State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

DECISION

OAL DKT. NO. HEA 5596-16

AGENCY DKT. NO. HESAA

NEW JERSEY HIGHER EDUCATION
STUDENT ASSISTANCE AUTHORITY
(NJHESAA; THE AGENCY),

Petitioner,

v.

SUSANA MARMOLEJOS,

Respondent.

Kortney Swanson-Davis, Esq., for petitioner (Schachter Portnoy, LLC, attorneys)

Susana Marmolejos, respondent, pro se

Record Closed: June 7, 2016 Decided: July 21, 2016

BEFORE **JOSEPH LAVERY,** ALJ t/a:

STATEMENT OF THE CASE

The **New Jersey Higher Education Student Assistance Authority (HESAA, the agency**), **petitioner**, acting under authority of 20 U.S.C.A. Sec. 1095(a) and (b) and 34 C.F.R. 682.410(b)(9) moves for an order of wage garnishment against respondent.

Respondent, Susana Marmolejos, contested this appeal by the agency,

Today's decision grants the agency's petition to impose garnishment.

PROCEDURAL HISTORY

This is an appeal brought by the agency, NJHESAA, seeking to garnish the wages of respondent. It was filed in the Office of Administrative Law (OAL) on April 11, 2016. Respondent Marmolejos challenges the garnishment. The Acting Director and Chief Administrative Law Judge (OAL) appointed the undersigned on May 2, 2016, to hear and decide the matter, the hearing of which was scheduled for, and convened on June 7, 2016.

Rather than appear personally on June 7, respondent Marmolejos filed a written prehearing statement and later submitted a financial statement (ExhibitP-14).

ANALYSIS OF THE RECORD

Background:

The agency presented its case through its witness, **Aurea Thomas**, accompanied by exhibits:

Ms. Thomas, a senior investigator with the agency, adopted the affidavit of Janice Seitz, Program Officer (Exhibit P-1), as her own, testifying that she herself was personally familiar with the information and documents therein. She observed that on October 24, 2001, respondent had executed an application and promissory note in the amount of $875. Similarly, on September 23, 2002, she borrowed $6,625. Finally, on November 17, 2004, respondent borrowed $8,834. All monies were lent by the Sallie Mae Education Trust (Exhibits P-1, P-2). All were Federal Stafford Loans.

Subsequently, Ms. Thomas stated, respondent defaulted on the loans and the lender submitted its claims to the agency, NJHESAA, as statutory guarantor. The claims on the notes were satisfied by NJHESAA (Exhibits P-3, P-5 and P-7). As of June 7, 2016, the total owed, inclusive of principal, interest and collection costs was $13,639.69. No voluntary payments have been made by respondent (Exhibit P-8).

On September 30, 2015, a default letter was sent to her, advising that garnishment was imminent, absent compliance (Exhibit P-10, P-11). In response, respondent requested a hearing to prove that a 15 percent deduction from her wages would cause “extreme financial hardship,” and declared that she would submit her case through written statement (Exhibit P-12).

In view of respondent’s intended defense, the agency forwarded to her a financial statement form designed to elicit the amounts of her income (Exhibit P-

13). She, in turn, filled it out and returned it to the agency, which received it on October 14, 2015 (Exhibit P-14).

Thereafter, hearing of the instant appeal convened on June 7, 2016, to resolve the case as required by law. The agency asked for the right to garnish in an amount of 15 percent of respondent's disposable pay. The agency stated that it would rely on the employer to ascertain the exact amount of deduction needed to reach that maximum.

Arguments of the parties:

The agency, NJHESAA, argued in the main that, despite its request when it forwarded the financial statement form to respondent Marmolejos, she has not to date forwarded either her 1040 tax form or her most recent pay stub. Without those items, Ms. Thomas testified, the agency had insufficient proofs of income to determine whether extreme financial hardship existed.

In more detailed argument, the agency offered those legal citations governing the process of recovery of unpaid debt by NJHESAA as guarantor[1]. The agency stated that these citations provide national guidelines standard for comparison of average household expenses. The agency maintained that, on the record in place, it has shown that (a) the debt has been proven, (b) the calculations of what is owed are accurate, and (c) the borrower is delinquent. In its view, that should be sufficient to satisfy its evidentiary burden.

Further, adverting to the law and rules cited, the agency insists it is authorized to recover through garnishment at 15 percent those monies owed when its own exercise of due diligence has failed to induce a respondent to comply voluntarily with repayment obligations. The agency contends that the fact of the agency's unsuccessful efforts in itself is preponderating evidence which

[1] 34 C.F.R. 34.24; 26 U.S.C. 7122(c)2

should override respondent's failed factual defense and affirmative burden to prove "extreme financial hardship" by a preponderance of the evidence.

