

DECISION

OAL DKT. NO. HEA 7400-15

AGENCY DKT. NO. HESAA

**NEW JERSEY HIGHER EDUCATION
STUDENT ASSISTANCE AUTHORITY
(NJHESAA),**

Petitioner,

v.

SHENNELL WIMBUSH,

Respondent.

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

Shennell Wimbush, respondent, pro se

Record Closed: July 28, 2015

Decided: September 11, 2015

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

STATEMENT OF THE CASE

The **New Jersey Higher Education Student Assistance Authority (NJHESAA, 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 to impose an administrative wage garnishment on income of respondent.

Respondent, Shennell Wimbush, opposes this action on appeal.

Today's decision affirms the right to garnish the wages of respondent Shennell Wimbush.

PROCEDURAL HISTORY

This matter was filed on May 11, 2015, in the Office of Administrative Law (OAL) by the agency head for hearing. The Acting Director and Chief Administrative Law Judge on June 5, 2015, ordered that this case be heard before the undersigned. Hearing convened on July 14, 2015, followed by letter-briefing on designated issues, the last of which was filed in the OAL on July 28, 2015. On that date, the record closed.

ANALYSIS OF THE RECORD

Background:

The following facts are not seriously disputed, except where noted:

Under the Federal Family Education Leave Program (the Program), on July 30, 2005, respondent Wimbush applied for and eventually received a Federal Consolidation Loan in the amount of \$5848.87. These monies were disbursed by the lender, Sallie Mae Trust (Exhs. P-1, P-2, P-3). Respondent thereafter fell into default for non-payment of any monthly monies due and the lender brought a formal claim under the Program for satisfaction by the guarantor, NJHESAA. The amount sought was \$5848.87 principal and \$2556.31 interest (Exh. P-3). In response, NJHESAA, to satisfy the lender's claim, issued a check in the total amount of \$9335.76, and assumed respondent Wimbush's debt (Exh. P-4).

Once NJHESAA sought scheduled payments from respondent, she again fell into default, and the agency cautioned her that it would seek garnishment, absent compliance with her obligation (Exhs. P-5, P-7). On March 24, 2015, respondent requested, in writing, a hearing to be held by telephone, and raised as a defense therein that the school in which she enrolled had closed, either during the time she was enrolled, or not later than ninety days after she withdrew. That school was the Academy of Professional Development (the Academy). She noted the date of her enrollment as being "on or about 03/96" (Exh. P-8). Respondent also attached a completed agency "financial statement" to her request. She eventually elected to appear in person at the hearing before this tribunal held July 14, 2015.

On this record, the parties presented their cases.

Legal Arguments of the parties:

NJHESAA's argument:

The agency grounded its petition on the testimony of Senior Investigator **Aurea Thomas**, documentary exhibits, and a post-hearing letter brief:

Ms. Thomas, from her personal knowledge of the case, adopted as her own the documentary testimony contained in the affidavit of Program Officer Janice Seitz. She disclosed the path of the debt from Sallie Mae through ultimate default when the agency assumed respondent's debt. Ms. Thomas asserted that the computer screen copies submitted accurately reflected the monies involved.

As to the closure of the school, she stated that the business records available to the agency depict its history. They disclose that respondent graduated (Exh. P-9) and that the school's demise thereafter was well beyond ninety days of respondent's departure (Exh. P-8).

Ms. Thomas observed additionally that respondent had in fact signed the notes, as her digital signature proves. Such electronic signing is done in the normal course. The agency also submitted a copy of the hand-signed original loan request, and a copy of the federal policy authorizing electronic signature pursuant to federal law (Exhs. R-16, R-17) in support of Ms. Thomas' testimony.

The agency denied knowledge that respondent had not graduated from high school at the time of enrollment in the Academy. It declared post-hearing in letter-brief that her application showed her statement that she had.

