AGRICULTURE DECISIONS

Volume 70

January – June 2011

UNITED STATES DEPARTMENT
OF AGRICULTURE

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Part One (General)
Pages 1- 416

THIS IS A COMPILATION OF DECISIONS ISSUED BY THE SECRETARY OF AGRICULTURE AND THE COURTS PERTAINING TO STATUTES ADMINISTERED BY THE UNITED STATES DEPARTMENT OF AGRICULTURE

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Errata

The Editor regrets having overlooked the timely inclusion of two Departmental Decisions, specifically:

Initial Decision *Charles McDonald* SOL Docket No. 09-0177 filed on July 8, 2010 by Chief Administrative Law Judge Peter M. Davenport and Miscellaneous Order *Billy Mike Gentry* PS Docket No. 07-0152 filed on March 18, 2009 by the Judicial Officer William Jenson.

These two decisions follow this page with special pagination for citation guidance. They are also added to the errata section of the OALJ webpage at http://www.dm.usda.gov/oaljdecisions/

The *Charles McDonald* decision has previously been posted on the above OALJ website in the section known as **Current OALJ Decisions** in the 2010 folder.

The *Billy Mike Gentry* Miscellaneous Order appeared on the Judicial Officer website in the **SUMMARY OF MAJOR DECISIONS BY THE JUDICIAL OFFICER Fiscal Year 2009**.

EQUAL OPPORTUNITY CREDIT ACT

DEPARTMENTAL DECISION

69 Agric. Dec. Jul. – Dec. (2010)

CHARLES McDONALD.
SOL Docket No. 09-0177.
Decision and Order.
Filed July 8, 2010.

EOCA – SOL --

Michael Beasley, Esq. and Ben Whaley LeClerq, Esq for Petitioner.
Stephany Moore, Esq and Brandi Peters, Esq. for OCR.
Decision and Order by Chief Administrative Law Judge Peter M. Davenport.

DECISION AND ORDER

Preliminary-Statement

Charles McDonald, a 72 year old black farmer from Manning, Clarendon County, South Carolina, brought this action under Section 741 of the Agriculture, Rural Development, Food and Drug Administration, and related Agencies Appropriation Act, 1999, enacted in Division A, section 101(a) of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. 105-277, §741, 112 Stat. 2681(Oct. 21, 1998) (codified at 7 U.S.C. §2279 Historical and Statutory Notes). (Section 741).

Mr. McDonald initially joined the *Pigford v. Glickman* class action, *Pigford v. Glickman*, No. 97-1978 (D.D.C. 1997), but opted out of the class when allowed to do so. *Pigford v. Glickman*, 182 F.R.D. 341, 351 (1998). This case was referred to the United States Department of Agriculture's (USDA or the Department) Office of Administrative Law Judges on August 21, 2009 when the Department's Office of Civil Rights (OCR) filed a letter forwarding the requests of Charles McDonald and that of another individual[1] for a hearing before an Administrative Law

[1] *In re: Richard Pearson*, SOL Docket No. 09-0178.

Judge. At the time that the letter was filed with the Hearing Clerk's Office, the Administrative Records for the cases were also provided, which in the McDonald case included two reports of investigation and nine binders of documents.[2]

The letter forwarded by OCR with their filing on August 29, 2009 was from Mr. McDonald's counsel, Ben Whaley Le Clercq, dated July 14, 2009. The letter requested immediate review by an Administrative Law Judge, noting that despite a statutory mandate that a final determination be issued within 180 days after the filing of a Section 741 Complaint, more than 10 years had elapsed in the instant case without such a determination.[3] By letter dated August 24, 2009, the Complainant's counsel was notified that the case had been docketed as SOL Docket No. 09-0177 and was being referred to the Chief Administrative Law Judge for assignment. On September 2, 2009, the case was assigned to my docket.

A pre hearing Conference was conducted on September 21, 2009 in Washington, DC. Ben Whaley Le Clercq, Esquire of Mount Pleasant, South Carolina appeared for Charles McDonald and Stephanie Moore, Esquire and Brandi Peters, Esquire, Civil Rights Litigation Division, Washington, DC appeared on behalf of the Department.[4] The parties expressed willingness to attempt mediation so the case was referred to then Chief Administrative Law Judge Marc R. Hillson for mediation

[2] The Administrative Record for the McDonald case contains thousands of pages of documents (approximately four feet of shelf space) and required five boxes to hold the contents.

[3] McDonald and Pearson had earlier sought to pursue their claims in United States District Court on the theory that their underlying complaints "have effectively been denied by USDA's unreasonable delay in making a final determination on their complaints." In his opinion, Judge Friedman granted summary judgment to USDA, declined to find constructive denial, found that despite the delay encountered by McDonald and Pearson they still were required to exhaust their administrative remedies, that exhaustion required Administrative Law Judge review and that there was no dispute that the plaintiffs had failed to seek and obtain Administrative Law Judge review. *Benoit, et al. v. United States Department of Agriculture,* 577 F. Supp. 12, 23 (D.C. 2008) Although the record contains a draft "Expedited Agency Position Statement" which found insufficient evidence of discrimination and recommended closure, no denial of the claim by OCR appears to have been made prior to referral to the Office of Administrative Law Judges. D109-112. In its brief, the Government suggests that the Complainant's decisions to join litigation in The United States District Court delayed the Department from acting on his complaint. Gov Brief at p. 3.

[4] Ms. Peters' participation was confined to this appearance; Stephanie Masker, Esquire later entered her appearance as Co-Counsel for the Respondent.

proceedings;[5] however, the case concurrently proceeded along the litigation path and deadlines were established for the exchange of witness and exhibit lists and for the exchange of exhibits in the event of trial. Due to the large size of the administrative record, counsel were asked to consult with each other, to prepare a Joint Appendix containing the relevant documents in the case, and to have the documents Bates™ Stamped for ease of reference during trial.[6] The matter was then set for hearing to commence on January 12, 2010 in Columbia, South Carolina. Docket Entry 4.

On December 22, 2009, the Department filed a motion with numerous attachments asking for a clarification of the issues, seeking to strike a number of the Complainant's witnesses and last, asking for clarification of the location of the hearing.[7] Docket Entry 20. Given the brief period of time prior to the commencement of the hearing and the overlay of the holiday season, the motions concerning clarification of the issues and to strike witnesses were deferred until after commencement of the hearing. Docket Entry 21. On January 6, 2010, the Department filed the Agency's Final Submission of Additional Documents and Witness List and the following day filed their Opposition to Complainant's Motion to Supplement Exhibit and Witness Lists; Provide Information about Witnesses; Allow Certain Evidence; and Establishment of Fixed Dates for Testimony. Docket Entries 23, 24. These matters were also deferred without entry of an Order to be heard after the commencement of the hearing.

The oral hearing of this action commenced on January 12, 2010 in Charleston, South Carolina and continued from day to day, until recessed on January 15, 2010 at the conclusion of the Complainant's case. As an accommodation to Agency counsel, the location of the resumed hearing was changed to Washington, DC and the proceedings reconvened on

[5] Mediation was conducted on November 17, 2009 in Charleston, South Carolina; however, the parties were unable to reach any resolution.

[6] Regrettably, the parties were unable to agree on what constituted the relevant documents in the case and each party independently identified and submitted their respective documents. The Complainant also submitted a binder of exhibits which were used during the hearing. As a result, there is considerable overlap and duplication of the exhibits, with many of the documents appearing both parties' binders.

[7] The Order identifying the hearing site as being in the Second Floor (Grand) Courtroom of the Historic Courthouse located at 84 Broad Street in Charleston, South Carolina had been entered on December 18, 2009, but apparently had not before received by Government counsel prior to the preparation of the Motions.

February 22, 2010 and concluded on February 26, 2010. Fifteen witnesses testified. During the testimony of the various witnesses, references were made to both parties' documents, as well as to the Complainant's book of exhibits.[8] Concurrent briefs were directed to be filed forty-five days after the filing of the transcript of the final portion of the hearing.[9] Briefs were received from both parties and the matter is now ready for disposition.

Historical Background of Discrimination Complaints by African American Farmers against the Department of Agriculture

In 1997, three African-American farmers brought a class action against the United States Department of Agriculture alleging racial discrimination in the administration of federally funded credit and benefits programs. *Pigford v. Glickman,* No. 97-1978 (D.D.C. 1997), 182 F.R.D. 341, (1998), 185 F.R.D. 82, 88 (D.D.C. 1999); *Pigford v. Veneman,* 141 F.Supp 60 (D.D.C. 2001), *rev'd and remanded,* 292 F3d. 918, 325 U.S. App. D.C. 214 (2002). The Court certified the case as a class action on October 9, 1998. *Pigford v. Glickman,* 182 F.R.D. 341 (1998) The class ultimately included some 22,000 similarly situated black farmers from fifteen states.[10]

Shortly before the farmers filed suit, the Department had released a report titled *Civil Rights at the United States Department of Agriculture: A Report by the Civil Rights Action Team,* (Washington, D.C.; February 1997) (CRAT Report) which had been commissioned in December of

[8] The Petitioner's exhibits were marked McDonald with the page number. A number of additional exhibits of the Petitioner were tabbed and included in a separate binder used at the hearings. The Department exhibits were marked D McDonald and the page number. References to the Petitioner's exhibits will be indicated as M and the page number or to PX and the numbered tab. References to the Department exhibits will be indicated as D and the page number. References to the transcript will be indicated as Tr. and the page.

[9] The Petitioner sought an extension and without objection from the Respondent, both parties were given until May 7, 2010 in which to file briefs. Docket Entry 32.

[10] A second putative class action was filed the following year and included farmers after the cut off for the *Pigford* class, but before the July 7, 1998 filing date of the Complaint in the second action. *Brewington v. Glickman,* Civil Action No. 98-1698. On January 5, 1999, prior to entry of the Consent Decree, the parties moved to consolidate the *Pigford* and *Brewington* cases which motion was granted by the Court. As of February of 2005, more than 13,700 *Pigford* claimants had received compensation totaling more than $839 million. USDA/OIG-A/03601-11-AT.

1996 by then Secretary Dan Glickman. That report in examining the "painful history" of the Department's dealings with African-American farmers concluded that local credit and loan agencies responsible for administering USDA programs had indeed often discriminated against the farmers. *Id.* at 6. The report went on to describe the complaints processing system as a "bureaucratic nightmare" that processed complaints slowly if at all while at the same time the agency proceeded with farm foreclosures even where discrimination may have contributed to the farmers' plight. *Id.* at 22-25.

Even before the release of the CRAT Report, the Department's Office of the Inspector General (IG) issued a report to Secretary Glickman reporting that USDA had a backlog of complaints of discrimination that had never been processed, investigated or resolved. The Report indicated that immediate action was needed, and concluded that the complaint process at Farm Services Agency (FSA)[11] lacked "integrity, direction and accountability." *Report to the Secretary on Civil Rights Issues- Phase I: Farm Loan Programs- Civil Rights Complaint System,* USDA/OIG Report No. 50801-2 (January 27, 1997); *See, Pigford,* 185 F.R.D. at 88. A subsequent report from that office issued in September of 1997 found that the backlog of civil rights discrimination complaints had grown significantly since the issuance of the February report from 241 open complaints to 984.[12] This second Report suggested that while the restructured OCR might be capable of ensuring that a backlog does not appear in the future, it recommended Department take additional efforts to reduce the backlog of complaints and to correct other deficiencies found in the report. *Minority Participation in Farm Service Agency's Farm Loan Programs-Phase II,* USDA/OIG-A/50801-3-Hq; September 29, 1997, p 1-2, 8-11. A series of Departmental IG Reports were made between 1997 and March of 2000 and thereafter which were critical of OCR's operations and its failure to adequately address the backlog of civil rights complaints. A 2005 Report concluded that progress had been made in most areas, but that deficiencies still existed and that additional emphasis was needed in the area of processing minority applications, that Civil Rights Compliance Reviews were needed and that the National Outreach Program should coordinate with County Officials to reach local minority communities. *Audit Report, Minority Participation in farm*

[11] FmHA ceased to exist in 1994 and the farm loan functions previously performed by FmHA were assumed by FSA.

[12] Of these, 474 were attributable to FSA.

Service Agency's Programs, USDA/OIG-A/03601-11-AT, November 17, 2005.

Numerous reports and news accounts have since discussed the fact that many complaints of discrimination related to agency actions were filed with USDA between 1981 and 1986, but were never processed, investigated, or forwarded to the appropriate agencies for conciliation because of "reorganizations" within USDA in the early 1980s.[13] The impact of those reorganizations and disbanding of the Office of Civil Rights at the Department in 1983 clearly was profound, resulting in effectively denying vast numbers of complainants the administrative structure to seek relief under such anti-discrimination statutes as the ECOA as the statutes of limitations expired while the complainants waited in vain for a response from USDA.

In the 1999 decision approving the Consent Decree in the *Pigford* case, United States District Judge Paul L. Friedman wrote:

For decades, despite its promise that "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity of an applicant or recipient receiving Federal financial assistance from the Department of Agriculture," 7 C.F.R. §15.1, the Department of Agriculture and the county commissioners discriminated against African American farmers when they denied, delayed or otherwise frustrated the applications of those farmers for farm loans and other credit and benefit programs. Further complicating the problem, in 1983 the Department of Agriculture disbanded its Office of Civil Rights and stopped responding to claims of discrimination. These events were the culmination of a string of broken promises that had been made to African American farmers for well over a century. *Pigford v. Glickman*, 185 F.R.D. 82, 85 (D.D.C. 1999)

Congress sought to remedy the plight of the large number of individuals affected by the USDA reorganizations in 1998 by enacting section 741 which retroactively waived the ECOA's two year statute of limitation for all individuals who had filed "eligible complaints" with

[13] *See,eg.*, United States Government Accounting Office Reports: *U.S. Department of Agriculture: Problems Continue to Hinder the Timely Processing of Discrimination Complaints*, GAO-99-38; and *U.S. Department of Agriculture, Management of Civil Rights Efforts Continues to be Deficient Despite Years of Attention*., GAO-08-755T

USDA.[14] That legislation afforded two alternative avenues of relief: (1) Complainants could file an action directly in federal court, provided they did so by October 21, 2000 (§741(a)); or (2) they could seek a determination on the merits of their complaints by USDA (§741(b)) and then obtain review in federal court if their claims were denied administratively. (§741(c)) Administrative decisions on complaints submitted under §741(b) were to be rendered within 180 days "to the maximum extent practicable." §741(b)(3).

After the Congressional intervention, the parties in the *Pigford* class action entered into a Consent Decree which was preliminarily approved on January 5, 1999. Following a hearing in March of 1999, modifications were made to the Decree and the revised terms were finally approved in the April 14, 1999 Decision.[15] *Pigford v. Glickman*, 185 F.R.D. 82, 88 (D.D.C. 1999). The high hopes generated at the time of the entry of the Consent Decree however were not to be realized as class counsel's inability to meet critical consent decree deadlines prompted severe court criticism and ultimately required further modification and litigation involving that decree.[16] *Pigford v. Veneman*, 141 F.Supp 60 (D.D.C. 2001); *rev'd and rem*, 292 F3d. 918, 325 U.S. App. D.C. 214 (2002).

[14] The term "eligible complaint" means a non-employment related complaint that was filed with the Department of Agriculture before July 1, 1997 and alleges discrimination at any time during the period beginning January 1, 1981 and ending December 31, 1996. Section 741(e).

[15] Judge Friedman's decision commences with "Forty acres and a mule" and eloquently narrates the history of the Freedmen's Bureau, the 1862 Congressional debate over the issue of providing land for former freed slaves, the creation of the Department of Agriculture envisioned by President Lincoln as the "people's department," and the dramatic decline in the number of African-American farmers over time, attributing much of the responsibility for the decline to the United States Department of Agriculture and the county commissioners to whom it granted so much power. The decision included the plaintiffs' estimate that the settlement in the consolidated class action cases could reach the sum of $2.25 billion making it the largest civil rights settlement in the history of the country. *Pigford*, 185 F.R.D. at 95.

[16] The *Pigford* Consent Decree established a two track dispute resolution process. Those with little or no documentary evidence would receive a virtually automatic cash payment of $50,000 and forgiveness of debt owed to USDA (Track A), while those who believed that they could proved greater damages could prove their cases with documentary or other evidence by a preponderance of proof under the traditional burden of proof and receive an award without any cap consistent with the damages proved. (Track B). Both types of cases were presented to an adjudicator whose decision was final, except in cases of clear and manifest error. Those choosing neither option could opt out of the class and pursue their individual remedies in court or administratively. Mr. McDonald chose the third option.

Even today, many of the class members are still awaiting Congressional action which would facilitate resolution of their claims.[17]

This case, heard now more than twenty years after the initial claim of discrimination, well illustrates both the procedural obstacles faced by a claimant as well as the evidentiary difficulties occasioned by the passage of time in presenting a claim.

Discrimination Claims under ECOA

ECOA creates a private right of action against a creditor who discriminates against an applicant "with respect to race, color, religion, national origin, sex, marital status, or age…." 15 U.S.C. §1691. As the statute defines creditor to include the "government or governmental subdivision or agency," it has been construed to constitute a waiver of the United States' sovereign immunity. 19 U.S.C. §1691a(f); *Moore v. USDA*, 55 F.3d 991, 994-995 (5th Cir. 1995); *Williams v. Conner*, 522 F. Supp 2d. 92, 99 (D.D.C. 2007). Although ECOA requires that actions be brought within two years of the date of the violation, the statute of limitations is extended for this case under Section 741, 7 U.S.C. §2279, note.

A credit applicant may prove unlawful discrimination under ECOA under one or more of three theories: (1) direct evidence of discrimination; (2) disparate impact analysis; and (3) disparate treatment analysis. *See, Faulkner v. Glickman*, 172 F. Supp.2d 732,737 (D. Md. 2001); *AB & S Auto Service, Inc. v. South Shore Bank of Chicago*, 962 F.Supp 1056, 1060 (N.D. Ill. 1997); *Shiplet v. Veneman*, 602 F. Supp. 1203, 1223 (D Mont. 2009).

Direct evidence is that evidence which establishes the existence of discriminatory intent without any inference or presumption. *Standard v. Sterling Bank, A.B.E.L. Servs, Inc.*, 161 F.3d 1318, 1330 (11th Cir. 1998). In the *Standard* case, the Court wrote "only the most blatant remarks, whose intent could be nothing other than to discriminate on the protected classification are direct evidence of discrimination." *Id.* at 1330.

[17] *See*, Krissah Thompson, *Q & A with Agriculture Secretary Tom Vilsack*, Washington Post, February 16, 2010; Carey Johnson, *U.S. approves settlement for black farmers*, Washington Post, February 19, 2010; and Krissah Thompson, *Hope, worry about bias suit with black farmers; Agreement gives other minorities optimism, but funds*…., Washington Post, February 26, 2010.

Where there is no direct evidence of discrimination, a claimant may prove his or her case by first meeting the burden of making a *prima facie* showing of circumstantial evidence of racial discrimination. *See, Arthur Young & Co. v. Sutherland,* 631 A.2d 354, 361 (D.C. 1993). Disparate impact and treatment claims are evaluated under the framework of analysis established in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973).[18]

To establish a *prima facie* showing of circumstantial evidence of discrimination, a claimant must prove: (1) that he or she is a member of a class protected by the statute; (2) that he or she applied for and was qualified to receive a credit benefit; (3) that despite his or her qualification for a credit benefit, it was denied or withheld from him or her; and (4) that he was treated less favorably than other similarly situated individuals who were not members of his or her protected class. *McDonnell Douglas,* 411 U.S. at 802. The elements must be established and not merely incanted and failure to prove any element results in a failure to make a *prima facie* showing. *Coco v. Elmwood Care, Inc.,* 128 F.3d 1177, 1178 (7th Cir. 1992); *Rowe v. Union Planters Bank,* 289 F.3d 533 (8th Cir. (2002); *Peele v. Country Mut. Ins. Co.,* 288 F.3d 319, 331 (7th Cir. 2002).

Once the claimant makes a *prima facie* showing, the burden shifts to the creditor to articulate a legitimate, non-discriminatory reason for the rejection. *McDonnell Douglas,* 411 U.S. at 802-803; *see also, Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 254 (1981). Should the creditor satisfy its burden, the claimant is then given an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the creditor were not its true reasons, but rather were a pretext for discrimination. The creditor need not persuade the court that it was actually motivated by the proffered reasons, but is sufficient if the creditor's evidence raises a genuine issue of fact as to whether it discriminated against the claimant. *Burdine* at 248.

Discussion

Charles McDonald asserts that the USDA violated the Equal Credit Opportunity Act, 15 U.S.C. §1691, *et seq.* (ECOA) by discriminating against him because of his race in connection with certain

[18] *See, Chiang v. Veneman,* 385 F.3d 256 (3d Cir. 2004) for a collection of such cases.

of the USDA's credit and non-credit benefits programs for farmers.[19] Charles McDonald is an award winning corn-producing farmer, who has been recognized by the Palmetto Corn Club, an organization that annually honors top crop producers.[20] In years prior to 1985 McDonald and his brother Richard Miller farmed well over 1,000 acres; however, as a result of credit denials, delayed and untimely loans and servicing decisions by FmHA, he alleged that he was forced into foreclosure and bankruptcy and ultimately forced to reduce the size of his farming operation to only approximately 300 acres, suffering a corresponding loss of income and wealth. Tr. 237, 361-364, 378.

Actions brought under ECOA are required by the Act to be brought not later than two years after the occurrence of the violation (15 U.S.C. §1691e(f)); however, Congress passed Section 741to toll ECOA's statute of limitations so that USDA claimants who had previously filed administrative claims of credit discrimination would not be penalized because the Agency had failed to take action on those pending claims. As with any consent to be sued, the grant of jurisdiction must be strictly construed and cannot be enlarged beyond the language of the waiver.

The record documents that Mr. McDonald complained of discrimination on at least three separate occasions that were regarded as "accepted complaints." The first instance was in the form of a letter from Mr. McDonald dated October 9, 1984 to Senator Strom Thurmond requesting assistance in connection with his application for a loan (the 1984 applications).[21] D34. The second instance was made in person by

[19] These programs were originally administered by Farmers Home Administration (FmHA). FmHA ceased to exist in 1994 and responsibility for its farm programs and those of the former Agricultural Soil and Conservation Service (ASCS) was assumed by Farm Services Agency.

[20] The Palmetto Corn Club and Contest was sponsored by the Cooperative Extension Service of Clemson University for the Pee Dee, Savannah, and Midland/Piedmont Extension Districts. Charles McDonald was a 200 bushel per acre Corn Club member in 1992, with a yield of 205.71 bushels per acre, and was recognized for his production in 1994. PX-53. McDonald was also recognized at the 1997 Ag Expo in Columbia, South Carolina was a first place county winner having produced 203.48 bushels of corn per acre. PX-58A.

[21] Although the Investigative Report for Docket No. 1183 makes note of the 1984 complaint, it appears that no action was taken to process, investigate or to resolve it as a discrimination complaint until after the second complaint was filed in 1996. McDonald's letter of October 9, 1984 was only the first of several letters and other contacts made by the McDonalds to Senator Thurmond and other Congressional Representatives and their staffs. *See,* D36, 40-45, 49, 52-53.

Mr. McDonald at a meeting with Farm Services Agency County Executive Director William W. Rowe on May 16, 1996 and documented in a letter to Mr. McDonald written on the same date by Mr. Rowe.[22] D47,48. An acknowledgment letter from OCR indicates that a third complaint was filed on April 1, 1997 which presumably was in written form; it was assigned Case Number 970401-504.[23] D-3, 50-51, 58-59.

As no evidence was introduced which met the blatant remark standard evincing intent which could be nothing other than to discriminate, an analysis must be made of the circumstantial evidence which was introduced.

Petitioner's Allegations of Discrimination

Charles McDonald raises thirteen allegations of discrimination in his Post Hearing Brief:

1. Charging McDonald a higher interest rate on a 1980 loan than that to which he was entitled…

2. Failing to disburse loan funds in a timely manner once approved, and disbursing less funds than Petitioner was approved for or for which the Petitioner was eligible under USDA programs:

3. Failing to advise McDonald about and failing to make available to McDonald introductory farmer, limited resource, and/or socially disadvantaged farmer programs to which he was eligible.

[22] The initial Investigative Report (Case Number 970401) was drafted by Autry Slay, an employee of Direct Data, Inc., a contractor hired by OCR and appeared to be limited to McDonald's inability to get his established corn crop yield increased. D394-406, Tabs 61-63. A second and more comprehensive Investigative Report bears Docket Number 1183. It was dated January 9, 2003 and was prepared by Philip L. Newby and Ruihong Guo. It cites May 16, 1996 as the date of complaint; however, in the Introduction the history of three complaints is noted and the report addresses the allegations contained in all three complaints. D1-16. Only excerpts from the two Investigative Reports were contained in the trial exhibits, but both reports in their entirety with all attachments are in the materials identified in footnote 2. A Fact-Finding Inquiry prepared by the Program Complaints Inquiry Branch in Montgomery, Alabama was less inclusive in scope. D17-25.

[23] Although the initial Investigative Report dated April 24, 1998 contains the Case Number 970401, no Investigative Report has been located for Case Number 970401-504. The record does contain a letter dated April 1, 1997 from Fred Broughton written to Leonard Hardy, Jr., Deputy Administrator for Operations and Management on Charles McDonald's behalf which is consistent with the issues mentioned in the acknowledgment letter. *See*, D54.

4. Terminating an interest credit agreement (lowering McDonald's interest rate and monthly payments on his home loan) in 1983 prior to its expiration.

5. Wrongfully denying McDonald, Mrs. McDonald and/or McDonald's half brother Richard Miller access to USDA loan programs (includ[ing] FO, OL, and EE) in 1984, after initially approving loans.

6. Wrongfully and arbitrarily denying McDonald, Mrs. McDonald, and/or

McDonald and his half brother Richard Miller's 1984 partnership loan application based on the inaccurate conclusion that the Small Business Administration (SBA) would not subordinate a loan to McDonald and Miller.

7. Not extending emergency, farm ownership, and farm operating loans for which he and his wife qualified in 1984, 1985, and 1986, when similarly situated white farmers were extended such loans. Mrs. McDonald's applications were entitled to "new farmer" loan processing in 1984-1986, but did not receive them.

8. Wrongfully processing McDonald's loan applications in a slow and dilatory fashion, when similarly situated white farmers got loans and assistance in a timely fashion.

9. Failing to advise McDonald of and/or failing to make available to McDonald numerous USDA loan and Rural Housing programs, including the "Continuation Policy," the Reagan "debt set aside" program, and other refinancing, loan forgiveness, loan moratorium, interest reduction/abatement, and other programs of a similar nature.

10. Wrongfully and intentionally altering loan documents on McDonald and his wife's verification of employment (VOE) so that McDonald and his wife would appear not to qualify for low income farming programs, when in fact the opposite was true, in order to deny McDonald and his wife access to such programs.

11. Failing to adequately respond to numerous complaints lodged by McDonald complaining of mistreatment by USDA.

12. Failing to assign an appropriate established yield on McDonald's crops in the period 1981-1998, despite McDonald's continuing and at least annual requests for the same, despite the fact that McDonald was an award winning corn producer, when similarly situated white farmers such as Vikki Brogdon were able to increase their established yields.

13. Failing to advise McDonald of his rights of appeal in the actions cited above. Petitioners Post Hearing Brief, p. 9-10.

The Agency Position

In addition to asserting that some of the Complainant's allegations are time barred, the Agency position is that it did not discriminate against the Complainant and that the Complainant failed to produce evidence that the Federal Government discriminated against him on any basis.

The Eligible Complaints of Discrimination

Given the limited scope of the waiver of the statute of limitations contained in Section 741, only "the discrimination alleged in an eligible complaint" can be considered as not barred by the statute of limitations. Section 741(a). The term "eligible complaint" is further defined by statutory and regulatory provisions and is confined to those complaints filed before July 1, 1997 and which allege discrimination at any time between the period beginning on January 1, 1981 and ending on December 31, 1996. [24] Section 741(e). Accordingly, even though the record may support a finding of discrimination as to other matters which were not previously alleged in an eligible complaint, without establishing some enabling jurisdictional basis for doing so, only those allegations previously filed during the specified period will be considered in this Decision. Similarly, Petitioner's claims for relief under the Fifth and Fourteenth Amendment to the Constitution and the Civil Rights Act of 1964 fall outside my limited jurisdictional authority as an Administrative Law Judge.

Identification of the specific allegations of discrimination reachable under Section 741 which were made during the pertinent time frame and which the Agency accepted for examination and investigation record can be discerned by examining the two Reports of Investigation contained in the record. While the findings and conclusions contained in the two reports are in no way binding upon either the fact finder or the Secretary, they nonetheless do provide a helpful analysis of the complaints made on two different occasions by individuals charged by OCR with the responsibility of investigating and making findings and recommendations concerning the allegations of discrimination.

[24] *See*, Footnote 14, *supra*.

Autry Slay, an employee of Direct Data, Inc., a contractor for the Office of Civil Rights conducted the first investigation on April 16-18, 1998. Investigative Report, Case Number 970401, April 24, 1998 (Slay Report); D393-406; PX70-71.[25] The Slay Report focused upon whether discrimination was involved in the setting of McDonald's established corn crop yields which are used by USDA in evaluating loan eligibility, disaster payments, deficiency payments and other program benefits. McDonald had actual corn production history of over 100 bushels per acre between 1989 through 1993:[26] however, his established corn crop yield was only 57 bushels per acre, despite his continued efforts to have it increased to a level consistent with his actual production. D405. Statistics and a graph contained in the report compared the average established yields of nine black and nine white corn producers. D406. That study revealed that the average established yield for the black farmers was 58 bushels of corn per acre while the average for the white farmers was almost twice as much at 101 bushels of corn per acre.[27] Without examining the mechanics of how established yields are set, the Slay Report concluded there was merit to the complaint of discrimination and noted that there were many cases where blacks and small farmers went out of business because of inappropriately low yields. D400. It also recommended that McDonald's established yield for his corn crop be increased from 57 bushels per acre to 155 bushels per acre and that he be compensated for a loss of income for a ten year period. D404, PX71.

The second report identified as Docket 1183 was prepared by Philip Newby and Ruihong Guo[28] (Newby/Guo Report) was initiated on

[25] The full Investigative Report for Case Number 970401 in its original form contained tabs A-I and A-F and is found in the Administrative Record. The material previously contained in Tabs G and H has been removed and was not included. It appears that parts, but not all of the full report were introduced by the parties during the oral hearing.D393-404 and PX70-71 are found at Tab E in the original report.

[26] The chart of McDonald's actual production history reflected production of a low of 90 bushels in 1989 experienced after severe losses from Hurricane Hugo to a high of 137 bushels in 1992, with an average of 108 bushels between 1989 and 1993. Tab E3A, D405.

[27] Tab E3B, D406, PX69.

[28] At the time the Newby/Guo Report was prepared, both Philip Newby and Dr. Ruihong Guo were USDA employees assigned to the Office of Civil Rights. Tr. 756, 973-974. Newby still works in that office; Dr. Guo now is the Director of Enforcement, Compliance and Enforcement Division, for the National Organic Program in the Agricultural Marketing Service, USDA. Tr. 970, 973.

October 9, 2002 and completed on January 9, 2003. The Newby/Guo Report identified four allegations of discrimination:

Allegation 1. Whether the complainant was denied EM, FO and OL Loans.

Allegation 2. Whether the complainant's loan applications were delayed.

Allegation 3. Whether the complainant was improperly assigned a low crop yield, which allegedly affected his ability to receive disaster payments and loans.

Allegation 4. Whether the complainant was treated less favorably than White farmers in crop yield assessment. D3, PX-79, p. 3-4

With only minor exceptions, the Newby/Guo Report concluded either that evidence existed that McDonald had been discriminated against or the Agency had failed to meet its burden of proving that there was a legitimate business reason for their action. D13-16, PX-79, p. 13-15. Because of the use of a 1996 version of the regulation (7 C.F.R. §1945.163), the Report erroneously concluded that the February 1984 EM loan denial was improper because the 1996 version, unlike the provisions in effect in 1984, required calculations to be rounded to the nearest whole number. D13-14. It also found that FSA had failed to provide documentation of Mrs. Miller's salary amount and as required by the regulation that governed the county committee's approval authority for outside (non-farm) income for February 1984 OL and FO loans. D14, PX-79 at p.13-14. As to the May 1984 Loan Application and the 1985 Loan Application, the Newby/Guo Report noted that the files provided did not contain documentation of official notice or correspondence explaining why the May 1984 Loan Application was cancelled after being initially approved and no documentation or official notices were provided giving any reason for the denial of the 1985 Loan Application. D14, PX-79 at p.14.

With respect to the allegation that McDonald's loan applications were delayed, the Newby/Guo Report concluded that while the February 1984 application for services was acted upon in a timely manner, action on the 1985 and 1986 applications were delayed.[29] D15-16, PX-79 at 15-

[29] Delay in processing loan applications of black farmers was noted in the CRAT Report which found that in several Southeast States, it took three times as long on average to process African-American loan applications as it did for nonminority applications. CRAT, p.21. The Report also noted that "[b]y the the processing is

16. Similar to the Slay Report, the Newby/Guo Report, without examining the process by which established yield were set, concluded that McDonald had been assigned an improperly low established corn crop yield. D16, PX-79, p. 16. Consistent with the prior allegation, it also concluded that McDonald was treated less favorably than white farmers in the assignment of established corn crop yield. D16.

Member of a Protected Class

The Agency has conceded that the Petitioner as an African-American or black farmer is a member of a protected class. Agency Post Hearing Brief, p. 19.

The 1984 Emergency (EM) Loan

On February 13, 1984, Charles McDonald and his brother Richard Miller applied for, but were denied an EM loan. D437, PX-17. To be eligible to qualify for such a loan, the applicant must have: (1) been a United States citizen; (2) been an established farmer; (3) been farming in a designated disaster area; (4) have suffered a 30% production loss; (5) possessed legal capacity; and (6) intended to keep farming. 7 C.F.R. §1945.163(2)(v)(1984); D1742.

The application for the McDonald/Miller EM loan was denied on the grounds that McDonald and Miller had not sustained a 30% production loss. Two calculations were made of the production loss sustained by McDonald and Miller. D153-157, 418, PX-13. Although both were signed, the first Form FmHA 1945-26, Calculation of Actual Loss dated February 13, 1984 appears to have been superseded by the second which computed the loss at 29.61% and was dated March 15, 1984.[30] *Id.* The provisions of 7 C.F.R. §1945.163 in effect during 1984

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completed, even when the loan is approved, planting season has already passed and the farmer either has not been able to plant at all, or has obtained limited credit on the basis of an expected FSA loan to plant a small crop, usually without the fertilizer and other supplies for the best yields. *Id.* at 15. Similarly, the Inspector General's Report, *Minority Participation in Farm Service Agency's Farm Loan Programs-Phase II*, September 1997 using FSA's APPL Data Base reflected processing times of an average of 40 days for White farmer applications, but 56 for African-American farmers. USDA/OIG-A/508-1-3-Hq, p.27.

[30] The Newby/Guo Report concluded that the computation should have been rounded to the closest whole number based upon a 1996 version of the regulation. Had that

established three prioritized alternative methods for making the Calculation of Actual Loss with reliable actual production records using the best four of the prior five years immediately preceding the disaster year being given first priority. 7 C.F.R. §1945-163(a)(1)(i), Tr. 1146, D1740. The second priority was given to established yields and the third and last priority was the use of County or State crop yield/acre averages. 7 C.F.R. §1945.163(a)(1)(ii-iii), D1740. Although a FmHA Form 1945-22 was completed in connection with the application, only entries for the disaster year were made rather than completing the entire form as is provided in the regulation.[31] Tr. 1146, 1619, D149, 1739-1746. Examination of the FmHA Form 1945-26 and the testimony given during the hearing reflects that a county average of 85.4 bushels per acre was used rather than the farm's actual production yields for the best four of the five years prior to the disaster year.[32] Tr. 1150, D153-154, D156-157, 418. The use of the county average of 85.4 bushels of corn per acre clearly was more favorable to McDonald and Miller than a use of their established yield of only 57 bushels of corn per acre would have been in making the calculation; however, the failure to use the actual production yields of over 100 bushels of corn per acre for the farm, if such proof existed,[33] even after deduction for program payments or disaster payments, potentially denied McDonald and his brother the EM loan for which they had applied. In denying the loan, the Agency articulated a legitimate non-discriminatory reason for the denial of the EM loan which was consistent with the permissible alternatives set forth in the

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provision been in effect, based upon the computation as made, the EM loan should have been approved. No rounding up provision language was found in the 1984 version of the regulation.

[31] No running record entry explains the incompleteness of the form. Sidney M. Brown, Jr. testified that in the 1980s, actual production yields should have been used. Tr. 1619. He also testified that it was his duty to help applicants complete the forms. Tr. 1645-1646.

[32] No specific testimony was given as to McDonald's actual corn crop yields for the years 1979 through 1983.

[33] *See*, Tr. 236; however, McDonald conceded that there were a number of hot dry years in the early 80s, so actual production yields for the average of the best four of five years prior to the disaster year could have been less than the 100 bushel per acre average McDonald suggested. In 1984, USDA calculated his corn yield at 125.8 bushels per acre. PX-28.

regulation.[34] Tr. 1239-1240. One may speculate whether a more favorable result would have resulted from the use of actual corn production yields or whether the county officials charged with helping him during the application process failed to explain to McDonald because of his race the option of using or proving his actual corn production yields for the prior years during a period when he was eligible to do so; however, the record falls far short of establishing either.[35] Accordingly, the Petitioner failed in his burden to establish that he was eligible for the loan or that the reasons advanced for the denial were pretextual.

The February 1984 Operating (OL) and Farm Ownership (FO) Loans

On February 13, 1984, Charles McDonald signed a FmHA Form 410-1 Application for FmHA Services on behalf of himself and wife Edna McDonald. D134-135, M136-137, PX-12. On the same day, his brother Richard Miller also signed one on his own behalf and that of his wife Madgelene Miller. D413-414, D429-430, PX-15. McDonald and Miller also signed a third FmHA Form 410-1 as partners. D136-137, M134-135, PX-10. The running record entry for that date acknowledges that both individual and the partnership applications were submitted. D129, 1325. For reasons that are not documented, FmHA took no action on the individual applications and the County Committee made an adverse determination only as to the **partnership's** eligibility for operating (OL) and farm ownership (FO) loans.[36]D158, 447-448, PX-17. As part of the application process, McDonald and Miller executed a FmHA Form 431-2, Farm and Home Plan for the partnership.[37] D145-148, PX-11. Section J, Line 10 on the fourth page of the Plan lists Non-Farm Income as being $26,400.00. D148. A Verification of Employment form returned by Edna McDonald's employer indicated that her income for the past year had been $15,949.00 and that her salary for 1984 would

[34] Although the use of the county average was the third alternative method, it nonetheless was a permissible figure to use and was more favorable than McDonald's established yield. *See*, 7 C.F.R. §1945.163(a)(1)(i-iii).

[35] Mr. McDonald's testimony only indicated that the county officials completed the forms and computed the loss. Tr. 275-276, 488-489.

[36] The running record noted that the land was separately titled. D129,1325.

[37] Although McDonald and Miller provided information for the form, the testimony established that FmHA filled the form out. Tr. 275-276, 1617.

be $17,052.00. D139, M1934, PX-13. Although no Verification of Employment form appears to be in the record for Mrs. Miller, the separate application submitted by the Millers dated February 13, 1984 indicated that Mrs. Miller was employed by Campbell Soup Co. and that her estimated salary was $11,800.00. D413, PX-15. As the income limit for such loans in Clarendon County had been set by the County Committee at $18,000.00, even if there had been no farm income, the income of the two wives exceeded that amount and the County Committee properly determined that under the partnership application, McDonald and his brother were not eligible for the loans.[38] D158, 447-448, PX-17.

While FmHA's actions resulting in an adverse determination are initially entitled to a presumption that the actions taken were done in good faith and strictly on the basis of the numbers themselves without considering any other motivation,[39] the disinclination to effectively assist McDonald and his brother amounted to discrimination which can be inferred where there is no indication in the record that County officials ever suggested that the applicants would meet the eligibility requirements if they dissolved the partnership and applied separately as individuals as was suggested or required elsewhere by FmHA in granting loans to

[38] The County Committee was required by 7 C.F.R. §1943.12(a)(4)(ii)(1984) to estimate typical income for successful residents in the area. No evidence was introduced as to whether the limit set for Clarendon County was consistent with or differed from surrounding counties in South Carolina.

[39] Although the majority of Clarendon County's population is Black or African-American (http://en.wkipedia.org/wiki/Clarendon_County,_South_Carolina), the number of black farmers has declined dramatically. Hezekiah Gibson testified that when he was in high school, there were as many as 250 black farmers; however, by 1979, that number had declined to about 100 and by 2010 was only around 10. Tr. 645. Gibson also commented on the financial pogrom practice of white farmers "putting the squeeze" on black farmers and indicated that the general attitude toward black farmers was that if you [as a black farmer] had a piece of land that was producing good, they would come after it. Tr. 646, 654. The CRAT Report also noted this decline, indicating that in 1920, there were 950,000 minority farmers, but only 60,000 in 1992 and documented the commonly held perception that USDA was a partner in the taking of minority farm land. CRAT Report at 14-16. Clarendon County's history also includes being the location involved in *Briggs v. Elliott*, the first filed of the four cases combined and decided as *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954). McDonald testified that "a few, not all, a few who were in charge---would do something…they destroy a lot of black families. Tr. 365-366.

white farmers.[40] *See, In re Robert A. Schwerdtfeger*, 67 Agric. Dec. 244, 249 (2008). Taking into account the totality of the evidence and finding evidence of a pattern of discrimination which was not rebutted, I find that the Petitioner has met his burden concerning this allegation.

The [May] 1984 Farm Ownership (FO) Loan

Although the record is unclear as to the date of the application, Charles McDonald applied a second time for a Farm Ownership (FO) loan in 1984.[41] An FmHA loan in the amount of $45,500.00 was approved by the County Committee on May 16, 1984 and the funds were obligated on May 24, 1984.[42] M140, PX-19-20. Undated Closing Instructions were sent to W.C. Coffey, Jr. referencing his preliminary title opinion dated June 20, 1984. M-1901-1902, PX-23. A Notification of Loan Closing dated July 18, 1984 was sent to McDonald; however, when he went on the scheduled date to the lawyer's office for the closing, he was informed that the loan had been cancelled, the loan check was cancelled and had already been picked up by the County office and the loan was not extended during 1984. Tr. 286, M1903, PX-25.

Notwithstanding these events, it is clear that enhanced Congressional interest and continued scrutiny by both Senator Strom Thurmond (then the President Pro Tempore of the Senate) and

[40] Although USDA employees routinely filled out forms and testified that they considered it their duty to assist applicants, the assistance provided to Charles McDonald appears to have been perfunctory. *See*, Tr. 275-276, 1617, 1645-1646.

[41] In the Agency's Post Hearing Brief, the Agency suggests that this application was made in 1985; however, the Newby/Guo Report made reference to a FmHA Form 440-2 dated May 16, 1984 indicating that McDonald was eligible for a FO loan and concluded that because of the lack of documentation in the agency records of any 1985 application that "It is highly possible that this refers to the "previously submitted loan application" mentioned in FmHA's letter to Senator Thurmond on October 29, 1984. PX-79, p 9. Clarence Ropp testified that his examination of the file did not reflect a 1985 application and that to the best of his recollection the application was made in 1984. Tr. 1157-1158.

[42] The amount approved of $45,500.00 is a significant reduction from the $285,500.00 of needed capital set forth in the 1885 Farm and Home Plan. Tr. 275-276, PX-10. The Certification Approval indicated joint participation by FmHA with South Carolina Rural Rehabilitation (SCRR) with that entity providing an additional $50,000.00. SCRR was to have the first lien and FmHA the second. PX-20. The running record account note date June 4, 1984 indicated that SBA would maintain third lien priority. PX-21.

Congressman Robin Tallon of South Carolina both of whom contacted Farmers Home on McDonald's behalf,[43] in October of 1984, the loan application was reactivated and McDonald was sent a letter telling him to make an appointment with the Acting County Supervisor to discuss his loan application. D38. On April 1, 1985, Mr. McDonald was advised that his loan application had been favorably considered. PX-32. A letter to Congressman Tallon dated April 4, 1985 from FmHA's State Director verified McDonald's statement that the Small Business Administration (SBA) had verbally agreed to subordinate in January of 1985, but indicated that FmHA could not process the loan until they had their agreement "in writing."[44] D39, M1907, PX-33. In writing to Mr. McDonald on April 10, 1985, Congressman Tallon indicated that he would request that SBA issue the letter of subordination and would forward it when received. D40, M1906. In the meantime, McDonald had been told that the FmHA office was busy processing the applications of other farmers and they didn't know when they could get to his. Tr. 293. As the file reflects no subsequent action, it is unclear what transpired after April 10, 1985; however, it is clear that despite FmHA's assurances, the loan was never made and McDonald was experienced a significant farm loss for 1985. Tr. 290-293. PX-29A. White farmers however did receive loans. Tr. 293.

In looking at FmHA's actions concerning this loan, I have considered (1) the lengthy delay on the part of FmHA of better than a year after initially advising the Petitioner of his eligibility for the loan; (2) FmHA's assurances giving the applicant repeated reason to believe that the much needed loan would be made; (3) FmHA's patently unacceptable excuse that they were busy with other farm loans; (4) the documented willingness of another government entity to subordinate

[43] McDonald wrote Senator Thurmond on October 9, 1984 concerning the recall of the loan. D34, PX-29. A letter from the State Director to the Senator dated October 26, 1984 indicated that the Clarendon County Supervisor would be contacting Mr. McDonald in an effort to work something out. D37 PX-29, p. 4. McDonald again contacted the Senator in June of 1985 indicating that SBA had agreed to subordinate their lien, but that the loan still had not closed even though it was six months into the planting season because the County Office was busy with other farm loans. D41-42, M1908-1909, PX-33.

[44] Although Clarence Ropp testified that FmHA had no responsibility to secure the subordination, typically the closing attorney would have taken care of this for the borrower if that were a requirement for closing. *See,* Tr. 1161 The record documents that SBA was willing to subordinate and no reference has been made to any contrary position. D39, 41-42, M1907-1909, PX-33.

their lien position to FmHA; and (5) the concurrent other adverse actions taken against McDonald.[45] The evidence persuades me that county officials were intentionally seeking to esuriently compromise Charles McDonald's financial condition and that each of the four elements of a *prima facie* showing of discrimination concerning this loan was established. The Agency's explanation of the reason(s) for denial in this instance is unworthy of credence and cannot be accepted as a benign race neutral denial based upon legitimate program practices. As a result, I will find that the Petitioner has met his burden concerning this allegation.

The 1986 Application of Edna McDonald

Even assuming *pro arguendo* that the Petitioner has standing to allege discrimination on his wife's behalf (*See, e.g., Dow Chemical Co. v. Schaefer Salt & Chemical Co.* 1992 WL 672289 *17 (.N.J. July 21, 1992)), the record amply reflects that Mrs. McDonald's was not eligible for a farm loan as she was a full time teacher not actively engaged in farming, was unacquainted with the farm's finances, and failed to complete the application process. Tr. 1267-1270; *See,* 7 C.F.R. §1910.4(a)(1984).

The Established Crop Yield

Charles McDonald's established corn crop yield was addressed in both Investigative Reports[46] and is relevant to his eligibility for the EM loan. Examination of this allegation requires review of both the method of assigning established crop yields and whether, as applied, the method used resulted in discriminatory treatment of black or other minority farmers. D1-16, 393-406, PX-70-71. At the hearing, Agency witnesses testified that established yields were established initially by the County Committee and approved by the ASCS District Director. Tr. 1660. The testimony indicated that the "established yield" was the result of a calculation that took into account the year in which an individual began

[45] Two weeks after meeting with William Duncan, in June of 1984, McDonald' interest credit benefit which had been expected to run for two years was reviewed and terminated the following month. PX-22, 24. During the hearing, the Agency witness, Michael Feinburg, conceded that the regulation was not properly followed. Tr. 1559.

[46] The established corn crop yield was the sole issue in the Slay Report and is addressed in the last two of the four allegations in the Newby/Guo Report.

farming, the historical production of the farm, and a comparison of that farm with three similar farms in the same county with an averaging of the existing yields for five years for the same crop on those three farms. Tr. 1658-1659, D1840-1844, 1851. In cases (such as McDonald's) where the property was inherited, any previously established yield passed to the individual inheriting the property.[47] Tr. 465, 1689; D66, 70. Once an established yield was assigned to a tract of land, it became tied to the land so that subsequent owners had the same established crop yield unless the farmer proactively seeks to have his or her yield increased during a window of time in which increases are allowed. Tr. 1663.

The testimony introduced during the hearing established that farmers were permitted during limited windows of time as set forth in specified "Farm Bills" to provide documentation to ASCS (later FSA) to demonstrate that their actual yields were higher than their established yields by submitting five years of weight tickets, other proof of production, or ASCS forms 578 and 658 within established deadlines. The Agricultural Adjustment Act of 1980 allowed producers to prove their yields from 1981-1985. Tr. 1664, D1869, 1918-1928. In similar fashion, the 2002 Farm Bill allowed producers to prove their yields for 2003. Tr. 1671, 1676, D1824-1832. McDonald testified that he had supplied the Agency with the requisite weight tickets to increase his yields during the period when the Farm Bill did permit yield changes, but the Agency claimed to have no records of him having done so and his established yield remains at a level well below his actual product even today despite Agency awareness of his actual yields being considerably higher than his established yield. Tr. 466-469. The evidence before me further indicates that while a number of white farmers succeeded in increasing their yields, no black farmer was identified as having increased his or her established yield. Tr. 128, 139, 647-649. Clearly, the Agency could have presented evidence of Clarendon County black farmers having successfully increased

[47] Charles McDonald inherited his yield of 57 bushels per acre when he inherited the land from his father. As corn crop yields improved dramatically over time, the use of historical production data while facially affecting all farmers disproportionately adversely affected black farmers who inherited their land and must be regarded as a major factor in the declining number of farms owned by black farmers.

their established crop yields from appropriate ASCS records; however, the failure to do so lends additional credence to the validity of this allegation.

Despite the blithe Agency aeolian assurances that the procedures for assigning established crop yields are completely race neutral provisions which result in all farmers being treated equally, the comparison of the established corn crop yields of black and white farmers appearing in the record before me reflects that in practice despite the facial neutrality of the provisions black farmers were assigned established yields of roughly only half of those assigned to white farmers. Tr. 633-634, 644, PX-69. Without addressing the question of whether the method of computing established yields had any rational relationship to its intended purpose or whether proffered records were intentionally misplaced, lost or destroyed, given the ability of an all white County Committee to select the three comparable farms in the same county used in making the computation, it is clear that an established yield for a farm could be manipulated either up or down by the Committee without significant risk of detection by the ASCS Director during his review. The impact magnitude of the disparity is significant and in the absence of a persuasive explanation or comprehensive analysis of the established corn yields of all farmers in Clarendon County, South Carolina to account for such a difference, the conclusion that race was the predominant differentiating factor in creating a disparate impact upon black farmers including the Petitioner cannot be escaped.

Difficulties Confronting the Petitioner

Although the alleged violations in this case occurred as early as 1984 and subsequent years, more than twenty years have elapsed before it proceeded to a point when it could be heard. In that period with the passage of time, memories fade, witnesses retire, move, disappear, become infirm or expire, and if available, are likely to have diminished endurance for extended examination or cross examination during a hearing. More importantly, documentary evidence which might have existed near that time of any alleged violation may become unavailable.[48]

[48] During his testimony, Clarence Ropp commented that the files that he had reviewed were very incomplete and documents which normally would be included were

As noted earlier, the Petitioner has the burden of establishing a *prima facie* showing of discrimination. In doing so, Petitioners, including McDonald, start at a severe disadvantage as there is no provision for the use of discovery through subpoena power under the Rules of Practice applicable to these proceedings. I relied upon Agency counsel to act in good faith in the various document exchanges, but it is not clear that Petitioners were provided with copies of the entire administrative record in the possession of Agency Counsel. Although the administrative record in this case is voluminous,[49] it is also obvious that documents in existence at the time of the alleged violations and at the time of the respective investigations are no longer included in the Investigative Reports appearing in the administrative record even though they once were included and referenced in certain of the narrative portions. Preparation of a case of this type is difficult enough when virtually all of the records required remain in the exclusive control of the Government. Some records which may have been of some significant benefit to the Petitioner were routinely disposed of by the Agency in the ordinary course of business after the passage of what was considered the requisite period of time.[50]

The purpose of a hearing in cases such as this is to determine the truth and to achieve Justice, with both sides aggressively representing their respective clients within the structure provided. Differences of opinion are always to be expected and Agency counsel are required and expected to aggressively defend their client. In so doing, they may strike hard blows; however, as noted by the Supreme Court, they may not be foul ones. *United States v. Berger*, 295 U.S. 78, 88 (1935). In avoiding any approach to that line, it is helpful, if not essential, to constantly maintain focus on the purpose of the hearing rather than seeking to achieve some procedural or tactical advantage at any cost. This sense of judicial fairness is particularly applicable given the limited financial resources of individuals such as the Petitioner who have to compete

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not there. Tr. 1139-1144. He also indicated that the files should have been maintained "forever." Tr. 1202.

[49] Due to the parties' inability to agree upon a joint record, unnecessary duplication, triplication and even quadruplication of some exhibits occurred as some exhibits appear in each of those tendered by the Petitioner in their volumes of exhibits, the Petitioner's tabbed volume intended for use during the hearing and the Government's volumes.

[50] Clarence Ropp testified that there was no way to tell whether any documents had been added or taken out. Tr. 1198. He did indicate that the files were very incomplete and that retention policies should have precluded them from being destroyed. Tr. 1139, 1202.

against the enormous resources of the United States Government. While permitted under the applicable Rules of Practice, but considering the Petitioner's onerous burden of persuasion: (1) the extensive record, but now incomplete, record already generated in the prior investigations of the discrimination allegations; (2) the filing of the type of prehearing motions in this case (some of which were filed in rapid succession without the normally allotted time to allow the Petitioner to reply) seeking prehearing discovery; (3) objections to extensions of time sought by the Petitioner to identify witnesses; (4) motions to limit the scope of the hearing; and (5) motions to preclude the testimony of certain witnesses on technical and procedural grounds,[51] served more to adding to the difficult burden faced by Petitioner and his counsel than for any other purpose.

Of particular concern in this regard was the thinly disguised intimidating oral Motion by Government Counsel on January 14, 2010 objecting to the testimony of Hezekiah Gibson, made in his presence, on the proffered basis that his testimony would somehow violate the terms of the *Pigford* Consent Decree and that counsel would be required to report him to the Department of Justice.[52] Tr. 612-620. My reading of the identified paragraph of the Consent Decision failed to discern any such prohibition and to Mr. Gibson's credit, he remained undeterred and testified.[53] Tr. 612-751.

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[51] In one Pre Hearing Motion, Government Counsel objected to the testimony of Petitioner's wife and to the authors of the Newby/Guo Report. Docket Entry 20.

[52] Paragraph 20 of the Consent Decree reads:

20. No Admission of Liability Neither this Consent Decree nor any order approving this Consent decree is or shall be construed as an admission by the defendant of the truth of any allegation or the validity of any claim asserted in the complaint, or of the defendant's liability therefore, nor as a concession or an admission of any fault or omission of any act or failure to act, or of any statement, written document, or report heretofore issued, filed or made by the defendant, not shall this Consent Decree nor any confidential papers related hereto and created for settlement purposes only, nor the terms of either, be offered or received as evidence of discrimination in any civil, criminal, or administrative action or proceeding, nor shall they be construed by anyone for any purpose whatsoever as an admission or resumption of any wrongdoing on the part of the defendant, not as an admission by any party to this Consent decree that the consideration to be given hereunder represents the relief that could be recovered after trial. However, nothing herein shall be construed to preclude the use of this Consent Decree in order to effectuate the consummation, enforcement, or modification of its terms. D1627-1628.

[53] Mr. Gibson's testimony described the delay experienced by black farmers when they visited the County Office, the dramatic decrease in the number of black farmers in the county from the 1980s to present and provided an account of the Clarendon County

Over the course of the hearing, although it certainly could have done so, the Agency made no effort to provide an objective overview of the operation of the Clarendon County, South Carolina FmHA and ASCS Offices showing the number of borrowers or program participants, the type of loans or programs, the race of the recipients or participants, the processing times for the respective applications and similar information to establish competent and material evidence that equitable treatment of all applicants had been provided. Such information being beyond the reach of the Petitioner without subpoena power, it was readily apparent that witnesses for the Agency were given only selective access to the Petitioner's file upon which to base their testimony. While it is possible that their review included all necessary and relevant documents, selective disclosure of records showing some, but not all of the facts, can easily have altered or distorted the opinions that were ultimately given.

Damages

7 C.F.R. §15f.24 provides where an Administrative Law Judge makes a proposed finding of discrimination, he or she will recommend an award of such relief as would be afforded under the applicable statute under which the eligible complaint was filed. Section 706(a) and (b) and 702(g) of the ECOA provide that creditors that violate the Act or the regulation are subject to civil liability for actual damages suffered by the individual. 15 U.S.C. §1691e. Actual (not punitive) damages are compensation to the injured party for losses sustained as a direct result of the injury suffered and are intended "to make persons whole for injuries sustained on account of unlawful discrimination." *Albemarle Paper Co. v. Moody,* 405 U.S. 405, 418 (1975).

As discussed by Administrative Law Judge Constance T. O'Bryant in *In re: Will Sylvester Warren*, there are two categories of actual or compensatory damages: tangible and intangible. Tangible damages include economic loss. Intangible damages include compensation for other less quantifiable elements of damage, including emotional distress; pain and suffering; injury to personal and professional reputation; injury to credit reputation; mental anguish, humiliation or embarrassment; impairment of reputation or standing in

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Office's retaliatory action being taken against him when he publicly made comments critical of them. Tr. 693. Not surprisingly, the official identified by Mr. Gibson also has entries appearing in the McDonald file.

the community, personal humiliation, and mental anguish and suffering; and intentional infliction of emotional distress. *Warren*, USDA Docket 1194, HUDALJ No. 00-19-NA, December 19, 2002 *Slip Opinion* at 22-23; Tab 40, Agency Post Hearing Brief (citations omitted).

As a result of USDA's discrimination against him, Charles McDonald suffered a loss of income from his farming operations. Following the discriminatory treatment by USDA, he was foreclosed upon, title to land that had been in his family for over 100 years was lost,[54] his equipment was sold at a forced sale, and he never was able to resume farming on the scale previously done, with a corresponding loss of income. Tr. 232, 363, 369, 374-375, 378.

Although testimony calculating Charles McDonald's tangible economic damages was provided by economic experts from both sides, the opinion of neither expert can be fully accepted without modification. As might have been predictable, the opinions of the experts differed significantly, with a large damages figure provided by the Petitioner's expert and a relatively small negative figure advanced by the Agency.

Charles W. King,[55] who testified on behalf of Charles McDonald, prepared both an initial report dated February 15, 2000 and a shorter supplemental report dated December 30, 2009. In the first report, using McDonald's 1985 Farm Plan as a starting point and extrapolating its anticipated profitability over future years with certain adjustments, he estimated McDonald's past economic damages as being $2,349,479 and his future economic damages, reflecting the loss of future income earning capacity, as $1,001,036, which he then translated to $3,350,515 in year 2000 dollars. PX-68, M34-50. In the later report, King extended his projection of damages through the year 2016 based upon McDonald's statistical life expectancy with a variety of other factors substantially increasing the estimate of McDonald's economic loss. PX-80. In calculating the damages after 1998, King assumed that the level of damages since 1998 would track the overall profitability of South Carolina farmers up to the most recent year for which data was available. The 1998 figure was based upon an average of the five preceding years.

[54] McDonald was able to purchase approximately 40 acres of inherited land which had been owned by his brother; however, title to the tract that he had inherited was lost. Tr. 232, 374-375, 378.

[55] The February 15, 2000 Economic Damage Summary was prepared by Mr. King when he was the President of the economic consulting firm of Snavely King Majoros O'Connor & Lee, Inc. located in Washington, D.C.

To develop a projection of the future damages, King averaged his damages for the five years 2004-2008 to be a forecast of the 2009 damages which were increased by compounding the Congressional Budget Office's projections of Gross Domestic Product Price Deflators. Further factors used by the Office of Management and Budget were then applied for computing the present value of the economic damages. Using those factors, King indicated the present value of McDonald's tangible economic damages were $7,574,495. PX-80.

John E. Jinkins, the economic expert testifying for the Agency has better than twenty years of experience as an economist with USDA and holds a Ph.D. in Agricultural Economics from Texas A. & M. Tr. 1981, 1985-1986. He testified that in his opinion the King analysis very much overstated the earnings that McDonald's operation could have been expected to produce and that the report contained numerous errors of analysis throughout its content. Tr. 1994. Jinkins testified that much of the overstatement was the result of a number of adjustments which were made in the King Report. Tr. 1996. According to his review, the King Report started with publicly available crop yields and increased them based upon assumptions made in two Farm and Home Plans (December of 1984 and January of 1985). Tr. 1998-1999. Using the potential yields for 1985 that never happened (due to the discrimination that I have found) or were ever proved, the report adjusted the yield projected for the McDonald farm upward from that point on by a factor of 12 to 15 percent,[56] a decision which Jinkins considered very arbitrary. Tr. 2004-2005, 2014. Jinkins also faulted the use of the Five Year Moving Average which had the effect of smoothing out the lowest of the lows and the highest of the highs. Tr. 2018. Dr. Jinkins found that the assumption that profit would be achieved in each year was not typical of any farm growing crops, particularly during a period which he characterized as the worst economic conditions in American agriculture since the 1930s.[57] Tr. 2023, 2072.

[56] Oats were increased by 227%. Tr. 2016. Oats were however not considered a significant factor in the McDonald operation. Tr. 2016-2017. King attempted to justify the multiplier based upon the fact that McDonald was a better than average farmer.

[57] Examination of PX-68, M44, and Charles McDonald's available tax returns lends some credence to the testimony as McDonald did experience significant losses during a number of the later years even farming on a reduced scale.

In addition to the overstatement of income,[58] Jinkins also criticized the expense projections as failing to include additional labor costs which should be incurred in the transition from a partnership to a sole proprietorship, failing to include provisions for the repayment of indebtedness, and failing to address or understating other expenses which he felt should have been included. Tr. 2047, 2049, 2055, 2058-2063, 2066-2069. His calculation based upon methodology of gauging profitability over the years using USDA data including average production costs and average yields, prices and government program payments included assumptions including an amortization of debt of nearly $400,000 weighted heavily in the first ten year period and inserting an allowance for machinery replacement concluded that the McDonald farming operation would have lost $42,579.07 through 2009.[59] D1592-1593.

In light of the available data before me including those available tax returns and the listing of his actual earnings which appears in the King Report, USDA's more conservative approach projecting some losses has some degree of validity, but in light of assumptions made by Dr. Jinkins, it cannot be fully accepted as an accurate projection of McDonald's farm operation's income generation for years after the initial 1985.[60] USDA expert's computation and projection of expenses becomes less appropriate with its use of front loading of debt service in excess of the required annual payments and the inappropriate inclusion of principal in the computation both of which served to present an overly pessimistic picture. Further, USDA's reliance on model averages for equipment replacement and land rental rates while consistent with the rest of their methodology is misplaced as the expenditures for those categories can vary significantly based upon personal practices and the relationship between the lessor and the lessee.[61]

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[58] Although Jinkins generally criticized the report as overstating income, he made note of its failure to include any income from government programs during the years in which the payments would have been available. That omission in his view "demonstrated to us that perhaps they didn't have a very fundamental understanding of agriculture in that period." Tr. 2064.

[59] This same methodology was rejected in the *Warren* decision. *Warren, supra, Slip opinion* at 26.

[60] The 1985 projection while possibly optimistic was prepared with FmHA's collaboration and will be accepted for the purpose of calculation.

[61] The judge in the *Warren* summarily rejected the average model methodology to project income and expenses. *Warren, supra* at 26.

To the extent that the two damage estimates can be reconciled, the schedules of both reflect some level of income over budgeted expenses. As I will confine the tangible portion of my award only to past economic damages, without the adjustment suggested by Charles King for what otherwise would amount to prejudgment interest, I find that Charles McDonald sustained a loss of income of seven hundred seventy-five thousand dollars ($775,000.00).[62] *See, Moore v. USDA*, 55 F.3d 991 (5th Cir. 1995)

Neither economist addressed the intangible damage inflicted by the loss of McDonald's interest in the approximately 483 acres of family land and the equipment that was foreclosed upon and lost as a result of the Petitioner's inability to timely secure necessary credit due to FmHA's discriminatory conduct.[63]Tr. 371. It is clear that while Charles McDonald continues to be well regarded in the community, the testimony amply established that as a result of the discrimination, he suffered significant emotional loss and distress, personal humiliation, the adverse stigma of having taken bankruptcy, and the loss of self esteem and pride by being forced to be dependent upon his wife's income for living expenses and to raise his family. Tr. 61-62, 66-67, 77-79, 81-84, 182, 346-348, 363-367, 369-371, 501-502, 514-515. Both Charles and Edna McDonald were credible witnesses. That Mr. McDonald continued to persevere as a farmer despite the obstacles placed in his path while most others quit and at the same time raised the type of upstanding sons that the record establishes[64] reflects a strength of character that lends additional credibility to his testimony and that of his wife concerning the effect that the discriminatory treatment had upon him.

In similar cases, judges have used two methods to calculate intangible damages. In one method, the judge will assign values to specific components of intangible damages, with so much for loss of reputation and another figure for emotional distress and so on. The preferable method, which I will adopt, is to apply a multiplier to the amount of the tangible damages to arrive at an appropriate figure for the

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[62] Rather than attempting a detailed independent calculation, the figure represents a balance between the two extremes advanced by the experts.

[63] Charles McDonald was able to purchase approximately 40 acres of the land formerly owned by his brother. Tr. 378. The desirability of the land can be inferred from the exceptional yields achieved by McDonald during certain years and from Charles McDonald's testimony that white farmers owned all of the land around him. Tr. 220, 239.

[64] The McDonald's son Charles is a Marine and has served in Iraq. M1870.

intangible damages. In the recent case of *In re Wilbur Wilkinson, ex rel. Ernest and Mollie Wilkinson*, 67 Agric. Dec. 241 (2008), Judge Victor W. Palmer, a former Chief Judge for the Department, followed that approach and applied a multiplier of two and a half to the amount of tangible damage award.[65] *Wilkinson*, at 244. Given the facts in this case, I feel that a multiplier of two and a half is also appropriate in this case rather than the factor of four to five which is routinely suggested in other cases. Accordingly, I recommend an award of one million, nine hundred thirty-seven thousand five hundred dollars for intangible damages, or a total of two million, seven hundred twelve thousand, five hundred dollars for both tangible and intangible damages.

Based upon the testimony of the witnesses testifying at the hearing and upon the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

FINDINGS OF FACT

1. The Petitioner in this case, Charles McDonald, is a black farmer who resides with his wife Edna McDonald in Manning, Clarendon County, South Carolina. Tr. 32, 233.

2. On February 13, 1984, McDonald and his brother Richard Miller each made both an individual and a partnership application (FmHA Forms 410-1) for FmHA services by applying to the FmHA County Office in Clarendon County, South Carolina for Operating, Farm Ownership and Emergency loans. D134-137, 423-414, 429-430, M134-137, PX-10,12,15.

3. As part of the application process, the applicants and their wives provided the information necessary to complete FmHA Form 431-2 Farm and Home Plan and Verification of Employment forms were sent to their wives' employers. In Section J, line 10 of the Farm and Home Plan, the non-farm income was filled in as $26,400.00. D148.

4. The Verification of Income form completed on February 22, 1984 by the Clarendon School District indicated that Edna McDonald's base

[65] Judge Palmer had been urged to use a factor of 4.687; however, he rejected that as excessive. Judge Palmer's decision was reversed by the then Assistant Secretary for Civil Rights Margo McKay on other grounds. 68 Agric. Dec. ____ (2009) Wilkinson's subsequent Petition for Writ of Mandamus was dismissed without prejudice. *Wilkinson v. Vilsack*, 666 F. Supp 2d 118 (D.D.C. 2009).

pay for the coming year was $17,052.00 and that her income for the past year was $15,949.00. D139, M1934, PX-13.

5. The separate application completed by Richard Miller and Madgelene Miller, his wife estimated her income from Campbell Soup Co. at $11,800.00. The file no longer contains a Verification of Employment form for Mrs. Miller.D413, PX-15.

6. The Clarendon County Committee had established $18,000.00 as the amount of income which could not be exceeded in order to be eligible for FO and OL loans for 1984. D158, 447-448, PX-17.

7. Based upon the information contained in the applications, the County Committee denied the partnership application of McDonald and Miller for FO and OL loans on the basis that the combined income of their wives exceeded the $18,000.00 limitation set for such loans. FmHA did not process the individual applications or offer or suggest to McDonald and Miller the option of dividing the partnership even though as individuals they would have come within the eligibility threshold and that option and suggestion was given to white applicants elsewhere.

8. The application process for EM loans requires completion of FmHA Forms 1945-22 and 1945-26. FmHA form 1945-22 allows for entries to be made for the production yield during the disaster year and for actual production yields in each the five preceding years. D149. The FmHA Form 1945-26 is used for the computation of the actual loss which is expressed as a percentage. D156-157, 418.

9. In completing the FmHA Form 1945-26, the regulation governing its completion established three prioritized types of yields that could be used for the purpose of the computation, including reliable actual production yields over a five year period dropping the lowest year's production, the established yield set by the ASCS Office, or the County or State averages. 7 C.F.R. §1945.163(a)(1)(i-iii), D1740.

10. In making the calculation of Charles McDonald's loss, only entries for the production yield for the disaster year were entered on the FmHA Form 1945-22 and in completing the FmHA Form 1945-26, the average County yield of 85.4 bushels of corn per acre was used which was higher than McDonald's established yield of 57 bushels of corn per acre. D149, 156-157.

11. Two FmHA Forms 1945-26 appear in the record, with the later calculation appearing to have superseded the first which was made at an earlier date. The resulting calculated percentage was 29.61% which was less than the qualifying threshold of 30% or more. D153-154, 156-157.

12. As the computed percentage disaster loss was less than 30%, the County Committee determined that McDonald and Miller were ineligible to receive an EM loan. D158.

13. Subsequent to February of 1984 and believed to be sometime in May of 1984, Charles McDonald made application the Clarendon County Office of FmHA for a FO loan. Tr. 1157-1158.

14. The County Committee for Clarendon County approved McDonald as being eligible for a FO loan in the amount of $46,500.00 on May 16, 1984 and the funds for the loan were obligated on May 24, 1984. Undated Closing Instructions were sent to W.C. Coffey, an attorney who was to handle the closing which referenced his preliminary title opinion dated June 20, 1984. A Notification of Loan Closing was sent to McDonald which was dated July 18, 1984. M1901-1902, PX-19, 20, 23, 28.

15. On August 9, 1984, the loan check was cancelled and recalled by the County Supervisor, according to FmHA because of SBA's failure to subordinate their lien position. M1903.

16. At the behest of McDonald and others on his behalf, Senator Strom Thurmond and Congressman Robin Tallon contacted FmHA officials during 1984 and 1985 expressing interest in Mr. McDonald's case. Senator Thurmond was advised that the County Supervisor would be contacting Mr. McDonald in an effort to work things out. PX-29.

17. McDonald again wrote Senator Thurmond advising him that SBA had agreed to subordinate their lien in January of 1985 and on April 1, 1985, McDonald was sent a letter indicating that his loan application had been favorably considered and Congressman Tallon was advised that SBA had agreed to subordinate their lien to that of FmHA by letter dated April 4, 1985. Congressman Tallon indicated that he would contact SBA personally and forward their letter of commitment so that the loan could go forward. D41-42, M1908-1909, PX-33.

18. Despite SBA's documented willingness to subordinate their lien, the loan based on the May 1984 application was never made. In light of the existing record, FmHA's explanation that the loan was not made because of legitimate reasons including SBA's refusal to subordinate is pretextual, disingenuous and not credible or worthy of belief.

19. The ACSC County Committee assigned Charles McDonald an established corn crop yield of 57 bushels of corn per acre sometime after he inherited the land from his father in 1973. He was considered a model or exceptional farmer and termed by a white farm neighbor as "one of

the best farmers I know." Tr. 150-151, 182-183, 195. On a regular basis in subsequent years, he achieved corn crop yields of over 100 bushels of corn, and in the 1990's was recognized in the county as a prize winning corn farmer for having produced over 200 bushels of corn. D405, PX-53, 69

20. Despite his regular and repeated efforts to get his established yields increased consistent with his actual production, his established corn crop yield has remained unchanged. Although USDA officials were aware of McDonald's efforts to get his established yields increased, no corrective action was ever taken by them even during periods that the established yield could have been adjusted. Tr. 191, 195, 648, D106, M70, 1890, PX 58A, 59.

21. A comparison of nine white farmers and nine black farms in Clarendon County, South Carolina appearing in the Slay Report reflects that the established yields of the white farmers was 108 bushels per acre and that of the black farmers was only 58. While the method of setting established yields is facially race neutral, in practice, the computation of established yields was based upon a subjective selection of the yield of comparable farms by a racially non-representative group of individuals and was susceptible to manipulation on the basis of race, the impact of which adversely operated to the detriment of black farmers in denying them program benefits to which they otherwise would qualify for. D105-106, PX-69

22. The pattern of discrimination found to exist against black and other minority group farmers in the United States by the Civil Rights Action Team in their report farmers published in February of 1997 included a litany of neglect, racial bias, unfair lending practices and discrimination by county officials. The Southeast in particular was singled out where discrimination in USDA programs was cited as the primary reason for the loss of land and farm income. While that report and subsequent USDA Inspector General Reports post date Charles McDonald's complaints, their findings of specific discriminatory conduct are consistent with some of the testimony before me and are indicative of long standing practices of discrimination by FmHA in South Carolina and the rest of the Southeast. Tr. 196, 352-353, 646, 654, 662-664, 671-672, 678, 686, 693,737, PX-62

23. During 1984 and 1985, McDonald and other black farmers were treated less favorably than farmers who were not black. Black farmers including McDonald were subjected to longer waits than white farmers

experienced when visiting the office. Processing time for application of loans were longer for black farmers than white farmers and disbursements of loan funds for black farmers were frequently delayed or reduced in amount. Protests were either ignored, or in certain cases subjected to retaliatory action by credit denial. Options available to white farmers were not suggested or offered to them. Tr. 196, 352-353, 662-664, 671-672, 678, 686, 693, *In re Robert A. Schwerdtfeger*, 67 Agric. Dec. 244, 249 (2008).

24. In 1986, Edna McDonald made application to the Clarendon County Office of FmHA for an unspecified farm loan.

25. The record lacks documentation as whether the above application was withdrawn or denied, however, Edna McDonald was a school teacher not actively engaged in farming, was unacquainted with the farm finances and she failed to provide all information required to process the application.

26. In 1986 following the denial of loans by FmHA, foreclosure proceedings were brought against McDonald by Production Credit Association which proceedings were settled by McDonald's conveyance of the farm that he had inherited to the creditor and by the forced sale of his equipment. Tr. 363, 369, M2-23, PX-31A, 36.

27. On December 17, 1986 McDonald filed a voluntary Chapter 7 petition in bankruptcy in the United States Bankruptcy Court for the District of South Carolina. Tr. 369-370, PX-35.

28. Beginning as early as 1984, Charles McDonald filed complaints of discrimination against him on account of his race on at least three occasions which were accepted by USDA and later investigated by OCR. D3, 34, 47-48, 50-51, 58-59.

29. The Slay Report and the Newby/Guo Report, both of which were initiated by OCR each concluded after their respective investigation that discrimination had in fact occurred. D1-16, 394-406.

30. Notwithstanding the conclusions of the Investigative Reports, the Agency position was and remains that no discrimination occurred or that the Petitioner failed in his burden to establish a *prima facie* showing of discrimination.

31. No final action was taken by OCR to deny McDonald's claims of discrimination despite the fact that the Investigations were completed in April of 1998 in the case of the Slay Report and January of 2003 in the case of the Newby/Guo Report.

32. The denial of credit and other program benefits to and for which Charles McDonald was eligible by FmHA was a proximate cause in his loss of title to land which he had inherited from his father and which had been in his family for over one hundred years. Tr. 220, 239, 369-371.

33. The actions of FmHA were also the proximate cause of Charles McDonald being unable to employ the best farming practices, forced him to discontinue farming on his previous scale of over one thousand acres, requiring him to farm on a much reduced scale. The direct result was loss of income which I calculate to be $775,000.00 through 2009.

34. The actions of FmHA also were also the proximate cause of Charles McDonald suffering intangible damage, including significant emotional loss and distress, personal humiliation, the adverse stigma of having taken bankruptcy, and the loss of self esteem and pride by being forced to be dependent upon his wife's income for living expenses and to raise his family. Tr. 61-62, 66-67, 77-79, 81-84, 346-348, 363-367, 369-371, 501-502, 514-515.

Conclusions of Law

1. Charles McDonald is both an African-American and black farmer and as such is a member of a class protected by ECOA.

2. On February 13, 1984, Charles McDonald applied to the FmHA County Office in Clarendon County, South Carolina for credit benefits for which he was eligible, including OL and FO loans.

3. Despite his eligibility to receive the credit benefits, his February of 1984 applications were denied.

4. In denying him credit benefits, Charles McDonald was treated less favorably than other similarly situated individual who were not members of his protected class.

5. FmHA (now FSA) violated ECOA by failing to process Charles McDonald's individual February 13, 1984 application for OL and FO loans for which he would have been eligible and instead considered only the partnership application which he and his brother had made.

6. While the partnership application was properly denied for exceeding the established income threshold of $18,000.00 due to the brothers' wives combined non-farm income, the failure to facilitate McDonald's individual application was discriminatory particularly when the land was already separately owned and resulted in less favorable treatment than was afforded white farmers elsewhere in the country.

7. FmHA (now FSA) violated ECOA by failing to close in 1985 a subsequent 1984 FO loan application which had been approved by the County Committee as being a loan for which he was eligible, funds had been committed, and the agreement of the Small Business Administration (SBA) to subordinate their lien had been secured.

8. FmHA's explanation for failing to close the loan on the basis that SBA had refused to subordinate their loan is contrary to the evidence in the record and resulted in McDonald being treated less favorably than others who were not members of his protected class.

9. Charles McDonald was treated less favorably than others who were not members of his protected class by USDA's utilization of a method of assigning established corn crop yields which in practice resulted in black farmers having established yields of approximately only half of those enjoyed by white farmers in the same county. Tr. 196, PX-62, 69.

10. In light of the finding of discrimination, an award of compensatory damages is indicated, with both tangible and intangible damages being appropriate.

Order

1. Within ten days of the date on which this Order becomes final, USDA shall pay damages in the amount of $2,712,500.00 to Charles McDonald for his injuries suffered as a result of discrimination.

2. USDA shall discharge all of Charles McDonald's debts to the FSA and shall thereafter hold him harmless for such debt. The discharge of his debt shall not adversely affect his eligibility for future participation in any USDA loan or loan servicing program, and shall not act to trigger the statutory provisions of Section 648 of the Federal Agricultural Improvement and Reform Act of 1996 that preclude an individual who has received debt forgiveness from obtaining future loans from USDA, or otherwise be used in any negative manner in conjunction with Mr. McDonald's applications for, or participation in, any USDA program, benefit or activity.

3. In addition, pursuant to 15 U.S.C. §1691e(d), the Petitioner is awarded the costs of this action, together with a reasonable attorney's fee as shall be determined by the Administrative Law Judge. Counsel for the Petitioner shall file an application with the Hearing Clerk, setting forth an itemization of the costs, justification for the same as well as an

itemization of the hours spent in representing the Petitioner, with a description of how the time was spent.

4. This Decision and Order shall become final 35 days after issuance unless reviewed within that time by the Department's Assistant Secretary for Civil Rights (ASCR), either upon the ASCR's own initiative or pursuant to request by the Petitioner. *See,* 7 C.F.R. §15f.24.

Copies of this Decision and Order shall be served on the parties by the Hearing Clerk.

Done at Washington, D.C.

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Applicable Statutory and Regulatory Provisions

Section 1691 of the ECOA provides:

Activities constituting discrimination

It shall be unlawful for any creditor to discriminate against any applicant with respect to any aspect of a credit transaction-

on the basis of race, color, religion, national origin, sex or marital status, or age…." 15 U.S.C. §1691(a).

The term "creditor" is defined as follows:

(e) The term "creditor" means any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who participates in the decision to extend, renew, or continue credit. 15 U.S.C. §1691a(e)

The term person is defined:

(f) The term "person" means a natural person, a corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative, or association. 15 U.S.C. §1691a(f)

Civil liability is imposed for discrimination in connection with credit transactions:

§1691e. Civil liability

Individual or class action for actual damages[66]

Any creditor who fails to comply with any requirement imposed under this subchapter shall be liable to the aggrieved applicant for any actual damages sustained by such applicant acting either in an individual capacity or as a member of a class. 15 U.S.C. §1691e.

In the event of successful actions, cost of the action and attorney fees shall be

added to the damage award:

(d) Recovery of costs and attorney fees

In the case of any successful action, under subsection (a), (b), or (c) of this section, the costs of the action, together with a reasonable attorney's fee as determined by the court, shall be added to any damages awarded by the court under such subsection. 15 U.S.C. §1691e(d).

Jurisdiction for such actions as originally enacted provided:

(f) Jurisdiction of courts; time for maintenance of action; exceptions

Any action under this section may be brought in the appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction. No such action shall be brought later than two years from the date of the occurrence of the violation except that- …. 15 U.S.C. §1691e(f).

The two year statute of limitations was modified by a limited waiver contained in

Section 741:

Waiver of Statute of Limitations.

[66] Punitive damages may be asserted against creditors other than a government or governmental subdivision or agency. 15 U.S.C. §1691e(b).

(a) To the extent permitted by the Constitution, any action to obtain relief with respect to the discrimination alleged in any eligible complaint, if commenced no later than 2 years after the enactment of this Act, shall not be barred by any statute of limitations.

(b) The complainant may, in lieu of filing a civil action, seek a determination on the merits of the eligible complaint by the Department of Agriculture if such complaint was filed not later than 2 years after the date of enactment of this Act [Oct. 21, 1998]. The Department of Agriculture shall –

(1) provide the complainant an opportunity for a hearing on the record before making that determination;
(2) award the complainant such relief as would be afforded under the applicable statute from which the eligible complaint arose notwithstanding any statute of limitations; and
(3) to the maximum extent practicable within 180 days after the date a determination of an eligible complaint is sought under this subsection conduct an investigation, issue a written determination and propose a resolution in accordance with this subsection.

(c) Notwithstanding subsections (a) and (b), if an eligible claim is denied administratively, the claimant shall have at least 180 days to commence a cause of action in a Federal court of competent jurisdiction seeking a review of such denial.

(d)The United States Court of Federal Claims and the United States District Court shall have exclusive original jurisdiction over –

(1) any cause of action arising out of a complaint with respect to which this section waives the statute of limitations; and
(2) any civil action for judicial review of a determination in an administrative proceeding in the Department of Agriculture under this section.

(e) As used in this section, the term 'eligible complaint' means a nonemployment related complaint that was filed with the Department of Agriculture before July 1, 1997 and alleges discrimination at any time

during the period beginning on January 1, 1981 and ending December 31, 1996 –

(1) in violation of the Equal Credit Opportunity Act (15 U.S.C. 1691 et seq.) in administering –

(A) a farm ownership, farm operating, or emergency loan funded from the Agricultural Credit Insurance Program Account; or

(B) a housing program established under title V of the Housing Act of 1949 [42 U.S.C. 1471 et seq.]; or

(2) in the administration of a commodity program or a disaster assistance program.

(f) This section shall apply in fiscal year 1999 and thereafter.

(g) The standard of review for judicial review of an agency action with respect to an eligible complaint is de novo review. Chapter 5 of title 5 of the United States

Code shall apply with respect to an agency action under this section with respect to an eligible complaint, without regard to section 554(a)(1) of that title.

Section 741, 7 U.S.C. §2279 (Historical and Statutory Notes).

MISCELLANEOUS ORDER

68 Agric. Dec. Jan- - Jun. (2009)

BILLY MIKE GENTRY.
P. & S. Docket No. D-07-0152.
Order Dismissing Purposed Appeal Petition.
Filed March 18, 2009.

Eric Paul, Esq. for GIPSA.
Respondent, Pro se.
Initial decision issued by Jill S. Clifton, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

Order Dismissing Purported Appeal Petition

On October 7, 2008, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued a Decision and Order by Reason of Default: (1) concluding Billy Mike Gentry willfully violated the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229b) [hereinafter the Packers and Stockyards Act] and the regulations issued under the Packers and Stockyards Act (9 C.F.R. pt. 201) [hereinafter the Regulations]; (2) ordering Mr. Gentry to cease and desist from violating the Packers and Stockyards Act and the Regulations; and (3) suspending Mr. Gentry as a registrant under the Packers and Stockyards Act.

On February 2, 2009, Timothy J. Brennan, an employee of the United States Department of Agriculture [hereinafter USDA], personally served Mr. Gentry with the ALJ's Decision and Order by Reason of Default. On February 24, 2009, Mr. Gentry filed a letter with the Hearing Clerk which states, as follows:

Dear Mr. Paul:

I am in receipt of the Decision and Order by Reason fo [sic] Default concerning the above referenced case. I received this paper work on February 2, 2009. I hereby request an appeal of said Decision and Order.

By copy of this letter, I am forward [sic] same to Judge Jill S. Clifton requesting an appeal.

Thank you for your attention, I am

Sincerely,
/s/
BILLY MIKE GENTRY

On March 16, 2009, the Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration, USDA, filed a response to Mr. Gentry's February 24, 2009, letter. On March 17, 2009, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Section 1.145(a) of the rules of practice applicable to the instant proceeding[1] sets forth the requirements for an appeal petition, as follows:

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

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[1]Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

7 C.F.R. § 1.145(a). Mr. Gentry's February 24, 2009, letter does not identify any purported error by the ALJ, does not identify any portion of the ALJ's decision or any ruling by the ALJ with which he disagrees, and does not allege any deprivation of rights. In short, Mr. Gentry's letter does not remotely conform to the requirements of 7 C.F.R. § 1.145(a). I have long held that purported appeal petitions which do not remotely conform to the requirements of the Rules of Practice are dismissed.[2] Since no appeal has been filed which remotely conforms to the requirements of the Rules of Practice (7 C.F.R. § 1.145(a)) and it is now too late to file an appeal (7 C.F.R. §§ 1.139, .145(a)), the ALJ's October 7, 2008, Decision and Order by Reason of Default became final and effective 35 days after February 2, 2009, when Mr. Gentry was personally served with the Decision and Order by Reason of Default.

For the foregoing reasons, the following Order is issued.

ORDER

Billy Mike Gentry's purported appeal from the ALJ's October 7, 2008, Decision and Order by Reason of Default is dismissed. The ALJ's October 7, 2008, Decision and Order by Reason of Default became final and effective March 9, 2009.

Done at Washington, DC

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[2] *In re Kermit Breed* (Order Dismissing Purported Appeal), 50 Agric. Dec. 675, 676 (1991); *In re Bihari Lall* (Order Dismissing Purported Appeal), 49 Agric. Dec. 895 (1990).

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COURT DECISIONS

MARVIN D. HORNE, ET AL. V. USDA.
No. 1:09–cv–01790–OWW–SKO.
Filed February 7, 2011.

[Cite as: 2011 WL 489166 (E.D.Cal.)].

AMAA – Rules, procedure in province of Agency – Arbitrary, when not.

Plaintiff (Raisin Producer) requested that USDA revise its rules for filing to enlarge the means to perfect filing. Plaintiff failed to receive the Agency's Initial Decision and thus lost its opportunity to appeal.

United States District Court,
E.D. California.

MEMORANDUM DECISION REGARDING CROSS–MOTIONS FOR SUMMARY JUDGEMENT

OLIVER W. WANGER, District Judge.

I. INTRODUCTION.

Plaintiffs Marvin D. Horne, Laura R. Horne, and Raisin Valley Farms Marketing, LLC proceed with this action for declaratory and injunctive relief against the United States Department of Agriculture ("USDA"). (Doc. 2). Plaintiffs seek an order setting aside the USDA's denial of Plaintiffs' petition for rule-making.

The parties have filed cross-motions for summary judgment. (Docs.14, 15). Plaintiffs filed opposition to USDA's motion for summary judgment on October 26, 2010. USDA filed a reply on November 15, 2010. (Doc. 17).

