 2010 at 4% per annum until paid.

(Sec'y Stat., ¶ 7; Dillon Decl., ¶ 5.)

A Notice of Intent to Initiate Administrative Wage Garnishment Proceedings, dated December 15, 2008, was sent to Petitioner. (Sec'y Stat., ¶ 8; Dillon Decl., ¶ 6.) In accordance with 31 C.F.R. § 285.11(e)(2)(ii), Petitioner was afforded the opportunity to enter into a written repayment agreement with HUD under mutually agreeable terms. (Sec'y Stat., ¶ 9; Dillon Decl., ¶ 7.) As of September 24, 2010, Petitioner has not entered into a written repayment agreement in response to the Notice. (*Id.*)

A Wage Garnishment Withholding Order was issued to Petitioner's employer on January 14, 2009. (Sec'y Stat., ¶ 10; Dillon Decl., ¶ 8.) Based on the issuance of the Wage Garnishment Order, Treasury received 42 garnishment payments totaling \$4,883.38. (Sec'y Stat., ¶ 11; Dillon Decl., ¶ 9.) These payments were credited towards Petitioner's debt, and are reflected in the outstanding balance now due above. (*Id.*)

The Secretary submits that a reasonable amount to garnish is 15% of Petitioner's disposable pay, or \$116.27 per pay period, which is the average garnishment received to date. (Sec'y Stat., ¶ 12; Dillon Decl., ¶ 10.)

Discussion

Petitioner asserts that the debt that is the subject of this proceeding may not be collected because the proposed administrative wage garnishment would cause him financial hardship. Petitioner writes, “[D]ue to my economic hardship and change in wages[,] I am not able to sustain myself and my family any longer. Things have changed drastically in the last year, with my wife loosing [sic] most of her earnings [of] \$800/month and increases in gas, medical and insurance costs[,] I am not able to make ends meet.” (Petitioner’s Request for Hearing (“Pet’r Hr’g Req.”), filed August 30, 2010.)

Pursuant to 31 C.F.R. § 285.11(f)(8)(ii), Petitioner bears the burden of proving, by a preponderance of the evidence, that no debt exists, that the amount of the debt is incorrect, or that the terms of the repayment schedule are unlawful or would cause financial hardship. On August 30, 2010, Petitioner filed a copy of Petitioner’s bi-weekly pay statements and a list of his assets and liabilities and monthly payments. (*Id.*, Attach.)

Petitioner’s three bi-weekly pay statements for the pay periods from June 19, 2010 to July 30, 2010 indicate that his average bi-weekly gross pay was \$898.78. (*Id.*) The Secretary is authorized to garnish “up to 15% of the debtor’s disposable pay,” which is determined “after the deduction of health insurance premiums and any amounts required by law to be withheld...[including] amounts for deductions such as social security taxes and withholding taxes....” 31 C.F.R. §§ 285.11(c) and (i)(2)(i)(A). After subtracting allowable deductions for federal tax and Social Security deductions, Petitioner is left with a disposable income of \$790.87 bi-weekly or \$1,581.70 monthly. (*Id.*)

Petitioner submitted a list of monthly household expenses in his request for hearing, but Petitioner failed to file documentary evidence to support these claimed expenses. Therefore, some of the items listed by Petitioner may not be credited toward essential household expenses. However, this Office has determined that credit may be given for certain essential household expenses, such as rent and food, where Petitioner has not provided bills or other documentation, yet the “financial information submitted by Petitioner . . . [was found to be] generally credible . . .” *David Herring*, HUDOA No. 07-H-NY-AWG53 (July 28, 2009) (*citing Elva and Gilbert Loera*, HUDBCA No. 03-A-CH-AWG28 (July 30, 2004)). In accordance with the holding in *Herring* and *Loera*, this Office will credit Petitioner with his alleged monthly expenses: rent/mortgage, \$929.00; vehicle finance, \$357.00; gas, vehicle repairs and insurance, \$100.00; electricity, water and rent insurance, \$180.00; trash, \$35.00; food, \$400.00; and minimum monthly payments of \$15 to \$25 each for seven credit cards, totaling \$140.00. (Pet’r Hr’g Req.) These essential household expenses total \$2141.00 monthly. Petitioner’s assertions concerning clothing of \$80.00, student loan of \$256.68, cable/satellite television/phone of \$140.00, and out-of-pocket medical expenses of \$200.00 will not be credited towards Petitioner’s monthly expenses because they are not deemed to be essential living expenses.

As a result, Petitioner’s monthly disposable income of \$1,581.70 less his essential monthly expenses of \$2,141.00 leaves a negative balance of \$559.25 per month. A 15% garnishment rate of Petitioner’s bi-weekly disposable income would equal \$237.26 and exceed Petitioner’s disposable pay by \$796.52. A wage garnishment of 10%, or \$158.17 monthly,

would still exceed Petitioner's disposable pay by \$717.43. A garnishment rate of 5%, or \$79.09 monthly, would again exceed Petitioner's disposable pay by \$638.34 each month.

Pursuant to 31 C.F.R. § 285.11(k)(3), this Office has the authority to order garnishment at a lesser rate based upon the record before it, particularly in cases where financial hardship is found. Upon due consideration, I find that Petitioner has demonstrated that the Secretary's proposed repayment schedule would cause him financial hardship. While the Secretary has successfully established that the debt that is the subject of this proceeding is legally enforceable against Petitioner in the amount claimed by the Secretary, a garnishment amount at any percentage of Petitioner's disposable pay would constitute a financial hardship sufficient to justify suspension of the collection action at the present time.

Finally, Petitioner proposes the settlement offer of \$3,000: "Would you accept a \$3,000 payment?" (Pet'r Hr'g Req.) In response, the Secretary states, "In his request for a hearing, Petitioner offered to settle the claim for less than the full amount due. However, when contacted by telephone on September 21, 2010, Petitioner indicated that he does not have the funds available to offer a settlement at this time." (Sec'y Stat., ¶ 13; Dillon Decl., ¶ 11.) Petitioner is advised that this Office is not authorized to consider any settlement offer or any waiver of interest request on behalf of HUD. However, Petitioner may wish to discuss this matter with Counsel for the Secretary or Mr. Lester J. West, Director, HUD Financial Operations Center, 52 Corporate Circle, Albany, NY 12203-5121, who may be reached at 1-800-669-5152.

ORDER

The Order imposing the stay of referral of this matter to the U.S. Department of Treasury for administrative wage garnishment shall remain in place indefinitely. For the reasons stated above, it is hereby

ORDERED that the Secretary shall not seek collection of this outstanding obligation by means of administrative wage garnishment at this time. The Secretary shall not be prejudiced from seeking administrative wage garnishment if, in the future, Petitioner's income increases or his essential household expenses are reduced.



H. Alexander Manuel
Administrative Judge

December 17, 2010