State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

DECISION

OAL DKT. NO. HEA 344-16

AGENCY DKT. NO. HESAA

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

Petitioner,

v.

JUSTIN MERRILL,

Respondent.

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

Justin Merrill, respondent, pro se

Record Closed: May 31, 2016 Decided: July 12, 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, Justin Merrill, 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 December 29, 2015. Respondent Merrill challenges the garnishment. The Acting Director and Chief Administrative Law Judge (OAL) appointed the undersigned on February 17, 2016, to hear and decide the matter. Hearing was scheduled for, and convened on, March 1, 2016. Respondent Merrill did not appear.

Post-hearing, respondent Merrill filed a written statement, with attachments. The agency, NJHESAA, responded with letter-brief filed in the Office of Administrative Law (OAL) on March 21, 2016. Supplemental hearing took place on May 31, 2016. On that date, the record closed.

ANALYSIS OF THE RECORD

Background:

The agency presented its case through its witness, **Aurea Thomas**, accompanied by exhibits and post-hearing letter brief:

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 March 28, 1994, respondent had executed an application and promissory note in the amount of $2,625 (Exhibit P-2) for a Federal Stafford loan from the lender, Educaid. Further, Ms. Thomas testified, on May 11, 1995, there was another Federal Stafford Loan to respondent in the amount of $7,500 (Exhibit P-4). Subsequently, Ms. Thomas stated, respondent defaulted on both (Exhibits P-7, P-8), and the lender submitted its claims to the agency as statutory guarantor (Exhibits P-3, P-5, P-6). The claims on the notes were satisfied by NJHESAA.

Ms. Thomas testified that, as of March 1, 2016, the date of hearing, the amount on both notes respondent owed NJHESAA in principal, interest and fees amounted to $23,023.15 (cf. Exhibit P-6). On July 8, 2015, by mail, the agency warned respondent that garnishment loomed, absent payment or voluntary deductions (Exhibits P-8, P-9). In response, respondent requested a hearing to prove that a 15 percent deduction from his wages would cause extreme financial hardship, and declared that he would submit his case through written statement (Exhibit P-10).

In view of respondent's intended defense, the agency forwarded to him a financial statement form designed to elicit the amounts of his income. He did not return it. (Exhibit P-11). Thereafter, hearing of the instant appeal convened on

March 1, 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 would rely on the employer to ascertain the exact amount of deduction needed to reach that maximum.

Post-hearing, respondent called to explain his failure to participate personally in the March 1 hearing[1]. The hearing was reopened and he was granted time to prepare and mail a submission, which he did (Exhibit R-1). Supplementary hearing then went forward, and the record closed on completion of the proceedings.

Arguments of the parties:

Respondent Merrill maintained that garnishment would cause "extreme financial hardship."[2] His written submission, with documents attached, is offered to serve as proofs that a garnishment in addition to another already in place, would be an insupportable economic burden. This burden would be compounded by other financial obligations demonstrated in the documents (Exhibit R-1). He contends that the financial stress of garnishment would force him to seek more lucrative employment than he now receives as a teacher.

Additionally, though he has directed much of his income to enhancing his children's growth, respondent states, he believes it appropriate to continue that practice for their general good. Should he be forced to leave his current employment to seek higher paid work, his wife's income would not be sufficient to sustain this lifestyle. Respondent acknowledges that his higher education has been costly. However, he counters that it was a positive step toward advancing a career which focuses on influencing today's youth for the better.

[1] At the outset, respondent had asked to be judged on his written statement and records on file with the agency (Exhibit P-10).
[2] Dated March 1, 2016, filed in the OAL on March 7, 2016

The agency, NJHESAA, replied in its letter brief[3] that respondent's pay exceeds the "statutory requirement." Petitioner at the onset of scheduled payments could have submitted $205 monthly, an amount acceptable to the agency. He chose not to, and did not submit or proffer any voluntary payment in lieu of garnishment. Consequently, extreme financial hardship has not been proven, the agency states.