II. FACTUAL BACKGROUND.

USDA's Rules of Practice ("Rules of Practice") provide that a final order issued by the Secretary shall be filed with the hearing clerk, who

shall serve it upon the parties. 7 C.F.R. § 900.66(b). The Rules of Practice provide several methods for service:

> Service shall be made either (1) by delivering a copy of the document or paper to the individual to be served or to a member of the partnership to be served or to the president, secretary, or other executive officer or any director of the corporation, organization, or association to be served, or to the attorney or agent of record of such individual, partnership, corporation, organization, or association; or (2) by leaving a copy of the document or paper at the principal office or place of business of such individual, partnership, corporation, organization, or association, or of his or its attorney or agent of record; or (3) by registering and mailing a copy of the document or paper, addressed to such individual, partnership, corporation, organization, or association, or to his or its attorney or agent of record, at his or its last known principal office, place of business, or residence.

7 C.F.R. § 900.69(b). The Rules do not provide for electronic service.

Plaintiffs were the victims of a failed notice attempt effected under section 900.69(b), and as a result, lost the ability to challenge a decision adverse to them. *See Horne v. USDA*, 2008 U .S. Dist. LEXIS 95094 * 16 (E.D.Cal. Nov. 10, 2008) aff'd, 2010 U.S.App. LEXIS 19393, 2010 WL 3679553 (9th Cir. Sept. 17, 2010). On or about December 31, 2008, Plaintiffs filed a petition with USDA seeking, inter alia, that USDA "engage in rule making to amend the Rules of Practice located at 7 C.F.R. § 900.50 Et Seq [sic] to require prompt notice, such as facsimile or e-mail, or even overnight delivery" of decisions by the Administrative Law Judge or Judicial Officer ("the Petition"). By letter dated September 18, 2009, USDA's Agricultural Marketing Service denied the Petition.

LEGAL STANDARD

.

Pursuant to 5 U.S.C. § 533(e), "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." As the Senate Judiciary Committee noted in its report on the APA:

> the mere filing of a petition does not require an agency to grant it, or to hold a hearing, or engage in any other public rule making

> proceedings. The refusal of an agency to grant the petition or to hold rule making proceedings, therefore, would not per se be subject to judicial reversal. However, the facts or considerations brought to the attention of the agency by [a petition for rule-making] might be such as to require the agency to act to prevent the rule from continuing or becoming vulnerable to judicial review.

WWHT, Inc. v. Federal Communications Com., 656 F.2d 807, 813 (Ct.App.D.C.1981) (citing S. REP. NO. 752, 79th Cong., 1st Sess. (1945), reprinted in LEGISLATIVE HISTORY, at 201–02 (1946)).

An Agency's denial of a petition for rule-making is subject to judicial review, but such review is "extremely limited" and "highly deferential." *Massachusetts v. EPA*, 549 U.S. 497, 527, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007) (citing *National Customs Brokers & Forwarders Ass'n. v. United States,* 883 F.2d 93, 96 (D.C.Cir.1989)); *see also Preminger v. Sec'y of Veterans Affairs,* 2011 U.S.App. LEXIS 1559 *16–17, 2011 WL 222482 (Ct.App.Fed.Cir.2011). Review is necessarily limited to the narrow issues as defined by the denial of the petition for rule-making, and does not extend to substantive review of the merits of the policies implicated by the rule-making petition. *See id., see also Digiovanni v. FAA*, 249 Fed. Appx. 842, 843 (2nd Cir.2007) (citing *Nat'l Labor Relations Bd. Union v. Fed. Labor Relations Auth.,* 834 F.2d 191, 196 (D.C.Cir.1987)). For purposes of a challenge to an agency's denial of a petition for rule-making, the administrative record consists of the petition for rule-making, comments pro and con where deemed appropriate, and the agency's explanation of its decision to reject the petition. *WWHT,* 656 F.2d at 817; *Defenders of Wildlife v. Gutierrez,* 532 F.3d 913, 920 (D.C.Cir.2008) (same); *see also Action for Children's Television v. FCC,* 564 F.2d 458, 472 n. 24 (D.C.Cir.1977) (in cases where the agency has decided against promulgation of a rule, the scope of review is very limited because the "record" will likely be a simple statement of reasons for non-adoption).

The "arbitrary and capricious" standard set forth in section 706(2)(A) of the Administrative Procedure Act provides the applicable standard of review for challenges to denial of rule-making petitions, *e.g. Weight Watchers Int'l v. FTC*, 47 F.3d 990, 992 (9th Cir.1994), but the standard is applied in an especially deferential manner as a decision to deny a

rule-making petition "is essentially a legislative one," *WWHT,* 656 F.2d at 817; *accord EMR Network v. FCC*, 391 F.3d 269, 273 (D.C.Cir.2004) ("[a]s applied to refusals to initiate rulemakings, this standard is 'at the high end of the range' of deference" to the agency) (citations omitted); *Brown v. Secretary of Health and Human Serv.*, 46 F.3d 102, 110 (1st Cir.1995) (agency's "refusal to institute rule-making 'is to be overturned only in the rarest and most compelling of circumstances.' ") (citations omitted). A reviewing court should do no more than assure itself that the agency acted "in a manner calculated to negate the dangers of arbitrariness and irrationality" in denying a petition for rule-making. *WWHT,* 656 F.2d at 817.[1]

DISCUSSION.

A. Plaintiff's Motion for Summary Judgment

The Petition is predicated on Plaintiffs' contention that the Rules of Practice "have no provision for promptly and expeditiously notifying Petitioners with various rulings," and that failure to provide prompt notice is a denial of due process. (Complaint, Ex. 1, Petition for Rule–Making at ¶¶ 25, 27). The only evidence presented in the Petition in support of Plaintiffs' request consisted of a single instance in which Plaintiffs did not receive timely notice because a decision that was sent to Plaintiffs' counsel did not arrive until after the time to file for judicial review had expired. (Complaint, Ex. 1, Petition for Rule–Making).

USDA denied Plaintiff's petition, finding that "procedures under the applicable Rules of Practice are adequate to effectuate service of department decisions and other legal documents." (Complaint, Ex. 2). This finding was neither arbitrary nor capricious in light of the scant evidence Plaintiffs presented to show that the Rules of Practice are inadequate. Plaintiffs did not present sufficient evidence of service failures to establish the need for rule-making as the problem is exceptional and has not been shown to be one that reoccurs.

In challenging an agency's denial of a petition for rule-making, a party must establish that the agency's denial was arbitrary and capricious

[1] Plaintiffs do not allege that the USDA did not comply with relevant procedural rules applicable to petitions for rule-making.

in light of the facts and considerations presented in the petition. *See, e.g.*, *WWHT,* 656 F.2d at 817 (scope of review limited to petition and decision). The Secretary of Agriculture's record, which included a judicial decision confirming the constitutional adequacy of the Rules of Practice in place, establishes that it was reasonable to find that the current procedures are adequate and to deny the Petition.

At oral argument, Plaintiffs' counsel argued it was inappropriate for the USDA to rely on this court's decision in denying the Petition. Plaintiffs' argument lacks merit, as the Petition was based, in part, on Plaintiffs' contention that the current Rules of Practice lead to due process violations.[2] The record demonstrates that USDA received Plaintiff's petition, considered it, and issued a reasoned written decision based on the record before it. Plaintiffs' Petition did not contain sufficient evidence to require USDA to change its notice procedures. Plaintiffs motion for summary judgment is DENIED.

B. USDA's Motion for Summary Judgment

The factual record in this action is limited to the Petition and the decision denying the Petition. Because, given state of the record before the USDA, the court cannot say that denial of the Petition was arbitrary and capricious, and because Plaintiffs cannot adduce additional evidence in this court that was not raised in the Petition, USDA's motion for summary judgment must be GRANTED.

ORDER

For the reasons stated, IT IS ORDERED:

1) Plaintiffs' motion for summary judgment is DENIED;

2) USDA's motion for summary judgment is GRANTED; and

[2] Had Plaintiffs produced sufficient evidence to establish that the Rules of Practice create too great a risk of repeated failed notice attempts, reliance on the court's decision may have been problematic. Based on the limited administrative record, however, the court cannot say that USDA's finding was arbitrary and capricious. Were a single anecdotal instance of injustice sufficient to permit court intervention in administrative rule-making, the broad discretion agencies enjoy in crafting appropriate policies and procedures would be eviscerated.

3) USDA shall lodge a form of order consistent with this memorandum decision within five (5) days of electronic service of this decision.

IT IS SO ORDERED.

HEIN HETTINGA, DBA SARAH FARMS; ELLEN HETTINGA, D/B/A SARAH FARMS V. USDA.
No. 10–15140.
Filed April 21, 2011.

[Cite as: 428 Fed.Appx. 732].

United States Court of Appeals,
Ninth Circuit.

AMAA – MMO – Assessments – Regulations, Agency's interpretation of its – Deference.

Before: REINHARDT, HAWKINS, and GOULD, Circuit Judges.

MEMORANDUM **

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36–3.

Hein and Ellen Hettinga ("the Hettingas") d/b/a Sarah Farms appeal the adverse grant of summary judgment in their action challenging the Secretary of the U.S. Department of Agriculture's ("USDA") interpretation of the 2006 amended Arizona–Las Vegas Milk Marketing Order ("Amended Order") as applied to them and seeking refund of $324,211.60 in assessments paid for the month of April 2006. We affirm.

The USDA's interpretation of its own regulation is entitled to substantial deference and must be given controlling weight "unless an 'alternative reading is compelled by the regulation's plain language or by other indications of the agency's intent at the time of the regulation's promulgation.' " *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512,

114 S.Ct. 2381, 129 L.Ed.2d 405 (1994) (quoting *Gardebring v. Jenkins*, 485 U.S. 415, 430, 108 S.Ct. 1306, 99 L.Ed.2d 515 (1988)); *see Auer v. Robbins,* 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997); *Miller v. Cal. Speedway Corp.*, 536 F.3d 1020, 1028 (9th Cir.2008).

Here, the agency's interpretation of the Amended Order is contradicted by neither its plain language nor other evidence of regulatory intent. The Hettingas did not lose their producer-handler exemption status in April 2006 due to failure to meet one of the five "designation requirements" or fulfillment of one of the three "cancellation conditions," and therefore the Amended Order's new cancellation provision, providing for a one-month enforcement grace period, does not, on its face, apply. *See* 7 C.F.R. § 1131.10(a), (c). Rather, USDA claims the Hettingas were immediately and automatically disqualified from producer-handler exemption status for the month of April 2006 because they exceeded the monthly three-million pound sales cap. *See id.* § 1131.10 pmbl. Reading the regulation as a whole, we cannot say the agency's interpretation of its own regulation is unreasonable. *See Or. Paralyzed Veterans of Am. v. Regal Cinemas, Inc.*, 339 F.3d 1126, 1131 (9th Cir.2003).

AFFIRMED.

KALEM H. BARSERIAN, D/B/A AMERICAN DRIED FRUIT COMPANY V.USDA.
No. CV F 10–2309 LJO GSA.
Filed April 15, 2011.

[Cite as: 2011 WL 1459004 (E.D.Cal.)].

AMAA -- Statutory time limits, Courts cannot create equitable exceptions --

United States District Court,
E.D. California.

ORDER ON DEFENDANTS' F.R.Civ.P. 12 MOTION TO DISMISS FIRST AMENDED COMPLAINT

LAWRENCE J. O'NEILL, District Judge.

INTRODUCTION

Defendant U.S. Department of Agriculture ("USDA") seeks to dismiss as untimely and thus failing to invoke this Court's subject matter jurisdiction the action of pro se plaintiff Kalem H. Barserian ("Mr.Barserian"), doing business as American Dried Fruit Company ("ADFC"), to seek judicial review of a USDA order regarding regulation of California raisins. Mr. Barserian responds that "procedural irregularities and misleading information" excuse his filing this action untimely. This Court considered USDA's F.R.Civ.P. 12(b)(1) motion to dismiss on the record and VACATES the April 27, 2011 hearing, pursuant to Local Rule 230(g). For the reasons discussed below, this Court DISMISSES this action.

BACKGROUND[1]

USDA Proceedings

Mr. Barserian operates ADFC as a sole proprietorship. ADFC is a California handler/packer registered with the Raisin Administrative Committee ("RAC") and is regulated by RAC by the federal Raisin Order for California Raisins ("Raisin Order"),7 C.F.R. §§ 989. 1, et seq. The RAC is the USDA agency responsible to administer the Raisin Order.

On March 11, 2010, ADFC filed its administrative petition, pursuant to 7 U.S.C. § 608c(15)(A), "challenging USDA's unlawful interpretation and application of the Raisin Order provisions, and seeking declaratory relief that a raisin handler may 'cause' inspection and certification by

[1] The factual recitation is derived generally from Mr. Barserian's First Amended Complaint for Declaratory Relief; Review of Administrative Decision ("FAC") and its attached exhibits.

compelling other interested parties to apply and pay for them."

By a May 27, 2010 decision, a USDA administrative law judge ("ALJ") "improperly dismissed the Petition, claiming that the Petition fails to state a claim." The decision refers to ADFC as "Petitioner." Hearing Clerk L. Euguene Whitfield's ("Mr.Whitfield's") May 27, 2010 letter ("May 27 letter") enclosed the decision and its subject line referred to "Respondent" as "Kalem H. Barserian d/b/a American Dried Fruit Co ." although the petitioner was ADFC. The May 27 letter references an incorrect case number. The May 27 letter states in part:

> Each party has thirty (30) days from the service of this *Opinion and Order* in which to file an appeal to the Department's Judicial Officer.
>
> If no appeal is filed, the Decision and Order shall become binding and effective as to each part [sic] thirty-five days after service. However, no Decision is final for purposes of judicial review except a final order issued by the Secretary or the Judicial Officer pursuant to an appeal.
>
> In the even [sic] you elect to file an appeal, an original and 4 copies are required. You are also instructed to consult § 1.45 of the Uniform Rules of Practice (7 C.F.R. § 1.145) for the procedure for filing an appeal.

Mr. Barserian notes that the May 27 letter "omitted information about seeking judicial review after a petition to the Secretary's Judicial Officer ("JO") for reconsideration.

On June 25, 2010, ADFC filed an appeal petition before a USDA judicial officer ("JO"), who issued an August 20, 2010 decision ("August 20 JO decision") to affirm the ALJ's decision and thus deny Mr. Barserian's appeal. Mr. Whitfield sent Mr. Barserian an August 23, 2010 letter ("August 23 letter") to enclose the JO's decision and which stated:

> Judicial review of this decision is available in an appropriate court if an appeal is timely filed. This office does not provide information on how to appeal. Please refer to the governing statute. If you are not currently represented by an attorney, you may choose to seek legal

advice regarding an appeal.

> Prior to filing an appeal respondent may file a petition for reconsideration of the Judicial Officer's decision within **10 days** of service of the decision. (Bold added.)

The FAC alleges that the "instructions are false and misleading because a petition for reconsideration of a JO's decision can only be made after an appeal" and that Mr. Barserian did not know that under regulations, "a final decision by the JO is automatically stayed, and the time for judicial review does not begin to run, until action on the petition for reconsideration." Mr. Barserian claims that the August 23 order misrepresented the May 27 letter by indicating: "This office does not provide information on how to appeal." Mr. Barserian faults the August 23 letter's failure to refer to 7 C.F.R. § 1.146 ("section 1.146"), which permits a petition to reconsider a JO decision. Section 1.146(b) provides in pertinent part:

> The decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely petition. Such decision shall not be final for purposes of judicial review until the petition is denied or the decision is affirmed or modified pursuant to the petition and the **time for judicial review shall begin to run upon the filing of such final action** on the petition. (Bold added.)

Mr. Barserian filed a September 7, 2010 reconsideration petition which the JO's October 7, 2010 order ("October 7 order") denied. Mr. Whitfield's October 7, 2010 letter ("October 7 letter") sent by certified mail to Mr. Barserian enclosed the JO's order and stated:

> Judicial review of this decision is available in an appropriate court if an appeal is timely filed. This office does not provide information on how to appeal. Please refer to the governing statute. If you are not currently represented by an attorney, you may choose to seek legal advice regarding an appeal.

The FAC alleges that the "JO omitted notice of the right to seek judicial review of that particular Order or that the August 20, 2010 Order would become final agency action for purposes of judicial review." The FAC further alleges that the October 7 letter was false and misleading by

indicating that "judicial review is available if an 'appeal' is filed" and that "USDA does not provide information on how to appeal."

Mr. Barserian's Claims

On December 10, 2010, Mr. Barserian filed his original complaint to seek a "declaratory order that the agency's actions were arbitrary, capricious, and not otherwise in accordance with law" and a further order "setting aside the agency's initial and final decisions and orders." In response to USDA's motion to dismiss, Mr. Barserian filed his FAC to allege that Mr. Whitfield "omitted instructions about seeking judicial review of the [October 7] order denying Plaintiff's petition for reconsideration" and "falsely claimed [his] office does not provide information on how to appeal. As such, Plaintiff could not have reasonably know that the 20–day limitation had begun to run on May 20, 2010."[2] The FAC further alleges that USDA "should be equitably estopped from asserting that Plaintiff failed to comply with the twenty day time limit because Defendant failed to provide accurate instructions to Plaintiff concerning timing and availability of judicial review was [sic] a prejudicial error that caused Plaintiff to suffer a legal wrong entitling him to judicial review."

DISCUSSION

F.R.Civ.P. 12(b)(1) Motion To Dismiss Standards

USDA contends that Mr. Barserian's failure to file this action within 20 days of the October 7 order bars invocation of this Court's subject matter jurisdiction.

F.R.Civ.P. 12(b)(1) authorizes a motion to dismiss for lack of subject matter jurisdiction. Fundamentally, federal courts are of limited jurisdiction. *Kokkonen v. Guardian Life Ins. Co.*, 511 U .S. 375, 377, 114 S.Ct. 341 (1994). A "court of the United States may not grant relief

[2] USDA correctly notes that May 20, 2010 "does not correspond with any other date mentioned" in the FAC in that the time to seek judicial review started to run on October 7, 2010.

absent a constitutional or valid statutory grant of jurisdiction." *U.S. v. Bravo–Diaz,* 312 F.3d 995, 997 (9th Cir.2002). "A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." *Stock West, Inc. v. Confederated Tribes,* 873 F.2d 1221, 1225 (9th Cir.1989). Limits on federal jurisdiction must neither be disregarded nor evaded. *Owen Equipment & Erection Co. v. Kroger,* 437 U.S. 365, 374, 98 S.Ct. 2396, 57 L.Ed.2d 274 (1978). A plaintiff bears the burden to establish that subject matter jurisdiction is proper. *Kokkonen,* 511 U.S. at 377, 98 S.Ct. 2396; *see Tosco Corp. v. Communities for Better Environment,* 236 F.3d 495, 499 (9th Cir.2001) ("plaintiff has burden of proving jurisdiction" to survive a F.R.Civ.P. 12(b)(1) motion to dismiss).

When addressing an attack on the existence of subject matter jurisdiction, a court "is not restricted to the face of the pleadings." *McCarthy v. U.S.,* 850 F.2d 558, 560 (9th Cir.1988). In such a case, a court may rely on evidence extrinsic to the pleadings and resolve factual disputes relating to jurisdiction. *St. Clair v. City of Chico,* 880 F.2d 199,201 (9th Cir.), *cert. denied,* 493 U.S. 993, 110 S.Ct. 541(1989); *Roberts v. Corrothers,* 812 F.2d 1173,1177 (9th Cir.1987); *Augustine v. United States,* 704 F.2d 1074, 1077 (9th Cir.1983); *Smith v. Rossotte,* 250 F.Supp.2d 1266, 1268 (D.Or.2003) (a court "may consider evidence outside the pleadings to resolve factual disputes apart from the pleadings").

No presumptive truthfulness attaches to a plaintiff's allegations, and the existence of disputed material facts does not preclude evaluation of the merits of jurisdictional claims. *Thornhill Pub. Co., Inc. v. General Tel. & Electronics Corp.,* 594 F.2d 730, 733 (9th Cir.1979). On a factual attack of a complaint with affidavits or other evidence, "the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." *Savage v. Glendale Union High School,* 343 F.3d 1036, 1040, n. 2 (9th Cir.2003).

"The plaintiff always bears the burden of establishing subject matter jurisdiction. In effect, the court presumes lack of jurisdiction until the plaintiff proves otherwise." *Valdez v. U.S.,* 837 F.Supp. 1065, 1067 (E.D.Cal.1993). "[T]he burden of proof is on the plaintiff to support allegations of jurisdiction with competent proof when the allegations are

challenged by the defendant." *O'Toole v. Arlington Trust Co.,* 681 F.2d 94, 98 (1st Cir.1982).

With these standards in mind, this Court turns to USDA's challenges to subject matter jurisdiction.

Absence Of Immunity Waiver

"The United States can be sued only to the extent that it has waived its sovereign immunity." *Baker v. U.S.,* 817 F.2d 560, 562 (9th Cir.1987), *cert. denied,* 487 U.S. 1204, 108 S.Ct. 2845, 101 L.Ed.2d 882 (1988). "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *F.D.I.C. v. Meyer,* 510 U.S. 471, 475, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994). "A party bringing a cause of action against the federal government bears the burden of showing an unequivocal waiver of immunity. *Baker,* 817 F.2d at 562. "Thus, the United States may not be sued without its consent and the terms of such consent define the court's jurisdiction." *Baker,* 817 F.2d at 562. A waiver of traditional sovereign immunity is not implied but must be unequivocally expressed. *See U.S. v. Testan,* 424 U.S. 392, 399, 96 S.Ct. 948, 953–954, 47 L.Ed.2d 114 (1976).

"The question whether the United States has waived its sovereign immunity against suits for damages is, in the first instance, a question of subject matter jurisdiction." *McCarthy,* 850 F.2d 558, 560 (1988). "It is incumbent upon the plaintiff properly to allege the jurisdictional facts ..." *McNutt v. General Motors Acceptance Corp. of Indiana,* 298 U.S. 178, 182, 56 S.Ct. 780, 80 L.Ed. 1135 (1936). "Absent consent to sue, dismissal of the action is required." *Hutchinson v. U.S.,* 677 F.2d 1322, 1327 (9th Cir.1982).

The terms of the United States' "consent to be sued in any court define that court's jurisdiction to entertain the suit." *U.S. v. Sherwood,* 312 U.S. 584, 586, 61 S.Ct. 767, 85 L.Ed. 1058 (1941). Waivers of immunity must be "construed strictly in favor of the sovereign," *McMahon v. United States,* 342 U.S. 25, 27, 72 S.Ct. 17, 19, 96 L.Ed. 268 (1951), and not "enlarge[d] ... beyond what the language requires," *Eastern Transp. Co. v. United States,* 272 U.S. 675, 686, 47 S.Ct. 289, 291, 71 L.Ed. 472 (1927); *see Hodge v. Dalton,* 107 F.3d 705, 707 (9th

Cir.1997) ("Any waiver of immunity must be 'unequivocally expressed,' and any limitations and conditions upon the waiver 'must be strictly observed and exceptions thereto are not to be implied.")

USDA contends that Mr. Bersarian failed to file this action timely to invoke a waiver of USDA's immunity from suit.

Judicial Review of USDA Decision

USDA notes that Mr. Barserian seeks this Court's review, pursuant to 7 U.S.C. § 608c(15)(B) ("section 608c(15)(B)") which provides in pertinent part: "The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed **within twenty days from the date of the entry of such ruling."** (Bold added.)

"Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them." *Bowles v. Russell*, 551 U.S. 205, 212, 213, 127 S.Ct. 2360, 168 L.Ed.2d 96 (2007). "Judicial review provisions, however, are jurisdictional in nature and must be construed with strict fidelity to their terms ... [and] 'with precision and with fidelity to the terms by which Congress has expressed its wishes.' " *Stone v. I.N.S.*, 514 U.S. 386, 405, 115 S.Ct. 1537, 131 L.Ed.2d 465 (1995) (quoting *Cheng Fan Kwok v. INS*, 392 U.S. 206, 212, 88 S.Ct. 1970, 1974, 20 L.Ed.2d 1037 (1968)); *see Caruncho v. I.N.S.*, 68 F.3d 356, 359 (9th Cir.1995) (This Court has recognized repeatedly that statutory time limits are "mandatory and jurisdictional.' ")

USDA explains that since the JO denied reconsideration on October 7, 2010, the last day to file this action was October 27, 2010 to render untimely the December 10, 2010 filing of this action and thus the failure to invoke this Court's jurisdiction. Mr. Barserian concedes that this action was not filed within 20 days of the October 7 order, the JO's reconsideration denial. Mr. Barserian appears to seek to invoke equitable tolling bases on what he characterizes as "procedural irregularities and misleading information about his rights to appeal and judicial review."

Equitable Tolling

The FAC alleges that Mr. Barserian could not have reasonably known when the 20–day limit ran. USDA contends such claim is "factually implausible and legally irrelevant" in that "federal courts cannot create equitable exceptions to statutory time limits for judicial review."

USDA notes that the October 7 order denying Mr. Barserian's reconsideration petition triggered the 20–day period to seek judicial review, pursuant to 7 C.F.R. § 1.146(b), which, as a reminder, provides: "Such decision shall not be final for purposes of judicial review until the petition is denied or the decision is affirmed or modified pursuant to the petition and the **time for judicial review shall begin to run upon the filing of such final action** on the petition." (Bold added.) USDA argues that the October 7 letter is not false and misleading in that it explains that judicial review of the October 7 order "is available in an appropriate court if an appeal is timely filed" and refers Mr. Barserian "to the governing statute."

USDA further argues that this Court lacks discretion to equitably estop USDA to assert the 20–day limit. "Judicial review provisions, however, are jurisdictional in nature and must be construed with strict fidelity to their terms." *Stone*, 514 U.S. 386, 405, 115 S.Ct. 1537, 131 L.Ed.2d 465 (1995). A "jurisdictional statute ... must be construed both with precision and with fidelity to the terms by which Congress has expressed its wishes." *Cheng Fan Kwok v. INS*, 392 U.S. 206, 212, 88 S.Ct. 1970, 1974, 20 L.Ed.2d 1037 (1968). "This is all the more true of statutory provisions specifying the timing of review, for those time limits are, as we have often stated, 'mandatory and jurisdictional,' *Missouri v. Jenkins*, 495 U.S. 33, 45, 110 S.Ct. 1651–1660, 109 L.Ed.2d 31 (1990), and are not subject to equitable tolling." *Stone*, 514 U.S. 386, 405, 115 S.Ct. 1537, 131 L.Ed.2d 465 (1995); *see Caruncho v. I.N.S.*, 68 F.3d 356, 359 (9th Cir.1995) (the Ninth Circuit "has recognized repeatedly that statutory time limits are 'mandatory and jurisdictional.' ")

As the U.S. Supreme Court has "long held, when an 'appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction.' " *Bowles*

v. Russell, 551 U.S. 205, 213, 127 S.Ct. 2360, 168 L.Ed.2d 96 (2007) (quoting *U.S. v. Curry*, 6 How. 106, 47 U.S. 106, 113, 12 L.Ed. 363 (1848)). The U.S. Supreme Court "has no authority to create equitable exceptions to jurisdictional requirements" although the plaintiff alleges "unique circumstances." *Bowles*, 551 U.S. at 214, 127 S.Ct. 2360, 168 L.Ed.2d 96.

USDA explains that when a statute sets a deadline for judicial review, there is "no reason not to read [the statute] as meaning what it says." *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 44 (9th Cir.1976). USDA continues that section 608c(15) (B) "means what it says, and the time to file this action commenced upon entry of the JO's order on October 7, 2010." USDA concludes that Mr. Barserian's "failure to bring this action within the time mandated by Congress renders the Court without jurisdiction."

Mr. Barserian argues that he "had the right to receive correct information of the Secretary's final decision and order, and his right to seek judicial review thereof." Mr. Barserian points to the May 27 letter as misleading given its incorrect references to the case number and Mr. Barserian as Respondent. Mr. Barserian attacks the August 23 letter as "false and misleading" in that the August 23 letter indicates that judicial review of the August 20 JO decision "is available in an appropriate court if an appeal is timely filed." Mr. Barserian claims that he had "no right to 'appeal' the JO's Order again" and was limited to file "an administrative petition for reconsideration or a complaint for judicial review in federal court." Mr. Barserian further finds fault in that the May 27 letter provided appeal information but the August 23 letter denied providing "information on how to appeal." Mr. Barserian claims that had he been informed of section 1.146, he would have known that the August 20 JO decision would be stayed and that the time for judicial review would not run until final action on the reconsideration petition. Mr. Barserian further faults failure to instruct how to appeal the October 7 order. Mr. Barserian faults the October 7 letter for suggesting judicial review if an appeal is filed but claims the October 7 letter "is untrue because a second appeal could not be filed."

Mr. Barserian points to no reasonable confusion arising from Mr. Whitfield's letters or the USDA orders. Mr. Barserian could have sought

direct judicial review of the August 20 JO decision. In fact, the August 20 JO decision informed him of the 20–day deadline to do so. Mr. Barserian chose to seek USDA reconsideration. The October 7 order to deny reconsideration became the final USDA action and invoked section 608c(15)(B)'s 20–day deadline for judicial review. Mr. Barserian fails to explain adequately why he delayed more than 60 days to take action to address the October 7 order.

Mr. Barserian's points as to general jurisdiction over administrative agency action are inapplicable in that he failed to file timely this action to comply with statutory requisites for such review. Mr. Barserian's notions as to constitutional violations are also immaterial as the key issue here is compliance with statutory provisions to unlock sovereign immunity to entitle Mr. Barserian to judicial review in the first place. Mr. Barserian failed to comply with the statutory requirements, and his claims of false and misleading information are unpersuasive, especially given his demonstrated ability to prosecute his matter before the USDA.

CONCLUSION AND ORDER

For the reasons discussed above, this Court:

1. DISMISSES this action with prejudice; [3] and
2. DIRECTS the clerk to enter judgment in favor defendant U.S. Department of Agriculture and against plaintiff Kalem H. Barserian.

IT IS SO ORDERED.

———

[3] As an alternative to dismissal with prejudice, Mr. Barserian "requests dismissal without prejudice so he can file a new administrative petition." Mr. Barserian fails to indicate how he could do so, especially given a res judicata bar.

COURT DECISIONS

LAKEYDA RENEE TYSON V. USDA, RICKY HUNT V. USDA.
Bankruptcy No. 10–13207.
Adversary No. 10–5246.
Filed June 7, 2011.

[Cite as: 450 B.R. 754].

AWG – Bankruptcy – Automatic stay, damages for refusal to obey.

In an adversary Chapter 13 bankruptcy proceeding, the refusal of the purchaser at judgment sale to stay his legal proceedings and/or cooperate with the stay while under the continuing automatic stay rendered the sale voidable. Willful stay violations warranted award of actual damages to debtor. "Good faith" actions in a post-petition foreclosure are voidable by the trustee.

United States Bankruptcy Court,
W.D. Tennessee,
Eastern Division.

FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: (1) PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, (2) DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, and (3) CROSS–DEFENDANT'S MOTION TO DISMISS CROSS–COMPLAINT

G. HARVEY BOSWELL, Bankruptcy Judge.

The Court conducted a hearing on the Plaintiff's motion for summary judgment, the Defendant's motion for summary judgment, and the Cross–Defendant's motion to dismiss the cross-complaint on May 19, 2011. FED. R. BANKR.P. 9014. These matters are core proceedings. 28 U.S.C. § 157(b)(2)(A). The Court has reviewed the testimony from the hearing and the record as a whole. This memorandum opinion shall serve as the Court's findings of fact and conclusions of law. FED. R. BANKR.P. 7052.

Findings of Fact

The facts in this proceeding are essentially undisputed. The debtor, Lakeyda Renee Tyson, ("Debtor"), filed a petition for chapter 13 bankruptcy relief on September 22, 2010. At the time of filing, the Debtor was the owner of a house and lot located at 708 George Street in Trenton, Tennessee, ("Trenton property"). The Debtor obtained title to the property by a warranty deed from Dwayne and Sherry Burkett dated and recorded on November 24, 2004.

At the time the petition was filed, the United States of America, acting by and through the United States Department of Agriculture, Rural Housing Service of Rural Development, ("USDA"), possessed a valid lien on the Debtor's property which was secured by a properly recorded deed of trust. The Debtor listed "USDA Rural Development, Centralized Servicing Center, P.O. Box 66806, Saint Louis, MO 63166" on Schedule D as the mortgage holder on the Trenton property. The Debtor also listed "USDA Rural Development, Centralized Servicing Center, P.O. Box 66806, St. Louis, Mo 63166–6806," "USDA Rural Housing Servicing, Centralized Servicing Center, P.O. Box 66879, St. Louis, MO 63166–6879," and "Jimmy Croom, AUSA, 109 S. Highland, Ste. 300, Jackson, TN 38301–6145" on her matrix. In its answer to the Debtor's complaint, USDA admitted that notice of the bankruptcy filing was sent to the P.O. Box 66806 address; however, it also stated that it was "without sufficient information to admit or deny whether its [Office of General Counsel] acknowledged that proper notice of the bankruptcy filing was given and received by USDA. USDA further stated that the USDA personnel who conducted the foreclosure sale were not aware of the bankruptcy filing at the time of the sale.

Prior to filing for bankruptcy relief, the Debtor defaulted on the mortgage on the Trenton property. Consequently, USDA conducted a foreclosure sale on October 5, 2010. Defendant Ricky Hunt, ("Hunt"), purchased the property at the foreclosure sale for $17,500. A substitute trustee's deed was executed on October 12, 2010 and delivered to Edward Guyton, an agent for Hunt, on October 13, 2010.

After execution of the substitute trustee's deed, but before it could be recorded, USDA learned of Debtor's bankruptcy filing. USDA alleges that it then contacted Hunt and his agent and advised them not to record the substitute trustee's deed because of problems with the sale. Hunt's

agent recorded the substitute trustee's deed in the Register's Office of Gibson County, Tennessee on October 13, 2010. Hunt disputes that he and/or his agent were contacted prior to the recordation of the deed. In his response to the Debtor's motion for summary judgment, Hunt states that neither he nor his agent were contacted by USDA until 3:54 p.m. on October 13, 2010, which was allegedly after the deed had been recorded. Hunt further alleged that "the problem that arises is that the Deed was already recorded and the Department gave no reason why this shouldn't have occurred."

On October 22, 2010, an attorney from USDA's Office of General Counsel contacted counsel for Debtor via email and advised him that he had contacted Hunt and asked Hunt to execute an agreement waiving the foreclosure as void, cancelling the recorded trustee's deed and reinstating the deed of trust, and that USDA would totally refund the purchase price. USDA's counsel also advised Debtor's counsel that Hunt had refused to waive the foreclosure because he felt he had a claim for expenses associated with the sale. USDA's counsel further stated that he had informed Hunt he could make a claim against USDA through an administrative procedure, but that Hunt still refused to cooperate.

On November 2, 2010, counsel for Debtor mailed a letter to Hunt explaining that Debtor had filed a petition under the Bankruptcy Code prior to the foreclosure sale and, as a result, the sale was in violation of the automatic stay and null and void. The letter asked Hunt to cooperate with USDA to resolve the matter and set aside the sale. Said letter further advised Hunt that if he refused to cooperate, counsel for Debtor would have no option but to institute an action in this Court seeking to set aside the sale. Hunt admitted that he received this letter on November 8, 2010.

Hunt refused to cooperate and on November 12, 2010, the Debtor filed a Complaint against him and USDA to declare the foreclosure sale void, to set aside and void the substitute trustee's deed and to reinstate the November 2, 2004, deed of trust. The Debtor also asked the Court to assess costs and Debtor's attorney's fees against Hunt and to impose "any such further sanctions on defendant Ricky Hunt for his willful and continuing violation of the automatic stay." The Debtor stated that she was bringing the complaint pursuant to 11 U.S.C. § 362(a)(3) and Federal Rule of Bankruptcy Procedure 7001(7).

On December 21, 2010, Hunt filed a motion to dismiss the adversary complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) in which he alleged that the Debtor had failed to state a claim upon which relief could be granted. Hunt based his motion on the fact that he had no notice of the Debtor's bankruptcy at the time the sale was conducted or at the time the substitute trustee's deed was recorded. Hunt also alleged that 11 U.S.C. § 549(c) prevents the Court from granting the Debtor's complaint. The Court heard Hunt's motion on January 13, 2011, and denied it. An order memorializing the Court's ruling was entered on February 15, 2011. This order provided that the Hunt's reliance on 11 U.S.C. § 549(c) was inappropriate in this case, that 11 U.S.C. § 362(a)(3) is a sustainable cause of action for the Debtor, and that the Debtors' complaint was sufficient as a matter of law pursuant to Federal Rule of Civil Procedure 8(a).

On February 2, 2011, Hunt filed a cross-claim against USDA alleging he is entitled to damages from USDA for breach of contract, fraudulent conveyance, wrongful foreclosure, unjust enrichment, conversion, slander of title and fraud. Although Hunt averred in the second paragraph of his complaint that these matters are not core proceedings and he did not consent to final orders being entered by this Court, in his prayer for relief, Hunt asks the Court to issue an order granting him a money judgment for his damages and expenses, including attorney's fees. Hunt also asked the Court to declare Hunt as the legal and equitable owner of the Trenton property and to declare that the property is not property of the Debtor's estate. Hunt further sought an order from the Court granting him possession of the Trenton property within 30 days from entry of a final order "or within a reasonable time as defined by the Court." Lastly, Hunt asked the Court to grant him relief from the automatic stay *nunc pro tunc* to October 4, 2010, "due to the actions of the Cross–Defendant, The United States of America, Department of Agriculture, Office of Housing Service and United States and any other responsible party not yet determined." As an alternative basis for relief, Hunt asked for his purchase price of $17,500 to be returned to him along with an award of actual damages with interest. Hunt amended his cross-claim on March 21, 2011, to allege that USDA had also violated the Federal Debt Collection Practices Act.

The Debtor filed a motion for summary judgment on February 11, 2011, in which she alleged that there was no genuine issue of material fact and judgment could be entered as a matter of law pursuant to Federal Rule of Bankruptcy Procedure 7056. The Debtor alleged that there was no genuine issue of material fact that Hunt "willfully violated the automatic stay of § 362 and as such [the Debtor] has suffered damages in the nature of attorney's fees and emotional distress."[1] In discussing the alleged violation of the automatic stay, the Debtor cited 11 U.S.C. § 362(a)(1), (3), (4), and (5).

Hunt filed a response to this motion on February 23, 2011, in which he alleged that the Debtor was not entitled to summary judgment for a number of reasons. First, although the Court had previously addressed the sufficiency of the Debtor's complaint in the order denying Hunt's motion to dismiss, Hunt again alleged that the Debtor's motion was insufficient as a matter of law because it failed to comply with the Federal Rules of Civil Procedure, specifically Rule 56(c). Hunt also alleged that, by citing to 11 U.S.C. § 362(a)(1), (4) and (5), the Debtor's motion for summary judgment averred additional causes of action which were not included in the original complaint and upon which the Debtor may not rely. Second, Hunt alleged that genuine issues do exist as they pertain to allegations against him and that he was entitled to summary judgment against USDA on his cross-claim. Third, Hunt averred that his pending discovery requests made the Debtor's motion premature.

On March 8, 2011, USDA filed a motion to dismiss Hunt's cross-complaint pursuant to Federal Rule of Civil Procedure 12(b)(1), made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7012(b). In that motion, USDA alleges that Hunt's claims are barred by the doctrine of sovereign immunity and that Hunt failed to file a prior administrative claim with the United States Department of Agriculture as required under the Federal Tort Claims Act codified at 28 U.S.C. § 2675(a). USDA also alleged that this Court lacks jurisdiction to adjudicate Hunt's claims pursuant to 28 U.S.C. § 1346(b)(1).

[1] Debtor's motion for summary judgment also contained allegations that the USDA had acted willfully in violating the automatic stay; however, at the hearing on the Debtor's motion, counsel for Debtor conceded that the USDA did not act willfully or intentionally in violating the stay in this case.

On April 26, 2011, Hunt filed a motion for summary judgment and/or declaratory relief against USDA in which he alleged that USDA has failed to give him possession of and title to the Trenton property. Hunt went on to restate the allegations contained in his previous pleadings.

At the conclusion of the hearing, the Court granted the Debtor's motion for summary judgment, declared the October 5, 2010, foreclosure sale and the deed prepared in accordance thereto void, reinstated the November 24, 2004, deed of trust, and ordered the Trenton property be restored to the Debtor. The Court granted USDA's motion to dismiss the cross-claim and denied Hunt's motion for summary judgment. The Court also ruled that it would abstain from hearing any proof on the issue of damages between the parties. The Court asked USDA's attorney to prepare an order memorializing its ruling, but stated it would issue written findings of fact and conclusions of law as well.

Conclusions of Law

A. Federal Rule of Civil Procedure 8

Although the February 15, 2011, order denying Hunt's motion to dismiss stated that the Debtor's complaint was sufficient as a matter of law, Hunt again raised the insufficiency argument in his February 23, 2011, response to the Debtor's motion for summary judgment. In that response, Hunt asserted that the Debtor's failure to assert § 362(a)(1), (4) and (5) as grounds for relief in her original complaint prohibited her from seeking relief under these sections in her motion for summary judgment and, therefore, made summary judgment inappropriate. The Court has already ruled on this issue and found Hunt's argument to be without merit. The February 15, 2011, order denying Hunt's motion to dismiss is conclusive on this issue and binding on these parties. Quite simply, it is the law of the case and the Court is precluded from reexamining it *Consolidation Coal Co. v. McMahon*, 77 F.3d 898, 905 n. 5 (6th Cir.1996). However, based on Hunt's reiteration of the insufficiency argument, the Court finds it necessary to more fully set forth the reasons for its conclusion that Hunt's argument regarding the complaint's sufficiency fails.

Federal Rule of Civil Procedure 8, made applicable to bankruptcy adversary proceedings by Federal Rule of Bankruptcy Procedure 7008(a), provides that a pleading setting forth a claim for relief must contain:

(1) a short and plain statement of the grounds for the court's jurisdiction ...;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

Fed.R.Civ.P. 8(a)(1)-(3). The statement required by Fed.R.Civ.P. 8(a)(2) is intended "to give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Bell Atlantic v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 1964, 167 L.Ed.2d 929 (2007). This requirement ensures "that the defending party can prepare an adequate answer." *The State Bank & Trust Co. v, Spaeth (In re Motorwerks, Inc.)*, 371 B.R. 281, 292 (Bankr.S.D.Ohio 2007). Pursuant to this rule, "the form of the complaint is not significant if it alleges facts upon which relief can be granted, even if it fails to categorize correctly the legal theory giving rise to the claim." *Gean v. Hattaway*, 330 F.3d 758, (6th Cir.2003) (internal quotation marks and citations omitted). If the pleading is sufficient to put the defendant on notice of the grounds for which plaintiff is seeking relief, the pleading will be deemed to satisfy the requirements of Rule 8(a)(2) "notwithstanding plaintiff's failure to ... cite the relevant statute." *Chiaverini, Inc., v. Frenchie's Fine Jewelry, Coins & Stamps, Inc.*, 2007 WL 1344183, at *1 (E.D.Mich.2007); *The Liquidation Trust v. Daimler AG (In re Old Carco LLC)*, 2011 WL 1833244, at *5 (Bankr.S.D.N.Y.2011) (citing *Northrop v. Hoffman of Simsbury, Inc.*, 134 F.3d 41, 46 (2nd Cir.1997); *McEachin v. McGuinnis*, 357 F.3d 197, 199 n. 2 (2nd Cir.2004)) ("It is well-established that the failure in a complaint to cite a statute, or to cite the correct one, in no way affects the merits of a claim. Factual allegations alone are what matters.")

In the case at bar, it is true that the Debtor originally stated she was bringing her complaint against Hunt and USDA pursuant to Federal Rule of Bankruptcy Procedure 7001(7) and 11 U.S.C. § 362(a)(3); however, the complaint contains numerous factual recitations regarding the defendants' alleged violation of § 362(a)(1), (3), (4) and (5). The complaint also contains sufficient statements that put the defendants on notice that the Debtor was seeking a judgment against Hunt for his willful violation of the automatic stay. The fact that the debtor did not specifically cite § 362(a)(1), (4) and (5) until she filed her motion for summary judgment is irrelevant. It was clear from the complaint that the Debtor was pursuing relief under all of these subsections of § 362(a). The Court therefore concludes that this addition of statutory citations to the motion for summary judgment is not grounds for denying the Debtor's motion for summary judgment.

B. Federal Rule of Bankruptcy Procedure 7056 & 11 U.S.C. § 362

1. Federal Rule of Bankruptcy Procedure 7056

Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c), made applicable to bankruptcy proceedings by Fed. R. Bankr.P. 7056. "The moving party has the burden of proving that no genuine issue as to any material fact exists and that it is entitled to a judgment as a matter of law." *R.S.W. W., Inc., v. City of Keego Harbor,* 397 F.3d 427, 433 (6th Cir.2005). A moving party can meet its burden under Rule 56(c) by "identifying those parts of the record that demonstrate the absence of any genuine issue of material fact." *Moldowan v. City of Warren,* 578 F.3d 351, 374 (6th Cir.2009) (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). With regard to an issue for which the moving party does not bear the burden of proof at trial, however, "the moving party may meet its burden by showing that there is an absence of evidence to support the nonmoving party's case." *Id; Cleveland v. Policy Mgmt. Sys. Corp.,* 526 U.S. 795, 805–06, 119 S.Ct. 1597, 143 L.Ed.2d 966 (1999). "By its very terms, this [Rule 56(c)] standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary

judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (emphasis in original).

Once the moving party has demonstrated that there are no genuine issues as to any material facts, the "nonmoving party 'must show sufficient evidence to create a genuine issue of material fact.' " *Klepper v. First Am. Bank*, 916 F.2d 337, 342 (6th Cir.1990). The nonmoving party cannot rely on "[a] mere scintilla of evidence" in order to satisfy its burden under Rule 56(c). *Prebilich–Holland v. Gaylord Entm't Co.*, 297 F.3d 438, 442 (6th Cir.2002); *Moldowan*, 578 F.3d at 374 (the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts."). Rather, the nonmoving party must present evidence on which a jury [or the trier of fact] could reasonably find for the nonmovant. *Anderson.*, 477 U.S. at 248, 106 S.Ct. 2505. The existence of a dispute over "irrelevant" or "unnecessary" facts will not defeat a summary judgment motion. *Id.* The substantive law of a particular case will determine which facts are material and which are not. *Id.*

"[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249, 106 S.Ct. 2505. When considering a motion for summary judgment, a court must view all the facts and make all reasonable inferences in favor of the non-moving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587–88, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Williams v. Mehra*, 186 F.3d 685 (6th Cir.1999). In addressing a motion for summary judgment, the court does not have a "duty to search the entire record to establish that it is bereft of a genuine issue of material fact." *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479–80 (6th Cir.1989). Instead, the "nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact." *Poss v. Morris (In re Morris)*, 260 F.3d 654, 665 (6th Cir.2001); *Guarino v. Brookfield Twp. Trustees*, 980 F.2d 399, 404 (6th Cir.1992).

After reviewing the pleadings in this case and the arguments made at the hearing, the Court concludes that there is no dispute as to the material facts in this case and that those facts entitled the Debtor to judgment as a matter of law.

2. 11 U.S.C. § 362(a)

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title ... operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

By virtue of 11 U.S.C. § 541, the filing of a bankruptcy petition creates a bankruptcy estate. Section 541 of the Bankruptcy Code defines "property of the estate" as "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). In addition to creating an estate, filing a bankruptcy petition also triggers the protections of the automatic stay under 11 U.S.C. § 362(a). Section 362(a) prohibits creditors from attempting to collect most debts from the

debtor or property of the estate. The scope of the automatic stay is broad and "[i]t stops all collection efforts, all harassment, and all foreclosure actions." H.R.Rep. No. 595, 95th Cong., 1st Sess. 340 (1978), U.S. Code Cong. & Admin. News 1978, pp. 5963, 6297; *Smith v. First Am. Bank (In re Smith)*, 876 F.2d 524, 526 (6th Cir.1989). "It is elementary that the automatic stay comes into existence automatically and immediately upon the filing of a petition in bankruptcy." *Webb Mtn, LLC, v. Exec. Realty P'ship, L.P. (In re Webb Mtn., LLC)*, 414 B.R. 308, 335 (Bankr.E.D.Tenn.2009) (internal quotation marks and citations omitted). The stay of an act against property of the estate continues until the property is no longer property of the estate. 11 U.S.C. § 362(c)(1). The stay of any other act continues until the case is closed, dismissed, or discharged, whichever is earliest. 11 U.S.C. § 362(c).

Actions taken in violation of the automatic stay are "invalid and voidable and shall be voided absent limited equitable circumstances." *Easley v. Pettibone Michigan Corp.*, 990 F.2d 905, 911 (6th Cir.1993). This rule is true even if the creditor had no notice of the stay. *In re Smith*, 876 F.2d at 526 ("The automatic stay is effective upon the date of the filing of the petition ... and formal service of process will not be required."); *In re Smith*, 224 B.R. 44, 46 (Bankr.E.D.Mich.1998) ("The [automatic] stay applies to all creditors, regardless of notice."). Where notice, or the lack thereof, is an issue, only where the debtor unreasonably withholds notice of the stay and the creditor would be prejudiced if the debtor is able to raise the stay as a defense, or where the debtor is attempting to use the stay unfairly as a shield to avoid an unfavorable result, will the protections of section 362(a) be unavailable to the debtor.

Easley, 990 F.2d at 911.

A post-petition foreclosure sale violates the protections of the automatic stay as does the post-petition recording of a deed. *In re Smith*, 224 B.R. at 46; *In re Webb Mtn, LLC*, 414 B.R. at 335; *In re Penfil*, 40 B.R. 474, 476 (Bankr.D.Mich.1984). Withholding possession of property of the estate also constitutes a violation of the automatic stay as "the exercise [of] control over property of the estate." *TranSouth Fin'l. Corp. v. Sharon (In re Sharon)*, 234 B.R. 676, 682 (6th Cir. BAP 1999). Absent

the unusual circumstances enumerated in *Easley*, these actions are void. *In re Smith*, 224 B.R. at 46.

Where the action at issue is a post-petition foreclosure sale, § 549(c) does not provide the purchaser with any protection from the voiding of the sale. *Id.* In a case similar to the one at bar, the lienholder on the debtor's property conducted a post-petition foreclosure sale. At the time of the sale, the lienholder was unaware of the debtor's bankruptcy. Upon learning of the chapter 13 filing, the lienholder contacted the purchaser of the property to inform him of the bankruptcy. The debtor then filed an adversary proceeding to set aside the foreclosure as violating the automatic stay and to declare the sale void.

In defense of the debtor's complaint, the purchaser alleged "that § 549(c) provided an exception to the principle that actions taken in violation of the automatic stay are void or voidable by protecting good faith purchasers of real property." *Id.* at 46. The *Smith* court found that argument to be without merit:

The Court concludes that § 549(c) is inapplicable in this context. Section 549(c) provides an exception to the trustee's right to avoid a transfer of property under § 549(a). However, this case does not involve an avoidance action under § 549(a). Rather, Smith moved to set aside the foreclosure sale because it violated the automatic stay. Section 549(a) was never implicated, and, accordingly, the exception to § 549(a) is not applicable. Further, because the Court has determined that the foreclosure sale is void, the sale did not result in a transfer for purposes of § 549(c).

Id. at 47.

In the case at bar, there is no dispute that USDA violated the automatic stay when it conducted the foreclosure sale on October 5, 2010. It is also clear that Hunt's recordation of the deed on October 13, 2010, violated the automatic stay. Additionally, Hunt's refusal to cooperate in voiding the foreclosure sale by reconveying the deed to the Trenton property qualifies as withholding possession of property of the estate and is a continuing violation of the automatic stay. The fact that the parties may not have had notice of the automatic stay's existence at

the time of the foreclosure sale on October 5, 2010, or at the time the deed was recorded on October 13, 2010, is immaterial to the decision that these actions are voidable.

There is nothing in the record, nor are there any allegations, that the debtor withheld notice of the case filing or the existence of the automatic stay from USDA or Hunt in either an unreasonable or unfair manner. The Debtor listed USDA on her petition and her matrix and USDA admitted to receiving notice of the case. Hunt was obviously not listed on the matrix since he is not one of the debtor's creditors; however, as soon as the Debtor learned that Hunt had purchased the Trenton property at the foreclosure sale, the Debtor's attorney wrote to Hunt informing him of the bankruptcy filing. There is simply no evidence that the Debtor is attempting to use the protections of the automatic stay to do anything other to obtain the protections afforded her by the Bankruptcy Code.

As a result of these findings, the Court concludes that the foreclosure sale, the recordation of the deed and Hunt's failure to cooperate in setting aside the foreclosure sale are violations of 11 U.S.C. § 362(a). There are no equitable circumstances that indicate an exception should be made to the general rule that actions taken in violation of the automatic stay in this case are invalid and voidable. The Court therefore concludes that the foreclosure sale conducted on October 5, 2010, is void. As a result, the Court concludes that the sale should be set aside and the November 24, 2004, deed of trust transferring the property to the debtor should be restored.

Section 362(k) of the Bankruptcy Code provides that "an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." 11 U.S.C.A. § 362(k)(1).[2] As a practical matter, the § 362(a) automatic stay, if innocently violated, will not halt collection activity of creditors, if such creditors are not actually aware that the debtor has in fact filed a bankruptcy case. If, however, a creditor knowingly and willfully ignores the statutory prohibitions provided by the automatic stay, the creditor

[2] Section 362(k)(1) is subject to an exception set forth in subparagraph (2); however, that exception is inapplicable to the case at bar.

may be subject to sanctions for violations of the stay. Because Congress chose to use the word "shall" in drafting § 362(k), the imposition of sanctions under this statute is mandatory. A bankruptcy court does not have the discretion to decide if sanctions are the appropriate remedy for a violation of the stay. So long as there is a "willful violation," the court must impose them.

The term "willful" is not defined by the Bankruptcy Code; however, courts have been rather thorough in interpreting the term. Judge Stair of the Eastern District of Tennessee aptly summed up the interpretation as follows:

A violation [of the automatic stay] is willful if "the creditor deliberately carried out the prohibited act with knowledge of the debtor's bankruptcy case." *Walker v. Midland Mortgage Co. (In re Medlin),* 201 B.R. 188, 194 (Bankr.E.D.Tenn.1996). The level of culpability necessary for a "willful" violation of the stay has been summarized as follows:

A specific intent to violate the stay is not required, or even an awareness by the creditor that her conduct violates the stay. It is sufficient that the creditor knows of the bankruptcy and engages in deliberate conduct that, it so happens, is a violation of the stay. Moreover, where there is actual notice of the bankruptcy it must be presumed that the violation was deliberate or intentional. Satisfying these requirements itself creates strict liability. There is nothing more to prove except damages. *In re Daniels,* 206 B.R. 444, 445 (Bankr.E.D.Mich.1997) (internal citations and quotations omitted). "[G]ood faith is not a defense and is irrelevant to liability." *Id.* at 446.

In re Printup, 264 B.R. 169, 173 (Bankr.E.D.Tenn.2001). It is irrelevant to a court faced with imposing § 362(k) sanctions whether a defendant actually intended to violate the automatic stay. So long as the defendant had knowledge of the bankruptcy case and took a deliberate act in violation of the automatic stay, a bankruptcy court must award the plaintiff actual damages. *In re Hill,* 222 B.R. 119, 123 (Bankr.N.D.Ohio 1998); *see also* 11 U.S.C. § 342(g)(2) (monetary penalties imposed under § 362(k) may only be awarded if the creditor receives appropriate notice of the case in compliance with § 342 or actual notice of the case.).

Should the court make an additional finding that the defendant acted in bad faith or with malice, the court may also award punitive damages to the debtor. *Crysen/Montenay Energy Co. v. Esselen Assocs., Inc. (In re Crysen/Montenay Energy Co.)*, 902 F.2d 1098, 1105 (2d Cir.1990). Although courts are required to award actual damages to an injured plaintiff for violations of the automatic stay, the imposition of punitive damages is left to the court's discretion. See *In re Timbs*, 178 B.R. 989, 997 (Bankr.E.D.Tenn.1994). The factors considered in a § 362(k) punitive damages action "include the nature of the creditor's conduct, the creditor's ability to pay the damages and the creditor's motives, and any provocation by the debtor." *Emberton v. Lobb (In re Emberton)*, 263 B.R. 817 (Bankr.W.D.Ky.2001). Courts are generally reluctant to award punitive damages under § 362(k) and will typically do so only in cases that "involve conduct that is egregious, vindictive or intentionally malicious," or "when there is a strong showing that the creditor acted in bad faith or otherwise undertook their actions in reckless disregard of the law." *In re Bivens*, 324 B.R. 39, 42–43 (Bankr.N.D.Ohio 2004). Courts have also found that actions "taken in arrogant defiance of federal law" can give rise to an award of punitive damages. *In re Russell*, 441 B.R. 859, 863 (Bankr.N.D.Ohio 2010).

At the hearing in the case at bar, Hunt admitted in his pleadings that he received a letter from the Debtor's attorney on November 8, 2010, informing him of the bankruptcy filing and the existence of the automatic stay. Despite having this knowledge, Hunt deliberately refused to cooperate in voiding the sale and reconveying the Trenton property to the Debtor at any time after this date. Clearly, these actions were willful and constitute a violation of the automatic stay for which the imposition of damages is appropriate under § 362(k).

From at least November 8, 2010, until now, Hunt has clearly defied the mandates of federal bankruptcy law. Hunt admitted he received the letter from Debtor's counsel informing him of the bankruptcy proceeding. He also admitted in his pleadings that USDA contacted him regarding the existence of this case on several occasions and informed him that as a result of the automatic stay, the October 5, 2010, foreclosure sale was void. Hunt's motion to dismiss the complaint was heard by this Court on January 13, 2011, at which time his counsel argued that his actions did not violate the automatic stay. The Court denied his motion. In so doing,

the Court informed Hunt's counsel that the automatic stay was in effect at the time of the foreclosure sale and that the issue of notice was irrelevant to the protections afforded thereby; however, the Court finds that Hunt's refusal to cooperate in the voiding of the foreclosure sale was not egregious, vindictive or intentionally malicious. The Court also finds that Hunt's actions were not the result of a reckless disregard of the federal bankruptcy laws, but were instead the result of a very mistaken understanding of how those laws work. As a result, the Court finds that an award of punitive damages is not appropriate in this case.

Although the Court has found that the Debtor is entitled to an award of actual damages against Hunt under 11 U.S.C. § 362(k), the Court is not making a determination as to the amount of those damages at this time. As will be discussed infra, the Court is without jurisdiction to hear Hunt's claims against USDA and will therefore abstain from adjudicating those claims. Without hearing those claims, it is impossible for the Court to determine the amount of damages. Any damages Hunt owes to the Debtor may be offset by potential liability USDA has to Hunt.

C. Hunt's Cross Claim

The subject matter jurisdiction of bankruptcy courts is set forth in 28 U.S.C. § 1334(a)[3]. Bankruptcy courts have jurisdiction to hear all cases under title 11 of the United States Code (the Bankruptcy Code) and all claims arising thereunder. 28 U.S.C. §§ 157(b) and 1334. These "arising under" claims are referred to as "core" proceedings and "either invoke[ ] a substantive right created by federal bankruptcy law or ... could not exist outside of the bankruptcy." *Browning v. Levy*, 283 F.3d 761, 773 (6th Cir.2002) (internal quotation marks and citations omitted). Core proceedings include matters concerning the administration of the bankruptcy estate, § 157(b)(2)(A), "proceedings to determine, avoid or recover preferences," § 157(b)(2)(F), and "motions to terminate, annul, or modify the automatic stay," § 157(b)(2)(G).

[3] 28 U.S.C. § 1334 gives district courts original and exclusive jurisdiction of bankruptcy cases. 28 U.S.C. § 157(a) gives district courts the power to refer all bankruptcy cases to bankruptcy courts.

If a matter does not "arise under" a bankruptcy case, but is only related thereto, it is what is referred to as a noncore proceeding. 28 U.S.C. § 157(c). In those instances, the bankruptcy court may hear the matter, but may not enter a final order. Instead, the bankruptcy court must submit proposed findings of fact and conclusions of law to the district court which then reviews the bankruptcy court's conclusions and enters a final order. 28 U.S.C. § 157(c)(1). *Id.* The only exception to this rule is found in 28 U.S.C. § 152(c)(2) which provides that a bankruptcy court may issue final orders in noncore proceedings with the consent of all the parties. In the case at bar, Hunt has consistently stated in his pleadings that his cross-claims against USDA are noncore proceedings and that he does not consent to the issuance of final orders by this Court.

In addition to the core/noncore distinction, a court may also decide to abstain from hearing a matter under federal abstention doctrines.[4]Section 1334(c)(1) of Title 28 sets forth the doctrine of permissive abstention and provides that nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

28 U.S.C. § 1334(c)(1). "Stated in the disjunctive, the plain language of the statute permits a district court, and a bankruptcy court if so delegated under 28 U.S.C. § 157(a), to abstain from exercising its jurisdiction to adjudicate a core or noncore matter 'in the interest of justice' if abstention lies in favor of another federal court." *In re Repurchase Corp.*, 329 B.R. 832, 835 (Bankr.N.D.Ill.2005).

In the case at bar, Hunt is not one of the Debtor's creditors and, if not for the automatic stay violation, would not be before this Court. The only relation Hunt's cross-claims against USDA have to this case is that they arise out of the post-petition foreclosure which the Court has found was void. It is true that Hunt has to relinquish ownership of the Trenton property because USDA conducted the foreclosure in violation of the automatic stay. It is also true that his alleged claims against the USDA have arisen because the sale is being set aside because it violated the

[4] Although none of the parties in this matter filed a formal motion to abstain, a court may raise the issue *sua sponte. Beneficial Nat'l Bank v. Best Receptions Sys., Inc. (In re Best Reception Sys., Inc.),* 220 B.R. 932, 952 (Bankr.E.D.Tenn.1998).

automatic stay. Aside from those two facts, however, none of Hunt's allegations against USDA are at all related to this case. He has claims against USDA for injuries he sustained from the foreclosure sale based on USDA's actions. Those actions have nothing to do with the Debtor in this case except for the fact that the automatic stay makes the sale void. Although the Court appreciates the impact bankruptcy law has had on the sale, it concludes that it is not enough of a nexus to bring Hunt's claims within the purview of this Court. At least a portion of Hunt's claims against USDA may be governed by the Federal Tort Claims Act which provides a basis for jurisdiction in another federal court.

The Court has done all it can do in this case. USDA and Hunt violated the automatic stay. The Court has conducted the hearings on the relevant motions and found the October 4, 2010, foreclosure sale to be void pursuant to 11 U.S.C. § 362. The Court has found that in failing to cooperate in voiding the sale Hunt has committed a willful violation of the automatic stay and is therefore liable to the debtor for her actual damages. The only matters left to be resolved are Hunt's claims against USDA and the issue of the Debtor's actual damages, including what portion of those damages Hunt is liable for. Only the court that adjudicates Hunt's cross-claims against USDA can adequately determine what the amount of the Debtor's damages are. This Court would be unable to make that determination without hearing the entire matter—which is something this Court finds it is jurisdictionally unable to do. And, because the Court found that there was no basis to award the Debtor punitive damages from Hunt, any calculation of the Debtor's actual damages will not impact her case.

In accordance with the Court's May 19, 2011, ruling in open court, the attorney for USDA is hereby directed to prepare and enter an order in accordance with this opinion. Said order shall be entered within 7 days from entry of this memorandum opinion.

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[Editor's Note: We have made a good faith effort to block the viewing of borrower's income and expenses.]

DEPARTMENTAL DECISIONS

TRACY ZEHNDER.
AWG Docket No. 11 – 0011.
Decision and Order.
Filed January 7, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Jill S. Clifton.

AWG

Decision and Order

1. The hearing was held, by telephone, on December 8, 2010. Ms. Traci Zehnder, the Petitioner ("Petitioner Zehnder") participated and was represented by Jennifer M. Galloway, Esq.

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and was represented by Ms. Mary Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

3. I encourage **Petitioner Zehnder and the collection agency** to work together to **establish a repayment schedule**. *See* paragraphs 10 and 11.

Summary of the Facts Presented

4. Petitioner Zehnder owes to USDA Rural Development a balance of **$39,506.23**, in repayment of a United States Department of Agriculture / Rural Housing Service ***Guarantee*** (*see* RX-1, esp. p. 2) for a loan made in 2004, the balance of which is now unsecured ("the debt"). Petitioner Zehnder borrowed to buy a home in Michigan. *See* USDA Rural Development Exhibits RX-1 through RX-7, which I admit into evidence, together with the Narrative, Witness & Exhibit List (filed November 8, 2010), and the testimony of Mary Kimball.

5. This ***Guarantee*** establishes an **independent** obligation of Petitioner Zehnder, "I certify and acknowledge that if the Agency pays a loss claim on the requested loan to the lender, I will reimburse the Agency for that amount. If I do not, the Agency will use all remedies available to it, including those under the Debt Collection Improvement Act, to recover on the Federal debt directly from me. The Agency's right to collect is independent of the lender's right to collect under the guaranteed note and will not be affected by any release by the lender of my obligation to repay the loan. Any Agency collection under this paragraph will not be shared with the lender." RX-1, p. 2.

6. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$39,506.23**, would increase the current balance by $11,061.74, to $50,567.97. RX-7.

7. Petitioner Zehnder proved that the responsibility to repay "the debt" is that of her co-borrower, her former husband, Carl John Goschke V. *See* Petitioner Zehnder's Exhibit 1, which I admit into evidence, together with Petitioner Zehnder's Narrative, Witness List and Exhibit List (filed December 8, 2010), and the testimony of Petitioner Zehnder. The Judgment of Divorce (Exhibit 1), dated in June 2008, details at page 7 the obligations of Carl John Goschke V. Petitioner Zehnder may well choose to proceed against him for his failures. Nevertheless, USDA Rural Development, and those collecting on its behalf, are entitled to collect from Petitioner Zehnder.

8. Petitioner Zehnder and her son live with her parents, and she receives about $** child support for her son. Her son requires inhalers and other remedies for asthma and allergies. Petitioner Zehnder's "Earnings Statement" for Period Ending 12/04/2010 (filed December 8, 2010), and her "Consumer Debtor Financial Statement" with attached 2009 U.S. Income Tax Return (received December 17, 2010 and filed January 5 & 6, 2011) are admitted into evidence. Petitioner Zehnder's

disposable pay (within the meaning of 31 C.F.R. § 285.11) is about $** per month. Garnishment, up to 15% of Petitioner Zehnder's disposable pay, could yield about $** per month in payment on "the debt."

9. Petitioner Zehnder's reasonable living expenses total about $****. These expenses would be far greater if her parents were not providing her and her son with lodging. So long as the child support is timely paid, and her parents continue to provide, Petitioner Zehnder does not have any circumstances of financial hardship (within the meaning of 31 C.F.R. § 285.11).

10. Petitioner Zehnder is responsible and willing and able to negotiate the repayment of the debt with Treasury's collection agency.

Discussion

11. **Through July 30, 2011, NO garnishment is authorized**. Thereafter, garnishment up to 15% of Petitioner Zehnder's disposable pay is authorized. I encourage **Petitioner Zehnder and the collection agency** to **negotiate promptly** the repayment of the debt. Petitioner Zehnder, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Zehnder, you may ask that the debt be **apportioned separately** to you and your co-borrower, especially since, pursuant to the Judgment of Divorce, the responsibility to repay the debt is that of your co-borrower, your former husband, Carl John Goschke V.[1] You may choose to offer to compromise the debt for an amount you are able to pay, to settle the claim for less.

Findings, Analysis and Conclusions

12. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Zehnder and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

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[1] You may ask to be given consideration for you having left the house December 24, 2006, when you and the co-borrower separated; for you having given Countrywide your new address, having requested Countrywide for duplicates, and having received nothing from Countrywide about the delinquency or the foreclosure. While the lack of notice to you was not the fault of the USDA / Rural Housing Service, it was not your fault, either.

13. Petitioner Zehnder owes the debt described in paragraphs 4, 5 and 6.

14. **Through July 30, 2011, NO garnishment is authorized**. Thereafter, garnishment is authorized, up to 15% of Petitioner Zehnder's disposable pay. 31 C.F.R. § 285.11.

15. Repayment of the debt may also occur through ***offset*** of Petitioner Zehnder's **income tax refunds** or other **Federal monies** payable to the order of Ms. Zehnder.

Order

16. Until the debt is fully paid, Petitioner Zehnder shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

17. USDA Rural Development, and those collecting on its behalf, are **NOT** authorized to proceed with garnishment **through July 30, 2011**. Thereafter, USDA Rural Development, and those collecting on its behalf, are authorized to proceed with garnishment, up to 15% of Petitioner Zehnder's disposable pay. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.

JAMES SHEALY.
AWG Docket No. 11 – 0017.
Decision and Order.
Filed January 10, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Hearing Official James Hurt.

AWG

DECISION AND ORDER

This matter is before me upon the request of James Shealey for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On October 28, 2010, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing.

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation on November 5, 2010. Mr. Shealey objected to the debt in his Petition but did not file any documentation.

On December 7, 2010 at the scheduled time, RD was available for the conference call. RD was sworn.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

On February 20, 2004, James Shealey, the Petitioner received a home mortgage loan in the amount of $59,934.00 from JP Morgan Chase Manhattan Mortgage for property located at 1## Wil*** Street, Dadeville, AL 36###.[1] The Petitioner signed a Housing Loan Guarantee on January 20, 2004 which acknowledged that if (FmHA), United States Department of Agriculture (USDA), now Rural Development paid a loss claim on the loan to the lender, Petitioners would reimburse the Agency (USDA) for that amount. (RD) RX-1.

The borrower defaulted on the loan on February 1, 2007 and the property was sold on December 4, 2008 for $28,900.00. Narrative.

A loss claim was submitted to RD based on a liquidation appraisal, accrued interest, protective advances, attorney fees, appraisal and property inspections. RX-2.

RD paid a loss claim to JP Morgan Chase in the amount of $31,250.86. RX-2.

USDA (RD) received one net payment from US Treasury totaling $4,335.00 exclusive of Treasury. RX-6.

The remaining unpaid debt is in the amount of $26,915.86 ($31,250.86 - $4,335.00) exclusive of potential Treasury fees. RX-3.

[1] Complete address maintained in USDA files.

The remaining potential treasury fees are $7,536.45. RX-6
Mr. Shealey's employment status is unknown.
Mr. Shealey did not submit any financial statements under oath.
I am unable to perform a Financial Hardship calculation.

Conclusions of Law

James Shealey is indebted to USDA Rural Development in the amount of $26,915.86 for the mortgage loan extended to him.

James Shealey is indebted to the US Treasury for potential fees in the amount of $7,536.45.

All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.

The Respondent is entitled to administratively garnish the wages of the Petitioner.

Order

For the foregoing reasons, the wages of James Shealey shall be subjected to administrative wage garnishment.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

Done at Washington, D.C.

HELEN JOHNSEN BROWN.
AWG Docket No. 10 – 0213.
Decision and Order.
Filed January 10, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Chief Administrative Law Judge Peter M. Davenport.

AWG

Decision and Order

This matter is before the Administrative Law Judge upon the request of Petitioner for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to

imposition of an administrative wage garnishment. On April 26, 2010, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing on July 30, 2010.

On May 17, 2010, Michael Lynch filed a letter with the Hearing Clerk's Office requesting that his appearance be entered as representing the Petitioner[1]. The Respondent complied with the Order of April 26, 2010 filing a Narrative, together with supporting documentation on June 17, 2010. The Petitioner filed a Narrative, Witness and Exhibit List with the Hearing Clerk on June 23, 2010.[2]

A telephonic hearing was held on July 30, 2010. The Petitioner participated, represented by her counsel Michael Lynch. The Respondent was represented by Mary E. Kimball, Accountant for the New Program Initiatives Branch of USDA and by Gene Elkin, Legal Liaison for Rural Development. As noted in the Summary of the Hearing filed on July 30, 2010, Counsel for the Petitioner moved for Summary Judgment based upon the arguments raised in the materials filed on behalf of the Petitioner. As the record did not contain the full payment history, the record was held open for the receipt of those records. Upon receipt of the payment history, both sides were directed to file a Memorandum of Points and Authority in support of their respective positions.

The payment history was filed with the Hearing Clerk on October 1, 2010 as an Additional Exhibit. The exhibit indicates that a copy was provided to Mr. Lynch. On October 26, 2010, the Hearing Clerk's Office received a copy of a letter from the Petitioner's counsel requesting that certified copies of the payment history be provided (something not required in administrative proceedings), questioning the variance in the payment amounts from those required under the terms of the note (suggesting a lack of familiarity with the interest credit program extended to his client) and finally requesting an explanation of the potential fees charged by Treasury. Despite the passage of time, the record contains neither any inquiry or a Memorandum of Points and Authorities received from the Petitioner.

In the Narrative filed by the Petitioner, her counsel argues that the federal statute of limitation contained in 28 U.S.C. § 2415 bars recovery. Administrative wage garnishment and administrative salary offsets are

[1] The original letter sent by mail was subsequently received on May 25, 2010.
[2] The originals sent by mail were received on June 29, 2010.

administrative remedies that are not subject to statutes of limitations. The doctrine of laches also raised by the Petitioner has long been held to be inapplicable to the federal government. *U.S. v. Kirkpatrick,* 22 U.S. 720 (1824); *Chesapeake & Delaware Canal Co. v. U.S.,* 250 U.S. 123 (1919). Although nearly all mortgages extended by federal agencies contain express language waiving the application of state statutes of limitation, the United States Supreme Court has held that the federal government is not subject to state statutes of limitation. *U.S. v.Thompson,* 98 U.S. 486 (1878) *U.S. v. Summerlin,* 310 U.S. 414 (1940). Although there is a federal statute of limitations found at 28 U.S.C. § 2415 that provides that "every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years of the right of action accrues…," the staute has been construed by the courts as being applicable only to civil actions or legal or judicial remedies and does not bar collections by administrative remedies. *Arch Mineral Corporation v. Bruce M. Babbitt,* 894 F. Supp. 974 (S.D. WV 1995) (citing *Gerrard v. U.S. Ofc of Education,* 656 F. Supp. 570 (N.D. Cal. 1987). Accordingly, the issues raised as defenses are without merit.

Given the very limited discovery provisions in proceedings of this type, the Petitioner's requests in the October 19, 2010 letter will be denied and the matter resolved without the need for further proceedings.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered

Findings of Fact

On May 24, 1985, the Petitioner (then known as Helen Johnsen) received a home mortgage loan in the amount of $30,000.00 from Farmers Home Administration (FmHA), United States Department of Agriculture (USDA), now Rural Development (RD) for property located in Rensselaerville, New York. RX-1.

The Petitioner defaulted on the loan and the State Office determined that the net recovery value based upon an appraisal did not warrant continuation of foreclosure proceedings. The State Office attempted without success to sell the property privately and ultimately approved a Valueless Lien based upon the appraisal of November 15, 2000. Respondent's Narrative, p. 1.

At the time of approval of the Valueless Lien, there being no recovery from the property, the Petitioner owed $66,307.81. RX-3.

Treasury offsets totaling $3,342.82 exclusive of Treasury fees have been received. RX-3.

Once a debt owed to the United States is placed with Treasury, although further interest ceases to accrue, consistent with their regulations, the Treasury Department assesses fees based upon the amount of the debt to recover the costs of collection of the debt. In the case of the Petitioner, the amount of potential fees is $17,630.20. RX-4.

The remaining unpaid debt is in the amount of $62,964.99 exclusive of potential Treasury fees. RX-4.

The Petitioners income which is minimal roughly approximates her monthly expenses and with her income level, it appears unlikely to be in a position to ever liquidate the debt owed.

Conclusions of Law

The Secretary has jurisdiction in this matter.

Petitioner is indebted to USDA Rural Development in the amount of $62,964.99 exclusive of potential Treasury fees for the mortgage loan extended to her.

The Petitioner is under a financial hardship at this time.

Collection of the debt is not barred by 28 U.S.C. § 2415 or by fundamental fairness or the doctrine of laches.

The Respondent is **NOT** entitled to administratively garnish the wages of the Petitioner; however the debt shall remain at Treasury for any and all other appropriate collection action.

Order

For the foregoing reasons, the wages of Petitioner shall **NOT** be subjected to administrative wage garnishment.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

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ANTHONY CRANNELL.
AWG Docket No. 10 – 0410.
Decision and Order.
Filed January 10, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Jill S. Clifton.

AWG

Decision and Order

1.The hearing was held by telephone on November 23, 2010. Anthony J. Crannell, the Petitioner ("Petitioner Crannell"), participated, representing himself (appeared *pro se*).

2.Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and was represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

3.Petitioner Crannell's Consumer Debtor Financial Statement (not signed and not dated) (filed October 12, 2010), is admitted into evidence, together with Petitioner Crannell's Hearing Request (dated July 22, 2010) with the attached statement and divorce decree regarding the marriage of Cassondra K. Crannell and Anthony J. Crannell. USDA Rural Development Exhibits RX 1 through RX 6, together with the Narrative, Witness & Exhibit List (filed October 25, 2010) are admitted into evidence. The testimony of Petitioner Crannell and the testimony of Mary E. Kimball are admitted into evidence.

Summary of the Facts Presented

4.Petitioner Crannell owes to USDA Rural Development a balance of **$34,994.05** (as of October 18, 2010), in repayment of a real estate loan made in March 2001 to finance the purchase of a residence in Kansas ("the debt"), now unsecured. *See* USDA Rural Development Exhibits and Narrative.

5.Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$34,994.05** would increase the current balance by $9,798.33, to $44,792.38. *See* USDA Rural Development Exhibits, especially RX 5.

6.Petitioner Crannell owes the debt, even though his former wife (his co-borrower) Cassondra K. Crannell, also known as Cassondra McFeters, was awarded the residence in Kansas and "the debt."

7.Petitioner Crannell is responsible and capable of negotiating the disposition of the debt with Treasury's collection agency.

Discussion

8.I encourage **Petitioner Crannell and the collection agency** to **negotiate promptly** the repayment of the debt. Petitioner Crannell, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Crannell, you may choose to offer to compromise the debt for an amount you are able to pay, to settle the claim for less. Meanwhile, **through November 30, 2011, NO garnishment is authorized**, because Petitioner Crannell's testimony established that he was unemployed and had been involuntarily separated from his job. This Decision does not prevent repayment of the debt through ***offset*** of Petitioner Crannell's **income tax refunds** or other **Federal monies** payable to the order of Mr. Crannell.

Findings, Analysis and Conclusions

9. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Crannell and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

10. Petitioner Crannell owes the debt described in paragraphs 4 and 5.

11. **Through November 30, 2011, NO garnishment is authorized**. 31 C.F.R. § 285.11.

12. This Decision does not prevent repayment of the debt through ***offset*** of Petitioner Crannell's **income tax refunds** or other **Federal monies** payable to the order of Mr. Crannell.

Order

13. Until the debt is repaid, Petitioner Crannell shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in his mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

14. USDA Rural Development, and those collecting on its behalf, are **NOT** authorized to proceed with garnishment **through November 30, 2011**.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.

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RONNIE EPPERSON.
AWG Docket No. 11 – 0002.
Decision and Order.
Filed January 10, 2011.

AWG

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Jill S. Clifton.

Decision and Order

1.The hearing by telephone was held on December 8, 2010. Mr. Ronnie Epperson, the Petitioner ("Petitioner Epperson"), participated, representing himself (appearing *pro se*).

2.Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and was represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
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4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

Summary of the Facts Presented

3.Petitioner Epperson owes to USDA Rural Development a balance of **$15,393.62** in repayment of a loan that he borrowed in 1988. The loan was from the United States Department of Agriculture Farmers Home Administration, now known as USDA Rural Development. Petitioner Epperson borrowed to buy a home in Kentucky, and the **$15,393.62** balance is now unsecured ("the debt"). *See* USDA Rural Development Exhibits, plus Narrative, Witness & Exhibit List (filed November 12, 2010), which are admitted into evidence, together with the testimony of Mary Kimball.

4.Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$15,393.62** would increase the current balance by $4,310.21, to $19,703.83. *See* USDA Rural Development Exhibits, esp. RX 6.

5.The amount borrowed from USDA Rural Development was $39,750.00 in 1988. By the time of the short sale in 2000, that debt had grown to $46,134.74:

$ 41,483.20	Principal Balance prior to short sale
$ 4,081.25	Interest Balance prior to short sale
$ 570.29	Fee Balance prior to short sale
$ 46,134.74	Total Amount Due prior to short sale

‘‘‘‘‘‘‘‘‘

$ 205.51	Escrow refund
$ 20,000.00	Proceeds from short sale
$ 25,929.23	Unpaid in 2000

RX 5, p. 1

So the short sale left $25,929.23 unpaid in 2000. Another $10,535.61 applied to the debt since then (***offsets*** and garnishments), leaves **$15,393.62** unpaid now (excluding the potential remaining collection fees). *See* RX 5, p. 2.

6.Also admitted into evidence are Petitioner Epperson's testimony and his Hearing Request. Based on what Petitioner Epperson read from his pay stub and explained, he works in maintenance and is paid every 2 weeks at the rate of $** per hour; he is limited through the end of March to 30 hours per week. I calculate his current gross pay (based on 30 hours per week) to be about $*** per month; and his disposable pay (after subtracting Federal, State, and local income tax, social security, Medicare, health insurance, and other withholding) to be about 75% of that, or about $*** per month. I calculate Petitioner Epperson's current reasonable and necessary living expenses to be about $*** per month, not including the expenses of his 18 year old son, who lives with him; and not including the $** per month he is paying on a personal loan with a balance of $***. While Petitioner Epperson is limited to 30 hours per week, his disposable pay does not support garnishment in any significant amount without creating hardship. 31 C.F.R. § 285.11.

7.Petitioner Epperson is responsible and willing and able to negotiate the repayment of the debt with Treasury's collection agency.

Discussion

8.Through June 30, 2011, NO garnishment is authorized. *See* paragraph 6. Thereafter, garnishment is authorized, up to 15% of Petitioner Epperson's disposable pay. I encourage **Petitioner Epperson and the collection agency** to **negotiate promptly** the repayment of the debt. Petitioner Epperson, this will require **you** to telephone the collection agency after you receive this Decision. Petitioner Epperson, you may ask that the debt be apportioned separately to you and the co-borrower; you may choose to offer to the collection agency to

compromise the debt for an amount you are able to pay, to settle the claim for less. The toll-free number for you to call is **1-888-826-3127**.

Findings, Analysis and Conclusions

9.The Secretary of Agriculture has jurisdiction over the parties, Petitioner Epperson and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

10.Petitioner Epperson owes the debt described in paragraphs 3, 4 and 5.

11.**Through June 30, 2011, NO garnishment is authorized**. Thereafter, garnishment is authorized, up to 15% of Petitioner Epperson's disposable pay. 31 C.F.R. § 285.11.

12.Repayment of the debt may also occur through ***offset*** of Petitioner Epperson's **income tax refunds** or other **Federal monies** payable to the order of Mr. Epperson.

Order

13.Until the debt is repaid, Petitioner Epperson shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in his mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

14.USDA Rural Development, and those collecting on its behalf, are **NOT** authorized to proceed with garnishment **through June 30, 2011**. Thereafter, USDA Rural Development, and those collecting on its behalf, are authorized to proceed with garnishment, up to 15% of Petitioner Epperson's disposable pay. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.

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BRITAIN J. REEVES.
AWG Docket No. 10 – 0345.
Decision and Order.
Filed January 11, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Jill S. Clifton.

AWG

Decision and Order

1.The hearing by telephone was held on October 27, 2010. Mr. Britain J. Reeves, the Petitioner ("Petitioner Reeves"), participated, representing himself (appearing *pro se*).

2.Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and was represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

Summary of the Facts Presented

3.Petitioner Reeves owes to USDA Rural Development **$18,164.43** in repayment of a loan balance from his mother that he assumed in 1999. The loan was from the United States Department of Agriculture Farmers Home Administration, now known as USDA Rural Development. Petitioner Reeves borrowed to provide the family home in Texas for himself and his siblings. The **$18,164.43** balance is now unsecured ("the debt"). *See* USDA Rural Development Exhibits, plus Narrative, Witness

& Exhibit List (filed September 2, 2010), which are admitted into evidence, together with the testimony of Mary Kimball.

4.Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$18,164.43** would increase the current balance by $5,086.04, to $23,250.47. *See* USDA Rural Development Exhibits, esp. RX 5.

5.The loan balance Petitioner Reeves assumed in 1999 from USDA Rural Development was about $35,049.66. By the time of the short sale in May 2003, that debt had grown to $50,003.74:

$ 37,181.53 Principal Balance prior to short sale
$ 8,496.76 Interest Balance prior to short sale
$ 4,325.45 Fee Balance prior to short sale

$ 50,003.74 Total Amount Due prior to short sale

- $ 28,819.98 Proceeds from short sale
$ 21,183.76 Unpaid in 2003

RX 4, p. 1

So the short sale left $21,183.76 unpaid in 2003. Another $3,019.33 applied to the debt since then (Treasury ***offsets*** and insurance refund), leaves **$18,164.43** unpaid now (excluding the potential remaining collection fees). *See* RX 4, p. 2.

6.Petitioner Reeves's testimony and his Hearing Request are admitted into evidence. No pay stub or Consumer Debtor Financial Statement from Petitioner Reeves has been filed. I cannot determine whether his disposable pay supports garnishment without creating hardship. 31 C.F.R. § 285.11. I cannot calculate Petitioner Reeve's disposable pay (after subtracting Federal income tax, social security, Medicare, health insurance, and any other "eligible" withholding from his gross pay), because there is no evidence to use for such calculations. I cannot calculate Petitioner Reeves's current reasonable and necessary living expenses. Petitioner Reeves may be unemployed.

7.Petitioner Reeves is responsible and willing and able to negotiate the repayment of the debt with Treasury's collection agency.

Discussion

8.Through April 30, 2011, NO garnishment is authorized. *See* paragraph 6. Thereafter, garnishment is authorized, up to 15% of Petitioner Reeves's disposable pay. I encourage **Petitioner Reeves and the collection agency** to **negotiate promptly** the repayment of the debt. Petitioner Reeves, this will require **you** to telephone the collection agency after you receive this Decision. Petitioner Reeves, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less. The toll-free number for you to call is **1-888-826-3127**.

Findings, Analysis and Conclusions

9.The Secretary of Agriculture has jurisdiction over the parties, Petitioner Reeves and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

10.Petitioner Reeves owes the debt described in paragraphs 3, 4 and 5.

11.**Through April 30, 2011, NO garnishment is authorized**. Thereafter, garnishment is authorized, up to 15% of Petitioner Reeves's disposable pay. 31 C.F.R. § 285.11.

12.Repayment of the debt may also occur through ***offset*** of Petitioner Reeves's **income tax refunds** or other **Federal monies** payable to the order of Mr. Reeves.

Order

13.Until the debt is repaid, Petitioner Reeves shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in his mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

14.USDA Rural Development, and those collecting on its behalf, are **NOT** authorized to proceed with garnishment **through April 30, 2011**. Thereafter, USDA Rural Development, and those collecting on its behalf, are authorized to proceed with garnishment, up to 15% of Petitioner Reeves's disposable pay. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties. Done at Washington, D.C

_____

DEBBIE SANCHEZ.
AWG Docket No. 10 – 0442.
Decision and Order.
Filed January 11, 2011

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Chief Administrative Law Judge Peter M. Davenport.

AWG

Decision and Order

This matter is before the Administrative Law Judge upon the request of Petitioner for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On November 24, 2010, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing on January 11, 2010.

The Respondent complied with the Order and filed a Narrative, together with supporting documentation on December 14, 2010. Nothing has been received from the Petitioner and the contact information required by the Order was not provided. As financial information was previously provided and is contained in the file, there is sufficient information available to make a decision without the necessity of a hearing.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

On September 28, 1993, the Petitioner (now known as Debbie Lizame) and Antonio Sanchez, then her husband received a home mortgage loans in the amount of $40,000.00 from Farmers Home Administration (FmHA), United States Department of Agriculture (USDA), now Rural Development (RD) for property located in Paducah, Texas. RX-1.

The Petitioner and her husband defaulted on the loan and a foreclosure sale was conducted on December 7, 1999. USDA received $12,089.00 from the sale.RX-6.

Prior to the sale, the Petitioner and her husband owed USDA $54,729.44. RX-6.

Treasury offsets totaling $15,552.13 exclusive of Treasury fees have been received. RX-3.

Once a debt owed to the United States is placed with Treasury, although further interest ceases to accrue, consistent with their regulations, the Treasury Department assesses fees based upon the amount of the debt to recover the costs of collection of the debt. In the case of the Petitioner, the amount of potential fees is $7,639.29. RX-6.

The remaining unpaid debt is in the amount of $27,283.19 exclusive of potential Treasury fees. RX-6.