Addressing the amount of garnishment sought, the agency believes that it should not have to offer more to be allowed a flat 15 percent garnishment. Respondent has shown willful intent not to pay. She has offered neither preponderating proofs nor legal argument to excuse her inaction. The agency reiterates that because of respondent's neglect it has nothing to review which would enable it to determine whether there is extreme financial hardship. Had she submitted adequate proofs, specifically her 1040 and her most recent pay stubs, there are federal guidelines available which would have allowed the agency to determine the appropriate amount for a voluntary payment schedule.

The agency stresses that without the 1040 and the pay stub there are no other options which the agency could utilize to get the minimal information necessary for determining hardship. Among those options available for agency action, if enough data were at hand, would be the process of selecting one from among plural programs which might be available to meet respondent's needs. Doing so, the agency would then be able to rely on the calculation formulas in the chosen program to arrive at a voluntary payment schedule, which would avoid the "extreme financial hardship" claimed. Lacking this data, the agency believes imposition of a maximum 15 percent garnishment fits respondent's circumstances. The agency is confident that this uniformly applied flat-rate approach is consistent with controlling legislation and rules, when a borrower has not carried his or her affirmative burden of proof.

Beyond its advocacy for disposition of the instant claim and facts, the agency concludes that, generally, the administrative law judge her-or-himself in every case can and should refer to those statutory and regulatory national standards which it has cited. The judge would then be enabled personally to apply the same mechanism of determination used by the agency for setting

voluntary repayment schedules. So armed, the judge would be in a position to decide whether garnishment, if granted, should extract from a recalcitrant borrower's disposable wages less than 15 percent, and, if so, what precise amount would be suitable in the circumstances of record.

Though not appearing in person, **respondent Susana Marmolejos** wrote what was to stand as her written statement in support of her application for hearing (Exhibit P-14) the statement in its entirety follows:

> I borrow money to make ends meet. Have not filed Federal Returns since 2012. As of today, 10/28/15 have not recieved [sic] paycheck. Please provide email or fax# to send info as soon as recieved [sic].

Findings of Fact:

I FIND that no material facts proffered by either side are in dispute, only their legal import is contested.

Conclusions of Law

Burden of Proof:

The burden of proof falls on the agency in enforcement proceedings to prove violation of administrative regulations, Cumberland Farms, Inc. v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987). The agency must prove its case by a preponderance of the credible evidence, which is the standard in administrative proceedings, Atkinson v. Parsekian, 37 N.J. 143 (1962). Precisely what is needed to satisfy the standard must be decided on a case-by-case basis. The evidence must be such as to lead a reasonably cautious mind to a given conclusion, Bornstein v. Metropolitan Bottling Co., 26 N.J. 263 (1958). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having

the greater convincing power, State v. Lewis, 67 N.J. 47 (1975). Credibility, or more specifically, credible testimony, in turn, must not only proceed from the mouth of a credible witness, but it must be credible in itself, as well, Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954).

However, where, as here, a respondent borrower offers an affirmative defense, claiming "extreme financial hardship," the burden of persuasion rests on that respondent throughout the proceeding, as does the "burden of production" and going forward on that issue. Nevertheless, this burden of production is "so light as to be little more than a formality." State v. Segars, 172 N.J. 481, 494 (2002). All that is needed is "a genuine issue of fact framed with sufficient clarity so that the other party has 'a full and fair opportunity' to respond." Id., at 494-495. Consequently, once a prima facie case is established, the burden of going forward with countering proofs shifts (but never the burden of persuasion). Cf. N.J.R.E.101(b)(2)

Applying the Law to the Facts:

The agency has carried its burden of persuasion:

Under authority of the provisions of 20 U.S.C.A. Sec. 1095(a) and (b) and 34 C.F.R. 682.410(b)(9)(i)(M) and (N), hearing was held before the undersigned. During this proceeding, the agency, NJHESAA, was required to show by a preponderance of evidence: (a) that the debt exists, (b) that it exists in the amounts the agency has calculated, and (c) that the debtor is delinquent. This the agency has done. The testimony of its witness was credible and supported by the unchallenged proffer of Exhibits P-1 through P-14, all now in evidence. It is plain that (a) the terms of the promissory notes, the authenticity or accuracy of which are not in dispute, (b) the financial figures standing as the amount owed, and (c) the enabling legislation (the Act) administered by NJHESAA, all compel the agency's exercise of its authority to recover her expended funds.