By way of legal argument, the agency offered those regulatory citations governing recovery of unpaid debt by NJHESAA as guarantor. The agency maintained that it had shown that the debt has been proven and the calculations of what is owed are accurate. That is sufficient to satisfy its evidentiary burden. The regulations cited, it argues further, are not meant to penalize. The intent of these rules is to authorize recovery of monies owed when the exercise of due diligence has failed to induce respondent to comply with his repayment obligation. The agency argues that the fact of its unsuccessful efforts in itself is preponderating evidence which should override respondent's failed factual defense of "extreme financial hardship." The agency contends that it should not have to offer more to be allowed a 15 percent garnishment.

Here the matter stood at the close of hearing on March 1, 2016. However, post-hearing, a letter issued from the administrative law judge, calling for further input by the parties. It stated, in pertinent part:

> In the interests of a complete record, I am **re-opening the hearing** to resolve the following questions:
>
> 1. Why should not the documents in evidence (Exhibit R-1) be held to have created a prima facie case requiring factual as well as legal response by the agency?
> 2. What standard (statutory, regulatory or written policy) has the agency relied on to determine whether the financial statements of respondent qualify (or not) as "extreme financial hardship"?
> 3. How was that standard applied here?

[3] Dated March 15, 2016, filed in the OAL on March 21, 2016

These questions triggered subsequent hearing on May 31, 2016, where the agency presented further evidence: Ms. Thomas gave testimony describing the agency process when borrowers claim extreme financial hardship to avoid garnishment. She stated that when a financial statement is returned, the data, in particular the borrower's family size and adjusted gross income, is evaluated through processing within a data base serving as the "National Guidelines." An amount for voluntary payment is then reached. In the present appeal of respondent Merrill, this process was employed by resorting exclusively to the data sent by respondent post-hearing. To describe the agency's steps, Ms. Thomas, in addition to her own testimony describing the mechanics of the process, provided Exhibits P-12 through P-14, which showed that the computerized calculation process generated a "reasonable and affordable" monthly payment of $176 monthly.

Ms. Thomas observed parenthetically that, after a 15 percent garnishment is in place, the agency regularly will work with any garnished borrower who returns to the agency with complaints of strained finances. The agency will then try once again to reach an accommodation on fair and acceptable repayment terms.

The agency also offered oral legal argument through counsel. It maintained that the National Guidelines on which it relied were derived from uniform schedules created by the United States Internal Revenue Service, citing 34 C.F.R. 34.24 and 26 U.S.C.A. 7122(c)2.[4] More precisely, it turned to the computerized calculation mechanics and data banks (See Exhibits P-11, P-12 and P-14) derived from those rules to reach a repayment figure for respondent: of $176 per month.

Addressing the burden of proof, the agency insists that it is a burden which remains with a respondent throughout any case where such a respondent

[4] More to the point would appear to be 26 U.S.C.A. 7122(d).

seeks to prove "extreme financial hardship." Further, the agency contends, when, as here, a borrower rejects the "reasonable and affordable payment schedule" for voluntary reimbursement on the loan, it is appropriate and legally allowable to move immediately to garnish 15 percent of disposable income. This should be the result here, it urges. The agency strenuously maintains that uniform exercise of its statutorily authorized option of the maximum 15 percent of disposable wages should not in any sense be construed as a penalty. Neither the agency nor the legislation has such intent.

The agency further explains that moving at once to full a 15 percent garnishment avoids arbitrary and capricious decisions. It believes that this approach provides a "flat" and fair consistency across the board in recovering the amounts owed. Moreover, the agency emphasizes, the foregoing course of action is authorized by the enabling laws and controlling rules of the United States Department of Education, cited supra.

Finally, in the agency's view, when a borrower on appeal submits a financial statement with documentation purporting to confirm extreme financial hardship, that information should stand on its own. The burden of proof throughout any appellate hearing is respondent's, not that of the agency. The agency may conclude on this evidence that reply is unnecessary. At that point, respondent's information alone should be the grounds for decision by the administrative law judge, i.e., whether the borrower has proved that garnishment would impose extreme financial hardship. In the end, at that point it is for the judge to determine the appropriate amount.

Though not appearing in person, **respondent Merrill** sent further documentary information to support his claim at supplementary hearing (Exhibit R-1). Based on that data, he maintains that there is preponderating proof that it would be an extreme financial hardship for him to make any payment whatever.

With the parties' supplementary argument and exhibits concluded, the record closed finally.