The Petitioner and her spouse's income which is minimal roughly approximates the family monthly expenses and with their income level, she is unlikely to be in a position to ever liquidate the debt owed

Conclusions of Law

The Secretary has jurisdiction in this matter.

Petitioner is indebted to USDA Rural Development in the amount of $27,283.19 exclusive of potential Treasury fees for the mortgage loan extended to her.

The Petitioner is under a financial hardship at this time.

The Respondent is **NOT** entitled to administratively garnish the wages of the Petitioner; however the debt shall remain at Treasury for any and all other appropriate collection action.

Order

For the foregoing reasons, the wages of Petitioner shall **NOT** be subjected to administrative wage garnishment at this time.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

JASON ALLEN.
AWG Docket No. 10 – 0449.
Decision and Order.
Filed January 11, 2011

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Chief Administrative Law Judge Peter M. Davenport.

AWG

Decision and Order

This matter is before the Administrative Law Judge upon the request of Jason Allen for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On November 24, 2010, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing on January 11, 2011.

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation on December 14, 2010. Nothing has been received from the Petitioner and the contact information required by the Order was not provided; however, there is sufficient information available to make a decision without the necessity of a hearing.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

On January 15, 2003, Jason Allen and Carla Allen (then his wife) received a home mortgage loan in the amount of $50,000.00 from Farmers Home Administration (FmHA) now Rural Development (RD), United States Department of Agriculture (USDA), for property located in Morley, Missouri. RX-1.

In 2009, subsequent to the purchase of the residence, the Petitioner and his wife divorced and as part of the division of property in the divorce, the residence was awarded to the Petitioner's ex-wife.

In 2009, while in sole possession of Carla Allen, the mortgage loan was defaulted upon. As part of the foreclosure proceedings, notice of the default and a notice of acceleration were sent to the borrowers at the property address.

Other than reference to the foreclosure proceedings and the proceeds received from the sale, the record contains none of the foreclosure pleadings. Moreover, the record contains no evidence that the Petitioner received notice of the default, acceleration of the loan, that he was provided an opportunity to cure the default, or any evidence that a deficiency judgment was taken against him.

Treasury offsets totaling $107.49 exclusive of Treasury fees have been received. RX-6.

Conclusions of Law

The Secretary has jurisdiction in this matter.

USDA Rural Development failed in its burden of proof of establishing that the Petitioner was given actual notice of the default, the acceleration of the loan or was given an opportunity to cure any default.

The Petitioner is not indebted to USDA Rural Development for the balance of the indebtedness stemming from the mortgage loan extended to him.

Any amounts collected by Treasury prior to the entry of this Decision and Order may be retained and need not be returned.

As personal liability for the debt has not been established, the wages of Jason Allen may **NOT** be subjected to garnishment

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Order

For the foregoing reasons, these proceedings are terminated and the wages of Jason Allen shall **NOT** be subjected to administrative wage garnishment and the debt shall be recalled from Treasury as cancelled.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

ROBIN TUTOR-BECK.
AWG Docket No. 11 – 0005.
Decision and Order.
Filed January 21, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Chief Administrative Law Judge Peter M. Davenport.

AWG

Decision and Order

This matter is before the Administrative Law Judge upon the request of Petitioner for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On November 24, 2010, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing on January 12, 2011.

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation on December 14, 2010. The Petitioner filed documentation as to her financial condition with the Hearing Clerk on January 6, 2011. When the call was made to the Petitioner at the time that the hearing was set, the call went directly to voice mail. As the financial information provided indicates that the Petitioner is not employed, there is sufficient information in the record to dispose of the issues before me without the need of further proceedings.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

On September 14, 1993, the Petitioner then known as Robin L. Tutor (now known as Robin Tutor-Beck and Robin McCracken) received a home mortgage loan in the amount of $52,900.00 from Farmers Home Administration (FmHA), United States Department of Agriculture (USDA), now Rural Development (RD) for property located in Delmar, Iowa. RX-1.

Following default by the Petitioner and the institution of foreclosure proceedings, the Petitioner offered the property to USDA in lieu of foreclosure and received credit for $24,000.00, leaving a balance due of $35,042.74. RX-5.

Treasury offsets totaling $1,183.68 exclusive of Treasury fees have been received. RX-5.

The remaining unpaid debt is in the amount of $33,859.06 exclusive of potential Treasury fees. RX-5.

The Petitioner is not employed at the present time.

Conclusions of Law

Petitioner is indebted to USDA Rural Development in the amount of $33,859.06 exclusive of potential Treasury fees for the mortgage loan extended to her.

The deed in lieu of foreclosure did not act to relieve the Petitioner of any remaining balance due.

As the Petitioner is not employed, she may not be subjected to administrative wage garnishment.

The Respondent is NOT entitled to administratively garnish the wages of the Petitioner; however, the debt may remain at Treasury for any and all other appropriate collection action.

Order

For the foregoing reasons, the wages of Petitioner shall NOT be subjected to administrative wage garnishment.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

BRIAN BOWEN.
AWG Docket No. 10 – 0392.
Decision and Order.
Filed January 12, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Hearing Official Stephen H. Reilly Hearing Official.

AWG

Decision and Order

This matter is before me upon the request of the Petitioner, Brian Bowen, for a hearing in response to efforts of Respondent, USDA's Rural Development Agency, Rural Housing Service, to institute a federal administrative wage garnishment against him. On August 26, 2010, I issued a Pre-hearing Order requiring the parties to exchange information concerning the amount of the debt. Rural Housing filed a copy of its Narrative along with exhibits RX-1 through RX-7 on September 3, 2010. On November 15, 2010, I issued an order rescheduling the hearing.

I conducted a telephone hearing on December 6, 2010. Rural Housing was represented by Mary Kimball who testified on behalf of the agency. Mr. Bowen represented himself. The witnesses were sworn. Mr. Bowen acknowledged that he received a copy of Rural Housing's Narrative and Exhibits. Mr. Bowen has not filed a Narrative or a Consumer Debtor Financial Statement.

On July 14, 1993, Mr. Bowen and his wife Christie borrowed $36,280.00 from USDA Farmers Home Administration to purchase their residence in Atoka, OK. On March 16, 1998, the Bowens were granted a divorce by the District Court of Atoka County, Oklahoma. In the Divorce Decree Mrs. Bowen was given the house. The Court also stated that Mrs. Bowen "shall be responsible for the indebtedness relating to the said marital home and shall hold [Mr. Bowen] harmless for the same." Divorce Decree page 2 ¶ 5. Mr. Bowen did not seek a release from USDA relieving him of his obligation for the remainder of the debt. Because Mr. Bowen did not obtain a release from his obligation, he is responsible for the amount of the deficiency. The order from the District

Court does not relieve Mr. Bowen from the requirement of satisfying the debt but rather gives him recourse against his ex-wife if he is required to make payment. I suggest that Mr. Bowen obtain legal counsel to determine his rights in pursuing a recovery from Christie Bowen.

The loan defaulted and on November 2, 2000, the house was disposed of by way of a short sale. USDA received $22,579.40 from the short sale and applied that to the outstanding balance. At the time of the sale the balance owed on the loan was $52,509.74 – $35,992.93 in principal, $10,851.68 in interest and $5,665.13 in fees. Applying the proceeds from the short sale along with a $45.92 insurance refund and $3,534.00 subsequently collected by Treasury leaves a current balance of $26,350.42.

Based on the testimony during the hearing and the record before me, I conclude that Mr. Bowen owes $26,350.42 on the USDA Rural Housing loan. In addition, there are potential fees of $7,378.12 due the US Treasury for the cost of collection. In determining the percentage of garnishment, if any, to be authorized for collection, I examine the petitioner's financial condition. This is usually accomplished by reviewing the Consumer Debtor Financial Statement. This gives me the opportunity to determine if a financial hardship exists that would preclude garnishment at this time; or, if the petitioner's financial condition indicates that I should limit the garnishment to a percentage below the maximum 15% authorized by the statute. It is the petitioner's burden to provide this information to me. Mr. Bowen did not file a Consumer Debtor Financial Statement, however, he testified that his income is $*** to $*** per month. Without the information contained in the Consumer Debtor Financial Statement, there is no evidence to indicate that any financial hardship exists. Therefore, I am only able to conclude that Mr. Bowen's disposable pay supports garnishment and that no financial hardship exists that would limit garnishment. I find that garnishment is appropriate, up to 15% of Mr. Bowen's disposable pay.[1]

[1] On December 12, 2010, at approximately 10:20 AM, I received a telephone call from Ms. Kimball. I view this as an inappropriate ex-parte communication. I informed her that I could not discuss the case without Mr. Bowen being part of the discussion. She went on to inform me that Rural Development intended to credit Mr. Bowen's account but would wait until I decided the case before doing the paperwork. In addition, Ms. Kimball attempted to clarify a point made during discussion but I would not let her proceed. I have not used any information provided during this phone call in making my decision on this case. In the future, if Rural Development desires to clarify a point made

I encourage Mr. Bowen and the collection agency to work together to establish a repayment schedule rather than immediately proceeding with garnishment, even though this Decision authorizes garnishment, up to 15% of Mr. Bowens's disposable pay

Findings of Fact

1. On July 14, 1993, Brian Bowen and his wife Christie, borrowed $36,280.00 from USDA Farmers Home Administration to purchase their residence in Atoka, OK.
2. On March 16, 1998, the Bowens were granted a divorce. In the Divorce Decree Mrs. Bowen was given the house and responsibility for the indebtedness relating to the house.
3. The loan defaulted and a short sale was held on November 2, 2000. The loan balance at that time was $52,509.74 including $35,992.93 in principal, $10,851.68 in interest and $5,665.13 in fees. USDA received $22,579.40 from the short sale.
4. USDA applied the proceeds from the short sale along with a $45.92 insurance refund and $3,534.00 subsequently collected by Treasury to the loan balance leaving leaves a balance of $26,350.42. In addition, there are potential fees due to the U.S. Treasury in the amount of $7,350.42 for a total amount due of $33,728.54.

Conclusions

1. The Secretary of Agriculture has jurisdiction over the parties, Mr. Bowen and USDA Rural Development Agency, Rural Housing Service; and over the subject matter, which is administrative wage garnishment.
2. Petitioner Brian Bowen is indebted to USDA's Rural Development Agency, Rural Housing Service program in the amount of $26,350.42
3. In addition, Mr. Bowen is indebted for potential fees to the US Treasury in the amount of $7,350.42.

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during the hearing or notify me of changes in its position, it may file a written notice, copying the petitioner.

4. All procedural requirements for administrative wage garnishment set forth in 31 C.F.R. § 285.11 have been met.

5. Mr. Bowen did not provide a Consumer Debtor Financial Statement. Therefore, I conclude that Mr. Bowen disposable pay supports garnishment, up to 15% of Mr. Bowen's disposable pay (within the meaning of 31 C.F.R. § 285.11); and Mr. Bowen has no circumstances of financial hardship (within the meaning of 31 C.F.R. § 285.11).

Order

Until the debt is fully paid, Mr. Bowen shall give notice to USDA Rural Development Agency, Rural Housing Service or those collecting on its behalf, of any changes in his mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

USDA Rural Development Agency, Rural Housing Service, and those collecting on its behalf, are authorized to proceed with garnishment, up to 15% of Mr. Bowen's disposable pay.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office Done at Washington, D.C.

TERESA MINOLETTI.
AWG Docket No. 10 – 0044.
Decision and Order.
Filed January 13, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Hearing Official James P. Hurt.

AWG

DECISION AND ORDER

This matter is before me upon the request of Teresa Minoletti for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an

administrative wage garnishment. On December 6, 2010, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing.

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation on December 20, 2010. Ms. Minoletti filed her documentation on December 27, 2010 with Rural Development and it was forwarded to the Hearing Clerk. I now label her exhibits as PX-1 (financial schedules), PX-2 (Short sale deed), PX-3 (Hearing request form), PX-4 (HUD-1 form), PX-5 (handwritten letter 3 pages 8/10/10), PX-6 (handwritten letter 4 pages 12/22/10).

On January 4, 2011 at the scheduled time, both parties were available for the conference call. The parties were sworn. Following the hearing, Ms. Minoletti forwarded a bi-weekly pay-stub to RD and it was forwarded to the hearing Clerk.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered

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Findings of Fact

On January 14,1992, Theresa Minoletti, the Petitioner assumed a USDA FmHA loan for $46,390.00 At the same time, she obtained a loan for $4,610.00 for a primary residence located at 6## Meadow***** Rd, Gaston, SC 29###.[1] The Petitioner signed a Promissory Note and a mortgage. RX-1, RX-2.

The borrower defaulted on the loan and on September 20, 2001, Ms. Minoletti entered into a short sale of her residence for $42,500.00 with a net amount to RD of $37,000.00. PX-4.

As an accommodation to Ms. Minoletti, RD released the property from the underlying lien and thus the loan secured by the real property became an unsecured loan with a balance due of $16,307.71. (RX-4). Grantee's deed (dated September 20, 2001) states in bold letters, " THE GRANTEE INTENDS TO OBTAIN, BY COMPROMISE, RELEASE OF THESE LIENS, BUT WILL NOT SATISFY THIS DEBT." PX-2. (Emphasis in original).

Treasury offsets totaling $7,676.74, exclusive of Treasury fees, have been received. RX-4.

[1] Complete address maintained in USDA files.

The remaining unpaid debt is in the amount of $8,630.97 exclusive of potential Treasury fees. RX-4.

The remaining potential treasury fees are $2,416.67. RX-5.

Ms. Minoletti has been employed for over one year.

Ms. Minoletti submitted her financial statements under oath which included her gross bi-weekly salary and monthly expenses.

Based upon the available financial information, I performed a Financial Hardship calculation using standard Federal and State Income Tax rate for head of Household. The result of the calculation is attached[2].

Conclusions of Law

Teresa Minoletti is indebted to USDA Rural Development in the amount of $8,630.97 for the mortgage loan extended to her.

Teresa Minoletti is indebted to the US Treasury for potential fees in the amount of $2,416.67.

All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.

The Respondent is not entitled to administratively garnish the wages of the Petitioner for a period of one year. After one year, RD may review the then existing financial statements and assess the legal entitlement to garnish her wages.

Order

For the foregoing reasons, the wages of Teresa Minoletti shall not be subjected to administrative wage garnishment for a period of one year.

After one year, RD may re-assess Ms. Minoletti's financial position.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

Done at Washington, D.C.

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[2] The Financial Hardship Calculation will not be posted on the OALJ website.

DANIEL FLORES.
AWG Docket No. 11 – 0035.
Decision and Order.
Filed January 13, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Chief Administrative Law Judge Peter M. Davenport.

AWG

Decision and Order

This matter is before the Administrative Law Judge upon the request of Daniel Flores for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On November 24, 2010, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt and setting the case for a telephonic hearing on January 13, 2011.

The Respondent filed a Narrative together with supporting documentation on December 15, 2010. The Petitioner failed to submit any evidence but did participate in the telephonic hearing. During the telephonic hearing, argument was received from Gene Elkin, Legal Liaison for Rural Development, United States Department of Agriculture, St. Louis, Missouri concerning the sufficiency of the evidence of the debt.

On the basis of the record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

On December 2, 2003, Daniel Flores applied for and received a home mortgage loan guarantee from Rural Development (RD), United States Department of Agriculture (USDA) (Exhibit RX-1) and on December 23, 2003 obtained a home mortgage loan in the amount of $75,000.00 for property located in Morriltown, Arkansas from Brinkley Mortgage Corporation. RX-9.

On December 23, 2003, Brinkley Mortgage Corporation assigned its interest in the Note and Mortgage to Chase Mortgage Corporation. RX-8, 9. The record contains a copy of a further assignment of the mortgage; however the name of the assignee of the mortgage is left blank. RX-8 page 2 of 4. Although the Respondent argues that an assignment was made to Chase Home Finance, LLC, there is no evidence of that assignment in the record.

In 2008, the Petitioner defaulted on the mortgage loan and J.P. Morgan Chase Bank, N.A., an entity other than Chase Mortgage Corporation or Chase Home Finance, LLC, submitted a loss claim. USDA paid J.P. Morgan Chase Bank, N.A. the sum of $28,042.45 for accrued interest, protective advances, liquidation costs and property sale costs. RX-2.

Treasury offsets in the amount of $188.22 exclusive of Treasury fees have been collected. RX-6. A further sum of $121.74 less collection fees is apparently in the system still being processed; however, USDA has not received such funds.

No record of any further assignment of the loan and mortgage appears in the record before me.

Conclusions of Law

The Secretary has jurisdiction in this matter.

USDA Rural Development has failed in its burden of proof in establishing a debt in this action. The loan guarantee appearing in the record was assigned from Brinkley Mortgage Corporation to Chase Manhattan Mortgage Corporation; however, there is no evidence of subsequent assignment to J.P. Morgan Chase Bank of N.A., the entity submitting the loss claim and receiving the guaranty payment.

As no debt was properly established by competent evidence, administrative wage garnishment is not appropriate.

As no debt to USDA was established, all sums collected from the Petitioner should be refunded to him.

4. The Respondent is NOT entitled to administratively garnish the wages of the Petitioner.

Order

For the foregoing reasons, the wages of Daniel Flores may **NOT** be subjected to administrative wage garnishment. The debt shall be recalled

from Treasury and all sums collected from him subsequent to foreclosure shall be refunded to him.

Copies of this Decision and order shall be served upon the parties by the Hearing Clerk's Office.

RAYMOND B. ORTHMAN.
AWG Docket No. 11 – 0036.
Decision and Order.
Filed January 13, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Chief Administrative Law Judge Peter M. Davenport.

AWG

Decision and Order

This matter is before the Administrative Law Judge upon the request of Petitioner for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On November 24, 2010, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing on January 13, 2011.

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation on December 14, 2010. The Petitioner has filed a letter which was received by the Hearing Clerk's Office on December 14, 2010 in which he indicates that he was a victim of fraud, sposered [sic] by agents of the United States Government. Documentation as to the Petitioner's financial condition in the form of an Application for Settlement of Indebtedness was contained with the Respondent's Narrative. As the financial information provided indicates that the Petitioner is employed at minimal wages, there is sufficient

information in the record to dispose of the issues before me without the need of further proceedings.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

On August 3, 1983, the Petitioner and Rose Orthman, his wife, received a home mortgage loan in the amount of $27,500.00 from Farmers Home Administration (FmHA), United States Department of Agriculture (USDA), now Rural Development (RD) for property located in Summit, Montana. RX-1.

Following default by the Petitioner in 1999, the property was sold in a short sale. USDA received $6,540.70 from the sale, leaving a balance due of $17,574.43. RX-5.

Treasury offsets totaling $8,680.71 exclusive of Treasury fees have been received. RX-5.

The remaining unpaid debt is in the amount of $8,893.72 exclusive of potential Treasury fees. RX-6.

The Petitioner is employed at minimal wages and is under a financial hardship at the current time.

Conclusions of Law

The Secretary has jurisdiction in this matter.

Petitioner is indebted to USDA Rural Development in the amount of $8,893.72 exclusive of potential Treasury fees exclusive of potential Treasury fees for the mortgage loan extended to him.

The Petitioner has made significant progress in liquidating this debt, but is under a financial hardship at this time.

The Respondent is **NOT** entitled to administratively garnish the wages of the Petitioner; however, the debt may remain at Treasury for any and all other appropriate collection action

Order

For the foregoing reasons, the wages of Petitioner shall **NOT** be subjected to administrative wage garnishment.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

DONYA R. TOMBERLINE.
AWG Docket No. 11 – 0037.
Decision and order.
Filed January 14, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Jill S. Clifton.

AWG

Decision and Order

1. The hearing by telephone was held January 4, 2011. Donya R. Tomberlin, the Petitioner ("Petitioner Tomberlin"), failed to appear. [She failed to appear by telephone; she did not provide a phone number where she could be reached.]

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and was represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

3. I encourage **Petitioner Tomberlin and the collection agency** to work together to **establish a repayment schedule** rather than immediately proceeding with garnishment, even though this Decision authorizes garnishment, up to 7.5% of Petitioner Tomberlin's disposable pay through April 2011; and up to 15% of Petitioner Tomberlin's

disposable pay thereafter. Petitioner Tomberlin, obviously, will have to make herself available to the collection agency if she wants to negotiate. *See* paragraph 9.

4. This is Petitioner Tomberlin's case (she filed the Petition), and in addition to failing to be available for the hearing, Petitioner Tomberlin failed to file with the Hearing Clerk any information. Petitioner Tomberlin's deadline for that was December 29, 2010.

Summary of the Facts Presented

5. Petitioner Tomberlin owes to USDA Rural Development a balance of **$29,175.56**, in repayment of a Farmers Home Administration / United States Department of Agriculture loan (now USDA / Rural Housing Service) made in 1989 for a home in Georgia, the balance of which is now unsecured ("the debt"). *See* USDA Rural Development Exhibits, plus Narrative, Witness & Exhibit List (filed December 14, 2010 and January 13, 2011), which are admitted into evidence, together with the testimony of Ms. Kimball.

6. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$29,175.56** would increase the current balance by $8,169.16, to $37,344.72. *See* USDA Rural Development Exhibits, esp. RX 10.

7. I cannot determine whether Petitioner Tomberlin's disposable pay supports garnishment without creating hardship. 31 C.F.R. § 285.11. Petitioner Tomberlin failed to file a completed "Consumer Debtor Financial Statement". I cannot calculate Petitioner Tomberlin's disposable pay (after subtracting income tax, social security, Medicare, health insurance, and any other "eligible" withholding from her gross pay), because there is no evidence to use for such calculations. I cannot calculate Petitioner Tomberlin's current reasonable and necessary living expenses. Nevertheless, I have taken into account RX 7 (dated in 2000) in limiting the potential garnishment to no more than 7.5% of Petitioner Tomberlin's disposable pay through April 2011; and up to 15% of Petitioner Tomberlin's disposable pay thereafter. 31 C.F.R. § 285.11.

8. Petitioner Tomberlin is responsible and willing and able to negotiate the disposition of the debt with Treasury's collection agency.

Discussion

9. Through April 2011, garnishment up to 7.5% of Petitioner Tomberlin's disposable pay; and thereafter, garnishment up to 15% of Petitioner Tomberlin's disposable pay; is authorized. *See* paragraphs 7 and 8. I encourage **Petitioner Tomberlin and the collection agency** to **negotiate promptly** the repayment of the debt. Petitioner Tomberlin, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Tomberlin, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less.

Findings, Analysis and Conclusions

10. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Tomberlin and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

11. Petitioner Tomberlin owes the debt described in paragraphs 5 and 6.

12. **Garnishment is authorized**, as follows: through April 2011, garnishment up to 7.5% of Petitioner Tomberlin's disposable pay; and thereafter, garnishment up to 15% of Petitioner Tomberlin's disposable pay. 31 C.F.R. § 285.11.

13. Repayment of the debt may also occur through ***offset*** of Petitioner Tomberlin's **income tax refunds** or other **Federal monies** payable to the order of Ms. Tomberlin.

Order

14. Until the debt is repaid, Petitioner Tomberlin shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

15. USDA Rural Development, and those collecting on its behalf, are authorized to proceed with garnishment, up to 7.5% of Petitioner Tomberlin's disposable pay through April 2011; and garnishment up to 15% of Petitioner Tomberlin's disposable pay thereafter. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.

MYLISSA POLLARD.
AWG Docket No. 11 – 0015.
Decision and Order.
Filed January 14, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Chief Administrative Law Judge Peter M. Davenport.

AWG

Decision and Order

This matter is before the Administrative Law Judge upon the request of Petitioner for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On November 24, 2010, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing on January 14, 2011.

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation on December 14, 2010. The Petitioner neither submitted any material nor contacted the Office of Administrative Law Judges with contact information. Accordingly it will be deemed that the Petitioner has waived her right to a hearing and the matter will be decided on the record.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

On November 16, 1994, the Petitioner received a home mortgage loan in the amount of $35,500.00 from Farmers Home Administration (FmHA), United States Department of Agriculture (USDA), now Rural Development (RD) for property located in Brownwood, Texas. RX-1.

The property was sold at a foreclosure sale on December 5, 2000 with proceeds realized from that sale in the amount of $26,859.92, leaving a balance due after payment of fees and credits of $24,671.06. RX-6.

Treasury offsets totaling $2,273.95 exclusive of Treasury fees have been received. RX-6.

The remaining unpaid debt is in the amount of $22,397.11 exclusive of potential Treasury fees. RX-6.

The file has no evidence concerning the Petitioner's employment or her financial condition.

Conclusions of Law

The Secretary has jurisdiction in this matter.

Petitioner is indebted to USDA Rural Development in the amount of $22,397.11 exclusive of potential Treasury fees for the mortgage loan extended to her.

All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.

The Respondent is entitled to administratively garnish the wages of the Petitioner.

Order

For the foregoing reasons, the wages of the Petitioner shall be subjected to administrative wage garnishment at the rate of 15% of disposable pay, or such lesser amount as might be specified in 31 C.F.R. § 285.11(i).

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

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LOIS L. BASS.
AWG Docket No. 11 – 0018.
Decision and Order.
Filed January 14, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Chief Administrative Law Judge Peter M. Davenport.

AWG

Decision and Order

This matter is before the Administrative Law Judge upon the request of Petitioner for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On November 24, 2010, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing on January 14, 2010.

The Respondent complied with the Order and filed a Narrative, together with supporting documentation on December 14, 2010. The Petitioner filed a Consumer Debtor Financial Statement and other material with the Hearing Clerk's Office on December 16, 2010. During the hearing, testimony was received from Mary E. Kimball, Accountant for the New Program Initiatives Branch of Rural Development, USDA, St Louis, Missouri and from the Petitioner.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

On September 21, 1987, the Petitioner (now known as Lois L. Cribb) and Billy Bass, then her husband received a home mortgage loan in the amount of $39,500.00 from Farmers Home Administration (FmHA), United States Department of Agriculture (USDA), now Rural Development (RD) for property located in Mullins, South Carolina. RX-1,2.

The Petitioner and her husband defaulted on the loan and foreclosure proceedings were initiated. After the proceedings were commenced, the property was sold at a short sale conducted on November 24, 1998. USDA received $18,890.86 from the sale.RX-4.

Prior to the sale, the Petitioner and her husband owed USDA $45,363.93. RX-4.

Billy Bass died on July 7, 2002.

Treasury offsets totaling $12,688.66 exclusive of Treasury fees have been received. RX-4.

Once a debt owed to the United States is placed with Treasury, although further interest ceases to accrue, consistent with their regulations, the Treasury Department assesses fees based upon the amount of the debt to recover the costs of collection of the debt. In the case of the Petitioner, the amount of potential fees is $3,987.11. RX-4.

The remaining unpaid debt is in the amount of $14,239.67 exclusive of potential Treasury fees. RX-6.

The Petitioner's and her spouse's income roughly approximates the family monthly expenses and with their income level, she is unlikely to be in a position to liquidate the debt owed

.

Conclusions of Law

The Secretary has jurisdiction in this matter.

Petitioner is indebted to USDA Rural Development in the amount of $27,283.19 exclusive of potential Treasury fees for the mortgage loan extended to her.

The Petitioner is under a financial hardship at this time.

The Respondent is **NOT** entitled to administratively garnish the wages of the Petitioner; however the debt shall remain at Treasury for any and all other appropriate collection action

.

Order

For the foregoing reasons, the wages of Petitioner shall **NOT** be subjected to administrative wage garnishment at this time.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

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CATHERINE NELLUMS.
AWG Docket No. 11 – 0013.
Decision And Order.
Filed January 20, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Jill S. Clifton.

AWG

Decision and Order

1. The hearing by telephone was held on January 19, 2011. Ms. Catherine Nellums, also known as Catherine M. Nellums ("Petitioner Nellums"), participated, representing herself (appeared *pro se*).

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and is represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

Summary of the Facts Presented

3. Petitioner Nellums owes to USDA Rural Development a balance of **$4,953.88** (as of November 23, 2010) in repayment of a $35,500.00 United States Department of Agriculture Farmers Home Administration loan made in 1987 for a home in Florida, the balance of which is now unsecured ("the debt"). *See* USDA Rural Development Exhibits, plus Narrative, Witness & Exhibit List (filed December 16, 2010), which are admitted into evidence.

4. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$4,953.88** would increase the current balance by $1,387.09, to $6,340.97. *See* USDA Rural Development Exhibits, esp. RX 7.

5. The amount Petitioner Nellums borrowed in 1987 was $35,500.00. A USDA letter dated 8/11/97, mailed to P.O. Box 264, Chipley FL 32428-0264, showed $37,350.19 due. The final figures from the short sale assumption had not yet been incorporated, although July 31, 1997 is shown as the settlement date. RX 5. The short sale assumption in 1997 yielded $28,785.00. RX 4, RX 5. The "Total Amount Due prior to sale" shown on RX 6 is $37,520.38. The remaining balance of the debt was $8,735.38 after the $28,785.00 was applied. RX 6.

6. The home could be sold in the short sale assumption, but Petitioner Nellums remained liable to repay the $8,735.38 balance. The $8,735.38 balance had **not** been canceled. I am persuaded that the balance was not "written off," because USDA Rural Development has no release of liability in its records, no cancellation of debt 1099 to the Internal Revenue Service, no papers indicating that the debt was paid in full - - instead, USDA Rural Development was collecting the debt, through U.S. Treasury, as shown by the income tax refunds intercepted and applied on the debt in March 1999, in May 2001, and in October 2001. *See* RX 6. Considerable progress repaying the debt resulted from those ***offsets*** of **income tax refunds**, reducing the remaining balance to **$4,953.88**. RX 6.

7. Admitted into evidence is the testimony of Petitioner Nellums and Petitioner Nellums' Hearing Request with letter to Ms. Renda. Perhaps the form(s) Petitioner Nellums would have been required to submit in 1997 for "debt settlement," following the short sale assumption, were never completed and submitted: USDA Rural Development has no record of receiving them. In evaluating the factors to be considered under 31 C.F.R. § 285.11, I find that Petitioner Nellums cannot withstand garnishment in any amount without hardship. *See* Hearing Request letter to Ms. Renda, paragraph 2. To prevent hardship, potential garnishment to repay "the debt" (*see* paragraph 3) must be limited to zero per cent (0%) of Petitioner Nellums' disposable pay through January 31, 2012; and no more than 15% of Petitioner Nellums' disposable pay thereafter. 31 C.F.R. § 285.11.

8. Petitioner Nellums is responsible and willing and able to negotiate the repayment of the debt with Treasury's collection agency.

Discussion

9. Through January 31, 2012, NO garnishment is authorized. Thereafter, garnishment up to 15% of Petitioner Nellums' disposable pay is authorized. *See* paragraphs 6 and 7. I encourage **Petitioner Nellums and the collection agency** to **negotiate promptly** the repayment of the debt. Petitioner Nellums, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Nellums, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less.

Findings, Analysis and Conclusions

10. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Nellums and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

11. Petitioner Nellums owes the debt described in paragraphs 3 and 4.

12. **Through January 31, 2012, NO garnishment is authorized**. Thereafter, garnishment **up to 15%** of Petitioner Nellums' disposable pay is authorized. 31 C.F.R. § 285.11.

13. This Decision does not prevent repayment of the debt through ***offset*** of Petitioner Nellums' **income tax refunds** or other **Federal monies** payable to the order of Ms. Nellums.

Order

14. Until the debt is repaid, Petitioner Nellums shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

15. USDA Rural Development, and those collecting on its behalf, are **NOT** authorized to proceed with garnishment **through January 31, 2012**. Thereafter, USDA Rural Development, and those collecting on its behalf, are authorized to proceed with garnishment, **up to 15%** of Petitioner Nellums' disposable pay. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties. **Two Consumer Debtor Financial Statement forms shall be enclosed to Petitioner Nellums**. Done at Washington, D.C.

LENA DAWKINS.
AWG Docket No. 11 – 0031.
Decision and Order.
Filed January 21, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Chief Administrative Law Judge Peter M. Davenport.

AWG

Decision and Order

This matter is before the Administrative Law Judge upon the request of Petitioner for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On November 24, 2010, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing on January 14, 2011.

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation on October 14, 2010. The Petitioner filed her documents with the Hearing Clerk on December 14, 2010. At the telephonic hearing, testimony was received from the Petitioner and Mary E. Kimball, Accountant for the New Program Initiatives Branch, Rural Development, United States Department of Agriculture, St. Louis, Missouri. The Petitioner expressed the opinion that she should not be held liable for any deficiency as the loan was assumed by her sister and she feels that she is having to pay twice for the loan given to her.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered

.

Findings of Fact

On May 2, 1985, the Petitioner received a home mortgage loan in the amount of $34,500.00 from Farmers Home Administration (FmHA), United States Department of Agriculture (USDA), now Rural Development (RD) for property located in Monroe, Louisiana. RX-1, 2.

The Petitioner defaulted on the loan and a portion of the loan was assumed by her sister Towanda Dawkins with proceeds realized from that transfer in the amount of $15,000.00, leaving a balance due of $21,639.98. RX-6.

Treasury offsets totaling $9,751.32 exclusive of Treasury fees have been received. RX-6.

The remaining unpaid debt is in the amount of $11,888.66 exclusive of potential Treasury fees. RX-6

.

Conclusions of Law

The Secretary has jurisdiction in this matter.

Petitioner is indebted to USDA Rural Development in the amount of $11,888.66 exclusive of potential Treasury fees for the mortgage loan extended to her.

All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.

The Petitioner is not under a financial hardship.

The Respondent is entitled to administratively garnish the wages of the Petitioner.

Order

For the foregoing reasons, the wages of Petitioner shall be subjected to administrative wage garnishment at the rate of 15% of disposable pay, or such lesser amount as might be specified in 31 C.F.R. § 285.11(i).

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

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KYRA BRIGGS.
AWG Docket No. 10 – 0247.
Decision and Order.
Filed January 21, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Hearing Official Stephen H. Reilly.

AWG

Decision and Order

This matter is before me upon the request of the Petitioner, Kyra Briggs, for a hearing in response to efforts of Respondent, USDA's Rural Development Agency, Rural Housing Service, to institute a federal administrative wage garnishment against her. On November 15, 2010, Chief Administrative Law Judge Peter M. Davenport issued a Pre-hearing Order setting the date for the hearing and requiring the parties to exchange information concerning the amount of the debt. That hearing did not take place and the case was transferred to me. On December 23, 2010, I issued an order rescheduling the hearing.

Rural Development had previously filed a copy of its Narrative along with exhibits RX-1 through RX-6 on July 8, 2010. Rural Development filed an amended Narrative, including exhibits RX-7 and RX-8 on December 3, 2010. Ms. Briggs filed exhibits PX-1 through PX-9 on December 16, 2010. PX-1 is Ms. Briggs Consumer Debtor Financial Statement, PX-9 is Ms. Briggs' narrative. The other exhibits relate to Ms. Briggs' financial condition. conducted a telephone hearing on January 18, 2011. Rural Development was represented by Mary Kimball who testified on behalf of the agency. Ms. Briggs represented herself. The witnesses were sworn. Ms. Briggs acknowledged that she received a copy of Rural Development's Narrative and Exhibits. Ms. Kimball acknowledged receipt of Ms. Briggs' exhibits.

On February 26, 2007, Ms. Briggs borrowed $146,400.00 from USDA Rural Housing Service to purchase her residence in Brainerd, MN. (RX-1, RX-8). Ms. Briggs defaulted on the loan and on April 17, 2009, the house was sold at a short sale. (RX-7).

After sales expenses, USDA received $101,714.43 from the short sale and applied that to the outstanding balance. At the time of the sale Mr.

Briggs owed $144,048.46 on the loan B $143,067.72 in principal, $495.84 in interest and $484.90 from a negative balance in her escrow account. Applying the proceeds from the short sale along with a credit of $319.36 from unapplied refunds and $16,661.00[1] subsequently collected by Treasury leaves a current balance of $40,353.67. Based on the testimony during the hearing and the record before me, I conclude that Ms. Briggs owes $40,353.67 on the USDA Rural Housing loan. In addition, there are potential fees of $11,299.02 due the US Treasury for the cost of collection giving a total amount due of $51,652.69. In determining the percentage of garnishment, if any, to be authorized for collection, I examine the petitioner's Consumer Debtor Financial Statement. This gives me the opportunity to determine if a financial hardship exists that would preclude garnishment at this time; or, if the petitioner's financial condition indicates that I should limit the garnishment to a percentage below the maximum 15% authorized by the statute.

Ms. Briggs is currently separated from her husband and has two young children to support. She works part-time, does some independent consulting, receives child support from the father of her first child and receives financial assistance from her current husband. Her listed expenses are not unreasonable and include a house payment, car payment, student loan payment, two judgments against her, utility payments, food, clothing and medical expenses. According to the credible evidence before me, Ms. Briggs' reasonable expenses exceed her income. Therefore, I find that garnishment is not appropriate at this time. USDA Rural Development may reexamine Ms. Briggs' financial situation in one year, and on an annual basis thereafter, to determine if Ms. Briggs finances have improved sufficiently to warrant garnishment.

Although I am not authorizing garnishment at this time, I want Ms. Briggs to understand I find that she owes the debt. Because she owes the debt to the government, Treasury will continue to obtain payment on the debt by keeping income tax returns and other payments from the government and applying those amounts to lower the debt.

Findings of the Fact

[1] Treasury withheld $3,900.00 from a tax refund due Ms. Biggs and her current husband. It returned $2,239.00 that resulted from Ms. Briggs current husband's income, netting a credit of $1,6661.00 towards the loan deficiency.

1. On February 26, 2007, Ms. Briggs borrowed $146,400.00 from USDA Rural Housing Service to purchase her residence in Brainerd, MN.

2. Ms. Briggs defaulted on the loan and a short sale was held on April 17, 2009. At the time of the sale Ms. Briggs owed $144,048.46 on the loan B $143,067.72 in principal, $495.84 in interest and $484.90 from a negative balance in her escrow account.

3. USDA applied the proceeds from the short sale along with a credit of $319.36 from unapplied refunds and $1,6661.00 subsequently collected by Treasury leaving a current balance of $40,353.67. In addition, there are potential fees due to the U.S. Treasury in the amount of $11,299.02 giving a total amount due of $51,652.69.

4. Ms. Briggs is currently separated from her husband and has two young children to support. She works part-time, does some independent consulting, receives child support from the father of her first child and receives financial assistance from her current husband.

5. Ms. Briggs' reasonable expenses exceed her income.

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction over the parties, Ms. Briggs and USDA Rural Development Agency, Rural Housing Service; and over the subject matter, which is administrative wage garnishment.

2. Petitioner Kyra Briggs is indebted to USDA's Rural Development Agency, Rural Housing Service program in the amount of $40,353.67.

3. In addition, Ms. Briggs is indebted for potential fees to the US Treasury in the amount of $11,299.02.

4. All procedural requirements for administrative wage garnishment set forth in 31 C.F.R. § 285.11 have been met.

5. I conclude that Ms. Briggs' financial circumstances, at this time, do not support garnishment.

Order

Until the debt is fully paid, Ms. Briggs shall give notice to USDA Rural Development Agency, Rural Housing Service or those collecting on its behalf, of any changes in his mailing address; delivery address for

commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

USDA Rural Development Agency, Rural Housing Service, and those collecting on its behalf, are not authorized to proceed with garnishment at this time. USDA Rural Development may reexamine Ms. Briggs' financial situation in one year, and on an annual basis thereafter, to determine if Ms. Briggs finances have improved sufficiently to warrant garnishment. Ms. Briggs shall provide to Rural Development, when requested, a Consumer Debtor Financial Statement to facilitate this review. Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

Done at Washington, D.C.

CHERYL MULLIGAN.
AWG Docket No. 10 – 0426.
Decision and Order.
January 25, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Hearing Official James P. Hurt.

AWG

DECISION AND ORDER

This matter is before me upon the request of Cheryl E. Mulligan, k/n/a Cheryl E. Greer, for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On September 30, 2010, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing.

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation on October 29, 2010. Ms.

Mulligan, (kna Greer), filed with her Petition portions of her divorce papers (which I now label as PX-1) relating to the Marital Property Settlement Agreement of 1996.

On November 30, 2011 at the scheduled time, both parties were available for the conference call. The parties were sworn. Ms. Mulligan was asked to file/forward financial statements if she would like a Financial Hardship Calculation to be prepared. No post-hearing documents have been received from the Petitioner.

In reviewing the central document of RD's deficiency judgment, (the 12/21/2001 Florida Summary Judgment), I am very perplexed about the facts recited in paragraph 11, thereof, especially in light of the Petitioner's Property Settlement Agreement of 1/11/1996, however, for the purposes of this Administrative Law matter, I cannot look beyond the terms of the Florida Circuit Court judgment.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

On September 1, 1993, Cheryl E. Mulligan, the Petitioner, and her then husband Michael Mulligan assumed a USDA FmHA loan for $34,399.59 (Account # 2158823). At the same time, they obtained a loan for $17,800.00 (Account # 2158810) for a primary residence located at 3# Asp** St., Daytona Beach, FL 32###.[1] The Petitioner signed joint and several Promissory Notes and a Mortgage which I now label as RX-1 and RX-2.

The borrower defaulted on the loan (see foreclosure notice which I now label as RX -3) and on December 21, 2001, the Circuit Court of Volusia County Florida entered a Summary Judgment foreclosing on the property and entered a deficiency order for $67,403.02. (see Summary Judgment Order which I now label as RX-5).

Thereafter, on February 25, 2002, the property was sold at a foreclosure sale for $46,500.00. (See RD "Breakdown of Account Activity" which I now label as RX-6).

After the foreclosure sale, Treasury offsets totaling $1,510.65, exclusive of Treasury fees, have been received. RX-6 at P. 2 of 2.

The remaining unpaid debt for both accounts is in the amount of $14,075.14 exclusive of potential Treasury fees. RX-6.

[1] Complete address maintained in USDA files.

The remaining potential treasury fees are $549.84 for account # 2400014950B and $3,391.20 for account # 2400014940B. (see RD "Cash balance inquiry" which I now label as RX-7).

Ms. Mulligan's work status is unknown

.

Conclusions of Law

Cheryl E. Mulligan, nka Cheryl E. Greer, is indebted to USDA Rural Development in the amount of $14,075.14 for the mortgage loan extended to her.

Cheryl E. Mulligan, nka Cheryl E. Greer, is indebted to the US Treasury for potential fees in the amount of $3,941.04.

All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.

The Respondent is entitled to administratively garnish the wages of the Petitioner.

Order

For the foregoing reasons, RD is entitled to administratively garnish the wages of Cheryl E. Mulligan, kna Cheryl E. Greer.

This Order shall be effectively immediately, but if within one year, the recitation of facts of the Florida Circuit Court Summary Judgment are determined by Florida law to have contained substantial errors of fact, I will upon the request of either party rehear this matter *ab initio.*

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

Done at Washington, D.C.

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KWANZAA JENKINS.
AWG Docket No. 11 – 0060.
Decision and Order.
January 26, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Jill S. Clifton.

AWG

Decision and Order

1. Kwanzza Jenkins, also known as Kwanzza D. Jenkins, the Petitioner ("Petitioner Jenkins"), represents herself (appears *pro se*). Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and is represented by Esther McQuaid.

2. This case was scheduled for a hearing by telephone, to be conducted on February 17, 2011. Based on USDA Rural Development's Motion to Dismiss filed January 24, 2011, the hearing will no longer be necessary. Consequently, the hearing is CANCELED, and the parties are no longer required to file documents (as had been required by my Order issued January 11, 2011).

3. The address for USDA Rural Development for this case is

Esther McQuaid
USDA / Rural Development
FC-351
PO Box 200011
St Louis MO 63120

esther.mcquaid@stl.usda.gov 314.457.4315 phone

Findings, Analysis and Conclusions

4. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Jenkins and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

5. USDA Rural Development's Motion to Dismiss includes the following:

> After a thorough review of the documents available, the Government does not feel that there is sufficient evidence to support the pursuit of the debt. The debt has been recalled from Treasury and no further attempt at collections will be made by Treasury or Rural Development in this matter.

6. No garnishment is authorized; no repayment of the debt through *offset* of Petitioner Jenkins's income tax refunds or other Federal monies payable to the order of Ms. Jenkins is authorized; no form of further debt collection from Petitioner Jenkins in this matter is authorized.

Order

7. No further debt collection from Petitioner Jenkins in this matter is authorized.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties, together with copies of the **Motion to Dismiss** filed January 24, 2011. Done at Washington, D.C.

JASON SHOPE.
AWG Docket No. 11 – 0045.
Decision and Order.
Filed February 2, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Jill S. Clifton.

AWG

Decision and Order

1. The hearing was held on February 1, 2011, as scheduled. Jason Shope, the Petitioner ("Petitioner Shope") failed to appear. [Petitioner Shope could not be reached at the telephone number listed on his hearing request, and he provided no other phone number.]

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and was represented by Ms. Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2

4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

3. I encourage **Petitioner Shope and the collection agency** to work together to **establish a repayment schedule** rather than immediately proceeding with garnishment, even though this Decision authorizes garnishment, up to 15% of Petitioner Shope's disposable pay. Petitioner Shope, obviously, will have to make himself available to the collection agency if he wants to negotiate. *See* paragraphs 10 and 11.

4. This is Petitioner Shope's case (he filed the Petition), and in addition to failing to be available for the hearing, Petitioner Shope failed to file with the Hearing Clerk any information. Petitioner Shope's deadline for that was January 24, 2011.

Summary of the Facts Presented

5. Petitioner Shope owes to USDA Rural Development a balance of **$38,227.56** (as of 11/17/2010), in repayment of a United States Department of Agriculture / Rural Housing Service ***Guarantee*** (*see* RX-1, esp. p. 2) for a loan made in 2005, the balance of which is now unsecured ("the debt"). Petitioner Shope borrowed to buy a home in Ohio. *See* USDA Rural Development Exhibits, plus Narrative, Witness & Exhibit List (filed January 10, 2011), which are admitted into evidence, together with the testimony of Mary Kimball.

6. This ***Guarantee*** establishes an **independent** obligation of Petitioner Shope, "I certify and acknowledge that if the Agency pays a loss claim on the requested loan to the lender, I will reimburse the Agency for that amount. If I do not, the Agency will use all remedies available to it, including those under the Debt Collection Improvement Act, to recover on the Federal debt directly from me. The Agency's right to collect is independent of the lender's right to collect under the guaranteed note and will not be affected by any release by the lender of my obligation to repay the loan. Any Agency collection under this paragraph will not be shared with the lender." RX 1, p. 2.

7. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on

$38,227.56, would increase the current balance by $11,468.27, to $49,695.83. *See* USDA Rural Development Exhibits, esp. RX 6.

. The amount Petitioner Shope borrowed from JP Morgan Chase Bank, N.A., was $70,890.00 in 2005. By the time of the foreclosure sale and subsequent eviction in 2007, that debt had grown to $82,439.05:

$ 70,550.13 Unpaid Principal Balance
$ 10,362.60 Accrued Interest Owed[1]
$ 1,447.94 Protective Advances
$ 78.38 Interest on Protective Advances
$ 82,439.05 Amount Due prior to sale

+ $ 10,836.47 Lender Expenses to Sell Property
$ 93,275.52 Debt Charged to Petitioner Shope

- $ 43,501.88 Credits to Petitioner Shope[2]

So, even after Petitioner Shope was credited with $39,000.00 for liquidation value of the house, and other credits, Petitioner Shope still owed USDA Rural Development $49,773.64, which is the amount USDA Rural Development paid the lender:

$ 93,275.52 Debt Charged to Petitioner Shope
-$ 43,501.88 Credits to Petitioner Shope
$ 49,773.64 USDA paid lender on 06/17/08

See USDA Rural Development Narrative, and RX 3.

Petitioner Shope has paid the balance down to **$38,227.56** as of 11/17/2010 (not including "Potential Treasury fees"). RX 6.

9. Petitioner Shope failed to file a Consumer Debtor Financial Statement or any other financial information or anything in response to my Order dated December 29, 2010; consequently there is no evidence before me regarding Petitioner Shope's disposable pay or any 31 C.F.R. § 285.11 factors. I must presume that Petitioner Shope's disposable pay supports garnishment, up to 15% of Petitioner Shope's disposable pay.

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[1] [12/01/2005 was the due date of the last payment made]
[2] [includes $39,000.00 liquidation value; the home sold on 06/11/09 for $12,000.00.]

10. Petitioner Shope is responsible and capable of negotiating the repayment of the debt with Treasury's collection agency.

Discussion

11. I encourage **Petitioner Shope and the collection agency** to **negotiate promptly** the repayment of the debt. Petitioner Shope, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Shope, you may choose to offer to compromise the debt for an amount you are able to pay, to settle the claim for less.

Findings, Analysis and Conclusions

12. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Shope and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

13. Petitioner Shope owes the debt described in paragraphs 5, 6 and 7.

14. Garnishment is authorized, up to 15% of Petitioner Shope's disposable pay. 31 C.F.R. § 285.11.

15. Repayment of the debt may also occur through ***offset*** of Petitioner Shope's **income tax refunds** or other **Federal monies** payable to the order of Mr. Shope.

Order

16. Until the debt is fully paid, Petitioner Shope shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in his mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

17. USDA Rural Development, and those collecting on its behalf, are authorized to proceed with garnishment, up to 15% of Petitioner Shope's disposable pay.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.

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KURT GILBERT.
AWG Docket No. 11 – 0032.
Decision and Order.
Filed February 4, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Jill S. Clifton.

AWG

Decision and Order

1. The hearing by telephone was held on February 1, 2011. Kurt D. Gilbert, the Petitioner ("Petitioner Gilbert"), represents himself (appears *pro se*).

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and is represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

3. I encourage **Petitioner Gilbert and the collection agency** to work together to **establish a repayment schedule** rather than immediately proceeding with garnishment, even though this Decision authorizes garnishment in a limited amount beginning September 2011. Petitioner Gilbert, obviously, will have to make himself available to the collection agency if he wants to negotiate. *See* paragraph 11.

Summary of the Facts Presented

4. USDA Rural Development's Exhibits, plus Narrative, Witness & Exhibit List, were filed on January 10, 2011, and are admitted into evidence, together with the testimony of Ms. Kimball.

5. Petitioner Gilbert's completed "Consumer Debtor Financial Statement," signed by Petitioner Gilbert and his wife on January 24, 2011, plus his typed statement, were filed on January 26, 2011, and are admitted into evidence, together with the testimony of Petitioner Gilbert.

6. Petitioner Gilbert owes to USDA Rural Development **$18,699.07** in repayment of a Farmers Home Administration loan made in 1995 for a home in Texas, the balance of which is now unsecured ("the debt").

7. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$18,699.07**, would increase the current balance by $5,235.74, to $23,934.81. *See* USDA Rural Development Exhibits, esp. RX 7.

8. Petitioner Gilbert is repaying a student loan with a balance of about $6,800.00 and considerable amounts on other indebtedness to several other creditors.

9. Petitioner Gilbert's disposable income is probably about $*** per month.[1] [Disposable income is gross pay minus Federal, Social Security, Medicare, and health insurance withholding; and in certain situations minus other employee benefits contributions that are required to be withheld.] Although Garnishment at 15% of Petitioner Gilbert's disposable pay would yield roughly $** per month in repayment of the debt, he cannot withstand garnishment in that amount without hardship. To prevent hardship, potential garnishment to repay "the debt" (*see* paragraph 6) must be limited to 0% of Petitioner Gilbert' disposable pay through August 2011; then up to 7.5% of Petitioner Gilbert's disposable pay beginning September 2011 through February 2012; then up to 15% of Petitioner Gilbert's disposable pay thereafter. 31 C.F.R. § 285.11.

10. Petitioner Gilbert is responsible and willing and able to negotiate the disposition of the debt with Treasury's collection agency.

Discussion

[1] Petitioner Gilbert said during the hearing he would FAX a copy of his pay stub. No pay stub copy was received, so my estimate is based on the Consumer Debtor Financial Statement that Petitioner Gilbert and his wife signed on January 24, 2011.

11. Through August 2011, no garnishment is authorized. Beginning September 2011 through February 2012, garnishment up to 7.5% of Petitioner Gilbert's disposable pay is authorized; and thereafter, garnishment up to 15% of Petitioner Gilbert' disposable pay is authorized. *See* paragraphs 8, 9 and 10. I encourage **Petitioner Gilbert and the collection agency** to **negotiate promptly** the repayment of the debt. Petitioner Gilbert, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Gilbert, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less.

Findings, Analysis and Conclusions

12. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Gilbert and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

13. Petitioner Gilbert owes the debt described in paragraphs 6 and 7.

14. **Garnishment is authorized**, as follows: through August 2011, **no** garnishment. Beginning September 2011 through February 2012, garnishment up to 7.5% of Petitioner Gilbert's disposable pay; and thereafter, garnishment up to 15% of Petitioner Gilbert's disposable pay. 31 C.F.R. § 285.11.

15. Repayment of the debt may also occur through ***offset*** of Petitioner Gilbert's **income tax refunds** or other **Federal monies** payable to the order of Mr. Gilbert.

Order

16. Until the debt is repaid, Petitioner Gilbert shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in his mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

17. USDA Rural Development, and those collecting on its behalf, are **not** authorized to proceed with garnishment through August 2011. Beginning September 2011 through February 2012, garnishment up to 7.5% of Petitioner Gilbert's disposable pay is authorized; and

garnishment up to 15% of Petitioner Gilbert's disposable pay thereafter. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties

Done at Washington, D.C.

ROY LEE CROKA.
AWG Docket No. 11 – 0068.
Decision and Order.
Filed February 7, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Hearing Official James P. Hurt.

AWG

DECISION AND ORDER

This matter is before me upon the request of Roy Lee Croka for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On December 29, 2010, I issued a Prehearing Order to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing.

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation on January 13, 2011. On January 18, 2011, Mr. Croka filed a Narrative and Exhibits PX-1 and Financial Statements (4 pages) which I now label as PX-2.

On February 1, 2011 at the scheduled time, both parties were available for the conference call. The parties were sworn. Mr. Croka advised that he was no longer represented and, following the hearing, filed a document that he was not represented. Mr. Croka acknowledged in his Narrative that he agree(s) to the debt owed in the amount of $18,322.93. . . however . . . do[esn't agree with] the extra $5,130.42

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

On December 22, 1997, Roy Lee Croka, the Petitioner, and Melissa Croka received a home mortgage loan in the amount of $22,000 from First Union Mortgage and also a second loan from FmHA in the amount of $33,000 for property located at 1## Weep*** ****** Rd., Winter haven, FL 33###.[1] RX-1.

The borrowers defaulted on the loan on September 16, 2000 and the property was sold in a foreclosure sale on December 20, 2000 for $37,400.00. Narrative.

USDA received $11,272.99 net proceeds from the sale of the house.

Prior to the sale, Mr. Croka owed $32,801.68 for principal and $1,778.71 for accrued interest. Narrative.

RD received post-sale payments from US Treasury totaling $4,984.47 exclusive of Treasury. RX-6.

The remaining unpaid debt is in the amount of $18,323.93 exclusive of potential Treasury fees. Narrative.

The remaining potential treasury fees are $5,130.42. RX-7

Mr. Croka has been employed for more than one year.

Mr. Croka submitted financial statements under oath.

I performed a Financial Hardship calculation which is attached[2].

Conclusions of Law

Roy Lee Croka is indebted to USDA Rural Development in the amount of $18,322.93 for the mortgage loan extended to him.

Roy Lee Croka is indebted to the US Treasury for potential fees in the amount of $5,130.42.

All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.

The Respondent is not entitled to administratively garnish the wages of the Petitioner for a period of one year

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[1] Complete address maintained in USDA files.

[2] The Financial hardship calculations are not posted on the OALJ website.

Order

For the foregoing reasons, the wages of Roy Lee Croka not shall be subjected to administrative wage garnishment for a period of one year.

After one year, his financial situation may be reviewed to determine if wage garnishment is appropriate.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

Done at Washington, D.C.

JAMES MARTIN.
AWG Docket No. 10 – 0412.
Decision and Order.
Filed February 7, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Chief Administrative Law Judge Peter M. Davenport.

AWG

Decision and Order

This matter is before the Administrative Law Judge upon the request of James Martin, for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On September 27, 2010, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt and setting the case for a telephonic hearing on December 15, 2010.

The Respondent complied with the Prehearing Order and a Narrative was filed, together with supporting documentation on October 6, 2010. Although the Petitioner attempted to file material with the Hearing Clerk, his efforts to do so prior to the hearing were unsuccessful.

At the request of the Petitioner, the December hearing was postponed and the telephonic hearing was ultimately held on January 31, 2011. At

that hearing, the Petitioner participated *pro se* and the Agency was represented by Mary E. Kimball, Accountant for the New Program Initiatives Branch, Rural Development Centralized Servicing Center, United States Department of Agriculture, St. Louis, Missouri. The Petitioner acknowledged that it looked like his signature on the Loan Guarantee Application (RX-1), but indicated that he had no recollection of signing the document and questioned why he would have done so over a month after the loan had closed. He also indicated that he had been informed that there would be no deficiency and testified that (as the judgment confirms) the deficiency had been waived. At the close of the hearing, both parties indicated that they would submit additional material.

The material submitted by the Petitioner confirms that the note holder expressly waived right to a personal or deficiency judgment. Paragraph 17, page 5 of the Judgment in *Chase Home Finance, LLC. vs. James C. Martin and Lendmark Financial Services, Inc.,* Case No. 08-CP-28-923, Court of Common Pleas, Kershaw County, South Carolina. Notwithstanding the note holder's waiver of any right to a personal or deficiency judgment against the Petitioner, JPMorgan Chase Bank, N.A., **an entity other than the note holder,** in contumely fashion submitted a loss claim under the loan guarantee and was paid $36,980.01 by USDA.[1]

The facts in this action may be considered illustrative of some of the more questionable practices of lenders and others in the financial industries responsible for precipitating the current economic difficulties confronting our country today. Initially, it is difficult to see any consideration for a guarantee executed over a month after a loan is closed. It is even more difficult to understand why the Agency would pay an entity other than the proper holder of a note under a purported guarantee.

On the basis of the record before me, nothing further having been received from the Petitioner, the following Findings of Fact, Conclusions of Law and Order will be entered.

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[1] The record reflects that the original note and mortgage to Homeowners Mortgage Enterprises, Inc. dated April 28, 2005 was duly recorded in Book 1749, page 246. The note and mortgage was thereafter assigned to JPMorgan Chase Bank, N.A. by an assignment dated April 28, 2005 which was recorded in Book 1749, page 263 and then assigned again to Chase Home Finance LLC by assignment dated August 14, 2008 and recorded in Book 2407 at page 175, all in the Office of the Registrar of Deeds for Kershaw County. The foreclosure action was brought by the holder of then holder of the note, Chase Home Finance LLC.

Findings of Fact

On April 28, 2005, James Martin received a home mortgage loan from Homeowners Mortgage Enterprises, Inc. in the amount of $92,857.00 for the purchase of property located in Lugoff, South Carolina.

Subsequent to obtaining the loan, without additional consideration, a loan guarantee agreement was executed, appearing to bear the Petitioner's signature.

In 2008, the Petitioner defaulted on the mortgage loan and foreclosure proceedings were initiated in the Court of Common Pleas for Kershaw County, South Carolina by Chase Home Finance LLC, then the holder of the note and mortgage.

In the foreclosure action, Chase Home Finance LLC expressly waived its right to a personal or deficiency judgment.

Thereafter, an entity not then the holder of the note, JPMorgan Chase Bank, N.A., submitted to USDA and was paid the sum of $36,980.01. RX-2.

The residence was subsequently resold by the foreclosing party and USDA received an additional $13,273.40. RX-4.

USDA referred this alleged debt of $23,706.01 to Treasury and $2,551.00 was collected from the Petitioner. RX-6

Conclusions of Law

The Secretary has jurisdiction in this matter.

The Agency has failed in its burden of proof of establishing a debt in this matter.

The purported loan guarantee contained in the record was executed well after the closing of the loan and accordingly was without consideration.

The note and mortgage holder expressly waived its right to a personal or deficiency judgment and by the terms of its judgment was precluded from asserting any claim against the Petitioner.

USDA paid an entity under the purported guarantee agreement that was not then the holder of the note entitled to make such a loss claim.

Any amount collected from the Petitioner arising out of the purported guarantee was improper and should be refunded to him.

Order

For the foregoing reasons, no debt being established, the wages of the Petitioner may **NOT** be subjected to administrative wage garnishment. Any amounts collected from the Petitioner subsequent to foreclosure **SHALL** be refunded.

Copies of this Decision and order shall be served upon the parties by the Hearing Clerk's Office.

PATRICIA PARKER.
AWG Docket No. 10 – 0393.
Decision and Order.
Filed February 7, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Hearing Official Stephen H. Reilly.

AWG

Decision and Order

This matter is before me upon the request of the Petitioner, Patricia A. Parker,[1] for a hearing in response to efforts of Respondent, USDA's Rural Development Agency, Rural Housing Service, to institute a federal administrative wage garnishment against her. On August 26, 2010, I issued a Pre-hearing Order setting the date for the hearing and requiring the parties to exchange information concerning the amount of the debt. On November 15, 2010, I issued a Rescheduling Order setting a new date for the hearing.

Rural Development filed a copy of its Narrative along with exhibits RX-1 through RX-6 on September 3, 2010. On December 3, 2010, Ms. Parker filed her Consumer Debtor Financial Statement.

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[1] Patricia A. Parker divorced Troy Parker and is currently known as Patricia A. Merchant. For the purposes of this decision, I will refer to her as Patricia A. Parker.

I conducted a telephone hearing on December 6, 2010. Rural Development was represented by Mary Kimball who testified on behalf of the agency. Ms. Parker represented herself. The witnesses were sworn.

Ms. Parker acknowledged that she received a copy of Rural Development's Narrative and Exhibits. Ms. Kimball acknowledged receipt of Ms. Parker's Consumer Debtor Financial Statement.

On September 8, 1994, Ms. Parker and her then husband, Troy Parker, borrowed $52,280.00 from USDA Farmers Home Administration to purchase their residence in French Lick, IN. (RX-1, RX-2).

The Parkers defaulted on the loan and Rural Development filed an action against the Parkers in the United States District Court, Southern District of Indiana. On April 7, 2000, the District Court issued a Decree of Foreclosure. On July 18, 2000, the house was sold at a foreclosure sale. USDA received $32,278.55 from the foreclosure sale and applied that to the outstanding balance. At the time of the sale, the amount owed on the loan was $64,950.51 - $51,225.00 in principal, $10,144.07 in interest and $3,581.44 in fees. Applying the proceeds from the foreclosure sale leaves a balance of $32,671.96. Since the sale, Rural Development received $8,683.21 subsequently collected by Treasury leaving a balance of $23,988.75. In addition, there are potential fees of $6,716.85 due the US Treasury for the cost of collection, giving a total amount claimed by Rural Development as $30,705.60.

On August 9, 2000, the District Court issued its Order Confirming Sale and Deficiency Judgment. In that order, the Court found that a deficiency exists and issued Aa personal money judgment against the Defendant, Troy L. Parker, for said deficiency in the sum of $30,315.62. The record does not show whether Rural Development did not seek a deficiency against Patricia Parker or the Court found the deficiency did not apply to her.[2] However, the Court made no mention of a deficiency applying to Ms. Parker. Therefore, I find that any amounts due Rural Development on the loan are not the responsibility of Ms. Parker. Furthermore, because the District Court did not find that Ms. Parker had

[2]At the hearing I asked Ms. Kimball to provide a memo/discussion, in writing, addressing the impact on Ms. Parker's obligation on the fact that the Court issued the deficiency judgment against Mr. Parker but not Patricia Parker. On February 3, 2011, I received from Ms. Kimball a copy of a short e-mail exchange that did not address the question or take a position regarding Ms. Parker's obligation.

responsibility for the deficiency, Rural Development had no authority to collect funds from Ms. Parker to satisfy this deficiency.

Findings and Conclusions

1. The Secretary of Agriculture has jurisdiction over the parties, Patricia A. Parker and USDA Rural Development Agency, Rural Housing Service; and over the subject matter, which is administrative wage garnishment.
2. The United States District Court, Southern District of Indiana issued a deficiency judgment holding Troy Parker responsible for the deficiency resulting from the loan foreclosure on the house he and Patricia Parker purchased in French Lick, IN.

3. Patricia A. Parker does not owe any debt to Rural Development resulting from the loan foreclosure on the house in French Lick, IN.
4. Rural Development had no authority to collect funds from Ms. Parker to satisfy the deficiency resulting from the loan foreclosure on the house in French Lick, IN.
5. Wage garnishment is not authorized.

Order

USDA Rural Development Agency, Rural Housing Service, and those collecting on its behalf, are not authorized to proceed with garnishment. All collection activities against Ms. Parker relating to the loan deficiency on the house in French Lick, IN shall cease. USDA Rural Development Agency, Rural Housing Service shall determine the amount of money collected from Patricia Parker to repay the debt on the house in French Lick, Indiana since August 9, 2000, the date of issuance of the Deficiency Judgment against her former husband. USDA Rural Development Agency, Rural Housing Service shall refund to Ms. Parker all such money collected from her.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

Done at Washington, D.C.

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DIANA RUIZ.
AWG Docket No. 11 – 0051.
Decision and Order.
Filed February 8, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Hearing Official James P. Hurt.

AWG

DECISION AND ORDER

This matter is before me upon the request of Diana Ruiz for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On December 6, 2010, I issued a Prehearing Order to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing.

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation RX-1 through RX-10 on December 16, 2010. Following the oral hearing, on January 12, 2011, Ms. Ruiz filed two letters (which I now label as PX-1 and Financial Statements with 2009 tax returns (12 pages) which I now label as PX-2.

On January 4, 2011 at the scheduled time, both parties were available for the conference call. The parties were sworn. Ms. Ruiz stated that she had written to RD very soon after the loan was approved (September 1998) and before the monies were distributed that she did not want to be a signatory to the loan. However, due to the RD document retention policies in effect, those documents (if they existed), were destroyed. PX-1.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

On September 16, 1998, Juan Reta and Diana Ruiz (Petitioner) received a home mortgage loan in the amount of $60,140.00 from USDA

FmHA for an unimproved lot located in Cameron County, TX 33###.[1] RX-1, RX-2.

The borrowers defaulted on the loan on August 10, 2000 were sent a Notice of Acceleration on February 1, 2002. RX-4 thru RX- 8.

Prior to the sale, borrowers owed $53,340.01 in principal, $9,718.13 in accrued interest and $5,959.01 in fees for a total of $69,017.15. RX-9.

A foreclosure sale was held on December 3, 2002 and RD netted $34,017.77 from the sale. RX-9.

Post sale Treasury offsets in the amount of $8,989.34 were received and applied to the account. RX- 9.

The remaining unpaid debt is in the amount of $26,010.04 exclusive of potential Treasury fees. RX-9, Narrative.

The remaining potential treasury fees are $7,282.81. RX-10.

Ms. Ruiz has been employed for more than one year.

Ms. Ruiz submitted financial statements under oath.

I performed a Financial Hardship calculation which is attached.[2]

Conclusions of Law

1. Diana Ruiz is jointly and severally indebted to USDA Rural Development in the amount of $26,010.04 for the mortgage loan extended to her.

2. Diana Ruiz is jointly and severally indebted to the US Treasury for potential fees in the amount of $7,282.81.

3. All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.

4. The Respondent is not entitled to administratively garnish the wages of the Petitioner for a period of one year

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Order

For the foregoing reasons, the wages of Diana Ruiz NOT shall be subjected to administrative wage garnishment for a period of one year.

After one year, her financial situation may be reviewed to determine if wage garnishment is appropriate.

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[1] Complete address maintained in USDA files.

[2] The Financial hardship calculations are not posted on the OALJ website.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

Done at Washington, D.C.

ROCHELLE STUART.
AWG Docket No. 11 – 0038.
Decision and Order.
Filed February 8, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Hearing Official Stephen H. Reilly.

AWG

Decision and Order

This matter is before me upon the request of the Petitioner, Rochelle Stuart, for a hearing in response to efforts of Respondent, USDA's Rural Development Agency, Rural Housing Service, to institute a federal administrative wage garnishment against her for an alleged deficiency on a mortgage issued by Rural Development to Ms. Stuart on property in Marion, Kansas. On January 10, 2011, I issued a Pre-hearing Order setting the date for the hearing and requiring the parties to exchange information concerning the amount of the debt.

Rural Development filed a copy of its Narrative along with exhibits RX-1 through RX-8 on January 13, 2011. Exhibit RX-8 is KS Form RD 1951-2 Satisfaction of Real Estate Mortgage (Kansas). This document, issued by USDA Rural Development, releases the mortgage A[i]n consideration of full payment of the debt secured by the mortgage." Rural Development recommends cancellation of the debt and refund of the money collected. I agree and so order.

Findings and Conclusions

1. The Secretary of Agriculture has jurisdiction over the parties, Rochelle Stuart and USDA Rural Development Agency, Rural Housing

Service; and over the subject matter, which is administrative wage garnishment.

2. Rochelle Stuart satisfied the debt to Rural Development resulting from the mortgage loan on the house in Marion, Kansas as evidenced by Exhibit RX-8, KS Form RD 1951-2 Satisfaction of Real Estate Mortgage (Kansas) dated October 19, 2004..

3. Wage garnishment is not authorized.

4. Rural Development indicates that it collected $5,168.26 since Ms. Stuart satisfied the debt.

Order

USDA Rural Development Agency, Rural Housing Service, and those collecting on its behalf, are not authorized to proceed with garnishment. All collection activities against Ms. Stuart relating to the mortgage loan on the house in Marion, Kansas shall cease. USDA Rural Development Agency, Rural Housing Service shall refund to Ms. Stuart the $5,168.26 it inappropriately collected.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

Done at Washington, D.C.

J.D. PHILLIPS.
AWG Docket No. 10 – 0432.
Decision and Order.
Filed February 9, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Chief Administrative Law Judge Peter M. Davenport.

AWG

Decision and Order

This matter is before the Administrative Law Judge upon the request of J. D. Phillips for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to

imposition of an administrative wage garnishment. On September 27, 2010, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing on December 16, 2010.

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation on November 9, 2010. On November 29 and 30, 2010, the Petitioner submitted a Response and supporting documentation. The Respondent submitted a Revised Narrative and additional documentation on December 23, 2010. At the request of the Petitioner, the December hearing was postponed and a telephonic hearing was ultimately held on February 8, 2011. At the February 8, 2011 hearing, the Petitioner participated, represented by his counsel, Landon Lambert, Esquire of Clarendon, Texas. Appearing for the Respondent was Mary E. Kimball, Accountant for the New Program Initiatives Branch of USDA Rural Development, St. Louis, Missouri. Sworn testimony was received from the Petitioner and Ms. Kimball.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

On June 25, 1981, J. D. Phillips and Patsy Phillips (then his wife) received a home mortgage loan in the amount of $37,650.00 from Farmers Home Administration (FmHA) now Rural Development (RD), United States Department of Agriculture (USDA), for property located in Childers, Texas. RX-1, 2.

In 1998, subsequent to the purchase of the residence, the Petitioner and his wife divorced and as part of the division of property in the divorce, possession of the residence was awarded to the Petitioner's ex-wife, the property was to be listed for sale; however, if the residence was not sold within three months, the wife was to assume responsibility for any house payments after that period.

In 1999, while in sole possession of Patsy Phillips, the mortgage loan was defaulted upon. As part of the non-judicial eviction proceedings, notice of the default and a notice of acceleration were sent to the borrowers at the property address. RX-4, 5.

Although the record reflects two PS Form 3811s (Domestic Return Receipts), credible testimony indicates that the Petitioner was not at the property address and an individual other than the Petitioner signed the receipts. RX-9.

The Petitioner never received notice of the default and acceleration of the loan, and was not provided an opportunity to cure the default,

While the Deed of Trust executed by the Petitioner contains a provision waiving any state law provision establishing a statute of limitations for bringing an action for a deficiency judgment, the record contains no evidence that any deficiency judgment was sought or taken against him.

The Deed by Substitute Trustee recorded in Deed Book 394, Page 228, *et seq.* in the Childress County/District Clerk's Office falsely recites that written notice of the proposed sale was served on the Petitioner by certified mail.

Treasury offsets totaling $2,708.34 exclusive of Treasury fees have been received. RX-6.

Conclusions of Law

The Secretary has jurisdiction in this matter.

USDA Rural Development failed in its burden of proof of establishing that the Petitioner was given actual notice of the default, the acceleration of the loan or was given an opportunity to cure any default.

The Petitioner is not indebted to USDA Rural Development for the balance of the indebtedness stemming from the mortgage loan extended to him.

Any amounts collected by Treasury prior to the entry of this Decision and Order may be retained and need not be returned.

As personal liability for the debt has not been established and no deficiency judgment was sought, the wages of J. D. Phillips may **NOT** be subjected to garnishment.

Order

For the foregoing reasons, these proceedings are terminated and the wages of J. D. Phillips shall **NOT** be subjected to administrative wage garnishment and the debt shall be recalled from Treasury.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

SHEILA MARIE FOUNTAIN.
AWG Docket No. 11 – 0096.
Decision and Order.
Filed February 10, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Chief Administrative Law Judge Peter M. Davenport.

AWG

Decision and Order

This matter is before the Administrative Law Judge upon the request of Petitioner for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On January 11, 2011, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing on February 10, 2011.

The Respondent complied with the Order and filed a Narrative, together with supporting documentation on January 24, 2011. The Petitioner filed a Consumer Debtor Financial Statement with the Hearing Clerk's Office on February 7, 2011. During the hearing, testimony was received from Mary E. Kimball, Accountant for the New Program Initiatives Branch of Rural Development, USDA, Saint Louis, Missouri and from the Petitioner.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

On September 21, 1987, the Petitioner received a home mortgage loan in the amount of $35,000.00 from Farmers Home Administration

(FmHA), United States Department of Agriculture (USDA), now Rural Development (RD) for property located in Hoxie, Arkansas. RX-1,2.

The Petitioner defaulted on the loan and the residence was sold at a short sale on February 18, 2000. USDA received $23,194.67 from the sale, leaving a balance due of $19,618.90. RX-5.

Treasury offsets totaling $5,822.64 exclusive of Treasury fees have been received. RX-5.

The remaining unpaid debt is in the amount of $13,796.26 exclusive of potential Treasury fees. RX-5.

The Petitioner's spouse is not employed and the family income roughly approximates the family monthly expenses. With their income level, she is unlikely to be in a position to liquidate the debt owed.

Conclusions of Law

The Secretary has jurisdiction in this matter.

Petitioner is indebted to USDA Rural Development in the amount of $13,796.26 exclusive of potential Treasury fees for the mortgage loan extended to her.

The Petitioner is under a financial hardship at this time.

The Respondent is **NOT** entitled to administratively garnish the wages of the Petitioner; however the debt shall remain at Treasury for any and all other appropriate collection action.

Order

For the foregoing reasons, the wages of Petitioner shall **NOT** be subjected to administrative wage garnishment at this time.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

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GAVIN ALFRED.
AWG Docket No. 11 – 0098.
Decision and Order.
Filed February 10, 2011

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Chief Administrative Law Judge Peter M. Davenport.

AWG

Decision and Order

This matter is before the Administrative Law Judge upon the request of Petitioner for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On January 19, 2011, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing on February 10, 2011.

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation on January 25, 2011. The Petitioner filed his documentation with the Hearing Clerk on January 27, 2011. At the telephonic hearing conducted on February 10, 2011, the Petitioner participated *pro se*, without benefit of representation and testified in his own behalf. The Petitioner acknowledged being involved in the collision in which a vehicle owned by the United States Department of Agriculture was damaged, but seeks to avoid financial responsibility for the damages on the grounds that he was driving a vehicle owned by another and the owners of that vehicle had allowed their insurance to lapse. His position is unsustainable as the operator of the vehicle is responsible for any damages caused by his operation. The Petitioner also claims to have been insured, but apparently has not advised his insurance company of the government claim.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

On March 20, 2009, the Petitioner while operating a 1994 Mustang automobile owned by Melissa Wilson collided with a government owned 2003 Dodge Dakota truck operated by Brenda Hutchins causing damage to the rear of the government owned vehicle in the amount of $701.38 . RX-4, 19.

The damages sustained by the government owned vehicle were caused by the negligence of the Petitioner in the operation of the vehicle he was driving. RX-8.

The Petitioner has been employed for less than a continuous twelve month period and earns less than the garnishment threshold.

Conclusions of Law

The Secretary has jurisdiction in this matter.

Petitioner is indebted to USDA APHIS in the amount of $701.38 for the damages caused by his negligent operation of a motor vehicle.

As the Petitioner has been employed for less than a continuous twelve month period and earns less than the garnishment threshold, his wages are not eligible for garnishment at this time.

The Respondent is **NOT** entitled to administratively garnish the wages of the Petitioner at this time.

The debt should remain at Treasury for any and all other appropriate collection action.

Order

For the foregoing reasons, the wages of Petitioner may **NOT** be subjected to administrative wage garnishment at this time.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

PAULINE JOHNSON.
AWG Docket No. 11 – 0048.
Decision and Order.
Filed February 10, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Hearing Official Stephen H. Reilly.

AWG

Decision and Order

This matter is before me upon the request of the Petitioner, Pauline Johnson,[1] for a hearing in response to efforts of Respondent, USDA's Rural Development Agency, Rural Housing Service, to institute a federal administrative wage garnishment against her. On January 11, 2011, I issued a Pre-hearing Order setting the date for the hearing and requiring the parties to exchange information concerning the amount of the debt.

Rural Development filed a copy of its Narrative along with exhibits RX-1 through RX-9 on January 31, 2011. Ms. Johnson did not file a Narrative or a Consumer Debtor Financial Statement.

I conducted a telephone hearing on February 8, 2011. Rural Development was represented by Mary Kimball who testified on behalf of the agency. Ms. Johnson represented herself. The witnesses were sworn. Ms. Johnson acknowledged that she received a copy of Rural Development's Narrative and Exhibits.

On September 15, 1995, Ms. Johnson assumed a USDA Farmers Home Administration[2] loan to purchase her residence in Americus, GA. The loan assumption was for $37,000.00. (RX-1). In addition, on the same day, Ms. Johnson borrowed $3,580.00 from Farmers Home Administration to complete the purchase of the home.

On October 23, 2007, Rural Development sent Ms. Johnson a Notice of Acceleration which included a demand for payment, a notice of intent to foreclose and notice that Ms. Johnson had appeal rights and the right to request a discussion with Rural Housing concerning this loan. (RX-5) The notice gave Ms. Johnson until November 7, 2007, to request the discussion. On November 25, 2008, over a year after the deadline for a response to the Notice of Acceleration passed, Ms. Johnson sent a letter to Rural Development seeking a modification of the loan terms. (RX-6) On December 18, 2008, Rural Development denied the request as untimely.

On January 5, 2010, the house was sold at a foreclosure sale. At the time of the sale, the principal balance on the loan assumption was $32,475.25 and the principal on the second mortgage was $3,279.71.

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[1] At the time of the loan Ms. Johnson was known as Pauline Walker. For the purposes of this decision, I will refer to her as Pauline Johnson.

[2] USDA Rural Development, Rural Housing Service is the successor agency to the Farmers Home Administration.

Interest on the loans was $10,575.99 and $1,028.96. Fees on the loans totaled $7,845.32 for a total amount due at the time of foreclosure of $55,205.20. Rural Development received $30,000.00 from the foreclosure and an additional cost of $320.00 was added to the balance leaving $25,525.20 due. (RX-7). There are remaining potential fees due for collection of $7,147.06 for a total of $32,672.26.

Based on the testimony during the hearing and the record before me, I conclude that Ms. Johnson owes $25,525.20 on the USDA Rural Housing loan. In addition, there are potential fees of $7,147.06 due the US Treasury for the cost of collection giving a total amount due of $32,672.26.

Ms. Johnson is currently on medical leave from her job. She developed Carpal Tunnel Syndrome that keeps her from working. She believes her job will be available after her wrist is surgically repaired and she recovers. Surgery is not scheduled at this time. She does not receive workers compensation or unemployment payments. She receives food stamps. Ms. Johnson has no other income. Therefore, I find that garnishment is not appropriate at this time. USDA Rural Development may reexamine Ms. Johnson's situation in one year to determine if Ms. Johnson finances have improved sufficiently to warrant garnishment.

Although I am not authorizing garnishment at this time, I want Ms. Johnson to understand I find that she owes the debt. Because she owes the debt to the government, Treasury will continue to obtain payment on the debt by keeping income tax returns, if any, and other payments from the government and applying those amounts to lower the debt.

Findings of the Fact

1. On September 15, 1995, Ms. Johnson assumed a $37,000.00 USDA Farmers Home Administration loan to purchase her residence in Americus, GA.

2. On September 15, 1995, Ms. Johnson borrowed $3,580.00 from Farmers Home Administration to complete the purchase of the home.

3. On January 5, 2010, the house was sold at a foreclosure sale. Rural Development received $30,000.00 from the foreclosure.

4. At the time of the sale, the total amount due counting principal, interest and fees was $55,205.20.

5. USDA applied the proceeds from the foreclosure, adding an additional expense of $320.00 giving a balance due of $25,525.20.

6. There are potential fees due to the U.S. Treasury in the amount of $7,147.06 giving a total amount due of $32,672.26.

7. Ms. Johnson is currently on medical leave from her job and has no income.

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction over the parties, Ms. Johnson and USDA Rural Development Agency, Rural Housing Service; and over the subject matter, which is administrative wage garnishment.
2. Petitioner Pauline Johnson is indebted to USDA's Rural Development Agency, Rural Housing Service program in the amount of $25,525.20.

3. In addition, Ms. Johnson is indebted for potential fees to the US Treasury in the amount of $7,147.06.

4. All procedural requirements for administrative wage garnishment set forth in 31 C.F.R. § 285.11 have been met.

5. I conclude that Ms. Johnson' financial circumstances, at this time, do not support garnishment.

Order

Until the debt is fully paid, Ms. Johnson shall give notice to USDA Rural Development Agency, Rural Housing Service or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es). Furthermore, Ms. Johnson shall notify USDA Rural Development Agency, Rural Housing Service when her medical leave is over and she returns to work.

USDA Rural Development Agency, Rural Housing Service, and those collecting on its behalf, are not authorized to proceed with garnishment at this time. USDA Rural Development may reexamine Ms. Johnson's situation in one year to determine if Ms. Johnson finances have improved sufficiently to warrant garnishment. Ms. Johnson shall provide to Rural Development, when requested, a Consumer Debtor Financial Statement to facilitate this review.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

Done at Washington, D.C._____

LINDA BENNETT.
AWG Docket No. 11 – 0006.
Decision and Order.
Filed February 10, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Jill S. Clifton.

AWG

Decision and Order

1. The hearing by telephone was held on December 8, 2010, and January 6, 2011. Ms. Linda S. Bennett, formerly known as Linda S. Cook ("Petitioner Bennett"), is represented by Edward F. Noyes, Esq.

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and is represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

Summary of the Facts Presented

3. Petitioner Bennett owes to USDA Rural Development a balance of **$25,002.98** (as of November 12, 2010) in repayment of two United States Department of Agriculture Farmers Home Administration loans, one *assumed* in 1991, and one *made* in 1991, for a home in Iowa. The balance is now unsecured ("the debt"). *See* USDA Rural Development Exhibits, plus Narrative, Witness & Exhibit List (filed November 17, 2010, and January 6, 2011), which are admitted into evidence, together with the testimony of Mary Kimball. 4. Potential Treasury fees in the

amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$25,002.98** would increase the current balance by $7,000.83, to $32,003.81. *See* USDA Rural Development Exhibits, esp. RX-6.

5. The amount Petitioner Bennett borrowed in 1991 was $48,046.07 ($37,476.07 loan assumed, plus $10,570.00 loan made). By the time of the foreclosure sale in 1999, that debt had grown to $62,563.14:

$ 48,302.35 Principal Balance prior to foreclosure sale
$ 10,849.83 Interest Balance prior to foreclosure sale
$ 3,410.96 Fee Balance prior to foreclosure sale

$ 62,563.14 Total Amount Due prior to foreclosure sale

- $ 36,433.35 Proceeds from foreclosure sale

$ 26,129.79 Unpaid in 1999

RX 5 and USDA Rural Development Narrative.

The foreclosure sale in 1999 yielded $36,433.35. The remaining balance of the debt was $26,129.79 after those funds were applied. Another $1,126.81 applied to the debt since then leaves **$25,002.98** unpaid now (excluding the potential remaining collection fees). *See* RX 5 and USDA Rural Development Narrative.

6. Petitioner Bennett's Exhibit 1 (pay stub) and Exhibit 2 (expenses) filed January 6, 2011, and Petitioner Bennett's Hearing Request statements are admitted into evidence, together with the testimony of Petitioner Bennett.

7. I calculate Petitioner Bennett's disposable pay to be about $*** per month. [I did allow the 401K deduction, in addition to all the other deductions. My calculations included both the 2-week pay period ending 11/28/10 (which yielded $*** per month disposable pay); AND the year-to-date which includes 24 pay periods (which yielded $*** per month disposable pay).] Petitioner's Exhibit 2 shows reasonable and necessary living expenses that exceed $*** per month. The approximate amount that could be garnished in repayment of the USDA Rural Development debt is $** per month, which is 15% of $***.

8. In evaluating the factors to be considered under 31 C.F.R. § 285.11, I find that Petitioner Bennett cannot withstand garnishment in that amount without hardship. To prevent hardship, potential garnishment to repay "the debt" (*see* paragraph 3) must be limited to zero per cent (0%) of Petitioner Bennett's disposable pay through August 2011; and no more than 5% of Petitioner Bennett's disposable pay thereafter. 31 C.F.R. § 285.11.

9. Petitioner Bennett is responsible and willing and able to negotiate the repayment of the debt with Treasury's collection agency.

Discussion

10. Through August 2011, NO garnishment is authorized. Thereafter, garnishment up to 5% of Petitioner Bennett's disposable pay is authorized. *See* paragraphs 6, 7 and 8. I encourage **Petitioner Bennett and the collection agency** to **negotiate promptly** the repayment of the debt. Petitioner Bennett, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Bennett, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less.

Findings, Analysis and Conclusions

11. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Bennett and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

12. Petitioner Bennett owes the debt described in paragraphs 3, 4 and 5.

13. **Through August 2011, NO garnishment is authorized**. Thereafter, garnishment **up to 5%** of Petitioner Bennett's disposable pay is authorized. 31 C.F.R. § 285.11.

14. This Decision does not prevent repayment of the debt through ***offset*** of Petitioner Bennett's **income tax refunds** or other **Federal monies** payable to the order of Ms. Bennett.

Order

15. Until the debt is repaid, Petitioner Bennett shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

16. USDA Rural Development, and those collecting on its behalf, are **NOT** authorized to proceed with garnishment **through August 2011**. Thereafter, USDA Rural Development, and those collecting on its behalf, are authorized to proceed with garnishment, **up to 5%** of Petitioner Bennett's disposable pay. 31 C.F.R. § 285.11. Copies of this Decision shall be served by the Hearing Clerk upon each of the parties. Done at Washington, D.C.

ROOSEVELT RICHARDSON.
AWG Docket No. 10 – 0293.
Decision and Order.
Filed February 10, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Chief Administrative Law Judge Peter M. Davenport.

AWG

Decision and Order

This matter is before the Administrative Law Judge upon the request of Petitioner for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On July 1, 2010, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing on August 17, 2010.

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation on August 2, 2010. During the hearing, testimony was received from Mary E. Kimball, Accountant for the New Program Initiatives Branch of Rural Development, USDA, Saint Louis, Missouri and from the Petitioner. The Petitioner indicated that he

had misplaced the Consumer Debtor Financial Statement and that his address had changed. At the conclusion of the hearing, the Petitioner was advised that a

Consumer Debtor Financial Statement would be mailed to him at his new address and that he would be given 10 days in which to complete it and return it to the Hearing Clerk. Despite the passage of a significant amount of time, nothing further has been received from him. Accordingly it will be deemed that the Petitioner has waived his right to further proceeding and the matter will be decided on the record.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

On August 8, 1986, the Petitioner and Angela Richardson, then his wife received a home mortgage loan in the amount of $29,200.00 from Farmers Home Administration (FmHA), United States Department of Agriculture (USDA), now Rural Development (RD) for property located in Osteen, Florida. RX-1.

The property was sold at a foreclosure sale on July 7, 2004 with proceeds realized from that sale in the amount of $21,000.00, leaving a balance due after payment of fees and credits of $36,560.68. RX-3.

Treasury offsets totaling $380.59 exclusive of Treasury fees have been received. RX-3.

The remaining unpaid debt is in the amount of $16,002.59 exclusive of potential Treasury fees. RX-4.

The file has no evidence concerning the Petitioner's employment or his financial condition.

Conclusions of Law

The Secretary has jurisdiction in this matter.

Petitioner is indebted to USDA Rural Development in the amount of $16,002.59 exclusive of potential Treasury fees for the mortgage loan extended to him.

All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.

