

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. In addition, Petitioner may present evidence that the terms of the repayment schedule are unlawful, would cause an undue financial hardship to the Petitioner, or that collection of the debt may not be pursued due to operation of law. (31 C.F.R. § 285.11(f)(8)(ii)). Pursuant to 31 C.F.R. § 285.11(f)(4), on May 23, 2006, this Office stayed the issuance of a wage withholding order until the issuance of this written decision.

Summary of Facts and Discussion

On February 18, 1992, Petitioner executed and delivered to Citizens Thrift and HUD Loan Association an installment note in the amount of \$15,000 for a home improvement loan that was insured against nonpayment by the Secretary pursuant to Title I of the National Housing Act, 12 U.S.C. § 1703. (Secretary's Statement, hereinafter, "Secy. Stat.," ¶2, Exh. A). On May 30, 1995, Citizens Thrift and Loan Association assigned the note to First Trust of California, N.A. (Secy. Stat., ¶2, Exh. B). Petitioner failed to make payments as agreed in the note and went into default in May 1995. (Secy. Stat., ¶¶ 3-4, Petitioner's Letter, dated May 22, 2006, p. 1). Consequently, First Trust of California, N.A., assigned the defaulted note to the United States of America on March 22, 1996, in accordance with 24 C.F.R. § 201.54 (2006). (Secy. Stat., ¶ 3, Exh. C; Declaration of Brian Dillon, Director, Asset Recovery Division, Financial Operations Center, Dillon Declaration, ¶ 3.) The Secretary is the holder of the note on behalf of the United States of America. (Secy. Stat., ¶ 3; Dillon Declaration, ¶ 3.)

The Secretary has filed a Statement with documentary evidence in support of his position that Petitioner is indebted to the Department. The Secretary alleges that Petitioner is currently in default on the note and that Petitioner is indebted to the Government in the following amounts: \$13,682.55 as the unpaid principal balance as of April 30, 2006; \$7,755.24 as the unpaid interest on the principal balance at 5% per annum through April 30, 2006; and interest on the principal balance from May 1, 2006, at 5% per annum, until paid. (Secy. Stat., ¶ 5; Dillon Declaration, ¶ 4.) Petitioner's monthly pay statement for the period ending on May 31, 2006 shows Petitioner's monthly disposable income to be \$1299.20 (\$194.88 is 15 percent of \$1,299.20). (Secy. Stat., ¶7.) This is the Secretary's proposed written repayment schedule. Id.

First, Petitioner contests the existence of the debt. Petitioner states "in September or October of 1996, I was told that I had been released from owing the money to HUD and that I would be receiving a 1099 for the release." (Petitioner's Hearing Request, "Pet. Hrg. Req.," dated May 22, 2006, p.2; Petitioner's Statement dated July 7, 2006, "Pet. Stat. I" ¶ 11; Petitioner's Statement dated August 7, 200[7], "Pet. Stat. II," ¶ 5). Petitioner further alleges:

Yes I was notified that HUD intended to collect but it was never followed through by HUD because at the time both the Treasury and HUD discontinued this process because of the release... on all three occasions they [HUD and the collection agency] did not respond to my letters and I assumed at the time that this was proof that this case was settled. A reasonable person would conclude that my responses brought to their attention that the case had been settled and no further action was necessary. That HUD had made a mistake in their record keeping with regard to the release [sic]. No response to my letters was affirmation that they had agreed with my position that the case was closed.

(Pet. Stat. I, ¶ 16). Petitioner admits that he cannot produce a copy of the alleged release but states “[he] believed that deep in [his] file would be the proof that this case was settled in 1996. When [he] finally got [his] file, it was as if the file had been sanitized. Not only was the proof missing, but even non-proof stuff was missing.” (Id. at ¶ 19). Petitioner also claims, “more evidence for the existence of my release lies in the fact that I truly believed that by getting my file from HUD, that all the correspondence short of the release notice would still prove there was a release.” (Id. at ¶ 20). Petitioner submitted copies of the documents he claimed were missing from HUD’s records.² Id. This Office found these documents to be authentic, probative, and credible to make a factual determination, but none of these documents contained a release.

The Secretary states that “HUD has no evidence that Petitioner was released from the debt in 1996, or that the Seattle office, the Albany office, or the Treasury Department received copies of documents establishing that Petitioner had been released from the debt.” (Dillon Declaration, ¶¶ 5, 7, 8). “Copies of supporting documentation regarding the alleged release have not been found at Petitioner’s Congressman’s office, the Treasury Department, HUD, Petitioner’s attorney’s office, in Petitioner’s records, or elsewhere.” (Secy. Stat., ¶ 8).

