

DECISION

OAL DKT. NO. HEA 1136-15

AGENCY DKT. NO. HESAA

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

Petitioner,

v.

MALLORY KELLY,

Respondent.

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

No appearance by Mallory Kelly, respondent

Record Closed: March 10, 2015

Decided: May 13, 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. § 1095a(a) and (b) and 34 C.F.R. § 682.410(b)(9)(i)(A) moves for an order of wage garnishment against respondent.

Respondent, Mallory Kelly, contests this appeal by the agency.

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

PROCEDURAL HISTORY

This is an appeal brought by the agency, NJHESAA, seeking authority to garnish. It was filed in the Office of Administrative Law (OAL) on January 8, 2015. The Acting Director and Chief Administrative Law Judge appointed the undersigned on February 4, 2015, to hear and decide the matter. Hearing was scheduled for and convened on March 10, 2015. Though respondent had requested a telephone proceeding, she was not available when called on her phone number of record. Hearing went forward nonetheless to place the agency's case on record, and Exhibit P-7, incomplete when filed at hearing, was re-filed on April 2, 2015. On that date, the record closed.

ANALYSIS OF THE RECORD

Background:

Most of the factual background alleged by the agency is not in contention:

The petitioner agency, NJHESAA, presented its case through exhibits and testimony from its witness, **Brian Lyskiewyzc**. Mr. Lyskiewyzc affirmed his familiarity with the documentary record in this matter, which he recognized from personal involvement and review. He outlined the case's history as follows:

On September 4, 2006, **respondent, Mallory Kelly** executed a Federal Stafford Loan Master Promissory Note for payment of tuition at Rowan College. Relying on the note, American Education Services (AES) disbursed to her \$1,700.¹ In the course of time, appellant fell behind in payment of the debt for a period entitling AES to reimbursement from the guarantor of the loan, NJHESAA (the agency). The lender then turned to the agency for its remedy.

In response, NJHESAA issued a check to AES on December 8, 2011, repaying the bank in the total amount of its claim: \$2,058.29 (\$1,935.34 principal and \$122.95 interest)². NJHESAA then placed respondent on a monthly schedule of repayment³. Notwithstanding, respondent has submitted no monies voluntarily since⁴.

¹ Exhibits P-1, P-2

² Exhibit P-4

³ Exhibit P-5

⁴ Ibid

To recover what it is owed, the agency gave notice to respondent that it intended to garnish her wages.⁵ She replied with an appeal for hearing by telephone in order to contest the intent to garnish, and based her petition on the theory that garnishment of 15 percent of disposable pay would result in “extreme financial hardship.”⁶ However, when the agency sent its financial statement form to respondent asking for data in support of her claim, respondent did not comply and sent nothing. There the matter stands. The agency now moves for compelled repayment through garnishment.

Findings of Fact:

1. **I FIND** that there is no dispute over the material facts of record narrated supra.
2. **I FIND** further that appellant has not introduced proofs beyond a mere assertion to show by a preponderance that garnishment in the amount of 15 percent of disposable income would result in extreme financial hardship.

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

⁵ Exhibits P-6, P-7

⁶ Exhibit P-8

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-9, now in evidence.

The ameliorating circumstances of “extreme financial hardship” claimed by respondent in the Request for Hearing Form is an affirmative defense. It is respondent who therefore has the burden of persuasion to show that both facts and law stand for non-repayment. Respondent has not submitted the proofs requested by the agency which might have enabled her to do so.

Consequently, it is a fair construction of the enabling Act and implementing rules that the agency, as holder of the outstanding note, is now entitled to be made whole. To achieve such “wholeness,” repayment should be compelled through garnishment. The garnishment should go forward by adjusting the amounts of the unpaid principal and capitalized interest to be made during the remaining monthly schedule of payments over the life of the loan. That

apportionment of payments may or may not reach the monthly cap of 15 percent of disposable wages, depending on the foregoing calculations.

Conclusion:

I **CONCLUDE** from the above that the agency has shown by a preponderance of the evidence that the conceded debt as claimed by NJHESAA is in the exact amounts owed by respondent. I **CONCLUDE** further that respondent has not carried her affirmative burden to show that “extreme financial hardship” will exist if there is a garnishment as provided by law.

DECISION

I **ORDER**, therefore, that the amount defined of record, plus accrued interest and fees to date, be recovered by garnishment. However, the amount deducted for any pay period may not exceed 15 percent of disposable pay. 20 U.S.C.A. 1095a(a)(1).

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

May 13, 2015
DATE

JOSEPH LAVERY, ALJ t/a

Date Received at Agency: _____

Date Mailed to Parties: _____

mph

LIST OF WITNESSES:

For petitioner:

Brian Lyskiewycz

For respondent:

None

LIST OF EXHIBITS:

For petitioner:

- P-1 Affidavit of Janice Seitz, dated December 29, 2014
- P-2 Federal Stafford Loan Master Promissory Note, dated September 4, 2006
- P-3 Claim Worksheet Summary, dated December 2, 2011
- P-4 Status-Monthly Repayment
- P-5 Payment Listing
- P-6 NJHESAA Correspondence Control System, Student Correspondence
- P-7 Notice of Intent to Garnish
- P-8 Request for Hearing Form
- P-9 Financial Statement Form

For respondent:

None