The Respondent is entitled to administratively garnish the wages of the Petitioner.

Order

For the foregoing reasons, the wages of the Petitioner shall be subjected to administrative wage garnishment at the rate of 15% of disposable pay, or such lesser amount as might be specified in 31 C.F.R. § 285.11(i).

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

CONSTANCE ABBOTT.
AWG Docket No. 11 – 0081.
Decision and Order.
Filed February 11, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Jill S. Clifton.

AWG

Decision and Order

1. The hearing by telephone was held as scheduled, February 11, 2011. Constance Abbott, the Petitioner, also known as Constance G. Abbott, formerly known as Constance G. LaBrie ("Petitioner Abbott"), failed to appear. [She failed to appear by telephone; she did not provide a phone number where she could be reached.]

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and was represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

3. I encourage **Petitioner Abbott and the collection agency** to work together to **establish a repayment schedule** rather than immediately proceeding with garnishment, even though this Decision authorizes garnishment, up to 15% of Petitioner Abbott's disposable pay. Petitioner Abbott, obviously, will have to make herself available to the collection agency if she wants to negotiate. *See* paragraph 9.

4. This is Petitioner Abbott's case (she filed the Petition), and in addition to failing to be available for the hearing, Petitioner Abbott failed to file with the Hearing Clerk any information. Petitioner Abbott's deadline for that was February 7, 2011.

Summary of the Facts Presented

5. Petitioner Abbott owes to USDA Rural Development a balance of **$6,609.99**, in repayment of two Farmers Home Administration / United States Department of Agriculture loans (now USDA / Rural Housing Service), made in 1982 and in 1989 for a home in Maine. The balance is now unsecured ("the debt"). *See* USDA Rural Development Exhibits, plus Narrative, Witness & Exhibit List (filed January 24, 2011), which are admitted into evidence, together with the testimony of Ms. Kimball.

6. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$6,609.99** would increase the current balance by $1,850.80, to $8,460.79. *See* USDA Rural Development Exhibits, esp. RX 5.

7. I cannot determine whether Petitioner Abbott's disposable pay supports garnishment without creating hardship. 31 C.F.R. § 285.11. Petitioner Abbott failed to file a completed "Consumer Debtor Financial Statement". I cannot calculate Petitioner Abbott's disposable pay (after subtracting income tax, social security, Medicare, health insurance, and any other "eligible" withholding from her gross pay), because there is no evidence to use for such calculations. I cannot calculate Petitioner Abbott's current reasonable and necessary living expenses. Consequently, garnishment up to 15% of Petitioner Abbott's disposable pay is authorized. 31 C.F.R. § 285.11.

8. Petitioner Abbott is responsible and willing and able to negotiate the disposition of the debt with Treasury's collection agency.

Discussion

9. Garnishment is authorized, up to 15% of Petitioner Abbott's disposable pay. *See* paragraphs 7 and 8. I encourage **Petitioner Abbott and the collection agency** to **negotiate promptly** the repayment of the debt. Petitioner Abbott, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Abbott, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less.

Findings, Analysis and Conclusions

10. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Abbott and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

11. Petitioner Abbott owes the debt described in paragraphs 5 and 6.

12. **Garnishment is authorized**, as follows: up to 15% of Petitioner Abbott's disposable pay. 31 C.F.R. § 285.11.

13. Repayment of the debt may also occur through ***offset*** of Petitioner Abbott's **income tax refunds** or other **Federal monies** payable to the order of Ms. Abbott.

Order

14. Until the debt is repaid, Petitioner Abbott shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

15. USDA Rural Development, and those collecting on its behalf, are authorized to proceed with garnishment, up to 15% of Petitioner Abbott's disposable pay. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties. Done at Washington, D.C.

MELISSA BRADFIELD.
AWG Docket No. 11 – 0086.
Decision and Order.
Filed February 14, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Jill S. Clifton.

AWG

Decision and Order

1. The hearing was held, by telephone, on February 11, 2011. Ms. Melissa J. VanMaele, formerly known as Melissa J. Bradfield, the Petitioner ("Petitioner VanMaele") participated, representing herself (appearing *pro se*).

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and was represented by Ms. Mary Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

Summary of the Facts Presented

3. Petitioner VanMaele owes to USDA Rural Development a balance of **$52,442.43** (as of January 15, 2011), in repayment of a United States Department of Agriculture / Rural Housing Service ***Guarantee*** (*see* RX-2, esp. p. 2) for a loan made in 2005, the balance of which is now unsecured ("the debt"). Petitioner VanMaele borrowed to buy a home in

Michigan. *See* USDA Rural Development Exhibits RX 1 through RX 8 which I admit into evidence, together with the Narrative, Witness & Exhibit List (filed February 4, 2011), and the testimony of Mary Kimball.

4. This ***Guarantee*** establishes an **independent** obligation of Petitioner VanMaele, "I certify and acknowledge that if the Agency pays a loss claim on the requested loan to the lender, I will reimburse the Agency for that amount. If I do not, the Agency will use all remedies available to it, including those under the Debt Collection Improvement Act, to recover on the Federal debt directly from me. The Agency's right to collect is independent of the lender's right to collect under the guaranteed note and will not be affected by any release by the lender of my obligation to repay the loan. Any Agency collection under this paragraph will not be shared with the lender." RX 2, p. 2.

5. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$52,442.43** would increase the current balance by $14,683.88, to $67,126.31. RX 8.

6. Petitioner VanMaele's "Consumer Debtor Financial Statement" (filed February 11, 2011) is admitted into evidence, together with Petitioner VanMaele's testimony. Petitioner VanMaele and her husband support five children with another child due in August 2011. Child support paid to Petitioner VanMaele is roughly equal to daycare expense. Petitioner VanMaele owes about $2,850.00 in student loans. Petitioner VanMaele's husband is **not** liable to repay "the debt" described in paragraph 3, and he has indebtedness of his own to repay. Petitioner VanMaele's disposable pay (within the meaning of 31 C.F.R. § 285.11) does not support garnishment. Petitioner VanMaele should not be and should not have been garnished when her disposable pay is $*** per week or less. Petitioner VanMaele's gross pay is about $** per hour, about 15 hours per week, which is about $*** per week. Petitioner VanMaele's disposable pay **does not exceed** "an amount equivalent to thirty times the minimum (hourly) wage" for a week, currently $*** per week (30 x $***).[1] USDA Rural Development **is required to return** any amounts garnished in violation of 29 C.F.R. § 870.10.

[1] The regulation at 31 C.F.R. § 285.11 includes the following restriction on garnishment: "The amount set forth at 15 U.S.C. 1673(a)(2) is the amount by which a debtor's disposable pay (for that week) exceeds an amount equivalent to thirty times the minimum (hourly) wage. See 29 CFR 870.10."

7. Petitioner VanMaele is responsible and willing and able to negotiate the repayment of the debt with Treasury's collection agency.

Discussion

8. **Through March 2013, NO garnishment is authorized**. I encourage **Petitioner VanMaele and the collection agency** to **negotiate promptly** the repayment of the debt. Petitioner VanMaele, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner VanMaele, you may ask that the debt be **apportioned separately** to you and your co-borrower, your former husband, Ryan M. Bradfield. You may choose to offer to compromise the debt for an amount you are able to pay, to settle the claim for less.

Findings, Analysis and Conclusions

9. The Secretary of Agriculture has jurisdiction over the parties, Petitioner VanMaele and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

10. Petitioner VanMaele owes the debt described in paragraphs 3, 4 and 5.

11. **Through March 2013, NO garnishment is authorized**, because garnishment would create financial hardship (and has created financial hardship). Thereafter, garnishment is authorized, the **lesser** of up to 15% of Petitioner VanMaele's disposable pay; **or** the amount by which her disposable pay per week **exceeds** 30 times the minimum hourly wage. 31 C.F.R. § 285.11, 29 C.F.R. § 870.10.

12. Petitioner VanMaele should not have been garnished when her disposable pay was $** per week or less. Petitioner VanMaele **shall be repaid any amounts already garnished** from her pay in violation of 29 C.F.R. § 870.10. [Garnishment is ongoing because Petitioner VanMaele's hearing request was late.]

13. Repayment of the debt may occur through ***offset*** of Petitioner VanMaele's **income tax refunds** or other **Federal monies** payable to the order of Ms. VanMaele.

Order

14. Until the debt is fully paid, Petitioner VanMaele shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

15. USDA Rural Development, and those collecting on its behalf, are **NOT** authorized to proceed with garnishment **through March 2013**. Thereafter, USDA Rural Development, and those collecting on its behalf, are authorized to proceed with garnishment, the **lesser** of up to 15% of Petitioner VanMaele's disposable pay; **or** the amount by which her disposable pay per week **exceeds** 30 times the minimum hourly wage. 31 C.F.R. § 285.11, 29 C.F.R. § 870.10.

16. Petitioner VanMaele **shall be repaid any amounts already garnished** from her pay in violation of 29 C.F.R. § 870.10.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.

BEVERLY HUFSTETLER.
AWG Docket No. 11 – 0058.
Decision and Order.
Filed February 17, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Jill S. Clifton.

AWG

Decision and Order

1. The hearing by telephone was held on February 17, 2011. Ms. Beverly Huffstetler, also known as Beverly L. Huffstetler, formerly known as Beverly F. Lathan, the Petitioner ("Petitioner Huffstetler"), participated, representing herself (appearing *pro se*). Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and was represented by Mary E. Kimball.

2. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

Summary of the Facts Presented

3. Admitted into evidence are the testimony of Mary Kimball and the USDA Rural Development Exhibits, plus Narrative, Witness & Exhibit List (filed January 31, 2011).

4. Admitted into evidence are the testimony of Petitioner Huffstetler, and Petitioner Huffstetler's pay stub (filed February 16, 2011); her Consumer Debtor Financial Statement, her letter, and a letter from an attorney dated in 2001 (filed February 14, 2011); and her Hearing Request documents and statements. 5. USDA Rural Development (formerly USDA Farmers Home Administration) is owed a balance of **$19,518.62**, remaining from a loan borrowed in 1992 to buy a home in South Carolina. The **$19,518.62** remaining balance is now unsecured ("the debt"). *See* USDA Rural Development Exhibits, esp. RX 4.

6. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$19,518.62** would increase the current balance by $5,465.21, to $24,983.83. *See* USDA Rural Development Exhibits, esp. RX 5.

7. USDA Rural Development has failed to locate the promissory note associated with Account #80490189 will ***cancel*** the remaining **$19,518.62** debt.

Findings, Analysis and Conclusions

8. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Huffstetler and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

9. **NO garnishment** of Petitioner Huffstetler' pay is authorized; **NO further *offset*** of Petitioner Huffstetler's **income tax refunds** or other

Federal monies payable to the order of Ms. Huffstetler is authorized; **NO form of further debt collection** from Petitioner Huffstetler is authorized.

10. **NO refund** to Petitioner Huffstetler of monies already collected is appropriate, and no refund is authorized.

Order

11. No further collection of the debt from Petitioner Huffstetler is authorized; no refund is authorized.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties. Done at Washington, D.C.

RHONDA KHAY WILLIAMS – BIRDOW.
AWG Docket No. 11 – 0083.
Decision and Order.
Filed February 18, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Jill S. Clifton.

AWG

Decision and Order

1. The hearing by telephone was held as scheduled on February 17, 2011. Ms. Rhonda Khay Williams-Birdow, formerly known as Rhonda K. Williams ("Petitioner Williams-Birdow"), did not participate. (Petitioner Williams-Birdow did not answer the mobile phone number provided in her Hearing Request; she did not provide any other phone number.) Petitioner Williams-Birdow, I see that you requested the Hearing to be "After 5 pm Texas Time," and that you wrote: PLEASE DO NOT TELEPHONE CALL ME AT MY PLACE OF EMPLOYMENT."

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development")

and is represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

Summary of the Facts Presented

3. Petitioner Williams-Birdow owes to USDA Rural Development a balance of **$25,452.77** (as of January 13, 2011) in repayment of two United States Department of Agriculture Farmers Home Administration loans, one *assumed* in 1997, and one *made* in 1997, for a home in Texas. The balance is now unsecured ("the debt"). *See* USDA Rural Development Exhibits, plus Narrative, Witness & Exhibit List (filed January 24, 2011), which are admitted into evidence, together with the testimony of Mary Kimball.

4. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$25,452.77** would increase the current balance by $7,126.78, to $32,579.55. *See* USDA Rural Development Exhibits, esp. RX 8.

5. The amount Petitioner Williams-Birdow borrowed in 1997 was $47,594.35 ($32,244.35 loan assumed, plus $15,350.00 loan made). By the time of the foreclosure sale in 2009, that debt had grown to $61,117.72:

$ 42,434.32 Principal Balance prior to foreclosure sale
$ 9,524.43 Interest Balance prior to foreclosure sale
$ 9,158.97 Fees Balance (including interest on fees) prior to foreclosure sale

$ 61,117.72 Total Amount Due prior to foreclosure sale
$ 35,100.00 Proceeds from foreclosure sale

$ 26,017.72 Unpaid in 2009

RX 7 and USDA Rural Development Narrative.

The foreclosure sale in 2009 yielded $35,100.00. The remaining balance of the debt was $26,017.72 after those funds were applied. Another $564.95 applied to the debt since then leaves **$25,452.77** unpaid now (excluding the potential remaining collection fees). *See* RX 7 and USDA Rural Development Narrative.

6. Evidence is required for me to determine whether Petitioner Williams-Birdow's disposable pay supports garnishment without creating hardship. 31 C.F.R. § 285.11. Petitioner Williams-Birdow failed to file a completed "Consumer Debtor Financial Statement" or anything in response to my Order dated January 11, 2011, so I cannot calculate Petitioner Williams-Birdow's reasonable and necessary living expenses. I do have Petitioner Williams-Birdow's Hearing Request with attachments. [Mr. Mark Anthony Williams did **not** sign the Assumption Agreement or the Promissory Note, so he is **not** legally obligated to USDA Rural Development. Petitioner Williams-Birdow, you may wish to consult a lawyer licensed to practice in Texas to help you determine whether Mr. Williams is legally obligated to you, to help you repay "the debt" (*see* paragraph 3). The terms of your marriage and dissolution of marriage may be a factor.]

7. With no testimony from Petitioner Williams-Birdow and no current pay stub, I cannot calculate with precision Petitioner Williams-Birdow's current disposable pay (after subtracting income tax, social security, Medicare, health insurance, and any other "eligible" withholding from her gross pay). I do have data from garnishments in 2010 (RX 7, p. 3) to help me determine whether Petitioner Williams-Birdow's disposable pay supports garnishment without creating hardship. I estimate Petitioner Williams-Birdow's disposable pay to be less than $*** per month (based on her Hearing Request attachments and RX 7, p. 3). The approximate amount that could be garnished in repayment of the USDA Rural Development debt, 15% of disposable pay, may be roughly $** to $** per month (roughly $** every 2 weeks). In evaluating the factors to be considered under 31 C.F.R. § 285.11, I find that Petitioner Williams-Birdow probably cannot withstand garnishment in that amount without hardship.

8. To prevent hardship, potential garnishment to repay "the debt" (*see* paragraph 3) must be limited to zero per cent (0%) of Petitioner

Williams-Birdow's disposable pay through August 2011; and no more than 5% of Petitioner Williams-Birdow's disposable pay thereafter. 31 C.F.R. § 285.11.

9. Petitioner Williams-Birdow is responsible and willing and able to negotiate the repayment of the debt with Treasury's collection agency.

Discussion

10. Through August 2011, NO garnishment is authorized. Thereafter, garnishment up to 5% of Petitioner Williams-Birdow's disposable pay is authorized. *See* paragraphs 6, 7 and 8. I encourage **Petitioner Williams-Birdow and the collection agency** to **negotiate promptly** the repayment of the debt. Petitioner Williams-Birdow, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Williams-Birdow, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less.

Findings, Analysis and Conclusions

11. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Williams-Birdow and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

12. Petitioner Williams-Birdow owes the debt described in paragraphs 3, 4 and 5.

13. **Through August 2011, NO garnishment is authorized**. Thereafter, garnishment **up to 5%** of Petitioner Williams-Birdow's disposable pay is authorized. 31 C.F.R. § 285.11.

14. This Decision does not prevent repayment of the debt through ***offset*** of Petitioner Williams-Birdow's **income tax refunds** or other **Federal monies** payable to the order of Ms. Williams-Birdow.

Order

15. Until the debt is repaid, Petitioner Williams-Birdow shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

16. USDA Rural Development, and those collecting on its behalf, are **NOT** authorized to proceed with garnishment **through August 2011**. Thereafter, USDA Rural Development, and those collecting on its behalf, are authorized to proceed with garnishment, **up to 5%** of Petitioner Williams-Birdow's disposable pay. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.

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SABRINA GILBREATH.
AWG Docket No. 11 – 0055
Decision and Order.
Filed February 22, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Jill S. Clifton.

AWG

Decision and Order

1. The hearing by telephone was CANCELED, because this Decision can be made without a hearing. Ms. Sabrina L. Gilbreath, also known as Sabrina Boswell and Sabrina L. Sinclair, the Petitioner ("Petitioner Gilbreath"), represents herself (appears *pro se*).

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and is represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

Summary of the Facts Presented

3. Admitted into evidence are the USDA Rural Development Exhibits (RX 1 through RX 8), plus Narrative, Witness & Exhibit List (filed January 13, 2011).

4. Admitted into evidence are Petitioner Gilbreath's Hearing Request and accompanying documents (filed November 16, 2010), including her Consumer Debtor Financial Statement.

5. USDA Rural Development (formerly USDA Farmers Home Administration) is owed a balance of **$2,356.27** (as of December 28, 2010), remaining from a loan assumed in 1995 to buy a home in Texas. The **$2,356.27** remaining balance is now unsecured ("the debt"). *See* USDA Rural Development Exhibits, esp. RX 5.

6. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$2,356.27** would increase the current balance by $659.76, to $3,016.03. *See* USDA Rural Development Exhibits, esp. RX 6.

7. USDA Rural Development includes in its Narrative:

> Since the Borrowers have paid a substantial amount of the debt, USDA is willing to recall the debt from Treasury and cancel the remaining balance of $2,356.27. Borrower will be issued a 1099C, Cancellation of Debt, for the amount cancelled. This will need to be included with the tax return for the year received. If this is acceptable to Borrower, USDA recommends that the hearing be dismissed. This cancellation will be completed once dispute is dismissed and debt has been returned from Treasury.

8. This IS acceptable to Petitioner Gilbreath, per telephone conversation between her and Marilyn Kennedy (Legal Secretary in the USDA Office of Administrative Law Judges); thus USDA Rural Development will ***cancel*** the remaining **$2,356.27** debt.

Findings, Analysis and Conclusions

9. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Gilbreath and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

10. **NO garnishment** of Petitioner Gilbreath's pay is authorized; **NO further *offset*** of Petitioner Gilbreath's **income tax refunds** or other **Federal monies** payable to the order of Ms. Gilbreath is authorized; **NO form of further debt collection** from Petitioner Gilbreath is authorized.

11. **NO refund** to Petitioner Gilbreath of monies already collected is appropriate, and no refund is authorized.

Order

12. No further collection of the debt from Petitioner Gilbreath is authorized; no refund is authorized.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.

LAURA HURST.
AWG Docket No. 11 – 0066.
Decision and Order.
Filed February 23, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Victor W. Palmer.

AWG

Decision and Order

On February 22, 2011, I held a hearing on a Petition to Dismiss the administrative wage garnishment proceeding to collect the debt allegedly owed to Respondent, USDA, Rural Development for a loss it incurred under a loan in the amount of $62,200.00 to finance the purchase of a primary residence located at 213 Melanie Lane, Pleasant Gap, PA 16823. Petitioner and Mary Kimball, who testified for Respondent, were duly sworn. Respondent proved the existence of the debt owed by Petitioner to Respondent for its payment of a loss it sustained in respect to the loan

it made to Petitioner. The mortgage loan had been made in 1989 and is evidenced by a promissory note that Petitioner signed. Ms. Hurst had failed to make all of her payments on the loan when the property was sold on May 15, 2002. After the sale proceeds were posted, Petitioner owed USDA, Rural Development $33,789.10. Treasury has since collected tax refunds and stimulus payments that Petitioner would have received and paid them to USDA, Rural Development. The present amount of the debt is $21,515.81 plus potential fees to Treasury of $6,152.43 for a total of $27,668.24.

Petitioner is employed as the General Manager of a Red Roof Hotel and receives net earnings of $*** per month. Her present monthly expenses are too high to permit any sum to be presently garnished from her disposable income. This degree of financial hardship shall continue for the next six months when she should then be able to have no more than $100.00 per month garnished from her wages. At some time in the future she should arrange a settlement with Treasury.

USDA, Rural Development has met its burden under 31 C.F.R. §285.11(f)(8) that governs administrative wage garnishment hearings, and has proved the existence and the amount of the debt owed by the Petitioner. However, for reasons of financial hardship, nothing may be garnished from her salary for the next six months, and after then the maximum that may be garnished from Petitioner's wages is $** per month

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ETHEL WILLIAMS.
AWG Docket No. 11 – 0064.
Decision and Order.
Filed February 24, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Victor W. Palmer.

AWG

Decision and Order

On February 22, 2011, I held a hearing on a Petition to Dismiss the administrative wage garnishment proceeding to collect the debt allegedly owed to Respondent, USDA, Rural Development for losses it incurred under a mortgage assumed by the Petitioner and on a loan Respondent, USDA Rural Development gave to Petitioner, Ethel Williams. Petitioner represented herself and USDA Rural Development was represented by Mary Kimball. Petitioner and Mary Kimball were each duly sworn.

Respondent sustained financial loss on the loan assumed by Petitioner and on the loan given to Petitioner to finance her purchase of a home at WH Turner Lane, Hazelhurst, MS 39083. The assumed loan was in the amount of $31,550.00, and the new loan, dated July 18, 1989 was in the amount of $6,950.00. The payments on the loans were not met and a short sale was held on April 19, 2000. Respondent received $25,700 from the sale of the house when a balance of $38,313.39 was still owed to USDA, Rural Development for principal, accrued interest, unpaid taxes and other expenses. Since the sale, $2,877.84 has been collected by the United States Treasury Department. The amount that is presently owed on the debt is $9,558.20 plus potential fees to Treasury of $2,867.46, or $12,425.66 total.

Petitioner resides with her husband who is unemployed and her 20 year old daughter who attends college. Petitioner is employed as a Deputy Clerk by the Copiah County Board of Supervisors and is paid a net bi-weekly salary of $** so that her net monthly income is $**. Her monthly household expenses are: auto loan-$**; auto insurance-$**; tuition-$**; health insurance-$**; loans-$** and $**; gasoline-$**; electric-$**; natural gas-$**; food-$**; medical-$**; clothing-$**; trash-$**; miscellaneous-$**. I have concluded that the collection of any

part of the debt during the next six (6) months would cause Petitioner undue, financial hardship within the meaning and intent of the provisions of 31 C.F.R. § 285.11.

USDA, Rural Development has met its burden under 31 C.F.R. §285.11(f)(8) that governs administrative wage garnishment hearings, and has proved the existence and the amount of the debt owed by the Petitioner. On the other hand, Petitioner showed that she would suffer undue financial hardship if any amount of money is garnished from her disposable income at any time during the next six (6) months. During that time, Mrs. Williams should undertake to contact Treasury to discuss a settlement plan to pay the debt.

Under these circumstances, the proceedings to garnish Petitioner's wages are suspended and may not be resumed for three (6) months from the date of this Order.

DONNA GAMMON.
AWG Docket No. 11 – 0050.
Decision and Order.
Filed February 24, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Hearing Official Stephen H. Reilly.

AWG

Decision and Order

This matter is before me upon the request of the Petitioner, Donna L. Gammon, for a hearing in response to efforts of Respondent, USDA's Rural Development Agency, Rural Housing Service, to institute a federal administrative wage garnishment against her. On November 24, 2010, Chief Administrative Law Judge Peter M. Davenport issued a Pre-hearing Order establishing the date of the hearing and requiring the parties to exchange information concerning the amount of the debt. On January 20, 2011, Chief ALJ Davenport issued an order rescheduling the hearing for February 23, 2011. When a conflict developed in his schedule, the Chief ALJ assigned the case to my docket.

Rural Housing filed a copy of its Narrative along with exhibits RX-1 through RX-9 on December 16, 2010. Ms. Gammon did not file a narrative or a copy of her Consumer Debtor Financial Statement. Ms. Gammon acknowledged receipt of Rural Housing's Narrative and Exhibits. I conducted a telephone hearing on February 23, 2010. Rural Housing was represented by Mary Kimball who testified on behalf of the agency. Ms. Gammon represented herself and was accompanied by Ms. Julie Linderbaum, the real estate agent who handled the sale of the property. The witnesses were sworn.

On June 27, 2000, Ms. Gammon borrowed $74,500.00 from USDA Rural Housing Service to purchase her residence in Ridgeway, Iowa. (RX-1, RX-2). In May 2007, Ms. Gammon re-amortized the loan, this added the amount delinquent to the outstanding principal making the new principal balance $74,063.85. No other terms of the loan changed.

On July 27, 2009, Rural Housing sent Ms. Gammon a Notice of Default (RX-4) and on August 27, 2009, Rural Housing accelerated the loan notifying Ms. Gammon of its intent to foreclose. (RX-5). In September 2009, Ms. Gammon sought reconsideration of the foreclosure decision. Rural Housing denied the request for reconsideration. (RX-6).

With the assistance of Ms. Linderbaum, Ms. Gammon sold the property at a short sale on February 1, 2010. At the time of the sale, Ms. Gammon owed $72,637.35 in principal, $4,564.46 in interest and $2,172.52 in fees. Other charges of $72.68 bring the total owed to $79,447.01. After selling expenses, Rural Housing received $54,533.81 from the sale. Applying that amount and subsequent collections to the loan bring the amount due to $24,654.05. (RX-8). In addition, there are potential fees due Treasury of $6,903.13 for a total amount due of $31,557.18. (RX-9).

Based on the testimony during the hearing and the record before me, I conclude that Ms. Gammon owes $24,654.05 on the USDA Rural Housing loan. In addition, there are potential fees of $6,903.13 due the US Treasury for the cost of collection.

In determining if garnishment is appropriate, I examine the Ms. Gammon's financial condition. Based on Ms. Gammon's testimony she has been continuously employed for over one year. She earns approximately $*** per month. She does not receive alimony or child support. Her monthly expenses include rent of $**, a car loan payment of $** and utility payments, including phone, of $**. In addition, she has credit card debt of approximately $***. Furthermore, she needs to

feed and provide clothing for herself and her four children. Clearly her monthly expenses exceed her monthly income. As such, I find that garnishment is not authorized at this time.

Findings of the Facts

1. On June 27, 2000, Ms. Gammon borrowed $74,500.00 from USDA Rural Housing Service to purchase her residence in Ridgeway, Iowa.

2. In May 2007, Ms. Gammon re-amortized the loan, adding the amount delinquent to the outstanding principal, making the new principal amount owed $74,063.85.

3. On July 27, 2009, Rural Housing sent Ms. Gammon a Notice of Default.

4. On August 27, 2009, Rural Housing accelerated the loan notifying Ms. Gammon of its intent to foreclose.

5. On February 1, 2010, Ms. Gammon sold the property at a short sale for $60,000.00. At the time of the sale, Ms. Gammon owed $79,447.01 in principal, interest and fees on the mortgage. After applying net proceeds from the short sale and other collected amounts to the loan balance, Ms. Gammon owes a deficiency of $24,654.05. In addition, there are potential fees due Treasury of $6,903.13 for a total amount due of $31,557.18.

5. Ms. Gammon's income is approximately $*** per month. Her expenses exceed her income.

Conclusions

1. The Secretary of Agriculture has jurisdiction over the parties, Ms. Gammon and USDA Rural Development Agency, Rural Housing Service; and over the subject matter, which is administrative wage garnishment.

2. Petitioner Donna L. Gammon is indebted to USDA's Rural Development Agency, Rural Housing Service program in the amount of $24,654.05.

3. In addition, Ms. Gammon is indebted for potential fees due to the US Treasury in the amount of $6,903.13.

4. Ms. Gammon's financial circumstances are such that garnishment is not appropriate at this time.

Order

Until the debt is fully paid, Ms. Gammon shall give notice to USDA Rural Development Agency, Rural Housing Service of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

USDA Rural Development Agency, Rural Housing Service, is not authorized at this time to proceed with garnishment. Rural Housing may review Ms. Gammon's financial circumstances on an annual basis and, if appropriate, seek authorization from the Office of Administrative Law Judges to proceed with garnishment at that time.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

Done at Washington, D.C.

RHONDA WHITE.
AWG Docket No. 11 – 0010.
Decision and Order.
Filed February 24, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Hearing Official Stephen H. Reilly.

AWG

Decision and Order

This matter is before me upon the request of the Petitioner, Rhonda White, for a hearing in response to efforts of Respondent, USDA's Rural Development Agency, Rural Housing Service, to institute a federal administrative wage garnishment against her. On November 24, 2010, Chief Administrative Law Judge Peter M. Davenport issued a Pre-hearing Order establishing the date of the hearing and requiring the parties to exchange information concerning the amount of the debt. On January 20, 2011, Chief ALJ Davenport issued an order rescheduling the

hearing for February 23, 2011. When a conflict developed in his schedule, the Chief ALJ assigned the case to my docket.

Rural Development filed a copy of its Narrative along with exhibits RX-1 through RX-8 on December 16, 2010. Ms. White did not file a narrative or a copy of her Consumer Debtor Financial Statement. Ms. White acknowledged receipt of Rural Housing's Narrative and Exhibits.

I conducted a telephone hearing on February 23, 2011. Rural Development was represented by Mary Kimball who testified on behalf of the agency. Ms. White was represented by Todd L. Alvey, Esq. The witnesses were sworn.

On September 9, 1977, Ms. White borrowed $27,230.00 from USDA Farmers Home Administration[1] to purchase her residence in Shamrock, TX. (RX-1, RX-2). Ms. White defaulted on the loan and on January 3,1997, she disposed of the house by way of a short sale. USDA received $11,500.00 from the short sale and applied that to the outstanding balance. At the time of the sale Ms. White owed $29,723.00 on the loan – $17,391.62 in principal, $3,329.17 in interest and $8,326.45 in fees. Applying the proceeds from the short sale along with $3,380.65 subsequently collected by Treasury leaves a current balance of $14,842.35. During the hearing, Ms. White, through counsel, acknowledged that she owes the debt. Furthermore, she accepted the amounts claimed by Rural Housing Service.

Based on the testimony during the hearing and the record before me, I conclude that Ms. White owes $14,842.35 on the loan. In addition, there are potential fees of $4,155.86 due the US Treasury for the cost of collection for a total amount due of $18,998.21.

In determining if garnishment is appropriate, I examine the Ms. White's financial condition. Based on Ms. White's testimony, she has been continuously employed for over one year. She earns approximately $*** per month and receives $** from Social Security. According to her testimony, her monthly expenses are less than $** per month. Ms. White is married and her husband also receives Social Security, plus he has incidental income from the sale of cattle. The home Ms. White lives in was in her husband's family and she indicated there is no mortgage payment. Ms. White's husband's income is not considered in my determination whether garnishment is appropriate.

[1]The USDA Farmers Home Administration is the predecessor agency to USDA's Rural Development Agency, Rural Housing Service.

Based on the testimony at the hearing and the record before me, I conclude that Ms. White's disposable pay supports garnishment and that no financial hardship exists that would preclude garnishment. I find that garnishment is appropriate. As recommended by Ms. Kimball at the hearing, Treasury is authorized to garnish $100.00 per month from Ms. White's disposable pay provided that $100.00 does not exceed 15% of Ms. White's disposable pay. Should Ms. White's income decrease, garnishment is capped at 15% of Ms. White's disposable pay.

I encourage Ms. White and the collection agency to work together to establish a repayment schedule rather than immediately proceeding with garnishment, even though this Decision authorizes garnishment.

Findings of Fact

1. On September 9, 1977, Ms. White borrowed $27,230.00 from USDA Farmers Home Administration to purchase her residence in Shamrock, TX.

2. Ms. White defaulted on the loan and on January 3,1997, she disposed of the house by way of a short sale. The loan balance at that time was $29,723.00 – $17,391.62 in principal, $3,329.17 in interest and $8,326.45 in fees. USDA received $11,500.00 from the short sale.

3. USDA applied the proceeds from the short sale to the deficiency which along with $3,380.65 subsequently collected by Treasury leaves a current balance of $14,842.35. In addition, there are potential fees due to the U.S. Treasury in the amount of $4,155.86 for a total amount due of $18,998.21.

4. Ms. White's income is $*** per month from her employment and approximately $** from Social Security.

5. Ms. White's monthly expenses are less than $**.

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction over the parties, Rhonda White and USDA Rural Development Agency, Rural Housing Service; and over the subject matter, which is administrative wage garnishment.

2. Petitioner Rhonda White is indebted to USDA's Rural Development Agency, Rural Housing Service program in the amount of $14,842.35.

3. In addition, Ms. White is indebted to the US Treasury for potential fees in the amount of $4,155.86.

4. All procedural requirements for administrative wage garnishment set forth in 31 C.F.R. § 285.11 have been met.

5. I conclude that Ms. White's disposable pay supports garnishment, up to $100.00 per month not to exceed 15% of Ms. White's disposable pay (within the meaning of 31 C.F.R. § 285.11); Ms. White has no circumstances of financial hardship (within the meaning of 31 C.F.R. § 285.11).

Order

Until the debt is fully paid, Ms. White shall give notice to USDA Rural Development Agency, Rural Housing Service or those collecting on its behalf, of any changes in his mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

USDA Rural Development Agency, Rural Housing Service, and those collecting on its behalf, are authorized to proceed with garnishment, up to $100.00 per month not to exceed 15% of Ms. White's disposable pay.

Copies of this Decision and Order shall be served upon the parties and counsel for Ms. White by the Hearing Clerk's Office. Done at Washington, D.C.

SANDRA LAW.
AWG Docket No. 11 – 0067.
Decision and Order.
Filed March 2, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Victor W. Palmer.

AWG

Decision and Order

Pursuant to a Hearing Notice, I held a hearing in this proceeding by telephone, on February 22, 2011, at 4:00 PM, Eastern Time. Petitioner, Sandra Law, and Respondent's representative, Mary E. Kimball, participated and were sworn. Ms. Kimball introduced, identified and authenticated records regularly maintained by USDA, Rural Development and received in evidence as exhibits. Petitioner had completed and filed a "Consumer Debtor Financial Statement" that she verified as accurate and it was received in evidence. Sandra Law had spoken to an attorney and thought that we would schedule the hearing for a later date. I advised that she was mistaken, but that if she called me back by March 1, 2011 and requested another hearing in substitution for this one and the decision and order that proposed to issue, I would grant the request. She did not make such a request and this decision and order is being issued on the basis of the exhibits before me and testimony by Sandra Law.

At issue is the nonpayment of a debt owed to USDA, Rural Development on a home mortgage loan on property that Sandra Law had owned that was sold in a foreclosure sale on April 7, 1998, which, after payment of the remaining principal, interest and various expenses, left a debt of $32,813.31 owed to USDA, Rural Development. Since then Respondent has received $5,918.79 from amounts Treasury has collected from Petitioner, Sandra Law. The balance presently owed to USDA, Rural Development is $26,894.57 plus an additional $7,530.48 owed to Treasury for potential collection fees, or a total of $34,425.05.

Ms. Law is employed by a County government agency as a Juvenile Probation Detention Officer and earns a net monthly income of $*** which, after deducting her necessary monthly living expenses of $***, would result in undue financial hardship if more than $** per month is garnished from her salary which is the 15% maximum amount that may be garnished from disposable income.

Order

For the foregoing reasons, administrative wage garnishment of the wages of the Petitioner, Sandra Law may be made provided the sum garnished each month does not exceed $100.00.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk.

KEVIN NETZEL.
AWG Docket No. 10 – 0388.
Decision and Order.
Filed March 8, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Jill S. Clifton.

AWG

Decision and Order

1. The hearing, by telephone, was held on October 28, 2010; on November 1, 2010; and on March 1, 2011. Kevin Netzel, also known as Kevin J. Netzel, the Petitioner (APetitioner Netzel"), participated in each segment of the hearing.

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and was represented by Mary E. Kimball in each segment of the hearing, joined by Gene Elkin for the final segment. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

Summary of the Facts Presented

3. Petitioner Netzel owes to USDA Rural Development a balance of **$17,803.53** (as of 09/10/2010), in repayment of a United States Department of Agriculture / Rural Housing Service ***Guarantee*** (*see* RX-1, esp. p. 2) for a loan made in 2004, the balance of which is now unsecured ("the debt"). Petitioner Netzel borrowed to buy a home in Minnesota. *See* USDA Rural Development Exhibits, plus Narrative, Witness & Exhibit List (filed September 17, 2010), which are admitted into evidence, together with the testimony of Mary Kimball and Gene Elkin.

4. This ***Guarantee*** establishes an **independent** obligation of Petitioner Netzel, "I certify and acknowledge that if the Agency pays a loss claim on the requested loan to the lender, I will reimburse the Agency for that amount. If I do not, the Agency will use all remedies available to it, including those under the Debt Collection Improvement Act, to recover on the Federal debt directly from me. The Agency's right to collect is independent of the lender's right to collect under the guaranteed note and will not be affected by any release by the lender of my obligation to repay the loan. Any Agency collection under this paragraph will not be shared with the lender." RX 1, p. 2.

5. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$17,803.53** would increase the current balance by $5,341.06, to $23,144.59. *See* USDA Rural Development Exhibits, esp. RX 6.

6. Petitioner Netzel's Consumer Debtor Financial Statement and the payoff letter from an attorney dated in March 2007 (filed October 1, 2010); and Petitioner Netzel's pay stub dated 10/20/2010 and Settlement documents from April 2007 (filed October 29, 2010), are admitted into evidence, together with the Petitioner Netzel's testimony.

7. The amount Petitioner Netzel borrowed from Wells Fargo Home Mortgage, Inc. was $106,000.00 in 2004. By the time of the foreclosure sale in December 2006, that debt had grown to $113,473.45. RX 3. At the foreclosure sale Wells Fargo bid an amount less than the debt amount; Wells Fargo bid in $85,000.00. There was no higher bid.

8. The amount to redeem the property from Wells Fargo was based on the bid amount ($85,000.00), plus the interest and expenses allowed by Minnesota statute; it was not based on the debt amount at foreclosure ($113,473.45). The redemption process did not repay Wells Fargo in full. Following the redemption process, Wells Fargo's "Net Loss Amount" was $20,312.53, which USDA Rural Development paid to

Wells Fargo. RX 2, p. 6. It is this loss claim ($20,312.53) that established Petitioner Netzel's debt to USDA Rural Development under the ***Guarantee***.

9. After Petitioner Netzel redeemed and sold the property, he was credited with the payoff to Wells Fargo ($92,618.75), plus estimated insurance refund ($542.17), for a total credit against the $113,473.45 debt amount of $93,160.92. The math is shown on the next page.

10. Petitioner Netzel owed Wells Fargo, in December 2006, $113,473.45. RX 3.

$103,435.92 Unpaid Principal Balance
$ 6,570.73 Accrued Interest Owed ($6,500.17 + $70.56)
$ 1,200.43 Protective Advances (i.e. taxes and insurance)
$ 6.87 Interest on Protective Advances
$111,213.95 Amount Due prior to sale

+ $ 2,259.50 Lender Foreclosure Fees & Costs & Property Inspection

$113,473.45 Debt Charged to Petitioner Netzel

See RX 3, also RX 2.

11. Petitioner Netzel was credited, in April 2007, with $93,160.92. RX 3.

$ 92,618.75 payoff to Wells Fargo
+ $ 542.17 estimated insurance refund
$ 93,160.92 Credits to Petitioner Netzel

See RX 3, also RX 2. By redeeming and selling, Petitioner Netzel kept down the loss, and he received back some cash from the sale. I commend Petitioner Netzel for redeeming and selling the property.

12. The difference between Petitioner Netzel's debt and his credits, was $20,312.53.

$113,473.45 debt as of foreclosure sale (December 2006)
- $93,160.92 credits as of sale of redeemed property (April 2007)
$ 20,312.53 Loss claim

Petitioner Netzel owed USDA Rural Development $20,312.53, which is the amount USDA Rural Development paid the lender, on June 29, 2007. RX 2, p. 7.

13. Petitioner Netzel has since paid the balance down to **$17,803.53** as of 09/10/2010 (not including "Potential Treasury fees"). RX 5, RX 6.

14. The evidence regarding Petitioner Netzel's disposable pay and other 31 C.F.R. § 285.11 factors persuades me that Petitioner Netzel's disposable pay does support garnishment. Petitioner Netzel's disposable pay is about $** per week, or about $*** per month. Garnishment, up to 15% of Petitioner Netzel's disposable pay, could yield about $** per month in payment on the Athe debt." *See* paragraph 3. Petitioner Netzel owes, in addition to Athe debt" to USDA Rural Development described here, about $4,500.00 in student loans and about $6,000.00 on his motor vehicle. Petitioner Netzel's reasonable and necessary living expenses are about $1,600.00 per month, including his student loan payment and his motor vehicle payment.

Discussion

15. I encourage **Petitioner Netzel** to **negotiate promptly** the repayment of the debt. Petitioner Netzel, you may choose to offer to compromise the debt for an amount you are able to pay, to settle the claim for less.

Findings, Analysis and Conclusions

16. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Netzel and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

17. Petitioner Netzel owes the debt described in paragraphs 3 through 13.

18. **Through September 2011, NO garnishment is authorized**. Thereafter, garnishment is **authorized, up to** 15% of Petitioner Netzel's disposable pay. 31 C.F.R. § 285.11.

19. Repayment of the debt may also occur through ***offset*** of Petitioner Netzel's **income tax refunds** or other **Federal monies** payable to the order of Mr. Netzel.

Order

20. Until the debt is fully paid, Petitioner Netzel shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in his mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

21. USDA Rural Development, and those collecting on its behalf, are **NOT** authorized to proceed with garnishment **through September 2011**. Thereafter, USDA Rural Development, and those collecting on its behalf, are authorized to proceed with garnishment, up to 15% of Petitioner Netzel's disposable pay.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.

SANDRA KAFKA.
AWG Docket No. 10 – 0440.
Decision and Order.
Filed March 9, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Jill S. Clifton.

AWG

Decision and Order

1. The hearing was held by telephone, beginning on December 9, 2010 and concluding on March 4, 2011. Sandra Kafka, the Petitioner (Petitioner Kafka), when telephoned on December 9, 2010, requested re-scheduling because she needed to go to the exit interview with federal inspectors at the nursing home where she was working. My Hearing Will Resume" notice, scheduling the hearing to resume on March 4, 2011, was mailed to Petitioner Kafka on February 10, 2011. On March 4, 2011, Petitioner Kafka failed to answer the telephone number referenced in my Order; she did not provide any other phone number

where she could be reached; and she did not respond to our FAXed message that requested that she call back.

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent (AUSDA Rural Development") and was represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

3. I encourage **Petitioner Kafka and the collection agency** to work together to **establish a repayment schedule** rather than immediately proceeding with garnishment, even though this Decision authorizes garnishment, up to 15% of Petitioner Kafka's disposable pay. Petitioner Kafka, obviously, will have to make herself available to the collection agency if she wants to negotiate. *See* paragraph 9.

4. This is Petitioner Kafka's case (she filed the Petition), and in addition to failing to be available for the hearing on March 4, 2011, Petitioner Kafka failed to file with the Hearing Clerk a representative pay stub (or pay stubs), or a completed Consumer Debtor Financial Statement, or any information responsive to my AHearing Will Resume" notice mailed to her on February 10, 2011.

Summary of the Facts Presented

5. Petitioner Kafka owes to USDA Rural Development a balance of **$37,812.62**, in repayment of a Farmers Home Administration / United States Department of Agriculture loan (now USDA / Rural Housing Service), made in 1990 for a home in Texas. The balance is now unsecured (Athe debt"). *See* USDA Rural Development Exhibits, plus Narrative, Witness & Exhibit List (filed November 8, 2010), which are admitted into evidence, together with the testimony of Ms. Kimball.

6. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$37,812.62** would increase the current balance by $10,587.53, to $48,400.15. *See* USDA Rural Development Exhibits, esp. RX 7.

7. I cannot determine whether Petitioner Kafka's disposable pay supports garnishment without creating hardship. 31 C.F.R. § 285.11. Petitioner Kafka failed to file a completed AConsumer Debtor Financial Statement". I cannot calculate Petitioner Kafka's disposable pay (after subtracting income tax, social security, Medicare, health insurance, and any other Aeligible" withholding from her gross pay), because there is no evidence to use for such calculations. I cannot calculate Petitioner Kafka's current reasonable and necessary living expenses, although Petitioner Kafka's letter does state that she is married with 4 children. Since I do not have the information I would need to determine whether garnishment would create hardship, garnishment up to 15% of Petitioner Kafka's disposable pay is authorized. 31 C.F.R. § 285.11.

8. Petitioner Kafka is responsible and able to negotiate the disposition of the debt with the U.S. Department of the Treasury or its collection agency.

Discussion

9. Garnishment is authorized, up to 15% of Petitioner Kafka's disposable pay. *See* paragraphs 7 and 8. I encourage **Petitioner Kafka and the collection agency** to **negotiate promptly** the repayment of the debt. Petitioner Kafka, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Kafka, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less.

Findings, Analysis and Conclusions

10. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Kafka and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

11. Petitioner Kafka owes the debt described in paragraphs 5 and 6.

12. **Garnishment is authorized**, as follows: up to 15% of Petitioner Kafka's disposable pay. 31 C.F.R. § 285.11.

13. Repayment of the debt may also occur through ***offset*** of Petitioner Kafka's **income tax refunds** or other **Federal monies** payable to the order of Ms. Kafka.

Order

14. Until the debt is repaid, Petitioner Kafka shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

15. USDA Rural Development, and those collecting on its behalf, are authorized to proceed with garnishment, up to 15% of Petitioner Kafka's disposable pay. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties. Done at Washington, D.C.

CHAIN WITTY.
AWG Docket No. 11 – 0115.
Decision and Order.
Filed March 14, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Jill S. Clifton.

AWG

Decision and Order

1. The hearing by telephone was held as scheduled on March 3, 2011. Chain Witty, also known as Chain D. Witty, the Petitioner (APetitioner Witty"), failed to appear. [She failed to appear by telephone; 3 phone calls to the phone number on her Hearing Request met with a recording; she provided no other number. She did not call back.]

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent (AUSDA Rural Development") and is represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

3. I encourage **Petitioner Witty and the collection agency** to work together to **establish a repayment schedule** rather than immediately proceeding with garnishment, even though this Decision authorizes garnishment in a limited amount beginning April 2012. Petitioner Witty, obviously, will have to make herself available to the collection agency if she wants to negotiate. *See* paragraph 10.

Summary of the Facts Presented

4. USDA Rural Development's Exhibits, plus Narrative, Witness & Exhibit List, were filed on February 10, 2011, and are admitted into evidence, together with the testimony of Mary Kimball.

5. Petitioner Witty's Hearing Request plus attachments were filed on January 3, 2011, and are admitted into evidence. Petitioner Witty thought the letter from USDA Rural Development dated 04/10/2010 proved that her debt is only $2,841.05. That amount was the Apast due debt," the amount that was delinquent at that time, not the whole debt.

6. Petitioner Witty owes to USDA Rural Development **$15,356.01** (as of January 28, 2011) in repayment of a USDA Rural Housing Service loan made in 1998 for a home in Kentucky, the balance of which is now unsecured (Athe debt"). *See* USDA Rural Development Exhibits, esp. RX 6.

7. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$15,356.01**, would increase the current balance by $4,299.68, to $19,655.69. *See* USDA Rural Development Exhibits, esp. RX 6.

8. Petitioner Witty's disposable income is probably about $*** per month, based on RX 7 and Petitioner Witty's Hearing Request plus attachments. [Disposable income is gross pay minus income tax, Social

Security, Medicare, and health insurance withholding; and in certain situations minus other employee benefits contributions that are required to be withheld.] Although Garnishment at 15% of Petitioner Witty's disposable pay would yield roughly $*** per month in repayment of the debt, she probably cannot withstand garnishment in that amount without hardship. To prevent hardship, potential garnishment to repay Athe debt" (*see* paragraph 6) must be limited to 0% of Petitioner Witty's disposable pay through March 2012; then up to 3% of Petitioner Witty's disposable pay beginning April 2012 through March 2014; then up to 15% of Petitioner Witty's disposable pay thereafter. 31 C.F.R. § 285.11.

9. Petitioner Witty is responsible and willing and able to negotiate the disposition of the debt with Treasury's collection agency.

Discussion

10. Through March 2012, no garnishment is authorized. Beginning April 2012 through March 2014, garnishment up to 3% of Petitioner Witty's disposable pay is authorized; and thereafter, garnishment up to 15% of Petitioner Witty' disposable pay is authorized. *See* paragraphs 8 and 9. I encourage **Petitioner Witty and the collection agency** to **negotiate promptly** the repayment of the debt. Petitioner Witty, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Witty, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less.

Findings, Analysis and Conclusions

11. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Witty and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

12. Petitioner Witty owes the debt described in paragraphs 6 and 7.

13. **Garnishment is authorized**, as follows: through March 2012, **no** garnishment. Beginning April 2012 through March 2014, garnishment up to 3% of Petitioner Witty's disposable pay; and thereafter, garnishment up to 15% of Petitioner Witty's disposable pay. 31 C.F.R. § 285.11.

14. Repayment of the debt may also occur through ***offset*** of Petitioner Witty's **income tax refunds** or other **Federal monies** payable to the order of Ms. Witty.

Order

15. Until the debt is repaid, Petitioner Witty shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

16. USDA Rural Development, and those collecting on its behalf, are **not** authorized to proceed with garnishment through March 2012. Beginning April 2012 through March 2014, garnishment up to 3% of Petitioner Witty's disposable pay is authorized; and garnishment up to 15% of Petitioner Witty's disposable pay thereafter. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties. Done at Washington, D.C.

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SANDRA LOREDO.
AWG Docket No. 11 – 0003.
Decision and Order.
Filed March 14, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Jill S. Clifton.

AWG

Decision and Order

1. The hearing by telephone was held on December 9, 2010, and on March 4, 2011. Ms. Sandra Loredo (APetitioner Loredo"), participated, representing herself (participated *pro se*). Petitioner Loredo's sister Alma Loredo was present for the first segment, as was Petitioner Loredo's boss, Deborah Lytle. Neither was available for the second segment.

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent (AUSDA Rural Development") and is represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

Summary of the Facts Presented

3. Petitioner Loredo owes to USDA Rural Development a balance of **$8,312.13** (as of November 22, 2010) in repayment of a United States Department of Agriculture Rural Housing Service loan, made in 1998, for a home in Florida. The balance is now unsecured (Athe debt"). *See* USDA Rural Development Exhibits, plus Narrative, Witness & Exhibit List (filed November 23, 2010), which are admitted into evidence, together with the testimony of Mary Kimball.

4. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$8,312.13** would increase the balance by $2,327.40, to $10,639.53. *See* USDA Rural Development Exhibits, esp. RX 7.

5. The amount Petitioner Loredo borrowed from USDA Rural Housing Service in 1998 was $41,400.00, and USDA Rural Housing Service was the ***second*** lien holder. About 3-1/2 years later, the ***first*** lien holder, Chase Manhattan Mortgage Corporation, obtained a Final Judgment of Mortgage Foreclosure (dated September 5, 2001). The amount recited in that Judgment was $37,547.00. *See* RX 5. That Judgment was for the benefit of Chase Manhattan Mortgage Corporation. The public sale occurred about 6 weeks later, on October 22, 2001. From that sale, Chase Manhattan Mortgage Corporation was paid, and $11,644.49 was left over to apply on the USDA Rural Housing Service Loan. That left $30,613.47 still to be paid. *See* RX 6, both page 1 and page 2. Since then, $22,301.34 in payments have been applied to the

loan (primarily from income tax refunds that were intercepted and applied to the loan - - called ***offsets***). That leaves the balance of **$8,312.13** (excluding potential collection fees), as of November 22, 2010.

6. Now that I have determined that Petitioner Loredo owes the debt, I consider the evidence to determine whether Petitioner Loredo's disposable pay supports garnishment without creating hardship. 31 C.F.R. § 285.11. During the first segment of the hearing, Petitioner Loredo's boss Deborah Lytle stated that she would send Petitioner's Loredo's pay information, but that did not happen. So, Petitioner Loredo read from her pay stub during the second segment of the hearing, so that I could calculate Petitioner Loredo's current disposable pay (after subtracting income tax, social security, Medicare, health insurance, and any other Aeligible" withholding from her gross pay). Petitioner Loredo's completed AConsumer Debtor Financial Statement" was filed on November 26, 2010, and is admitted into evidence, together with the testimony of Petitioner Loredo. Petitioner Loredo's reasonable and necessary living expenses cannot be calculated with precision. She shows no medical expenses because she is not paying them. But, she owes for them. She showed no expenses for clothing or incidentals, because her income covers only the basics (housing, utilities, food, transportation). Her husband's landscaping income is sporadic.

7. Petitioner Loredo testified that she earns $* per hour; that she typically works 30 to 31 hours per week (sometimes 40 hours per week when she fills in for another, but never more than 40 hours per week); and that nothing other than Social Security and Medicare is withheld. The pay stub she was reading from covered a 2-week period (61.5 hours) and showed $** gross and $** net, with two deductions: $* Social Security and $* Medicare. Based on that testimony, I calculate Petitioner Loredo's ***monthly*** disposable pay to range from about $*** (based on 132 hours per month) to about $*** (based on 173 hours per month). The approximate amount that could be garnished in repayment of the USDA Rural Development debt, 15% of disposable pay, could be roughly $** to $** per month (roughly $* to $* every 2 weeks). In evaluating the factors to be considered under 31 C.F.R. § 285.11, I find that Petitioner Loredo probably cannot withstand garnishment in that amount without hardship.

8. To prevent hardship, potential garnishment to repay Athe debt" (*see* paragraph 3) must be limited to zero per cent (0%) of Petitioner Loredo's

disposable pay through March 2012; and no more than 3% of Petitioner Loredo's disposable pay thereafter. 31 C.F.R. § 285.11.

9. Petitioner Loredo is responsible and willing and able to negotiate the repayment of the debt with Treasury's collection agency.

Discussion

10. Through March 2012, NO garnishment is authorized. Thereafter, garnishment up to 3% of Petitioner Loredo's disposable pay is authorized. *See* paragraphs 6, 7 and 8. I encourage **Petitioner Loredo and the collection agency** to **negotiate promptly** the repayment of the debt. Petitioner Loredo, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Loredo, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less.

Findings, Analysis and Conclusions

11. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Loredo and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

12. Petitioner Loredo owes the debt described in paragraphs 3, 4 and 5.

13. **Through March 2012, NO garnishment is authorized**. Thereafter, garnishment **up to 3%** of Petitioner Loredo's disposable pay is authorized. 31 C.F.R. § 285.11.

14. This Decision does not prevent repayment of the debt through ***offset*** of Petitioner Loredo's **income tax refunds** or other **Federal monies** payable to the order of Ms. Loredo.

Order

15. Until the debt is repaid, Petitioner Loredo shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

16. USDA Rural Development, and those collecting on its behalf, are **NOT** authorized to proceed with garnishment **through March 2012**. Thereafter, USDA Rural Development, and those collecting on its behalf, are authorized to proceed with garnishment, **up to 3%** of Petitioner Loredo's disposable pay. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties. Done at Washington, D.C.

PAMELA TROTTER.
AWG Docket No. 11 – 0119.
Decision and Order.
Filed March 15, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Hearing Official James P. Hurt.

AWG

Decision and Order

This matter is before me upon the request of Pamela Trotter k/n/a Pamela T. Evans for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On January 14, 2011, I issued a Prehearing Order to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing.

The USDA Rural Development (RD), Respondent, complied with that Order and a Narrative was filed, together with supporting documentation on January 31, 2011. Ms. Trotter filed with her original petition Financial Documents (4 pages) which I now label as PX-1 and a completed USDA form RD-1956-1 (4 pages) which I now label as PX-2).

On February16, 2011 at the scheduled time, both parties were available for the conference call. The parties were sworn. Following the hearing, Ms. Trotter forwarded a bi-weekly pay-stub as well as a

clarification to her monthly expenses to RD and it was forwarded to the hearing Clerk.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law, and Order will be entered.

Findings of Fact

On March 3, 1998, Pamela Trotter, the Petitioner obtained two loans ($ 19,000.00 and $16,718.00) from USDA FmHA loan for a total of $35,718.00 for a primary residence located at 55## Race***** Rd., Yazoo City, MS 39###.[1] The Petitioner signed a Promissory Note and a mortgage. RX-1, RX-2.

The borrower defaulted on the loan and on August 23, 2000 she was mailed a notice of acceleration. RX-4.

At the time of the sale, Ms. Trotter owed a total of $37,373.13 on both accounts.

The property was sold in a foreclosure sale on January 8, 2001.

USDA RD received a net $16,426.00 from the foreclosure sale. Narrative and RX- 5 @ p. 2 of 3.

After application of the sale proceeds, Ms. Trotter owed $19,613.17 on account # 15938292 (RX-5 @ p. 1 of 3) and $1,333.96 on account # 15936414. RX-5 @ p. 2 of 3.

Since the sale, RD has received a net $867.95 ($233.00 + $516.46 +$84.30 + $34.19) from treasury. Narrative, RX 5 @ p. 1 of 3.

The remaining unpaid debt is in the amount of $20,079.18 ($18,747.22 + $1,333.96) exclusive of potential Treasury fees. RX-6.

The remaining potential treasury fees are $6,023.76 ($5,623.57 + $400.19). RX-6.

Ms. Trotter has been employed since February 2010 and is a widow receiving S.S.A. benefits and child support for one of her three dependents.

Ms. Trotter submitted her financial statements under oath which included her gross bi-weekly salary and monthly expenses. Ms. Trotter forwarded additional financial information after the hearing, also under oath. It appears her wages are barely more than the mandatory minimum wage. Her SSA benefits and child support were not subject to potential wage garnishment, however they were considered in the Financial hardship calculation. Although it appears she did not have full time

[1] Complete address maintained in USDA files.

employment, I calculated Petitioner's potential wages at 40 hours per week.

Since the hearing, another creditor has filed a notice of garnishment for a debt of $4,090.90 with collection at the rate of 25% of net wages.

Based upon the available financial information, I performed a Financial Hardship calculation using standard Federal and State Income Tax rate for head of Household. The result of the calculation is attached[2].

Conclusions of Law

Pamela Trotter, k/n/a Pamela T. Evans is indebted to USDA Rural Development in the amount of $20,079.18 for the two mortgage loans extended to her.

Pamela Trotter is indebted to the US Treasury for potential fees in the amount of $6,023.76.

All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.

The Respondent is **not** entitled to administratively garnish the wages of the Petitioner for a period of one year. After one year, RD may review the then existing financial statements and assess the legal entitlement to garnish her wages.

Order

For the foregoing reasons, the wages of Pamela Trotter Evans shall **not** be subjected to administrative wage garnishment for a period of one year.

After one year, RD may re-assess Ms. Trotter's financial position.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

Done at Washington, D.C.

———

[2] The Financial Hardship Calculation will not be posted on the OALJ website.

JASON BRATSCH.
AWG Docket No. 10 – 0424.
Decision and Order.
Filed March 15, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Hearing Official James P. Hurt.

AWG

DECISION AND ORDER

This matter is before me upon the request of Jason Bratsch for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On September 30, 2010, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing.

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation on October 25, 2010. Mr. Bratsch filed his documentation on November 8, 2010 with Rural Development and it was forwarded to the Hearing Clerk.

On November 29, 2010 at the scheduled time, both parties were available for the conference call. The parties were sworn. Following the hearing, Mr. Bratsch forwarded additional financial documents relating to his income and deductions beginning in 2011. Also on March 7, 2011 RD forwarded documentation showing the nexus between Wells Fargo Bank, NA (original lender) and US Bank Home Mortgage (final loan servicer). RX-7 – RX-10. On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law, and Order will be entered.

Findings of Fact

On April 15, 2005, Jason Bratsch, the Petitioner (and his wife, Stacy) received a home mortgage loan guarantee in the amount of $79,000.00

from Wells Fargo Bank for property located at 6## Ro***** Street, Starbuck, MN 56###.[1] The Petitioner and his wife signed a Housing Loan Guarantee on January 17, 2005 which acknowledged that if (FmHA), United States Department of Agriculture (USDA), now Rural Development paid a loss claim on the loan to the lender, Petitioners would reimburse the Agency (USDA) for that amount. (RD) RX-1.

The borrowers defaulted on the loan on October 1, 2006 At the time of the default, the amount due on the principal balance was $76,955.76. Narrative.

The property was appraised on March 19, 2008 for $79,000. There was a BPO appraisal on March 30, 2008 for $52,900.00. There was a RHS Liquidation Appraised Value of $55,000 on October 21, 2008. RX – 2 @ p. 4 of 8.

The property was finally sold for $46,000.00 on March 18, 2009 RX-4 @ 1 of 6.

Based on the RHS Liquidation value, on July 23, 2009 RD paid $37,094.27 to U.S. Bank, N.A. as a loss claim. RX – 2 @ p. 7 of 8.

Treasury offsets totaling $9,787.00 exclusive of Treasury fees have been received. RX-3.

The remaining unpaid debt is in the amount of $27,307.27 ($37,094.27 - $9,787.00) exclusive of potential Treasury fees. RX-3 @ p. 1 of 3.

The remaining potential treasury fees are $7,646.04. RX-6

Mr. Bratsch has been employed for over one year.

Mr. Bratsch submitted his financial statements under oath which included his bi-monthly wages and monthly expenses. He also submitted three pay stubs showing that for the 10/31/2010 through 12/11/2010 period he averaged 57 working hours for the two week periods. Based upon the available financial information, I performed a Financial Hardship calculation using a full 40 hours work-week, standardized tax tables and his stated monthly expenses.

Conclusions of Law

Jason Bratsch is jointly and severally indebted to USDA Rural Development in the amount of $27,307.27 for the mortgage loan extended to him.

[1] Complete address maintained in USDA files.

Jason Bratsch is jointly and severally indebted to the US Treasury for potential fees in the amount of $7,646.04.

All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.

The Respondent is **not** entitled to administratively garnish the wages of the Petitioner.

Order

For the foregoing reasons, the wages of Jason Bratsch shall be subjected to administrative wage garnishment at this time.

After one year, RD may re-assess Mr. Bratsch's financial position.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

Done at Washington, D.C.

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RANDALL OSTROM.
AWG Docket No. 11 – 0102.
Decision and Order.
Filed March 15, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Chief Administrative Law Judge Peter M. Davenport.

AWG

Decision and Order

This matter is before the Administrative Law Judge upon the request of the Petitioner for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On February 8, 2011, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt and setting the case for a telephonic hearing on March 16, 2011.

The Respondent complied with the Prehearing Order and a Narrative was filed, together with supporting documentation on February 18, 2011. The Petitioner filed his Narritve [sic] and supporting materials on February 28, 2011. At the March 16, 2011 hearing, the Petitioner participated without the benefit of counsel. Appearing for the Respondent was Mary E. Kimball, Accountant for the New Program Initiatives Branch of USDA Rural Development, St. Louis, Missouri. Sworn testimony was received from the Petitioner and Ms. Kimball. As the Petitioner had not provided any financial information, the record was left open for seven days for him to provide that information. The supplemental material was filed March 22, 2011.

On the basis of the record before me, nothing further having been received from the Petitioner, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

On September 27, 2005, Randall Ostrom received a home mortgage loan from JP Morgan Chase Bank, N.A. in the amount of $74,500.00 for the purchase of property located in Rhinelander, Wisconsin. RX-1, 2.

On September 22, 2005, prior to obtaining the loan, the Petitioner had executed a Loan Guarantee Agreement with Rural Development (RD), USDA in which he agreed to repay to RD any loss incurred in connection with the above loan. RX-3.

In 2008, the Petitioner defaulted on the mortgage loan and the residence was ultimately sold at foreclosure for $46,000.00. RX-6.

Prior to the residence being foreclosed upon, the Petitioner had received a short sale offer in the amount of $58,000.00; however, the offer was declined by the lender. Narritive [sic], PX-2.3.

The record is silent as to whether there was any deficiency judgment obtained.

Thereafter, although the Narrative filed by RD indicates otherwise, the records reflect that RD paid Chase Home Finance LLC, an entity not then the holder of the note, the sum of $43,186.44 on the Loan Guarantee. RX-4.

USDA referred this alleged debt of $43,186.44 to Treasury. RX-9.

There is no indication that any amounts have been received via the Treasury Offset Program.

Conclusions of Law

The Secretary has jurisdiction in this matter.

The Agency has failed in its burden of proof of establishing a debt in this matter.

USDA paid an entity under the guarantee agreement that was not then the holder of the note entitled to make such a loss claim.

Order

For the foregoing reasons, no debt being established, the wages of the Petitioner may **NOT** be subjected to administrative wage garnishment.

Copies of this Decision and order shall be served upon the parties by the Hearing Clerk's Office.

REBECCA RUFF.
AWG Docket No. 11 – 0097.
Decision and Order.
Filed March 17, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Chief Administrative Law Judge Peter M. Davenport.

AWG

Decision and Order

This matter is before the Administrative Law Judge upon the request of the Petitioner for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On February 8, 2011, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt and setting the case for a telephonic hearing on March 16, 2011.

The Respondent complied with the Prehearing Order and a Narrative was filed, together with supporting documentation on February 17, 2011. The Petitioner has neither filed any material subsequent to the Request for Hearing nor otherwise complied with the Prehearing Order. Nothing further having been received from the Petitioner, and there being no compliance with the Prehearing Order, the Petitioner will be deemed to have waived the right to a hearing and the matter will be decided upon the record before me.

On the basis of the record before me, nothing further having been received from the Petitioner, the following Findings of Fact, Conclusions of Law and Order will be entered

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Findings of Fact

On July 7, 2005, Rebecca Ruff received a home mortgage loan from JP Morgan Chase Bank, N.A. in the amount of $37,000.00 for the purchase of property located in Kings Mountain, North Carolina. RX-1.

On June 29, 2005, prior to obtaining the loan, the Petitioner had executed a Loan Guarantee Agreement with Rural Development (RD), USDA in which she agreed to repay to RD any loss incurred in connection with the above loan. RX-2

In 2008, the Petitioner defaulted on the mortgage loan and the residence was ultimately sold for $17,000.00. RX-5.

The record is silent as to whether there was any foreclosure action or deficiency judgment obtained.

Thereafter, although the Narrative indicates otherwise, the records reflects that RD paid Chase Home Finance LLC, an entity not then the holder of the note, the sum of $23,504.37 on the Loan Guarantee. RX-3, 4.

Subsequent adjustments resulted in a tax refund of $55.29, a reduction of attorney's fees from $800.00 to the $600.00 (the state allowed maximum) and a further reduction of property preservation [sic] from $1,875.00 to $125.00. RX-3.

USDA referred this alleged debt of $23,504.37 to Treasury. RX-7.

There is no indication that any amounts have been received via the Treasury Offset Program.

Conclusions of Law

The Secretary has jurisdiction in this matter.

The Agency has failed in its burden of proof of establishing a debt in this matter.

USDA paid an entity under the guarantee agreement that was not then the holder of the note entitled to make such a loss claim

Order

For the foregoing reasons, no debt being established, the wages of the Petitioner may **NOT** be subjected to administrative wage garnishment.

Copies of this Decision and order shall be served upon the parties by the Hearing Clerk's Office.

ELIZABETH BOGAN.
AWG Docket No. 11 – 0125.
Decision and Order.
Filed March 17, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Hearing Official Stephen H. Reilly.

AWG

Decision and Order

This matter is before the Office of Administrative Law Judges upon the request of Elizabeth Bogan ("Petitioner") for a hearing to address the existence or amount of a debt alleged to be due to the United States Department of Agriculture, Rural Development ("USDA-RD"), and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. By Order issued February 9, 2011, the parties were directed to exchange information and documentation concerning the existence of the debt. In addition, the matter was set for a telephonic hearing to commence on March 15, 2011 and deadlines for filing documents with the Hearing Clerk's Office were established. The

parties were further instructed to provide contact information for participation in the hearing.

USDA-RD filed a Narrative, together with supporting documentation, on February 8, 2011. Petitioner did not file any documents, nor did Petitioner provide contact information as directed in the Order of February 9, 2011. However, Petitioner's phone number was included in her request for a hearing.

On the scheduled date of the hearing, telephone calls were placed to Petitioner and USDA-RD's representative, Esther McQuaid. Petitioner did not answer the telephone, but a message was left on an answering machine. Ms. McQuaid confirmed that Petitioner had signed certified mail return receipt forms that acknowledged that she had received USDA-RD's narrative and exhibits. The official Hearing Clerk file reflects that the Order issued February 9, 2011 was sent to the same address used by USDA-RD and provided by Petitioner, and no undeliverable mail has been returned. After a sufficient time passed without Petitioner's response to the message, I proceeded with the hearing in her absence.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

Petitioner Elizabeth Bogan qualified for benefits under a rental subsidy/assistance program administered by USDA-RD.

On July 15, 2005, Petitioner and two (2) minor children moved into an apartment and reported annual income of $*** of which $*** represented wages earned, which qualified her for assistance effective August 1, 2005.

In September, 2005, Petitioner reported that she was no longer employed, and her rent was further reduced.

Effective August 1, 2006, Petitioner re-certified that her annual income was $3,311.00, with no wages earned.

On February 1, 2007, Derick Black moved into the apartment with Ms. Bogan, and a tenant certification completed at that time reflected household income of $***.

No wages were disclosed as earned on the tenant certification completed on February 1, 2007.

A Wage Record Inquiry completed by the State of Louisiana revealed that both Petitioner and Derick Black were employed at times throughout the pendency of their residency.

Neither Petitioner nor Mr. Black reported their employment or income as required.

Accordingly, USDA-RD reconsidered whether Petitioner and Mr. Black properly received assistance during the periods of their employment, and concluded that a total of $8,065.00 in unauthorized assistance had been paid.

Petitioner and Mr. Black's lease was canceled, and USDA-RD offered them the opportunity to enter into a repayment agreement in lieu of being subjected to debt collection action by the United States Department of Treasury ("Treasury").

The parties entered into a repayment agreement, with the first payment of $25.00 monthly due May 1, 2008.

Payments in the aggregate of $355.00 were made, but after payments were discontinued, the balance of the debt ($7,710.00) was submitted to Treasury for collection on September 30, 2009.

As of the date of the hearing, March 16, 2011, the debt had been reduced to $2,901.56.

At the time this collection action was initiated, Petitioner was employed.

As of the date of the hearing, Petitioner was no longer employed

.

Conclusions of Law

The Secretary has jurisdiction in this matter.

Petitioner is indebted to USDA Rural Development in the amount of $2,901.56 exclusive of potential Treasury fees.

All procedural requirements for administrative wage offset set forth at 31 C.F.R. §285.11 have been met.

USDA Rural Development has established that the Petitioner was given actual notice of the unauthorized assistance and an opportunity to cure any default.

The Petitioner acknowledged that the debt is valid by signing a repayment agreement.

As Petitioner is not employed, wage garnishment cannot be effected.

USDA-RD is **NOT** entitled to administratively garnish the wages of the Petitioner; however the debt shall remain at Treasury for any and all other appropriate collection action.

Order

For the foregoing reasons, these proceedings are terminated.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

So ORDERED this 17th day of March, 2011 in Washington, D.C.

JARED FELKINS.
AWG Docket No. 11 – 0122.
Decision and Order.
Filed March 17, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Hearing Official Stephen H. Reilly.

AWG

DECISION AND ORDER

This matter is before the Office of Administrative Law Judges ("OALJ") upon the request of Jared Felkins ("Petitioner") for a hearing to address the existence or amount of a debt alleged to be due, and if established, the propriety of imposing administrative wage garnishment. By Order issued on February 9, 2011, the parties were directed to participate in a conference to discuss the resolution of the case and to exchange information and documentation concerning the existence of the debt. In addition, the matter was set for a telephonic hearing to commence on March 15, 2011 and deadlines for filing documents with the Hearing Clerk's Office were established.

The Respondent filed a Narrative, together with supporting documentation[1] on February 18, 2011 and Petitioner filed a Consumer

[1] References to Respondent's exhibits herein shall be denoted as "RX-#".

Debtor Financial Statement[2] on March 15, 2011. On that date, Respondent filed an amended Narrative and document. At the hearing, Petitioner was represented by counsel, Robert K. Jordan, Esq. Testimony was received from Mary E. Kimball, Accountant for the New Program Initiatives Branch of Rural Development, USDA, Saint Louis, Missouri and from the Petitioner.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered:

FINDINGS OF FACT

On April 8, 2005, the Petitioner received a home mortgage loan in the amount of $99,000.00 from Taylor Mortgage for residential property located in Boaz, Alabama.

Before executing the promissory note for the loan, on March 11, 2005, Petitioner requested a Single Family Housing Loan Guarantee from the United States Department of Agriculture (USDA), Rural Development (RD), which was granted. RX-1.

By executing the guarantee request, Petitioner certified that he would reimburse USDA for the amount of any loss claim on the loan paid to the lender or its assigns.

The Petitioner subsequently defaulted on the loan on November 1, 2007, when the balance due on the loan was $96,026.10.

On November 8, 2008, foreclosure action was undertaken by JP Morgan Chase Bank, N.A.[3] ("Lender"), with foreclosure concluding on December 4, 2008 with sale of the property to the Lender for $95,200.00. RX-2.

On January 14, 2009, Lender sold the property for $91,500.00. RX-5.

Lender's loss claim of $18,765.40, representing principal differential, accrued interest, protective advances, attorney fees, appraisal and property inspection fees, and lender closing costs, was paid by USDA on March 3, 2009. RX-3; RX-4.

USDA entered the amount of the loss claim that it paid as a debt due from Petitioner, but subsequently entered into an agreement with

[2] This exhibit has been identified as, and shall be referred to herein as, "PX-1".

[3] Although the original loan was made to Petitioner by Taylor Mortgage, a summary of the activity regarding the loan reflects that at the time of foreclosure, the Assignment Entity, Servicing Lender, and Loss Payee were consistently JP Morgan Chase Bank, N.A. RX-3.

Petitioner to settle the debt by relieving $9,765.40 of the total indebtedness and accepting monthly installment payments to satisfy the remaining $9,000.00. RX 6.

Petitioner made monthly payments of $150.00 each on November 5, 2009 and November 24, 2009, which were applied to Petitioner's account.

Although Petitioner attempted to continue making monthly payments, his proffered payments were returned by mail.

USDA deemed Petitioner delinquent on the installment plan, and canceled the agreement on February 4, 2010.

12. The outstanding indebtedness in the amount of $8,700.00 was referred to the United States Department of Treasury ("Treasury") for collection. RX 7.

13. Treasury offsets totaling $3,822.64 exclusive of Treasury fees have been received and applied to the balance. RX-5.

On November 23, 2010, Treasury, through its agent, issued a notice to Petitioner of intent to garnish his wages.

Two wage garnishments were effected on Petitioner's salad on February 14, 2011 and March 1, 2011, in the amount of $222.97 each, resulting in a debt balance of $5,619.60, exclusive of Treasury fees.

Petitioner timely requested a hearing, which was held on March 15, 2011.

Petitioner does not contest the validity of the debt, but contends that the wage garnishment effected against his salary represented a substantial financial hardship.

The Petitioner's spouse is not employed, but received unemployment benefits that are expected to terminate in May, 2011.

Despite the contribution of Petitioner's wife's benefits, the family income exceeds the family monthly expenses. With their income level, Petitioner is unlikely to be in a position to liquidate the debt owed at this time.

Petitioner expects that his financial situation may improve when his wife resumes employment.

Petitioner expressed willingness to attempt to resolve the debt.

Even allowing for Petitioner's wife's return to work, the family income will not withstand garnishment at the level of legal limits; however, Petitioner should be able to absorb garnishment at a percentage lower than the maximum.

CONCLUSIONS OF LAW

The Secretary has jurisdiction in this matter.

Petitioner is indebted to USDA Rural Development in the amount of $5,619.60 exclusive of potential Treasury fees for the mortgage loan extended to him.

All procedural requirements for administrative wage offset set forth at 31 C.F.R. §285.11 have been met.

The Petitioner is under a financial hardship at this time that appears to be temporary in nature.

The Respondent is entitled to administratively garnish the wages of the Petitioner when the financial hardship is anticipated to ease; however Respondent shall not be entitled to garnish more than 5% of Petitioner's wage.

Treasury shall remain authorized to undertake any and all other appropriate collection action.

ORDER

For the foregoing reasons, the wages of Petitioner shall **NOT** be subjected to administrative wage garnishment at this time. As of September 15, 2011, garnishment up to 5% of Petitioner's disposable pay is authorized. 31 C.F.R. §285.11.

Petitioner is encouraged in the interim to negotiate repayment of the debt with the representatives of Treasury. The toll free number for Treasury's agent is **1-888-826-3127**.

Petitioner is advised that this Decision and Order does not prevent payment of the debt through offset of any federal money payable to Petitioner.

Until the debt is satisfied, Petitioner shall give to USDA RD or those collecting on its behalf, notice of any change in his address, phone numbers, or other means of contact.

Petitioner may direct questions to RD's representative Mary Kimball, c/o:

USDA New Program Initiatives Branch
Rural Development Centralized Servicing Center
4300 Goodfellow Blvd. F-22
St. Louis, MO 63120

314-457-5592
314-457-4426 (facsimile)

Copies of this Decision and Order shall be served upon the parties and counsel by the Hearing Clerk's Office.

So Ordered this _____day of March, 2011 in Washington, D.C.

MICHAEL MIZE.
AWG Docket No. 11 – 0047.
Decision and Order.
Filed March 17, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Chief Administrative Law Judge Peter M. Davenport.

AWG

Decision and Order

This matter is before the Administrative Law Judge upon the request of Michael Mize for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On February 9, 2011, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing on March 17, 2011.

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation on February 18, 2011. On March 1, 2011, the Petitioner submitted a Response and supporting documentation. At the time and date for the hearing, the Petitioner could not be reached and consistent with the language of the Prehearing Order will be decided on the record.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

On November 4, 1993, Michael Mize and Chastity Mize, then his wife received a home mortgage loan in the amount of $43,500.00 from Farmers Home Administration (FmHA) now Rural Development (RD), United States Department of Agriculture (USDA), for property located in Alba, Texas. RX-1, 2.

In 1998, subsequent to the purchase of the residence, the Petitioner and his wife divorced and as part of the division of property in the divorce, possession of the residence was awarded to the Petitioner's then ex-wife. The ex-wife was to assume responsibility for the indebtedness and was by the terms of the decree to indemnify the Petitioner from any loss. Final Decree of Divorce, 114th Judicial District, Wood County, Texas dated August 17, 1998.

In 2000, while in sole possession of Chastity Mize, the mortgage loan was defaulted upon. As part of the foreclosure proceedings, notices of the default and acceleration were sent to the borrowers at the property address. RX-4, 5.

The Domestic Return Receipts in the record indicate that the mail was not in fact delivered to the Petitioner. *Id.*

The Petitioner accordingly never received notice of the default and acceleration of the loan, and was not provided an opportunity to cure the default,

While the Deed of Trust executed by the Petitioner contains a provision waiving any state law provision establishing a statute of limitations for bringing an action for a deficiency judgment, the record contains no evidence that any deficiency judgment was sought or taken against him.

Treasury offsets totaling $6,993.38 exclusive of Treasury fees have been received. RX-6.

Conclusions of Law

The Secretary has jurisdiction in this matter.

USDA Rural Development failed in its burden of proof of establishing that the Petitioner was given actual notice of the default, the acceleration of the loan or was given an opportunity to cure any default.

The Petitioner is not indebted to USDA Rural Development for the balance of the indebtedness stemming from the mortgage loan extended to him.

Any amounts collected by Treasury prior to the entry of this Decision and Order may be retained and need not be returned. The Petitioner has recourse against his ex-wife under the terms of the decree to recoup such amounts.

As personal liability for the debt has not been established and no deficiency judgment appears to have been sought, the wages of Michael Mize may **NOT** be subjected to garnishment.

Order

For the foregoing reasons, these proceedings are terminated and the wages of Michael Mize shall **NOT** be subjected to administrative wage garnishment and the debt shall be recalled from Treasury.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

ERNESTO HINOJOSA.
AWG Docket No. 11 – 0101.
Decision and Order.
Filed March 23, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Janice K. Bullard.

AWG

Final Decision and Order

This matter is before the Office of Administrative Law Judges ("OALJ") upon the request of Ernesto Hinojosa ("Petitioner") for a hearing to address the existence or amount of a debt alleged to be due to the United States Department of Treasury ("Treasury") through the United States Department of Agriculture, Rural Development Agency ("Respondent"; "USDA-RD"), and if established, the propriety of

imposing administrative wage garnishment. By Order issued on February 16, 2011, the parties were directed to submit and exchange information and documentation concerning the existence of the debt. In addition, the matter was set for a telephonic hearing to commence on March 22, 2011 and deadlines for filing documents with the Hearing Clerk's Office were established. The Respondent filed a Narrative, together with supporting documentation on February 28, 2011 and Petitioner filed a Consumer Debtor Financial Statement on March 8, 2011.

I conducted a telephone hearing at the scheduled time on March 22, 2010. Respondent was represented by Mary Kimball who testified on behalf of the RD agency. Ms. Marcia Moore of USDA-RD attended as an observer. Petitioner, acting as his own representative, participated and testified.

Petitioner acknowledged that he had received a copy of Respondent's narrative statement and exhibits identified as RX 1 through RX 7. Respondent acknowledged receiving a copy of Petitioner's correspondence, including a Consumer Debtor Financial Statement. I hereby denote that statement as Petitioner's exhibit, PX-1.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered:

Findings of Fact

1. On May 31, 2007, Petitioner Ernesto Hinojosa executed a promissory note to Coastal Bend Mortgage, Inc., d/b/a Global Mortgage Group for a loan in the amount of $124,387.00 for the purchase of real property in Alice, Texas. RX-1.

2. Subsequently, the loan was assigned to JP Morgan Chase Bank, N.A. RX-1.

3. On May 3, 2007, Petitioner signed a request for Respondent to guarantee the loan with Coastal Bend Mortgage, Inc. RX-2.

4. On October 1, 2008, Petitioner defaulted on the loan, which at the time had a balance of $122,722.55. RX 3.

5. Foreclosure action initiated on April 27, 2009 was completed with sale of the property to the lender on July 7, 2009 in the amount of $106,250.00. RX-3

6. The lender paid protective advances, which together with the principal balance and interest accrued, resulted in a balance of $134,961.16. RX-3.

7. The foreclosed property was sold on October 1, 2009 for the sum of $104,000.00. RX-5.

8. The lender realized proceeds in the amount of $89,620.08 after accounting for fees and costs relating to the sale of the property. RX-3.

9. USDA RD paid Chase Bank, N.A the amount of $43,737.08 as the amount of net loss under the guarantee agreement. RX-4.

10. When Treasury proposed the instant wage garnishment action, the amount due was $43,708.84. RX-7.

11. The principal of the debt has been subsequently reduced because Petitioner's tax refund was intercepted and applied to offset the debt.

11. In addition, potential fees due U.S. Treasury pursuant to the Loan Guarantee Agreement are $12,237.92. RX-7.

13. Mr. Hinojosa is the sole signor of the promissory note and guarantee, and is liable for the debt.

14. Mr. Hinojosa has been gainfully employed as a mechanic, but has asserted that wage garnishment would constitute a financial hardship.

15. Mr. Hinojosa's monthly wages vary according to whether or not he works overtime.

16. Petitioner provided a financial schedule of expenses that include a wage garnishment of approximately $1,000.00 per month for child support for three children who do not reside with him. PX-1.

17. In addition to paying child support, Petitioner contributes to other expenses for his children, including clothing, and health and dental insurance.

18. Petitioner's liability for a loan for his vehicle shall extend for several more years.

19. Petitioner recently secured a long-term loan for the purchase of household goods.

20. Although Petitioner undertook the household loan after notice of the instant proposed garnishment action, Petitioner believed that he was not solely liable for his home loan.

21. Petitioner's receipt of Respondent's exhibits in late February demonstrated to him that he was the sole signor of the note and request for guarantee.

22. In determining whether wage garnishment would constitute a hardship, I considered Petitioner's sworn testimony, his financial

statement (PX-1), and Treasury Standard Form SF 329C (Wage Garnishment Worksheet).

Conclusions of Law

1. Petitioner, Ernesto Hinojosa, is indebted to USDA's Rural Development program in the amount of $55,944.76, representing the debt and Treasury fees, minus the amount offset by his tax refund.
2. All procedural requirements for administrative wage garnishment set forth in 31 C.F.R. ¶ 285.11 have been met.
3. Wage garnishment at the legally permissible amount would constitute a hardship.
4. USDA-RD may administratively garnish Petitioner's wages in the amount of 4% percent of his Monthly Disposable Income, estimated at $*** after accounting for child support payments, health insurance premiums, and tax withholdings.
5. Treasury shall remain authorized to undertake any and all other appropriate collection action.
6. After one year, USDA-RD may reassess Petitioner's financial hardship criteria.

Order

1. The Administrative Wage Garnishment may proceed at this time at the rate of 5.0% of his Monthly Disposable Income.
2. After one year, RD may reassess the Debtor's financial position and modify the garnishment percentage as circumstances dictate.
3. Petitioner is advised that this Decision and Order does not prevent payment of the debt through offset of any federal money payable to Petitioner.
4. Petitioner is further advised that a debtor who is considered delinquent on debt to the United States may be barred from obtaining other federal loans, insurance, or guarantees. See, 31 C.F.R. § 285.13.
5. Until the debt is satisfied, Petitioner shall give to USDA RD or those collecting on its behalf, notice of any change in his address, phone numbers, or other means of contact. Petitioner may direct questions to RD's representative Mary Kimball, c/o:

USDA New Program Initiatives Branch
Rural Development Centralized Servicing Center

4300 Goodfellow Blvd. F-22
St. Louis, MO 63120
314-457-5592
314-457-4426 (facsimile)

6. Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office. **N.B. Change of Petitioner's Address:**

Ernesto Hinojosa
****
Alice, TX 78332

So Ordered this _____day of March, 2011 in Washington, D.C.

_____

TED WEBER.
AWG Docket No. 11 – 0087.
Decision and Order.
Filed March 24, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Chief Administrative Law Judge Peter M. Davenport.

AWG

Decision and Order

This matter is before the Administrative Law Judge upon the request of Ted Webber for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On February 8, 2011, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt and setting the case for a telephonic hearing on March 17, 2011.

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation on February 17, 2011. The Petitioner contacted the Office of Administrative Law Judges with a

telephone number at which he could be reached, but did not file any additional material. On the date and at the time set for the hearing, the Petitioner could not be reached. At the time of filing his request for hearing, the Petitioner indicated that he disputed the debt indicating that the house was foreclosed upon in 2009. As the Petitioner was unavailable at the time set for the hearing, he will be deemed to have waived his right to a hearing.

On the basis of the record before me, nothing further having been received from the Petitioner, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

On June 14, 2007. Ted Weber applied for and received a home mortgage loan guarantee from Rural Development (RD), United States Department of Agriculture (USDA), RX-2) and on July 26, 2007 obtained a home mortgage loan for property located in Youngsville, Louisiana from J.P. Morgan Chase Bank, N.A. (Chase) for $138,000.00. RX-1.

In 2008, the Petitioner defaulted on the mortgage loan and foreclosure proceedings were initiated. RX-3.

Chase submitted a loss claim and USDA paid Chase the sum of $29,190.96 for accrued interest, protective advances, liquidation costs and property sale costs. RX-3, 4.

The remaining unpaid debt is in the amount of $29,190.96 exclusive of Treasury fees. RX-6.

Conclusions of Law

Ted Weber is indebted to USDA Rural Development in the amount of $29,190.96 exclusive of Treasury fees for the mortgage loan guarantee extended to him.

All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.

The Respondent is entitled to administratively garnish the wages of the Petitioner.

Order

For the foregoing reasons, the wages of the Ted Weber shall be subjected to administrative wage garnishment at the rate of 15% of disposable pay, or such lesser amount as might be specified in 31 C.F.R. § 285.11(i).

Copies of this Decision and order shall be served upon the parties by the Hearing Clerk's Office.

ROBYN JONES.
AWG Docket No. 10 – 0318.
Decision and Order.
Filed March 25, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Hearing Official James P. Hurt.

AWG

DECISION AND ORDER

This matter is before me upon the request of Robyn M. Jones for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On August 11, 2010, I issued a Prehearing Order to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing.

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation RX-1 through RX-5 on August 8, 2010. Prior to the hearing Ms. Jones filed financial statements under oath (which I now label as PX-1).

