

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

Nikolas C. Murdock,

Petitioner.

15-VH-0029-AG-011

7210078410

June 22, 2016

DECISION AND ORDER

This case is before the Office of Hearings and Appeals upon a *Request for Hearing* (“Hearing Request”) filed by Petitioner, Nikolas C. Murdock, on January 8, 2015 concerning the existence, amount, or enforceability of a debt allegedly owed to the U.S. Department of Housing and Urban Development (“HUD” or “the Secretary”).

Pursuant to 31 C.F.R. § 285.11(f)(4), on January 8, 2015, the Court stayed the issuance of a wage withholding order until the issuance of this written decision. *Notice of Docketing, Order, and Stay of Referral* (“Notice of Docketing”), filed January 8, 2015. On February 6, 2015, the Secretary filed his *Statement* along with documentation in support of his position. The Court granted Petitioner’s *Request for Extension of Time* on four occasions, and on August 27, 2015, Petitioner filed *Documentary Evidence* in support of his position. This case is now ripe for review.

JURISDICTION

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.

BACKGROUND

This is a debt collection action brought pursuant to Title 31 of the United States Code, section 3720D, as a result of a defaulted loan that was insured against non-payment by the Secretary. 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 allegedly owed to the United States government.

On or about August 1, 2011, Petitioner executed and delivered to the Secretary a Subordinate Note (“Note”) in the amount of \$4,835.79. *Sec’y Stat* ¶ 2; *Dillon Decl.* ¶ 4. The Note secured a Subordinate Mortgage held by the Secretary. *Id.* The Note specified events that would make the debt immediately due and payable. (*Sec’y Stat.*, ¶ 4; *Declaration of Brian Dillon* (“Dillon Decl.”), ¶ 4). One of these events was the full payment of all amounts due under the primary note and related mortgage insured by the Secretary. *Id.*

On or about April 2, 2003, the Petitioner's first mortgage was paid in full and the FHA mortgage insurance was terminated. *Id.* The Secretary has made efforts to collect this debt from Petitioner, but has been unsuccessful. *Sec'y Stat* ¶ 6; *Dillon Decl.* ¶ 5. As a result, Petitioner remains in default on the Note and is indebted to the Secretary in the following amounts:

- (a) \$4,835.79 as the unpaid principal balance as of December 31, 2014;
- (b) \$16.12 as the unpaid interest on the principal balance at 1% per annum through December 31, 2014;
- (c) \$326.44 as the unpaid penalties on the principal balance through December 31, 2014; and
- (d) interest on said principal balance from December 31, 2014, at 1% per annum until paid.

Sec'y Stat ¶ 8; *Dillon Decl.* ¶ 5.

Pursuant to 31 C.F.R. § 285.11(e), a Notice of Intent to Initiate Administrative Wage Garnishment Proceedings ("Notice of Intent"), dated December 5, 2014, was sent to Petitioner. *Sec'y Stat* ¶ 7; *Dillon Decl.* ¶ 6. In accordance with 31 C.F.R. § 285.11(e)(2)(ii), Petitioner was afforded an opportunity to enter into a written repayment agreement. *Dillon Decl.* ¶ 7. Petitioner did not enter into a written repayment agreement or pay the debt in full in response to the Notice of Intent. *Id.*

The Secretary proposed a garnishment repayment schedule in the amount of \$461.37 per month, which the Secretary states will liquidate the debt in approximately three years, as recommended by the Federal Claims Collection Standards. *Sec'y Stat* ¶ 12; *Dillon Decl.* ¶ 8. Alternatively, the Secretary requests a repayment schedule in an amount equal to 15% of Petitioner's disposable income. *Sec'y Stat* ¶ 12; *Dillon Decl.* ¶ 8.

DISCUSSION

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, or would cause undue financial hardship to Petitioner, or that the collection of the debt may not be pursued by operation of law. *Id.*

Petitioner disputes the existence or enforceability of the debt because, according to Petitioner the subject debt was paid when the house was sold. Petitioner states:

When we sold the home I requested a payoff quote from the Law Offices of Les Zieve, I also contacted Flagstar directly and requested a payoff amount for my loan....The payoff quote was provided on February 4, 2014, at which point I forwarded to Jenni Brannan at Old Republic Title

Company. We proceeded with the sale of the home and all known debts associated with it were paid. *Hearing Request* at 1.