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 (but never the burden of persuasion) shifts. Cf. N.J.R.E.101(b)(2)

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-14, and as well by the data shown in respondent's Exhibit, R-1, all now in evidence.

The ameliorating circumstances, namely "extreme financial hardship," claimed by respondent in his Request for Hearing Form (Exhibit P-10) as justification for not submitting any payments and for avoidance of garnishment creates an affirmative defense. It is respondent Merrill who therefore has the burden of persuasion on this issue. He must show with preponderating evidence that the facts and the law compel a retreat by the agency from its request to initiate garnishment. This respondent has not done, thus failing in carrying his evidentiary burden. It is plain that the terms of the promissory notes, the authenticity or accuracy of which are not in dispute, the financial figures standing as the amount owed, and the enabling legislation (the Act) administered by NJHESAA, compel the agency's exercise of its authority to recover expended public funds.

Because of the foregoing analysis, 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 and demographic mix of factors the agency normally employs when computing remaining monthly schedules of payment. These added amounts would be spread over the life of the loan. The goal must be to assure repayment in its entirety.

Such an apportionment of repayments must not exceed the statutory cap of 15 percent of respondent Merrill's disposable wages. Garnishment at that full 15 percent amount now is suggested by the agency as most appropriate because the agency, across-the-board moves to that amount once a voluntary repayment schedule is refused by any borrower. This is not a viable argument. Within this practice, there is no application of a fair and uniformly applied standard tailored to a borrower's circumstances. Blind imposition of the maximum but not mandatory 15 percent garnishment is not a standard.

The agency's candid testimony is that the maximum level of garnishment is automatically sought when a borrower rejects the voluntary payment schedule offered by the agency. However, at variance with this fall-back policy is the absence of any ineluctable compulsion in law or rules to do so automatically. Moving to the maximum smacks of de facto penalty imposition (though it must be emphasized that the agency's denial of intent is entirely credible).

Fundamental fairness decrees that NJHESAA should reach the monthly garnishment figure it seeks through adherence to a defined, fair and uniform policy. Fortunately, such a policy already exists. It is used by the agency with all borrowers in the normal course when the agency tries to aid a defaulted borrower by helping her or him to rehabilitate loans through formulaic creation of a voluntary repayment schedule.

In the present case, this normal course of aid has been followed by the agency: NJHESAA offered to respondent Merrill a voluntary repayment schedule created through the computerized comparisons and the data bases available under the statutory authority cited by the agency in its oral argument. The payment schedule was reached using the data which respondent himself submitted after the first hearing day. The underlying mechanics are described by agency testimony and memorialized in Exhibits P-12 through P-14. Calculations thereunder derive from the statutorily engendered National Guidelines, which take into account a borrower's adjusted gross income and family size. The agency uniformly applies these guidelines to all borrowers.

The foregoing process is a legally defensible standard, grounded as it is in the statutes cited supra by the agency. It will be the rule today. Cf. Metromedia, Inc. v. Director, Division of Taxation, 97 N.J. 313 (1984). Here, credible agency testimony confirms that the guidelines' computerized algorithms, taking into account respondent Merrill's individual circumstances, arrive at a repayment appropriate in the amount of $176 per month. This is the level of garnishment which should prevail.

DECISION

I ORDER that the total amount owed and defined of record, plus accrued interest and fees **be recovered by garnishment**. However, the amount deducted **may not exceed 15 percent of 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 12, 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 November 18, 2016

P-2 Application and Promissory Note: Justin Merrill, dated March 28, 1994

P-3 Claim worksheet summary from lender

P-4 Application and Promissory Note: Justin Merrill, dated May 11, 1995

P-5 Claim Worksheet

P-6 Default Master Screen

P-7 Payment screen

P-8 Correspondence screen

P-9 Notice of intent to garnish package

P-10 Request for Hearing: Justin Merrill, dated July 28, 2015

P-11 Blank financial statement form, NJHESAA

P-12 Screen shot showing adjusted gross income

P-13 Financial Disclosure for Reasonable and Affordable Rehabilitation Payments form

P-14 Financial Disclosure figures: Justin Merrill

For respondent:

R-1 Summary of Financial Disclosure with attached documents