On March 25, 2011 at the re-scheduled time, both parties were available for the conference call. Mary Kimball represented United States Department of Agriculture Rural Development (RD). The parties were sworn. Ms. Jones had made a payment offer regarding payoff of the balance due. However, because the matter was in "collection" status – RD could not act upon the offer.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

On August 23, 1984, Robyn Jones assumed a FmHA loan in the amount of $50,000.00 from Val d. King and Denise King for a primary residence located at 21** W. 21** S. Syracuse, UT 84***.[1] Narrative, RX-1.

Ms. Jones reamortized her loan under the same terms on June 3, 1998.

The borrower defaulted on the loan and entered a short sale on November 9, 2000. Narrative. RX-3.

Prior to the sale, borrower owed $62,649.58 in principal, $13,370.96 in accrued interest and $6,394.29 in fees for a total of $82,414.83. Narrative, RX-3.

Post sale Treasury offsets in the amount of $3,358.25 were received and applied to the account. Narrative, RX- 3.

The remaining unpaid debt is in the amount of $8,056.58 exclusive of potential Treasury fees. RX-3, Narrative.

The remaining potential treasury fees are $2,255.84. RX-4.

Ms. Jones has been employed for more than one year.

Ms. Jones submitted financial statements under oath.

I performed a Financial Hardship calculation which is attached.[2]

Conclusions of Law

1. Robyn Jones is indebted to USDA Rural Development in the amount of $8,056.58 for the mortgage loan assumed by her.

2. Robyn Jones is indebted to the US Treasury for potential fees in the amount of $2,255.84.

3. All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.

4. The Respondent is entitled to administratively garnish the wages of the Petitioner at the rate of eight percent of her gross pay.*[Editor's Note:This has been corrected to read"…her net disposable income:]*

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Order

[1] Complete address maintained in USDA files.

[2] The Financial hardship calculations are not posted on the OALJ website.

For the foregoing reasons, the wages of Robyn Jones shall be subjected to administrative wage garnishment at the rate of eight percent (8%) of her gross pay. *.[Editor's Note: This has been corrected to read"…her net disposable income:]*

After one year, her financial situation may be reviewed.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office. Done at Washington, D.C.

KENNETH PERKINS.
AWG Docket No. 10 – 0303.
Decision and Order.
Filed March 29, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Hearing Official James P. Hurt.

AWG

Final Decision and Order

This matter is before me upon the request of the Petitioner (or "Debtor"), Kenneth Perkins, for a hearing in response to efforts of Respondent to institute a federal administrative wage garnishment against him. On February 16, 2011, I issued a Pre-hearing Order requiring the parties to exchange information concerning the amount of the debt. Mr. Perkins filed his Petition on/about May 27, 2010, but the file did not clearly reflect that he was mailed the Pre-Hearing Order and thus it was re-issued. Also, Mr. Perkins only appealed the garnishment as to Account # 0016837224 and this order will **only** apply to that Account.

I conducted a telephone hearing at the revised scheduled time on March 28, 2011. USDA Rural Development Agency (RD) was represented by Mary Kimball who testified on behalf of the RD agency. Ms. Marcia Moore of RD was attending but did not testify.

Mr. Perkins was present and was self-represented. Mr. Perkins advised that he could not read or write and he was accompanied by his mother, Geneva Perkins who was literate.

The witnesses were sworn in. RD had filed a copy of a Narrative along with exhibits RX-1 through RX-6 on July 26, 2010 with the OALJ Hearing Clerk and certified that it mailed a copy of the same to Petitioner. Prior to the hearing, RD filed exhibits RX-10 and 11 (which I re-number as RX-7 and 8. Mr. Perkins stated that he received RD's Exhibits and witness list.

Following the hearing, Mr. Perkins filed a bi-weekly pay stub from his employer and a financial statement under oath of his monthly expenses which I now label as PX-1.

Petitioner owes $10,967.67 on the USDA RD FmHA loan # 16837224 as of today, and in addition, potential fees of $3,070.95 due the US Treasury pursuant to the terms of the Promissory Note and guarantee. The debt related to FmHA loan # 4515671 has not been determined in this order.

Findings of Fact

1. On November 25, 1997, Petitioner Kenneth Perkins and Abigail (his wife) obtained a USDA FmHA home mortgage loan for property located at 52** KY 1** , Campton, KY 413**.[1] Petitioner was signor to a assumption agreement for $32,376.81 (Account # 4515671) and at the same time obtained a loan from USDA FmHA for $11,030.00 (Account # 16837224). RX-1.

2. The Borrowers defaulted on the loans and a foreclosure sale was held on January 13, 2003. RX-7.

3. Prior to the sale, borrowers owed $10,967.67 as principal and $3,489.95 as interest on account #16837224. RX-4.

4. The net proceeds received by RD from the foreclosure sale was $31,850. RX- 4. Of the net monies received from the foreclosure sale, $3,489.95 was applied to account # 16837224.

5. After the application of a portion of the foreclosure sale proceeds, Mr. Perkins now owes $10,967.67 on account # 16837224. Narrative, RX-4.

6. The potential fees due U.S. Treasury pursuant to the Loan Agreement on account #16837224 are $3,070.95. Narrative, RX-5.

7. Mr. Perkins is jointly and severally liable on the debt under the terms of the Promissory Note.

[1]Complete address maintained in USDA records.

8. Mr. Perkins stated that he has been gainfully employed for more than one year, but he raised issues of financial hardship.

9. Mr. Perkins provided a financial schedule of expenses under oath and a bi-weekly pay stub from his employer. PX-1.

10. Using the Financial Hardship Calculation program and data from his sworn testimony and financial statement (PX – 1), I made a calculation of the appropriate wage garnishment. The calculations are enclosed.[2]

Conclusions of Law

1. Petitioner, Kenneth Perkins, is indebted to USDA's Rural Development program in the amount of $10,967.67 on account # 16837224.

2. In addition, Petitioner is indebted for potential fees to the US Treasury in the amount of $3,070.95 on account # 16837224.

3. All procedural requirements for administrative wage garnishment set forth in 31 C.F.R. ¶ 285.11 have been met.

4. Petitioner is under a duty to inform USDA's Rural Development of his current address, employment circumstances, and living expenses.

5. RD may administratively **not** garnish Petitioner's wages.

6. After one year, RD may reassess Petitioner's financial hardship criteria.

7. These findings are res judicata as to Finding of Facts paragraphs 1 through 16 above but not as to the remaining debt (if any) on account # 4515671.

Order

1. The requirements of 31 C.F.R. ¶ 288.11(i) & (j) have been met.

2. The wages of Petitioner may **not** be garnished for one year as to account #16837224.

3. After one year, RD may reassess the Debtor's financial position and modify the garnishment percentage as circumstances dictate.

4. Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's office.

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[2] The Financial Hardship Calculation is not posted on the OALJ website.

BRIAN KING.
AWG Docket No. 11 – 0124.
Decision and Order.
Filed March 31, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Chief Administrative Law Judge Peter M. Davenport.

AWG

Decision and Order

This matter is before the Administrative Law Judge upon the request of Petitioner for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On February 8, 2011, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing on March 16, 2011.

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation on February 18, 2011. The hearing was held as scheduled and the testimony of the Petitioner and Mary E. Kimball was received. At the conclusion of the hearing on March 16, 2011, the Petitioner was given additional time to file information concerning his financial condition. That documentation was received by the Hearing Clerk on March 28, 2011.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

On April 19, 1990, the Petitioner and Patrice King received a home mortgage loan in the amount of $44,000.00 from Farmers Home Administration (FmHA), United States Department of Agriculture (USDA), now Rural Development (RD) for property located in Athens, Alabama. RX-1& 2.

The property was sold at a foreclosure sale on April 26, 2001 with proceeds realized from that sale in the amount of $38,000.00, leaving a balance due of $31,539.82. RX-5.

No Treasury offsets have been received. RX-6.

The remaining unpaid debt is in the amount of $31,539.82 exclusive of potential Treasury fees. RX-6.

Although the Petitioner is employed, he has not been employed for a continuous twelve month period.

Conclusions of Law

Petitioner is indebted to USDA Rural Development in the amount of $31,539.82 exclusive of potential Treasury fees for the mortgage loan extended to him.

As the Petitioner has not been employed for a continuous twelve month period, garnishment of the wages of the Petitioner is not appropriate at this time.

Order

For the foregoing reasons, the wages of Petitioner may **NOT** be subjected to administrative wage garnishment. The indebtedness is still subject to Treasury action and garnishment proceedings may be re-commenced after an appropriate period of time.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

ANDRES VALDEZ.
AWG Docket No. 11 – 0120.
Decision and Order.
Filed March 31, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Jill S. Clifton.

AWG

Decision and Order

1. Andres D. Valdez, the Petitioner (APetitioner Valdez"), represents himself (appears *pro se*). The hearing by telephone was held on March 3, and on March 31, 2011.[1]

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent (AUSDA Rural Development") and is represented by Mary E. Kimball. The address for USDA Rural Development for this case is:

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

3. I encourage **Petitioner Valdez and the collection agency** to work together to **establish a repayment schedule** rather than immediately proceeding with garnishment, even though this Decision authorizes garnishment beginning May 2012. Petitioner Valdez, obviously, will have to make himself available to the collection agency if he wants to negotiate. *See* paragraph 10.

Summary of the Facts Presented

4. USDA Rural Development's Exhibits, plus Narrative, Witness & Exhibit List, were filed on February 10, 2011, and are admitted into evidence, together with the testimony of Ms. Kimball.

5. Petitioner Valdez's completed AConsumer Debtor Financial Statement," plus his pay stub, plus his typed statement, were filed on March 29, 2011, and are admitted into evidence, together with the testimony of Petitioner Valdez. Petitioner Valdez maintains that he was told by USDA personnel that, after a short sale, he would owe nothing

[1] *See also* AWG Docket No. 10-0326, in which a Dismissal of Petition for Oral Hearing was entered on September 22, 2010, after Petitioner was not available for the hearing that he requested, and he had submitted no exhibits.

more on the house. [The foreclosure sale was June 12, 2009; USDA received $74,000.00 from the sale,[2] which was applied to the $108,958.07 owed.] Evidence of forgiveness or cancellation of the remaining debt would include a returned promissory note, a written release of liability, a 1099-C, none of which is before me.

6. Petitioner Valdez owes to USDA Rural Development **$34,734.23** (as of February 7, 2011) in repayment of a Rural Housing Service loan made in 2000 for a home in New Mexico, the balance of which is now unsecured (Athe debt").

7. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$34,734.23** would increase the current balance by $9,725.58, to $44,459.81. *See* USDA Rural Development Exhibits, esp. RX 6.

8. Petitioner Valdez's disposable income is about $**** per month. [Disposable income as calculated here is gross pay minus Federal, Social Security, Medicare withholding.] Although Garnishment at 15% of Petitioner Valdez's disposable pay would yield roughly $*** per month in repayment of the debt, he cannot withstand garnishment in that amount without hardship. Petitioner Valdez is supporting three minor children in addition to himself, and he is repaying motor vehicle and credit card loans and other indebtedness. He and his wife are going through a divorce. To prevent hardship, potential garnishment to repay Athe debt" (*see* paragraph 6) must be limited to **0%** of Petitioner Valdez' disposable pay through April 2012; then up to **7%** of Petitioner Valdez's disposable pay beginning May 2012 through April 2013; then up to **15%** of Petitioner Valdez's disposable pay thereafter. 31 C.F.R. § 285.11.

9. Petitioner Valdez is responsible and willing and able to negotiate the disposition of the debt with Treasury's collection agency.

Discussion

10. Through April 2012, no garnishment is authorized. Beginning May 2012 through April 2013, garnishment up to 7% of Petitioner Valdez's disposable pay is authorized; and thereafter, garnishment up to 15% of Petitioner Valdez' disposable pay is authorized. *See* paragraphs

[2] Here, USDA was outbid at the foreclosure sale. USDA's bid would have been based on net recovery value minus 6 months of holding expenses.

8 and 9. I encourage **Petitioner Valdez and the collection agency** to **negotiate promptly** the repayment of the debt. Petitioner Valdez, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Valdez, you may ask that the debt be **apportioned separately** to you and your co-borrower, Kristen S. Valdez. You may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less.

Findings, Analysis and Conclusions

11. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Valdez and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

12. Petitioner Valdez owes the debt described in paragraphs 6 and 7.

13. **Garnishment is authorized**, as follows: through April 2012, **no** garnishment. Beginning May 2012 through April 2013, garnishment up to 7% of Petitioner Valdez's disposable pay; and thereafter, garnishment up to 15% of Petitioner Valdez's disposable pay. 31 C.F.R. § 285.11.

14. Repayment of the debt may also occur through ***offset*** of Petitioner Valdez's **income tax refunds** or other **Federal monies** payable to the order of Mr. Valdez.

Order

15. Until the debt is repaid, Petitioner Valdez shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in his mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

16. USDA Rural Development, and those collecting on its behalf, are **not** authorized to proceed with garnishment through April 2012. Beginning May 2012 through April 2013, garnishment up to 7% of Petitioner Valdez's disposable pay is authorized; and garnishment up to 15% of Petitioner Valdez's disposable pay thereafter. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties. Done at Washington, D.C.

HANK MESSER.
AWG Docket No. 11 – 0105.
Decision and Order.
Filed April 1, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Janice K. Bullard.

AWG

Decision and Order

This matter is before the Office of Administrative Law Judges ("OALJ") upon the request of Hank Messer ("Petitioner") for a hearing to address the existence or amount of a debt alleged to be due to the United States Department of Agriculture, Rural Development ("Respondent"; "RD"), and if established, the propriety of imposing administrative wage garnishment. By Order issued on February 7, 2011, the parties were directed to provide information and documentation concerning the existence of the debt and deadlines were set for the submissions. In addition, the matter was set for a telephonic hearing to commence on March 31, 2011.

The Respondent filed a Narrative, together with supporting documentation[1] on February 18, 2011 and Petitioner filed a Consumer Debtor Financial Statement[2] on March 24, 2011. At the hearing, Petitioner represented himself and Respondent was represented by Mary E. Kimball, Accountant for the New Program Initiatives Branch of RD, Saint Louis, Missouri. Petitioner testified, as did his wife, Sherryl Messer. In addition, Realtor Bruce Gooding and Ms. Kimball testified.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law, and Order will be entered:

FINDINGS OF FACT

[1] References to Respondent's exhibits herein shall be denoted as "RX-#".
[2] This exhibit has been identified as, and shall be referred to herein as, "PX-1".

1. On December 29, 1988, the Petitioner and his wife signed a promissory note for a home mortgage loan in the amount of $34,120.00 from RD for residential property located in Hugo, Oklahoma. RX-1; RX-2.

2. The Petitioner subsequently defaulted on the loan when the balance due on the loan was $33,407.57, of which $31,154.03 represented principle; $1500.12 represented interest; and $753.42 represented fees.

3. With the help of realtor Bruce Gooding, on January 24, 1997, Petitioner and his wife sold the property at a short sale that yielded the sum of $12,600.98.

4. A balance due on the loan of $20,806.59 was referred to the U.S. Department of Treasury ("Treasury") for collection, as required by prevailing statutes and regulations. RX 4; Respondent's Narrative.

5. Treasury offsets totaling $5,137.18 exclusive of Treasury fees have been received and applied to the balance. RX-4.

6. The outstanding indebtedness is now $15,669.41 plus potential fees of $4,387.43, for a balance due of $20,056.84. RX-5.

7. On November 10, 2010, Treasury, through its agent, issued notices to Petitioner of intent to garnish wages.

8. Petitioner timely requested a hearing, which was held on March 31, 2011.

9. Petitioner contested the validity of the debt, and testified that at the time of the short sale, he believed from representations of RD officials that the balance of the debt would be forgiven.

10. Realtor Mr. Gooding testified that he believed that the debt would be reduced.

11. Petitioner did not recall receiving copies of Respondent's offer to compromise the debt, mailed in 2001.

12. Petitioner Hank Messer is self-employed.

13. Petitioner filed a Consumer Debtor Financial Report, PX-1, signed by him and his wife, and he accepts joint and several ownership of and liability with his wife for their monthly income and expenses.

15. Petitioner expressed willingness to attempt to resolve the debt.

CONCLUSIONS OF LAW

The Secretary has jurisdiction in this matter.

Petitioner is indebted to USDA Rural Development in the amount of $15,669.41 plus potential fees of $4,387.43, for a balance due of

$20,056.84 for the balance due after sale on the mortgage loan extended to him and his wife.

All procedural requirements for administrative wage offset set forth at 31 C.F.R. §285.11 have been met.

Petitioner Hank Messer is self-employed and therefore not subject to wage garnishment

Treasury shall remain authorized to undertake any and all other appropriate collection action.

ORDER

For the foregoing reasons, no administrative wage garnishment against Petitioner may be undertaken, although Petitioner is liable for the debt.

Petitioner is encouraged to negotiate repayment of the debt with the representatives of Treasury. The toll free number for Treasury's agent is **1-888-826-3127**.

Petitioner is advised that this Decision and Order does not prevent payment of the debt through offset of any federal money payable to Petitioner.

Petitioner is further advised that a debtor who is considered delinquent on debt to the United States may be barred from obtaining other federal loans, insurance, or guarantees. See, 31 C.F.R. § 285.13.

Until the debt is satisfied, Petitioner shall give to USDA RD or those collecting on Treasury's behalf, notice of any change in address, phone numbers, or other means of contact.

Petitioner may direct questions to RD's representative Mary Kimball, c/o:

USDA New Program Initiatives Branch
Rural Development Centralized Servicing Center
4300 Goodfellow Blvd. F-22
St. Louis, MO 63120
314-457-5592
314-457-4426 (facsimile)

Copies of this Decision and Order shall be served upon the parties and counsel by the Hearing Clerk's Office.

So Ordered this 31st day of March, 2011 in Washington, D.C.

———

SHERRYL MESSER.
AWG Docket No. 11 – 0106.
Decision and Order.
Filed April 1, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Janice K. Bullard.

AWG

DECISION AND ORDER

This matter is before the Office of Administrative Law Judges ("OALJ") upon the request of Sherryl Messer ("Petitioner") for a hearing to address the existence or amount of a debt alleged to be due to the United States Department of Agriculture, Rural Development ("Respondent"; "RD"), and if established, the propriety of imposing administrative wage garnishment. By Order issued on February 7, 2011, the parties were directed to provide information and documentation concerning the existence of the debt and deadlines were set for the submissions. In addition, the matter was set for a telephonic hearing to commence on March 31, 2011.

The Respondent filed a Narrative, together with supporting documentation[1] on February 18, 2011. At the hearing, Petitioner represented herself and Respondent was represented by Mary E. Kimball, Accountant for the New Program Initiatives Branch of RD, Saint Louis, Missouri. Petitioner testified, as did her husband Hank Messer, Realtor Bruce Gooding and Ms. Kimball.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law, and Order will be entered:

FINDINGS OF FACT

1. On December 29, 1988, the Petitioner and her husband Hank Messer signed a promissory note for a home mortgage loan in the amount of $34,120.00 from RD for residential property located in Hugo, Oklahoma. RX-1; RX-2.

[1] References to Respondent's exhibits herein shall be denoted as "RX-#".

2. The Petitioner subsequently defaulted on the loan when the balance due on the loan was $33,407.57, of which $31,154.03 represented principle; $1500.12 represented interest; and $753.42 represented fees.

3. With the help of realtor Bruce Gooding, on January 24, 1997, the Petitioner and her husband sold the property at a short sale that yielded the sum of $12,600.98.

4. A balance due on the loan of $20,806.59 was referred to the U.S. Department of Treasury ("Treasury") for collection, as required by prevailing statutes and regulations. RX 4; Respondent's Narrative.

5. Treasury offsets totaling $5,137.18 exclusive of Treasury fees have been received and applied to the balance. RX-4.

6. The outstanding indebtedness is now $15,669.41 plus potential fees of $4,387.43, for a balance due of $20,056.84. RX-5.

7. On November 10, 2010, Treasury, through its agent, issued a notice to Petitioner of intent to garnish wages.

8. Petitioner timely requested a hearing, which was held on March 31, 2011.

9. Petitioner contested the validity of the debt, and her husband Hank Messer testified that he and Petitioner believed from representations of RD officials that the balance of the debt would be forgiven.

10. Realtor Mr. Gooding testified that he believed that the debt would be reduced.

11. Petitioner did not recall receiving copies of Respondent's offer to compromise the debt, mailed in 2001.

12. Petitioner Sherryl Messer is employed, and her employer pays social security taxes and unemployment compensation on her behalf.

14. Petitioner agreed that the Consumer Debtor Financial Report that she signed and that was filed in her husband's case, Docket No. 11-0105, represents her income and expenses.

15. In determining whether wage garnishment would constitute a hardship, I have considered the sworn testimony, Petitioner's signed financial statement[2], Treasury Standard Form SF 329C (Wage Garnishment Worksheet), and standard geographical allowable per diem expense rates (www.irs.gov; www.opm.gov).

16. Petitioner expressed willingness to attempt to resolve the debt.

CONCLUSIONS OF LAW

[2] PX-1 reflects that Petitioner owns property in addition to her residence as well as a variety of vehicles, all of which are encumbered.

The Secretary has jurisdiction in this matter.

Petitioner is indebted to USDA Rural Development in the amount of $15,669.41 plus potential fees of $4,387.43, for a balance due of $20,056.84 for the balance due after sale on the mortgage loan extended to her.

All procedural requirements for administrative wage offset set forth at 31 C.F.R. §285.11 have been met with respect to Petitioner Sherryl Messer.

Although Petitioner's monthly income appears to be consumed by expenses, I conclude from consideration of her financial statement and the number of assets held jointly by her and her husband that garnishment would not present a financial hardship, as that term is recognized by law.

I nevertheless find that garnishment should be deferred for six (6) months to allow Petitioner and her husband to negotiate a compromise of the debt or a payment plan with Treasury.

The Respondent is entitled to administratively garnish the wages of Petitioner Sherryl Messer after that six month period; however Respondent shall not be entitled to garnish more than 15% of Petitioner Sheryll Messer's wage.

Treasury shall remain authorized to undertake any and all other appropriate collection action.

ORDER

For the foregoing reasons, the wages of Petitioner Sherryl Messer shall **NOT** be subjected to administrative wage garnishment at this time. As of October 1, 2011, garnishment up to 15% of Petitioner Sherryl Messer's disposable pay is authorized. 31 C.F.R. §285.11.

Petitioner is encouraged in the interim to negotiate repayment of the debt with the representatives of Treasury. The toll free number for Treasury's agent is **1-888-826-3127**.

Petitioner is advised that this Decision and Order does not prevent payment of the debt through offset of any federal money payable to Petitioner.

Petitioner is further advised that a debtor who is considered delinquent on debt to the United States may be barred from obtaining other federal loans, insurance, or guarantees. See, 31 C.F.R. § 285.13.

Until the debt is satisfied, Petitioner shall give to USDA RD or those collecting on Treasury's behalf, notice of any change in address, phone numbers, or other means of contact.

Petitioner may direct questions to RD's representative Mary Kimball, c/o:

USDA New Program Initiatives Branch
Rural Development Centralized Servicing Center
4300 Goodfellow Blvd. F-22
St. Louis, MO 63120
314-457-5592
314-457-4426 (facsimile)

Copies of this Decision and Order shall be served upon the parties and counsel by the Hearing Clerk's Office.

So Ordered this 31st day of March, 2011 in Washington, D.C.

———

WILLIE WOODS.
AWG Docket No. 11 – 0056.
Decision and Order.
Filed April 1, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Victor W. Palmer.

AWG

Decision and Order

Pursuant to a Hearing Notice, I held a hearing by telephone, on February 22, 2011, at 10:30 AM Eastern Time, in consideration of a Petition seeking to dispute Petitioner's obligation to pay a debt that Petitioner incurred under a single family mortgage loan that was given to Petitioner, Willie Woods (now Willie Daniels) by Respondent, USDA, Rural Development. The loan in the amount of $34,700.00 was made to facilitate the purchase of a primary residence located in Edgewood, Texas. However the loan was not paid and was re-amortized on December 12, 1987 when the principal amount was raised to $38,944.58 to cover unpaid interest. In 1996, a Chapter 13 proceeding was filed that

was subsequently dismissed, on May 14, 1998, for failure to make ordered payments. On July 6, 2009, a foreclosure sale was held that resulted in USDA receiving $27,045.00 when Petitioner owed $64,544.11 for principal, interest and fees respecting the unpaid loan. After application of the sale proceeds, Petitioner still owed $37,499.11. Subsequent offsets from Petitioner's income tax refunds were made. She presently owes $34,667.71 plus $9,706.96 in fees to Treasury, or $44,374.67 total. Respondent has initiated administrative garnishment of Petitioner's wages for the nonpayment of the amount still owed. At the hearing, Petitioner was represented by her attorney, Jane Horta, Tyler, Texas, and Mary Kimball, represented Respondent. Both Petitioner and Ms. Kimball were sworn.

Petitioner as instructed by the Hearing Notice filed: 1. completed forms respecting her current employment, general financial information, assets and liabilities, and monthly income and expenses; 2. a narrative of events or reasons concerning the existence of the alleged debt and her ability to repay all or part of it; 3. supporting exhibits with a list of the exhibits and a list of witnesses who would testify in support of his petition. Petitioner is 61 years of age, divorced and employed as a Home Health Care Aide earning a gross monthly income of $**** Her monthly expenses are: car payments-$***; gasoline-$***; electricity-$***; natural gas-$**; food-$***; cable TV-$**; health insurance-$***; clothing-$**; property tax-$**; water-$**; phone-$**; car insurance-$**; home owners insurance-$**; medicine- $**; Church-$***. Total monthly expenses are $***. The monthly expenses nearly equal her monthly gross income. Respondent's representative, Mary Kimball, Accountant for the New Initiatives Branch, USDA Rural Development, filed supporting documents and gave testimony showing that the debt owed to it by Petitioner has a present balance of $34,667.71 plus $9,706.96 in fees that are being assessed by Treasury for its collection efforts, or $44,374.67 total.

Under these circumstances, there is no present disposable monthly income available for garnishment and the proceedings to garnish Petitioner's wages are hereby suspended and shall not be resumed for six (6) months from the date of this Order.

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TIFFANY TIBBS.
AWG Docket No. 10 – 0447.
Decision and Order.
Filed April 1, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Victor W. Palmer.

AWG

Decision and Order

On December 2, 2010, I held a hearing on a Petition to Dismiss the administrative wage garnishment proceeding to collect the debt allegedly owed to Respondent, USDA, Rural Development for losses it incurred under a mortgage given by the Respondent, USDA Rural Development to Petitioner, Tiffany Tibbs, and to her former husband, David Tibbs. Petitioner represented herself and USDA Rural Development was represented by Mary Kimball. Petitioner and Mary Kimball were each duly sworn.

Respondent sustained financial loss on the loan it gave to Petitioner and her former husband to finance the purchase of a home. The loan was in the amount of $38,000.00, dated July 3, 1991. The payments on the loan were not met and a foreclosure sale was held on February 27, 2003. The house sold for $28,850.00 when a balance of $51,122.99 was still owed to USDA, Rural Development for principal, accrued interest, unpaid taxes and other expenses. Since the sale, $16,361.81 has been collected by the United States Treasury Department. The amount that is presently owed on the debt is $7,774.14 plus potential fees to Treasury of $2,176.76, or $9,950.90 total.

Petitioner and David Tibbs are divorced, and Petitioner has remarried and resides with her new husband, her 18 year old daughter who attends high school and her 20 year old son who attends college. Petitioner is employed as a Head Start Teacher earning $**** annually. Monthly household expenses are so divided that she is responsible for the monthly electric bills of $*** and food bills of $***. She shall also have large bills coming due during the next three months due to various seasonal family obligations. I have concluded that the collection of any part of the debt during the next three (3) months would cause Petitioner undue,

financial hardship within the meaning and intent of the provisions of 31 C.F.R. § 285.11.

USDA, Rural Development has met its burden under 31 C.F.R. §285.11(f)(8) that governs administrative wage garnishment hearings, and has proved the existence and the amount of the debt owed by the Petitioner. On the other hand, Petitioner showed that she would suffer undue financial hardship if any amount of money is garnished from her disposable income at any time during the next three (3) months. During that time, Mrs. Tibbs should undertake to contact Treasury to discuss a settlement plan to pay the debt.

Under these circumstances, the proceedings to garnish Petitioner's wages are suspended and may not be resumed for three (3) months from the date of this Order.

ERNST DAMESSOUS.
AWG Docket No. 11 – 0100.
Decision and Order.
Filed April 6, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Janice K. Bullard.

AWG

Decision and Order

This matter is before the Office of Administrative Law Judges for the United States Department of Agriculture ("OALJ") upon the December 21, 2010 request of Ernst Damessous ("Petitioner") for a hearing to address the existence or amount of a debt alleged to be due to the United States Department of Agriculture, Rural Development ("USDA-RD"); and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. By Order issued February 7, 2011, the parties were directed to exchange information and documentation concerning the existence of the debt. In addition, the matter was set for a telephonic hearing to commence on March 23, 2011 and deadlines for filing documents with the Hearing Clerk's Office were established. The

parties were further instructed to provide contact information for participation in the hearing. Copies of the Order were sent to Petitioner's address of record.

On February 28, 2011, USDA-RD filed a Narrative, together with supporting documentation identified as RX-1 through RX-7. Copies were sent to Petitioner at his address of record, noted in his petition. Petitioner did not file any documents, nor did Petitioner provide contact information as directed. No document mailed to Petitioner's was returned as undeliverable. However, since a page of Petitioner's petition was not filed with the Hearing Clerk, I determined that due process would be best served by allowing Petitioner the opportunity to explain his failure to comply with previous Orders. By Order issued March 23, 2011, I directed Petitioner to show good cause why he failed to provide a number where he could be contacted for the telephonic hearing. As of this date, Petitioner has failed to file a statement of good cause. Accordingly, I find it appropriate to make a Decision on the basis of the entire record before me. The following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

Petitioner Ernst Damessous obtained loans from USDA-RD loans in the amount of $155,500.00 and $16,500.00 for the purchase of his primary residence in Lehigh Acres, Fl.

Petitioner executed promissory notes and mortgage dated September 29, 2006 as evidence of indebtedness for the loans. RX 1 and RX 2.

The loans were accelerated on February 6, 2008. RX 4

USDA-RD initiated foreclosure proceedings, which concluded on June 8, 2009 with a judgment of foreclosure. RX 5.

A foreclosure sale was held on July 9, 2009, at which time USDA-RD acquired the property for $27,990.00, which was credited against the balance due on the loans of $191,422.55 ($191,422.55 in principal; $16,841.50 in interest; and $5,103.65 in fees).

The balance due was then $163,432.55 plus $70.00 in fees.

The amount of $1,215.00 was applied against the balance by the U.S. Department of Treasury ("Treasury").

The remaining balance of $162,287.55 was referred to Treasury for collection. RX 6.

The outstanding balance on the loans is $207,728.07, consisting of the debt of $162,287.55 plus potential fees due to Treasury of $45,440.52.

At the time this collection action was initiated, Petitioner was employed.

Conclusions of Law

The Secretary has jurisdiction in this matter.

Petitioner is indebted to USDA Rural Development in the amount of $162,287.55 plus potential Treasury fees in the amount of $45,440.52.

All procedural requirements for administrative wage offset set forth at 31 C.F.R. §285.11 have been met.

USDA Rural Development has established that the Petitioner was given notice of the debt and an opportunity to cure any default.

As Petitioner is employed, wage garnishment may be effected.

USDA-RD is entitled to administratively garnish the wages of the Petitioner.

In addition, Treasury may implement any and all other appropriate collection action.

Order

1. The Administrative Wage Garnishment may proceed at this time at the rate of 15% of Petitioner's Monthly Disposable Income.

2. Petitioner is advised that this Decision and Order does not prevent payment of the debt through offset of any federal money payable to Petitioner.

3. Petitioner is further advised that a debtor who is considered delinquent on debt to the United States may be barred from obtaining other federal loans, insurance, or guarantees. See, 31 C.F.R. § 285.13.

4. Until the debt is satisfied, Petitioner shall give to USDA RD or those collecting on its behalf, notice of any change in his address, phone numbers, or other means of contact. Petitioner may direct questions to RD's representative Mary Kimball, c/o:

USDA New Program Initiatives Branch
Rural Development Centralized Servicing Center
4300 Goodfellow Blvd. F-22
St. Louis, MO 63120
314-457-5592

314-457-4426 (facsimile)

5. Copies of this Decision and Order shall be served upon the parties by the Hearing
Clerk's Office.

So ORDERED this 6th day of April, 2011 in Washington, D.C.

MARY WERNER MCGRUDER.
AWG Docket No. 11 – 0082.
Decision and Order.
Filed April 8, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Chief Administrative Law Judge Peter M. Davenport.

AWG

Decision and Order

This matter is before the Administrative Law Judge upon the request of Petitioner for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On February 9, 2011, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing on March 17, 2011.

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation on February 18, 2011. The Petitioner has not responded to the Prehearing Order, either with a telephone number at which she could be reached or with the filing of any documentation with the Hearing Clerk. No response having been received, her request for a hearing will be deemed to have been waived and the matter will be decided upon the record.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

On September 18, 1987, the Petitioner (then Mary Werner) received a home mortgage loan in the amount of $37,000.00 from Farmers Home Administration (FmHA), United States Department of Agriculture (USDA), now Rural Development (RD) for property located in Wills Point, Texas. RX-1 & 2.

The Petitioner defaulted in payments on the indebtedness and the property was sold at a foreclosure sale on December 2, 2008. Proceeds from that sale were received in the amount of $38,488.52, leaving a balance due of $27,962.93. RX-6.

Treasury offsets totaling $815.32 exclusive of Treasury fees have been received. RX-6.

The remaining unpaid debt is in the amount of $27,147.61 exclusive of potential Treasury fees. RX-4.

Conclusions of Law

Petitioner is indebted to USDA Rural Development in the amount of $27,147.61 exclusive of potential Treasury fees for the mortgage loan extended to her.

All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.

The Respondent is entitled to administratively garnish the wages of the Petitioner.

Order

For the foregoing reasons, the wages of Petitioner shall be subjected to administrative wage garnishment at the rate of 15% of disposable pay, or such lesser amount as might be specified in 31 C.F.R. § 285.11(i).

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

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CHALONDA D. HOBSON.
AWG Docket No. 11 – 0143.
Decision and Order.
Filed April 13, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Jill S. Clifton.

AWG

Decision and Order

1. The hearing by telephone was held as scheduled on April 13, 2011. Chalonda D. Hobson, the Petitioner (APetitioner Hobson"), represents herself (appears *pro se*) and failed to appear. [She failed to appear by telephone; she did not answer at the number she provided on her Hearing Request, and she provided no other telephone number.]

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent (AUSDA Rural Development") and was represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

Summary of the Facts Presented

3. Petitioner Hobson owes to USDA Rural Development a balance of **$22,381.28**, in repayment of a $31,150.00 United States Department of Agriculture Farmers Home Administration loan made in 1996 for a home in Mississippi, the balance of which is now unsecured (Athe debt"). *See* USDA Rural Development Exhibits, plus Narrative, Witness & Exhibit

List (filed March 21, 2011), plus Mary Kimball's testimony, all of which are admitted into evidence.

4. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$22,381.28** would increase the current balance by $6,266.76, to $28,648.04. *See* USDA Rural Development Exhibits, esp. RX 8.

5. In September 2010, Petitioner Hobson sold the home in a Ashort sale." Based on the appraisal (RX 6), Petitioner Hobson's sale was priced right. By the time of the short sale, $4,630.98 in interest had accrued, and $7,259.26 in fees. The $38,859.64 due prior to the short sale included:

$ 26,969.40 principal
4,630.98 accrued interest
7,259.26 Afee" balance [real property taxes likely included]
$ 38,859.64

less escrow balance - 390.24

$ 38,469.40

6. The short sale in September 2010 yielded $11,500.00, which reduced the $38,469.40 amount owed to $26,969.40. Uncollected interest ($1,403.88) increased the debt to $28,373.28. A $6,009.00 Treasury ***offset***, minus the $17.00 collection fee, has paid down the debt by $5,992.00, reducing the balance to **$22,381.28**. *See* RX 7.

7. Petitioner Hobson's Hearing Request with statements and pay stubs (submitted in January 2011) are admitted into evidence and show that Petitioner Hobson works 2 jobs, making $* per hour (gross) at the nursing home working probably less than half-time; and making $* per hour (gross) on the week-end job for the rehabilitation center, perhaps for 11 hours each week-end. [Without testimony from Petitioner Hobson, and without a completed Consumer Debtor Financial Statement, I do not have all the information I would prefer to have.] Petitioner Hobson's monthly gross income from the two jobs together may be less than $**** per month; her weekly gross income may be roughly 30 times Federal minimum wage. It appears to me that any garnishment would result in

financial hardship to Petitioner Hobson and is NOT authorized. 31 C.F.R. § 285.11.

8. Petitioner Hobson is responsible and able to negotiate the disposition of the debt with Treasury's collection agency.

Discussion

9. Any garnishment would result in **financial hardship** to Petitioner Hobson and is NOT authorized. *See* paragraph 7. I encourage **Petitioner Hobson and the collection agency** to **negotiate promptly** the repayment of the debt. Petitioner Hobson, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Hobson, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less.

Findings, Analysis and Conclusions

10. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Hobson and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

11. Petitioner Hobson owes the debt described in paragraphs 3, 4, 5 and 6.

12. Any garnishment would result in **financial hardship** to Petitioner Hobson and is NOT authorized. 31 C.F.R. § 285.11.

13. This Decision does not prevent repayment of the debt through ***offset*** of Petitioner Hobson's **income tax refunds** or other **Federal monies** payable to the order of Ms. Hobson.

Order

14. Until the debt is repaid, Petitioner Hobson shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

15. USDA Rural Development, and those collecting on its behalf, are **NOT** authorized to proceed with garnishment. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.

JASON H. HOLLEY.
AWG Docket No. 11 – 0135.
Decision and Order.
Filed April 13, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Victor W. Palmer.

AWG

Decision and Order

On March 29, 2011, at 11:00 AM EDT, I held a hearing on a Petition to Dismiss the administrative wage garnishment proceeding to collect the debt allegedly owed to Respondent, USDA, Rural Development for losses it incurred under a mortgage USDA gave to Petitioner, Jason Holley and his former wife, Jennifer Holley. Petitioner represented himself and USDA Rural Development was represented by Mary Kimball. Petitioner and Mary Kimball were each duly sworn.

Respondent sustained financial loss on the loan given to Petitioner and his former wife to finance their purchase of a home at 303 Independence Drive, Milton, FL 32570. The loan, dated April 27, 1994, was in the amount of $42,500.00. The payments on the loans were not met and a foreclosure sale was held on May 22, 2000. The house sold for $27,500.00. Respondent received $26,791.84 after the deduction of selling expenses. $48,982.52 was still owed to USDA, Rural Development for principal, accrued interest, unpaid taxes and other expenses. Since the sale, $9,638.70 has been collected by the United States Treasury Department. The amount that is presently owed on the debt is $12,551.98 plus potential fees to Treasury of $3,514.55, or $16,066.53 total.

Petitioner and Jennifer Holley divorced, in 1999, prior to the foreclosure sale where Jennifer and their one child, a son, resided. At

present the son resides with the Petitioner and his new wife. Petitioner is employed in construction work by Spence Brothers Construction Company. He had worked there for many years until laid off due to the downturn in the company. He was just reemployed by Spence Brothers one year and one month ago and is paid wages on a weekly basis that presently comes to $**** per month gross, or $**** per month net. His monthly household expenses are: rent-$***; gasoline-$***; electric-$***; food-$***; cable TV-$**; medical-$***; miscellaneous-$***, or $**** total. I have concluded that the garnishment of any part of Petitioner's weekly paychecks during the next six (6) months would cause Petitioner undue financial hardship within the meaning and intent of the provisions of 31 C.F.R. § 285.11.

USDA, Rural Development has met its burden under 31 C.F.R. §285.11(f)(8) that governs administrative wage garnishment hearings, and has proved the existence and the amount of the debt owed by the Petitioner. On the other hand, Petitioner showed that he would suffer undue financial hardship if any amount of money is garnished from his disposable income at any time during the next six (6) months. During that time, Mr. Holley should undertake to contact Treasury to discuss a settlement plan to pay the debt.

Under these circumstances, the proceedings to garnish Petitioner's wages are suspended and may not be resumed for six (6) months from the date of this Order.

MARIO BARRIENTOS.
AWG Docket No. 11 – 0057.
Decision and Order.
Filed April 15, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Victor W. Palmer.

AWG

Decision and Order

This matter is before me upon the request of the Petitioner, Mario Barrientos, for a hearing to contest the efforts of the Respondent, USDA/Rural Development, to garnish his wages in order to collect a debt remaining from a mortgage loan it provided to him and to his former wife, Pearl Barrientos, on a house they had purchased together in Cameron County , TX.. A hearing was held by telephone conference, on February 3, 2011, and both Petitioner, Mario Barrientos, and Respondent's representative, Mary Kimball, participated and gave sworn testimony. Respondent's exhibits RX-1 through RX-7 were received in evidence after being indentified and authenticated by Ms. Kimball.

The exhibits showed that the mortgage loan was in the amount of $44,280.00 and was secured by a promissory note and a deed of trust dated November 9, 1993 (RX-1 and RX-2).

Mr. Barrientos completed and filed a Consumer Debtor Financial Statement and testified that, in 1997, he divorced Pearl Barrientos and has since remarried. At the time of the divorce, Pearl Barrientos was given possession of the house and was to pay the mortgage while Petitioner was ordered to pay child support. She failed to make the mortgage payments and a foreclosure sale was held on April 14, 2000 at which time $56,650.90 was owed for principal, interest and various fees. USDA received $36,001.00 from the sale and after the sale proceeds were posted, $20,649.90 was owed on the debt. Since the sale, Treasury has collected some of the debt so that the current debt is $20,546.16 plus potential fees to Treasury of $5,753.01, or $26,299.47 total (RX-7).Mr. Barrientos has remarried and shares monthly household expenses with his new wife. He had been laid off by a former employer and was unemployed until 10 months ago when he secured employment as a construction helper. His most recent weekly paycheck shows his net monthly earnings to be $**, and his monthly expenses to be $***.

Accordingly, USDA, Rural Development has met its burden under 31 C.F.R. §285.11(f)(8) that governs administrative wage garnishment hearings, and has proved the existence and the amount of the debt owed by the Petitioner. On the other hand, Petitioner has shown that he would suffer undue financial hardship if any amount of money is garnished from his disposable income. In light of the documents filed by Petitioner and his sworn testimony, I have concluded that garnishment should not take place at any time during the next six (6) months. During that time, Mr. Barrientos should undertake to contact Treasury to discuss dismissal of the debt for reason of financial hardship.

Under these circumstances, the proceedings to garnish Petitioner's wages are suspended and may not be resumed for six (6) months from the date of this Order.

CHRISTY MASON.
AWG Docket No. 11 – 0046.
Decision and Order.
Filed April 15, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Hearing Official James P. Hurt.

AWG

Final Decision and Order

This matter is before me upon the request of the Petitioner (or "Debtor"), Christy Mason, a/k/a Christy Bass, for a hearing in response to efforts of Respondent to institute a federal administrative wage garnishment against her. On December 17, 2010, I issued a Pre-hearing Order requiring the parties to exchange information concerning the amount of the debt.

I conducted a telephone hearing at the revised scheduled time on April 12, 2011. USDA Rural Development Agency (RD) was represented by Mary Kimball who testified on behalf of the RD agency.

Ms. Mason/Bass was present and was represented by Heath R. Hasenbeck, Esq.

The witnesses were sworn in. RD had filed a copy of a Narrative along with exhibits RX-1 through RX-8 on January 10, 2011 with the OALJ Hearing Clerk and certified that it mailed a copy of the same to Petitioner. Petitioner filed her financial statement on March 9, 2011 and a pay stub on March 10, 2011 which I now label as RX-1 and 2. Ms. Mason's attorney stated in his March 9, 2011 email (which I now label as RX-3) that Petitioner "does not contest the validity of the debt" but did raise the issue of financial hardship.

Ms. Mason/Bass stated that she split her household expenses with a roommate and as such, the amounts stated on her financial statement were her share of the monthly expenses. Her pay stub from the Arkansas local school district includes a mandatory 6% deduction for a teachers retirement system.

Petitioner owes $61,651.69 on the USDA RD FmHA loan, and in addition, potential fees of $18,495.51 due the US Treasury pursuant to the terms of the Promissory Note and guarantee.

Findings of Fact

1. On April 29, 2005, Petitioner Christy Mason and Terry Mason (her husband) obtained a USDA FmHA home mortgage loan for property located at 19** SW Asp** Street, Benton, AR 727**.[1] Prior to obtaining this loan, borrowers signed a Single Housing Loan Guarantee. RX -1, RX-2, and RX-3.

2. The Borrowers defaulted on the loans and a foreclosure sale was held on August 14, 2006. Narrative, RX-4 @ p. 3 of 8.

3. Prior to the sale, borrowers owed $184,431.40 as principal and $65,892.62 as interest. They also owed $6,013.74 as Lenders Liquidation costs. Narrative, RX-4 @ p. 3-7 of 8.

4. The net proceeds received by RD from the foreclosure sale was $129,987.26. RX- 4 @ p. 6 of 8.

5. After the application of the foreclosure sale proceeds, the borrowers jointly and severally owed $65, 651.69. RX-4 @ p. 7 of 8.

6. USDA has received payments amounting to $4,240.93 bringing the current amount owed to $61,651.69.

7. Terry Mason has been discharged in Chapter 7 bankruptcy. Narrative.

8. The potential fees due U.S. Treasury pursuant to the Loan Agreement are $18,495.51. Narrative, RX-8.

9. Ms. Mason/Bass is jointly and severally liable on the debt under the terms of the Promissory and Guarantee Notes.

10. Ms. Mason stated that she has been gainfully employed for more than one year, but she raised issues of financial hardship.

11. Ms. Mason provided a financial schedule of expenses under oath and a monthly pay stub from her employer. PX-1 and PX-2.

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[1]Complete address maintained in USDA records.

12. Using the Financial Hardship Calculation program and data from her sworn testimony and financial statement (PX – 1,2), I made a calculation of the appropriate wage garnishment. The calculations are enclosed.[2]

Conclusions of Law

1. Petitioner, Christy Mason/Bass, is indebted to USDA's Rural Development program in the amount of $61,651.69.

2. In addition, Petitioner is indebted for potential fees to the US Treasury in the amount of $18,495.51.

3. All procedural requirements for administrative wage garnishment set forth in 31 C.F.R. ¶ 285.11 have been met.

4. Petitioner is under a duty to inform USDA's Rural Development of her current address, employment circumstances, and living expenses.

5. RD may administratively **not** garnish Petitioner's wages.

6. After one year, RD may reassess Petitioner's financial hardship criteria.

Order

1. The requirements of 31 C.F.R. ¶ 288.11(i) & (j) have been met.

2. The wages of Petitioner may **not** be garnished for one year.

3. After one year, RD may reassess the Debtor's financial position and modify the garnishment percentage as circumstances dictate.

4. Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's office.

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[2] The Financial Hardship Calculation is not posted on the OALJ website.

ROY NICKERSON.
AWG Docket No. 11 – 0008.
Decision and Order.
Filed April 15, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Victor W. Palmer.

AWG

Decision and Order

Pursuant to a Hearing Notice, I held a hearing in this proceeding by telephone, on December 2, 2010, at 3:00 PM, Eastern Time. Petitioner, Roy Nickerson, and Respondent's representative, Mary E. Kimball, participated and were sworn. Ms. Kimball introduced, identified and authenticated records regularly maintained by USDA, Rural Development that were received as Exhibits RX-1 through RX-6. Petitioner completed and filed a "Consumer Debtor Financial Statement" that he verified as accurate and it was received in evidence. At issue is the nonpayment of a debt owed to USDA, Rural Development on a home mortgage loan on property that Mr. Nickerson had owned with his former wife, Lola Nickerson, who was given the home under the terms of their divorce decree that ordered her to pay the remaining debt.

However, she did not. The property was sold in a foreclosure sale that, after payment of the remaining principal, interest and various expenses, left a debt of $27,884.09 owed to USDA, Rural Development. Since then, $13,092.83 was received from Treasury by way of offsets against income tax refunds. Mr. Roy Nickerson is employed by a college performing a maintenance work at salary which, after deducting necessary living expenses, would result in undue financial hardship if more than $* per month is garnished from his salary.

Findings

The testimony and exhibits received in evidence proved that:

On October 9, 1985, petitioner and his former wife obtained a loan in the amount of $44,100.00 from USDA Farmers Home Administration

(now USDA, Rural Development) for the purchase of a home at 6000 Meadowbrook Dr., Hitchcock, TX 77563 (RX-1).

The mortgage loan was not paid and the property was sold at a foreclosure sale, on December 1, 1998. USDA, Rural Development received $22,000.00 from the sale. At that time, the amount due to USDA, Rural Development for principal, interest and fees was $49,884.00. After the funds from the foreclosure sale were applied, the amount of the debt still owed was $27,884.09. Since the sale, USDA, Rural Development has received $13,092.83 from the U.S. Treasury Department. The balance owed to USDA, Rural Development is $14,791.26 plus an additional $4,141.55 owed to Treasury for potential collection fees for a total of $18,932.81 (RX-3 and RX-4).

Mr. Nickerson is currently employed performing maintenance work for a college at a monthly wage of $***. He resides with and supports a 13 year old daughter. He pays $*** per month for rent, car payments, gasoline, electric, natural gas, food, cable TV, clothing, water, telephones and auto insurance. Upon deducting these expenses from his net monthly income, $** remains. Inasmuch as a maximum of 15% may be garnished from disposable income, the amount that may appropriately be garnished from his monthly salary may not exceed $*.

Conclusions

1. USDA, Rural Development has proven that Roy Nickerson is indebted to USDA, Rural Development in the amount of $14,791.26 plus an additional $4,141.55 is owed to Treasury for potential collection fees for a total of $18,932.81.

2. Based upon the Petitioner's current income and necessary living expenses, administrative wage garnishment of Petitioner's wages shall be at the rate of $* per month. A higher amount of monthly garnishment would cause him undue financial hardship.

Order

For the foregoing reasons, administrative wage garnishment of the wages of the Petitioner, Roy Nickerson may be made provided the sum garnished each month does not exceed $70.00.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk.

DORIS PAIGE.
AWG Docket No. 11 – 0142.
Decision and Order.
Filed April 18, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Jill S. Clifton.

AWG

Decision and Order

1. The hearing by telephone was held as scheduled on April 13, 2011. Doris E. Paige, the Petitioner (APetitioner Paige"), participated, representing herself (appearing *pro se*).

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent (AUSDA Rural Development") and was represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

Summary of the Facts Presented

3. Petitioner Paige owes to USDA Rural Development a balance of **$24,715.88**, in repayment of a $42,500.00 United States Department of Agriculture Farmers Home Administration loan made in 1988 for a home in Mississippi, the balance of which is now unsecured (Athe debt"). *See* USDA Rural Development Exhibits, plus Narrative, Witness & Exhibit List (filed March 23, 2011), plus Mary Kimball's testimony, all of which

are admitted into evidence. *See* especially RX 7 for the loan balance, plus Mary Kimball's testimony that another $182.50 from garnishment has been applied to the debt since RX 7 was prepared. [The loan balance will change, because garnishment is ongoing; the balance may have been reduced by the time I sign this Decision.]

4. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$24,715.88** would increase the current balance by $6,920.45, to $31,636.33. *See* RX 7, plus Mary Kimball's testimony that another $182.50 from garnishment has been applied to the debt, which changes the figures from those shown on RX 7.

5. About 10 years after the loan was made, the loan was reamortized, in 1998. RX 2. The loan had become delinquent, and the reamortization made the loan current, by adding unpaid interest to the principal balance. Petitioner Paige was not able to keep the loan current; she testified that she was unable financially to stop the foreclosure. *See* RX 4 and RX 5.

6. Petitioner Paige's Hearing Request and attached statements (including her Financial Statement, wage stub copies, and bill copies); and Petitioner Paige's testimony, are all admitted into evidence. Petitioner Paige was devastated by her son's death in about April 2000. RX 5, p. 5, and Petitioner Paige's testimony. Petitioner Paige's son was killed in St. Louis, Missouri, and Petitioner Paige went to St. Louis, which caused her to be out of work and contributed to her falling behind in paying the loan. RX 5, p. 5. Petitioner Paige testified that her son's death impacted her health, so that for years she was unable to work much, if at all.

7. In June 2000, Petitioner Paige would have been able to stop the foreclosure sale by paying the $1,725.05 in arrears, plus paying any real estate tax and homeowner's insurance that needed to be paid to be current. RX 5, p. 1. Petitioner Paige failed to do so. The foreclosure sale was held on October 30, 2001. By the time of the foreclosure sale, $3,543.02 in interest had accrued, and $885.00 in fees. The $44,790.30 due prior to the foreclosure sale included:

$ 40,362.28 principal
3,543.02 accrued interest
885.00 Afee" balance
$ 44,790.30

less escrow balance -15.18

$ 44,775.12

RX 6.

8. The foreclosure sale on October 30, 2001 yielded $18,670.00, which reduced the $ 44,775.12 amount owed to $26,105.12. Additional pre-foreclosure fees ($526.92) increased the debt to $26,632.04. A $1,308.00 Treasury ***offset***, minus the $11.75 collection fee, has paid down the debt by $1,296.25; and recent garnishments minus collection fees have paid down the debt by $619.91 ($437.41, plus the $182.50 Mary Kimball testified about), reducing the balance to **$24,715.88**. *See* RX 6.

9. Petitioner Paige's evidence (described in paragraph 6) shows that Petitioner Paige works as a caregiver/sitter (PRN), making $* per hour (gross), or $* per hour (gross), or $* per hour (gross), depending on her assignment and her hours. Garnishment is ongoing. Petitioner Paige needs reliable transportation, especially to get to work, and she testified that she does not have it because she cannot afford to get it. She testified that she pays $*** per month for rent, and that does not include utilities. *See also* her documentary evidence. It appears to me that garnishment any greater than $* per pay period would result in **financial hardship** to Petitioner Paige and is NOT authorized. 31 C.F.R. § 285.11.

10. Further, Petitioner Paige needs to determine whether she is required to file income tax returns for the past few years. Petitioner Paige, even if you would have difficulty finding W-2 forms and other papers you need, a qualified person such as an accountant can advise and assist you. Please ask for help.

11. Petitioner Paige is responsible and willing and able to negotiate the disposition of the debt with Treasury's collection agency.

Discussion

12. Garnishment any greater than $20.00 per pay period would result in **financial hardship** to Petitioner Paige and is NOT authorized. 31 C.F.R. § 285.11. *See* paragraph 9. I encourage **Petitioner Paige and the collection agency** to **negotiate promptly** the repayment of the debt. Petitioner Paige, this will require **you** to telephone the collection agency

after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Paige, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less.

Findings, Analysis and Conclusions

13. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Paige and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

14. Petitioner Paige owes the debt described in paragraphs 3 through 8.

15. Garnishment any greater than $20.00 per pay period would result in **financial hardship** to Petitioner Paige and is NOT authorized. 31 C.F.R. § 285.11. I am NOT, however, ordering any amounts already collected through garnishment of Petitioner Paige's pay prior to implementation of this Decision to be returned to Petitioner Paige.

16. This Decision does not prevent repayment of the debt through ***offset*** of Petitioner Paige's **income tax refunds** or other **Federal monies** payable to the order of Ms. Paige.

Order

17. Until the debt is repaid, Petitioner Paige shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

18. USDA Rural Development, and those collecting on its behalf, are already garnishing Petitioner Paige's pay, but garnishment any greater than $20.00 per pay period would result in **financial hardship** to Petitioner Paige and is NOT authorized. 31 C.F.R. § 285.11.

19. USDA Rural Development, and those collecting on its behalf, will NOT be required to return to Petitioner Paige any amounts already collected through garnishment of Petitioner Paige's pay, prior to implementation of this Decision.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties. Done at Washington, D.C.

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MILISSA TAYLOR.
AWG Docket No. 11 – 0141.
Decision and Order.
Filed April 18, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Jill S. Clifton.

AWG

Decision and Order

1. The hearing was held by telephone, as scheduled, on April 13, 2011. Milissa Taylor, formerly known as Milissa A. Utter, the Petitioner (Petitioner Taylor), failed to appear. She failed to appear by telephone; no one answered the telephone number she had provided on her Hearing Request (there was a recording), and she did not provide any other phone number where she could be reached.

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent (USDA Rural Development) and was represented by Mary E. Kimball. The address for USDA Rural Development for this case is:

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

3. I encourage **Petitioner Taylor and the collection agency** to work together to **establish a repayment schedule** rather than immediately proceeding with garnishment, even though this Decision authorizes garnishment, up to 15% of Petitioner Taylor's disposable pay. Petitioner Taylor, obviously, will have to make herself available to the collection agency if she wants to negotiate. *See* paragraph 10.

4. This is Petitioner Taylor's case (she filed the Petition), and in addition to failing to be available for the hearing on April 13, 2011, Petitioner Taylor failed to file with the Hearing Clerk a completed Consumer Debtor Financial Statement, or any information responsive to my Order issued March 9, 2011.

Summary of the Facts Presented

5. Petitioner Taylor owes to USDA Rural Development a balance of **$41,884.54** (as of March 3, 2011), in repayment of a United States Department of Agriculture / Rural Housing Service ***Guarantee*** (*see* RX 3, esp. p. 2) for a loan made in 2006, the balance of which is now unsecured (the debt). Petitioner Taylor borrowed to buy a home in Illinois. *See* USDA Rural Development Exhibits RX 1 through RX 8 which I admit into evidence, together with the Narrative, Witness & Exhibit List (filed March 9, 2011), and the testimony of Mary Kimball.

6. This ***Guarantee*** establishes an **independent** obligation of Petitioner Taylor, I certify and acknowledge that if the Agency pays a loss claim on the requested loan to the lender, I will reimburse the Agency for that amount. If I do not, the Agency will use all remedies available to it, including those under the Debt Collection Improvement Act, to recover on the Federal debt directly from me. The Agency's right to collect is independent of the lender's right to collect under the guaranteed note and will not be affected by any release by the lender of my obligation to repay the loan. Any Agency collection under this paragraph will not be shared with the lender. RX 3, p. 2.

7. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$41,884.54** would increase the current balance by $11,727.67, to $53,612.21. RX 8.

8. I cannot determine whether Petitioner Taylor's disposable pay supports garnishment without creating hardship. 31 C.F.R. § 285.11. I cannot calculate Petitioner Taylor's disposable pay (after subtracting income tax, social security, Medicare, health insurance, and any other Aeligible" withholding from her gross pay), because there is no evidence to use for such calculations. I cannot calculate Petitioner Taylor's current reasonable and necessary living expenses. Since I do not have the information I would need to determine whether garnishment would

create hardship, garnishment up to 15% of Petitioner Taylor's disposable pay is authorized. 31 C.F.R. § 285.11.

9. Petitioner Taylor is responsible and able to negotiate the disposition of the debt with the U.S. Department of the Treasury or its collection agency.

Discussion

10. Garnishment is authorized, up to 15% of Petitioner Taylor's disposable pay. *See* paragraphs 4 and 8. I encourage **Petitioner Taylor and the collection agency** to **negotiate promptly** the repayment of the debt. Petitioner Taylor, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Taylor, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less.

Findings, Analysis and Conclusions

11. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Taylor and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

12. Petitioner Taylor owes the debt described in paragraphs 5, 6 and 7.

13. **Garnishment is authorized**, as follows: up to 15% of Petitioner Taylor's disposable pay. 31 C.F.R. § 285.11.

14. Repayment of the debt may also occur through ***offset*** of Petitioner Taylor's **income tax refunds** or other **Federal monies** payable to the order of Ms. Taylor.

Order

15. Until the debt is repaid, Petitioner Taylor shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

16. USDA Rural Development, and those collecting on its behalf, are authorized to proceed with garnishment, up to 15% of Petitioner Taylor's disposable pay. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties. Done at Washington, D.C.

CHARMAINE MOORE.
AWG Docket No. 11 – 0107.
Decision and Order.
Filed April 18, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Hearing Official James P. Hurt.

AWG

DECISION AND ORDER

This matter is before me upon the request of Charmaine Moore for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On January 14, 2011, I issued a Prehearing Order to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing.

The USDA Rural Development (RD), Respondent, complied with that Order and a Narrative was filed, together with supporting documentation on January 31, 2011.

Ms. Moore filed documentation with her Petition relating to her sale/transfer of the residence to her co-borrower, Ricky Hathorn which I now label collectively as PX-1. On February 15, 2011 at the scheduled time, both parties were available for the conference call. The parties were sworn. Following the hearing, Ms. Moore forwarded her financial statements under oath and a bi-weekly pay stub which I now label as PX 2 and 3, respectively. Also, RD filed clarification to their prior

submissions to the Hearing Clerk as Revised Narrative and Additional exhibits RX-9 and 10. Ms. Moore raised the issue of Financial Hardship.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law, and Order will be entered

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Findings of Fact

On May 29, 1992, Ricky Hathorn and Charmaine Moore, the Petitioner obtained a $ 40,000.00 USDA FmHA loan for a primary residence located at 116## Road 832, Philadelphia, MS 39###.[1] The Petitioner signed a promissory note and a mortgage. RX-1, RX-2.

On October 29, 1998, Petitioner, Charmaine Moore sold her remaining interest to Ricky Hathorn. RX-7 @ p. 8 of 9. Ms. Moore did not obtain a release of her obligation on the May 29, 1992 note and remained jointly and severally liable.

The borrowers defaulted on the loan and on September 28, 2004, she was mailed a notice of acceleration to her last known address. RX-4 @ p.1 of 11.

The property was appraised at $25,000 on May 24, 2010. RX-11.

The Ricky Hathorn entered into a short sale on July 26, 2010 and USDA received a net of $20,000 from the sale. RX-9.

At the time of the sale, Ms. Moore jointly and severally owed a total of $54,216.29, including principal, interest and fees. Narrative, RX – 5 @ p. 1 of 2, RX-9.

After application of the sale proceeds, Ms. Moore jointly and severally owed $34,216.29, plus uncollected interest of $3,682.72, and uncollected Pre-foreclosure fee of $232.78 for a total of $38,131.79. RX-9.

Since the sale, RD has received a insurance refund in the amount of $245.18 and a net $3,128.00 from treasury. Narrative, RX 9.

The remaining unpaid debt is in the amount of $34,758.61 exclusive of potential Treasury fees. RX-9, 10.

The remaining potential treasury fees are $9,732.41. RX-10.

Ms. Moore has been employed since March 2010.

Ms. Moore submitted her financial statements under oath which included her gross bi-weekly salary and monthly expenses. It appears her wages are barely more than the mandatory minimum wage. Although it appears from her February 2011 pay stub she did not have

[1] Complete address maintained in USDA files.

full time employment, I calculated Petitioner's potential wages at 40 hours per week.

Based upon the available financial information, I performed a Financial Hardship calculation using standard Federal and State Income Tax rate for head of Household. The result of the calculation is attached[2].

Conclusions of Law

Charmaine Moore is indebted to USDA Rural Development in the amount of $34,758.61 for the mortgage loan extended to her.

Charmaine Moore is indebted to the US Treasury for potential fees in the amount of $9,732.41.

All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.

The Respondent is **not** entitled to administratively garnish the wages of the Petitioner for a period of one year. After one year, RD may review the then existing financial statements and assess the legal entitlement to garnish her wages.

Order

For the foregoing reasons, the wages of Charmaine Moore shall **not** be subjected to administrative wage garnishment for a period of one year

After one year, RD may re-assess Ms. Moore's financial position.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

Done at Washington, D.C.

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[2] The Financial Hardship Calculation will not be posted on the OALJ website.

RAY FORD.
AWG Docket No. 11 – 0146.
Decision and Order.
Filed April 19, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Jill S. Clifton.

AWG

Decision and Order

1. The hearing was held on April 14, 2011, as scheduled. Ray E. Ford, the Petitioner (APetitioner Ford") failed to appear. [Petitioner Ford failed to appear by telephone. He could not be reached at the telephone number he provided on his Hearing Request (which yielded AMessage No. 21: the Cricket phone is no longer in service"), and he provided no other phone number.]

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent (AUSDA Rural Development") and was represented by Ms. Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

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314.457.4426 FAX

3. I encourage **Petitioner Ford and the collection agency** to work together to **establish a repayment schedule** rather than immediately proceeding with garnishment, even though this Decision authorizes garnishment, up to 15% of Petitioner Ford's disposable pay. Petitioner Ford, obviously, will have to make himself available to the collection agency if he wants to negotiate. *See* paragraphs 10 and 11.

4. This is Petitioner Ford's case (he filed the Petition), and in addition to failing to be available for the hearing, Petitioner Ford failed to file with the Hearing Clerk any information in response to my Order issued March 8, 2011. Petitioner Ford's deadline for that was April 1, 2011.

Summary of the Facts Presented

5. Petitioner Ford owes to USDA Rural Development a balance of **$25,085.14** (as of March 10, 2011), in repayment of a United States Department of Agriculture / Farmers Home Administration loan made in 1996, the balance of which is now unsecured (Athe debt"). Petitioner Ford borrowed to buy a home in Texas. *See* USDA Rural Development Exhibits, plus Narrative, Witness & Exhibit List (filed March 21, 2011), which are admitted into evidence, together with the testimony of Mary Kimball.

6. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$25,085.14** would increase the current balance by $7,023.84, to $32,108.98. *See* USDA Rural Development Exhibits, esp. RX 8.

7. The amount Petitioner Ford borrowed was $59,780.00 in 1996. By the time of the foreclosure sale in 2001, that debt had grown to $80,132.88. Petitioner Ford was credited with $46,336.00 in sale proceeds. RX 7.

8. Petitioner Ford has paid the balance down to **$25,085.14**, as of March 10, 2011 (not including ARemaining potential fees" which are the collection fees). RX 7 and RX 8.

9. Petitioner Ford failed to file a Consumer Debtor Financial Statement or any other financial information or anything in response to my Order dated March 8, 2011; consequently there is no evidence before me regarding Petitioner Ford's disposable pay or any 31 C.F.R. § 285.11 factors. I must presume that Petitioner Ford's disposable pay supports garnishment, up to 15% of Petitioner Ford's disposable pay.

10. Petitioner Ford is responsible and capable of negotiating the repayment of the debt with Treasury's collection agency.

Discussion

11. I encourage **Petitioner Ford and the collection agency** to **negotiate promptly** the repayment of the debt. Petitioner Ford, this will

require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Ford, you may choose to offer to compromise the debt for an amount you are able to pay, to settle the claim for less.

Findings, Analysis and Conclusions

12. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Ford and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

13. Petitioner Ford owes the debt described in paragraphs 5, 6, 7 and 8.

14. Garnishment is authorized, up to 15% of Petitioner Ford's disposable pay. 31 C.F.R. § 285.11.

15. Repayment of the debt may also occur through ***offset*** of Petitioner Ford's **income tax refunds** or other **Federal monies** payable to the order of Mr. Ford.

Order

16. Until the debt is fully paid, Petitioner Ford shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in his mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

17. USDA Rural Development, and those collecting on its behalf, are authorized to proceed with garnishment, up to 15% of Petitioner Ford's disposable pay.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties. Done at Washington, D.C.

WILLIAM HOLTZ JR.
AWG Docket No. 11 – 0129.
Decision and Order.
Filed April 19, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Jill S. Clifton.

AWG

Decision and Order

1. The hearing by telephone was held as scheduled on April 12, 2011. Mr. William J. Hotz, Jr., the Petitioner (APetitioner Hotz, Jr."), failed to appear. [He failed to appear by telephone; he was at work and not available at his home phone.]

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent (AUSDA Rural Development") and was represented by Mary E. Kimball and Marsha Moore. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

Summary of the Facts Presented

3. Petitioner Hotz, Jr. owes to USDA Rural Development a balance of **$30,853.74** in repayment of loans that he borrowed in 1998. The loans were from the United States Department of Agriculture, Rural Housing Service, a part of USDA Rural Development. Petitioner Hotz, Jr. borrowed to buy a home in Iowa, and the **$30,853.74** balance is now unsecured (Athe debt"). *See* USDA Rural Development Exhibits, plus Narrative, Witness & Exhibit List (filed March 9 and April 12, 2011), which are admitted into evidence, together with the testimony of Mary Kimball.

4. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$30,853.74** would increase the current balance by $8,639.05, to $39,492.79.

5. The amount borrowed from USDA Rural Development was $40,000.00 in 1988 ($36,626.43 in the assumed loan, plus $3,373.57).

By the time of the foreclosure sale in 2009, that debt had grown to $41,370.24. From the sale of the home (for $8,000.00), $7,369.62 was applied to the debt. A small escrow refund ($50.88), plus collections since then, have reduced the balance to **$30,853.74**, as of April 12, 2011. RX 10.

6. Petitioner Hotz, Jr.'s Consumer Debtor Financial Statement (filed in April 2011), is admitted into evidence, together with his Hearing Request statements (made in December 2010). Petitioner Hotz, Jr.'s pay is about $*** per month; and his reasonable and necessary living expenses for 3 children and himself are about $*** per month.

7. Petitioner Hotz, Jr.'s disposable pay does not support garnishment, which would create financial hardship. 31 C.F.R. § 285.11.

8. Petitioner Hotz, Jr. is responsible and willing and able to negotiate the repayment of the debt with Treasury's collection agency.

Discussion

9. NO garnishment is authorized. *See* paragraphs 6 & 7. I encourage **Petitioner Hotz, Jr. and the collection agency** to **negotiate promptly** the repayment of the debt. Petitioner Hotz, Jr., this will require **you** to telephone the collection agency after you receive this Decision. Petitioner Hotz, Jr., you may request that the debt be apportioned separately to you and your former wife the co-borrower, and that you be permitted to compromise the debt for an amount you are able to pay, to settle the claim for less. You may ask that you be given consideration for your pay being less than your reasonable and necessary living expenses, particularly since you provide for your children. The toll-free number for you to call is **1-888-826-3127**.

Findings, Analysis and Conclusions

10. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Hotz, Jr. and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

11. Petitioner Hotz, Jr. owes the debt described in paragraphs 3, 4 and 5.

12. **NO garnishment is authorized**, because garnishment would create financial hardship, especially considering the responsibilities Petitioner Hotz, Jr. carries regarding his children. 31 C.F.R. § 285.11.

13. This Decision does not prevent repayment of the debt through ***offset*** of Petitioner Hotz, Jr.'s **income tax refunds** or other **Federal monies** payable to the order of Mr. Hotz, Jr.

Order

14. Until the debt is repaid, Petitioner Hotz, Jr. shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in his mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

15. USDA Rural Development, and those collecting on its behalf, are **NOT** authorized to proceed with garnishment.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.

ROBERT DAUM.
AWG Docket No. 11 – 0030.
Decision and Order.
Filed April 19, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Jill S. Clifton.

AWG

Decision and Order

1. Robert Daum, also known as Robert T. Daum, the Petitioner ("Petitioner Daum"), represents himself (appears *pro se*). The hearing by telephone was held on January 19 and on April 14, 2011.

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and is represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

3. I encourage **Petitioner Daum and the collection agency** to work together to **establish a repayment schedule** rather than immediately proceeding with garnishment, even though this Decision **authorizes garnishment beginning November 2011**. Petitioner Daum, obviously, will have to make himself available to the collection agency if he wants to negotiate. *See* paragraph 10.

Summary of the Facts Presented

4. USDA Rural Development's Exhibits, plus Narrative, Witness & Exhibit List, were filed on December 16, 2010, and are admitted into evidence, together with the testimony of Ms. Kimball.

5. Petitioner Daum did not file a "Consumer Debtor Financial Statement" or copies of his pay stub(s), or other financial information, but he did testify, and his testimony is admitted into evidence.

6. Petitioner Daum owes to USDA Rural Development **$19,781.57** (as of November 29, 2010) in repayment of a Rural Housing Service loan made in 1995 for a home in Tennessee, the balance of which is now unsecured ("the debt").

7. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$19,781.57** would increase the current balance by $5,538.84, to $25,320.41. *See* USDA Rural Development Exhibits, esp. RX 6.

8. Petitioner Daum works long hours as a home appliances technician, going from place to place working from his van. He supports his son as well as himself; for 7 years he was a "single parent." Petitioner Daum is making payments to the Internal Revenue Service for back taxes; he may have additional tax liability. To prevent hardship, potential garnishment to repay "the debt" (*see* paragraph 6) must be limited to **0%** of Petitioner

Daum's disposable pay through October 2011; then up to **15%** of Petitioner Daum's disposable pay thereafter. 31 C.F.R. § 285.11.

9. Petitioner Daum is responsible and willing and able to negotiate the disposition of the debt with Treasury's collection agency.

Discussion

10. Through October 2011, no garnishment is authorized. Beginning November 2011, garnishment up to 15% of Petitioner Daum's disposable pay is authorized. *See* paragraphs 8 and 9. I encourage **Petitioner Daum and the collection agency** to **negotiate promptly** the repayment of the debt. Petitioner Daum, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Daum, you may ask that the debt be **apportioned separately** to you and your co-borrower, Linda W. Daum. You may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less.

Findings, Analysis and Conclusions

11. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Daum and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

12. Petitioner Daum owes the debt described in paragraphs 6 and 7.

13. **Garnishment is authorized**, as follows: through October 2011, **no** garnishment. Beginning November 2011, garnishment up to 15% of Petitioner Daum's disposable pay. 31 C.F.R. § 285.11.

14. Repayment of the debt may also occur through ***offset*** of Petitioner Daum's **income tax refunds** or other **Federal monies** payable to the order of Mr. Daum.

Order

15. Until the debt is repaid, Petitioner Daum shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in his mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

16. USDA Rural Development, and those collecting on its behalf, are **not** authorized to proceed with garnishment through October 2011.

Beginning November 2011, garnishment up to 15% of Petitioner Daum's disposable pay is authorized. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.

CHARLES MOORE.
AWG Docket No. 11 – 0153.
Decision and Order.
Filed April 20, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Victor W. Palmer.

AWG

Decision and Order

On April 19, 2011, at 12:00 PM, EDT, I held a hearing on a Petition to Dismiss an administrative wage garnishment proceeding to collect a debt allegedly owed to Respondent, USDA, Rural Development for losses it incurred under a loan guarantee it gave to assist Petitioner, Charles Moore and Sara Green to obtain a mortgage to purchase a house. Petitioner represented himself and USDA Rural Development was represented by Mary Kimball. Petitioner and Mary Kimball were each duly sworn. Various exhibits were offered by Ms. Kimball that were received in evidence (RX-1 through RX-8).

Respondent sustained financial loss on the loan given to Petitioner and his former partner to finance their purchase of a house located at 506 Airbase Road, Pollack, LA 71467. The loan, dated November 6, 2006, was in the amount of $156,120.00 (Exhibit RX-2). The payments on the mortgage were not met and a foreclosure sale was held on December 16, 2008, at which time the house sold for $88,700.00 (Exhibit RX-6) respondent paid Fannie Mae $77,118.50 for accrued interest, advances, attorney fees, appraisal and property inspections and selling costs (Exhibits RX-3 and RX-4). Since the sale, $3,337.00 has been collected by the United States Treasury Department. The amount that is presently

owed on the debt is $73,781.50 plus potential fees to Treasury of $20,658.82 or $94,440.32 total (Exhibit RX-8).

Petitioner is employed by the Penfield School District in Rochester, NY, as a School Bus Driver. His wages are paid on a bi-weekly basis, and he presently receives $***-$*** per month net. His monthly household expenses are: rent-$**; gasoline-$**; electric-$**; utilities-$*; back taxes-$**; miscellaneous-$**, or $*** total. I have concluded that the garnishment of any part of Petitioner's weekly paychecks during the next six (6) months would cause Petitioner undue financial hardship within the meaning and intent of the provisions of 31 C.F.R. § 285.11. After that time, the maximum that may be garnished will be $* per month.

USDA, Rural Development has met its burden under 31 C.F.R. §285.11(f)(8) that governs administrative wage garnishment hearings, and has proved the existence and the amount of the debt owed by the Petitioner. On the other hand, Petitioner has shown that he would suffer undue financial hardship if any amount of money is garnished from his disposable income at any time during the next six (6) months and that the maximum that may be garnished after that perod of time from his disposable income should not exceed $50.00 per month. During the next six months, Mr. Moore should undertake to contact an attorney to discuss filing for bankruptcy or to arrange a settlement plan with Treasury to pay the debt.

Under these circumstances, the proceedings to garnish Petitioner's wages are suspended and may not be resumed for six (6) months from the date of this Order, and subsequent to that time no more than $50.00 a month may be garnished.

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JUANTITA YOUNG.
AWG Docket No. 10 – 0422.
Decision and Order.
Filed April 21, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Chief Administrative Law Judge Peter M. Davenport.

AWG

Decision and Order

This matter is before the Administrative Law Judge upon the request of Petitioner for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On September 27, 2010, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing on December 16, 2010.

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation on November 9, 2010. The Petitioner failed to provide a telephone number as directed in the Prehearing Order and has neither contacted the Hearing Clerk nor filed any documents. By reason of her failure to provide additional information, the case will be determined on the record.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

On August 30, 1996, the Petitioner received a home mortgage loan in the amount of $54,780.00 from Farmers Home Administration (FmHA), United States Department of Agriculture (USDA), now Rural Development (RD) for property located in Jasonville, Indiana. RX-1 and 2.

The property was sold at a short sale on September 15, 2000 with proceeds realized from that sale in the amount of $50,000.00, leaving a balance due of $17,975.96. RX-5-7.

Treasury offsets totaling $3,061.80 exclusive of Treasury fees have been received. RX-7.

The remaining unpaid debt is in the amount of $14,914.16 exclusive of potential Treasury fees. RX-4.

Conclusions of Law

Petitioner is indebted to USDA Rural Development in the amount of $14,914.16 exclusive of potential Treasury fees for the mortgage loan extended to her.

All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.

The Respondent is entitled to administratively garnish the wages of the Petitioner.

Order

For the foregoing reasons, the wages of Petitioner shall be subjected to administrative wage garnishment at the rate of 15% of disposable pay, or such lesser amount as might be specified in 31 C.F.R. § 285.11(i).

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

JEAN CONSTABLE.
AWG Docket No. 11 – 0145.
Decision and Order.
Filed April 22, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Jill S. Clifton.

AWG

Decision and Order

1. The hearing was held by telephone as scheduled, on April 14, 2011. Ms. Jean Constable, also known as Delores Jean Constable, the Petitioner (Petitioner Constable) participated, representing herself (appearing *pro se*).

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and was represented by Ms. Mary Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

Summary of the Facts Presented

3. Petitioner Constable owes to USDA Rural Development a balance of **$43,021.15** (as of March 2, 2011), in repayment of a United States Department of Agriculture / Rural Housing Service ***Guarantee*** (*see* RX-2, esp. p. 2) for a loan made in 2005, the balance of which is now unsecured ("the debt"). Petitioner Constable borrowed to buy a home in Kentucky. *See* USDA Rural Development Exhibits RX 1 through RX 8 which I admit into evidence, together with the Narrative, Witness & Exhibit List (filed March 21, 2011), and the testimony of Mary Kimball.

4. This ***Guarantee*** establishes an **independent** obligation of Petitioner Constable, "I certify and acknowledge that if the Agency pays a loss claim on the requested loan to the lender, I will reimburse the Agency for that amount. If I do not, the Agency will use all remedies available to it, including those under the Debt Collection Improvement Act, to recover on the Federal debt directly from me. The Agency's right to collect is independent of the lender's right to collect under the guaranteed note and will not be affected by any release by the lender of my obligation to repay the loan. Any Agency collection under this paragraph will not be shared with the lender." RX 2, p. 2.

5. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on of **$43,021.15** would increase the current balance by $12,045.92, to $55,067.07. RX 8.

6. Petitioner Constable's "Consumer Debtor Financial Statement" and accompanying documentation (filed March 25, 2011) are admitted into evidence, together with Petitioner Constable's testimony, together with Petitioner Constable's Hearing Request and accompanying documentation. Petitioner Constable is 70 years old; her ability to work was interrupted by her atrial fibrillation. Petitioner Constable is again working (beginning February 10, 2011), sewing, for $* per hour. Petitioner Constable's disposable pay (within the meaning of 31 C.F.R. § 285.11) does **not** support garnishment and **no** garnishment is authorized. Petitioner Constable's social security payments are already being ***offset***, which causes financial hardship.

7. Petitioner Constable is responsible and willing and able to negotiate the repayment of the debt with Treasury's collection agency.

Discussion

8. **NO garnishment is authorized**. I encourage **Petitioner Constable and the collection agency** to **negotiate promptly** the repayment of the debt. Petitioner Constable, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. You may request a ***financial hardship discharge***. You may want to explain your health problems, including Atrial Fibrillation, and to obtain your physician's statement for the collection agency. You may want to describe the impact of the death from Lou Gehrig's disease[1] of your husband co-borrower, including the financial aftermath you are still coping with.

Findings, Analysis and Conclusions

9. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Constable and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

[1] Amyotrophic lateral sclerosis, or ALS, is a disease of the nerve cells in the brain and spinal cord that control voluntary muscle movement. ALS is also known as Lou Gehrig's disease.

10. Petitioner Constable owes the debt described in paragraphs 3, 4 and 5.

11. **NO garnishment is authorized**, because garnishment would create financial hardship. 31 C.F.R. § 285.11. In fact, I recommend a ***financial hardship discharge*** of the debt.

12. Repayment of the debt may occur through ***offset*** of Petitioner Constable's **income tax refunds** or other **Federal monies** payable to the order of Ms. Constable. Petitioner Constable's social security payments are already being ***offset***, which causes financial hardship.

Order

13. Until the debt is fully paid, Petitioner Constable shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

14. USDA Rural Development, and those collecting on its behalf, are **NOT** authorized to proceed with garnishment. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.

DELMAR FALCON.
AWG Docket No. 11 – 0061.
Decision and Order.
Filed April 28, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Hearing Official James P. Hurt.

AWG

Final Decision and Order

This matter is before me upon the request of the Petitioner (or "Debtor"), Delmar Falcon, for a hearing in response to efforts of Respondent to institute a federal administrative wage garnishment

against him. On December 29, 2010, I issued a Pre-hearing Order requiring the parties to exchange information concerning the amount of the debt.

I conducted a telephone hearing at the revised scheduled time on March 1, 2011. USDA Rural Development Agency (RD) was represented by Mary Kimball who testified on behalf of the RD agency.

Mr. Falcon was present and was represented by Richard A. McKennett, Esq.

The witnesses were sworn in.

RD had filed a copy of a Narrative along with exhibits RX-1 through RX-9 on January 10, 2011 with the OALJ Hearing Clerk and certified that it mailed a copy of the same to Petitioner. On March 17, 2011, RD filed exhibits RX-10 and RX-11.

Petitioner filed his Narrative and financial statement (under oath) (PX 1 –PX-5) on February 25, 2011. Mr. Falcon's attorney stated in his Narrative that Petitioner that Petitioner was discriminated against in financial matters related to this loan and related that both Delmar Falcon and his wife have serious health issues and raised issues of financial hardship. On March 30, 2011, Petitioner filed an Additional Narrative stating among other contentions that the FmHA 1944-A6 Interest Assistance forms were accurate when filed. I do not have jurisdiction to determine existence of discrimination in matters of equal credit opportunities[1]. Similarly, I am not authorized to opine on matters of the debtor's health, but instead I am bound to determine the amount of the debt and debtor's ability to withstand garnishment of his wages based upon certain financial hardship criteria.

Petitioner owes $22,686.83 on the USDA RD FmHA loan, and in addition, potential fees of $6,352.31 due the US Treasury pursuant to the terms of the Promissory Note and reamortize agreement.

Findings of Fact

1. On December 15, 1983, Petitioner Delmar Falcon and Linda Falcon (his wife) obtained a USDA FmHA home mortgage loan of $48,000.00 for property located at Lots # and # in Block * of the Townsite of Trenton, ND 588##.[2] Narrative RX-1, RX-2.

[1] See 15 U.S.C. § 1691 et seq.

[2] Complete address maintained in USDA records.

2. Borrowers became delinquent on their account. They reamortized their account on August 15, 1998 on the same terms to bring their account current.

3. Borrowers defaulted on the loans and were sent a Notice of Acceleration on January 8, 1999. RX-4 @ p. 1 of 8.

4. Borrowers entered into a short sale September 5, 2002. RX-6 @ p. 1 of 2, Petitioner's Narrative @ p. 1.

3. Prior to the sale, borrowers owed $42,742.08 as principal and $2,808.96 as accrued interest. They also owed $840.37 for fees, and $202.14 for escrow shortage for a total of $46,593.55. Narrative, RX-6 @ p. 1 of 2.

4. RD received a net of $26,683.84 from the short sale. Narrative, RX -6 @ p. 1 of 2.

5. During the term of the loan, borrowers submitted requests for assistance on the interest of their loan using FmHA form 1944-A6 for the years of 1997 through 2001, inclusive. RD determined that for those years - that borrowers were not entitled to the Interest Credit assistance and that the borrowers received unauthorized assistance in the total amount of $11,305.26. RX-5 @ p. 6 of 29.

6. After the application of the short sale proceeds, the borrowers jointly and severally owed $31,214.97. Narrative, RX-6 @ p. 1 of 2.

7. USDA has received payments amounting to $8,528.14 bringing the current amount owed to $22,686.83. RX-6 @ p. 1 of 2.

8. The potential fees due U.S. Treasury pursuant to the Loan Agreement are $6,352.31. Narrative, RX-7.

9. Mr. Falcon is jointly and severally liable on the debt under the terms of the Promissory Notes.

10. RD presented evidence that for the Tax year 1997, Mr. Falcon's adjusted gross income was $**** (RX-10) whereas his Interest Assistance FmHA 1944-A6 form for same tax year stated his planned income would be $****. (RX-5 @ p. 20 of 29). Following the hearing, Mr. Falcon was given another opportunity to show that his annual income for the tax years 1997 through 2002 was substantially the same as the planned annual income stated on his FmHA forms 1944-A6.

11. Petitioner's counsel stated that the Petitioner could not obtain the tax forms for the years 1997 through 2002 due to government document destruction rules. (Petitioner's Additional Narrative). RD's exhibits regarding the UNAUTHORIZED ASSISTANCE RUNNING RECORD

for this borrower's account indicate that borrowers were advised to get those tax records for prior years on May 21, 2002. RX-5 @ p.2 of 29.

12. Under the terms of the FmHA form 1944-A6 @ paragraph XIII, there does not appear to be any fraud penalty for gross understatements estimates of future income for the tax year although recapture is authorized. Therefore, I will make the usual Financial Hardship calculation.

13. Mr. Falcon stated that he has been gainfully employed for more than one year, but he raised issues of financial hardship.

14. Mr. Falcon provided a financial schedule of monthly household income and expenses under oath but did not provide a monthly pay stub from his employer. PX-5. On April 20, 2011, I requested via e-mail to Petitioner's attorney clarifications of certain items on the financial statement. No response has been received.

15. Using the Financial Hardship Calculation program and data from his sworn testimony and financial statement, I made a calculation of the appropriate wage garnishment. I utilized Petitioner's statement of total payroll tax deductions ["Fed, ND,Soc. M.Care"]. I considered the current non-governmental loan obligations. The calculations are enclosed.[3]

Conclusions of Law

1. Petitioner, Delmar Falcon is jointly and severally indebted to USDA's Rural Development program in the amount of $22,686.83.

2. In addition, Petitioner is jointly and severally indebted for potential fees to the US Treasury in the amount of $6,352.31.

3. All procedural requirements for administrative wage garnishment set forth in 31 C.F.R. ¶ 285.11 have been met.

4. Petitioner is under a duty to inform USDA's Rural Development of his current address, employment circumstances, and living expenses.

5. RD may administratively garnish Petitioner's wages at the rate of 15% of his Monthly Family Disposable Income.

6. After one year, RD may reassess Petitioner's financial hardship criteria.

Order

[3] The Financial Hardship Calculation is not posted on the OALJ website.

1. The requirements of 31 C.F.R. ¶ 288.11(i) & (j) have been met.

2. The wages of Petitioner may be garnished at the rate of 15% of his monthly Family Disposable Income.

3. After one year, RD may reassess the Debtor's financial position and modify the garnishment percentage as circumstances dictate.

4. Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's office.

TAMMY ATKINS.
AWG Docket No. 11 – 0080.
Decision and Order.
Filed May 4, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Jill S. Clifton.

AWG

Decision and Order

1. The hearing by telephone was held as scheduled on May 3, 2011. Ms. Tammy L. Atkins (APetitioner Atkins"), did not participate. (Petitioner Atkins did not participate by telephone: no one answered the phone number provided in her Hearing Request; she did not provide any other phone number. I left a recorded message asking for a return call and giving my phone number and did not receive a return call.)

