

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

In the Matter of:

**Venus Wethington,**

Petitioner.

18-AM-0044-AG-026

780796493

July 21, 2021

**DECISION AND ORDER**

This proceeding is before the Office of Hearings and Appeals upon a *Request for Hearing* (“*Hearing Request*”) filed on or about November 8, 2017, by Venus Wethington (“Petitioner”) concerning the existence, amount, or enforceability of the payment schedule of a debt allegedly owed to the U.S. Department of Housing and Urban Development (“HUD” or “the Secretary”). The Debt Collection Improvement Act of 1996 authorizes federal agencies to use administrative wage garnishment as a mechanism for the collection of debts owed to the United States government. *See* 31 U.S.C. § 3720D.

The Secretary of HUD has designated the administrative judges of this Office of Hearings and Appeals to adjudicate contested cases where the Secretary seeks to collect debts 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.

**PROCEDURAL HISTORY**

Pursuant to 31 C.F.R. § 285.11(f)(4), on November 9, 2017, the Court stayed the issuance of a wage garnishment order until the issuance of this written decision. (*See Notice of Docketing, Order, and Stay of Referral* (“*Notice of Docketing*”) at 2).

On December 7, 2017, the Secretary filed his *Statement* (“*Sec’y. Stat.*”), along with documentary evidence in support of his position. On or about December 8, 2017, Petitioner filed a brief written *Statement* (“*Petr.’s Stat.*”) and documentary evidence in support of her position, which therein refers to Petitioner’s past, separate case (Case No. 17-VH-0132-AO-071) before HUD’s Office of Hearing and Appeals regarding a *Notice of Intent to Collect by Treasury Offset* for the subject debt. (*See Sec’y. Stat.*, ¶ 9; Exh. 1, *Declaration of Brian Dillon*, (“*Dillon Decl.*”), ¶ 9; *Sec’y. Stat.*, Exh. 3). Subsequently, on or about April 22, 2019, Petitioner filed a *Response* (“*Petr.’s Resp.*”) along with additional documentary evidence and evidence of alleged financial hardship. This case is now ripe for review.

## BACKGROUND

In or about April 2014, the HUD-insured primary mortgage on Petitioner's home was in default, and Petitioner was threatened with foreclosure. (*See Sec'y. Stat.*, ¶¶ 2-3; *Dillon Decl.*, ¶ 4). To prevent the lender from foreclosing, HUD advanced funds to Petitioner's FHA-insured lender to bring the primary note current. (*Id.*). In exchange for foreclosure relief, on April 7, 2014, Petitioner executed a Subordinate Note ("Note") in the amount of \$41,427.73 in favor of the Secretary. (*See Sec'y. Stat.*, ¶ 4; *Dillon Decl.*, ¶ 4).

Paragraph 4(A) of the Note cites specific events that make the debt become due and payable. One of those events is the payment in full of the primary note. (*See Sec'y. Stat.*, ¶ 4; *Dillon Decl.*, ¶ 4; Note, ¶ 4(A)(i)). On or about November 8, 2016, the primary lender notified the Secretary that the primary note was paid in full. (*See Sec'y. Stat.*, ¶ 5; *Dillon Decl.*, ¶ 4). Upon payment in full of the primary note, Petitioner was to make payment to HUD on the Note at the "Office of the Housing FHA-Comptroller, Director of Mortgage Insurance Accounting and Servicing, 451 Seventh Street, SW, Washington, DC 20410 or any such other place as [HUD] may designate in writing by notice to Borrower." (*See Note*, ¶ 4(B)).

Petitioner failed to make payment on the Note at the place and in the amount specified above. Consequently, the Secretary alleges that Petitioner's debt to HUD is delinquent. (*See Sec'y Stat.*, ¶ 6; *Dillon Decl.*, ¶ 5.) The Secretary has made efforts to collect this debt from Petitioner by mailing a *Notice of Intent to Initiate Administrative Wage Garnishment Proceedings* ("Notice") to Petitioner on or around October 12, 2017. (*See Sec'y. Stat.*, ¶ 8; *Dillon Decl.*, ¶ 6). In accordance with 31 C.F.R. § 285.11(e)(2)(ii), Petitioner was afforded the opportunity to enter into a written repayment agreement under terms agreeable to HUD. (*See Dillon Decl.*, ¶ 7). Petitioner did not enter into a repayment agreement and to HUD's knowledge, Petitioner still has not repaid the Note. Therefore, the Secretary asserts that Petitioner is justly indebted to the Secretary in the following amounts:

- a) \$41,427.73 as the unpaid principal balance as of October 31, 2017;
- b) \$241.57 as the unpaid interest on the principal balance at 1% per annum through October 31, 2017;
- c) \$2,529.28 as the unpaid penalties and administrative costs through October 31, 2017; and
- d) interest on said principal balance from November 1, 2017, at 1% per annum until paid.

(*See Sec'y. Stat.*, ¶ 7; *Dillon Decl.*, ¶ 5).

