

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF HEARINGS AND APPEALS

In the Matter of:

Denise Smith,

Petitioner.

14-VH-0068-AG-030

2013422331B

February 2, 2015

DECISION AND ORDER

On March 13, 2014, Denise Smith (“Petitioner”) filed a hearing request concerning a proposed administrative wage garnishment relating to a debt allegedly owed to the U.S. Department of Housing and Urban Development (“Secretary” or “Government”). 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.

Applicable Law

The administrative judges of this Court have been designated to adjudicate contested cases where the Secretary seeks to collect an alleged debt by means of administrative wage garnishment. 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. § 17.81. 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). Thereafter, Petitioner 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 any proposed repayment schedule are unlawful, would cause an undue financial hardship to Petitioner, or that collection of the debt may not be pursued due to operation of law. Id.

Procedural History

Pursuant to 31 C.F.R. § 285.11(f) (4), on March 13, 2014, this Court stayed the issuance of a wage garnishment order until the issuance of this written decision. *Notice of Docketing, Order, and Stay of Referral* (“*Notice of Docketing*”). On April 10, 2014, the Secretary filed his *Statement* along with documentation in support of her position. On May 13, 2014, Petitioner submitted documentary evidence in support of her position. This case is now ripe for review.

Background

On June 21, 2005, Petitioner executed and delivered to the Secretary a Subordinate Note (“Note”) in the amount of \$3,834.02. The Note secured a Subordinate Mortgage (“Mortgage”) held by the Secretary. *Secretary’s Statement* (“*Sec’y Stat.*”) ¶ 2, filed April 10, 2014; Ex. 1, Note.

“As a means of providing foreclosure relief to Petitioner, HUD advanced funds to Petitioner’s FHA insured mortgage lender and, in exchange for such funds, Petitioner executed the Note in favor of the Secretary.” *Sec’y Stat.*, ¶ 3; Ex. 2, *Declaration of Gary Sautter* (“*Sautter Decl.*”), ¶ 4. Based on the terms of the Note, the amount to be repaid becomes due and payable when the first of the following events occurs (i) borrower has paid in full all amounts due under the primary note and related mortgage, deed of trust or similar security instrument insured by the Secretary; (ii) the maturity date of the primary note has been accelerated; (iii) the primary note and related mortgage, deed of trust or similar security instrument are no longer insured by the Secretary; or (iv) the purchaser does not occupy the property as his or her principal residence. *Sec’y Stat.*, ¶ 4; Ex. 1, ¶ 4. “On or about December 20, 2012, the FHA insurance on the first mortgage was terminated as the lender indicated that the mortgage was paid in full.” *Sec’y Stat.*, Ex. 2, *Sautter Decl.*, ¶ 4.

Accordingly, the Secretary has attempted to collect from Petitioner but without success. The Secretary alleges that Petitioner is indebted in the following amounts:

- (a) \$ 1038.63 as the unpaid principal balance as of February 28, 2014;
- (b) \$ 0.00 as the unpaid interest on the principal balance at 1% per annum through February 28, 2014; and,
- (c) Interest on said principal balance from March 1, 2014 at 1% per annum until paid.

Sec’y Stat., ¶ 7; *Sautter Decl.*, ¶ 5.

Pursuant to 31 C.F.R. § 285.11(e), a Notice of Intent to Initiate Administrative Wage Garnishment Proceedings (“Notice”), dated February 10, 2014, was sent to Petitioner. *Sec’y Stat.*, ¶ 6; Ex. 2, *Sautter Decl.*, ¶ 6. In the Notice, Petitioner was afforded the opportunity to enter into a written repayment agreement under the terms acceptable to HUD. *Sec’y Stat.*, Ex. 2, *Sautter Decl.*, ¶ 7. Petitioner did not enter into a repayment agreement or pay the debt in full based on the February 10, 2014 Notice. *Sec’y Stat.*, Ex. 2, *Sautter Decl.*, ¶ 8.

Petitioner provided the Secretary with a copy of her weekly pay statement that reflected a net weekly disposable income of \$1813.97 for the period ending February 22, 2014. *Sec’y Stat.*, ¶ 10; *Sautter Decl.*, ¶ 9. The Secretary requests authorization of a garnishment repayment schedule of \$272.00 per pay period, or alternatively, an amount equal to 15% of any amount determined to be Petitioner’s disposable income. *Sec’y Stat.*, ¶ 9; *Sautter Decl.*, ¶ 8.

Discussion

In this case, Petitioner disputes the existence of the debt, and claims that a garnishment in any amount would cause severe financial hardship. (*Petitioner's Hearing Request* ("Hearing Request"), filed February 25, 2014.) More specifically, Petitioner claims:

This whole situation has caused a financial burden on me. I still don't believe this debt belongs to me because I've had a different resident since 2004. [I] [f]iled taxes separately, and the ONLY reason I signed that paper was because I was on the home loan, & until now he wasn't able to refinance. But none of this matters! As a result of my taxes being taken ALL of my bills are behind and my credit is suffering as a result of something that really is no fault of mine.

Emphasis in original. *Id.*

In order to show extreme financial hardship, Petitioner "must submit 'particularized evidence,' including proofs of payment, showing that she will be unable to pay essential subsistence costs such as food, medical care, housing, clothing or transportation." Ray J. Jones, HUDAJF 84-1-OA at 2 (March 27, 1985). As support for her claim of financial hardship, Petitioner provided expense calculation worksheets, two pay statements, copies of various bills, bank and credit card statements, and other related documentary evidence. (*Hearing Req.; Petitioner's Documentary Evidence* ("Pet'r's Doc. Evid."), filed May 13, 2014.