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent (AUSDA Rural Development") and is represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

Summary of the Facts Presented

3. Petitioner Atkins owes to USDA Rural Development a balance of **$7,234.45** (as of January 25, 2011) in repayment of two United States Department of Agriculture Farmers Home Administration loans, one *assumed* in 1995, and one *made* in 1995, for a home in Florida. The balance is now unsecured (Athe debt"). *See* USDA Rural Development Exhibits, plus Narrative, Witness & Exhibit List (filed April 12, 2011), which are admitted into evidence, together with the testimony of Mary Kimball.

4. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$7,234.45** would increase the current balance by $2,151.85, to $9,386.30. *See* USDA Rural Development Exhibits, esp. RX 6, pages 1 and 2.

5. The amount Petitioner Atkins borrowed in 1995 was $49,499.03 ($17,959.03 loan assumed, plus $31,540.00 loan made). By the time of the short sale in 2001, that debt had grown to $54,370.72:

$ 48,110.63 Principal Balance prior to short sale
$ 3,839.49 Interest Balance prior to short sale
$ 2,420.60 Fees Balance (including interest on fees) prior to short sale

$54,370.72 Total Amount Due prior to short sale

- $ 47,341.18 Proceeds from short sale

$ 7,029.54 Unpaid in 2001

RX 5 and USDA Rural Development Narrative.

The short sale in 2001 yielded $47,341.18. The remaining balance of the debt was $7,029.54 after those funds were applied. Then $471.50 (pre foreclosure fee) was added; and $107.73 (force place insurance refund) was subtracted. RX 5, page 1. Another $158.86 applied to the debt since then leaves **$7,234.45** unpaid now (excluding the potential

remaining collection fees). *See* RX 5 and USDA Rural Development Narrative.

6. Evidence is required for me to determine whether Petitioner Atkins' disposable pay supports garnishment without creating hardship. 31 C.F.R. § 285.11. Petitioner Atkins failed to file a completed AConsumer Debtor Financial Statement" or anything in response to my Order dated March 31, 2011, so I cannot calculate Petitioner Atkins' reasonable and necessary living expenses. I do have Petitioner Atkins' Hearing Request with attachments.

One paragraph states in part: AIn closing I am raising my 4 children and survive with the economy the way it is. It takes all I make to do this; I can not afford anymore hardship."

7. With no testimony from Petitioner Atkins and no current pay stub, I cannot calculate with precision Petitioner Atkins' current disposable pay (after subtracting Federal income tax, social security, Medicare, health insurance, and any other Aeligible" withholding from her gross pay). I do have data from garnishments in January 2011 (RX 5, page 2): each garnishment collects $6.09 and yields $4.76 net payment on Athe debt" (see paragraph 3). Such garnishments do not appear to be cost effective. Further, such small yields do help me to evaluate the factors to be considered under 31 C.F.R. § 285.11, such that I find that Petitioner Atkins probably cannot withstand garnishment without financial hardship.

8. To prevent financial hardship, potential garnishment to repay Athe debt" (*see* paragraph 3) must be limited to zero per cent (0%) of Petitioner Atkins' disposable pay. 31 C.F.R. § 285.11.

9. Petitioner Atkins is responsible and able to negotiate the repayment of the debt with Treasury's collection agency.

Discussion

10. NO garnishment is authorized. *See* paragraphs 6, 7 and 8. I encourage **Petitioner Atkins and the collection agency** to **negotiate promptly** the repayment of the debt. Petitioner Atkins, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Atkins, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less.

Findings, Analysis and Conclusions

11. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Atkins and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

12. Petitioner Atkins owes the debt described in paragraphs 3, 4 and 5.

13. **NO garnishment is authorized**. 31 C.F.R. § 285.11. I am NOT, however, ordering any amounts already collected through garnishment of Petitioner Atkins' pay prior to implementation of this Decision to be returned to Petitioner Atkins.

14. This Decision does not prevent repayment of the debt through ***offset*** of Petitioner Atkins' **income tax refunds** or other **Federal monies** payable to the order of Ms. Atkins.

Order

15. Until the debt is repaid, Petitioner Atkins shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

16. USDA Rural Development, and those collecting on its behalf, are **NOT** authorized to proceed with garnishment. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties. Done at Washington, D.C.

JUAN VALDEZ.
AWG Docket No. 11 – 0078.
Decision and Order.
Filed May 5, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Jill S. Clifton.

AWG

Decision and Order

1. The hearing by telephone was held as scheduled on February 15 and May 3, 2011. Mr. Juan M. Valdez, the Petitioner (APetitioner Valdez"), participated, representing himself (appeared *pro se*).

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent (AUSDA Rural Development") and was represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
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4300 Goodfellow Blvd
St Louis MO 63120-1703

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314.457.4426 FAX

Summary of the Facts Presented

3. Petitioner Valdez owes to USDA Rural Development a balance of **$178,826.32** (as of January 15, 2011) in repayment of a United States Department of Agriculture / Rural Housing Service ***Guarantee*** (*see* RX 2, esp. p. 2) for a loan made on April 24, 2007 by JP Morgan Chase Bank, for a home in California, the balance of which is now unsecured (Athe debt").[1] *See* USDA Rural Development Exhibits, plus Narrative, Witness & Exhibit List (filed January 24, 2011), which are admitted into evidence, together with the testimony of Mary Kimball.

4. This ***Guarantee*** establishes an **independent** obligation of Petitioner Valdez, AI certify and acknowledge that if the Agency pays a loss claim on the requested loan to the lender, I will reimburse the Agency for that amount. If I do not, the Agency will use all remedies available to it, including those under the Debt Collection Improvement Act, to recover on the Federal debt directly from me. The Agency's right to collect is independent of the lender's right to collect under the

[1] Rural Housing Service is a part of USDA Rural Development.

guaranteed note and will not be affected by any release by the lender of my obligation to repay the loan. Any Agency collection under this paragraph will not be shared with the lender." RX 2, p. 2.

5. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$178,826.32** would increase the current balance by $50,071.37, to $228,897.69. *See* USDA Rural Development Exhibits, esp. RX 6.

6. The amount Petitioner Valdez borrowed from JP Morgan Chase Bank was $232,560.00 on April 24, 2007. RX 1. Foreclosure was initiated in 2008. RX 3, p. 3. The liquidation value of the home was estimated at $65,000.00. RX 3, p. 4. USDA Rural Development paid JP Morgan Chase Bank $185,670.37 on May 20, 2009. RX 3, p. 7. The home sold for a higher price than the estimated liquidation value; the home sold for $71,500.00 on June 19, 2009. *See* Narrative. This permitted USDA Rural Development to recover $6,844.05 of what it had paid. RX 4. This left **$178,826.32** (*see* RX 4) as the amount USDA Rural Development had paid, and the amount USDA Rural Development recovers from Petitioner Valdez under the ***Guarantee***.

7. Petitioner Valdez testified that he was lied to, regarding two aspects of his purchase of the home. He testified that he had been told that the taxes were included in his monthly mortgage payments to JP Morgan Chase Bank, and he then learned they were not. He did not have the money to pay any additional amounts. He testified that he had been told he would get $5,000.00 back and was counting on that to buy furniture; he got only $2,000.00 back. Petitioner Valdez faults the real estate professionals, such as the mother-daughter real estate team, whom he trusted. Further, he tried to do a short sale. The due date of the last payment he made was September 1, 2007. RX 3, p. 2. Losing the home, his first homes, and being in such a hole, financially, have been very hard on him.

8. Petitioner Valdez did not file a Consumer Debtor Financial Statement or any pay stubs, but his testimony is admitted into evidence. Petitioner Valdez testified that he works for Home Depot and ordinarily works a second job. Health issues such as an ulcer (stomach) have caused him to cut back on hours worked, and he has expenses for antibiotics. Petitioner Valdez pays the reasonable and necessary living expenses for not only himself but also his 8 year-old son and his long-time (16 years) girlfriend, who helps him with his son, who is autistic. Without the Consumer Debtor Financial Statement and pay stubs, I do

not have the evidence necessary to evaluate the factors to be considered under 31 C.F.R. § 285.11. Nevertheless, based on Petitioner Valdez's testimony, through November 2011, NO garnishment is authorized, to give Petitioner Valdez time to prepare for coping with Athe debt" (see paragraph 3). Beginning December 1, 2011, I must presume that Petitioner Valdez can withstand garnishment up to 15% of Petitioner Valdez's disposable pay without creating financial hardship. 31 C.F.R. § 285.11.

9. Petitioner Valdez is responsible and able to negotiate the disposition of the debt with Treasury's collection agency.

Discussion

NO garnishment is authorized through November 2011. Beginning December 1, 2011, garnishment up to 15% of Petitioner Valdez's disposable pay is authorized. *See* paragraphs 7 & 8. I encourage **Petitioner Valdez and the collection agency** to **negotiate promptly** the repayment of the debt. Petitioner Valdez, this will require **you** to telephone the collection agency after you receive this Decision. Petitioner Valdez, you may request that you be permitted to compromise the debt for an amount you are able to pay, to settle the claim for less. You may ask that you be given consideration particularly since you provide for your 8-year old son with autism. The toll-free number for you to call is **1-888-826-3127**.

Findings, Analysis and Conclusions

11. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Valdez and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

12. Petitioner Valdez owes the debt described in paragraphs 3, 4, 5 and 6.

13. **NO garnishment is authorized through November 2011.** Because I do not have evidence such as a Consumer Debtor Financial Statement and pay stubs, beginning December 1, 2011, I must presume that Petitioner Valdez can withstand garnishment up to 15% of Petitioner Valdez's disposable pay without creating financial hardship. 31 C.F.R. § 285.11.

14. This Decision does not prevent repayment of the debt through ***offset*** of Petitioner Valdez's **income tax refunds** or other **Federal monies** payable to the order of Mr. Valdez.

Order

15. Until the debt is repaid, Petitioner Valdez shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in his mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

16. USDA Rural Development, and those collecting on its behalf, are **NOT** authorized to proceed with garnishment through November 2011. Beginning December 1, 2011, garnishment is authorized, up to 15% of Petitioner Valdez's disposable pay. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties. Done at Washington, D.C.

TINA FLAHERTY KING.
AWG Docket No. 10 – 0258.
Decision and Order.
Filed May 5, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Victor W. Palmer.

AWG

DECISION AND ORDER

This matter is before me upon the request of the Petitioner, Tina Flaherty King, for a hearing to contest the efforts of the Respondent, USDA/Rural Development, to garnish her wages in order to collect a debt remaining from a mortgage loan it provided her. A hearing was held by telephone conference, on March 9, 2011, at 11:30 AM, Eastern Time, and both Petitioner, Tina Flaherty King, and Respondent's representative, Mary Kimball, participated and gave sworn testimony.

Ms. Tina Flaherty King testified that she is receiving medical treatment for breast cancer and has incurred $*** in medical bills that she is struggling to pay. She is divorced and is currently employed by Laboratory Corporation as a phlebotomist earning a net monthly income of $***. Her monthly expenses are: rent-$**; gas and electric-$**; car payment-$**; car insurance-$*; trash collection-$*; water and sewer-$*; cable TV-$*; telephone-$*; internet-$*; food-$**; and token payments against the overdue medical bills-$*.These monthly expenses total $***, and she is left with only $* for any other expense that may arise.

USDA, Rural Development filed documentation showing that petitioner currently owes $13,175.50 plus potential fees to Treasury of $3,689.14 for a total of $16,864.64. Accordingly, USDA, Rural Development has met its burden under 31 C.F.R. §285.11(f)(8) that governs administrative wage garnishment hearings, and has proved the existence and the amount of the debt owed by the Petitioner. On the other hand, Petitioner states that she would suffer undue financial hardship if any amount of money is presently garnished from her disposable income. In light of the documents filed by Petitioner and her sworn testimony, I agree with her and have concluded that garnishment should not take place at any time during the next six (6) months. During that time, Ms. King should undertake to contact Treasury to discuss dismissal of the debt for reason of financial hardship.

Under these circumstances, the proceedings to garnish Petitioner's wages are suspended and may not be resumed for six (6) months from the date of this Order.

———

TROY WEEKS.
AWG Docket No. 11 – 0009.
Decision and Order.
Filed May 9, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Chief Administrative Law Judge Peter M. Davenport.

Decision and Order

This matter is before the Administrative Law Judge upon the request of Petitioner for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On November 24, 2010, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing on January 13, 2011.

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation on December 14, 2010. Andrew B. Jackson, Counsel for the Petitioner entered his appearance and filed the Petitioner's documentation with the Hearing Clerk on December 22, 2010. At the hearing, the Petitioner and Mary E. Kimball testified. A summary of those proceeding was entered on January 13, 2011 and the Petitioner was given ten days in which to file a Memorandum in support of his position. A faxed copy was transmitted on January 21, 2011 and a hard copy was received by the Hearing Clerk's Office on January 31, 2011.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

On May 16, 1984, the Petitioner and Susan Weeks, then his wife, received a home mortgage loan in the amount of $35,000.00 from Farmers Home Administration (FmHA), United States Department of Agriculture (USDA), now Rural Development (RD) for property located in Sebring, Florida. RX-1, 2.

On February 25, 1993, the Petitioner and his wife were divorced. A Property Settlement Agreement dated December 17, 1992 was approved as part of the divorce decree. That agreement required the Petitioner to convey his interest in the martial residence which was subject to the FmHA note and mortgage to his ex-wife who in turn was to assume liability for the indebtedness and hold him harmless from any further obligation under the note and mortgage. PX-1

In 1999, Susan Weeks, after living in the property for a number of years, defaulted on the note and mortgage and foreclosure proceeding were initiated. A summary judgment of foreclosure was entered in the

Circuit Court of the Tenth Judicial Circuit of Florida in and for Highlands County on November 16, 1999 at which time the amount due was established at $43,050.19, which amount included recapture of interest credit previously granted to the Petitioner and his ex-wife. PX-2.

No deficiency judgment appears to have been sought.

Treasury offsets totaling $8,234.26 exclusive of Treasury fees have been received. RX-5.

The Petitioner is delinquent in his child support obligations and is under a financial hardship at this time.

Conclusions of Law

The Secretary has jurisdiction in this matter.

No deficiency judgment having been sought, the Petitioner is no longer indebted to USDA Rural Development for the mortgage loan extended to him.

Collection action against the Petitioner shall be **TERMINATED.**

Amounts previously collected may be retained without being returned to the party from whom they were collected.

If not otherwise barred, the indebtedness may remain at Treasury for continued collection action against Susan Weeks.

The Respondent is **NOT** entitled to administratively garnish the wages of the Petitioner.

Order

For the foregoing reasons, the wages of Petitioner may **NOT** be subjected to administrative wage garnishment.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

THOMAS CRNKOVIC.
AWG Docket No. 11 – 0034.
Decision and Order.
Filed May 10, 2011.

Petitioner Pro se.
Mary Kimball for RD.

Decision and order by Administrative Law Judge Jill S. Clifton.

AWG

Decision and Order

1. Thomas M. Crnkovic, full name Thomas Matthew Crnkovic, the Petitioner (APetitioner Crnkovic"), represents himself (appears *pro se*). The hearing by telephone was held on January 5, and on May 4, 2011.

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent (AUSDA Rural Development") and is represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball"stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

3. I encourage **Petitioner Crnkovic and the collection agency** to work together to **establish a repayment schedule** rather than proceeding with garnishment, even though this Decision authorizes garnishment beginning June 2013. Petitioner Crnkovic will have to make himself available to the collection agency if he wants to negotiate. *See* paragraph 11.

Summary of the Facts Presented

4. USDA Rural Development's Exhibits, plus Narrative, Witness & Exhibit List, were filed on December 16, 2010, and are admitted into evidence, together with the testimony of Ms. Kimball.

5. Petitioner Crnkovic's most recently completed AConsumer Debtor Financial Statement," and attachments, were filed on May 9, 2011, and are admitted into evidence, together with the testimony of Petitioner

Crnkovic. Also admitted into evidence are his statement written in September 2010 attached to his Hearing Request; and his statement and earlier completed AConsumer Debtor Financial Statement" filed on January 5, 2011.

6. Petitioner Crnkovic owes to USDA Rural Development **$29,090.80** (as of November 30, 2010) in repayment of two Rural Housing Service loans, one assumed in 1998, and the other made in 1998, for a home in Louisiana, the balance of which is now unsecured (Athe debt").

7. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$29,090.80** would increase the current balance by $8,727.24, to $37,818.04. *See* USDA Rural Development Exhibits, esp. RX 8 (both pages).

8. The amount borrowed from USDA Rural Development was $49,945.00 in 1998 ($46,000.00 on the assumed loan, plus $3,945.00). By the time of the short sale in 2003, that debt had grown to $54,733.39. From the sale of the home, $18,500.00 was applied to the debt. Adjustments plus collections since then (*see* RX 7 (both pages)), have reduced the balance to **$29,090.80**, as of November 30, 2010. RX 7, page 1.

9. Petitioner Crnkovic's disposable income is about $**** per month. [Disposable income is gross pay, minus withholding for such items as income tax, Social Security, Medicare, health insurance, and the like.] Although Garnishment at 15% of Petitioner Crnkovic's disposable pay would yield roughly $*** per month in repayment of the debt, he cannot withstand garnishment in that amount without hardship. Petitioner Crnkovic is supporting three minor children in addition to himself, and he is helping to support his father, who recently had a heart attack and surgery. Petitioner Crnkovic owes back income taxes; he's trying to help pay for his father's medications; and thousands of dollars of medical bills are unpaid. Further, with his move to his father's house, he was without income for four months, from November 2010 until near the end of February 2011. To prevent hardship, potential garnishment to repay Athe debt" (*see* paragraph 6) must be limited to **0%** of Petitioner Crnkovic' disposable pay through May 2013; then up to **3%** of Petitioner Crnkovic's disposable pay beginning June 2013 through May 2015; then up to **5%** of Petitioner Crnkovic's disposable pay thereafter. 31 C.F.R. § 285.11.

10. Petitioner Crnkovic is responsible and willing and able to negotiate the disposition of the debt with Treasury's collection agency.

Discussion

11. Through May 2013, no garnishment is authorized. Beginning June 2013 through May 2015, garnishment up to 3% of Petitioner Crnkovic's disposable pay is authorized; and thereafter, garnishment up to 5% of Petitioner Crnkovic's disposable pay is authorized. *See* paragraph 9. I encourage **Petitioner Crnkovic and the collection agency** to **negotiate promptly** the repayment of the debt. Petitioner Crnkovic, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. You may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less.

Findings, Analysis and Conclusions

12. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Crnkovic and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

13. Petitioner Crnkovic owes the debt described in paragraphs 6, 7 and 8.

14. **Garnishment is authorized**, as follows: through May 2013, **no** garnishment. Beginning June 2013 through May 2015, garnishment up to 3% of Petitioner Crnkovic's disposable pay; and thereafter, garnishment up to 5% of Petitioner Crnkovic's disposable pay. 31 C.F.R. § 285.11.

15. Repayment of the debt may also occur through ***offset*** of Petitioner Crnkovic's **income tax refunds** or other **Federal monies** payable to the order of Mr. Crnkovic.

Order

16. Until the debt is repaid, Petitioner Crnkovic shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in his mailing address; delivery address for commercial carriers

such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

17. USDA Rural Development, and those collecting on its behalf, are **not** authorized to proceed with garnishment through May 2013. Beginning June 2013 through May 2015, garnishment up to 3% of Petitioner Crnkovic's disposable pay is authorized; and garnishment up to 5% of Petitioner Crnkovic's disposable pay thereafter. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.

BARBARA CROSNOE.
AWG Docket No. 11 – 0164.
Decision and Order.
Filed May 11, 2011 .

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Jill S. Clifton.

AWG

Decision and Order

1. The hearing by telephone was held on May 4, 2011. Barbara L. Crosnoe, the Petitioner (APetitioner Barbara Crosnoe"), represents herself (appears *pro se*).

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent (AUSDA Rural Development") and is represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

3. I encourage **Petitioner Barbara Crosnoe and the collection agency** to work together to **establish a repayment schedule** rather than proceeding with garnishment, even though this Decision authorizes garnishment in a limited amount beginning June 2012. Petitioner Barbara Crosnoe, obviously, will have to make herself available to the collection agency if she wants to negotiate. *See* paragraph 11.

Summary of the Facts Presented

4. USDA Rural Development's Exhibits, plus Narrative, Witness & Exhibit List, were filed on April 12 and May 6, 2011, and are admitted into evidence, together with the testimony of Ms. Kimball.

5. Petitioner Barbara Crosnoe's completed AConsumer Debtor Financial Statement," filed on April 28, 2011; plus the revised AConsumer Debtor Financial Statement" filed May 3, 2011 with the accompanying documents, are admitted into evidence, together with the testimony of Petitioner Barbara Crosnoe and the testimony of her husband Bart Crosnoe.

6. Petitioner Barbara Crosnoe owes to USDA Rural Development **$8,014.08** in repayment of a Farmers Home Administration loan assumed in 1995 for a home in Iowa, the balance of which is now unsecured (Athe debt").

7. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$8,014.08**, would increase the current balance by $2,243.94, to $10,258.02. *See* USDA Rural Development Exhibits, esp. RX 5.

8. Petitioner Barbara Crosnoe is repaying more than $4,000.00 in medical expenses as her husband endured a stroke in January 2011 and requires quarterly MRIs for tumors in his neck. She owes considerable amounts on additional indebtedness, particularly 2010 income taxes, her home, truck and truck repair.

9. Petitioner Barbara Crosnoe's disposable income is probably about $***** per month. [Disposable income is gross pay minus income tax, Social Security, Medicare, and health insurance withholding; and in certain situations minus other employee benefits contributions that are required to be withheld.] Although Garnishment at 15% of Petitioner

Barbara Crosnoe's disposable pay could yield roughly $*** per month in repayment of the debt, she cannot withstand garnishment in that amount without hardship. To prevent hardship, potential garnishment to repay Athe debt" (*see* paragraph 6) must be limited to 0% of Petitioner Barbara Crosnoe's disposable pay through May 2012; then up to 7% of Petitioner Barbara Crosnoe's disposable pay beginning June 2012 through May 2013; then up to 15% of Petitioner Barbara Crosnoe's disposable pay thereafter. 31 C.F.R. § 285.11.

10. Petitioner Barbara Crosnoe is responsible and willing and able to negotiate the disposition of the debt with Treasury's collection agency.

Discussion

11. Through May 2012, no garnishment is authorized. Beginning June 2012 through May 2013, garnishment up to 7% of Petitioner Barbara Crosnoe's disposable pay is authorized; and thereafter, garnishment up to 15% of Petitioner Barbara Crosnoe's disposable pay is authorized. *See* paragraphs 8, 9 and 10. I encourage **Petitioner Barbara Crosnoe and the collection agency** to **negotiate promptly** the repayment of the debt. Petitioner Barbara Crosnoe, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Barbara Crosnoe, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less.

Findings, Analysis and Conclusions

12. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Barbara Crosnoe and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

13. Petitioner Barbara Crosnoe owes the debt described in paragraphs 6 and 7.

14. **Garnishment is authorized**, as follows: through May 2012, **no** garnishment. *I am **NOT**, however, ordering any amounts already collected through garnishment of Petitioner Barbara Crosnoe's pay prior to implementation of this Decision to be returned to Petitioner Barbara Crosnoe.* Beginning June 2012 through May 2013, garnishment up to 7% of Petitioner Barbara Crosnoe's disposable pay; and thereafter,

garnishment up to 15% of Petitioner Barbara Crosnoe's disposable pay. 31 C.F.R. § 285.11.

15. Repayment of the debt may also occur through ***offset*** of Petitioner Barbara Crosnoe's **income tax refunds** or other **Federal monies** payable to the order of Mrs. Crosnoe.

Order

16. Until the debt is repaid, Petitioner Barbara Crosnoe shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

17. USDA Rural Development, and those collecting on its behalf, are **not** authorized to proceed with garnishment through May 2012. Beginning June 2012 through May 2013, garnishment up to 7% of Petitioner Barbara Crosnoe's disposable pay is authorized; and garnishment up to 15% of Petitioner Barbara Crosnoe's disposable pay thereafter. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.

BART CROSNOE.
AWG Docket No. 11 – 0163.
Decision and Order.
Filed May 11, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Jill S. Clifton.

AWG

Decision and Order

1. The hearing by telephone was held on May 4, 2011. Bart J. Crosnoe, the Petitioner (APetitioner Bart Crosnoe"), represents himself (appears *pro se*).

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent (AUSDA Rural Development") and is represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

3. I encourage **Petitioner Bart Crosnoe and the collection agency** to work together to **establish a repayment schedule** rather than proceeding with garnishment, even though this Decision authorizes garnishment in a limited amount beginning June 2012. Petitioner Bart Crosnoe, obviously, will have to make himself available to the collection agency if he wants to negotiate. *See* paragraph 11.

Summary of the Facts Presented

4. USDA Rural Development's Exhibits, plus Narrative, Witness & Exhibit List, were filed on April 12 and May 6, 2011, and are admitted into evidence, together with the testimony of Ms. Kimball.

5. Petitioner Bart Crosnoe's completed AConsumer Debtor Financial Statement," prepared by his wife Barbara Crosnoe and filed on April 28, 2011; plus the revised AConsumer Debtor Financial Statement" filed May 3, 2011 with the accompanying documents, are admitted into evidence, together with the testimony of Petitioner Bart Crosnoe and the testimony of his wife Barbara Crosnoe.

6. Petitioner Bart Crosnoe owes to USDA Rural Development **$8,014.08** in repayment of a Farmers Home Administration loan

assumed in 1995 for a home in Iowa, the balance of which is now unsecured (Athe debt").

7. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$8,014.08**, would increase the current balance by $2,243.94, to $10,258.02. *See* USDA Rural Development Exhibits, esp. RX 5.

8. Petitioner Bart Crosnoe is repaying more than $***** in medical expenses as he endured a stroke in January 2011 and requires quarterly MRIs for tumors in his neck. He owes considerable amounts on additional indebtedness, particularly 2010 income taxes, his home, his truck and truck repair.

9. Petitioner Bart Crosnoe's disposable income is probably close to $***** per month. [Disposable income is gross pay minus income tax, Social Security, Medicare, and health insurance withholding; and in certain situations minus other employee benefits contributions that are required to be withheld.] Although Garnishment at 15% of Petitioner Bart Crosnoe's disposable pay would yield roughly $*** per month in repayment of the debt, he cannot withstand garnishment in that amount without hardship. To prevent hardship, potential garnishment to repay Athe debt" (*see* paragraph 6) must be limited to 0% of Petitioner Bart Crosnoe's disposable pay through May 2012; then up to 7% of Petitioner Bart Crosnoe's disposable pay beginning June 2012 through May 2013; then up to 15% of Petitioner Bart Crosnoe's disposable pay thereafter. 31 C.F.R. § 285.11.

10. Petitioner Bart Crosnoe is responsible and willing and able to negotiate the disposition of the debt with Treasury's collection agency.

Discussion

11. Through May 2012, no garnishment is authorized. Beginning June 2012 through May 2013, garnishment up to 7% of Petitioner Bart Crosnoe's disposable pay is authorized; and thereafter, garnishment up to 15% of Petitioner Bart Crosnoe's disposable pay is authorized. *See* paragraphs 8, 9 and 10. I encourage **Petitioner Bart Crosnoe and the collection agency** to **negotiate promptly** the repayment of the debt. Petitioner Bart Crosnoe, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Bart Crosnoe, you may choose to

offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less.

Findings, Analysis and Conclusions

12. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Bart Crosnoe and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

13. Petitioner Bart Crosnoe owes the debt described in paragraphs 6 and 7.

14. **Garnishment is authorized**, as follows: through May 2012, **no** garnishment. *I am **NOT**, however, ordering any amounts already collected through garnishment of Petitioner Bart Crosnoe's pay prior to implementation of this Decision to be returned to Petitioner Bart Crosnoe.* Beginning June 2012 through May 2013, garnishment up to 7% of Petitioner Bart Crosnoe's disposable pay; and thereafter, garnishment up to 15% of Petitioner Bart Crosnoe's disposable pay. 31 C.F.R. § 285.11.

15. Repayment of the debt may also occur through ***offset*** of Petitioner Bart Crosnoe's **income tax refunds** or other **Federal monies** payable to the order of Mr. Crosnoe.

Order

16. Until the debt is repaid, Petitioner Bart Crosnoe shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in his mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

17. USDA Rural Development, and those collecting on its behalf, are **not** authorized to proceed with garnishment through May 2012. Beginning June 2012 through May 2013, garnishment up to 7% of Petitioner Bart Crosnoe's disposable pay is authorized; and garnishment up to 15% of Petitioner Bart Crosnoe's disposable pay thereafter. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.

MARTHA ENCISO.
AWG Docket No. 11 – 0151.
Decision and Order.
Filed May 11, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Victor W. Palmer.

AWG

Decision and Order

On May 10, 2011, at 2:30 PM, EDT, I held a hearing on a Petition to Dismiss an administrative wage garnishment proceeding to collect a debt allegedly owed to Respondent, USDA, Rural Development, for losses it incurred under a mortgage loan it gave to Petitioner to purchase a house. Petitioner represented herself, and USDA Rural Development was represented by Mary Kimball. Petitioner, her former husband, Russell Pierson, and Mary Kimball were each duly sworn. Various exhibits were offered by Ms. Kimball that were received in evidence (RX-1 through RX-8). Exhibits offered by Petitioner were also received in evidence (PX-1 through PX-16).

Respondent sustained financial loss on the mortgage loan it gave to Petitioner to purchase a house located at 529 Highway N, Montgomery City, MO. The loan, dated December 12, 2007, was in the amount of $136,400.00 (RX-1 and RX-2). The payments on the mortgage were not met and a short sale was held on June 18, 2010, at which time the house sold for $118,000.00. After selling expenses, USDA received $110,940.24 from the sale (Exhibit RX-5). Prior to the sale, Petitioner owed USDA $138,641.07 for principal, accrued interest, and fees. Since the sale, $4,462.00 has been collected by the United States Treasury Department. The amount that is presently owed on the debt is $23,006.68 plus potential fees to Treasury of $6,441.87 or $29,448.55 total (RX-6).

Petitioner is employed by Dairy Queen in Food Service and presently receives $***-$*** bi-weekly net. Her usual monthly household expenses are: rent-$***; gasoline-$***; gas-$***; food-$***; medicine-$**; clothing-$***; water-$***; car repairs $***; miscellaneous-$***, or $**** total. I have concluded that the garnishment of any part of Petitioner's bi-weekly paychecks during the next six (6) months would cause Petitioner undue financial hardship within the meaning and intent of the provisions of 31 C.F.R. § 285.11.

USDA, Rural Development has met its burden under 31 C.F.R. §285.11(f)(8) that governs administrative wage garnishment hearings, and has proved the existence and the amount of the debt owed by the Petitioner. On the other hand, Petitioner has shown that she would suffer undue financial hardship if any amount of money is garnished from her disposable income at any time during the next six (6) months.

Under these circumstances, the proceedings to garnish Petitioner's wages are suspended and may not be resumed for six (6) months from the date of this Order.

SONIA SAULOG.
AWG Docket No. 11 – 0109.
Decision and Order.
Filed May 11, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Victor W. Palmer.

AWG

Decision and Order

Pursuant to a Hearing Notice, I held a hearing in this proceeding by telephone, on May 10, 2011, at 11:00 AM, Eastern Time. Petitioner, Sonia Saulog, her brother, Alberto Baulista, and Respondent's representative, Mary E. Kimball, participated and were sworn. Ms. Kimball introduced, identified and authenticated records regularly maintained by USDA, Rural Development, which were received in evidence as exhibits. Petitioner had completed and filed a "Consumer

Debtor Financial Statement" that she verified as accurate, and it was received in evidence.

At issue is the nonpayment of a debt owed to USDA, Rural Development on a USDA home mortgage loan that Sonia Saulog and her ex-huband, Rey Saulog, had assumed, on June 26, 1995, to acquire a home that was sold in a foreclosure sale on April 21, 2000, which, after payment of the remaining principal, interest and various expenses, left a debt of $42,078.18 owed to USDA, Rural Development. Since then, Respondent has received $18,163.21 from amounts Treasury has collected from Petitioner and from her former husband. The balance presently owed to USDA, Rural Development is $23,914.97 plus an additional $6,696.19 owed to Treasury for potential collection fees, or a total of $30,611.16.

Ms. Saulog is employed by Medtronics, Jacksonville, Florida and earns a net monthly income of $**** that is paid bi-weekly. After deducting her necessary monthly living expenses of $*****, an undue financial hardship would result if more than $** is garnished from her bi-weekly pay checks which is the 15% maximum amount that may be garnished from disposable income

.

Order

For the foregoing reasons, administrative wage garnishment of the wages of the Petitioner, Sandra Law may be made provided the sum garnished each two weeks does not exceed $**.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk.

MARK ZWISLE.
AWG Docket No. 11 – 0136.
Decision and Order.
Filed May 12, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Jill S. Clifton.

AWG

Decision and Order

1. Mark Zwisle, the Petitioner (APetitioner Zwisle"), represents himself (appears *pro se*). The hearing by telephone was held on April 12, 2011.

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent (AUSDA Rural Development") and is represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

3. I encourage **Petitioner Zwisle and the collection agency** to work together to **establish a repayment schedule** rather than proceeding with garnishment, even though this Decision **authorizes garnishment beginning December 2011**. Petitioner Zwisle, obviously, will have to make himself available to the collection agency if he wants to negotiate. *See* paragraph 13.

Summary of the Facts Presented

4. USDA Rural Development's Exhibits, plus Narrative, Witness & Exhibit List, were filed on March 9, 2011, and are admitted into evidence, together with the testimony of Ms. Kimball.

5. Petitioner Zwisle's AConsumer Debtor Financial Statement" and a copy of his W-2 Wage and Tax Statement for 2010, were filed on May 9, 2011, and are admitted into evidence, together with the testimony of Petitioner Zwisle. Also admitted into evidence are Petitioner Zwisle's Hearing Request and attached Statement, filed in January 2011.

6. Petitioner Zwisle owes to USDA Rural Development **$11,926.81** (as of February 16, 2011) in repayment of a USDA Farmers Home

Administration loan made in October 1989 for a home in Pennsylvania, the balance of which is now unsecured (Athe debt"). *See* USDA Rural Development Exhibits, esp. RX 4 (both pages).

7. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$11,926.81** would increase the current balance by $3,339.51, to $15,266.32. *See* USDA Rural Development Exhibits, esp. RX 5.

8. Petitioner Zwisle asserts that he was not afforded due process as the loan went into default, through a short sale, and then for collection. Petitioner Zwisle testified that he had lived in the property only about 9 months before he left his wife and co-borrower, Wanda J. Zwisle, in the home. Petitioner Zwisle's Statement attached to his Hearing Request states that they had not resided together since Oct/Nov 1990. Petitioner Zwisle maintains that the loan balance is entirely his co-borrower's responsibility.

9. About 10 years after the loan was made, on May 13, 1999, the loan was re-amortized (the amount delinquent on the account was added to principal, making the loan current). *See* Narrative. Notice of Acceleration (that the entire indebtedness was declared immediately due and payable) was sent to Petitioner Zwisle by certified mail on March 28, 2000, at both the Pennsylvania address of the home; and a South Carolina address where it appears that Dustin Zwisle signed to take delivery of the Notice, on April 1, 2000. RX 6.

10. Petitioner Zwisle testified that his divorce from co-borrower Wanda J. Zwisle happened 4-5 years before the short sale of the home on December 1, 2000, although the divorce proceeding was bifurcated, so that no property settlement occurred. Petitioner Zwisle testified that he signed a quitclaim deed to his co-borrower, so that she could accomplish the sale. He maintains that any balance remaining to be collected after the sale is the responsibility of his co-borrower.

11. Petitioner Zwisle's disposable income is about $**** per month. [Disposable income is gross pay minus income tax, Social Security, Medicare, and health insurance withholding; and in certain situations minus other employee benefits contributions that are required to be withheld.] Petitioner Zwisle supports himself and his wife Rhonda, and his AConsumer Debtor Financial Statement" shows living expenses in excess of his disposable income. Petitioner Zwisle is paying a student loan. Although Garnishment at 15% of Petitioner Zwisle's disposable pay would yield roughly $*** per month in repayment of the debt, he

cannot withstand garnishment in that amount without hardship. To prevent hardship, potential garnishment to repay Athe debt" (*see* paragraph 6) must be limited to **0%** of Petitioner Zwisle's disposable pay through November 2011; then up to **15%** of Petitioner Zwisle's disposable pay beginning December 2011 and thereafter. 31 C.F.R. § 285.11.

12. Petitioner Zwisle is responsible and willing and able to negotiate the disposition of the debt with Treasury's collection agency.

Discussion

13. Through November 2011, no garnishment is authorized. Beginning December 2011, garnishment up to 15% of Petitioner Zwisle's disposable pay is authorized. [*See* paragraph 11.] I encourage **Petitioner Zwisle and the collection agency** to **negotiate promptly** the repayment of the debt. Petitioner Zwisle, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Zwisle, you may ask that the debt be **apportioned separately** to you and your co-borrower, Wanda Griffith, formerly Wanda J. Zwisle. You may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less.

Findings, Analysis and Conclusions

14. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Zwisle and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

15. Petitioner Zwisle owes the debt described in paragraphs 6 through 10. If Petitioner Zwisle claims reimbursement from his co-borrower, he may pursue such claim against his co-borrower, but that does not prevent USDA Rural Development from collecting from him.

16. **Garnishment is authorized**, as follows: through November 2011, **no** garnishment. *I am **NOT**, however, ordering any amounts already collected through garnishment of Petitioner Zwisle's pay prior to implementation of this Decision to be returned to Petitioner Zwisle.* Beginning December 2011, garnishment up to 15% of Petitioner Zwisle's disposable pay. 31 C.F.R. § 285.11.

17. Repayment of the debt may also occur through ***offset*** of Petitioner Zwisle's **income tax refunds** or other **Federal monies** payable to the order of Mr. Zwisle.

Order

18. Until the debt is repaid, Petitioner Zwisle shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in his mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

19. USDA Rural Development, and those collecting on its behalf, are **not** authorized to proceed with garnishment through November 2011. Beginning December 2011, garnishment up to 15% of Petitioner Zwisle's disposable pay is authorized. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.

CRISANN POSAS.
AWG Docket No. 11 – 0192 .
Decision and Order.
Filed May 18, 2011 .

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Janice K. Bullard.

AWG

DECISION AND ORDER

This matter is before the Office of Administrative Law Judges ("OALJ") upon the request of Chrisann Posas de los Santos ("Petitioner") for a hearing to address the existence or amount of a debt alleged to be due to the United States Department of Agriculture, Rural Development ("Respondent"; "RD"), and if established, the propriety of imposing administrative wage garnishment. By Order issued on April 15, 2011, the parties were directed to provide information and

documentation concerning the existence of the debt and deadlines were set for the submissions. In addition, the matter was set for a telephonic hearing to commence on May 17, 2011.

The Respondent filed a Narrative, together with supporting documentation[1] on April 21, 2011. Petitioner filed a Consumer Debtor Financial Report (herein identified as PX-1) and a copy of her divorce decree (herein identified as PX-2) on May 10, 2011. The parties' submissions are hereby admitted to the record. At the hearing, Petitioner represented herself and Respondent was represented by Mary E. Kimball, Accountant for the New Program Initiatives Branch of RD, Saint Louis, Missouri. Petitioner and Ms. Kimball testified at the hearing.

In determining whether wage garnishment would constitute a hardship, I have considered the sworn testimony, Petitioner's signed financial statement, Treasury Standard Form SF 329C (Wage Garnishment Worksheet), and standard geographical allowable per diem expense rates (www.irs.gov; www.opm.gov). On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law, and Order will be entered:

FINDINGS OF FACT

1. On September 14, 2007, the Petitioner and Juan Posas[2] signed a promissory note for a home mortgage loan in the amount of $71,000.00 from JP Morgan Chase for residential real property located in Lyford, Texas. RX-1.

2. On August 7, 2007, Petitioner and Juan Posas requested a Single Family Housing Loan Guarantee from the United States Department of Agriculture (USDA), Rural Development (RD) on March 11, 2005. RX-2.

3. Petitioner subsequently defaulted on the loan and vacated the property in conjunction with her divorce from Juan Posas.

4. The real property suffered damage from a storm, and was subsequently appraised by RD at $12,000.00.

5. USDA paid JP Morgan Chase $61,125.76 for the loss, plus taxes, interest, and attorney fees pursuant to the guarantee. RX 4.

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[1] References to Respondent's exhibits herein shall be denoted as "RX-1 through RX-7".

[2] Petitioner and Juan Posas subsequently divorced. See, Petitioner exhibit PX-2.

6. The property was sold on January 4, 2010 for $20,550.00.

7. Petitioner's account with USDA was credited with $6,179.50, plus $2,428.68 from an overpay adjustment, leaving a balance due on the debt of $52,517.58. RX 5.

8. The debt was referred to the U.S. Department of Treasury ("Treasury") for collection as required by prevailing statutes and regulations. RX 5.

9. The total indebtedness is $67,222.50, including Treasury fees of $14,704.92. RX-7.

10. Treasury, through its agent, issued a notice to Petitioner of intent to garnish wages.

11. Petitioner timely requested a hearing, which was held on May 17, 2011.

12. Petitioner contested the validity of the debt, and testified that her ex-husband had interfered with her ability to repair or sell the property.

13. Petitioner did not receive any notices of acceleration or a debt settlement package from RD, despite having left forwarding addresses with the post office when she vacated the real property.

14. Petitioner is employed, but anticipates being laid off from her job with a school district before the start of the new school year.

15. Petitioner agreed that the Consumer Debtor Financial Report that she signed represents her income and expenses.

17. Petitioner expressed willingness to attempt to resolve the debt.

CONCLUSIONS OF LAW

The Secretary has jurisdiction in this matter.

Petitioner is indebted to USDA Rural Development in the amount of $52,517.58 plus potential fees of $14,704.92, for a balance due of $67,222.50 on the mortgage loan extended to her.

Petitioner's ex-husband also remains liable for the debt.

All procedural requirements for administrative wage offset set forth at 31 C.F.R. §285.11 have been met with respect to Petitioner.

Petitioner's monthly income appears to be consumed by expenses, and I conclude from consideration of her financial statement and Treasury collection guidelines that garnishment would present a financial hardship, as that term is recognized by law.

Treasury shall remain authorized to undertake any and all other appropriate collection action except garnishment.

ORDER

For the foregoing reasons, the wages of Petitioner shall **NOT** be subjected to administrative wage garnishment at this time. Petitioner is encouraged in the interim to attempt to negotiate repayment of the debt with the representatives of Treasury. The toll free number for Treasury's agent is **1-888-826-3127**.

Petitioner is advised that this Decision and Order does not prevent payment of the debt through offset of any federal money payable to Petitioner.

Petitioner is further advised that a debtor who is considered delinquent on debt to the United States may be barred from obtaining other federal loans, insurance, or guarantees. See, 31 C.F.R. § 285.13.

Petitioner's current address is ******** Austin Texas, 78733. Until the debt is satisfied, Petitioner shall give to USDA RD or those collecting on Treasury's behalf, notice of any change in address, phone numbers, or other means of contact. Petitioner may direct questions to RD's representative Mary Kimball, c/o:

USDA New Program Initiatives Branch
Rural Development Centralized Servicing Center
4300 Goodfellow Blvd. F-22
St. Louis, MO 63120
314-457-5592
314-457-4426 (facsimile)

Copies of this Decision and Order shall be served upon the parties and counsel by the Hearing Clerk's Office.

So Ordered this 18th day of May, 2011 in Washington, D.C.

DOROTHY CRAWFORD.
AWG Docket No. 11 – 0085.
Decision and Order.
Filed May 18, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Janice K. Bullard.

AWG

DECISION AND ORDER

This matter is before the Office of Administrative Law Judges ("OALJ") upon the request of Dorothy Crawford ("Petitioner") for a hearing to address the existence or amount of a debt alleged to be due to the United States Department of Agriculture, Rural Development ("Respondent"; "RD"), and if established, the propriety of imposing administrative wage garnishment. By Order issued on April 15, 2011, the parties were directed to provide information and documentation concerning the existence of the debt and deadlines were set for the submissions. In addition, the matter was set for a telephonic hearing to commence on May 17, 2011.

The Respondent filed a Narrative, together with supporting documentation[1] on April 21, 2011. Petitioner did not file any responsive documents or statement. Respondent's submissions are hereby admitted to the record. At the scheduled date of the hearing, attempts were made to contact Petitioner at the telephone number she provided in her petition. No one responded to phone calls, and the hearing was commenced after several attempts to reach Petitioner proved futile. Respondent was represented by Mary E. Kimball, Accountant for the New Program Initiatives Branch of RD, Saint Louis, Missouri. Petitioner and Ms. Kimball testified at the hearing.

In determining whether wage garnishment would constitute a hardship, I have considered the sworn testimony, Petitioner's petition, Treasury Standard Form SF 329C (Wage Garnishment Worksheet), and standard geographical allowable per diem expense rates (www.irs.gov; www.opm.gov). On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law, and Order will be entered:

FINDINGS OF FACT

[1] References to Respondent's exhibits herein shall be denoted as "RX-1 through RX-8".

1. On January 29, 2007, the Petitioner signed a promissory note for a home mortgage loan in the amount of $64,200.00 from Mortgage One for residential real property located in Arcadia, Louisiana. RX-1.

2. On January 2, 2007, Petitioner requested a Single Family Housing Loan Guarantee from the United States Department of Agriculture (USDA), Rural Development (RD). RX-3.

3. On January 30, 2007, the promissory note was assigned to JP Morgan Chase. RX 2.

4. Petitioner subsequently defaulted on the loan and the loan was foreclosed on August 1, 2008. RX 5.

5. On July 24, 2009, the home was sold for $39,100.00. RX 5.

6. On September 18, 2009, USDA paid JP Morgan Chase $37,136.38, which included taxes, interest, and attorney fees pursuant to the guarantee. RX 5.

7. Petitioner's account with USDA was credited with $418.00, in the form of six payments intercepted by Treasury as offsets from social security payments made to Petitioner. RX 7.

8. The balance of the debt of $37,718.98 was referred to the U.S. Department of Treasury ("Treasury") for collection as required by prevailing statutes and regulations. RX 7.

9. The total indebtedness is $47,000.30, including Treasury fees of $10,281.32. RX-8.

10. Treasury, through its agent, issued a notice to Petitioner of intent to garnish wages.

11. Petitioner timely requested a hearing, and advised that garnishment would represent a financial hardship, as her income did not meet her expenses, which included the cost of cancer treatment.

CONCLUSIONS OF LAW

The Secretary has jurisdiction in this matter.

Petitioner is indebted to USDA Rural Development in the amount of $37,718.98 plus potential fees of $10,281.32, for a balance due of $47,000.30 on the mortgage loan extended to her.

All procedural requirements for administrative wage offset set forth at 31 C.F.R. §285.11 have been met with respect to Petitioner.

Although Petitioner failed to appear at the hearing and did not present specific evidence regarding her monthly income, I infer from the fact that

she is being paid social security payments[2] and undergoing treatment for cancer that she is not working.

The record contains sufficient information to conclude that garnishment would present a financial hardship, as that term is recognized by law.

Treasury shall remain authorized to undertake any and all other appropriate collection action except garnishment.

ORDER

For the foregoing reasons, any wages which Petitioner may be earning shall **NOT** be subjected to administrative wage garnishment at this time. Petitioner is encouraged in the interim to attempt to negotiate repayment of the debt with the representatives of Treasury. The toll free number for Treasury's agent is **1-888-826-3127**.

Petitioner is advised that this Decision and Order does not prevent payment of the debt through offset of any federal money payable to Petitioner.

Petitioner is further advised that a debtor who is considered delinquent on debt to the United States may be barred from obtaining other federal loans, insurance, or guarantees. See, 31 C.F.R. § 285.13.

Until the debt is satisfied, Petitioner shall give to USDA RD or those collecting on Treasury's behalf, notice of any change in address, phone numbers, or other means of contact.

Petitioner may direct questions to RD's representative Mary Kimball, c/o:

USDA New Program Initiatives Branch
Rural Development Centralized Servicing Center
4300 Goodfellow Blvd. F-22
St. Louis, MO 63120
314-457-5592
314-457-4426 (facsimile)

Copies of this Decision and Order shall be served upon the parties and counsel by the Hearing Clerk's Office.

So Ordered this 18th day of May, 2011 in Washington, D.C.

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[2] Petitioner was born on October 29, 1949, and is not yet eligible for retirement benefits; therefore, I infer that her social security benefits represent disability benefits.

LEONARD MORSE.
AWG Docket No. 11 – 0160.
Decision and Order.
Filed May 20, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Jill S. Clifton.

AWG

Decision and Order

1. The hearing by telephone was held as scheduled May 19, 2011. Leonard E. Morse, the Petitioner (APetitioner Morse"), failed to appear. [Petitioner Morse failed to appear by telephone for the hearing May 19, 2011; he failed to provide a phone number where he could be reached.][1] Petitioner Morse represents himself (appears *pro se*).

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent (AUSDA Rural Development") and is represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

[1] The phone number on Petitioner Morse's Hearing Request is the number we called. Petitioner Morse did not provide any other phone number. We got a Ageneric@ recording and left messages requesting him to return our call, but he did not.

3. I encourage **Petitioner Morse and the collection agency** to work together to **establish a repayment schedule** rather than immediately proceeding with garnishment, even though this Decision authorizes garnishment, up to 15% of Petitioner Morse's disposable pay. *See* 31 C.F.R. § 285.11. Petitioner Morse, obviously, will have to make himself available to the collection agency if he wants to negotiate. *See* paragraph 11.

4. This is Petitioner Morse's case (he filed the Petition), and in addition to failing to be available for the hearing, Petitioner Morse failed to file with the Hearing Clerk any information, such as a completed Consumer Debtor Financial Statement. Petitioner Morse's deadline for filing was May 12, 2011 (*see* my Order filed April 20, 2011).

Summary of the Facts Presented

5. Petitioner Morse owes to USDA Rural Development a balance of **$36,188.44** (as of March 15, 2011), in repayment of United States Department of Agriculture / Rural Housing Service ***Guarantee*** (*see* RX 3, esp. p. 2) for a loan made in 2006 by First Midwest Bank of Dexter, for a home in Missouri, the balance of which is now unsecured (Athe debt"). *See* USDA Rural Development Exhibits, plus Narrative, Witness & Exhibit List (filed April 21, 2011), which are admitted into evidence, together with the testimony of Ms. Kimball.

6. This Guarantee establishes an **independent** obligation of Petitioner Morse, AI certify and acknowledge that if the Agency pays a loss claim on the requested loan to the lender, I will reimburse the Agency for that amount. If I do not, the Agency will use all remedies available to it, including those under the Debt Collection Improvement Act, to recover on the Federal debt directly from me. The Agency's right to collect is independent of the lender's right to collect under the guaranteed note and will not be affected by any release by the lender of my obligation to repay the loan. Any Agency collection under this paragraph will not be shared with the lender."

7. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$36,188.44** would increase the current balance by $10,132.76, to $46,321.20. *See* USDA Rural Development Exhibits, esp. RX 10.

8. Petitioner Morse has provided no information about his income and expenses and no indication of hardship. I have no way of evaluating the

factors to be considered under 31 C.F.R. § 285.11; consequently I must presume that Petitioner Morse can withstand garnishment up to 15% of Petitioner Morse's disposable pay.

9. Petitioner Morse's Hearing Request states: I was informed the account was settled when the house was resold. While the Bank did not seek more money from Petitioner Morse, the Bank filed a claim with USDA Rural Development, and USDA Rural Development paid a loss claim of $38,174.44 to the Bank on August 14, 2009. RX 4, p.7.

10. Petitioner Morse is responsible and able to negotiate the disposition of the debt with Treasury's collection agency.

Discussion

11. Garnishment up to 15% of Petitioner Morse's disposable pay is authorized. *See* paragraph 8. I encourage **Petitioner Morse and the collection agency** to **negotiate promptly** the repayment of the debt. Petitioner Morse, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Morse, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less.

Findings, Analysis and Conclusions

12. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Morse and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

13. Petitioner Morse owes the debt described in paragraphs 5, 6 and 7.

14. **Garnishment is authorized**, up to 15% of Petitioner Morse's disposable pay. 31 C.F.R. § 285.11.

15. This Decision does not prevent repayment of the debt through ***offset*** of Petitioner Morse's **income tax refunds** or other **Federal monies** payable to the order of Mr. Morse.

Order

16. Until the debt is repaid, Petitioner Morse shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in his mailing address; delivery address for commercial carriers

such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

17. USDA Rural Development, and those collecting on its behalf, are authorized to proceed with garnishment, up to 15% of Petitioner Morse's disposable pay. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.

CAMILLA RAY.
AWG Docket No. 11 – 0137.
Decision and Order.
Filed May 24, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Jill S. Clifton.

AWG

Decision and Order

1. The hearing by telephone was held on April 12 and April 18, 2011. Ms. Camilla S. Ray, formerly known as Camilla S. Nadi (APetitioner Ray"), participated, representing herself (participated *pro se*).

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent (AUSDA Rural Development") and is represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

Summary of the Facts Presented

3. Petitioner Ray owes to USDA Rural Development a balance of **$65,597.47** (as of February 17, 2011) in repayment of a United States Department of Agriculture Rural Housing Service loan, made in 2005, for a home in Georgia.[1] The balance is now unsecured (Athe debt"). *See* USDA Rural Development Exhibits, plus Narrative, Witness & Exhibit List (filed on March 10 and May 3, 2011), which are admitted into evidence, together with the testimony of Mary Kimball. [The May 3 filing included Additional Narrative and Exhibits RX 9 and RX 10.]

4. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$65,597.47** would increase the balance by $18,367.29, to $83,964.76. *See* USDA Rural Development Exhibits, esp. RX 8.

5. The amount Petitioner Ray borrowed from USDA Rural Housing Service in 2005 was $120,137.50. Thereafter, Petitioner Ray benefitted from a 2-year Moratorium. When the Moratorium expired, Petitioner Ray re-amortized her account, on May 23, 2008. The re-amortization allowed Petitioner Ray to become current on her debt, by transferring the delinquent amount to principal. The principal amount due became $130,108.55. *See* USDA Rural Development Narrative. Petitioner Ray testified she had no means to prevent the loan from again becoming delinquent, as is explained more fully below.

6. Petitioner Ray's Hearing Request filed February 7, 2011, states that she does not owe the debt; or in the alternative she does not owe the full amount of the debt; for the reason that: AI didn't receive due process when my home foreclosed. I don't agree with the amount owed. I want to inspect the records." Petitioner Ray's Narrative and Exhibits, including her Consumer Debtor Financial Statement (filed on March 30 and March 31, 2011) are admitted into evidence, together with the testimony of Petitioner Ray.

7. Petitioner Ray testified that her $**** per year earnings were insufficient, and that the court-ordered child support due her was not always delivered to her. She testified that child support of $**** per year that should have been paid to her ($**** per year when she applied, according to Petitioner Ray's Narrative and PX 1), was unreliable and should not have been considered in qualifying her for the loan. Petitioner Ray's excellently written Narrative explains that, although she

[1] Rural Housing Service is a part of USDA Rural Development.

desperately wanted a home for her two children, she never did have the means to make the mortgage payments. Petitioner Ray testified to her health problems in addition to low wages and lack of child support.

8. Petitioner Ray testified that not all the notices pertaining to the delinquency reached her. This was a time when her mother was having heart surgery; her grandmother died; and custody of her son was at issue. The mailings sent to Petitioner Ray at home (the property that was security for the debt) may not have reached her (she believed September 2009 was about the last date she was in the home), because the mailbox was knocked down an average of once every 2 weeks. Petitioner Ray testified that she provided her mother's address in Richmond, Georgia as a mailing address to reach her, in care of her mother; and her mother may not have given her all of the mailings sent there.

9. Petitioner Ray testified that her realtor was not able to accomplish a short sale, and cites lack of cooperation from USDA Rural Development. *See* Petitioner Ray's Narrative. On September 14, 2009, USDA Rural Development received Petitioner Ray's consent letter to release information to Carmen Cribbs (the realtor). RX 9, p. 31. Petitioner Ray testified that after she got the $3,661.64 demand (letter dated July 13, 2009, RX 5, p. 1), and there were AFor Sale" signs everywhere, she had contacted the realtor. The evidence does not show why Petitioner Ray through her realtor was not able to accomplish a short sale; there is no record of an offer to buy being presented to USDA Rural Development. Petitioner Ray's Narrative does mention her realtor's comment on the bad economy.

10. Petitioner Ray acknowledges in her Narrative that there was a time when a payment of $3,600 (to be precise, $3,661.64) would have stopped the foreclosure, and Petitioner Ray testified she had no way to pay. Ms. Kimball testified that Petitioner Ray had received all the advantages and benefits that USDA Rural Housing Service could offer. On May 10, 2010, USDA Rural Development sent the notice to vacate letter by certified mail to Petitioner Ray. RX 9, p. 20. *See* Notice of Foreclosure and Demand to Vacate Real Estate, RX 6, p. 12. Numerous notices had been sent to Petitioner Ray. The foreclosure sale occurred on June 1, 2010, yielding $75,176.00 to be applied to the $140,773.47 balance, after which the balance still owed on the debt was **$65,597.47**. RX 9, p. 5. RX 7. RX 6.

11. Petitioner Ray challenges the low price paid for the home, asserting that the fair market value of the home was $135,138.00 in 2010

(based on Assessor's records) (see Exhibits PX-16, PX-17, & PX-18). AIt is not my fault that they didn't seek a fair amount (bid) for the home." Petitioner Ray's Narrative, p. 2. As I look at the Assessor's records, without further evidence, I cannot assume that the Assessor's values had been updated to reflect current values. Additionally, distressed sales such as the foreclosure sale here are not expected to yield high prices. The home was well-advertised prior to the foreclosure auction, a minimum bid was established (the successful bid, which was the highest bid, was $1.00 higher than the minimum bid required), and the auction process itself (ASale Under Power"), well-documented in RX 5 and RX 6, satisfies the fairness requirement.

12. Petitioner Ray asserts that USDA Rural Development failed to comply with Georgia law regarding establishment of a deficiency. Petitioner Ray has done an excellent job of arguing her case, not only on this issue, but on all the issues. Nevertheless, after careful consideration of the evidence and the law, including the law concerning administrative collections such as this, I find that Petitioner Ray did receive due process, that USDA Rural Development treated Petitioner Ray fairly, that an agency of the United States government collecting administratively has rules that differ from those of the various jurisdictions in which the loans were made, and that Petitioner Ray owes the balance of **$65,597.47** (excluding potential collection fees), as of February 17, 2011.

13. Now that I have determined that Petitioner Ray owes the debt, I consider the evidence to determine whether Petitioner Ray's disposable pay supports garnishment, up to 15% of her disposable pay, without creating hardship. 31 C.F.R. § 285.11. Petitioner Ray's current disposable pay (after subtracting income tax, social security, Medicare, health insurance, and any other Aeligible" withholding from her gross pay) is zero (-0-). Petitioner Ray owes money that she does not have, not only for the USDA Rural Development debt, but also for medical care, for student loans, for her car, and for miscellaneous other items. Petitioner Ray's reasonable and necessary living expenses are largely met by her husband, and he is not obligated to pay the USDA Rural Development debt. In evaluating the factors to be considered under 31 C.F.R. § 285.11, I find that Petitioner Ray cannot withstand garnishment at this time without hardship.

14. To prevent hardship, potential garnishment to repay Athe debt" (*see* paragraph 3) must be limited to zero per cent (0%) of Petitioner

Ray's disposable pay through May 2012; and no more than 3% of Petitioner Ray's disposable pay thereafter. 31 C.F.R. § 285.11.

15. Petitioner Ray indicates that she has no means of paying under a repayment agreement; consequently she will not negotiate the repayment of the debt with Treasury's collection agency.

Discussion

16. Through May 2012, NO garnishment is authorized. Thereafter, garnishment up to 3% of Petitioner Ray's disposable pay is authorized. *See* paragraph 13. If Petitioner Ray does decide to negotiate the repayment of the debt, this will require Petitioner Ray to telephone Treasury's collection agency. The toll-free number is **1-888-826-3127**. Petitioner Ray, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less.

Findings, Analysis and Conclusions

17. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Ray and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

18. Petitioner Ray owes the debt described in paragraphs 3, 4 5, 10, and 12.

19. **Through May 2012, NO garnishment is authorized**. Thereafter, garnishment **up to 3%** of Petitioner Ray's disposable pay is authorized. 31 C.F.R. § 285.11.

20. This Decision does not prevent repayment of the debt through ***offset*** of Petitioner Ray's **income tax refunds** or other **Federal monies** payable to the order of Ms. Ray.

Order

21. Until the debt is repaid, Petitioner Ray shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

22. USDA Rural Development, and those collecting on its behalf, are **NOT** authorized to proceed with garnishment **through May 2012**.

Thereafter, USDA Rural Development, and those collecting on its behalf, are authorized to proceed with garnishment, **up to 3%** of Petitioner Ray's disposable pay. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties. Petitioner Ray's copy shall be sent not only to the address the Hearing Clerk has been using, **but also to the address on her Hearing Request** (and on her Consumer Debtor Financial Statement, and on her 2010 income tax return), as she testified it is her correct address.

Done at Washington, D.C.

KELLY LITCHFIELD.
AWG Docket No. 11 – 0177.
Decision and Order.
Filed June 3, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Jill S. Clifton.

AWG

Decision and Order

1. The hearing was held by telephone on June 2, 2011. Ms. Kelly R. Litchfield, full name Kelly Rae Litchfield, the Petitioner (APetitioner Litchfield") participated, represented by Janel B. Fredericksen, Esq.

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent (AUSDA Rural Development") and was represented by Ms. Mary Kimball and Marsha Moore. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone

314.457.4426 FAX

Summary of the Facts Presented

3. Petitioner Litchfield owes to USDA Rural Development a balance of **$32,066.63** (as of June 2, 2011, *see* RX 9A), in repayment of a United States Department of Agriculture / Rural Development / Rural Housing Service ***Guarantee*** (*see* RX-2, esp. p. 2) for a loan made in 2007, the balance of which is now unsecured (Athe debt"). Petitioner Litchfield borrowed, with the co-borrower, her husband, to buy a home in North Dakota. *See* USDA Rural Development Exhibits RX 1 through RX 9 together with the Narrative, Witness & Exhibit List (filed April 28, 2011); plus Exhibits RX 7A, RX 8A, and RX 9A together with the Updated Narrative & Exhibit List (filed June 2, 2011); and the testimony of Mary Kimball, all of which I admit into evidence.

4. This ***Guarantee*** establishes an **independent** obligation of Petitioner Litchfield, AI certify and acknowledge that if the Agency pays a loss claim on the requested loan to the lender, I will reimburse the Agency for that amount. If I do not, the Agency will use all remedies available to it, including those under the Debt Collection Improvement Act, to recover on the Federal debt directly from me. The Agency's right to collect is independent of the lender's right to collect under the guaranteed note and will not be affected by any release by the lender of my obligation to repay the loan. Any Agency collection under this paragraph will not be shared with the lender." RX 2, p. 2.

5. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on of **$32,066.63** would increase the current balance by $8,978.66, to $41,045.29. RX 9A.

6. Petitioner Litchfield's Exhibits PX 1 through PX 11, including her AConsumer Debtor Financial Statement" and accompanying documentation, together with her Narrative, Witness & Exhibit List (filed May 23, 2011), are all admitted into evidence, together with Petitioner Litchfield's testimony, together with Petitioner Litchfield's Hearing Request and accompanying documentation.

7. USDA Rural Development would not need to collect the debt from Petitioner Litchfield IF the co-borrower had done what was legally required of him (*see* PX 2, PX 3). The co-borrower was required to and failed to pay the debt on the home. Petitioner Litchfield was removed

from the home, thanks to the action of the co-borrower (*see* PX 1), about nine months after the co-borrower and she bought the home. Nevertheless, although Petitioner Litchfield may pursue the co-borrower for monies collected from her on the debt, that does not prevent USDA Rural Development from collecting from her.

8. Petitioner Litchfield supports herself and her 3-year old daughter. Petitioner Litchfield testified that she works full-time (usually 40 hours per week) as a Restorative Therapy Aide (following the work of physical therapists and occupational therapists), for $** per hour. Petitioner Litchfield's disposable income may be about $*** to $**** per month (PX 11). [Disposable income is gross pay minus income tax, Social Security, Medicare, and health insurance withholding; and in certain situations minus other employee benefits contributions that are required to be withheld.]

9. Petitioner Litchfield testified that she is under cardiac care and has already required a surgical procedure for tachycardia and may require installation of a pacemaker or other cardiac surgery; she is under treatment for a colon condition that includes ulceration; and she has ongoing chiropractic treatment that includes correction of residuals from an accident in 1997. Petitioner Litchfield has thus far been able to repay her medical expenses, but she is incurring ongoing medical expenses and has a $**** deductible plus co-pay requirements. Petitioner Litchfield owes considerable amounts on indebtedness, primarily $**** in student loans and $**** in attorneys' fees from her dissolution of marriage (PX 3) in March 2009 from the co-borrower. PX 4.

10. Petitioner Litchfield's disposable pay (within the meaning of 31 C.F.R. § 285.11) does **not** currently support garnishment and **no** garnishment is authorized through **June 2016**. Although Garnishment at 15% of Petitioner Litchfield's disposable pay could yield roughly $*** to $*** per month in repayment of the debt, she cannot withstand garnishment in that amount without financial hardship. To prevent hardship, potential garnishment to repay Athe debt" (*see* paragraph 3) must be limited to **0%** of Petitioner Litchfield's disposable pay through **June 2016**; then, following review of Petitioner Litchfield's financial circumstances to determine what amount of garnishment she can withstand without financial hardship, beginning no sooner than July 2016, garnishment up to 15% of Petitioner Litchfield's disposable pay is authorized. 31 C.F.R. § 285.11.

11. Petitioner Litchfield is responsible and willing and able to negotiate the repayment of the debt with Treasury's collection agency.

Discussion

12. **NO garnishment is authorized through June 2016.** I encourage **Petitioner Litchfield and the collection agency** to **negotiate promptly** the repayment of the debt. Petitioner Litchfield, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. You may want to explain your health problems and to obtain your physicians' statements for the collection agency. You may want to request apportionment of debt between you and the co-borrower. You may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less.

Findings, Analysis and Conclusions

13. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Litchfield and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

14. Petitioner Litchfield owes the debt described in paragraphs 3, 4 and 5.

15. **NO garnishment is authorized through June 2016**, because garnishment would create financial hardship. 31 C.F.R. § 285.11. Further, Petitioner Litchfield **shall be repaid the amounts already garnished** from her pay. [Garnishment is ongoing because Petitioner Litchfield's hearing request was late; it was late because she did not receive the notice sent to a wrong address, and her employer's notification was the first she had that her pay was being garnished.]

16. Then, following review of Petitioner Litchfield's financial circumstances to determine what amount of garnishment she can withstand without financial hardship, **beginning no sooner than July 2016, garnishment up to 15% of Petitioner Litchfield's disposable pay is authorized**. 31 C.F.R. § 285.11.

17. This Decision does not prevent repayment of the debt through ***offset*** of Petitioner Litchfield's **income tax refunds** or other **Federal monies** payable to the order of Ms. Litchfield.

Order

18. Until the debt is fully paid, Petitioner Litchfield shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

19. USDA Rural Development, and those collecting on its behalf, are **NOT** authorized to proceed with garnishment through **June 2016** and **shall repay the amounts already garnished** from her pay. Following review of Petitioner Litchfield's financial circumstances to determine what amount of garnishment she can withstand without financial hardship, **beginning no sooner than July 2016, garnishment up to 15% of Petitioner Litchfield's disposable pay is authorized**. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties, **including both Petitioner Litchfield AND her attorney**.

Done at Washington, D.C.

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SHIRLEY MCLEOD.
AWG Docket No. 11 – 0189.
Decision and Order.
Filed June 9, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Hearing Officer James P. Hurt.

AWG

DECISION AND ORDER

This matter is before me upon the request of Shirley McLeod for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On April 20, 2011, I issued a Prehearing Order to facilitate a meaningful conference with the parties as

to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing.

The USDA Rural Development (RD), Respondent, complied with that Order and a Narrative was filed, together with supporting documentation on April 22, 2011.

Ms. McLeod filed her financial statements on May 12, 2011 which I now label collectively as PX-1. On June 7, 2011 at the scheduled time, both parties were available for the conference call. The parties were sworn. Following the hearing, I requested that Ms. McLeod file a copy of her most recent pay stub to assist with the Financial Hardship calculation and the same was received on June 9, 2011 which I now label as PX-2. Ms. McLeod advised that she expects to retire due to her employer's budget reductions on/about February 2012. She states that she presently travels 75 miles round trip to her place of employment. In February 2012, she expects to be eligible for social security early retirement.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law, and Order will be entered.

Findings of Fact

On February 8, 1992, Shirley McLeod, the Petitioner obtained a $37,000.00 USDA FmHA loan for a primary residence located at 77## Ancon Dr., Fayetteville, NC 283##.[1] The Petitioner signed a promissory note and a Deed of Trust. RX-1, RX-2.

Petitioner reamortized her account on July 8, 1997. (RX-4).

Petitioner's property was involved in an uninsured fire which substancially destroyed the property on March 5, 1998.

On March 12, 1999, the property was declared a valueless lien with no recovery value.

In the best interests of the government, USDA released the lien, but not the debt thus creating an unsecured debt owed by Ms. McLeon.

The borrower defaulted on the loan and on May 22, 2001, she was mailed a notice of the remaining balance along with available options. RX-7.

Ms. McLeod owes a total of $30,036.25, including principal, interest and fees. Narrative, RX–6 .

[1] Complete address maintained in USDA files.

The remaining potential treasury fees are $8,410.15. RX-7.

Ms. McLeod raised the issue of financial hardship and I performed a Financial Hardship calculation which is effective through her current full time employment.[2]

Conclusions of Law

Shirley M. McLeod is indebted to USDA Rural Development in the amount of $30,036.25 for the mortgage loan extended to her.

Shirley M. McLeod is also indebted to the US Treasury for potential fees in the amount of $8,410.15.

All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.

The Respondent is **not** entitled to administratively garnish the wages of the Petitioner at this time. After February 2012, RD may review the then existing financial statements and assess the legal entitlement to garnish her wages.

Order

For the foregoing reasons, the wages of Shirley McLeod shall **not** be subjected to administrative wage garnishment at this time

[2] The Financial Hardship calculations are not posted on the OALJ website.

After February 2012, RD may re-assess Ms. McLeod's financial position.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

Done at Washington, D.C.

MARIA MONTES.
AWG Docket No. 11 – 0126.
Decision and Order.
Filed June 9, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Hearing Officer James P. Hurt.

AWG

DECISION AND ORDER

This matter is before me upon the request of Maria Montes for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On April 20, 2011, I issued a Prehearing Order to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing.

The USDA Rural Development (RD), Respondent, complied with that Order and a Narrative was filed, together with supporting documentation on April 21, 2011.

Ms. Montes filed her financial statements on May 4, 2011 which I now label collectively as PX-1. On May 19, 2011 at the scheduled time, both parties were available for the conference call. The parties were sworn. Ms. Montes was assisted by Concepcion Viramontes in this oral hearing. Following the hearing, I requested that Ms. Kimball file a revised paragraph 3 of her narrative which more closely follows RD exhibit RX-6 as Revised Narrative and the same was received on June 7, 2011. Ms. Montes advised that she was involuntarily terminated from her employment prior to the hearing.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law, and Order will be entered.

Findings of Fact

On June 20, 1997, Dario and Maria Montes, the Petitioner obtained a $ 55,000.00 USDA FmHA loan for a primary residence located at 21## Commander Dr., Lake Havasu City, AZ 864##.[1] The Petitioner signed a promissory note and a mortgage. RX-1, RX-2.

Petitioner, Maria Montes stated that she transferred her remaining interest to Dario Montes. Ms. Montes did not obtain a release of her obligation on the June 20, 1997 note and remained jointly and severally liable.

The borrowers defaulted on the loan and on January 5, 2008, she was mailed a notice of acceleration to her last known address. RX-4.

A Notice of a Trustee's sale was published and the property was sold at public auction on November 3, 2009. Narrative, RX-6.

At the time of the sale, Ms. Montes jointly and severally owed a total of $56,373.63, including principal, interest and fees. Narrative, RX–6, RX-7.

After the sale, a escrow account refund of $265.20 was credited to borrower. Narrative, RX-6

After application of the sale proceeds, Ms. Montes jointly and severally owed $2,116.43, plus pre-foreclosure fees of $1,422.67 for a total of $3,539.10. Narrative, RX-6.

The remaining unpaid debt is in the amount of $3,539.10 exclusive of potential Treasury fees. Narrative, RX-6.

The remaining potential treasury fees are $990.95. RX-7.

Ms. Montes has been involuntarily unemployed since March 2011.

Conclusions of Law

Maria Montes is indebted to USDA Rural Development in the amount of $3,539.10 for the mortgage loan extended to her.

Maria Montes is indebted to the US Treasury for potential fees in the amount of $990.95.

All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.

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[1] Complete address maintained in USDA files.

The Respondent is **not** entitled to administratively garnish the wages of the Petitioner until she has been gainfully employed for a period of one year. After one year, RD may review the then existing financial statements and assess the legal entitlement to garnish her wages.

Order

For the foregoing reasons, the wages of Maria Montes shall **not** be subjected to administrative wage garnishment until she has been gainfully employed for a period of one year.

After one year, RD may re-assess Ms. Montes's financial position.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office

Done at Washington, D.C.

JUANITA BUENDIA.
AWG Docket No. 11 – 0059.
Decision and Order.
Filed June 9, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Hearing Officer James P. Hurt.

AWG

Decision and Order

This matter is before me upon the request of Petitioner for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On January 11, 2011, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing. The hearing date was reset to May 13, 2011 by agreement of the parties.

The Rural Development Agency (RD), Respondent, complied with the Discovery Order and a Narrative was filed, together with supporting

documentation RX-1 through RX-7 on January 31, 2011. The Petitioner filed four typed pages with her Petition (which I now label as PX-5) and financial information and exhibits PX -1 through PX-4 on February 8, 2011. Ms. Buendia raised issues relating to the existence of a hidden gas pipeline on her property and that the house was constructed in a flood prone area. Following the hearing, RD filed additional documentation at my request concerning the field manual and/or field procedures then in effect. RX-8 and RX-11. Petitioner was present and Ms. Mary Kimball represented RD. The parties were sworn.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

On November 15, 1982, the Petitioner received a home mortgage loan in the amount of $28,000.00 from Farmers Home Administration (FmHA), United States Department of Agriculture (USDA), now Rural Development (RD) for construction of her home on a property located in Cameron County, Los Fresnos, TX 785##[1]. RX-1, RX-2.

2. A title insurance policy available to Ms. Buendia at the time of her loan gave her written notice of a pre-existing pipeline easement to Valley Pipeline on her property. RX-7 @ p. 6 of 45.

3. Rural Housing Applicant Interview office procedures state that they ". . . will be reviewed in detail during a personal interview. . ." at paragraph 17.

INSPECTION OF PROPERTY: The borrower will be responsible for making inspections necessary to protect the borrower's interest. . .

4. The FmHA instruction Manual at paragraph § 1924.9 Inspection of development work which was in effect at the time of the loan states, in part:

FmHA's inspections are not to assure the borrower that the house is built in accordance with the plans and specifications. RX-8 and RX-11.

5. The borrower became in default and a Notice of Acceleration was mailed on May 8, 2000. RX-4.

6. After the construction of her home, Ms. Buendia was required to pay for relocation of the gas line. PX-3.

[1] The complete address is maintained in USDA files.

7. After the construction of her home, she suffered flood damage and related mold problems and discovered that her septic system was not properly installed. PX-3.

8. RD declared the property as a valueless lien and released the lien on borrower's property; however the underlying debt remained as an unsecured debt. Narrative, RX-7 @ p. 1 of 45.

9. The principal loan balance prior to the valueless lien was $27,127.55, plus $27,146.94 for accrued interest, plus $8,166.93 for fees for a total of $62,441.42. Narrative , RX-5

10. Treasury offsets totaling $4,883.91 exclusive of Treasury fees have been received. RX-5.

11. The remaining unpaid debt is in the amount of $57,575.51 exclusive of potential Treasury fees. RX-6.

12. The remaining potential fees from Treasury are $16,121.14.

13. Ms. Buendia states that she has been involuntarily unemployed since November 2011.

Conclusions of Law

Petitioner is indebted to USDA Rural Development in the amount of $57,575.51 exclusive of potential Treasury fees for the mortgage loan extended to her.

In addition, Petitioner is indebted for potential fees to the US Treasury in the amount of $16,121.14.

All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.

The Respondent is entitled to NOT administratively garnish the wages of the Petitioner.

Order

For the foregoing reasons, the wages of Petitioner shall NOT be subjected to administrative wage garnishment until she has been employed for one year. After one year, RD may re-assess the Petitioner's financial position.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

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CYNTHIA POINTER.
AWG Docket No. 11 – 0183.
Decision and Order.
Filed June 14, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Jill S. Clifton.

AWG

Decision and Order

1. The hearing was held by telephone on June 14, 2011. Ms. Cynthia J. Pointer, the Petitioner (APetitioner Pointer"), participated, representing herself.

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent (AUSDA Rural Development") and was represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

Summary of the Facts Presented

3. Petitioner Pointer owes to USDA Rural Development a balance of **$5,914.10** (as of April 26, 2011) in repayment of loans made in 1994 (Athe debt"). *See* USDA Rural Development Exhibits, plus Narrative, Witness & Exhibit List (filed April 28, 2011), which are admitted into evidence.

4. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on

$5,914.10 would increase the current balance by $1,655.95, to $7,570.05. *See* USDA Rural Development Exhibits, esp. RX 7.

5. Petitioner Pointer's testimony and Narrative and exhibits (filed May 25, 2011), which are admitted into evidence, prove that she is paid $* per hour gross pay, working as a homemaker's aide only about 80 hours per month. Petitioner Pointer's gross pay is currently about $*** per month, or about $*** per week. Disposable pay is gross pay minus income tax, Social Security, Medicare, and health insurance withholding; and in certain situations minus other employee benefits contributions that are required to be withheld. Petitioner Pointer's disposable pay does not support garnishment, which would create hardship. 31 C.F.R. § 285.11.

6. Additionally, Petitioner Pointer should not be garnished when her disposable pay is $*** per week or less. Petitioner Pointer's $*** gross pay per week is **less** than the $*** minimum disposable pay per week; *see* 29 C.F.R. § 870.10. [Petitioner Pointer's disposable pay **does not exceed** Aan amount equivalent to thirty times the minimum (hourly) wage" for a week, currently $217.50 per week (30 x $7.25).[1]]

7. Petitioner Pointer is responsible and willing and able to negotiate the disposition of the debt with Treasury's collection agency.

Discussion

8. NO garnishment is authorized. *See* paragraphs 5 and 6. Petitioner Pointer, you may choose to negotiate with the collection agency the repayment of the debt. Petitioner Pointer, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Pointer, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less.

9. Petitioner Pointer has made substantial progress repaying, primarily through her income tax refunds.

Findings, Analysis and Conclusions

[1] The regulation at 31 C.F.R. ' 285.11 includes the following restriction on garnishment: AThe amount set forth at 15 U.S.C. 1673(a)(2) is the amount by which a debtor's disposable pay (for that week) exceeds an amount equivalent to thirty times the minimum (hourly) wage. See 29 CFR 870.10."

10. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Pointer and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

11. Petitioner Pointer owes the debt described in paragraphs 3 and 4.

12. **NO garnishment is authorized**. 31 C.F.R. § 285.11.

13. This Decision does not prevent repayment of the debt through ***offset*** of Petitioner Pointer's **income tax refunds** or other **Federal monies** payable to the order of Ms. Pointer.

Order

14. Until the debt is repaid, Petitioner Pointer shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

15. USDA Rural Development, and those collecting on its behalf, are **NOT** authorized to proceed with garnishment.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.

JAIME GARAY.
AWG Docket No. 11 – 0186.
Decision and Order.
Filed June 16, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Jill S. Clifton.

AWG

Decision and Order

1. The hearing by telephone was held as scheduled on June 14, 2011. Mr. Jaime G. Garay, the Petitioner (APetitioner Garay"), failed to appear. [He failed to appear by telephone: (a) the phone number Petitioner

Garay provided on his Hearing Request was answered by a person who said he did not know Mr. Garay; and (b) Petitioner Garay failed to respond to my Order filed April 20, 2011, which, among other things, instructed him to provide a telephone number for the hearing.]

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent (AUSDA Rural Development") and was represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

Summary of the Facts Presented

3. Petitioner Garay owes to USDA Rural Development a balance of **$7,935.26** in repayment of a loan that he borrowed in 1992. The loan was from the United States Department of Agriculture, Farmers Home Administration. [Farmers Home Administration became Rural Housing Service, a part of USDA Rural Development.] Petitioner Garay borrowed to buy a home in Texas, and the **$7,935.26** balance is now unsecured (Athe debt"). *See* USDA Rural Development Exhibits, plus Narrative, Witness & Exhibit List (filed April 22 and June 15, 2011), which are admitted into evidence, together with the testimony of Mary Kimball.

4. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$7,935.26** would increase the current balance by $2,221.87, to $10,157.13.

5. The amount borrowed from USDA Rural Development was $37,000.00 in 1992. The loan was re-amortized in 1996 and re-amortized again in 1999. These re-amortizations allowed Petitioner Garay to become current, by adding the delinquent amounts to principal.

By the time of the foreclosure sale on May 1, 2001, Petitioner Garay's debt had grown to $43,167.65.

$37,149.58 unpaid principal
4,582.94 unpaid interest, and
1,435.13 unpaid fees, probably including real estate taxes

$43,167.65
‘‘‘‘‘‘‘‘

RX 5, page 1.

From the sale of the home, $27,315.00 was applied to the debt. Collections since then have reduced the balance to **$7,935.26**, as of June 14, 2011. RX 6A.

6. This is Petitioner Garay's case (he filed the Petition), and in addition to failing to be available for the hearing, Petitioner Garay failed to file with the Hearing Clerk any information, such as a completed Consumer Debtor Financial Statement. Petitioner Garay's deadline for filing was June 3, 2011 (*see* my Order filed April 20, 2011). Petitioner Garay failed to file anything; he has provided no information about his income and expenses and no indication of hardship. I have no way of evaluating the factors to be considered under 31 C.F.R. § 285.11; consequently I must presume that Petitioner Garay can withstand garnishment up to 15% of Petitioner Garay's disposable pay.

7. Petitioner Garay is responsible and able to negotiate the repayment of the debt with Treasury's collection agency.

Discussion

8. Garnishment up to 15% of Petitioner Garay's disposable pay is authorized. *See* paragraph 6. I encourage **Petitioner Garay and the collection agency** to **negotiate promptly** the repayment of the debt. Petitioner Garay, this will require **you** to telephone the collection agency after you receive this Decision. The toll-free number for you to call is **1-888-826-3127**. Petitioner Garay, you may choose to offer to the collection agency to compromise the debt for an amount you are able to pay, to settle the claim for less.

Findings, Analysis and Conclusions

9. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Garay and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

10. Petitioner Garay owes the debt described in paragraphs 3, 4 and 5.

11. **Garnishment is authorized**, up to 15% of Petitioner Garay's disposable pay. 31 C.F.R. § 285.11.

12. Repayment of the debt may also occur through ***offset*** of Petitioner Garay's **income tax refunds** or other **Federal monies** payable to the order of Mr. Garay.

Order

13. Until the debt is repaid, Petitioner Garay shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in his mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

14. USDA Rural Development, and those collecting on its behalf, are authorized to proceed with garnishment, up to 15% of Petitioner Garay's disposable pay. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.

BEVERLY BROADHEAD.
AWG Docket No. 10 – 0425.
Decision and Order.
Filed June 16, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Janice K. Bullard.

AWG

DECISION AND ORDER

This matter is before the Office of Administrative Law Judges ("OALJ") upon the request of Beverly Broadhead ("Petitioner") for a hearing to address the existence or amount of a debt alleged to be due to the United States Department of Agriculture, Rural Development ("Respondent"; "RD"), and if established, the propriety of imposing administrative wage garnishment. By Order issued on May 20, 2011[1], the parties were directed to provide information and documentation concerning the existence of the debt and deadlines were set for the submissions. In addition, the matter was set for a telephonic hearing to commence on June 15, 2011 at 11:00 a.m. o'clock, E.S.T.

The Respondent filed a Narrative, together with supporting documentation[2] on October 21, 2010. Petitioner did not file any responsive documents or statement; however in response to my most recent Order, Petitioner called my staff to provide a phone number where she could be reached at the time of the hearing. On June 15, 2011, between 10:50 a.m. and 11:30 a.m., several attempts were made to reach the Petitioner at the number she provided. No one answered the phone.

As Petitioner has been provided with many opportunities to participate in a hearing on the notice to garnish her wages and has failed to comply with Orders and hearing protocol, I find it appropriate to make a Decision on the basis of the entire record before me. The following Findings of Fact, Conclusions of Law and Order shall be entered.

Findings of Fact

1. Petitioner Beverly Broadhead obtained a loan from USDA-RD in the amount of $90,700.00 to finance the purchase of her primary residence in Theodore, Alabama.

2. Petitioner executed promissory notes and deed of trust dated May 18, 2000 as evidence of indebtedness for the loans. RX 1 and RX 2.

3. Petitioner reamortized her account on three occasions by adding delinquent and unauthorized assistance amounts to the principal of the loan: (RX-4)

[1] This case has been scheduled several times by Orders issued September 27, 2010; November 2, 2010; and April 10, 2011, and continued and rescheduled at Petitioner's request.

[2] References to Respondent's exhibits herein shall be denoted as "RX-1 through RX-8".

a) The principal due after the first reamortization on July 18, 2003 was $89,521.53;

b) The principal due after the second reamortization on June 18, 2006 was $94,614.42

c) The principal due after the third reamortization on August 18, 2007 was $106,030.88.

4. On September 16, 2003, Petitioner filed a bankruptcy petition under 11 U.S.C. Chapter 7, but she reaffirmed her debt with USDA-RD on November 19, 2003, and it therefore was not discharged. RX-4A

5. Petitioner was sent Notice of Acceleration of her account, dated December 11, 2008. RX-5.

6. Petitioner defaulted on the loan from USDA, and the property was sold at short sale on March 23, 2009 for $83,398.63, which was applied to the account balance of $109,770.72, consisting of $103,851.57 in principal; $5,203.93 in accrued interest; and $715.22 in fees.

7. The difference after application of sales proceeds was $26,372.09, which was referred to Treasury for collection. RX 6.

8. The amount of $691.31 was applied to Petitioner's account through tax offset and the balance at Treasury is now $25,680.78. RX-6.

9. The total indebtedness is $32,871.40, consisting of the balance on the loan and potential fees of $7,190.62. RX-7.

Conclusions of Law

The Secretary has jurisdiction in this matter.

Petitioner is indebted to USDA Rural Development in the amount of $32,871.40, comprised of $25,680.78 plus potential Treasury fees of $7,190.62.

All procedural requirements for administrative wage offset set forth at 31 C.F.R. §285.11 have been met.

USDA Rural Development has established that the Petitioner was given notice of the debt and an opportunity to cure any default.

5. USDA-RD is entitled to administratively garnish the wages of the Petitioner.

6. In addition, Treasury may implement any and all other appropriate collection action.

Order

1. The Administrative Wage Garnishment may proceed at this time at the rate of 15% of Petitioner's Monthly Disposable Income.

2. Petitioner is advised that this Decision and Order does not prevent payment of the debt through offset of any federal money payable to Petitioner.

3. Petitioner is further advised that a debtor who is considered delinquent on debt to the United States may be barred from obtaining other federal loans, insurance, or guarantees. See, 31 C.F.R. § 285.13.

4. Until the debt is satisfied, Petitioner shall give to USDA RD or those collecting on its behalf, notice of any change in his address, phone numbers, or other means of contact. Petitioner may direct questions to RD's representative Mary Kimball, c/o:

USDA New Program Initiatives Branch
Rural Development Centralized Servicing Center
4300 Goodfellow Blvd. F-22
St. Louis, MO 63120
314-457-5592
314-457-4426 (facsimile)

5. Copies of this Decision and Order shall be served upon the parties by the Hearing
Clerk's Office.

So ORDERED this 16th day of June, 2011 in Washington, D.C.

SUSAN THOMPSON.
AWG Docket No. 10 – 0338.
Decision and Order.
Filed June 17, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Victor W. Palmer.