On September 10, 2018, Petitioner's subject debt on the Note in favor of HUD was ruled past due and legally enforceable by a different HUD Administrative Judge in a past case concerning a *Notice of Intent to Collect by Treasury Offset* (Case No. 17-VH-0132-AO-071).

## **DISCUSSION**

The Secretary bears the initial burden of proof to show the existence and amount of the alleged debt. *See* 31 C.F.R. § 285.11(f)(8)(i). Petitioner, thereafter, must show by a preponderance of the evidence that no debt exists or that the amount of the debt is incorrect. *See id.* § 285.11(f)(8)(ii). Petitioner may also present evidence that the terms of the proposed repayment schedule are unlawful, would cause an undue hardship to Petitioner, or that the alleged debt is legally unenforceable. *See id.*

As evidence of Petitioner's indebtedness, the Secretary has filed *Secretary's Statement That Petitioner's Debt is Past Due and Legally Enforceable* (*see Sec'y. Stat.*); a sworn declaration by Brian Dillon, Director, Asset Recovery Division, HUD Financial Operations Center (*see Dillon Decl.*); a copy of the Note (*see Sec'y. Stat.*, Exh. 2); and a copy of *Secretary's Statement That Petitioner's Debt is Past Due and Legally Enforceable* for Petitioner's prior case, Case No. 17-VH-0132-AO-071. Accordingly, the Court finds that the Secretary has met his initial burden of proof.

"A petitioner has the burden of producing evidence which demonstrates that the claimed debt is not past-due or legally enforceable." *See Michael Cook*, HUDBCA No. 87-2782-H307 (Aug. 11, 1988). In the case at bar, Petitioner maintains she should not be held responsible for the subject debt because it (1) should already have been paid off by the proceeds of her home sale; and (2) would impose a financial burden on Petitioner.

### **I. Proceeds of Home Sale Did Not Pay Off Petitioner's Note**

On September 10, 2018, Petitioner's subject debt on the Note in favor of HUD was ruled past due and legally enforceable by a different HUD Administrative Judge in a past case concerning a *Notice of Intent to Collect by Treasury Offset* (Case No. 17-VH-0132-AO-071). Pursuant to 31 C.F.R. § 285.11(b)(6), agencies are not required to duplicate administrative proceedings. Nonetheless, the undersigned has independently reviewed the evidence presented by the parties in this case and reaches the same conclusion as the judge in Case No. 17-VH-0132-AO-071 regarding the past due status and legal enforceability of the debt, for the reasons discussed below.

Petitioner maintains here, as she did in her past case, that she does not owe the debt pursuant to HUD's Note because she was advised by Bank of America and her title agency at the closing of the sale of her home that the debt owed to HUD, in the amount of \$3,334.02, was paid from the proceeds of that sale. (*See Petr's. Stat.*, 1; *Petr's. Resp.*, 24; *see also Sec'y. Stat.*, ¶ 9; *Sec'y. Stat.*, Exh. 3). Petitioner introduced, as support for her position, a copy of a Bank of America Home Loan Account statement dated September 15, 2016 that shows that a "non-interest bearing principal balance of \$3,334.02" was owed to Bank of America as of that date. (*See Sec'y. Stat.*, Exh. 3). Petitioner also introduced a copy of her October 28, 2016 emails with a Licensed Escrow Officer with Fidelity National Title, Christina A. Blair, wherein Blair erroneously informed Petitioner, "Just the one payoff is taking care of both mortgages." (*See Petr's. Stat.*, at 2; *Petr's. Resp.*, 24). However, the Bank of America Home Loan Account statement dated September 15, 2016, introduced by Petitioner to prove that the subject debt to

HUD was paid in full, showed instead that the subject debt was not included. (*See Sec'y. Stat., Exh., 3*). Rather, Petitioner's payment of \$3,334.02 paid in full the non-interest bearing principal balance of her primary note. (*See Sec'y. Stat., Exh., 3*).

Petitioner has provided no evidence that shows the debt owed to HUD pursuant the Note, or any other amount, was ever repaid to HUD. Petitioner executed the Note, and she has failed to produce any evidence that the funds borrowed were repaid to HUD or that she was otherwise released from her obligations pursuant to the Note. The Note signed by Petitioner when she was threatened with foreclosure clearly states under the heading "Borrower's Promise to Pay" that "[i]n return for a loan received from Lender, Borrower promises to pay the principal sum of ... \$41,427.73..." (*See Note, ¶ 2*) (emphasis added). "Lender" is defined under the heading "Parties" as "the Secretary of Housing and Urban Development." (*See Note, ¶ 1-2*) (emphasis added).

For Petitioner not to be held liable for the full amount of the debt, Petitioner must produce either a release in writing explicitly relieving Petitioner's obligation under the terms of the Note or proof of "valuable consideration accepted by the lender" that indicates HUD's intent to release. *See Cecil F. and Lucille Overby*, HUDBCA No. 87-1917-G250 (Dec. 22, 1986). Petitioner has failed to produce either in this case. Thus, the evidence submitted by Petitioner merely demonstrates that Petitioner was provided erroneous information upon which Petitioner relied as binding.