Respondent Marmolejos has not satisfied her affirmative defense obligations of proof:

In her defense, respondent claims ameliorating circumstances, namely "extreme financial hardship," in her Request for Hearing Form (Exhibit P-12). She believes this hardship is justification for not submitting any payments and for avoidance of garnishment. This argument creates an affirmative defense. On this issue it is respondent who has the burden of persuasion. She must show with preponderating evidence how the underlying facts and the law compel a retreat by the agency from its request to initiate garnishment. This respondent has not done. She has not submitted either her 1040 tax form or her most recent pay stub. These are customarily the de minimis documents needed for the agency to reach a conclusion concerning her hardships. Respondent by inaction therefore has rendered the agency unable to apply its national guidelines nor any other circumstance-related standard. Absent those documents, the agency has inadequate information to examine and upon which to decide whether her claim is valid.

The agency's move to garnish at the full 15 percent of disposable wages:

It is a fair construction of the Act and its implementing rules that the agency is now entitled to be made whole. To achieve such "wholeness," at this point repayment can only be compelled through garnishment. The garnishment should go forward by adding the amounts of respondent's unpaid principal and capitalized interest to the mathematical and demographic mix of factors the agency normally employs when computing remaining monthly schedules of payment. The agency believably testified and argued that this is usually done through adherence to comparative national guidelines. The monthly amounts calculated would be spread over the life of the loan to assure full repayment. In the normal course, such an apportionment of repayments would not exceed the statutory cap of 15 percent of disposable wages but it might well fall below it,

depending on the facts, and would be distributed in varying amounts, which would nonetheless be consistent with the aforementioned national guidelines.

In contrast, however, the agency here wants the full garnishment allowed under the Act. Having not been supplied the figures it sought from respondent, the agency insists that it is entitled to a grant of its uniform, across-the-board application of a full 15 percent. This is the remedy it seeks in all similar instances. Under these circumstances, the agency's petition makes administrative sense. For lack of fundamental borrower-supplied data, the agency has no other choice but to make the request. Favoring an order is the inarguable legal fact that the agency's practice comes within the congressional discretion which it has been granted.

More to the inescapable point, it is respondent who has the obligation to bring preponderating proofs to her affirmative defense of extreme financial hardship. She has not met this obligation. Once a voluntary repayment schedule is refused by any borrower, and the borrower has not provided information to allow application of the comparative national guidelines to her or his circumstances, garnishment at full 15 percent is unavoidable. It is a means to equal treatment. In this case, as noted above, the agency is justified by respondent's inaction.

Therefore, the agency, NJHESAA, should now be authorized to impose a garnishment at the 15 percent of disposable wages sought.

DECISION

I ORDER that the total amount owed and defined of record, plus accrued interest and fees **be recovered by garnishment**. The amount to be deducted **is 15 percent of respondent Susana Marmolejos' disposable pay**. 20 U.S.C.A. 1095(a)(1).

I ORDER further, on the strength of the reasoning herein, that garnishment be in the amount of **$176 per month**.

This decision is final pursuant to 34 C.F.R. § 682.410(b)(9)(i)(N) (2010).

July 21, 2016
DATE

JOSEPH LAVERY, ALJ t/a

Date Received at Agency: _____

Date Mailed to Parties: _____

LIST OF WITNESSES:

For petitioner:

Aurea Thomas

For respondent:

None

LIST OF EXHIBITS:

For petitioner NJHESAA:

P-1 Affidavit of Janice Seitz, dated March 24, 2016, with (3) attached promissory notes (See below)
P-2 Federal Stafford Loan Master Promissory Note: Susana Marmolejos, dated 10/24/01
P-3 Claim worksheet summary, dated 05/02/07: Susana Marmolejos
P-4 Federal Stafford Loan Master Promissory Note, dated 9/23/01: Susana Marmolejos
P-5 Claim worksheet summary, dated 05/02/07: Susana Marmolejos
P-6 Federal Stafford Loan Master Promissory Note: Susana Marmolejos, dated 11/17/04
P-7 Claim worksheet summary, dated 01/25/13: Susana Marmolejos
P-8 Default Master Screen
P-9 Payment history
P-10 Correspondence screen.
P-11 Blank Notice Prior To Wage Withholding
P-12 Request For Hearing dated 10/5/15
P-13 Blank Financial Statement Form.

P-14 Executed Financial Statement Form: Susana Marmolejos

For respondent:

None