AWG

Decision and Order

Pursuant to a Hearing Notice, I held a hearing by telephone, on June 16, 2011, at 11:00 AM Eastern Time, in consideration of a Petition seeking to dispute Petitioner's obligation to pay a debt that Petitioner, Susan Thompson (now Susan Thompson Garcia), incurred when she assumed a single family mortgage loan that had been given by Respondent, USDA, Rural Development's predecessor (USDA-FHA). The assumed loan was in the amount of $33,553.93, and, on November 30, 1984, it was assumed to facilitate the purchase of a primary residence located in Crockett, Texas. However, the loan was not paid and a foreclosure sale was held, on March 3, 1998, that resulted in USDA receiving $15,397.00 when Petitioner owed $44,224.93 for principal, interest and fees respecting the unpaid loan. After application of the sale proceeds, Petitioner still owed $28,827.93. She presently owes $28,827.93 plus $8,071.82 in fees to Treasury, or $36,899.75 total. Respondent has initiated administrative garnishment of Petitioner's wages for the nonpayment of the amount still owed. At the hearing, Petitioner represented herself and Mary Kimball, represented Respondent. Both Petitioner and Ms. Kimball were sworn.

Petitioner as instructed by the Hearing Notice filed: 1. completed forms respecting her current employment, general financial information, assets and liabilities, and monthly income and expenses; 2. a narrative of events or reasons concerning the existence of the alleged debt and her ability to repay all or part of it; 3. supporting exhibits with a list of the exhibits and a list of witnesses who would testify in support of his petition. Petitioner is separated from her husband, Alberto Garcia, has two daughters ages 14 and 23, both of whom are in school, and she is employed as HSenior Recruiter earning a gross monthly income of $****, or net monthly income of $*****. Her monthly expenses are: rent-$***; car payments-$***; gasoline-$***; electricity-$***; natural gas-$**; food-$***; cable TV & internet phone-$***; life insurance-$***; clothing-$***; trash/water-$**; car insurance-$***; college fund-$***; and credit card payments- $**. Total monthly expenses are: $*****. The monthly expenses exceed her monthly net income. Respondent's representative, Mary Kimball, Accountant for the New Initiatives Branch, USDA Rural Development, filed supporting documents and gave testimony showing that the debt owed to it by Petitioner has a present balance of $28,927.93 plus $8,071.82 in fees that are being assessed by Treasury for its collection efforts, or $36,899.75 total.

Under these circumstances, there is no present disposable monthly income available for garnishment and the proceedings to garnish Petitioner's wages are hereby suspended and shall not be resumed for six (6) months from the date of this Order.

LOIS COMEAU.
AWG Docket No. 11 – 0195.
Decision and Order.
Filed June 24, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Jill S. Clifton.

AWG

Decision and Order

1. The hearing was held by telephone as scheduled, on June 23, 2011. Ms. Lois Comeau, also known as Lois G. Comeau, the Petitioner (APetitioner Comeau") participated, represented by Stephen Cosgrove, Esq.

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent (AUSDA Rural Development") and was represented by Ms. Mary Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

Summary of the Facts Presented

3. Petitioner Comeau owes to USDA Rural Development a balance of **$33,039.30** (as of April 28, 2011), in repayment of a United States Department of Agriculture / Rural Housing Service ***Guarantee*** (*see* RX-2, esp. p. 2) for a loan made in 2003, the balance of which is now unsecured (Athe debt"). [This **$33,039.30** balance will change (increase), because I order that wages already garnished be **returned** to Petitioner Comeau.] Petitioner Comeau borrowed to buy a home in Vermont. *See* USDA Rural Development Exhibits RX 1 through RX 10 which I admit into evidence, together with the Narrative, Witness & Exhibit List (filed May 9, 2011), and the testimony of Mary Kimball.

4. This ***Guarantee*** establishes an **independent** obligation of Petitioner Comeau, "I certify and acknowledge that if the Agency pays a loss claim on the requested loan to the lender, I will reimburse the Agency for that amount. If I do not, the Agency will use all remedies available to it, including those under the Debt Collection Improvement Act, to recover on the Federal debt directly from me. The Agency's right to collect is independent of the lender's right to collect under the guaranteed note and will not be affected by any release by the lender of my obligation to repay the loan. Any Agency collection under this paragraph will not be shared with the lender." RX 2, p. 2.

5. I have studied carefully Petitioner Comeau's Memorandum of Law with exhibits filed June 21, 2011. The document presents excellent argument. Nevertheless, after careful consideration of the evidence and the law, especially the law concerning administrative collections such as this, I find that an agency of the United States government collecting administratively has rules that differ from those of the various jurisdictions in which the loans were made, and that Petitioner Comeau owes the balance of **$33,039.30** (excluding potential collection fees), as of April 28, 2011.

6. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$33,039.30** would increase the current balance by $9,251.00, to $42,290.30. RX 10.

7. Petitioner Comeau's testimony, together with Petitioner Comeau's AConsumer Debtor Financial Statement" (filed June 21, 2011), and pay stub filed June 23, 2011, are admitted into evidence, together with Petitioner Comeau's Hearing Request and accompanying documentation. Petitioner Comeau's disposable pay (within the meaning of 31 C.F.R. § 285.11) does **not** support garnishment and **no** garnishment is authorized.

8. Petitioner Comeau works 35 hours per week (considered part-time) as a production clerk. Petitioner Comeau's disposable income is about $*** per month. [Disposable income is gross pay minus income tax, Social Security, Medicare, and health insurance withholding; and in certain situations minus other employee benefits contributions that are required to be withheld.] Although Garnishment at 15% of Petitioner Comeau's disposable pay could yield roughly $*** per month in repayment of the debt, she cannot withstand garnishment in that amount without hardship. To prevent hardship, potential garnishment to repay Athe debt" (*see* paragraph 3) must be limited to 0% of Petitioner Comeau's disposable pay.

Discussion

9. **NO garnishment is authorized**. Petitioner Comeau, you may choose to contact the U.S. Treasury Department to **negotiate** the repayment of the debt. Whether Treasury would agree to apportion the debt between you and your co-borrower is perhaps worth exploring (even though your co-borrower may be discharging through bankruptcy his responsibility to repay the debt). Whether Treasury would agree to a repayment schedule you can afford is perhaps worth exploring. Petitioner Comeau, negotiating with Treasury will require **you** to make the telephone call(s) after you receive this Decision; the toll-free number for you to call is **1-888-826-3127**. You are, of course, welcome to include an attorney or anyone else with you in the call.

Findings, Analysis and Conclusions

10. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Comeau and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

11. Petitioner Comeau owes the debt described in paragraphs 3, 4, 5 and 6.

12. **NO garnishment is authorized**, because garnishment would create financial hardship. 31 C.F.R. § 285.11. Further, Petitioner Comeau **shall be repaid the amounts already garnished** from her pay. [Garnishment is ongoing because Petitioner Comeau's hearing request was late; it was late because she did not receive the notice sent to a wrong address, and her employer's notification was the first she had that her pay was being garnished.]

13. Repayment of the debt may occur through ***offset*** of Petitioner Comeau's **income tax refunds** or other **Federal monies** payable to the order of Ms. Comeau.

Order

14. Until the debt is fully paid, Petitioner Comeau shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

15. USDA Rural Development, and those collecting on its behalf, are **NOT** authorized to proceed with garnishment (31 C.F.R. § 285.11) and **shall repay the amounts already garnished** from her pay.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties, including **both** Petitioner Comeau **AND her attorney** Mr. Cosgrove.

Done at Washington, D.C.

DAVON STADLER.
AWG Docket No. 11 – 0167.
Decision and Order.
Filed June 29, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Jill S. Clifton.

AWG

Decision and Order

1. The Petitioner, Davon M. Stander, full name Davon Montrell Stander (APetitioner Stander"), represents himself (appears *pro se*). The hearing, by telephone, was held on April 27, 2011, May 12, 2011, and May 26, 2011. The record was held open for any additional filings, and a friend of Petitioner Stander telephoned to report that more would be filed, but nothing has been filed since my Order filed May 31, 2011.

2. The Respondent, Rural Development, an agency of the United States Department of Agriculture (AUSDA Rural Development"), is represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

Summary of the Facts Presented

3. USDA Rural Development's Exhibits, plus Narrative, Witness & Exhibit List, were filed on April 11, April 15, and May 13, 2011, and are admitted into evidence, together with the testimony of Ms. Kimball. USDA Rural Development presented evidence that Petitioner Stander owes to USDA Rural Development a balance of **$27,068.36** (as of March 17, 2011), in repayment of a Farmers Home Administration / United States Department of Agriculture loan (now USDA / Rural Housing Service) for a home in Mississippi assumed from Lula Mae Nix in 2008 (RX 3). The Assumption Agreement (RX 3) is dated May 7, 2008, and bears a signature purporting to be that of ADavon Montrell Stander" (Petitioner Stander). The balance is now unsecured (Athe debt").

4. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$27,068.36** would increase the current balance by $7,579.14, to $34,647.50. *See* USDA Rural Development Exhibits, esp. RX 8.

5. Petitioner Stander's Exhibits were filed on April 21, April 22, April 27, and May 6, 2011, and are admitted into evidence, together with the testimony of Petitioner Stander. Petitioner Stander testified that the signature on the Assumption Agreement (RX 3) is not his and was not authorized by him. The home and the loan assumed had been his grandmother's. He testified that someone else had signed his name, although he did not know who. He wondered if perhaps a family member of his had arranged the signing of his name, not authorized by him.

6. The signature on RX 3 (the Assumption Agreement) ADavon Montrell Stander" looks ***different*** from the signatures on (1) Petitioner Stander's Identification Card issued 12/18/2009 (FX 35); (2) Petitioner Stander's Hearing Request dated February 13, 2011; (3) Petitioner Stander's Credit Report Release and Information Form dated February 21, 2011 (FX-37); (4) Petitioner Stander's memorandum to the CBE Group dated February 25, 2011 which was forwarded with his Hearing Request by the CBE Group; and (5) Petitioner Stander's Consumer Debtor Financial Statement dated April 15, 2011.

7. In contrast, the signature on RX 3 (the Assumption Agreement) looks ***like*** the signatures on the documents provided to USDA Rural Development, including, in 2008 and early 2009, signatures on (1) RX 10, page 6 (copy of signature page of the 2007 Federal Income Tax Return, BUT it is obvious that the signature was added to the copy after the Return was prepared; a ADavon Stander" signature has been added, NOT to the taxpayer's signature line, but to the Preparer's signature line for the TAXES R US representative), submitted to USDA Rural Development May 21, 2008; (2) RX 10, page 1 (Payment Subsidy Renewal Certification), submitted to USDA Rural Development May 21, 2008; (3) RX 13, both page 1 (listing of items attached) and page 2 (Authorization to Release Information), both submitted to USDA Rural Development June 20, 2008; (4) RX 11, page 1 (Payment Subsidy Renewal Certification), submitted to USDA Rural Development on December 2, 2008; (5) RX 11, page 3 (Authorization to Release Information), submitted to USDA Rural Development on December 2, 2008; (6) RX 11, page 5 (Moratorium request), submitted to USDA Rural Development on December 2, 2008; (7) RX 12, page 6 (Moratorium request, showing Jasmine Green signing as Co-Borrower), submitted to USDA Rural Development on February 23, 2009; (8) RX 12, page 1 (Payment Subsidy Renewal Certification) submitted to USDA

Rural Development on February 23, 2009; and (9) RX 12, page 3 (Authorization to Release Information) submitted to USDA Rural Development on February 23, 2009.

8. Two pieces of the documentary evidence described in paragraphs 6 and 7 are particularly persuasive in convincing me that Petitioner Stander's testimony is correct, that he did not sign and did not authorize his signature on the Assumption Agreement, RX 3. These are his Identification Card issued 12/18/2009 (FX 35), which is Item (1) in paragraph 6; and the altered copy of the signature page of Federal Income Tax Return (RX 10, page 6), submitted to USDA Rural Development May 21, 2008, which is Item (1) in paragraph 7.

9. Whoever arranged the signing of Petitioner Stander's name had access to his social security number, his pay stubs, and his income tax return copies. I have carefully considered whether Petitioner Stander authorized the signing of his name. A signature purporting to be that of Petitioner Stander's cousin LeTasha Rena Carter is on the Certification received in December 2008 as an additional ABorrower," even though she had not signed the Assumption Agreement. A signature purporting to be that of Petitioner Stander's fiancee Jasmine Green is on the Certification received in February 2009 as an additional ABorrower," even though she had not signed the Assumption Agreement. The same name Jasmine Green with the same social security number also appears on a 2008 Earned Income Credit Schedule to Petitioner Stander's 2008 Federal Income Tax Return, describing Jasmine Green as a permanently and totally disabled sister. Much dishonesty is involved with the documents provided to USDA Rural Development, but I cannot discern who is responsible for the documents that appear to be fraudulent. Also,

I cannot conclude that Petitioner Stander authorized the signing of his name on the Assumption Agreement (RX 3).

Findings, Analysis and Conclusions

10. The Secretary of Agriculture has jurisdiction over the parties, Petitioner Stander and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

11. I find that Petitioner Stander did not sign and did not authorize his signature on the Assumption Agreement, RX 3; consequently, USDA Rural Development should discontinue any further collection of the debt from Petitioner Stander.

12. **NO further garnishment** of Petitioner Stander's pay is authorized; **NO further *offset*** of Petitioner Stander's **income tax refunds** or other **Federal monies** payable to the order of Mr. Stander is authorized; **NO form of further debt collection** from Petitioner Stander is authorized.

13. **NO refund** to Petitioner Stander of monies already collected is appropriate, and no refund is authorized.

Order

14. No further collection of the debt from Petitioner Stander is authorized.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.

VICTORIA TAYLOR.N/K/A VICTORIA ADAM
AWG Docket No. 11 – 0204.
Decision and Order.
Filed June 29, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Victor W. Palmer.

AWG

Decision and Order

On June 29, 2011, I held a hearing on a Petition to Dismiss the administrative wage garnishment proceeding to collect the debt allegedly owed to Respondent, USDA, Rural Development for a loss it incurred under an assumed loan in the amount of $41,750.00 to finance the purchase of a primary residence located at 840 Rockport New Heron Road, New Herron, MS 39140. Petitioner and Mary Kimball, who testified for Respondent, were duly sworn. Respondent proved the existence of the debt owed by Petitioner to Respondent for its payment of a loss it sustained in respect to the loan that Petitioner had assumed on

January 23, 2004 that is evidenced by an Assumption Agreement. Petitioner failed to make all of her payments on the loan and the property was sold at a short sale on October 29, 2010. After the sale proceeds were posted and a pre-foreclosure fee added, Petitioner owed USDA, Rural Development $39,142.45. The present amount of the debt is $39,142.45 plus potential fees to Treasury of $10,959.89 for a total of $50, 102.34.

Petitioner is on maternity leave from her job as a Cashier for KFC. When working, she typically receives bi-weekly take-home pay of $**. She is married to Marcus Adam who earns $*** net per week as an Assembler in a Plant. They have two sons, ages 9 and 5, and she is pregnant and should give birth any day now to a third child. In that Petitioner has no income at present, nothing may now be garnished. When Petitioner returns to work, her share of the family monthly expenses will permit no more than $25.00 to be garnished from her bi-weekly pay checks. In light of the financial hardship that garnishment will cause Petitioner, nothing may be garnished from her pay for the next twelve (12) months; after that period of time, no more than $25.00 may be garnished from her bi-weekly pay checks.

USDA, Rural Development has met its burden under 31 C.F.R. §285.11(f)(8) that governs administrative wage garnishment hearings, and has proved the existence and the amount of the debt owed by the Petitioner. However, for reasons of financial hardship, nothing may be garnished from her salary for the next twelve (12) months, and after that period of time the maximum that may be garnished from Petitioner's bi-weekly wages is $25.00.

LAWRENCE MCCUEN.
AWG Docket No. 11 – 0208.
Decision and Order.
Filed June 30, 2011.

Petitioner Pro se.
Mary Kimball for RD.
Decision and order by Administrative Law Judge Jill S. Clifton.

AWG

Decision and Order

1. The hearing by telephone was held as scheduled on June 23, 2011. Mr. Lawrence E. McCuen, the Petitioner ("Petitioner McCuen"), participated, representing himself (appeared *pro se*).

2. Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and was represented by Mary E. Kimball. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

Summary of the Facts Presented

3. Petitioner McCuen owes to USDA Rural Development a balance of **$74,160.43** (as of June 8, 2011) in repayment of a United States Department of Agriculture / Rural Housing Service ***Guarantee*** (*see* RX 3, esp. p. 2) for a loan made on March 14, 2008 by New West Lending, Inc., for a home in Arizona, the balance of which is now unsecured ("the debt").[1] *See* USDA Rural Development Exhibits, plus Narrative, Witness & Exhibit List (filed June 9, 2011), which are admitted into evidence, together with the testimony of Mary Kimball.

4. This ***Guarantee*** establishes an **independent** obligation of Petitioner McCuen, "I certify and acknowledge that if the Agency pays a loss claim on the requested loan to the lender, I will reimburse the Agency for that amount. If I do not, the Agency will use all remedies available to it, including those under the Debt Collection Improvement Act, to recover on the Federal debt directly from me. The Agency's right to collect is independent of the lender's right to collect under the guaranteed note and will not be affected by any release by the lender of

[1] Rural Housing Service is a part of USDA Rural Development.

my obligation to repay the loan. Any Agency collection under this paragraph will not be shared with the lender." RX 3, p. 2.

5. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects; Treasury keeps another 3%) on **$74,160.43** would increase the current balance by $20,764.92, to $94,925.35. *See* USDA Rural Development Exhibits, esp. RX 10.

6. The amount Petitioner McCuen borrowed from New West Lending, Inc. was $146,273.00 on March 14, 2008. RX 1. Foreclosure was initiated in 2008. RX 5, p. 3. The liquidation value of the home was estimated at $81,000.00 on October 22, 2009. RX 5, p. 4. RX 6 contains a summary of the amounts owed to JP Morgan Chase Bank, including principal and interest and costs of sale ($170,045.61), less credits for the liquidation value and other credits and refunds ($86,944.90). USDA Rural Development paid JP Morgan Chase Bank $83,100.71 on January 6, 2010. RX 5, p. 7. Thus $83,100.71, the amount USDA Rural Development paid, is the amount USDA Rural Development recovers from Petitioner McCuen under the ***Guarantee***. Payments made to USDA Rural Development through ***offset*** (of Petitioner McCuen's social security disability payments, and of an income tax refund; see RX 9 plus Narrative for detail) have reduced the balance to **$74,160.43**.

7. Petitioner McCuen's Exhibits were filed on June 14, June 20, and June 21, 2011. Petitioner McCuen's Exhibits are admitted into evidence, together with his testimony, together with his Hearing Request dated March 31, 2011, and his accompanying letter dated March 31, 2011. Petitioner McCuen maintains that he and his wife should not have qualified for the loan, and that the loan should therefore never have been made. Petitioner's recourse, if any, is against the lender. I find nothing questionable with respect to the ***Guarantee*** and USDA Rural Development's payment to JP Morgan Chase Bank.

8. Petitioner McCuen pays reasonable and necessary living expenses for not only himself but also toward the expenses of his wife and two children, from whom he is separated. His $*** per month social security disability payments (excluding the spouse and child benefits, which go directly to his wife), do not meet his reasonable and necessary living expenses. Petitioner McCuen has no other income. Further, he owes a substantial school loan debt ($19,000.00) in addition to this USDA Rural Development debt. NO garnishment is authorized, because any garnishment would create financial hardship. 31 C.F.R. § 285.11.

9. Petitioner McCuen may want to negotiate the disposition of the debt with Treasury's collection agency.

Discussion

10. NO garnishment is authorized. *See* paragraph 8. I encourage **Petitioner McCuen and the collection agency** to **negotiate promptly** the repayment of the debt. Petitioner McCuen, this will require **you** to telephone the collection agency after you receive this Decision. Petitioner McCuen, you may request that you be permitted to compromise the debt for an amount you are able to pay, to settle the claim for less. You may ask that a smaller amount of your social security disability payment be ***offset***. The toll-free number for you to call is **1-888-826-3127**.

Findings, Analysis and Conclusions

11. The Secretary of Agriculture has jurisdiction over the parties, Petitioner McCuen and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

12. Petitioner McCuen owes the debt described in paragraphs 3, 4, 5 and 6.

13. **NO garnishment is authorized**. Petitioner McCuen cannot withstand garnishment in any amount without creating financial hardship. 31 C.F.R. § 285.11. Petitioner McCuen has no earnings. His sole income is social security disability payments.

14. This Decision does not prevent repayment of the debt through ***offset*** of Petitioner McCuen's **income tax refunds** or other **Federal monies** payable to the order of Mr. McCuen.

Order

15. Until the debt is repaid, Petitioner McCuen shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in his mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

16. USDA Rural Development, and those collecting on its behalf, are **NOT** authorized to proceed with garnishment. 31 C.F.R. § 285.11.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties. Done at Washington, D.C.

ZooCats, Inc, Marcus Cook, Melissa Coody,
Zoo Dynamics and Zoocats Zoological Systems v. USDA
70 Agric. Dec. 325
ANIMAL WELFARE ACT

COURT DECISIONS

ZOOCATS, INC, MARCUS COOK, A/K/A MARCUS CLINE HINES COOK, MELISSA COODY, A/K/A MISTY COODY, D/B/A ZOO DYNAMICS AND ZOOCATS ZOOLOGICAL SYSTEMS v. USDA.
No. 10–60109.
Filed February 2, 2011.

[Cite as: 417 Fed. Appx. 378].

United States Court of Appeals,
Fifth Circuit.

Background: Business which had exhibited wild animals for promotional events, conventions, and photography sessions filed petition for review of an order of USDA, which ordered business to cease and desist from violating the Animal Welfare Act (AWA), and which revoked business's animal exhibitor license.

Holdings: The Court of Appeals held that:
(1) ALJ had broad discretion to manage docket;
(2) even if ALJ committed legal error in failing to admit relevant evidence, error was harmless because overwhelming evidence supported finding that business violated AWA; and
(3) business was not a research facility under AWA.

Petition denied.

Before KING, DeMOSS, and PRADO, Circuit Judges.

PER CURIAM:*

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

This petition follows a final order of the Secretary of the United States Department of Agriculture (USDA) ordering ZooCats, Inc., Marcus Cook, and Melissa Coody (collectively ZooCats) to cease and desist from violating the Animal Welfare Act (AWA), and revoking ZooCats's animal exhibitor license. ZooCats argues on appeal that the Secretary erred in extending certain filing deadlines, erred in determining certain audio tapes were inadmissible evidence, and erred in determining that ZooCats does not qualify as a "research facility" under the AWA. We find that the Secretary's order was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, and that it was supported by substantial evidence.

I.

ZooCats is in the business of exhibiting wild animals such as lions and tigers to the public for promotional events, conventions, and photography sessions. In 2003, the Animal and Plant Health Inspection Service (APHIS), an agency of the USDA, issued a complaint against ZooCats alleging that ZooCats wilfully violated the AWA and its regulations, which set forth the standards for the exhibition, housing, and treatment of animals. *See* 7 U.S.C. §§ 2131–2159; 9 C.F.R. §§ 1.1–3.142. The evidence supporting the complaint included affidavits and reports by APHIS inspectors showing that ZooCats had repeatedly failed to provide its animals with proper facilities, adequate food, and veterinary care, and had exhibited its animals in ways that risked harm to both the animals and the public. In 2007, the Administrative Law Judge (ALJ) instructed APHIS to file an amended complaint by April 13, 2007. On April 13, 2007, APHIS requested that the ALJ extend the filing deadline due to "the abundance of materials" APHIS was reviewing and the "significant number of additional violations" it was alleging.

On May 8, 2007, APHIS filed an amended complaint alleging additional AWA violations by ZooCats similar to those in the original complaint occurring between July 2002 and February 2007, and also alleging that ZooCats does not qualify as a "research facility" under the AWA because ZooCats never performed research and never established the administrative procedures required by the AWA for research facilities. Also on May 8, 2007, the ALJ instructed APHIS to file its supplemental witness and exhibits list by November 9, 2007. APHIS

filed its supplemental exhibits list on December 11, 2007. APHIS filed its supplemental witness list on December 19, 2007. Upon APHIS's request, the ALJ permitted both late filings. ZooCats did not object to any of APHIS's late filings or to the ALJ's extensions of the deadlines.

On September 24, 2008, the ALJ issued a decision and order finding that ZooCats (i) did not qualify as a "research facility," (ii) wilfully violated the AWA's animal handling regulations on numerous occasions, (iii) wilfully violated the AWA's animal sanitation, employee, housing, drainage, and feeding standards, and (iv) wilfully violated the veterinary care regulations. Based on these findings, the ALJ ordered ZooCats to cease and desist from violating the AWA and its regulations, and permanently revoked ZooCats's exhibitor license.

ZooCats timely appealed the ALJ's decision and order to the USDA Judicial Officer (JO). On July 27, 2009, the JO issued a decision and order adopting the ALJ's decision and order with minor changes related to the admissibility of audio tape recordings into evidence. The JO stated that ZooCats "repeatedly endangered the lives of the viewing public, as well as the lives of [its] animals.... To allow [ZooCats] to have an Animal Welfare Act exhibitor license ... would subject both the animals [it] would exhibit and the public, to an unacceptable level of risk of harm." On December 14, 2009, the JO denied ZooCats's petition to reconsider, and on January 8, 2010, the JO stayed its final order pending review by this court. ZooCats timely petitioned for review.

II.

We have jurisdiction to review the final order of the Secretary, as issued by the JO, pursuant to 7 U.S.C. § 2149(c). "Judicial review of the decision of an administrative agency is narrow." *Allred's Produce v. U.S. Dep't of Agric.*, 178 F.3d, 743, 746 (5th Cir.1999). We will uphold the Secretary's order unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law [or] unsupported by substantial evidence." 5 U.S.C. § 706(2)(A), (E). We do not substitute our own judgment for that of the Secretary, and will only set aside the order if it is "unwarranted in law or without justification in fact." *Allred's Produce*, 178 F.3d at 746 (citations omitted). This deferential standard requires that we affirm if there is substantial evidence in the record

considered as a whole to support the decision. *Cedar Lake Nursing Home v. U.S. Dep't of Health & Human Servs.*, 619 F.3d 453, 456 n. 3 (5th Cir.2010). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Chao v. Occupational Safety & Health Review Comm'n*, 401 F.3d 355, 362 (5th Cir.2005) (quoting *Consol. Edison Co. of N.Y. v. Nat'l Labor Relations Bd.*, 305 U.S. 197, 229, 59 S.Ct. 206, 83 L.Ed. 126 (1938) (citations omitted)).

ZooCats argues: (i) that the ALJ erred when it extended the filing deadlines for the amended complaint and the witness and exhibits list; (ii) that the ALJ and JO improperly excluded from evidence an audio tape of a conversation between Marcus Cook and an APHIS investigator; and (iii) that the ALJ and JO incorrectly found that ZooCats does not qualify as a "research facility." In essence, ZooCats contends that each of these alleged errors makes the Secretary's order "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." § 706(2)(A). We find each of these arguments unpersuasive.

First, ZooCats argues that ALJ erred when it extended the filing deadlines for the amended complaint and the witness and exhibits list. It contends that the additional evidence supporting the amended complaint should not have been admitted or considered by the Secretary in issuing its order. We disagree. An ALJ has broad discretion to manage its docket to promote judicial economy, efficiency, and to protect the interests of the parties. *See Fla. Mun. Power Agency v. Fla. Energy Regulatory Comm'n*, 315 F.3d 362, 366 (D.C.Cir.2003). Additionally, extensions of filing deadlines are authorized if, in the ALJ's judgment, there is "good reason for the extension." 7 C.F.R. § 1.147(f). In this case, the decisions to grant extensions were within the ALJ's discretion, and APHIS provided good reasons (i.e., the amount of evidence being compiled and the number of allegations being prepared) to justify the deadline extensions.

Moreover, ZooCats failed to object to the extensions and was not prejudiced by the extensions because there was sufficient evidence supporting the original complaint showing ZooCats had wilfully violated the AWA. *See* 7 U.S.C. § 2149; *see also Cox v. U.S. Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir.1991) (noting only one willful violation is

needed to revoke a license). We find the ALJ committed no error in granting the extensions, permitting the amended complaint, and admitting the additional evidence.

Second, ZooCats argues that the audio tape recordings were admissible evidence and asks that we remand this case to the JO for consideration of the audio tape evidence. ZooCats states that the recordings contain a conversation between Marcus Cook and an APHIS inspector where they discuss ZooCats's alleged non-compliance with the AWA and are therefore relevant evidence. ZooCats is correct that the audio tapes were excluded from evidence by the ALJ on an improper basis. And on appeal, the JO correctly found that the tapes were generally admissible evidence. Nonetheless, the JO upheld the ALJ's decision because ZooCats failed to lay a proper foundation to admit the tapes, and that in any case the failure to admit the tapes was harmless error.

We agree with the JO that the tapes lacked foundation and ZooCats does not challenge the JO's finding. Moreover, even if the tapes were admissible, failure to admit the tapes would be harmless error because we find that there is still substantial evidence in the record supporting the agency's determination that ZooCats wilfully violated the AWA. *See Conoco, Inc., v. Dir., Office of Worker's Comp. Programs*, 194 F.3d 684, 690–91 (5th Cir.1999) (holding even where an ALJ committed "significant legal error," such error was harmless because substantial evidence supported the agency's order). The administrative record shows that on numerous occasions ZooCats exhibited lions and tigers for photography shoots with children without placing any barrier between the animals and the public, creating a danger to the public and a risk of behavioral stress and harm to the animals. Additionally, several members of the public have been injured by the animals due to improper exhibition barriers. There is evidence that ZooCats's trainers did not handle the animals properly, at times using physical abuse with a cattle prod to train, work, or control an animal during an exhibition. Evidence also shows that ZooCats failed to provide its animals with a proper diet, failed to properly treat the animals or illnesses and injuries, and failed to maintain proper facilities in which to house the animals. Even if failure to admit the tapes was legal error, it would not be so significant as to overcome the overwhelming amount of evidence in support of the order.

Finally, ZooCats contends that the agency erred in concluding that it did not qualify as a "research facility" as that term is defined by the AWA. Under the AWA, a "research facility" is "any school, institution, organization, or person that uses or intends to use live animals in research, tests, or experiments." 7 U.S.C. § 2132(e). The ALJ and the JO found that ZooCats did not use or intend to use its animals in research, tests, or experiments, in part because ZooCats has not complied with many of the regulations governing research facilities. ZooCats was first registered as a research facility in March 2001, but the record indicates that ZooCats has not conducted any research, tests, or experiments with its animals since that time. The absence of any research, testing, or experimentation in the almost ten years since ZooCats registered as a research facility and its lack of adherence to the regulations refute its assertion that it intends to conduct research with the animals. Therefore, we find that the Secretary did not err in concluding that ZooCats is not an AWA research facility.

III.

We reject each of ZooCats's arguments that the ALJ or JO committed legal errors, and find that the administrative record contained substantial evidence that ZooCats repeatedly and wilfully violated the AWA, and that ZooCats is not an AWA research facility. We therefore hold that the Secretary's order compelling ZooCats to cease and desist from violating the AWA and permanently revoking ZooCats's exhibitor license was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 2 U.S.C. § 706(2)(A).

PETITION DENIED.

LORENZO PEARSON, D/B/A L & L EXOTIC ANIMAL FARM v. USDA.
No. 09–4114.
Filed February 17, 2011.

Lorenzo Pearson d/b/a L & L Animal Farm
v. USDA
70 Agric. Dec. 330

[Cite as: 411 Fed.Appx. 866].

United States Court of Appeals,
Sixth Circuit.

Background: Former licensee filed petition for review of an order of USDA terminating his license to own and exhibit wild animals, issuing a cease and desist order, and imposing civil sanctions for alleged violations of the Animal Welfare Act (AWA).

Holdings: The Court of Appeals, Clay, Circuit Judge, held that:

(1) replacement of administrative law judge (ALJ) did not require termination of proceedings and a retrial;

(2) denial of licensee's motion for a continuance after his home was destroyed by fire was not an abuse of discretion;

(3) Department of Agriculture had 20 days after licensee's appeal to file cross-appeal for civil sanctions;

(4) cross-appeal that was filed within formal filing extension was timely; and

(5) termination of license was supported by evidence of willful violations of AWA.

Petition denied.

Before: SUHRHEINRICH, CLAY, and ROGERS, Circuit Judges.

CLAY, Circuit Judge.

Petitioner Lorenzo Pearson petitions for review of the decision and order of the Secretary of the United States Department of Agriculture, terminating his license to own and exhibit wild animals, issuing a cease and desist order, and imposing civil sanctions in the amount of $93,975, for alleged violations of the Animal Welfare Act, 7 U.S.C. §§ 2131–2159. For the reasons set forth below, the petition for review is **DENIED.**

BACKGROUND

Between 1985 and 2005, Petitioner Lorenzo Pearson[1] was a licensed exhibitor under the Animal Welfare Act ("AWA"), 7 U.S.C. §§ 2131–2159, and proprietor of a business called L & L Exotic Animal Farm in Akron, Ohio. At the peak of his business, Petitioner was the caretaker for more than eighty-two animals, including lions, tigers, and bears, which he displayed at fairs and exhibits. Petitioner also successfully underwent periodic inspections and annually renewed his exhibitor's license.

However, beginning in May 1999,[2] employees of the Animal and Plant Health Inspection Service ("APHIS") cited Petitioner for a number of violations of the AWA and associated regulations. Between May 1999, when Petitioner was initially found to be non-compliant, and February 2006, Petitioner's facilities were inspected by APHIS officials more than twenty-five times and Petitioner was cited for more than 280 instances of non-compliance. These included minor infractions such as using a cage with incorrect dimensions, as well as larger infractions concerning drainage and sanitation at the facility, the quality of record keeping, the adequacy of food provided to the animals, and the adequacy of veterinary care.[3]

Although the record reveals that Petitioner corrected many infractions brought to his attention, some problems persisted across inspections, including inadequate sewage and sanitation, lack of potable water for animals, preparation of unwholesome food, and inadequate

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[1] In proceedings before the Secretary, Petitioner's name was mistakenly spelled Lorenza Pearson.

[2] Petitioner was previously cited during inspections occurring in May and November 1998; however, these citations were later withdrawn.

[3] Petitioner implies that the APHIS inspections were improper due to the participation of inspector Dr. Norma Harlan, who allegedly cited Petitioner for infractions after he refused to cooperate in the investigation of another animal handler. However, Petitioner has not briefed the issue of selective enforcement, so we deem it waived on appeal. *See Molina–Crespo v. U.S. Merit Sys. Prot. Bd.*, 547 F.3d 651, 656 n. 2 (6th Cir.2008) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived") (citing *McPherson v. Kelsey*, 125 F.3d 989, 995 (6th Cir.1997)).

veterinary care. On June 12, 2002, following nearly a dozen inspections that revealed infractions, APHIS commenced administrative disciplinary proceedings against Petitioner. However, these proceedings stalled after the administrative law judge ("ALJ") assigned to the case became unavailable. Petitioner continued to operate his business and undergo periodic inspection.

In addition to repeated APHIS investigations, Petitioner became the subject of a state nuisance action brought by the Summit County Board of Health that resulted in the seizure of many of his animals. As scrutiny mounted, Petitioner's upkeep of his facilities and compliance with animal welfare regulations appears to have decreased. During a May 2005 visit, Dr. Albert Lewandowski, an APHIS inspector formerly employed by the Akron Zoo, described Petitioner's facilities as "squalid," and oversaw the seizure of seven of Petitioner's bears that remained without adequate food, water, or veterinary care despite a previous warning. In 2005, Petitioner was also cited for denying APHIS inspectors access to his facilities on two occasions, and for storing animals offsite in an attempt to evade inspection. On October 5, 2005, APHIS sent Petitioner a license termination letter that served to initiate the proceedings which form the basis of this appeal.

Procedural History

On June 14, 2002, following a dozen inspections that revealed infractions, disciplinary proceedings were commenced against Petitioner and a hearing was held September 24–25, 2003 before ALJ Leslie Holt. After APHIS and the United States Department of Agriculture ("Respondents") presented their case and had their witnesses cross-examined, ALJ Holt became unavailable and proceedings were stayed before Petitioner was able to present his defense. The case was later reassigned to ALJ Victor W. Palmer. Petitioner moved to have ALJ Palmer retry the case in its entirety, claiming that retrial was necessary to permit credibility assessments of Respondents' witnesses. This motion was denied. However, ALJ Palmer agreed to recall Respondents' witnesses for cross-examination. A hearing was initially scheduled for June 8–10, 2004, but proceedings were repeatedly pushed back due to scheduling conflicts from both parties.

On March 17, 2006, Respondents filed an amended complaint that covered infractions occurring after June 2002. Respondents' amended complaint also sought a cease and desist order, civil sanctions in the amount of $100,000, and permanent revocation of Petitioner's AWA license. A hearing was scheduled for June 20–23, 2006, and April 4, 2006 was designated as the parties' deadline to submit exhibits. However, Petitioner failed to submit exhibits by the deadline.

On May 23, 2006, Petitioner's home was destroyed in a fire, along with most of the documents, veterinary reports, financial records, and photographs pertaining to Petitioner's animal farm. Citing the fire damage, on June 15, 2006 Petitioner moved to continue the hearing and requested three additional months to prepare. This motion was denied on grounds that rescheduling posed an administrative inconvenience, destroyed evidence could not be replaced, and Petitioner could make his case using witness testimony. Petitioner renewed his request for a continuance at the start of his June 20, 2006 hearing, and then again in the middle of proceedings. Petitioner also sought to continue proceedings on the additional ground that a veterinarian who cared for several of his animals had a scheduling conflict and would be unable to testify. This request was denied on grounds that Petitioner had been given adequate opportunity to assemble witnesses for trial.

In an opinion dated April 6, 2007, ALJ Palmer issued a cease and desist order and permanently revoked Petitioner's exhibitor's license on grounds that Petitioner repeatedly committed willful violations of the AWA. However, ALJ Palmer declined to impose civil sanctions-reasoning that permanent revocation would provide sufficient deterrence under the Act, such that fines and civil sanctions were unwarranted.

Petitioner appealed the ALJ's decision to the Secretary of the United States Department of Agriculture (“the Secretary”) on July 23, 2007. On August 21, 2007, Respondents cross-appealed the ALJ's decision not to impose sanctions. On July 13, 2009, a judicial officer acting as a designee for the Secretary released a Decision and Order adopting the ALJ's determination that Petitioner repeatedly violated the AWA, as well as the ALJ's decision to deny Petitioner's motion for a continuance and retrial, and to revoke Petitioner's license. However, the judicial officer granted Respondents' cross-appeal, concluding that civil sanctions in the

amount of $93,975[4] were appropriate in light of what he determined were Petitioner's 281 individual violations of the AWA and associated regulations. *See In re Lorenza Pearson, d/b/a L & L Exotic Animal Farm*, No. 02–0020, 2009 WL 2134028, at *30 (U.S.D.A. July 13, 2009).

In this timely petition for review, Petitioner challenges the Secretary's decision on procedural grounds, and asserts that substantial evidence does not support his determinations.

DISCUSSION

I. Standard of Review

"We review a decision of the U.S. Department of Agriculture under the Act only to determine whether the proper legal standards were employed and [whether] substantial evidence supports the decision." *Derickson v. U.S. Dep't of Agric.*, 546 F.3d 335, 340 (6th Cir.2008) (citing *Gray v. U.S. Dep't of Agric.*, 39 F.3d 670, 675 (6th Cir.1994)) (internal quotation marks omitted). Substantial evidence is evidence that "a reasonable mind might accept as adequate to support a conclusion." *Gray*, 39 F.3d at 675 (citing *Murphy v. Sec'y of Health & Human Servs.*,

[4] The judicial officer explained his sanction award as follows:

> I assess Mr. Pearson a civil penalty of $275 for each violation committed on or before June 23, 2005, and $375 for each violation committed after June 23, 2005. Except that, I assess Mr. Pearson $1,000 for each failure to have a responsible person available to allow APHIS officials to inspect his facility, in violation of section 2.126(a) of the Regulations (9 C.F.R. § 2.126(a)) (August 27, 2002, May 5, 2003, and May 11, 2005); $2,000 for housing animals at unapproved locations on January 18, 2004, in violation of section 2.5(d) of the Regulations (9 C.F.R. § 2.5(d)); $2,000 for housing animals at unapproved locations on January 30, 2004, in violation of section 2.5(d) of the Regulations (9 C.F.R. § 2.5(d)); $2,000 for the January 30, 2004, failure to notify the Animal Care Regional Director of additional sites at which Mr. Pearson housed animals, in violation of section 2.8 of the Regulations (9 C.F.R. § 2.8); and $2,000 for each refusal to allow APHIS officials to inspect his entire facility, in violation of section 2.126(a)(4) of the Regulations (9 C.F.R. § 2.126(a)(4)) (May 12, 2005, and October 5, 2005). I find these violations are extremely serious because they thwart the Secretary of Agriculture's ability to enforce the Animal Welfare Act.
>
> *In re Lorenza Pearson*, 2009 WL 2134028, at *30 n. 9.

801 F.2d 182, 184 (6th Cir.1986)). "The record, as a whole, is considered in determining the substantiality of evidence." *Derickson,* 546 F.3d at 340–41.

Because the judicial officer "acts as the final deciding officer in lieu of the Secretary in Department administrative proceedings," *Utica Packing Co. v. Block,* 781 F.2d 71, 72 (6th Cir.1986), we limit our review to his decision. *See also Marine Mammal Conservancy, Inc. v. U.S. Dep't of Agric.,* 134 F.3d 409, 410–411 (D.C.Cir.1998) (judicial review is limited to "decisions of the judicial officer on appeal"). When a judicial officer disagrees with certain conclusions of the ALJ, "the standard does not change; the ALJ's findings are simply part of the record to be weighed against other evidence supporting the agency." *Rowland v. U.S. Dep't of Agric.,* 43 F.3d 1112, 1114 (6th Cir.1995) (internal citations and quotation marks omitted).

Finally, "when the issue is whether the agency followed the requisite legal procedure, our review is limited, but exacting." *Coal. for Gov't Procurement v. Fed. Prison Industs., Inc.,* 365 F.3d 435, 457 (6th Cir.2004). When an agency is accused of violating a statute, we examine *de novo* whether "statutorily prescribed procedures have been followed." *Id.* (citing *Nat'l Res. Def. Council, Inc. v. Sec. & Exch. Comm'n,* 606 F.2d 1031, 1045 (D.C.Cir.1979)). Alternately, when an appeal concerns an agency's compliance with ambiguous procedural regulations, we consider only whether the agency's interpretation is "plainly erroneous or inconsistent." *Ky. Waterways Alliance v. Johnson,* 540 F.3d 466, 474 (6th Cir.2008).

II. Procedural Aspects of the Secretary's Decision

A. The Secretary's Decision Not to Retry Petitioner's Case

First, Petitioner argues that the Secretary erred by allowing ALJ Palmer to take over the proceedings for ALJ Holt instead of granting Petitioner's request to retry the case, and that he suffered prejudice as a result because ALJ Palmer was unable to assess the credibility of Respondents' witnesses. United States Department of Agriculture ("U.S.D.A.") regulations speak directly to the issue of when abatement and retrial are proper, providing that: "[i]n case of the absence of the

Judge or the Judge's inability to act, the powers and duties to be performed by the Judge under these rules of practice in connection with any assigned proceeding may, without abatement of the proceeding unless otherwise directed by the Chief Judge, be assigned to any other Judge." 7 C.F.R. § 1.144(d).

In denying Petitioner's request to terminate proceedings and grant a retrial, ALJ Palmer interpreted this provision to mean that "absent an order from the Chief Administrative Judge, the case will proceed from the point at which the first administrative law judge became unavailable." The judicial officer affirmed. We do not believe this interpretation was "plainly erroneous or inconsistent with the regulation." *See Intermodel Tech., Inc. v. Peters*, 549 F.3d 1029, 1031 (6th Cir.2008) (providing standard for reversal). Further, to address Petitioner's concerns regarding witness testimony, ALJ Palmer recalled all of Respondents' witnesses and allowed them to be recross-examined by Petitioner so that they could be impeached and their credibility examined anew. These measures were adequate to ensure that Petitioner was not unduly prejudiced. Accordingly, Petitioner's procedural objection is not well taken.

B. The Secretary's Denial of Petitioner's Motion for a Continuance

Second, Petitioner alleges that the Secretary erred by denying his motion for a continuance after Petitioner's home was destroyed in a fire. While we are troubled by the Secretary's disposition of this issue,[5] a denial of a continuance is reviewed deferentially for abuse of discretion and petitioners must establish prejudice. *See, e.g., United States v. Lewis*, 605 F.3d 395, 401 (6th Cir.2010); *Fitzhugh v. Drug Enforcement Admin.*, 813 F.2d 1248, 1252 (D.C.Cir.1987); *NLRB v. Hackenberger*, 531 F.2d 364, 365 (6th Cir.1976).

In the instant case, Petitioner's challenge to the Secretary's decision

[5] We have little doubt that Petitioner's request for a continuance was based on a legitimate and compelling reason, not one that was "dilatory, purposeful or contrived" or the product of Petitioner's own actions. *Powell v. Collins*, 332 F.3d 376, 396 (6th Cir.2003). However, this alone does not compel a finding of abuse of discretion. *Id.*

fails because he is unable to establish prejudice. Petitioner forfeited his right to submit evidence to the Secretary on April 6, 2006, two months prior to the fire, by failing to comply with the ALJ's deadline regarding the exchange and submission of exhibits. *See* 7 C.F.R. § 1.322(g) ("[N]o exhibit not provided to the opposing party as provided above shall be admitted into evidence at the hearing absent a showing of good cause."). Even assuming that Petitioner's late evidence would have been received, Petitioner has failed to indicate, even on appeal to this Court, what if any destroyed evidence he would have been able to reamass if given additional time. Without any such proffer, we are forced to conclude that Petitioner was not prejudiced, and that no abuse of discretion occurred.

C. The Secretary's Decision to Grant Respondents' Cross–Appeal for Civil Sanctions

Finally, Petitioner contends that the Secretary violated agency procedural rules when he assessed civil sanctions against Petitioner pursuant to a cross-appeal that Respondents filed nearly three months after the ALJ decision. Petitioner argues that Respondents' cross-appeal contravenes 7 C.F.R. § 1.145(a) of the U.S.D.A. Rules of Practice, which provides that "[w]ithin 30 days after receiving service of the Judge's decision ... a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk." *Id.*

After reviewing the Secretary's decision and pertinent regulations, we conclude that no legal error occurred. As a preliminary matter, Petitioner's reliance on 7 C.F.R. § 1.145(a) is misplaced. Cross-appeals are in fact governed by sub-section (b) of the provision, which provides that "[w]ithin 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised." 7 C.F.R. § 1.145(b). This procedural regulation has been interpreted to "permit a party to await the other party's appeal before filing a cross-appeal raising any relevant issue, without first filing a protective notice of appeal." *In re Daniel Sterbin & William Strebin,* 56 Agric. Dec. 1095, at *32 (U.S.D.A.

Nov. 26, 1997) (table) (describing the rule as well-settled). Therefore, Respondents' brief was not due until 20 days after Petitioner submitted his appeal, and Respondents were entitled to raise the issue of sanctions, even though it was not raised in Petitioner's appeal petition.

Respondents' cross-appeal was also timely. Following the hearing, Petitioner and Respondents were each granted a filing extension pursuant to the provisions of 7 C.F.R. §§ 1.143(d) and 1.147(f). Petitioner's appeal, which was initially due on May 9, 2008, was timely filed on July 23, 2007 pursuant to an extension. Respondents' cross-appeal, initially due on August 13, 2007 based on the provisions of 7 C.F.R. § 1.145(b), was timely filed on August 21, 2007 pursuant to an extension granted on August 8, 2007 that made August 21, 2007 the new due date. Because Respondents cross-appealed for sanctions in accordance with agency procedures and pursuant to a formal extension, we believe that the Secretary did not err when he took Respondents' brief as timely.

Nonetheless, despite no finding of legal error, we feel compelled to express our concern regarding the Secretary's handling of the imposition of the fine. Had Petitioner not exercised his right to appeal, presumably he would only be facing revocation of his license, not revocation plus a $93,957 fine. While the Secretary was fully authorized to impose the fine, this outcome may discourage other petitioners from exercising their statutory rights.

III. Evidentiary Support for the Secretary's Determinations

Challenging a handful of the ALJ's factual findings, Petitioner contends that his license revocation was not supported by substantial evidence. This argument is without merit. An AWA license may be revoked following a single, willful violation of the Animal Welfare Act, *see Cox et al. v. U.S. Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir.1991), and in the instant case the Secretary based his determinations on a substantial, perhaps overwhelming body of evidence, including investigation reports, photographs, witness testimony, and exhibits concerning nearly twenty-five inspections of Petitioner's facilities that revealed infractions. Petitioner's failure to bring his facilities into compliance after repeated warnings also makes clear that his violations were willful. *See Hodgins v. U.S. Dep't of Agric.*, 238 F.3d 421, at *9

(6th Cir. Nov. 20, 2000) (table) (defining willful conduct as conduct "knowingly taken by one subject to the statutory provisions in disregard of the action's legality"). Therefore, we affirm the Secretary's findings.

CONCLUSION

The Secretary did not commit procedural error with respect to the proceedings, and the record substantiates that Petitioner failed to conform his conduct to the requirements of the Animal Welfare Act, despite having numerous opportunities to do so. Therefore, the petition for review is **DENIED.**

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ANIMAL WELFARE ACT

DEPARTMENTAL DECISIONS

LION'S GATE CENTER, LLC.
Docket No. 09-0069.
Decision and Order.
Filed May 9, 2011.

AWA

Jay W. Swearingen and Jennifer Reba Edwards for Respondent.
Colleen A. Carroll for APHIS.
Decision and Order on Remand by Chief Administrative Law Judge Peter M. Davenport

Decision and Order on Remand

Appearances: Jay Wayne Swearingen, Esquire and Jennifer Reba Edwards, Esquire, The Animal Law Center, LLC, Wheat Ridge, Colorado for the Petitioner

Colleen A. Carroll, Esquire, Office of General Counsel, United States Department of Agriculture, Washington, DC for the Respondent

Preliminary Statement

This action was originally brought by Lion's Gate Center, LLC., a Colorado Limited Liability Company, (Lion's Gate) seeking review of and requesting a hearing concerning the Administrator's determination that the corporation was unfit to be licensed under the Animal Welfare Act. 7 U.S.C. §2131, *et seq*. The matter was set for oral hearing to commence in Denver, Colorado on January 26, 2010; however, prior to that date the Respondent filed a Motion for Summary Judgment which I granted in a Decision and Order entered on January 5, 2010.

The Petitioner appealed my Decision, and on August 30, 2010, the Departmental Judicial Officer remanded the case to me for further proceedings in accordance with the rules of practice applicable to this proceeding to determine the identity of the person or persons whose Animal Welfare Act license was revoked effective August 27, 2003 pursuant to *In re Michael Jurich* (Consent Decision), 60 Agric. Dec. 722

(2001),[1] as implemented by the settlement agreement in *Jurich v. U.S. Dep't of Agric.*, No. 1:03-cv-00793-EWN-OES (D. Colo. Sept. 10, 2003) and for any other purpose that I as the Chief Administrative Law Judge might determine necessary for the proper disposition of the proceeding.

Following a telephonic conference in the case on February 9, 2011, the parties agreed that the issues in the case were of law rather than of fact and that disposition could be effected by briefs and affidavits rather than by holding an evidentiary hearing. The briefs have since been received and the matter is now ready for disposition.

Discussion

At issue in this action is whether the Administrator, acting through the Western Regional Director, Animal Care, Animal and Plant Health Inspection Service (APHIS), United States Department of Agriculture (USDA) was justified in denying Petitioner's application for an Animal Welfare Act license on the basis that the applicant had entered into a License Agreement with an entity whose license had been revoked and as a result, issuance of a license to the Petitioner would circumvent an order of revocation issued by the Secretary of Agriculture.

The Petitioner takes the position that the license issued to Michael Jurich and Laurie E. Jurich, d/b/a Prairie Wind Animal Refuge[2] (AWA License 84-C-0052[3]) was voluntarily terminated by Jurich as of January 31, 2000 and accordingly was not in effect and thus could not have been revoked in 2003 by violation of the terms of probation of the earlier Consent Decision entered in *In re Michael Jurich, an individual and Prairie Wind Animal Refuge, a Colorado corporation*, AWA Docket No. 01-0029.[4] Reliance on such a position is misplaced. In the Consent Decision, Jurich agreed that he as an individual and the corporate entity Prairie Wind Animal Refuge would neither apply for a license nor engage in any activities for which a license would be required. They also agreed that if there was a failure to comply with §2.1 of the Regulations,

[1] See also: www.dm.usda.gov/oaljdecisions

[2] The Colorado Secretary of State Business Center website lists Prairie Wind Animal Refuge as being incorporated on September 13, 1993.

[3] The number sometimes also appears in the record as 84-C-052. The parties are in agreement that 84-C-052 and 84-C-0052 are one and the same. *See:* ¶ 3, Declaration of Robert M. Gibbens, DVM and Petitioner's Brief, ¶ 3.

[4] The Consent Decision refers to AWA License No. 94-C-0052. This is a typographical error as no such license exists.

(9 C.F.R. §2.1), such failure would trigger both a revocation of the license and the civil penalty of $15,000.00.[5] As the Consent Decision was executed by both Jurich, individually and in his corporate capacity as "President," and his counsel, awareness of the full consequences will be presumed.

Petitioner argues that issuance of AWA License 84-C-0052 to Michael R. Jurich and Laurie E. Jurich, d/b/a Prairie Wind Animal Refuge did not constitute an issuance of the license to Prairie Wind Animal Refuge, a Colorado non-profit corporation. That argument is also without merit. Jurich's initial application identified him as "owner" of an unspecified form of entity[6] and the renewal applications clearly identify the licensed entity as a corporation in the type of organization block of the renewal form. RX-16, p. 3, 4, 6, and 11 of 15. Similarly, the Declaration of Robert M. Gibbens, DVM indicates that the license issued on February 7, 1994 was identified on agency records as a corporation. Declaration of Robert M. Gibbens, DVM, ¶ 3.

The letter dated October 31, 2008 accompanying Petitioner's license application explained that the Petitioner had entered into a License Agreement with Prairie Wind Animal Refuge dated October 27, 2008. More tellingly, that letter acknowledges that Prairie Wind Animal Refuge's license had been revoked. Attachment 6, Respondent's Motion for Summary Judgment. The letter goes on to explain that their counsel had considered dissolving Prairie Wind Animal Refuge, but were concerned that such dissolution might jeopardize the corporation's grandfathered status as a wildlife sanctuary. *Id.*

In denying the Petitioner's application for an Animal Welfare Act license, the Respondent relied upon Section 2.10(b) and 2.11 of the Regulations. Section 2.10(b) provides:

> Any person whose license has been revoked shall not be licensed in his name or her own name or in any other manner; nor will any partnership, firm, corporation, or other legal entity in which any such person has a substantial interest, financial or otherwise, be licensed. 9 C.F.R. §2.10(b).

Section 2.11 provides:

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[5] Revocation is attended by permanent ineligibility to be issued a license. 9 C.F.R. §2.11.

[6] The type of organization block does not appear on the form; however, is present on subsequent forms used for renewal of the license.

> A license will not be issued to any applicant…(3) has had a license revoked or whose license is suspended as set forth in §2.10; 9 C.F.R. §2.11.

In the letter to the Petitioner dated February 18, 2009, Dr. Gibbens indicated his reasons for finding Lion's Gate Center, LLC. unfit as an applicant. Specifically, because of the Petitioner's involvement and relationship with a disqualified entity, issuance of a license to Lion's Gate was considered contrary to the purposes of the Act and would operate so as to circumvent the order of revocation issued by the Secretary of Agriculture against the disqualified entity, Prairie Wind Animal Refuge. The stated purpose of the agreement between the Petitioner and Prairie Wind Animal Refuge was to facilitate exhibition of the animals owned by Prairie Wind Animal Refuge and Dr. Joan Laub at Prairie Wind Animal Refuge's facility. In turn, Lion's Gate would be allowed to employ the wildlife sanctuary license issued by the Colorado Division of Wildlife and Lion's Gate would obtain an Animal Welfare Act license in its name. CMSJ, RX 6, PX 4. As Prairie Wind Animal Refuge's license had been revoked, the Director's conclusion that the arrangement would operate so as to circumvent the order of revocation issued by the Secretary of Agriculture against a disqualified entity, the denial was proper.

Accordingly on the basis of the evidence before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. The records of the Colorado Secretary of State indicate that Prairie Wind Animal Refuge is a nonprofit corporation that was formed on September 13, 1993. Its term of duration is perpetual. Michael R. Jurich's name appears on the early filings; the more recent filings contain Joan Laub's name. RX-8.

2. On July 31, 2001, United States Administrative Law Judge Jill S. Clifton entered a Consent Decision in *In re Michael Jurich, an individual; and Prairie Wind Animal Refuge, a Colorado corporation,* AWA Docket 01-0029. That decision resolved the pending administrative proceeding and included a civil penalty, a cease and desist order and liquidated penalties including license revocation and an

additional civil penalty should there be further violations of the Regulations during a specified probationary period. Complainant's Motion for Summary Judgment (CMSJ) RX 1.

3. The reference to AWA License No. 94-C-0052 in the above Consent Decision was a typographical error and should properly have been 84-C-0052. License 94-C-0052 does not exist. In assigning AWA License numbers, the first two digits refer to the state of issuance (Colorado is coded 84); the letter refers to the type of license (exhibitor); and the three (and later four) digits following the letter indicate the sequential numbering of the issuances. Declaration of Robert M. Gibbens, DVM, ¶ 3.

4. The Animal Welfare Act license issued originally to Michael R. Jurich and Laurie E. Jurich, d/b/a Prairie Wind Animal Refuge (No. 84-C-0052) is one and the same as 84-C-052 and was consistently renewed as a corporate license. RX-16, p. 4, 6, 11 of 15.

5. Lion's Gate Center, LLC. was formed by Peter Winney on or about May 31, 2002.

6. By letter dated February 11, 2003, the Animal and Plant Health Inspection Service (APHIS) advised Jurich and Prairie Wind Animal Refuge that APHIS had documented a failure to comply with the Regulations during the probationary period, enclosed documentary evidence of the violations and assessed the penalty set forth in the Decision and revoked License No 84-C-0052. CMSJ, RX 2.

7. Jurich and Prairie Wind Animal Refuge filed suit seeking review of the APHIS action in the United States District Court for the District of Colorado, *Jurich, et al. v. U.S. Dep't of Agriculture,* 1:03-cv-00793-EWN-OES. CMSJ, RX 3a. On or about August 27, 2003, the case was settled, with both Jurich and Prairie Wind Animal Refuge expressly acknowledging revocation of the exhibitor's license. RX 3c.

8. On or about May 11, 2005, Peter Winney applied for an exhibitor's license, identifying himself as an individual doing business as "Lion's Gate." The application listed Dr. Joan Laub and himself as "owners of the business." The application was subsequently withdrawn. CMSJ, RX 4.

9. By deed dated December 21, 2007, Joan Laub took title to the real estate located at 22111 County Road 150, Agate, Colorado on which Prairie Wind Animal Refuge was and is currently located. CMSJ, RX 6, pp. 15-16. Prairie Wind Animal Refuge continues to exist at that location according to filings with the Colorado Secretary of State's Office. RX-8.

10. Prairie Wind Animal Refuge holds Colorado Division of Wildlife License No. 08CP270. Both Dr. Laub and Winney are officers of Prairie Wind Animal Refuge.

11. On July 7, 2008, Prairie Wind Animal Refuge applied for an Animal Welfare Act license as an exhibitor, identifying Dr. Laub as the corporation's President and Executive Director, and Winney as its Vice President and Director. CMSJ, RX 5, p 1.

12. On August 12, 2008, APHIS denied the application and returned the application fee, stating that APHIS was unable to issue a license to Prairie Wind Animal Refuge due to its previous license revocation. CMSJ, RX 5, pp. 2-3.

13. On October 31, 2008, Peter Winney submitted Lion's Gate Center, LLC.'s application for an Animal Welfare Act license as an exhibitor. Included in the attachments to the application was a "License Agreement" between Lion's Gate and Prairie Wind Animal Refuge, stating that Prairie Wind Animal Refuge and Dr. Laub own the property, facility, and animals intended to be exhibited by the applicant Lion's Gate. One of the stated purposes of the agreement was to facilitate exhibition of the animals owned by Prairie Wind Animal Refuge and Laub both on and off Prairie Wind Animal Refuge's facility. In turn, Lion's Gate would be allowed to employ the wildlife sanctuary license issued by the Colorado Division of Wildlife and Lion's Gate would obtain an Animal Welfare Act license in its name. CMSJ, RX 6, PX 4.

14. The above letter expressly acknowledged that Prairie Wind Animal Refuge's license had been revoked, but explained that their counsel had considered dissolving Prairie Wind Animal Refuge, but were concerned that such dissolution might jeopardize the corporation's grandfathered status as a wildlife sanctuary.

15. On February 18, 2009, APHIS denied Lion's Gate's application on the grounds that it was unfit to be licensed and "that issuance of a license to Lion's Gate would be contrary to the purposes of the Act, and would operate so as to circumvent an oder of revocation issued by the Secretary of Agriculture as to Prairie Wind Animal Refuge." PX 14.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. The Settlement Agreement reached in *Jurich v. U.S. Dep't of Agric.*, No. 1:03-cv-00793-EWN-OES (D. Colo. Sept. 10, 2003) acknowledged

the revocation of the Animal Welfare Act license previously held by Jurich and Prairie Wind Animal Refuge and the imposition of the accompanying civil penalty.

3. The Administrator's determination that Lion's Gate was unfit for issuance of a license and the denial of the application on the basis of Sections 2.10(b) and 2.11(a) of the Regulations (9 C.F.R. §§ 2.10(b) and 2.11) was in accordance with law and the Regulations as the application sought approval of a joint venture with a corporate entity whose license had been revoked by the Secretary.

4. The divestiture of ownership and subsequent death of Michael Jurich do not act to remove the permanent disqualification from licensure of a corporate entity whose existence is perpetual.

Order

1. The determination of unfitness and denial of the license application of Lion's Gate Center, LLC. is **AFFIRMED.**

2. Lion's Gate Center, LLC. is disqualified for a period of one year from obtaining, holding, or using an Animal Welfare Act license directly or indirectly through any corporate or other device or person.

3. This Decision and Order shall become final without further proceedings 35 days from service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to Section 1.145 of the Rules of Practice. 7 C.F.R. §1.145.

Copies of this Decision and Order will be served upon the parties by the Hearing Clerk.

CYNTHIA EYSAMAN.
Docket No. 11-0138.
Decision and Order.
Filed May 11, 2011.

Petitioner Pro se.
For APHIS
Decision and Order by Administrative Law Judge Janice K. Bullard.

AWA

DECISION AND ORDER GRANTING SUMMARY JUDGMENT

INTRODUCTION

The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary under Various Statutes ("the Rules"), set forth at 7 C.F.R. subpart H, apply to the adjudication of the instant matter. The case involves a petition for a hearing ("Petition") filed by pro se petitioner Cynthia Eysaman ("Petitioner") upon her objection to the United States Department of Agriculture's ("USDA"; "Respondent") denial of her application for an exhibitor's license under the Animal Welfare Act, 7 U.S.C. §§2131 et seq. ("AWA" or "the Act"). The AWA vests USDA with the authority to regulate the transportation, purchase, sale, housing, care, handling and treatment of animals subject to the Act. Pursuant to the AWA, persons who sell and transport regulated animals, or who use animals for research or exhibition, must obtain a license or registration issued by the Secretary of the USDA. 7 U.S.C. §2133. Further, the Act authorizes USDA to promulgate appropriate regulations, rules, and orders to promote the purposes of the AWA. 7. U.S.C. §2151. The Act and regulations fall within the enforcement authority of the Animal Plant Health Inspection Service ("APHIS"), an agency of USDA. APHIS is the agency tasked to issue licenses under the AWA.

This matter is ripe for adjudication, and this Decision and Order[1] is based upon the documentary evidence, as I have determined that summary judgment is an appropriate method for disposition of this case.

ISSUE

The primary issue in controversy is whether, considering the record, summary judgment may be entered in favor of USDA and Petitioner's request for a hearing may be dismissed.

PROCEDURAL HISTORY

[1] In this Decision and Order, documents submitted by Petitioner shall be denoted as "PX-#" and documents submitted by Respondent shall be denoted as "RX-#".

On January 10, 2011, Petitioner applied to APHIS for a license to allow her to exhibit a bobcat for educational purposes. By letter dated January 28, 2011, amended on February 22, 2011, APHIS denied Petitioner's application. On February 9, 2011, Petitioner filed an objection to APHIS' denial of her application for an exhibitor's license and requested a hearing before USDA's Office of Administrative Law Judges ("OALJ"). On March 1, 2011, counsel for Respondent filed a response to the Petition. On April 8, 2011, Respondent moved for summary judgment. Petitioner has not filed a response to Respondent's motion.

SUMMARY OF THE EVIDENCE[2]

Petitioner purchased what she believed to be a legally bred hybrid bobcat kitten from an internet vendor in 2008. The kitten arrived at Petitioner's home on June 13, 2008 and lived in Petitioner's home with her family and her other pets. The cat was neutered and declawed, and was allowed to roam Petitioner's 75 acre property. The cat generally returned home at night voluntarily, but failed to do so on two occasions. Petitioner was concerned about the cat when it had stayed out, and therefore constructed a large outside cage where the cat could safely stay.

Petitioner has no children, but sometime after she acquired the cat, her nephew and his family moved in with her. Her nephew's school-aged children and their classmates became aware of the cat, and on October 20, 2009, Petitioner was visited by an officer with the New York State Environmental Conservation Officer ("the State"). Petitioner was instructed to cease taking the cat for walks. Petitioner confined the cat to the house and its cage, and since her nephew and his family were no longer in residence, she believed the cat was safe with her.

Sometime after the State's visit, Petitioner was advised by the State to return the cat to its breeder, but since the cat was spayed the breeder rejected it. Petitioner was unable to place the cat in another suitable home with proper licensing. Petitioner entered into a Consent Order with the State whereby she paid for DNA testing that showed the cat was 98% bobcat. In addition, Petitioner paid a fine. Petitioner applied for an AWA license, but the application was returned as incomplete. She reapplied and was denied again due to a technical

[2] This summary relies upon statements set forth in the Petition.

deficiency. Petitioner applied once more, and the denial of that application is at the heart of the instant adjudication.

DISCUSSION

An administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or other materials show that there is no genuine issue as to any material fact. *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987) (affirming the Secretary of Agriculture's use of summary judgment under the Rules and rejecting Veg-Mix, Inc.'s claim that a hearing was required because it answered the complaint with a denial of the allegations); Federal Rule of Civil Procedure 56(c). An issue is "genuine" if sufficient evidence exists on each side so that a rational trier of fact could resolve the issue either way, and an issue of fact is "material" if under the substantive law it is essential to the proper disposition of the claim. *Alder v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998). The mere existence of some factual dispute will not defeat an otherwise properly supported motion for summary judgment because the factual dispute must be material. *Schwartz v. Brotherhood of Maintenance Way Employees*, 264 F.3d 1181, 1183 (10th Cir. 2001).

The usual and primary purpose of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477, U. S. 317, 323-34 (1986). If the moving party properly supports its motion, the burden shifts to the non-moving party, who may not rest upon the mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial. *Muck v. United States*, 3 F.3d 1378, 1380 (10th Cir. 1993). In setting forth these specific facts, the non-moving party must identify the facts by reference to affidavits, deposition transcripts, or specific exhibits. *Adler*, 144 F.3d at 671. The non-moving party cannot rest on ignorance of facts, on speculation, or on suspicion and may not escape summary judgment in the mere hope that something will turn up at trial. *Conaway v. Smith*, 853 F.2d 789, 793 (10th Cir. 1988). However, in reviewing a request for summary judgment, I must view all of the evidence in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby*, 477 U.S. 262 (1986).

By motion filed April 8, 2011, Respondent moved for summary judgment, and filed supporting documentation and a brief with the

Hearing Clerk for USDA's OALJ. Pursuant to 7 C.F.R. §1.143(d), a response to a motion is due within 20 days after service of the motion.

The Hearing Clerk sent a copy of the motion and documents to Petitioner on April 11, 2011 by certified mail, and on April 18, 2011, Petitioner acknowledged receipt of the mail. As of the date of this Decision and Order, Petitioner has failed to file a response. Regardless, the record is sufficiently developed to allow me to find that the material facts underlying the instant adjudication are not in dispute, and that entry of summary judgment in favor of Respondent is appropriate.

The number of applications that Petitioner made for a license is a fact that is genuinely in dispute. Petitioner refers to three applications (see, Petition), while the evidence supports that at least two applications were filed (PX-2; PX-3; RX-1; RX-2). I find that the determination of the number of applications Petitioner filed is not material to my inquiry into whether APHIS properly rejected Petitioner's request for a license. The applications were denied because of Petitioner's violation of State law, which is a circumstance that remains immutable. Petitioner has argued that she was prejudiced by the amount of time APHIS took to reach its ultimate determination in her quest for a license. When APHIS rejected Petitioner's most recent application, it advised that she could re-apply for a license "one year from the date the denial of your application becomes final". (PX-3; RX 2). Ms. Eysaman posits that had her license been rejected earlier, the yearlong prohibition from re-applying would have commenced earlier. However, this argument fails to consider the effect of Petitioner's request for a hearing, which delayed the date that a denial may be deemed final. In addition, Petitioner has no way of knowing how long it took APHIS to conclude its investigation into her eligibility for a license. As of July 20, 2010, APHIS had not confirmed whether Petitioner had filed any false information on any license application. (See, RX-4, page 1). Accordingly, I find that it would be speculative to conclude that APHIS's actions with respect to Petitioner's applications were not timely performed. Further, a finding otherwise would not be material to my inquiry into whether APHIS properly denied Petitioner's applications.

The record clearly establishes that Petitioner admitted in a Consent Order with the State of New York that she possessed a bobcat in violation of State law. RX-4. Petitioner suggests that the bobcat is not a "wild animal" as it has been domesticated and is tame. Indeed, since the cat has been declawed, it would be difficult to release it to the

wild. However, it is not the character or the personality of the cat that determines its classification under the law, but its genetics. Accordingly, Petitioner's possession of a wild animal in violation of State law is not in dispute.

Pursuant to 9 C.F.R. §2.11(a) A license shall not be issued to any applicant who:

> (6) Has made any false or fraudulent statements or provided any false or fraudulent records to the department of other government agencies, or has pled *nolo contendre* (no contest) or has been found to have violated any Federal State or local laws or regulations pertaining to the transportation, ownership, neglect or welfare of animals or is otherwise unfit to be licensed and the Administrator determines that the issuance of a license would be contrary to the purposes of the Act.

9 C.F.R. §2.11(a)(6).

Petitioner's violation of the State law meets the first test of this two part inquiry into her eligibility for an AWA license to exhibit the cat. The second test is established by APHIS' conclusion that Petitioner's violation of the Act rendered her unfit to be licensed. PX-3; RX-2. I find that APHIS' determination that Petitioner's violation of State Law disqualified her from eligibility for a license was a proper exercise of USDA's authority to regulate the AWA. Summary judgment is hereby entered in favor of Respondent. However, I find no grounds have been provided to support the disqualification of Petitioner for a two-year period, as counsel for Respondent has requested. I find that the one year period of disqualification determined by APHIS in its initial and amended denial letters promotes the remedial nature of the Act. (See, PX-3; RX-2).

FINDINGS OF FACT

1. In the spring of 2008, Petitioner bought a cat from an internet vendor that she believed to be a hybrid between housecat and bobcat, but which DNA tests revealed to be 98% bobcat. (See Petition for hearing)

2. The State cited Petitioner for a violation of a statute prohibiting possession of wild animals, including bobcats. (RX 4)
3. Petitioner entered into a Consent Order with the State in which she admitted that she had violated Article 1.1 of New York State's Environmental Conservation Law by acquiring a wild animal (bobcat) for use as a pet. (See, Declaration of Elizabeth Goldentyer, D.V.M., Regional Director, Animal Care, Easter Region, APHIS, hereby identified and admitted to the record as RX-3; Copy of Consent Order, hereby identified and admitted to the record as RX-4).
4. Shortly after entering into the Consent Order, Petitioner requested information about obtaining a license under the AWA. (See, attachment to Petition, hereby identified and admitted to the record as PX-1).
5. Petitioner applied[3] for a license from APHIS. (PX-2; RX-2).
6. APHIS denied Petitioner's application by letter dated January 28, 2011. (PX-3).
7. On February 8, 2011, Petitioner requested a hearing before OALJ. (See, Petition).
8. On February 22, 2011, APHIS sent a second letter denying the application, which amended the grounds for the denial of Petitioner's application. (RX-2).
9. APHIS denied the license because Petitioner had admitted to violating a State law regarding the possession of an animal, which the agency concluded rendered her unfit for an AWA license.
10. By letter dated June 3, 2010, Petitioner was advised by the New York State Department of Environment that the terms of her Consent Order had been satisfied, and was further advised to "consider this matter closed". (PX-4).

CONCLUSIONS OF LAW

1. The Secretary, USDA, has jurisdiction in this matter.
2. The request for a hearing was timely filed, in compliance with 9 C.F.R. §2.11(b) and 7 C.F.R. § 1.141(a)

[3] It appears as though Petitioner filed an application in 2010 that was returned as incomplete (PX-2) and then filed another application in January, 2011 (RX-1)

3. The material facts involved in this matter are not in dispute and the entry of summary judgment in favor of Respondent is appropriate
4. APHIS' denial of a license to Petitioner pursuant to 9 C.F.R. §2.11(a)(6), promotes the remedial nature of the AWA and is hereby AFFIRMED.
5. Petitioner's disqualification from applying for a license is appropriate.

ORDER

Petitioner is hereby disqualified from obtaining an AWA license for a period of one year, commencing on the date that this Order becomes final. This Decision and Order shall be effective 35 days after this decision is served upon the Petitioner unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145.

So Ordered this 11th day of May, 2011 in Washington, D.C.

_____

EQUAL CREDIT OPPORTUNITY ACT

COURT DECISIONS

GARY R. GRANT v. USDA.
No. 5:10–CV–201–BO.
Filed January 27, 2011.

[Cite as 2011 WL 308418 (E.D.N.C.)].

EOCA –Protected class, Race as.

United States District Court, E.D. North Carolina, Western Division.

ORDER

TERRENCE W. BOYLE, District Judge.

Before the Court is Defendant's Motion to Dismiss or, Alternatively, for Summary Judgment [DE 71]. The Plaintiff has responded in opposition to the instant Motion, the Defendant has filed a reply, and the Motion is ripe for adjudication. For the reasons that follow, Defendant's Motion to Dismiss is GRANTED.

BACKGROUND

Nine African–American and female farmers brought a class action on October 19, 2000, in the District Court for the District of Columbia, alleging that the United States Department of Agriculture ("USDA") discriminated against them on the basis of race and sex by denying them credit and other benefits under farm programs. Plaintiffs sought relief under the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691 *et seq.*, Administrative Procedures Act ("APA"), 5 U.S.C. § 701 *et seq.*, Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d), and the Fifth and Thirteenth Amendments to the Constitution (Compl.¶ 1.)

The United States requested additional time to answer, a stay, and dismissal and summary judgment on March 25, 2002. The court, by

order dated March 31, 2003, stayed the entire action based upon related litigation, dismissed the Plaintiffs' claims under the APA, Title VI, and those relating to USDA's failure to investigate discrimination, and struck Plaintiffs' demand for a jury trial. On December 12, 2007, the Court entered an order denying Plaintiffs' motion to certify a class. After a status conference and motions, the District of Columbia Court transferred venue to this Court on March 17, 2009.

This Court lifted the stay previously entered and severed the distinct discrimination claims of the eight remaining plaintiffs by an order entered May 13, 2010. On July 12, 2010, the Defendant filed a Motion to Dismiss the Complaint or, Alternatively, for Summary Judgment. That Motion is presently before the Court.

In the Complaint, Plaintiff alleges that Matthew Grant (hereinafter "Mr. Grant") was an African–American male who farmed in Halifax County, North Carolina, obtained loans from the Farmers Home Administration ("FmHA") beginning in 1971, experienced repayment troubles in the mid–1970s, received little FmHA restructuring assistance, and complained by writing letters alleging that the failure to provide loan servicing was based on his race (Compl.¶ 10.) Plaintiff demands actual damages, lost profits, and consequential damages of at least $3,000,000 (Compl.¶ 19.) Furthermore, Plaintiff requests this Court to discharge Plaintiff's outstanding debt to the USDA (Compl.¶ 19.)

DISCUSSION

A. *Dismissal Standard Under Rule 12(b)(6)*

Defendant has moved for dismissal of this action pursuant to Federal Rule of Civil Procedure 12(b)(6) or, alternatively, for summary judgment pursuant to Federal Rule of Civil Procedure 56. A Rule 12(b)(6) motion to dismiss for failure to state a claim for which relief can be granted challenges the legal sufficiency of a plaintiff's complaint. *Francis v. Giacomelli*, 588 F.3d 186, 192 (4th Cir.2009). When ruling on the motion, the court "must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus*, 551 U.S. 89, 93–94 (2007) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007)). Although complete and detailed factual allegations are not required, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to

relief requires more than labels and conclusions." *Twombly,* 550 U.S. at 555 (citations omitted). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal,* —— U.S. ——, ——, 129 S.Ct. 1937, 1949 (2009) (citing *Twombly,* 550 U.S. at 555). A trial court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Twombly,* 550 U.S. at 555. Accordingly, to survive a Rule 12(b)(6) motion, a complaint must contain facts sufficient "to raise a right to relief above the speculative level" and to satisfy the court that the claim is "plausible on its face." *Id.* at 555, 570.

i *Plaintiff's ECOA Claim*

Here, Defendant is entitled to dismissal of Plaintiff's ECOA claim under Rule 12(b)(6) because the Plaintiff has failed to plead sufficient facts establishing his plausible right to relief under the ECOA. Unlawful discrimination under the ECOA must be proven using one of three theories: (1) direct evidence of discrimination; (2) disparate treatment analysis; or (3) disparate impact analysis. *See, e.g., Shiplet v. Veneman,* 620 F.Supp.2d 1203, 1223 (D.Mt .2009) (citations omitted).

Rather than pursue a direct discrimination or disparate impact theory of discrimination, Plaintiff relies solely upon disparate treatment analysis. For disparate treatment claims, the plaintiff must allege and come forward with circumstantial evidence that creates an inference to "shift the burden" to the defendant to defend the treatment; the analysis is analogous to the framework outlined in *McDonnell Douglass Corp v. Green,* 411 U.S. 792 (1973), and its progeny. *See, e.g., Crestar Bank v. Driggs,* 1993 WL 198187, at *1 (4th Cir. June 11, 1993); *Cooley v. Sterling Bank,* 280 F.Supp.2d 1331, 1337 (M.D.Ala.2003).

If the plaintiff alleges and presents evidence to shift the burden, the burden of production then shifts to the defendant to articulate some legitimate, nondiscriminatory reason for its allegedly discriminatory actions. While the intermediate evidentiary burden shifts under the disparate treatment analysis, the ultimate burden of persuasion as to discrimination remains with the plaintiff at all times. *See, e.g., Shiplet,* 620 F.Supp.2d at 1232.

In ECOA disparate treatment cases, courts have framed the prima facie test as requiring plaintiffs to demonstrate:

(1) they are a member of a protected class;

(2) they applied for an extension of credit;

(3) they were rejected despite their qualifications; and

(4) others of similar credit stature were extended credit or were given more favorable treatment than plaintiffs.

See, e.g., *Cooley*, 280 F.Supp.2d at 1339–40 (fourth element requires proof "that the defendant continued to approve loans or applicants outside of the plaintiff's protected class with similar qualification" because plaintiff must show similarly situated persons outside the class were treated differently).

Here, Plaintiff fails to plead facts establishing a prima facie case of discrimination under the ECOA. Although the Complaint is sufficient with respect to the first three prima facie elements, it is devoid of any plausible substantive allegations establishing the fourth and final element of an ECOA claim.

It is undisputed that Plaintiff is a member of a protected class. It is further undisputed that Plaintiff, on several occasions, applied for an extension of credit and credit servicing. Plaintiff has, moreover, pled sufficient facts establishing that he was denied USDA's credit servicing despite his qualifications (Compl.¶ 13) (outlining Plaintiff's 1989 denial of credit and the subsequent findings by the National Appeals Staff that the USDA "improperly denied the [Plaintiff's] application for [credit services] because the farm and home plan [Plaintiff] submitted showed sufficient income to service the FmHA debt and pay outside creditors.").

However, Plaintiff's Complaint fails to plead sufficient facts to support the fourth and final element of his prima face case. As mentioned, *supra*, to carry his evidentiary burden, Plaintiff must show that "others of similar credit stature were extended credit or were given more favorable treatment than plaintiffs." *Cooley*, 280 F.Supp.2d at

1339–40. "The 'similarly situated' prong of the prima facie test is important because no presumption of discrimination arises [from] the fact that a defendant treated dissimilar persons differently." *Id.* at 1341.

Plaintiff has failed to plead sufficient facts plausibly demonstrating the existence of a single non-minority who was (1) of similar credit stature as the Plaintiff and (2) given more favorable financial or credit-related treatment than Plaintiff by the USDA. In fact, the only portion of the Complaint which refers to this element of the prima facie case does so as a mere recital of the elements of an ECOA violation. In response to Defendant's Motion to Dismiss, Plaintiff directs the Court to paragraph 17 of the Complaint (Pl.'s Br. at 8) ("In paragraph 17 of Plaintiff's Complain, the clearly articulates that white farmers were afforded more favorable treatment than he." [sic]). Paragraph 17 of the Complaint alleges:

> The Grants claim that the USDA employees and/or agents denied them the right to application assistance and technical support, loan servicing, including but not limited to debt write-off and/or write-down, leaseback/buyback, homestead protection and other rights afforded white farmers under the United States Constitution and the laws and regulations enacted thereunder.
>
> (Compl.¶ 17.)

Considering the "similarly situated" prong of an ECOA prima facie case, in conjunction with Paragraph 17 of Plaintiff's Complaint, it is the opinion of the Court that the Plaintiff has pled facts that are "merely consistent with" Defendant's liability, as opposed to facts which plausibly establish Plaintiff's right to recovery under the ECOA. But, as the Supreme Court has held "[w]here a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Iqbal*, 129 S.Ct. at 1949 (citing *Twombly*, 550 U.S. at 557) (internal quotations and brackets omitted). Plaintiff's minimal burden, at the pleading stage, is to come forward with more than a mere recital that he was denied certain "rights afforded white farmers under the United States Constitution and the laws and regulations enacted thereunder" (Compl.¶ 17.) Plaintiff has failed to satisfy this burden. Plaintiff's Complaint is legally insufficient to

state an ECOA claim, and the Defendant is, therefore, entitled to dismissal of this action pursuant to Federal Rule of Civil Procedure 12(b)(6).

The ECOA claims purportedly asserted against Defendant are hereby dismissed because Plaintiff's allegations fail to allege either (1) direct statements of discrimination, (2) disparate impact, or (3) disparate treatment, any one of which might give rise to the Defendant's liability under the ECOA.

ii. *Plaintiff's Non–ECOA Claims*

The Government has moved to dismissed the Plaintiff's remaining non-ECOA claims for failure to state a claim. Plaintiff baldly contends that the Government's attacks on Plaintiff's Constitutional and non-ECOA claims are "feckless" and "without merit." But Plaintiff fails to substantively respond to the specific legal challenges made by the Government and he presents no evidence to support his claims under any non-ECOA theory of liability. At the pleading stage, the plaintiff is required to allege facts that support each of his various claims, rather than merely offering labels and conclusory allegations. *See, e.g.*, *Iqbal*, 129 S.Ct. at 1949; *Twombly*, 550 U.S. at 555.

Considering the pleadings, the Defendant's instant Motion, as well as the Plaintiff's response in opposition, the Court finds that the Plaintiff has failed to plead a plausible right to relief under any of the non-ECOA claims. With respect to these claims, the Complaint merely invokes various statutory and constitutional provisions and then states, in bare and conclusory style, that Plaintiff is entitled to recover under those provisions. Plaintiff's barren method of pleading is ineffective, however, since "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 129 S.Ct. at 1949. The allegations before the Court are insufficient, as a legal and factual matter, to sustain Plaintiffs' claims of discrimination under the Fifth Amendment, Thirteenth Amendment, the Equal Protection clause, or the Due Process clauses of the Constitution, as well as the referenced statutory provisions. Defendant is entitled to dismissal of all non-ECOA claims pursuant to Federal Rule of Civil Procedure 12(b)(6).

CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss or, Alternatively, for Summary Judgement of the United States [DE 71] is GRANTED. The Clerk is directed to close the case.

DONE AND ORDERED.

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EDDIE WISE AND DOROTHY MONROE–WISE V. USDA.
No. 5:10–CV–197–BO.
Filed February 2, 2011.

[Cite as: WL 381765 (E.D.N.C.)]

EOCA – Protected class, Race and sex.

United States District Court, E.D. North Carolina, Western Division.

ORDER

TERRENCE W. BOYLE, District Judge.

Before the Court is Defendant's Motion to Dismiss or, Alternatively, for Summary Judgment [DE 71]. The Plaintiff has responded in opposition to the instant Motion, the Defendant has filed a reply, and the Motion is ripe for adjudication. For the reasons that follow, Defendant's Motion to Dismiss is GRANTED.

BACKGROUND

Nine African–American and female farmers brought a class action on October 19, 2000, in the District Court for the District of Columbia, alleging that the United States Department of Agriculture ("USDA") discriminated against them on the basis of race and sex by denying them credit and other benefits under farm programs. Plaintiffs sought relief under the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691 *et*

seq., Administrative Procedures Act ("APA"), 5 U.S.C. § 701 *et seq.*, Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d), and the Fifth and Thirteenth Amendments to the Constitution (Compl. at ¶ 1.)

The United States requested additional time to answer, a stay, dismissal, and summary judgment on March 25, 2002. The court, by an order dated March 31, 2003, stayed the entire action based upon related litigation, dismissed the Plaintiffs' claims under the APA, Title VI, and those relating to USDA's failure to investigate discrimination, and struck Plaintiffs' demand for a jury trial. On December 12, 2007, the Court entered an order denying Plaintiffs' motion to certify a class. After a status conference and motions, the District of Columbia Court transferred venue to this Court on March 17, 2009.

This Court lifted the stay previously entered and severed the distinct discrimination claims of the eight remaining Plaintiffs by an order entered May 13, 2010. On July 12, 2010, the Defendant filed a Motion to Dismiss the Complaint or, Alternatively, for Summary Judgment. That Motion is presently before the Court.

The Plaintiffs are husband and wife. Plaintiffs are also African–American. Plaintiffs allege they attempted to purchase a 105 acre farm suitable for a swine operation (the "Lynch farm") held in the USDA Farmers Home Administration ("FmHA") inventory. Plaintiffs allege they inquired about the Lynch farm in June, 1991, and submitted an application to purchase it sometime in 1992. Plaintiffs allege they were eligible for a loan through the socially disadvantaged farmer program, the beginning farmer program, and the guaranteed loan program administered by USDA. Plaintiffs allege that as they attempted to obtain USDA loans and other forms of financial assistance, they were "intentionally and unlawfully discouraged, delayed and denied" in their efforts, in violation of the law. (Compl. at ¶ 6.)

The Complaint alleges Nash County, North Carolina USDA Supervisor F. Sydney Long discriminated against the Wises, on account of their race, by

a) failing to provide them loan applications when requested;

b) failing to provide them with technical support and assistance to facilitate the submission and approval of their various applications;

c) failing to submit their applications to USDA in a timely manner;

d) failing to appropriately assist and advise them with adequate information and assistance for guaranteed loans through outside lenders;

e) failing to timely process the completed loan applications;

f) intentionally, discriminatorily [sic], and summarily denying their loan applications;

g) failing to offer them options other than leasing the Lynch farm in an act of retaliation because Long's arbitrary, capricious, erroneous decision denying the Wises [sic] category 1 status and placing them in primary position to purchase the Lynch farm was overturned on appeal to the Nation Appeals Division;

h) failing to offer them other options authorized for socially disadvantaged farmers and beginning farmers pursuant to USDA regulations in retaliation for complaints of discrimination filed by the Wises between 1992 and 1997, with the State Director of Farmers Home Administration, Congresswoman Eva M. Clayton, Congressman David Funderburke, Congressman Wayne T. Gilchrest, Director of Civil Rights and Small Business Development Staff at USDA, Willie D. Cook, the Director of the Office of Civil Rights for USDA, Lloyd Wright, and Secretary of USDA Daniel R. Glickman.