This Court has consistently maintained that "assertions without evidence are insufficient to show that the debt claimed by the Secretary is not past due and legally enforceable." *See Sara Hedden*, HUDOA No. 09-H-NY-AWG95 (July 8, 2009), *quoting Bonnie Walker*, HUDBCA No. 95-G-NY-T300 (July 3, 1996). In this case, Petitioner failed to introduce into evidence proof of a written release, directly from HUD, that effectively discharged Petitioner from the debt associated with the subordinate note. Because Petitioner agreed in the Note to pay the subject debt, the onus falls on Petitioner, not on the primary lender or title company, to ensure that the subject debt was satisfied. Hence, the Court finds that the Petitioner's claim fails for lack of proof and, as a result, the subject debt remains past due and enforceable.

## **II. Petitioner Has Established Financial Hardship**

Petitioner alleges administrative wage garnishment would impose a financial hardship. Petitioner claims, "my income does not even cover my bills" and "my daughter has to help me pay rent!" (*See Petr.'s Stat., 1*).

While financial hardship does not invalidate a debt or release a debtor from the obligation to pay, financial hardship factors are relevant in determining the amount of administrative garnishment that will be allowed. *See Raymond Kovalski*, HUDBCA No. 87-1681-G18 (December 8, 1986); *see also* 31 C.F.R. § 285.11(f)(2), (k)(3). Here, the Secretary seeks to garnish 15% of Petitioner's disposable income from each paycheck, which is the maximum amount allowed by law. *See* 31 U.S.C. § 3720D(b)(1). Petitioner's disposable income for purposes of administrative wage garnishment is defined as that part of Petitioner's compensation that remains after the deduction of health insurance premiums and any amounts required by law

to be withheld. *See* 31 C.F.R. § 285.11(c). Such deductions include social security taxes and withholding taxes, but not amounts withheld pursuant to court order. *See id.*

In this case, Petitioner provided copies of her biweekly pay statement for the pay periods ending January 27, 2019 and February 10, 2019. Petitioner receives approximately \$3,117.58 for her monthly gross income, before deductions that, here, total \$747.92 (Federal Withhold Tax, \$207.30; Social Security Tax, \$173.00; Medicare Tax, \$40.46; Local Med Plan \$280.00; Dental Plan \$42.56; and Vision Plan \$4.60). Thus, after deductions, Petitioner's approximate monthly net disposable pay is \$2,369.99.

Petitioner has produced sufficient evidence for the Court to determine whether the Secretary's proposed garnishment amount would cause financial hardship. Petitioner's essential monthly expenses include: rent, \$1,248.00; water and sewage, \$70.00; community pest control fee, \$3.00; electricity, \$90.00; cellphone and internet, \$150.00; car payment, \$260.00; bundled car and rental insurance, \$85.00; car fuel and maintenance, \$120.00; food, \$460.00; life insurance, \$75.00; and a 10% tithe to the church, \$236.97. Thus, Petitioner's essential monthly expenses total \$2,797.97. This number does not include Petitioner's \$3,705.30 expense for an ongoing dental procedure.

Petitioner's monthly disposable income of \$2,369.99, less her total monthly essential household expenses of \$2,797.97, yields a negative balance of (-\$427.98) per month. Even if Petitioner's net disposable income is adjusted to account for the \$400 her daughter contributes to cover household expenses, the new adjusted amount of \$2,769.99, less Petitioner's total monthly essential household expenses of \$2,797.97, yields a negative balance of (-\$27.98) per month. Accordingly, any wage garnishment at this time would leave Petitioner with no balance to cover non-essential expenses by the end of each month. Pursuant to 31 C.F.R. § 285.11(e)(8)(ii), this Court has the discretion to modify the Secretary's proposed repayment schedule if there is a *bona fide* showing of financial hardship based on the record, and such has been proven in this case. Petitioner has successfully persuaded the Court, with sufficient documentation, that imposition of the proposed wage garnishment in any amount would in fact create a financial hardship for Petitioner.

While the Secretary has successfully proven that the debt is past due and enforceable, any wage garnishment rate is burdensome for Petitioner. The Court will use its discretionary power under 31 C.F.R. § 285.11(e)(8)(ii) to stay the Secretary's proposed repayment schedule. Accordingly, the *Order* imposing the stay of referral in this matter to the U.S. Department of Treasury for administrative wage garnishment will remain in place until Petitioner's financial circumstances otherwise improve in the future.

**ORDER**

The *Order* imposing the stay of referral in this matter to the U.S. Department of Treasury for administrative wage garnishment will remain in place. It is hereby

**ORDERED** that the Secretary is not authorized at this time to seek collection of this outstanding obligation by means of administrative wage garnishment and will not become authorized to seek collection of the obligation until such time as Petitioner's financial circumstances change.

**SO ORDERED,**



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H. Alexander Manuel  
Administrative Judge

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**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 only upon a showing of good cause.