As support Petitioner introduced into evidence copies of his letter and email communications to Flagstar Bank along with settlement papers associated with the sale of the property. While such documentation may prove that the sale of the property occurred, this same evidence failed to prove, sufficiently, that the junior lender, herein HUD, received proceeds from the subsequent sale towards the satisfaction of the partial claim. In order for Petitioner to be released from this obligation, the proceeds must have been sufficient to satisfy the partial claim as well. Absent a showing that the proceeds equaled or exceeded the balance of the partial claim amount, Petitioner remains legally obligated to pay the subject debt. See Maura O'Keefe, HUDBCA No. 86-1194- F202 (January 7, 1986); Lawrence P. Pappau, HUDBCA No. 87-2381- G701 (July 31, 1987). Thus, the Court finds that the subject debt does in fact exist and is past due and enforceable against Petitioner.

Petitioner next asserts that the proposed garnishment amount constitutes a significant financial hardship for him. *Petitioner's Documentary Evidence* ("Pet'r's Doc. Evid."), filed August 27, 2015. Petitioner maintains, "I believe the next step in this process is for me to submit any last pieces of information to the judge as additional evidence that the proposed repayment plan is financially unattainable for me." *Id.* As support, Petitioner introduced into evidence copies of a Debt Resolution Program Financial Statement, pay statements for Petitioner and his spouse, a list of monthly expenses, an auto finance statement, a phone bill statement and preschool payment statement, and his automobile insurance statement. *Pet'r's Doc. Evid.*

While financial hardship does not invalidate a debt or release a debtor from the legal obligation to repay it, financial hardship is relevant to the amount of administrative wage garnishment that will be allowed. 31 C.F.R. §§ 285.11(f)(2) and (f)(10)(iii); see also Raymond Kovalski, HUDBCA No. 87-1681-G18 (Dec. 8, 1986). In order to show proof of financial hardship, Petitioner must submit documentary evidence in support of his hardship claim. Percy Cates, HUDOHA No. 14-VH-0048-AG-019 (October 30, 2014). Such evidence must not only include proof of Petitioner's disposable income but include, more specifically, " 'particularized evidence,' including proofs of payment, showing that [Petitioner] 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).

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).

As a threshold matter, the Court must first identify what amount constitutes Petitioner's actual gross income before determining his disposable income. Petitioner's pay statement reflects a bi-weekly gross income of \$2,048.03, which subsequently yields a monthly gross income of \$4,096.00. *Pet'r's Doc. Evid.* at 3. After deductions for health insurance premiums and withholdings required by law, Petitioner bi-weekly deductions total \$339.37, or \$678.74 monthly. His monthly disposable net income totals \$3,417.32. *Id.* Petitioner's pay statement also lists a pre-tax deduction of \$155 for a commuter benefit. *Id.* Absent a showing of evidence that Petitioner is legally required to contribute to the commuter benefit, this commuter benefit

will not be credited towards Petitioner's income because it lacks credibility as an amount required by law to be withheld.

Petitioner claims other essential household expenses: \$1,500, mortgage; \$417.55, auto loan payment; \$250, gas and electricity; \$50, water; \$240.01, auto insurance; and \$235.22, phone bill. *Pet'r's Doc. Evid.* at 2, 5, 6, 9. Petitioner also claims the following household expenses: \$550, groceries; \$300, gasoline; \$160, child daycare; \$320, preschool; \$600, afterschool care; \$50, tuition costs; \$350, credit card payments; and \$400, miscellaneous family expenses. *Pet'r's Doc. Evid.* at 2, 8.