This Office has given Petitioner two opportunities to produce the documents Petitioner has claimed as missing from the records. Petitioner was issued a Notice of Docketing, Order, and Stay of Referral (“Notice of Docketing”) on May 23, 2006 in which he was ordered to submit documentary evidence to prove that the alleged debt was unenforceable. Petitioner responded to the Notice of Docketing by submitting documents alleged to be missing (Pet. Stat. I, and enclosures). Another Order was issued to Petitioner, on July 18, 2007, ordering Petitioner to submit documentary evidence to verify the current status of Petitioner’s wages, income, and expenses. Petitioner responded by submitting wage and tax statements from 2003-2006, and submitting recent pay statements from March-May, 2007. (Pet. Stat. II, and enclosures). None of the

² There were 12 exhibits attached to Petitioner’s Statement, dated July 7, 2006, which included letters from Brian Dillon, Petitioner’s loan documents, letters from Congressmen, pay statements, and wage and tax statement, but, no release.

documents submitted by Petitioner in response to both Orders included a copy of the release Petitioner alleged was missing.

While the absence of supporting documentation does not prove that the release did not occur, the lack of documentation places this Office in the position of having to speculate that such a release was issued. There is nothing in the record to refute the existence of the debt other than Petitioner's uncorroborated statements. This Office has held that assertions without evidence are insufficient to show that the debt claimed by the Secretary is not past due or enforceable. *Bonnie Walker*, HUDBCA No. 95-G-NY-T300 (July 3, 1996). Thus, this Office finds that the Secretary has submitted sufficient documentary evidence to establish the debt as enforceable and past due.

Second, Petitioner disputes the debt based upon the statute of limitations. Petitioner argues, "[i]t is now 11 years, [and] 2 months since the default of April 27, 1995, and 10 years, [and] 3 months since the Secretary of HUD received the assignment of the note. The statute of limitation of this kind of loan in Federal Credit Law is 7 years, the statute of limitation for this kind of loan in California is 4 years." (Pet. Stat. I, ¶ 23.) Petitioner generally cites, as examples, other agencies that provide statutes of limitation and statutes for the destruction of records after a certain specified period of time. (Id. at ¶¶ 30-35.) Petitioner states, "[w]hy should I have to keep records forever, maintain an almost foresight knowledge of HUD's ability to keep records all because the burden of proof is on me to prove with evidence that I settled a claim with them some 10 years ago." (Id. at ¶ 31). Petitioner also questions, "[w]hy didn't HUD proceed with a wage garnishment process for when I had a full time job making in excess of \$60,000 a year from 1996 to 2002? Why did they wait until I was indigent and employed for only a few hours a month?" (Id. at ¶ 27).

31 U.S.C. § 3720D, the controlling statute in this case, authorizes federal agencies to use administrative wage garnishment as a mechanism for the collection of debts owed to the United States Government and, unlike administrative offset cases, it does not contain a time limitation in which the government may bring such administrative actions. As the Supreme Court recently reiterated, "This canon is rooted in the traditional rule that time does not run against the King." *BP America Prod. Co. v. Burton*, 127 S. Ct. 638, 640 (2006). Government contract actions have traditionally not been subject to any statute of limitations. *Id.* at 641, citing *Guaranty Trust Co. v. United States*, 304 U.S. 126, 132. "Absent congressional action changing this rule, it remains the law . . ." *Id.* at 641; In the matter of: *Douglas P. Hansen*, HUDBCA No. 06-A-CH-AWG03, Decision and Order on Reconsideration (February 13, 2007).

For the foregoing reason, neither laches nor public policy serve to bar administrative wage garnishment actions, and thus, will not do so in this case. Not only does the traditional rule that time does not run against the King apply, but it is also well established in case law that the United States is not generally subject to the defense of laches. *See, e.g., United States v. Beebe*, 127 U.S. 338, 344 (1888); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917); and *United States v. Summerlin*, 310 U.S. 414, 416 (1940). This Office has no authority to craft a remedy that is not created by the

governing statute or the implementing regulations. Therefore, this Office finds that this debt is not subject to a statute of limitation.

Third, Petitioner disputes the terms of the proposed repayment schedule and asserts that the administrative wage garnishment proposed at 15% of his income would cause financial hardship. (Pet. Stat. I, ¶¶ 39-43, and Pet. Stat. II, ¶¶ 3-4). 31 C.F.R. § 285.11(f)(8)(ii) provides that Petitioner may present evidence that the terms of the repayment schedule would cause a financial hardship. Petitioner states, "I am broke, without assets of any kind." (Pet. Stat. II, ¶ 4.) Petitioner states that "he has moved in with his elderly parents, who are very ill, to care for them and their home." (Id. at ¶ 3.) As a result, he has been "working less and earning less and less each year over the past several years." (Id., and enclosed W-2 statements, 2003-2006). Petitioner states:

"[m]y full time job now is to take care of my elderly parents until they need a nursing home full time. My job now is to fix meals, dress them, handle their finances, repair their home of almost 40 years and to keep them together for as long as possible. For all of this I get no salary, but some of my personal bills are covered that I cannot cover from my employment with Pacific Hospital Management." (Pet. Stat. I, ¶ 43.)