Financial adversity does not invalidate a debt or release a debtor from a legal obligation to repay it. Raymond Kovalski, HUDBCA No. 87-1681-G18 (Dec. 8, 1986). 24 C.F.R. § 285.11(k)(3) provides that if financial hardship is found this Court may downwardly adjust the garnishment amount to reflect the debtor's financial condition. When considering a claim of financial hardship, the Court reviews the Petitioner's disposable income, alleged monthly expenses, and supporting documentation. Disposable income is defined as "that part of the debtor's compensation from an employer remaining 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).

Based on Petitioner's pay statements, her monthly disposable income is \$1,748.96, the difference between her average monthly income of \$2,385.60,¹ less her monthly deductions of: \$209.72, federal income tax; \$155.24, Social Security tax; \$125.64, state tax; \$22.64, Medicare; and, \$123.40, health insurance. The other adult in her household, "Sam," contributes \$362.36 per month which, together with \$1,748.96, yield a total monthly household income of \$2,111.32.

A review of the adjusted disposable income figure (monthly disposable income less monthly expenses) provides the basis for determining whether financial hardship exists. See Carolyn Reed, HUDOA No. 12-M-CH-AWG05 (January 20, 2012). This Court has held that credit may be given for certain essential household expenses, despite insufficient documentation,

¹ Petitioner's pay statements are largely illegible, making it difficult to calculate her earnings and deductions with precision. The figures used here represent averages from both pay statements.

when the “financial information submitted by Petitioner ... [was found to be] generally credible....” *Reed*, p. 4 (citing *Elva and Gilbert Loera*, HUDBCA No. 03-A-CH-AWG28 (July 30, 2004)). Here, Petitioner has provided proofs of payment for a number of essential monthly expenses: rent, \$487.00; car payment, \$385.11; and electricity, \$123.98; car, home, and life insurance, \$305.66; condominium fees, \$110.00; food, \$105.00; student loans, \$595.00; water and garbage service, \$58.00; and household goods, \$50.00. Other expenses were claimed such as church contributions, \$224.00; phone and internet service, \$170.00; and clothing, \$140.00. The Court determined that these expenses for contributions, internet access, and clothing were not essential household expenses. Telephone service is, however, considered an essential household item. As a result, Petitioner will only be credited for \$85.00 of the full amount of her internet/telephone bill. It was difficult to determine from the phone/internet bill which portion of the bill was associated with the phone services.

Petitioner’s documentary evidence also included several credit card statements. Again, it was unclear whether the purchases made with those credit cards included items that were deemed to be essential household expenses. Since there was no evidence to substantiate that, the credit card bills will not be included in the total amount of expenses for Petitioner.

Based on the proofs of payment provided by Petitioner, her alleged monthly expenses total \$2,304.75, an amount that exceeds her adjusted monthly income of \$2,111.32, and yields a negative monthly balance of \$193.43.

Next, Petitioner claims, “I still don’t believe this debt belongs to me because I’ve had a different resident since 2004.” The legal obligation of Petitioner to pay the subject debt emanates from the terms of a valid contract, not on a determination of whether the Petitioner resided at a different address. Petitioner met her obligation to notify HUD of her change of address, and the record reflects the same. As a result, the Court renders this a moot issue.

Now, the Government claims that Petitioner’s debt is past due and legally enforceable. The Government now seeks authorization of a repayment schedule to recover the subject debt at 15% of Petitioner’s disposable income. As support, the Government produced a copy of the Note in which Petitioner promised to pay the principal sum owed when the ... “Borrower had paid in full all amounts due under the primary Note and related mortgage...insured by the Secretary.” *Sec’y. Stat.*, Ex. 1, ¶ 4 (A)(i). Such has occurred in this case and therefore Petitioner should comply with the terms of the agreement. The Government also introduced into evidence a sworn declaration from the Acting Director of HUD’s Asset Recovery Division in which the Director provided further proof that the subject debt was legally enforceable against Petitioner. *Sec’y. Stat.*, Ex. 2. Citing *In re Ray J. Jones*² and *August C. Frazier*,³ the Government stated that, in order to show extreme financial hardship, Petitioner “must submit ‘particularized evidence,’ including proofs of payment, showing that she will be unable to pay essential subsistence costs such as food, medical care, housing, clothing or transportation.” *Sec’y. Stat.*, ¶ 9. The Court disagrees with the Secretary that Petitioner has failed to meet her burden of proof for financial hardship. Based on the evidence presented by Petitioner, the Court is fully persuaded that the proposed garnishment amount would present a severe financial hardship for Petitioner.

² *Ray J. Jones*, HUDAJF 84-1-OA at 2 (March 27, 1985).

³ *August C. Frazier*, HUDALJ 86-05-OA at 2 (April 11, 1986).

While the Secretary has successfully established that the subject debt is legally enforceable against Petitioner in the amount claimed by the Secretary, the Court nevertheless finds that a garnishment amount at any percentage of Petitioner's disposable income would constitute a financial hardship sufficient enough to forego collection at this time.

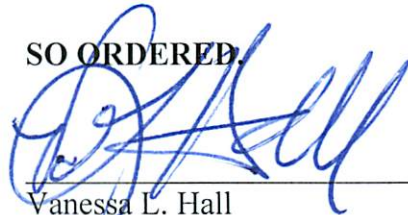
ORDER

Based on the foregoing, 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. Therefore, it is hereby

ORDERED that the Secretary shall not seek collection of this outstanding obligation by means of an 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 her expenses for necessities are reduced.

SO ORDERED.



Vanessa L. Hall
Administrative Judge

Review of determination by hearing officers. A motion for reconsideration of this Court's written decision, specifically stating the grounds relied upon, may be filed with the undersigned Judge of this Court within 20 days of the date of the written decision, and shall be granted only upon a showing of good cause.