Respondent's argument:

Respondent in testimony reiterated her original contention underlying her request for hearing (Exh. P-7): i.e., the school she attended had closed while she was there. She also declared that its address was on Parkway Avenue in Trenton, and the sign above its entrance was different in title than that of the school referred to by NJHESAA. She attended part-time at night, respondent stated, not full-time as claimed by the agency, because she was compelled to maintain a job to support her family.

Further, respondent denied that she signed any promissory note which she would be obliged to pay. Rather, she testified, she was told by the Board of Social Services at the time of enrollment in the Academy that her attendance there would be free of charge. She acknowledged, however, that she signed the checks which were disbursed to her by the lender.

Finally, respondent stated that she had not graduated from high school when she enrolled in the Academy (Exh. R-1(a) and (b))¹. This impinged on her ability to properly benefit from the school's instruction. In support of that position, she submitted post-hearing documents emanating from the Trenton Board of Education confirming this claim.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact:

To resolve disputes of material fact, I make the following **FINDINGS**:

1. Respondent personally signed her original promissory note (Exh. P-16) and the Federal Consolidation Loan Application and Promissory Note (Exhs. P-1, P-2, P-14).
2. Respondent was aware of her obligation to repay the loans received in return for the promissory notes she signed.

¹ Exhibit R-1(a) Confirmation from the Trenton Board of Education that respondent had completed all graduation requirements as of June 24, 2004, and Exhibit R-1 (b) Daylight-Twilight High School attached listing of course credits earned, with reference to "Graduation Date: June 2004."

3. The existence of the debt (Exh. P-4; \$11,785.60, as of July 13, 2015) the amounts of principal and interest calculated by the agency as owing, and the state of delinquency in the loan all comport with the facts underlying the claim of NJHESAA.
4. The school which respondent attended was the Academy of Professional Development referenced in the agency's exhibits (P-8 through P-12). It had multiple addresses.
5. Respondent graduated from the Academy of Professional Development on September 12, 1997 (Exh. P-9).
6. The Academy of Professional Development closed on June 3, 1998 (Exh. P-8).
7. Respondent graduated from high school in June of 2004 under the auspices of the Trenton Board of Education.

Conclusions of Law

Burden of Proof:

The burden of persuasion 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).

Applying the Law to the Facts:

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-17, now in evidence.

The testimony of respondent that she did not sign any promissory notes and was told that she would attend the Academy without cost does not ring true, on this record. It must therefore be held as less than credible, both in content and demeanor.

Respondent, in her request for hearing form, checked off as the sole basis for her challenge to garnishment a mitigating circumstance which could prompt relief under the Program. That circumstance was an alleged closure of the school, either before she could complete her educational program or within ninety days after her withdrawal. In this dispute, the preponderating evidence favors the agency. Its business records are of greater credible weight than respondent's undocumented assertions. If the school closed in June of 1998 (Exh. P-8) and respondent graduated in September of 1997 (Exh. P-9), the

threshold for relief under the Program has not been crossed. Respondent is therefore without remedy on this claim.

As with her denial that she signed notes of obligation, false on the face of Exhs. P-1, P-2, P-14, and P-16, respondent also raises a claim outside the basis of her request for hearing. She maintains that the Academy enrolled her despite lack of a high school diploma, possibly warranting a False Certification Discharge. The former grounds, i.e., her ostensible lack of signature on the notes, may be dismissed on the present record. The latter, a lack of high school diploma, may not.

With her diploma (Exh. P-1), respondent offers a prima facie proof. It is not offset by the agency's rejoinder that she had in fact graduated. The agency did not precisely pinpoint its proof, notwithstanding Exh. R-13. However, neither had the agency been forewarned of this affirmative defense in respondent's request for hearing (Exh. P-7), and respondent's critical evidence was submitted post-trial. This is fundamentally unfair. Today's decision therefore will turn on respondent's original basis for challenging garnishment. Whether subsequently she can obtain relief based on earlier non-high-school-diploma status must await another day, and potentially another hearing. This part of her petition is now dismissed, but without prejudice to renew.