Petitioner produced sufficient documentation as proof of payment for the automobile loan and insurance, phone bill, and preschool care. Petitioner has not, however, provided sufficient evidence to adequately substantiate the remaining alleged expenses. *Pet'r's Doc. Evid.* at 2, 5-6, 8-9. This Court has previously held that credit may be given for certain *essential* household expenses, despite insufficient documentation, when such "financial information submitted by Petitioner ... [was found to be] generally credible" Elva and Gilbert Loera, HUDBCA No. 03-A-CH-AWG28 (July 30, 2004) (emphasis added). So, the evidence produced thus far by Petitioner reflects a good-faith effort towards meeting his burden of proof and thus shall be admitted for consideration by the Court. Moreover, the food expenses Petitioner has alleged for his family of five seem reasonable and consistent with what the Court deems to be suitable. Additional expenses for Petitioner's gasoline, child care, and preschool are also considered reasonable and therefore shall be fully credited towards Petitioner's essential monthly expenses.

Certain other expenses alleged by Petitioner, however, will not be credited. More specifically, the Court will not extend credit for Petitioner's credit card payments of \$350.00, and \$400 for miscellaneous family expenses. *Pet'r's Doc. Evid.* at 2. Sufficient evidence has not been provided that such expenses qualify as essential household expenses. Petitioner also included a \$4,306.32 property tax balance, along with a payment statement, but, Petitioner failed to explain the nature of such an expense as a recurring household cost, or identify the person required to make such payments, or identify which property was associated with the property tax. *Pet'r's Doc. Evid.* at 7. Without such explanation, the Court is ill-equipped to determine whether the property tax would be considered an essential household expense due to recur on a monthly basis in the future. Elizabeth Godfrey, HUDOA No. 12-M-CH-AWG45 (June 14, 2012).

In total, Petitioner has alleged, and fully substantiated, monthly expenses totaling \$4,672.78. The pay statement of Petitioner's spouse shows that, together, they earn enough income to support the Court's conclusion that Petitioner should be responsible for 50% of the monthly household expenses, in other words \$2,336.39. After deducting this amount from Petitioner's monthly disposable income of \$3,417.32, the remaining balance is \$1,080.93. The Secretary's proposed monthly garnishment amount of \$461.37, after deduction, would leave Petitioner with a monthly balance of \$619.56. Alternatively, the Secretary's proposed 15% garnishment amount would reduce Petitioner's income by \$512.60 which, after deduction, would leave Petitioner with a monthly balance of \$568.33. Based on these calculations, the Court finds that neither garnishment amount, as proposed, would constitute a substantial financial hardship for Petitioner and thus would be sufficient to satisfy the monthly payments for the subject debt. As a result, the Court further finds that Petitioner remains legally obligated to pay the subject debt as so claimed by the Secretary.

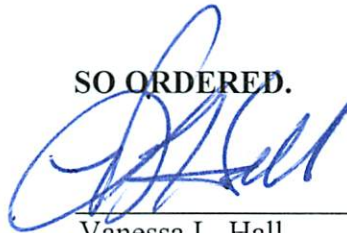
Petitioner finally states, "I am submitting a package of information for the judge to review. There is a[n] overview of my finances and sup[p]orting evidence of my expenses, also included is my repayment plan request." Petitioner submitted along with his Hearing Request a repayment plan request for consideration by the Court. While Petitioner may wish to negotiate repayment terms with the Department, this Court is not authorized to extend, recommend, or accept any payment plan or settlement offer on behalf of the Department. Petitioner may want to discuss this matter with Counsel for the Secretary or Michael DeMarco, Director, HUD Financial Operations Center, 52 Corporate Circle, Albany, NY 12203-5121, who may be reached at 1-800-669-5152, extension 2859. Petitioner may also request a review of his financial status by submitting to the HUD Office a Title I Financial Statement (HUD Form 56142).

ORDER

Based on the foregoing, the Order imposing the stay of referral of this matter to the U.S. Department of the Treasury for administrative wage garnishment is **VACATED**.

The Secretary is authorized to seek collection of this outstanding obligation by means of administrative wage garnishment in an amount of \$461.37, or alternatively, in an amount equal to 15% of Petitioner's disposable pay.

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 upon a showing of good cause.