Petitioner generally contends that he has also taken an early withdrawal from his retirement IRA to cover the cost of his mother's extremely expensive medical treatments and prescriptions for breast cancer, and has also sold his car. (Pet. Stat. II, ¶¶ 3-4).

Petitioner is requesting that his monthly payments toward the instant debt be lowered from 15 percent of his net pay due to severe financial hardship. Petitioner submitted two sets of documents showing his monthly expenses, and his decreasing income, as evidence that the terms of the repayment schedule would cause financial hardship. (Pet. Stat. I, and Pet. Stat. II, and enclosures.) The various documents Petitioner submitted include: W-2 and tax documents for 2003-2006; social security statement, showing earnings; pay statements for 2007; child support order and check; telephone and internet bills; credit card statement; a financial statement for 2006 and 2007; IRS debt statement; and documents showing car insurance.

Petitioner's monthly expenses, more specifically, included the following estimated items based upon the documents submitted³: \$100 for cell phone, (which he is required to have for work) (Pet. Stat. II, ¶ 1); \$41 for gasoline and automobile insurance; \$280 for life and health insurance; \$300 for food; \$680 for child support; \$35 for internet service; and \$10 for IRS debt payments. (Id. and enclosed "Summary of Financial Data"). These expenses total \$1,366 per month. This total does not include monthly expenses for clothes, credit card debt and financial fees, or other miscellaneous expenses.

³ Although Petitioner sold his car and uses his mom's car for work, Petitioner alleges he is legally required to carry auto insurance even though he owns no car. (Pet. Stat. II, ¶ 4).

In addition to the extent of his monthly expenses, Petitioner also relies on his decreasing income to further support his allegation of financial hardship. His most recent pay statements, during the highest month of income in 2007, reflect a monthly disposable income of \$843, and, in other months as low as half that amount. (Id. and enclosed pay statements for March-May, 2007). Petitioner's annual income, for the past two years, ranged between \$13,000 and \$14,000, which is economically below the poverty level. (\$17,170.00 for a household of three persons).⁴ (Id. and enclosed W-2 statements, 2005 and 2006). The Secretary states that Petitioner's monthly disposable income is \$1299.20 based upon the pay period ending May 31, 2006. (Secy. Stat., dated June 12, 2006, ¶ 7). More recent pay statements submitted by Petitioner, however, reflect a monthly disposable income of \$464.42 for March, 2007, \$108.47 for April, 2007, and \$843.23 for May, 2007. (Id., and enclosed Pacific Hospital Management pay statements, March-May, 2007).

The Secretary's proposed garnishment amount of \$194.88 equates to 15% of Petitioner's monthly earning of \$1299.20 for the pay period ending May, 2006. (Secy. Stat., dated June 12, 2006, ¶ 7). Petitioner has since submitted documentary evidence that substantiates that his income has consistently decreased, nearly \$455, to a monthly disposable income of \$843, and even lower in subsequent months. Even if Petitioner's highest monthly earning of \$843 was used to estimate his monthly garnishment amount, his monthly expenses, of \$1366 alone, would exceed his monthly income of \$843 by \$523. A 15% garnishment rate of Petitioner's current monthly disposable income would equal approximately \$127 per month (15% of \$843 = \$126.50). A 10% garnishment rate would lower Petitioner's garnishment amount to approximately \$84 per month, and, at 5%, would lower Petitioner's payments to \$42 per month. To impose an administrative wage garnishment against the Petitioner, at any rate, would be ineffective and unproductive at this time.

Upon due consideration, this Office finds that the Petitioner has submitted sufficient documentary evidence to substantiate his claim that the administrative wage garnishment of his disposable pay, in the amount sought by the Secretary, would cause severe 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 income, would, at this time, constitute a financial hardship sufficient enough to forego collection.

ORDER

Based on the foregoing, I conclude that an administrative wage garnishment would create a financial hardship for the Petitioner at this time. The Order imposing the

⁴ 2007 Health and Human Services Poverty Guidelines, January 24, 2007, Federal Register, at FR volume 72, number 15, pages 3147-3148.

stay of referral of this matter to the U.S. Department of Treasury for administrative wage garnishment shall remain indefinitely. Therefore, it is hereby

ORDERED that the Secretary shall not seek collection of this outstanding obligation by means of administrative wage garnishment because of Petitioner's financial circumstances at this time.

The Secretary shall not be prejudiced from seeking an administrative wage garnishment if, in the future, Petitioner's income increases or his expenses for necessities are reduced.

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Vanessa L. Hall
Administrative Judge

November 30, 2007