Consequently, it is a fair construction of the Act and implementing rules that the agency is now entitled to be made whole. To achieve such "wholeness," repayment should be compelled through garnishment. The garnishment should go forward by adding the amounts of respondent's unpaid principal and capitalized interest to the mathematical mix of factors the agency normally employs when computing remaining schedules of payment. These added amounts would be spread over the life of the loan. The goal must be to assure complete repayment of the entire loan within that number of years for which repayment was originally contracted.

Such an apportionment of payments here may or may not reach the monthly cap of 15 percent of disposable wages which now is suggested by the agency as most appropriate. Notwithstanding, the decisive consideration must be otherwise. There is an absence of any ineluctable compulsion in law or rules which demands immediate, automatic move to garnish at the monthly maximum of 15 percent of disposable income simply by reason of past non-payment. Further consistent with this view is the lack of legislative intent to be found in the Act or in the cited rules to automatically garnish the maximum by way of *penalty* for a borrower's non-compliance (the agency likewise denies that intent). Consequently, NJHESAA should reach the garnishment figure it seeks by adherence to its normal, uniformly-applied course of disposition. It must rely on whatever consistent assessment calculation procedure it customarily follows when administering the Act. As noted above, this process may, or may not reach the 15 percent legal maximum.

ORDER

I ORDER, therefore, that the amount defined of record as owed by respondent and sought by petitioner NJHESAA, plus accrued interest and fees, be recovered by garnishment consistent with the above reasoning. However, the monies deducted for any pay period shall be at no more than 15 percent of disposable wages. 20 U.S.C.A. 1095(a)(1).

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

September 11, 2015
DATE

JOSEPH LAVERY, ALJ t/a

Date Received at Agency

Date Mailed to Parties:

mph

LIST OF WITNESSES:

For petitioner:

Aurea Thomas

For respondent:

Shennell Wimbush testified on her own behalf

LIST OF EXHIBITS:

For petitioner NJHESAA:

- P-1 Affidavit of Janice Seitz, dated April 22, 2015
- P-2 Federal Consolidation Loan and Promissory Note, dated July 30, 2005:
Shennell Wimbush
- P-3 Lender's Claim to guarantor NJHESAA
- P-4 Default Screen NJHESAA: Shennell M. Wimbush
- P-5 Correspondence Screen NJHESAA: Shennell M. Wimbush
- P-6 Notice of Intent to Garnish Form (generic)
- P-7 Request for Hearing: Shennell Wimbush, dated March 2, 2015
- P-8 PEPS school information, dated July 8, 2015, from Rita Larkin, Program
Officer
- P-9 NSLDS Enrollment Summary: Shennell M. Wimbush, sent 9/23/2005
- P-10 Loan Discharge Application: False Certification of Ability to Benefit:
Shennell M. Wimbush, dated February 1, 2001
- P-11 Letter: E.H. Stewart, Compliance Officer, Student Assistance Authority to
Shennell Wimbush, dated April 23, 2002.
- P-12 Letter: Elsie L. Barnes, Paralegal to Mr. E.H. Stewart, Jr. NJHESAA

- P-13 Closed School Investigation: Shennell M. Wimbush, dated July 19, 2001
- P-14 Federal Consolidation Loan and Promissory Note, dated July 30, 2005:
Shennell Wimbush
- P-15 Letter from Loan Processing Unit, NJHESAA to Student Loan Officer,
CONSL-SLMA-EDUCATION LOAN CORP: Shennell M. Wimbush
- P-16 Application and Promissory Note for Federal Stafford Loans, Shennell M.
Wimbush, dated March 13, 1997

For Respondent:

- R-1(a) Confirmation from the Trenton Board of Education that respondent had
completed all graduation requirements as of June 24, 2004
- R-1(b) Daylight-Twilight High School attached listing of course credits earned,
with reference to "Graduation Date: June 2004."