(Compl. at ¶ 7.)

The Wises seek relief in the form of actual damages in the amount of $2,000,000 and punitive damages in the amount of "at least $1,000,000" (Compl. at ¶ 9.)

DISCUSSION

A. *Dismissal Standard Under Rule 12(b)(6)*

Defendant has moved for dismissal of this action pursuant to Federal Rule of Civil Procedure 12(b)(6) or, alternatively, for summary judgment pursuant to Federal Rule of Civil Procedure 56. A Rule 12(b)(6) motion to dismiss for failure to state a claim for which relief can be granted challenges the legal sufficiency of a plaintiff's complaint. *Francis v. Giacomelli,* 588 F.3d 186, 192 (4th Cir.2009). When ruling on the motion, the court "must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus,* 551 U.S. 89, 93–94 (2007) (citing *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555–56 (2007)). Although complete and detailed factual allegations are not required, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions." *Twombly,* 550 U.S. at 555 (citations omitted). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal,* ––– U.S. ––––, ––––, 129 S.Ct. 1937, 1949 (2009) (citing *Twombly,* 550 U.S. at 555). A trial court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Twombly,* 550 U.S. at 555. Accordingly, to survive a Rule 12(b)(6) motion, a complaint must contain facts sufficient "to raise a right to relief above the speculative level" and to satisfy the court that the claim is "plausible on its face." *Id.* at 555, 570.

i. *Plaintiffs' ECOA Claim*

Here, Defendant is entitled to dismissal of Plaintiffs' ECOA claim under Rule 12(b)(6) because Plaintiffs have failed to sufficiently plead facts manifesting their plausible right to relief under the ECOA. Unlawful discrimination under the ECOA must be proven using one of three theories: (1) direct evidence of discrimination; (2) disparate treatment analysis; or (3) disparate impact analysis. *See, e.g., Shiplet v. Veneman,* 620 F.Supp.2d 1203, 1223 (D.Mt.2009) (citations omitted).

Rather than pursue a direct discrimination or disparate impact theory of discrimination, Plaintiffs rely solely upon disparate treatment analysis. For disparate treatment claims, the plaintiff must allege and come forward with circumstantial evidence that creates an inference to "shift the burden" to the defendant to defend the treatment. Disparate treatment

analysis in the context of an ECOA violation is analogous to the framework outlined in *McDonnell Douglass Corp v. Green*, 411 U.S. 792 (1973), and its progeny. *See, e.g., Crestar Bank v. Driggs*, 1993 WL 198187, at *1 (4th Cir. June 11, 1993); *Cooley v. Sterling Bank*, 280 F.Supp.2d 1331, 1337 (M.D.Ala.2003).

If the plaintiff alleges and presents evidence to shift the burden, the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its allegedly discriminatory actions. While the intermediate evidentiary burden shifts under the disparate treatment analysis, the ultimate burden of persuasion as to discrimination remains with the plaintiff at all times. *See, e.g., Shiplet*, 620 F.Supp.2d at 1232.

In ECOA disparate treatment cases, courts have framed the prima facie test as requiring plaintiffs to demonstrate:

(1) they are a member of a protected class;

(2) they applied for an extension of credit;

(3) they were rejected despite their qualifications; and

(4) others of similar credit stature were extended credit or were given more favorable treatment than plaintiffs.

See, e.g., Cooley, 280 F.Supp.2d at 1339–40 (fourth element requires proof "that the defendant continued to approve loans or applicants outside of the plaintiff's protected class with similar qualification" because plaintiff must show similarly situated persons outside the class were treated differently).

Here, although the Complaint is sufficient with respect to the first three prima facie elements, it is devoid of any plausible substantive allegations establishing the fourth and final element of an ECOA claim.

It is undisputed that the Plaintiffs are African–Americans and therefore members of a protected class. It is also undisputed that Plaintiffs applied to the USDA for an extension of credit or credit-related services or assistance. Moreover, Plaintiffs have sufficiently pled that

they were rejected for financing despite their qualifications, thus satisfying the third prong of an ECOA prima facie case (Compl. at ¶ 7(h)) (alleging that USDA Supervisor Sidney Long's denial of the Wises' application "was overturned on appeal to the Nation Appeals Division," creating an inference that Long's denial was improper).

However, with respect to the fourth and final element of an ECOA prima facie case, Plaintiffs fail to sufficiently allege that other similarly-situated applicants, outside Plaintiffs' protected class, were treated more favorably by the USDA in the provision of credit or in the provision of services or assistance. In fact, this Court's searching review of the Complaint reveals no colorable allegations supporting the "similarly situated" prong of an ECOA disparate treatment claim.

Considering the fourth prong of an ECOA prima facie case, in conjunction with Paragraphs 6–8 of Plaintiff's Complaint, it is the opinion of the Court that the Plaintiffs have pled facts that are "merely consistent with" the USDA's liability for a violation of the ECOA, as opposed to facts which *plausibly establish* Plaintiffs' right to recovery under the ECOA. But, unfortunately for Plaintiffs, the Supreme Court has held that "[w]here a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Iqbal*, 129 S.Ct. at 1949 (citing *Twombly*, 550 U.S. at 557) (internal quotations and brackets omitted). Plaintiffs' minimal burden, at the pleading stage, is to come forward with more than a mere recital that they were "intentionally and unlawfully discouraged, delayed and denied loan applications ..." (Compl. at ¶ 8.) Plaintiffs' bald recitations and unsupported legal conclusions render their Complaint subject to dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6).

The ECOA claims purportedly asserted against Defendant are hereby dismissed because Plaintiffs' allegations fail to allege either (1) direct statements of discrimination, (2) disparate impact discrimination, or (3) disparate treatment discrimination, any one of which might give rise to the Defendant's liability under the ECOA.

ii. *Plaintiffs' Non–ECOA Claims*

The Government has moved, under Federal Rule of Civil Procedure 12(b)(6), to dismiss the Plaintiffs' remaining non-ECOA claims for failure to state a claim. Plaintiffs' sole contention in response to the Government's Motion is that the Government's arguments are "feckless" and "without merit." How Plaintiffs reach this conclusion is unclear, however, because they fail to develop any argument or otherwise to direct the Court's attention to the problems with the Government's logic. Plaintiffs' dismissive response fails to substantively address the specific and well-grounded legal challenges made by the Government in its Motion to Dismiss.

Plaintiffs, as the Government rightly contends, present insufficient evidence establishing a plausible right to recovery under any non-ECOA theory of liability. At the pleading stage, the plaintiff is required to allege facts that support each of his various claims, rather than merely offering labels and conclusory allegations. *See, e.g., Iqbal,* 129 S.Ct. at 1949; *Twombly,* 550 U.S. at 555. Here, the Complaint before the Court merely invokes various statutory and Constitutional provisions and then states, in bare and conclusory style, that Plaintiff is entitled to recover under those provisions. Plaintiffs' denudate pleading is ineffective since "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal,* 129 S.Ct. at 1949.

Considering the Complaint, the Defendant's instant Motion, as well as the Plaintiffs' response in opposition, the Court finds that the Plaintiffs have failed to plead a plausible right to relief under any of the non-ECOA claims. Defendant is entitled to dismissal of all non-ECOA claims pursuant to Federal Rule of Civil Procedure 12(b)(6).

CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss or, Alternatively, for Summary Judgment of the United States [DE 71] is GRANTED. The Clerk is directed to close the case.

DONE AND ORDERED.

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KATHERINE HILLIARD V. USDA.
No. 5:10–CV–202–B0.
Filed February 4, 2011.

[Cite as: 2011 WL 474588 (E.D.N.C.)].

EOCA – Protected class, Race and sex.

United States District Court,
E.D. North Carolina.

ORDER

TERRENCE W. BOYLE, District Judge.

Before the Court is Defendant's Motion to Dismiss or, Alternatively, for Summary Judgment [DE 71]. The Plaintiff has responded in opposition to the instant Motion, the Defendant has filed a Reply, and the Motion is ripe for adjudication. For the reasons that follow, Defendant's Motion to Dismiss is GRANTED.

BACKGROUND

Nine African–American and female farmers brought a class action on October 19, 2000, in the District Court for the District of Columbia, alleging that the United States Department of Agriculture ("USDA") discriminated against them on the basis of race and sex by denying them credit and other benefits under farm programs. The Putative Class sought relief under the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691 *et seq.*, Administrative Procedures Act ("APA"), 5 U.S.C. § 701 *et seq.*, Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d), and the Fifth and Thirteenth Amendments to the Constitution (Compl. at ¶ 1.)

The United States requested additional time to answer, a stay, dismissal, and summary judgment on March 25, 2002. The court, by an order dated March 31, 2003, stayed the entire action based upon related litigation, dismissed the Plaintiffs' claims under the APA, Title VI, and those relating to USDA's failure to investigate discrimination, and struck Plaintiffs' demand for a jury trial. On December 12, 2007, the Court

entered an order denying Plaintiffs' motion to certify a class. After a status conference and motions, the District of Columbia Court transferred venue to this Court on March 17, 2009.

This Court lifted the stay previously entered and severed the distinct discrimination claims of the eight remaining Plaintiffs by an order entered May 13, 2010. On July 19, 2010, the Defendant filed a Motion to Dismiss the Complaint or, Alternatively, for Summary Judgment [DE 71]. That Motion is presently before the Court.

The Plaintiff has been substituted for the late Margie Brauer, a Caucasian female. As alleged in the Complaint, Brauer farmed in the area of Warren County, North Carolina, on land that "had been in her family for more than 100 years." The Complaint alleges that Brauer grew tobacco, corn, and soybeans. Plaintiff maintained approximately 50 dairy cows as well as a chicken egg production operation on nearly 400 acres of land in Warren County. The Complaint alleges that Brauer applied for annual operating loans from the USDA Farmers Home Administration ("FmHA") from 1981 to 1985. The Complaint alleges that the loans were issued late in the season, causing Brauer "to lose a substantial portions [sic] of the property rented due to the uncertainty of the availability of funds." (Compl. at ¶ 54.) The Complaint alleges that in late 1985, Brauer was informed that an operating loan would not be issued for the upcoming season. (*Id.*)

The Complaint further alleges that Brauer's requests for loan servicing were denied and that requests for technical support and assistance were denied based upon her gender, in violation of regulations of the USDA and the Equal Protection Clause of the Constitution. The Complaint alleges USDA's denials forced Mrs. Brauer to file bankruptcy and take an off-farm job, and that she is entitled to damages of $1,375,000.

DISCUSSION

A. *Dismissal Standard Under Rule 12(b)(6)*

Defendant has moved for dismissal of this action pursuant to Federal Rule of Civil Procedure 12(b)(6) or, alternatively, for summary judgment pursuant to Federal Rule of Civil Procedure 56. A Rule 12(b)(6) motion

to dismiss for failure to state a claim for which relief can be granted challenges the legal sufficiency of a plaintiff's complaint. *Francis v. Giacomelli,* 588 F.3d 186, 192 (4th Cir.2009). When ruling on the motion, the court "must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus,* 551 U.S. 89, 93–94 (2007) (citing *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555–56 (2007)). Although complete and detailed factual allegations are not required, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief requires more than labels and conclusions." *Twombly,* 550 U.S. at 555 (citations omitted). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal,* ––– U.S. ––––, ––––, 129 S.Ct. 1937, 1949 (2009) (citing *Twombly,* 550 U.S. at 555). A trial court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Twombly,* 550 U.S. at 555. Accordingly, to survive a Rule 12(b)(6) motion, a complaint must contain facts sufficient "to raise a right to relief above the speculative level" and to satisfy the court that the claim is "plausible on its face." *Id.* at 555, 570.

i. *Plaintiff's ECOA Claim*

Here, Defendant is entitled to a dismissal of Plaintiff's ECOA claim under Federal Rule of Civil Procedure 12(b)(6) because Plaintiff has failed to sufficiently plead facts manifesting her plausible right to relief under the ECOA. The ECOA creates a private right of action against a creditor who "discriminate[s] against any application, with respect to any aspect of a credit transaction ... on the basis of ... sex...." 15 U.S.C. § 1691(a)(1). Unlawful discrimination under the ECOA must be proven using one of three theories: (1) direct evidence of discrimination; (2) disparate treatment analysis; or (3) disparate impact analysis. *See, e.g., Shiplet v. Veneman,* 620 F.Supp.2d 1203, 1223 (D.Mt.2009) (citations omitted).

Rather than pursue a direct discrimination or disparate impact theory of discrimination, Plaintiff relies solely upon disparate treatment analysis.[1] For disparate treatment claims, the plaintiff must allege and

[1] Plaintiff incorrectly notes that Defendant "wrongfully assumes that plaintiff must allege direct statements of discrimination in order to be entitled to relief under ECOA and disparate treatment." (Pl.'s Br. at 8.) Plaintiff is incorrect. Defendant merely covered the

come forward with circumstantial evidence that creates an inference to "shift the burden" to the defendant to defend the treatment. Disparate treatment analysis in the context of an ECOA violation is analogous to the framework outlined in *McDonnell Douglass Corp v. Green*, 411 U.S. 792 (1973), and its progeny. *See, e.g., Crestar Bank v. Driggs*, 1993 WL 198187, at *1 (4th Cir. June 11, 1993); *Cooley v. Sterling Bank*, 280 F.Supp.2d 1331, 1337 (M.D.Ala.2003).

If the plaintiff alleges and presents evidence to shift the burden, the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its allegedly discriminatory actions. While the intermediate evidentiary burden shifts under the disparate treatment analysis, the ultimate burden of persuasion as to discrimination remains with the plaintiff at all times. *See, e.g., Shiplet*, 620 F.Supp.2d at 1232.

In ECOA disparate treatment cases, courts have framed the prima facie test as requiring plaintiffs to demonstrate:

(1) they are a member of a protected class;

(2) they applied for an extension of credit;

(3) they were rejected despite their qualifications; and

(4) others of similar credit stature were extended credit or were given more favorable treatment than plaintiffs.

See, e.g., Cooley, 280 F.Supp.2d at 1339–40 (fourth element requires proof "that the defendant continued to approve loans or applicants outside of the plaintiff's protected class with similar qualification" because plaintiff must show similarly situated persons outside the class were treated differently).

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waterfront of potential theories of liability for an ECOA violation. These distinct theories of liability include (1) direct evidence of discrimination, (2) disparate treatment discrimination, and (3) disparate impact discrimination. Defendant, in its instant Motion, correctly attempts to shoe-horn Plaintiff's allegations into one of these theories of liability, since Plaintiff failed to do so explicitly in the Complaint or otherwise.

Here, although the Complaint is sufficient with respect to the first two prima facie elements, it is devoid of any plausible substantive allegations establishing the third and fourth elements of an ECOA prima facie case. It is undisputed that Plaintiff was a member of a protected class and that she applied for an extension of credit or credit related services from the USDA. However, the Complaint fails to allege the last two elements of an ECOA disparate treatment case: that Plaintiff was rejected for an extension of credit despite her qualifications, and that other similarly situated applicants, outside Plaintiff's protected class, were treated more favorably.

The Government specifically challenged the Plaintiff's disparate treatment claim and, unfortunately, the Plaintiff offered no intelligible, relevant response. This Court's searching review of the Complaint reveals no colorable allegations supporting the third prong of an ECOA disparate treatment claim, and the only evidence Plaintiff purports to offer in support of the fourth-prong is really no evidence at all.

With respect to the similarly-situated, fourth prong of an ECOA violation, the Plaintiff relies entirely on a March 30, 1987 letter from attorney James B. Craven, III as evidence that similarly situated non-female farmers were treated more favorably by the USDA than Plaintiff. Plaintiff argues that Craven's letter, "satisfies the similar-situated farmer requirement as Attorney Craven notes that no other properties similar to Margie Brauer's has sold in the 'Norlina area of Warren County' ... [thus] signifying that no other white male farmers have been forced to sell the family farmland like Margie Brauer." Craven's letter, and specifically the provisions cited by Plaintiff, do little more than to comment on a declining real estate market. Contrary to Plaintiff's assertions, the letter does not support a finding that "similarly situated" non-female farmers have been treated more favorably than the Plaintiff. Plaintiff offers no other evidence on this critical element of her prima facie case.

Considering the third and fourth prongs of an ECOA prima facie case, in conjunction with Paragraphs 54–57 of Plaintiff's Complaint, it is the opinion of the Court that the Plaintiff has pled facts that are "merely consistent with" the USDA's liability for a violation of the ECOA, as opposed to facts which plausibly establish Plaintiff's right to recovery under the ECOA. But, unfortunately for Plaintiff, the Supreme Court has

held that "[w]here a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Iqbal,* 129 S.Ct. at 1949 (citing *Twombly,* 550 U.S. at 557) (internal quotations and brackets omitted). Plaintiff's minimal burden, at the pleading stage, is to come forward with more than a mere recital that "the failure to provide her loan servicing and technical assistance was in violation of the FmHA regulations ..., denying her equal protection under the law because she is a woman [,] in violation of the United States Constitution and the laws and regulations enacted thereunder." (Compl. at ¶ 56.) Plaintiffs' bald recitations and unsupported legal conclusions render her Complaint subject to dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6).

The ECOA claims purportedly asserted against Defendant are hereby dismissed because Plaintiff's allegations fail to allege either (1) direct statements of discrimination, (2) disparate impact discrimination, or (3) disparate treatment discrimination, any one of which might give rise to the Defendant's liability under the ECOA.

ii. *Plaintiff's Non–ECOA Claims*

The Government has moved, under Federal Rule of Civil Procedure 12(b)(6), to dismiss the Plaintiff's remaining non-ECOA claims for failure to state a claim. Plaintiff's sole contention in response to the Government's Motion is that the Government's arguments are "feckless" and "without merit." How Plaintiff reaches this conclusion is unclear, however, because she fails to develop any argument or otherwise to direct the Court's attention to the problems with the Government's logic. Plaintiff's dismissive response fails to substantively address the specific and well-grounded legal challenges made by the Government in its Motion to Dismiss.

Plaintiffs, as the Government rightly contends, present insufficient evidence establishing a plausible right to recovery under any non-ECOA theory of liability. At the pleading stage, the plaintiff is required to allege facts that support each of his various claims, rather than merely offering labels and conclusory allegations. *See, e.g., Iqbal,* 129 S.Ct. at 1949; *Twombly,* 550 U.S. at 555. Here, the Complaint before the Court merely invokes various statutory and Constitutional provisions and then states,

in bare and conclusory style, that Plaintiff is entitled to recover under those provisions. Plaintiffs' denudate pleading is ineffective since "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 129 S.Ct. at 1949.

Considering the Complaint, the Defendant's instant Motion, as well as the Plaintiff's response in opposition, the Court finds that the Plaintiff has failed to plead a plausible right to relief under any of the non-ECOA claims. Defendant is entitled to dismissal of all non-ECOA claims pursuant to Federal Rule of Civil Procedure 12(b)(6).

CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss or, Alternatively, for Summary Judgment of the United States [DE 71] is GRANTED. The Clerk is directed to close the case.

DONE AND ORDERED.

HARRY T. YOUNG V. USDA.
No. 4:10–CV–00074–R.
Filed March 11, 2011.

[Cite as: 2011 WL 864977 (W.D.Ky.)].

EOCA – Protected class, Race.

United States District Court, W.D. Kentucky, Owensboro Division.

MEMORANDUM OPINION AND ORDER

THOMAS B. RUSSELL, Chief Judge.

This matter first came before the Court upon Defendants' Motion to Dismiss (DN 30). During the pendency of that motion, Plaintiff filed an Amended Complaint, obviating a number of the Defendants initial objections (DN 42). Plaintiff has also filed a response to Defendants' Motion to Dismiss in light of the changes contained within the Amended

Complaint (DN 47). The time for Defendants to file a reply has passed. This motion is now ripe for adjudication. For the reasons that follow, Defendants' Motion is DENIED.

BACKGROUND

Plaintiff Harry T. Young originally filed this action, *pro se*, against a litany of federal agencies and federal employees protesting the 2005 foreclosure of his farm. He has since retained counsel and filed an Amended Complaint, simplifying the parties to this action and his alleged theories of recovery. Young brings suit against the United States Department of Agriculture ("USDA") and a number of its employees, including Tom Vilsack, Pearlie Reed, Lloyd Wright, Carl Ruiz–Martin, Joseph Wathen, and Joe Leonard. He also proceeds against the United States Department of Justice ("DOJ"), the U.S. Attorney General, Eric Holder, and Michael Spalding, who is an Assistant United States Attorney in Louisville, Kentucky (collectively "DOJ Defendants").

Young is an African–American farmer that, until July of 2005, owned some 289 acres of farmland near Utica, Kentucky (the "farm"). Previously, he had sought loans from the Farm Service Agency ("FSA"), under the regulatory umbrella of USDA, receiving at least one that he claims was collateralized by his farm machinery. On July 5, 2005, Young avers that the USDA and FSA foreclosed on the farm without any advanced notice and that he was forcibly removed from the property. He further declares that after his eviction, the USDA and FSA twice rejected his offers to pay off the balance of the loan.

On the basis of this narrative, Young advances that this foreclosure and eviction violated a number of his statutory and constitutional rights. Specifically, he claims violations of the Equal Credit Opportunity Act ("ECOA"), the Administrative Procedure Act ("APA"), and his rights under the Fifth Amendment. He also says that several Defendants have conspired to interfere with his civil rights, in violation of 42 U.S.C. § 1985. Finally, Young alleges fraud and negligent retention claims against the DOJ Defendants.

Defendants move for dismissal citing the doctrine of *res judicata*. They argue that in October of 2006, Young pursued a very similar action

("2006–Litigation") in this very Court "seeking to undo the foreclosure and sale of his property."[1] DN 30–1 at 2. In this prior matter, Young took action against the USDA and FSA, claiming that a fraud had been perpetrated upon him by the agencies and citing *Pigford v. Glickman*, 206 F.3d 1212 (D.C.Cir.2000), a class action by minority farmers that examined discriminatory lending practices by these two agencies. Complaint at 2, *Young v. U.S. Dep't of Agric.*, 4:06–cv–00138, (W.D.Ky. October 30, 2006).[2] The court eventually chose, on the defendants' motion, to dismiss Young's complaint, in large part because his claims had previously been adjudicated under *Pigford. Young*, No. 4:06–cv–00138 (W.D.Ky. March 14, 2007) (order dismissing action). The Sixth Circuit Court of Appeals upheld this dismissal. In the instant action, Defendants now claim that this dismissal indicates that his current claims have been confronted and rejected by this Court. As such, they aver that this matter is barred by *res judicata.*

STANDARD

"When considering a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the district court must accept all of the allegations in the complaint as true, and construe the complaint liberally in favor of the plaintiff." *Lawrence v. Chancery Court of Tenn.*, 188 F.3d 687, 691 (6th Cir.1999) (citing *Miller v. Currie*, 50 F.3d 373, 377 (6th Cir.1995)).

To survive a Rule 12(b)(6) motion to dismiss, the complaint must include "only enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955,

[1] Defendants also allege that Young has filed a total of six lawsuits in the Western District of Kentucky stating similar grievances. For the purposes of this motion however, only the 2006–Litigation is discussed. As for the other cases, according to the record before the Court, two more were resolved in this district without a final decision while another is still pending.

[2] In examining this motion to dismiss, the Court has take judicial notice of a number of documents filed in Young's prior suit. *See Jones v. City of Cincinnati*, 521 F.3d 555, 562 (6th Cir.2008) (district courts may take judicial notice of reliable public documents in examining a motion to dismiss); *Bradfield v. Corr. Medical Servs.*, No. 1:07–CV–1016, 2008 WL 5685586, *3–4 (W.D.Mich. July 3, 2008) (same); *United States ex rel. Dingle v. BioPort Corp.*, 270 F.Supp.2d 968, 971–72 (W.D.Mich.2003) (same).

167 L.Ed.2d 929 (2007); *see also Ashcroft v. Iqbal*, —– U.S. ——, ——, 129 S.Ct. 1937, 1950, 173 L.Ed.2d 868 (2009). The "[f]actual allegations in the complaint must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true." *Twombly*, 550 U.S. at 555 (internal citation and quotation marks omitted). A plaintiff must allege sufficient factual allegations to give the defendant fair notice concerning the nature of the claim and the grounds upon which it rests. *Id.*

Furthermore, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* A court is not bound to accept "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Iqbal*, 129 S.Ct. at 1949.

DISCUSSION

I. Res Judicata

With successive federal actions, this circuit has chosen to apply the federal common law of *res judicata* rather than the law of the state in which the district court sits. *J.Z. G. Resources, Inc. v. Shelby Ins. Co.*, 84 F.3d 211, 213–14 (6th Cir.1996). The overall doctrine can be broken down into two smaller legal theories, claim preclusion and issue preclusion. While the latter seeks to bar only particular issues previously litigated between participating parties, "claim preclusion applies not only to bar the parties from relitigating issues that were actually litigated but also to bar them from relitigating issues that *could have been raised* in an earlier action." *Id.* at 214. The party asserting this affirmative defense must demonstrate the following four elements: "(1) a final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or their privies; (3) an issue in the subsequent action which was litigated or which should have been litigated in the prior action; and (4) an identity of the causes of action." *Rawe v. Liberty Mut. Fire Ins. Co.*, 462 F.3d 521, 528 (6th Cir.2006) (quoting *Kane v. Magna Mixer Co.*, 71 F.3d 555, 560 (6th Cir.1995)).

In rejecting this basis for dismissal, the Court first notes that while

the 2006–Litigation involved only the USDA and FSA, the instant action brings suit against eight parties who were not previously named. Federal courts define the same-party requirement as precluding litigation against "a successor in interest to the party, one who controlled the earlier action, or one whose interests were adequately represented." *United States v. Vasilakos,* 508 F.3d 401, 406 (6th Cir.2007) (quoting *Sanders Confectionery Prods., Inc. v. Heller Fin., Inc.,* 973 F.2d 474, 481 (6th Cir.1992)). As the new Defendants do not fall within any of these categories, and as many of the parties are currently being sued in their individual capacities or were unnamed in the 2006–Litigation, the party-element has not been satisfied.

In addition, the Court does not believe that there is an "identity of the causes of action" between the pending matter and the 2006–Litigation. To establish this element, Defendants must show "an identity of the facts and events creating the right of action and of the evidence necessary to sustain each action." *Dover v. United States,* 367 F. App'x. 651, 654 (6th Cir.2010) (quoting *Sanders Confectionery Prods., Inc. v. Heller Fin., Inc.,* 973 F.2d 474, 484 (6th Cir.1992)). In 2006, Judge McKinley provided the following rationale for dismissing Young's complaint:

> The Court has reviewed the Defendant's motion and finds that the Plaintiff has not stated a claim upon which relief can be granted. Plaintiff is precluded by the terms of the Pigford consent decree from re-litigating issues which were raised or could have been raised there. Plaintiff's concerns regarding the fairness of the administration of the Pigford consent decree should be raised before the court overseeing that litigation. Any of the Plaintiff's claims not precluded by the Pigford decree are long since barred by the statute of limitations. Furthermore, Plaintiff's claims for money damages based on constitutional violations is barred by sovereign immunity.

Young, No. 4:06–cv–00138, at 3 (W.D.Ky. March 14, 2007) (order dismissing action). This language reveals that the prior lawsuit was dismissed for several different reasons, however primarily because it was construed as an extension of the *Pigford* litigation. That cannot be said of this action. Here, Young brings this case on bases independent of *Pigford* that rose specifically from the allegedly improper taking of the farm. Although the complaint of the 2006–Litigation did indeed protest the

seizure of his farm, the above stated language from the order illustrates that Judge McKinley did not expressly distinguish between the parts of Young's action that were barred by *Pigford's* earlier decision rather than other legal theories. Nor can this Court read Judge McKinley's prior order and determine with certainty whether it was decided on the same evidence. In fact, with Young's sparse and ill-pled complaint in the 2006–Litigation, the Court is incapable of deciphering exactly what evidence the previous dismissal is founded upon. As this Court must construe Young's complaint liberally in his favor in light of the Rule 12(b)(6) standard, it believes that this final element of claim preclusion has not been met as well.

For these reasons, claim preclusion in favor of Defendants is inappropriate.

II. Other Grounds Offered for Dismissal

In addressing Young's original complaint, Defendants cited a number of other grounds for dismissal under Rule 12(b)(6), not limited to misstated claims under 42 U.S.C. § 1983, sovereign immunity issues, and the citation of irrelevant criminal statutes. These issues however have been rendered moot by Plaintiff's amended complaint. Accordingly, the Court does not examine these reasons for dismissal.

CONCLUSION

In denying this Motion to Dismiss, the Court recognizes that a number of Young's claims appear barred by the statute of limitations, and may be subject to dismissal under other legal theories. However, after scrutinizing the facts at hand and the relevant filings from the 2006–Litigation, the Court does not believe that the current matter is barred by claim preclusion. For the foregoing reasons, IT IS ORDERED THAT Defendant's Motion to Dismiss (DN 30) is DENIED.

COREY LEA AND COREY LEA, INC. v. USDA, ET AL.
Civil Action No. 1:10–CV–00029.
Filed June 6, 2011.

[Cite as: 2011 WL 2193372 (W.D.Ky.)

EOCA – Protected class, not alleged – Subject matter, lack of jurisdiction.

United States District Court, W.D. Kentucky,
Bowling Green Division.

MEMORANDUM OPINION AND ORDER

JOSEPH H. McKINLEY, JR., District Judge.

This matter is before the Court upon a motion by Plaintiffs to alter, amend, or vacate [DN 82] the Court's January 19, 2011, Memorandum Opinion and Order [DN 80] granting Defendants' motion to Dismiss [DN 54, DN 55] and a motion to file a second amended complaint [DN 83]. Fully briefed, this matter is ripe for decision. For the reasons that follow, the motions are denied.

I. BACKGROUND

Plaintiff Corey Lea obtained a loan from First National Bank ("FNB") through the USDA Farm Service Agency ("FSA") in order to acquire and operate farm property located in Warren, Kentucky. Pursuant to the loan guarantee program, FSA has a second mortgage on Plaintiffs' real property and FNB holds a first mortgage. On December 21, 2007, Plaintiffs requested a loan subordination from the USDA after Plaintiffs secured a loan with Independence Bank to refinance Plaintiffs' outstanding loans and to fund the cost of building a new house on the property. Mr. Lea's request was denied. Following allegations of discrimination and foreclosure proceedings initiated by FNB on Plaintiffs' property, this suit ensued and Plaintiffs alleged violations of the Equal Credit Opportunity Act ("ECOA"), violations of the Food, Conservation, and Energy Act ("FCEA"), and violations of 42 U.S.C. § 1985(3).

On January 19, 2011, this Court issued an Opinion and Order

dismissing Plaintiffs' claims. The Court concluded that the ECOA claim must be dismissed because Plaintiffs failed to plead facts indicating they were denied loans while others with similar qualifications were approved, that the FCEA claim failed as a matter of law because the FCEA is inapplicable to foreclosure proceedings initiated by private institutions, and that the § 1985(3) claim was without merit because Plaintiffs failed to show that Defendants were motivated by class-based animus. In response, Plaintiffs filed a motion to alter, amend, or vacate the Court's Opinion pursuant to Federal Rule of Civil Procedure 59(e) and for leave to file a second amended complaint.

II. DISCUSSION

A. Motion to Reconsider

Motions to alter or amend judgment may be "made for one of three reasons: (1) An intervening change of controlling law; (2) Evidence not previously available has become available; or (3) It is necessary to correct a clear error of law or prevent manifest injustice." *United States v. Jarnigan*, 2008 WL 5248172, at *2 (E.D.Tenn. Dec. 17, 2008) (citing Fed.R.Civ.P. 59(e); *Helton v. ACS Group*, 964 F.Supp. 1175, 1182 (E.D.Tenn.1997)). *See GenCorp, Inc. v. Am. Int'l Underwriters*, 178 F.3d 804, 834 (6th Cir.1999). Rule 59(e) is not intended to be used to " 'relitigate issues previously considered' or to 'submit evidence which in the exercise of reasonable diligence, could have been submitted before.' " *United States v. Abernathy*, 2009 WL 55011, at * 1 (E.D.Mich. Jan. 7, 2009) (citation omitted). *See Browning v. Pennerton*, 2008 WL 4791491, at *1 (E.D.Ky. Oct. 24, 2008) ("[A] motion for reconsideration is not a vehicle to re-hash old arguments...."); *Electric Ins. Co. v. Freudenberg–Nok, Gen. P'ship*, 487 F.Supp.2d 894, 902 (W.D.Ky.2007) ("Such motions are not an opportunity for the losing party to offer additional arguments in support of its position."). Motions to alter or amend a judgment pursuant to Rule 59(e) "are extraordinary and sparingly granted." *Marshall v. Johnson*, 2007 WL 1175046, at *2 (W.D.Ky. Apr. 19, 2007).

Applying the above standard to the current motion, the Court denies Plaintiffs' motion to reconsider the merits of the case. The arguments raised in Plaintiffs' motion to reconsider based on the Court's

misconstruing of Plaintiffs' Complaint were previously advanced by Plaintiffs and addressed by the Court or could have been advanced in their response. "A Rule 59(e) motion is not properly used as a vehicle to re-hash old arguments or to advance positions that could have been argued earlier, but were not." *Gray v. Comm'r of Social Sec.*, 2006 WL 3825066, at *2 (E.D.Mich. Dec. 13, 2006) (citing *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir.1998)). Plaintiffs may disagree with the Court's decision, but that is an issue for appeal, not reconsideration. Accordingly Plaintiffs' motion for reconsideration is denied.

B. Motion for Leave to File Second Amended Complaint

Plaintiffs have also moved for leave to file a Second Amended Complaint pursuant to Fed.R.Civ.P. 15(a)(2). Plaintiffs argue that their proposed amended complaint will cure the defects the Court found in their prior complaint. The Court disagrees.

Fed.R.Civ.P. 15(a)(2) states that after a responsive pleading has been served, "a party may amend its pleading only with the opposing party's written consent or the court's leave." A district court should freely grant a plaintiff leave to amend a complaint "when justice so requires." Fed.R.Civ.P. 15(a)(2). However, a district court may deny a motion to amend where there is "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." *Foman v.. Davis*, 371 U.S. 178, 182 (1962).

The changes appearing in Plaintiffs' Second Amended Complaint fail to correct the problems that doomed their first complaint. The ECOA claim continues to lack evidence of disparate treatment, the FCEA claim remains meritless because the foreclosure proceedings were not instituted by the Department of Agriculture, and the 42 U.S .C. § 1985(3) claim fails because Plaintiffs again did not allege any facts supporting evidence of class-based animus. For these reasons, the Court denies Plaintiffs' motion for leave to file a second amended complaint.

III. CONCLUSION

For the reasons set forth above, **IT IS HEREBY ORDERED** that Plaintiffs' motion to alter, amend, or vacate [DN 82] the Court's January 19, 2011, Memorandum Opinion and Order [DN 80] is **DENIED** and Plaintiffs' motion to file a second amended complaint [DN 83] is **DENIED.**

EQUAL CREDIT OPPORTUNITY ACT

DEPARTMENTAL DECISIONS

COREY LEA, COREY LEA INC., START YOUR DREAM INC., AND COWTOWN FOUNDATION, INC.,[1]
Docket No. 11-0180.
Decision and Order.
Filed May 26, 2011.

EOCA – APA – FTCA -- Protected class, Race .

Petitioner Pro se.
Jeffrey Knishkowy for OCR
Decision and Order by Administrative Law Judge Janice K. Bullard

DECISION AND ORDER DISMISSING PETITION

I. Procedural History

On March 31, 2011, Corey Lea (Petitioner)[2] filed a petition for a hearing before the Office of the Office of Administrative Law Judges (OALJ) for the United States Department of Agriculture (Secretary; USDA) regarding the denial of complaints of discrimination that he had filed with USDA's Office of the Assistant Secretary for Civil Rights (OASCR). In a Decision issued March 25, 2010, OASCR dismissed Petitioner's complaints, which alleged that he had been discriminated against by USDA's Farm Service Agency (FSA). Petitioner invoked the Administrative Procedures Act (APA), 5 U.S.C. §551, et seq., as authority for OALJ to conduct the requested hearing and review of the OASCR's determinations.

In an amended petition filed on April 18, 2011, Petitioner asserted that his request for a hearing was permitted by the APA because OASCR failed to issue a final determination within 180 days of his complaint of May 1, 2008. Petitioner further asserted that as a member of the class

[1] I have amended the original caption of this case to include the additionally named petitioning parties.

[2] Throughout this Decision and Order "Petitioner" refers to Corey Lea, whose pleadings variably identified himself as "Plaintiff", "Complainant" and "Petitioner".

addressed in the Consent Decree and subsequent rulings in the matter of *Pigford et al v. Dan Glickman, Secretary, United States Department of Agriculture*[3], he has standing to request a hearing in the denial of his complaints.

On April 25, 2011, OASCR filed a response asserting that OALJ had no authority to conduct a hearing or otherwise assume jurisdiction over Petitioner's complaints. OASCR moved for dismissal of Petitioner's petitions for a hearing.

On May 2, 2011, duplicated on May 9, 2011, Petitioner filed a memorandum opposing the dismissal of his request for a hearing before OALJ. In addition, Petitioner filed an administrative tort claim for property damage and personal injury, requesting relief in the amount of $10,000,000.

On May 9, 2011, Petitioner moved to supplement his statement of jurisdiction to assert that OALJ has jurisdiction to hold a hearing in the instant matter pursuant to Section 741 and 7 C.F.R. §15f et seq.

On May 19, 2011, Petitioner filed another document titled "Original Complaint", which included additionally named "Petitioners"[4]. Additional claims of discrimination were alleged.

II. Issues

Whether Petitioners are entitled to a hearing before OALJ regarding the Secretary's dismissal of complaints of discrimination;

Whether OALJ has authority to order USDA to disclose information and provide documents to Petitioners pursuant to the Freedom Of Information Act (FOIA), 5 U.S.C.§552.

Whether OALJ has authority to determine whether Petitioners are entitled to damages for property damage and personal injury pursuant to the Torts Claim Act (FTCA), 28 U.S.C. §1346(b).

III. Factual History

Background

[3] 185 F.R.D. 82 (D.D.C. 1999); 206 F.3d 1212 (D.C. Cir. 2000); 127 F. Supp. 2nd 35 (2001).

[4] Hereafter, all references to "Petitioners" shall be construed to include all individuals named as Complainant, Petitioner or Plaintiff in the pleadings filed with OALJ.

Two class-action lawsuits filed in 1997 and 1998 alleged that the USDA had discriminated against African-American farmers on the basis of race. The cases were consolidated and settled in 1999 by a consent decree (Decree) entered on April 14, 1999 by the Honorable Paul Friedman of the U.S. District Court for the District of Columbia. 185 F.R.D. 92 (1999). The Decree certified a class of individuals defined generally as all African-American farmers who farmed or attempted to farm between January 1, 1981 and December 31, 1996; who had applied to USDA for federal farm credit or benefits; and who believed that they were discriminated against and had filed a discrimination complaint on or before July 1, 1997.

To be eligible for relief under the Decree, individuals were required to comply with filing procedures, meet time limitations, and provide certain evidence. The Decree allowed individuals to choose between two separate tracks of relief, and an individual's choice of remedy was "irrevocable and exclusive". See, Decree at Paragraph 5(d). In addition, individuals who otherwise qualified for relief but failed to timely file a complete claim could petition the Court for an extension of time if extraordinary circumstances prevented compliance with the time limitations. Individuals also had the right to opt out of the class and pursue relief on an individual basis.

The Decree further provided that individuals who had not filed a discrimination complaint until after July 1, 1997 would be entitled to relief if they could establish that they had attempted to pursue a remedy but filed defective pleadings; or failed to file a timely complaint in reliance upon inducement by USDA officials; or were prevented from filing a timely complaint due to extraordinary circumstances. Under the terms of the Decree, USDA was enjoined from pursuing foreclosure actions against class members. In addition, all members who established discrimination were entitled to priority consideration of their applications for credit for up to five years after the entry of the Decree.

Because many potentially eligible class members did not timely file their claims under the Decree, Section 14012 of the 2008 Farm Bill provided class members with a new right to sue in federal district court, or in the alternative, the right to seek an expedited review based upon the remedies set forth in the Decree. All lawsuits filed under the auspices of the 2008 Farm Bill have been consolidated into one case, *In re Black Farmers Discrimination Litigation*, 08-mc-0511 (D.D.C.), which is

pending before Judge Friedman. In addition, Judge Friedman ordered USDA to establish a neutral website to provide information regarding these claims, and the address for the site is as follows: http://www.blackfarmercase.com/index.php?option=com_content&view=article&id=52&Itemid=58. The website posts a list of all lawsuits now consolidated before Judge Friedman. The list does not include a suit filed by any of the Petitioners in the instant matter.

Petitioners' Allegations

In the first petition before OALJ, Petitioner asserted that he filed complaints of discrimination that charged FSA with willful and erroneous devaluation of his property on appraisal. Petitioner alleged that his property was foreclosed in violation of the Decree's cease and desist Order[5]. Petitioner further charged FSA with violations of FOIA and requested an order directing USDA to disclose records.

In his amended complaint before OALJ, Petitioner again alleged that the appraisal method used by FSA with respect to his property and the foreclosure action taken against his property represented violations of civil rights law.

In another "Original Complaint" that identified additional Petitioners, it was alleged that FSA employees engaged in discriminatory acts concerning applications for federal financial assistance. Petitioners sought remedies in tort for property loss and personal injury.

IV. DISCUSSION

I find it appropriate to consolidate all of the petitions and causes of action for disposition in the instant Decision and Order.

OALJ Lacks Jurisdiction to Hold a Hearing to Review Petitioners' Complaints of Discrimination

Part 15d of 7 C.F.R. sets forth the nondiscrimination policy of USDA regarding programs or activities in which agencies of USDA provide benefits directly to persons, and establishes the process for

[5] Though Petitioner does not specifically refer to the Decree, I infer as much from his pleadings and references.

administrative review of complaints of discrimination. 7 C.F.R. §15d.1. Individuals who believe that they have been subjected to discrimination on the grounds of race, color, religion, sex, age, national origin, marital status, familial status, sexual orientation, disability, or financial status may file a written complaint with the Director of the Office of Civil Rights, USDA, within 180 calendar days from the date of the discrimination. 7 C.F.R. §§15d.2, and 4 (a) and (b). The Director is authorized to investigate complaints and make final determinations as to the merits of the complaint and to order corrective actions arising from the complaints. 7 C.F.R. §15d.4 (b).

Petitioners' complaints fall within the scope of Part 15d, as their allegations of discrimination concern eligibility for farm loans and intentional discriminatory practices by FSA employees. The prevailing regulations do not provide the right to a hearing regarding the OASCR's conclusions, as the rules specifically state that the Office of Civil Rights "will make final determinations as to the merits of complaints. . .and as to the corrective actions required to resolve program complaints." 7 C.F.R. §15d.4(b). Congress may authorize agencies to promulgate such regulations deemed necessary to implement a statute. U.S. Const., Article I, Section 8, Clause 18. In the instant circumstances, USDA's regulations specifically vest the OASCR with authority to make the final determination regarding complaints of program discrimination.

Petitioners argue that the APA requires a hearing before the OALJ because their complaints were not decided within 180 days.[6] Petitioners cite no statutory provision of the APA that supports their right to a hearing before USDA's OALJ. Moreover, the prevailing regulations concerning complaints of discrimination place no limitation on the time it takes USDA to process a complaint. 7 C.F.R. Part 15d. *Section 741*

Petitioners assert that they are entitled to a hearing under Section 741, enabled by regulations set forth at 7 C.F.R. Part 15f. The regulatory scheme provides procedures for processing certain complaints of discrimination that were filed with USDA prior to July 1, 1997, and the

[6] OASCR has surmised that Petitioner relies upon rules controlling the processing of complaints of alleged employment discrimination by USDA. Since "180 days" is a hallmark period that triggers appeals and tolls the period for filing complaints of discrimination in many programs covered by USDA regulations, I decline to engage in similar speculation.

regulations authorize OALJ to hear complaints of discrimination; however the rule states that

if at any time the ALJ determines that your complaint is not an eligible complaint, he or she may dismiss your complaint with a final determination and USDA review of your complaint will then have been completed.

7 C.F.R.§15f.12.

Petitioners' complaints were filed, by Petitioners' admissions, on or about May 1, 2008 and involve alleged acts of discrimination occurring after July 1,1997. See, all pleadings of Petitioners. Accordingly, Petitioners' complaints were not filed, either actually or constructively, with USDA prior to July 1, 1997, and they are not eligible complaints under Section 741. Therefore, OALJ's sole authority under Section 741 is to dismiss the petitions for a hearing, and OASCR's determinations in the complaints constitute the final agency determinations. 7 C.F.R. §15f.12.

7 C.F.R. Part 15 Subparts A and C

Some of Petitioners' allegations may be construed to fall within the auspices of USDA's regulations implementing title VI of the Civil Rights Act of 1964 ("the Act"), as the complaints ostensibly involve guaranteed loans.[7] Part 15 Subpart A prohibits discrimination against a participant in a USDA-assisted program or activity[8]. 7 C.F.R. §15.3. However, the rules that apply to discrimination in federal financial assistance programs do not automatically provide Petitioners with the right to a hearing. The regulations authorize the OASCR to determine the manner in which complaints under this Subpart shall be investigated, and whether remedial action is warranted. 7 C.F.R. §15.6. The regulations specifically allow applicants or recipients to request a hearing before OALJ if the applicant or recipient is adversely affected by an Order of the Secretary suspending, terminating, or refusing to continue Federal financial assistance; and the Secretary subsequently denies a

[7] I have credited Petitioner's undocumented references to foreclosure by "a Bank" with "the permission" of USDA officials and the United States Attorney's Office.

[8] "Program" and "activity" are described at 7 C.F.R. § 15.2(k)(1)-(4) and a list of Federal Financial Assistance from USDA is set forth at Appendix A to Subpart A of Part 15.

request to restore eligibility for the assistance. 7 C.F.R. §§ 15.8(c); 10(f); 10(g); Subpart C. There is no evidence of a specific Order by the Secretary suspending or terminating Federal financial assistance to Petitioners, or an Order by the Secretary refusing to continue or grant the same. Similarly, there is no evidence that Petitioners requested the Secretary to restore their eligibility for assistance, which is the event that triggers the right to a hearing. Accordingly, Petitioners are not entitled to a hearing under §§ 15.09 and 15.10.

Authority of Secretary to Delegate Responsibility for Final Determination

In addition, the regulations empower the Secretary to assign responsibilities to other agencies to effectuate the purposes of the Act. 7 C.F.R. §15.12 (c). As OASCR has moved for dismissal of Petitioners' complaints with OALJ, it is axiomatic that the complaints were not referred to OALJ for a hearing and Petitioners have no right to a hearing pursuant to §15.12(c).

Administrative Procedures Act

Petitioners refer to the APA as the authorizing statute for OALJ's jurisdiction, but fail to state with any specificity how the APA vests OALJ with statutory or regulatory jurisdiction. The APA provides a framework for agencies to follow to assure due process in adjudicatory proceedings, but the statute allows broad latitude to agencies to establish their own procedures within that framework. See, 5 U.S.C. §554. The right to a hearing under the APA exists only so long as another statute provides for such right. 5 U.S.C. §551 et seq. USDA has promulgated regulations governing adjudications before OALJ where prevailing statues require a hearing on the record. Petitioners' request for a hearing does not involve any of those statutes, which are enumerated at 7 C.F.R. § 1.131. Absent specific statutory authority, the APA does not vest OALJ with jurisdiction to hold a hearing in Petitioners' complaints.

Consent Decree and Section 1402 of the Farm Act of 2008

In the instant matter, Petitioner asserts that he was among the class members covered by the Consent Decree between African-American farmers and the USDA, which was further addressed by the Farm Act of 2008. However, the record does not demonstrate that Petitioner meets

the criteria for class membership. The Decree provided remedies to individuals who did not file a discrimination complaint until after July 1, 1997 if they could establish the pre-requisites discussed infra., supra. Petitioner admits that his complaints were filed in 2008, well past the time anticipated by the Decree, and nine years after the Decree was entered. Moreover, Petitioners cannot establish that they would have filed a complaint within the period encompassed by the Decree, as the events underlying their allegations of discrimination also occurred years after the Decree's timeframe. In addition, since the Farm Bill of 2008 addressed additional methods for processing complaints covered by the Decree, Petitioners' complaints are not covered by that legislation.

Moreover, even if any of the Petitioners could establish membership in the class affected by the Decree and the Farm Bill of 2008, a complaint would need to be filed in federal district court, and not before the USDA OALJ. See, Section 14012 of the 2008 Farm Bill. Accordingly, the Decree and Farm Bill of 2008 do not provide OALJ with jurisdiction to hear Petitioners' complaints.

Tort Claims and Claims of Fraud

Petitioners seek remedies in tort for alleged actions by employees of USDA. Under the common law doctrine of sovereign immunity, "the United States cannot be sued without its consent." *Federal Housing Administration v. Burr,* 309 U.S. 242, 244 (1940). "Congress alone has the power to waive or qualify that immunity." *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 20 (1926). In 1946, Congress enacted the Federal Tort Claims Act (FTCA), 28 U.S.C. §1346(b), waiving sovereign immunity for some tort suits and making the United States liable for injury to or loss of property, or personal injury or death, caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment. 28 U.S.C. § 1346(b); §§2671-2680.

Prior to filing suit under the FTCA, a claimant must present his claim to the federal agency out of whose activities the claim arises (28 U.S.C. § 2675) within two years after the claim accrues (28 U.S.C. § 2401). *McNeil v. United States, 508 U.S. 106 (1993); United States v. Kubrick, 444 U.S. 111, 120 (1979).* Petitioners have filed with OALJ what purports to be an administrative claim and complaint for damages relating to allegations of loss of property and personal injury. Pursuant

to 7 C.F.R. §2.31(a), the General Counsel for the USDA is delegated the authority to consider, ascertain, adjust, determine, compromise, and settle claims brought under the FTCA. OALJ has no authority to review or adjudicate such claims, and accordingly, they shall be dismissed.

Requests for information under FOIA

Agencies of the Federal Government are required to disclose documents after receiving a request under FOIA, unless those documents are protected from disclosure by one of nine exemptions. 5 U.S.C. §552(a): §552(b)(1)-(9). When an agency fails to disclose requested information or fails to respond within the statutory time limitations[9] the requester may file a suit in federal district court. 5 U.S.C. 552(a)(4)(B).

Petitioners request OALJ to order USDA's compliance with FOIA requests. Since the statute clearly grants jurisdiction over disputes involving requests for information to federal district court, OALJ is deprived of jurisdiction to adjudicate Petitioners' assertions regarding compliance with FOIA.

V. CONCLUSION

I find that OALJ is without jurisdiction to grant Petitioners' request for a hearing regarding the Secretary's denial of complaints of discrimination. OALJ also does not have jurisdiction to consider Petitioners' claims under the FTCA and FOIA. Accordingly, I find that Petitioners' request for a hearing should be dismissed.

ORDER

Petitioners' petitions for a hearing are hereby DISMISSED.

So ORDERED this __ day of May, 2011 in Washington, D.C.

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[9] See, 5 U.S.C. § 552(a)(6)(A)(i).

SALARY OFFSET ACT

DEPARTMENTAL DECISIONS

CHAD PAAVOLA.
Docket No. 11-0211.
Decision and Order.
Filed June 10, 2011.

SOA – Salary Offset

DECISION AND ORDER

1. The parties informed me of the terms of their settlement agreement during a teleconference with me on June 9, 2011; the parties' settlement agreement is the basis of this Decision and Order ("Decision"). Any objections to this Decision and any requests for modification or clarification or reconsideration of this Decision, shall be filed with the Hearing Clerk by July 8 (Friday), 2011. Chad Paavola, the Petitioner (Petitioner Paavola), participated; Brent Robinson, the Union's representative (Union representative), participated; and John "Pancho" Smith, the USDA-Forest Service representative (USDA-Forest Service representative), participated, in the teleconference with me on June 9. Legal Secretary Marilyn ("Nita") Kennedy, who works me, placed and monitored the call.

2. The hearing scheduled for **June 21 (Tuesday), 2011** is CANCELED.

Order

3. Petitioner Paavola owes a debt to and shall pay the USDA-Forest Service **$7,190.00** ("the debt")

4. USDA-Forest Service, and those collecting on its behalf, are **not** authorized to proceed with ***salary offset*** to collect the debt until Pay Period 15 (during 2011). Beginning with Pay Period 15 (during 2011), ***salary offset*** of **$100.00 per pay period** is authorized. 5 C.F.R. §550.1101, *et seq*.

5. At Petitioner Paavola's option, he may pay (at any time in any amount) one or more lump sums in repayment of the debt; such lump sum payments will interrupt the ***salary offset*** only if the debt is paid in full.

6. If Petitioner Paavola should separate from the USDA-Forest Service before the debt is paid in full, Petitioner Paavola shall take the initiative (he is obligated to do so) to make arrangements to continue to pay his installments ($100.00 every two weeks).

7. Until the debt is repaid, Petitioner Paavola shall give notice to USDA-Forest Service or those collecting on its behalf, of any changes in his mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties; and **Brent Robinson** shall be added to those being served, and Petitioner Paavola shall continue to be served.

Done at Washington, D.C.

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MISCELLANEOUS ORDERS
70 Agric. Dec. 395-410

[Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Miscellaneous Orders] with the sparse case citation but without the body of the order. Miscellaneous Orders issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported - Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: www.dm.usda.gov/oaljdecisions

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Filed June 29, 2011.

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Miscellaneous Order.
Filed June 29, 2011.

ANIMAL QUARANTINE ACT

MISCELLANEOUS ORDERS

J & B HORSE COMPANY A/K/A JBS.
Docket No. AQ 11 – 0259.
Miscellaneous Order.
Filed May 26, 2011.

ANIMAL WELFARE ACT

MISCELLANEOUS ORDERS

SAM MAZZOLA, D/B/A WORLD ANIMAL STUDIOS, INC. AND WILDLIFE ADVENTURES OF OHIO, INC.
AWA DOCKET NO. 06-0010
AND
SAM MAZZOLA.
Awa Docket No. D-07-0064.
Miscellaneous Order.
Filed January 26, 2011.

Petitioner Pro Se.
Babak Rastgoufard For Aphis.
Miscellaneous Order Issued By Judicial Officer William Jenson.

AWA

Order Lifting Stay

On November 24, 2009, I issued a Decision and Order in which I found that Sam Mazzola violated the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; and the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations].[1] Mr. Mazzola filed a petition requesting that I reconsider the November 24, 2009, Decision

[1] *In re Sam Mazzola*, __ Agric. Dec. ___ (Nov. 24, 2009).

and Order, and I subsequently issued an order denying Mr. Mazzola's petition for reconsideration.[2]

On May 27, 2010, Mr. Mazzola filed a request that I stay the Orders in *In re Sam Mazzola*, __ Agric. Dec. ___ (Nov. 24, 2009), and *In re Sam Mazzola* (Order Denying Pet. for Recons. and Ruling Denying Motion for Oral Argument), __ Agric. Dec. ___ (Mar. 29, 2010), pending the outcome of proceedings for judicial review. On June 1, 2010, I granted Mr. Mazzola's request for a stay.[3]

On December 6, 2010, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, filed Complainant's Motion to Lift Stay stating the United States Court of Appeals for the Sixth Circuit issued an order in *Mazzola v. U.S. Dep't of Agric.*, No. 10-3653 (6th Cir. Oct. 27, 2010), dismissing Mr. Mazzola's appeal for want of prosecution and stating proceedings for judicial review are concluded. Mr. Mazzola did not file a timely response to Complainant's Motion to Lift Stay, and, on January 26, 2011, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for a ruling on Complainant's Motion to Lift Stay.

The June 1, 2010, Stay Order is lifted and the Orders issued in *In re Sam Mazzola*, __ Agric. Dec. ___ (Nov. 24, 2009), and *In re Sam Mazzola* (Order Denying Pet. for Recons. and Ruling Denying Motion for Oral Argument), __ Agric. Dec. ___ (Mar. 29, 2010), are effective, as follows:

ORDER

1. Mr. Mazzola, his agents, employees, successors, and assigns, directly or indirectly, through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and, in particular, shall cease and desist from:

a. operating as an exhibitor without an Animal Welfare Act license;

b. operating as a dealer without an Animal Welfare Act license;

c. interfering with, threatening, abusing, or harassing any Animal and Plant Health Inspection Service official in the course of carrying out his or her duties under the Animal Welfare Act;

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[2] *In re Sam Mazzola* (Order Denying Pet. for Recons. and Ruling Denying Motion for Oral Argument), __ Agric. Dec. ___ (Mar. 29, 2010).

[3] *In re Sam Mazzola* (Stay Order), __ Agric. Dec. ___ (June 1, 2010).

d. filing any false charge with the United States Department of Agriculture, Office of the Inspector General, in an effort to interfere with any Animal and Plant Health Inspection Service official in the course of carrying out his or her duties under the Animal Welfare Act;

e. failing or refusing to make facilities, animals, and records available to an Animal and Plant Health Inspection Service official for inspection;

f. failing to have a written program of veterinary care available for inspection;

g. allowing a member of the public to enter a primary enclosure containing an adult bear or an adult tiger without sufficient distance or barriers between the animals and the public so as to assure the safety of the animals and the public; and

h. housing any bear or tiger in an enclosure that lacks adequate structural integrity and height to contain the animal.

Paragraph 1 of this Order shall become effective 1 day after service of this Order on Mr. Mazzola.

2. Animal Welfare Act license number 31-C-0065 is revoked.

Paragraph 2 of this Order shall become effective 60 days after service of this Order on Mr. Mazzola.

3. Mr. Mazzola is permanently disqualified from obtaining a license under the Animal Welfare Act and the Regulations.

Paragraph 3 of this Order shall become effective immediately upon service of this Order on Mr. Mazzola.

4. Mr. Mazzola is assessed a $21,000 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

Babak Rastgoufard
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building
Washington, DC 20250-1417

Payment of the civil penalty shall be sent to, and received by, Mr. Rastgoufard within 60 days after service of this Order on Mr. Mazzola. Mr. Mazzola shall state on the certified check or money order that payment is in reference to AWA Docket No. 06-0010.

5. Mr. Mazzola's Petition opposing the Animal and Plant Health Inspection Service's denial of Mr. Mazzola's November 1, 2006, Animal Welfare Act license application, is denied.

Paragraph 5 of this Order shall become effective immediately upon service of this Order on Mr. Mazzola.

Done at Washington, DC.

BRIAN KARL TURNER.
AWA Docket No. 09-0128.
Miscellaneous Order.
Filed March 1, 2011.

Second Remand Order

Petitioner Pro Se.
Colleen Carroll for Aphis.
Miscellaneous Order Issued By Judicial Officer William Jenson.

PROCEDURAL HISTORY

Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this proceeding on June 4, 2009, by filing an "Order to Show Cause Why Animal Welfare License 88-C-0158 Should Not Be Terminated" [hereinafter Order to Show Cause]. On December 22, 2009, after Brian Karl Turner filed a response to the Order to Show Cause, the Administrator filed a motion for summary judgment. On March 1, 2010, Administrative Law Judge Victor W. Palmer [hereinafter the ALJ] issued a Decision and Order in which he found Mr. Turner had not filed a response to the Administrator's motion for summary judgment and granted the Administrator's motion for summary judgment. Mr. Turner appealed the ALJ's Decision and Order stating he had filed a timely response to the Administrator's motion for summary judgment. On April 7, 2010, the Hearing Clerk located Mr. Turner's timely-filed response to the Administrator's motion for summary judgment. As the ALJ did not consider Mr. Turner's response

to the Administrator's motion for summary judgment, I vacated the ALJ's March 1, 2010, Decision and Order and remanded the instant proceeding to the ALJ for consideration of Mr. Turner's response.[1]

On October 6, 2010, the ALJ scheduled a hearing to be conducted by audio-visual telecommunication on November 9-10, 2010, in Washington, DC, and Las Vegas, Nevada. The hearing commenced November 9, 2010. Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator. Mr. Turner of Pahrump, Nevada, appeared pro se.

Mr. Turner did not attend the second day of the hearing, and the Administrator moved for entry of a decision based upon Mr. Turner's failure to appear at the hearing without good cause. The ALJ granted the Administrator's motion and, on November 10, 2010, issued a Decision and Order in which the ALJ concluded Mr. Turner "is deemed to have waived the right to an oral hearing and to have admitted all of the material allegations of fact contained in the amended complaint" based upon his failure to appear at the hearing without good cause (ALJ's Decision and Order at 1).[2] The ALJ found that Mr. Turner violated the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act], and the regulations issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142), and terminated Mr. Turner's Animal Welfare Act license (Animal Welfare Act license number 88-C-0158) (ALJ's Decision and Order).

On December 20, 2010, Mr. Turner appealed the ALJ's Decision and Order to the Judicial Officer. On February 24, 2011, the Administrator filed a response to Mr. Turner's appeal petition, and on February 25, 2011, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

CONCLUSION BY THE JUDICIAL OFFICER

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[1] *In re Brian Karl Turner* (Remand Order), __ Agric. Dec. ___ (Apr. 7, 2010).

[2] I find the ALJ's reference to the "amended complaint" perplexing as the record does not contain an amended complaint or any other amended pleading filed by the Administrator.

The ALJ's Decision and Order is based upon the ALJ's finding that Mr. Turner failed to appear at the hearing without good cause. Mr. Turner asserts he appeared at the hearing and had good cause for failing to attend on the second day of the hearing, November 10, 2010 (Mr. Turner's appeal petition). The rules of practice applicable to the instant proceeding[3] provide for the issuance of a decision based upon a failure to appear at the hearing, as follows:

§ 1.141 Procedure for hearing.

(e) *Failure to appear*. (1) A respondent who, after being duly notified, fails to appear at the hearing without good cause, shall be deemed to have waived the right to an oral hearing in the proceeding and to have admitted any facts which may be presented at the hearing. Such failure by the respondent shall also constitute an admission of all the material allegations of fact contained in the complaint. Complainant shall have an election whether to follow the procedure set forth in § 1.139 or whether to present evidence, in whole or in part, in the form of affidavits or by oral testimony before the Judge. Failure to appear at a hearing shall not be deemed to be a waiver of the right to be served with a copy of the Judge's decision and to appeal and request oral argument before the Judicial Officer with respect thereto in the manner provided in § 1.145.

7 C.F.R. § 1.141(e)(1). The record establishes that Mr. Turner entered an appearance at the hearing and participated in the first day of the two-day hearing (Transcript of the November 9, 2010, segment of the hearing). Therefore, I conclude Mr. Turner appeared at the hearing. Based upon this conclusion, I vacate the ALJ's November 10, 2010, Decision and Order and remand the instant proceeding to the ALJ.

For the foregoing reasons, the following Remand Order is issued.

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[3]The rules of practice applicable to the instant proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

REMAND ORDER

1. The ALJ's November 10, 2010, Decision and Order is vacated.
2. The instant matter is remanded to the ALJ for further proceedings in accordance with the Rules of Practice. Done at Washington, DC

KARL MITCHELL AND BIG CAT ENCOUNTERS.
AWA Docket No. 09-0084.
Miscellaneous Order.
Filed March 8, 2011.

Petitioner Pro Se.
Babak Rastgoufard For Aphis.
Miscellaneous Order Issued By Judicial Officer William Jenson.

Order Denying Petition to Reconsider

PROCEDURAL HISTORY

On February 25, 2011, Karl Mitchell and Big Cat Encounters filed a petition requesting that I reconsider *In re Karl Mitchell*, __ Agric. Dec. ___ (Dec. 21, 2010). On March 7, 2011, Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, filed "Reply to Petition for Reconsideration." On March 8, 2011, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for a ruling on Mr. Mitchell and Big Cat Encounters' petition to reconsider.

CONCLUSION BY THE JUDICIAL OFFICER

The Hearing Clerk served Mr. Mitchell and Big Cat Encounters with *In re Karl Mitchell*, __ Agric. Dec. ___ (Dec. 21, 2010), on February 1,

2011.[1] The rules of practice applicable to the instant proceeding[2] provide that a petition to reconsider must be filed within 10 days after the date of service of the Judicial Officer's decision, as follows:

§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.

(a) *Petition requisite.* . . .

. . . .

(3) *Petition to rehear or reargue proceeding, or to reconsider the decision of the Judicial Officer*. A petition to rehear or reargue the proceeding or to reconsider the decision of the Judicial Officer shall be filed within 10 days after the date of service of such decision upon the party filing the petition. Every petition must state specifically the matters claimed to have been erroneously decided and alleged errors must be briefly stated. 7 C.F.R. § 1.146(a)(3). Therefore, Mr. Mitchell and Big Cat Encounters were required to file a petition to reconsider *In re Karl Mitchell*, __ Agric. Dec. ___ (Dec. 21, 2010), no later than February 11, 2011. On February 25, 2011, Mr. Mitchell and Big Cat Encounters filed the petition to reconsider *In re Karl Mitchell*, __ Agric. Dec. ___ (Dec. 21, 2010). Mr. Mitchell and Big Cat Encounters' petition to reconsider was not timely filed. Accordingly, Mr. Mitchell and Big Cat Encounters' petition to reconsider is denied.[3]

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[1]See Memorandum to the File dated February 1, 2011, signed by the Hearing Clerk, Leslie E. Whitfield.

[2]The rules of practice applicable to the instant proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151).

[3]*See In re Susan Biery Sergojan* (Order Denying Pet. to Reconsider), __ Agric. Dec. ___ (Aug. 3, 2010) (denying, as late-filed, the respondent's motion to reconsider filed 22 days after the Hearing Clerk served the respondent with the order denying late appeal); *In re David L. Noble* (Order Denying Motion for Recons.), __ Agric. Dec. ___ (Jan. 20, 2010) (denying, as late-filed, the respondent's motion to reconsider filed

For the foregoing reasons, the following Order is issued.

ORDER

Mr. Mitchell and Big Cat Encounters' petition to reconsider, filed February 25, 2011, is denied. This Order shall become effective upon service on Mr. Mitchell and Big Cat Encounters. Done at Washington, DC

CAROLYN AND JULIE ARENDS D/B/A.
Docket No. AWA 11 – 0147.
Miscellaneous Order.
Filed June 9, 2011.

EQUAL CREDIT OPPORTUNITY ACT

MISCELLANEOUS ORDERS

FERRELL C ODEN.
Docket No. EOCA 11 – 0179.
Miscellaneous Order.
Filed May 3, 2011.

COREY LEA A/K/A COREY LEA INC.
Docket No. EOCA 11 – 0180.
Miscellaneous Order.
Filed May 26, 2011.

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19 days after the Hearing Clerk served the respondent with the order denying late appeal); *In re Mitchell Stanley* (Order Denying Pet. for Recons.), 65 Agric. Dec. 1171 (2006) (denying, as late-filed, a petition to reconsider filed 13 days after the date the Hearing Clerk served the respondents with the decision and order); *In re Heartland Kennels, Inc.* (Order Denying Second Pet. for Recons.), 61 Agric. Dec. 562 (2002) (denying, as late-filed, a petition to reconsider filed 50 days after the date the Hearing Clerk served the respondents with the decision and order); *In re David Finch* (Order Denying Pet. for Recons.), 61 Agric. Dec. 593 (2002) (denying, as late-filed, a petition to reconsider filed 15 days after the date the Hearing Clerk served the respondent with the decision and order).

COREY LEA A/K/A COREY LEA INC.
Docket No. EOCA 11 – 0252.
Miscellaneous Order.
Filed May 26, 2011.

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FEDERAL MEAT INSPECTION ACT

MISCELLANEOUS DECISIONS

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Docket No. FMIA 11 – 0157.
Miscellaneous Order.
Filed April 7, 2011.

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Docket No. FMIA 11 – 0174.
Miscellaneous Order.
Filed May 31, 2011.

JAMIE STACHROWSKI.
Docket No. FMIA 11 – 0278.
Miscellaneous Order.
Filed May 31, 2011.

HORSE PROTECTION ACT

MISCELLANEOUS ORDER

LISA A BENINATI AND PAUL.
Docket No. HPA 11 – 0243.
Miscellaneous Order.
Filed May 18, 2011.

ORGANIC FOOD PRODUCTION ACT

MISCELLANEOUS ORDER

PROMISELAND LIVESTOCK, LLC, AND ANTHONY J. ZEMAN.
OFPA Docket No. 08-0134.
Miscellaneous Order.
Filed February 24, 2011.

Petitioner Pro Se
Babak Rastgoufard For Aphis.
Miscellaneous Order Issued By Judicial Officer William Jenson.

OFPA

Ruling Denying Motion to Lift Stay Order

On December 2, 2010, Promiseland Livestock, LLC, and Anthony J. Zeman filed a motion requesting that I stay the Order in *In re Promiseland Livestock, LLC*, __ Agric. Dec. ___ (Oct. 19, 2010), pending the outcome of proceedings for judicial review, and I granted Promiseland Livestock, LLC, and Mr. Zeman's motion.[1] On February 11, 2011, the Administrator, Agricultural Marketing Service, United States Department of Agriculture, filed Complainant's Motion to Lift Stay. On February 24, 2011, Promiseland Livestock, LLC, and Mr. Zeman filed Objection to Complainant's Motion to Lift Stay stating, on February 18, 2011, they instituted proceedings for judicial review

[1] *In re Promiseland Livestock, LLC* (Stay Order), __ Agric. Dec. ___ (Dec. 2, 2010).

which are not yet concluded.[2] As proceedings for judicial review are not yet concluded, Complainant's Motion to Lift Stay is denied.

Done at Washington, DC.

[2]Attached to Promiseland Livestock, LLC, and Mr. Zeman's Objection to Complainant's Motion to Lift Stay is a copy of a Complaint filed in *Promiseland Livestock, LLC v. U.S. Dep't of Agric.*, Civ. Action No. 8:11-CV-62 (D. Neb. Feb. 18, 2011), in which Promiseland Livestock, LLC, and Mr. Zeman seek review of *In re Promiseland, LLC*, __ Agric. Dec. ___ (Oct. 19, 2010).

[Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Default Orders] with the sparse case citation but without the body of the order. Default Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported - Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: www.dm.usda.gov/oaljdecisions]

AGRICULTURE MARKETING AGREEMENT ACT

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Default Decision.
Filed February 28, 2011.

ANIMAL WELFARE ACT

DEFAULT DECISION

JAMIE MICHELLE PALAZZO.
Docket No. AWA 11 – 0023.
Default Decision.
Filed April 7, 2011.

GRAIN STANDARDS ACT

DEFAULT DECISION

KENSAL FARMERS ELEVATOR.
Docket No. GSA 11 – 0063.
Default Decision.
Filed March 8, 2011.

PLANT QUARANTINE ACT

DEFAULT DECISION

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Docket No. PQ 10 – 0108.
Default Decision.
Filed March 10, 2011.

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AGRICULTURE DECISIONS

Volume 70

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Part Two (P & S)
Pages 417 - 434

THIS IS A COMPILATION OF DECISIONS ISSUED BY THE SECRETARY OF AGRICULTURE AND THE COURTS PERTAINING TO STATUTES ADMINISTERED BY THE UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

Agriculture Decisions is an official publication by the Secretary of Agriculture consisting of decisions and orders issued in adjudicatory administrative proceedings conducted for the Department under various statutes and regulations. Selected court decisions concerning the Department's regulatory programs are also included. The Department is required to publish its rules and regulations in the *Federal Register* and, therefore, they are not included in *Agriculture Decisions*.

Beginning in 1989, *Agriculture Decisions* is comprised of three Parts, each of which is published every six months. Part One is organized alphabetically by statute and contains all decisions and orders other than those pertaining to the Packers and Stockyards Act and the Perishable Agricultural Commodities Act, which are contained in Parts Two and Three, respectively.

The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket number, e.g., AWA Docket No. 99-0022, and the use of such references generally indicates that the decision has not been published in *Agriculture Decisions*. Decisions and Orders found on the OALJ Website may be cited as primary sources.

Consent Decisions entered subsequent to December 31, 1986, are no longer published in *Agriculture Decisions*. However, a list of Consent Decisions is included in the printed edition. Since Volume 62, the full texts of Consent Decisions are posted on the USDA/OALJ website (See url below). Consent Decisions are on file in portable document format (pdf) and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges (OALJ).

Beginning in Volume 63, all **Initial Decisions** decided in the calendar year by the Administrative Law Judge(s) will be arranged by the controlling statute and will be published chronologically along with decisions from appeals (if any) of those ALJ decisions issued by the Judicial Officer.

Beginning in Volume 60, each part of *Agriculture Decisions* has all the parties for that volume, including Consent Decisions, listed alphabetically in a supplemental List of Decisions Reported. The Alphabetical List of Decisions Reported and the Subject Matter Index (from the beginning of the annual Volume) are included in a separate volume, entitled Part Four.

Volumes 57 (circa 1998) through the current volume of *Agriculture Decisions* are available online at http://www.dm.usda.gov/oaljdecisions/ along with links to other related websites. Volumes 39 (circa 1980) through Volume 56 (circa 1997) have been scanned but due to privacy concerns there are no plans that they appear on the OALJ website. Beginning on July 1, 2003, current ALJ Decisions will be displayed in pdf format on the OALJ website in reverse chronological order. Decisions and Orders for years prior to the current year are also available in pdf archives by calendar year.

Beginning in Volume 69 (Circa 2010), Miscellaneous Orders and Default Decisions by the Administrative Law Judges will continue to be cited, but without the full text of the Order/Decision. The full context of the Order/Decision will be published on the OALJ website (see above).

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EMPIRE KOSHER POULTRY, INC.
Docket No. 10-0109.
Decision and Order.
Filed March 8, 2010.

PS --

Decision and Order

Appearances: Charles E. Spicknell, Esquire, Office of General Counsel, United States Department of Agriculture, Washington, DC for the Complainant

Jonathan H. Rudd, Esquire, McNees Wallace & Nurick, LLC, Harrisburg, Pennsylvania for the Respondent

Preliminary Statement

This is a disciplinary proceeding brought under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §181, *et seq*.) (Act), instituted by a Complaint filed on February 4, 2010 by Alan R. Christian, Deputy Administrator, Packers and Stockyards Program, United States Department of Agriculture. The Complaint alleges that Empire Kosher Poultry, Inc. (Empire) willfully violated section 410 of the Act (7 U.S.C. §228b-1) by failing to make prompt payments for turkeys that it had purchased, received, and accepted from Koch's Turkey Farm (Koch's).

Empire, after seeking and being granted an extension of time in which to respond to the Complaint, filed its Answer on April 15, 2010. A telephonic prehearing conference was conducted on September 29, 2010 at which time the dates for the filing of witness and exhibit lists and the exchange of exhibits was established and the matter was set for oral hearing on January 4, 2011 in Harrisburg, Pennsylvania.

The oral hearing of this action was held at the scheduled time and place. Eight witnesses were called and testified under oath.[1] At the beginning of the proceeding, the parties stipulated that with the exception

[1] References to the transcript of the proceedings will be indicated as Tr. with the page reference.

of Exhibit CX-4, all of the exhibits were admissible as evidence.[2] At the conclusion of the hearing the parties were directed to file post hearing briefs. The briefs have been filed and the matter is now ripe for disposition.

The Agency Position

The Agency contends that Empire wrongfully delayed payment to Koch's for turkeys which Empire had purchased, received and accepted without a credit agreement[3] in place for 45 days or more while attempting to obtain additional turkeys and an extended payment plan from Koch's.

Empire's Position

Empire takes the position that the Act does not apply to the transactions between Empire and Koch's, but that even if it does, the Act does not prevent Empire from withholding payment where Koch's breached the parties' contract. Empire also asserts that even if the Act was violated, no penalty is warranted as both parties have put the matter behind them and moved on in their business relationship.

The 1987 Poultry Amendments

The Secretary of Agriculture has exercised jurisdiction over shipments of live poultry since 1935. In 1987, the Secretary became concerned that poultry growers were being forced to encounter unreasonable periods of time before receiving payment for birds that they had sold while their bills were coming due. Congress amended the Packers and Stockyards Act to establish specific timetables for processors to make payments for live poultry purchases. H.R. Rep. 100-397, reprinted in U.S.C.C.A.N. 855, 857 (the "Poultry Producers Financial Protection Act of 1987").

Under the 1987 amendments, all poultry sales are deemed to be "cash sales" in which payment is due "before the close of the next business day following the purchase" **unless** there is an **express** extension of credit by

[2] The Agency had submitted 14 exhibits (CX-1 through CX-14) and Empire had submitted 17 (RX-1 through RX-17). CX-4 was admitted later during the proceedings. Tr. 337-338.

[3] 7 U.S.C. §228

the poultry seller or a growing arrangement contract in place. *See,* 7 U.S.C. §228b-1 (Emphasis added).

Evaluation of the Evidence

The transactions between Empire and Koch's in 2008 were generated as a result of Empire securing a favorable contract with Trader Joe's for the holiday delivery of 43,200 kosher turkeys. RX-1, Tr. 201, 208. The Trader Joe's contract had special significance and importance to Empire as it had previously supplied turkeys to Trader Joe's in prior years, but had been dropped as a supplier in 2002 thereby losing an important and profitable segment of their business.[4] Tr. 198. With the backdrop of having been dropped previously, the opportunity to re-establish the relationship with Trader Joe's at an even greater level was a "huge, huge deal" and was of critical importance to Empire.[5] Tr. 201, 210.

The execution of the contract however represented a significant gamble for Empire as in order to fulfill its contractual requirements of supplying the 43,200 kosher birds to Trader Joe's Empire needed to acquire a minimum of 54,000 antibiotic free (ABF) hen turkeys. Given the 18 week growing time required to attain the proper size and degree of maturity, at the time the contract was executed, Empire did not possess the capacity to supply the contractually required number of birds. Tr. 207-208. Because the contract specified that only ABF birds would meet contract specifications and because of the limited number of ABF turkey producers, Empire had to compete in the marketplace for the already commenced production of ABF turkeys which would mature and reach the target weight during the performance period. Tr. 206-209. Having a long standing relationship with Koch's over successive generations, Empire contacted Duane Koch as a potential supplier of the needed birds. Tr. 209. Although there was conflicting testimony as to the exact number of turkeys which Koch's would supply, Duane Koch agreed to sell some ABF turkeys to Empire. Tr. 141, 151-152, 175-176, 209-210.

[4] According to Jeff Brown, the relationship between Empire and Trader Joe's had started in the mid to late 1990's and continued until 2002. By 2002, Trader Joe's represented approximately 6% of Empire's sales. Tr. 198-199. By 2008, Trader Joe's had grown in size and importance adding literally hundreds of stores. Tr.199-200. At the current time, Trader Joe's is Empire's largest account, representing approximately 20% of their sales. Tr. 198.

[5] Failing to fulfill the contract with Trader Joe's was considered to have the potential of shutting the business down. Tr. 241.

Empire claimed that the transaction was a credit sale; however, although emails were exchanged concerning requested terms, the evidence clearly established that no meeting of the minds was reached and credit terms were never agreed upon. Tr. 79, 87, 134-135, 212-213, 254-255, 360, 363.

Koch's commenced delivering ABF hen turkeys to Empire's processing plant on August 6, 2008 and sent Empire an invoice for the initial shipment of four truckloads on August 8, 2008 in the amount of $114,380.00. Payment was requested to be made within 14 days. Prior to the expiration of the 14 day period, on August 13 and 14, 2008, Koch's sent a second shipment of four truckloads. On this occasion, for reasons which are not entirely clear, there was a large number of what appeared on the inspection reports as "Plant Rejects" from the first two truckloads. [6] Tr. 144-147, 180-182, 220-221, 228, 256-257, 288, 317. The second two trucks were sent back to Koch's where Koch's processed the birds in their own plant without any condemnations. Tr. 143-144. Additional shipments were made on August 20, 2008 which were invoiced to Empire along with the August 13 and 14, 2008 shipments on August 25, 2008. By this time Empire had not made payment within the 14 day period requested in the August 6, 2008 invoice. When Duane Koch called and inquired about when payment would be received, he was informed that if he wanted to get paid, he would have to send more turkeys. Tr. 151. Under the threat of non-payment unless additional birds were shipped to Empire, Koch's sent additional shipments on September 3, 4, and 8, 2008, invoicing those loads on September 10 and 18, 2008. On September 19, 2008 some 42 days after the date of the first invoice and 44 days after the actual delivery, Koch's received a partial payment of only $50,000.00 payment from Empire.[7]

On September 24, 2008, faced with Empire's continued failure to pay the approximately $400,000.00 in outstanding invoices for the tens of

[6]Empire claimed that the 1,200 plant rejects were rejected by the USDA inspectors for airsaccualitis; however, there is no entry for airsacculitis on the condemnation form and none of the witnesses testifying personally observed the condition of the birds in question. Tr. 288, 317. Neither the Plant Representative nor the inspector signing the Condemnation form appeared as a witness.

[7] The $50,000.00 payment was less than half of the amount due for the initial shipment and Koch's at that point had a receivable of over $420,000.00 which was unpaid, nearly $185,000 of which was over 30 days from the Invoice date which because of waiting for the receipt of the weight slips customarily was prepared several days after the actual delivery. CX-8, 157-158, 160.

thousands of turkeys which Empire had purchased, received and accepted and being under mounting financial pressure by his own suppliers after deferring payments for feed, Koch's contacted the hotline maintained by the Grain Inspection, Packers and Stockyards Administration (GIPSA) for assistance. Tr. 23-24, 38-39. Following contact by GIPSA concerning the non-payment of Koch's invoices, Empire initially indicated that the company had been experiencing cash flow problems and that payment to Koch's would be forthcoming.[8] Tr. 24. Thereafter Empire sent Koch's an extended payment plan and installment payments to Koch's were commenced by Empire. CX-6. Koch's agreed to the deferred payments, but final and complete payment of the amounts owed by Empire to Koch's was not completed until November 3, 2008.[9]

Given the vague terms and informal and relaxed nature of the negotiation for the supply of birds that was "the biggest thing on the company's board by far," in absence of a written agreement, it is difficult to see how Empire could have legally compelled Koch's to deliver any specific number of turkeys, particularly after Empire failed to remit in a timely manner for Koch's initial shipment to it. Tr. 196, 201, 210, 240-241, 244. It is manifestly clear from the testimony that no express credit agreement was agreed prior to any of the shipments to Empire. Tr. 135, 212-213. While Jeff Brown's testimony established that Empire clearly eschewed cash sales and in its usual arrangements assiduously avoided complying with Section 410 requirements,[10] Empire's failure to agree on credit terms in advance of delivery by Koch's effectively eliminated the possibility of the transaction being considered a credit sale and left as the only option a cash sale under the Act.[11] Viewing the chronology of events, it is difficult to view Empire's conduct as anything other than a

[8] The cash flow problems testified to by John Rollins (Tr. 24-25) were minimized by Jeff Brown in his testimony; however, he did testify concerning the need to pay other suppliers of turkeys being processed for the Trader Joe's contract during the same time he was withholding payment to Koch's. Tr. 240-241.

[9] Empire's check was dated October 30, 2008; Koch's did not receive it until November 3, 2008. CX-8, Tr.138-139, 155.

[10] Jeff Brown provided a confident gasconade in response to a question asking whether he had planned on paying Koch's the next day after he picked up the birds: "A. Absolutely not, that never, that doesn't happen." When asked if he had ever been involved in a cash sale with another processor, he also answered: "A. Never., whether buying or selling." Tr. 213

[11] For the purpose of this section, a cash sale means a sale in which the seller does not expressly extend credit to the buyer. 7 U.S.C. §228b-1(c)

particularly pernicious "unfair practice" contrary to the purpose and intent of the Act.[12] Given both the inordinate delay in payment and the threats of withholding further payments to Koch's unless and until Empire could satisfy its own contractual obligations which Empire failed to adequately protect and bind in advance by appropriate and enforceable supply agreements. Given the importance of the Trader Joe's contract to Empire, its dilatory and cavalier treatment of its obligations to the single largest supplier that was enabling their performance under the contract with Trader Joe's at the same time selectively paying other suppliers of turkeys cannot be excused. Only after coming under scrutiny by GIPSA did Empire commence making payments to Koch's in an extended and protracted basis.

As I consider the transactions before me to be a live poultry dealer's purchases of live poultry in a cash sale I reject the position that the Act does not apply to the transaction between Empire and Koch's. Similarly, as the vague, relaxed and informal agreement between the parties failed to create a contract capable of being breached, I will find Empire's withholding of payment was without justification and in violation of the Act. I will also reject Empire's suggestion because Empire and Koch's are still doing business together that no sanction is called for under the circumstances.

On the basis of the entire record including the testimony provided during the oral hearing and the exhibits entered into evidence, having considered the arguments of counsel, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. Empire Kosher Poultry, Inc. is a Delaware corporation which operates a kosher chicken and turkey processing plant. Its principal place of business is in Mifflintown, Pennsylvania. CX-1.

2. Empire is a kosher poultry processor, processing chicken and turkey products, both raw and further processed, selling cold cuts of meat, whole birds as well as cooked and fried products to distributors for

[12] 7 U.S.C. §228b-1(b) provides "Any delay or attempt to delay…the collection of funds as herein provided, or otherwise for the purpose of or resulting in extending the normal period of payment for poultry…shall be considered an "unfair practice" in violation of this chapter. Nothing in this section shall be deemed to limit the meaning of the term "unfair practice" as used in this chapter.

delivery to supermarkets and delicatessens around the country. Tr. 189-190.

3. Empire is a live poultry dealer operating in interstate commerce subject to the Packers and Stockyards Act.

4. In approximately May or June of 2008, Empire executed a contract to provide 43,200 ABF kosher hen turkeys to Trader Joe's for the 2008 end of year holiday season. Tr. 208. At time of executing the contract, Empire lacked capacity to fulfill the terms of the contract with their existing growing arrangements and was forced to compete in the marketplace for the already commenced production of ABF turkeys which would mature and reach the target weight during the performance period. Tr. 206. Empire contacted Duane Koch as a potential supplier of the needed birds. Although there is conflicting testimony as to the exact number of turkeys which Koch's would supply, Duane Koch agreed to sell some ABF turkeys to Empire.[13] Tr. 141, 151-152, 175-176, 209-210.

5. The arrangement between Empire and Koch's was vague, relaxed, informal and was never reduced to writing. There was no express agreement in place concerning credit terms. Tr. 79, 87, 134-135, 196, 213, 254-255, 360, 363.

6. On August 6, 2008, Koch's delivered four truckloads containing 8,910 live turkeys weighing 163,400 pounds with a value of $114,380.00 to Empire's processing plant. CX-9.

7. Empire failed to pay for the turkeys it received from Koch's within the time period required for payment in a cash sale as set forth in Section 410 of the Act. On August 8, 2008, Koch's invoiced Empire for the August 6, 2008 shipment requesting payment within 14 days.[14] CX-9. Empire also failed to make payment within the requested 14 day period, and ultimately made only a single partial payment of $50,000.00 which Koch's deposited on September 19, 2008 prior to the date that Empire was contacted by GIPSA.[15] CX-8.

8. On August 13 and 14, 2008, Koch's sent a second four truckloads of 7,168 live turkeys to Empire's processing plant. CX-11. One truck containing 1,736 turkeys weighing 30,300 pounds of turkeys was

[13] Koch's ultimately provided approximately 43,000 ABF hen turkeys. CX-9 through 14.

[14] Invoice No. 130111, CX-9.

[15] This single payment represented less than half of the total amount due for the first shipment which had been purchased, received and accepted by Empire and was the only payment made by Empire to Koch's until after Empire was contacted by GIPSA.

unloaded and processed. *Id.* at 3. A second truck containing 1,848 turkeys weighing 32,840 was also unloaded; however, only 84 birds were processed. *Id.* at 4. Of the 1,820 birds in the lot, 4 were dead on arrival, 31 were condemned for Septicaemia and Toxemia, and another 1,200 were Plant rejects.[16] The other two truckloads were not processed, but were sent back to Koch's. Tr. CX-11 at 5, 6.

9. Empire failed to pay for the turkeys it received from Koch's on August 13 and 14, 2008 within the time period required for payment in a cash sale as set forth in Section 410 of the Act.

10. Koch processed the loads returned to it by Empire at their own processing plant without any birds being condemned. Tr. 143-144.

11. On August 20, 2008, Koch's delivered another four truckloads containing 8,902 turkeys weighing 140,120 pounds with a value of $98,084.00 to Empire's processing plant. CX-10; RX-3.

12. Empire failed to pay for the turkeys it received from Koch's on August 20, 2008 within the time period required for payment in a cash sale as set forth in Section 410 of the Act.

13. On August 25, 2008, Koch's invoiced Empire for the August 13 and 14, 2008 shipments in the amount of $30,840.00[17] and for the August 20, 2008 shipment in the amount of $98,084.00.[18] Payment of both invoices was again requested within 14 days. CX-10, 11.

14. Empire failed to make payment of the August 25, 2008 invoice within the 14 day period requested by Koch's and, without justification, threatened Koch's by telling Duane Koch to send more turkeys if Koch's wanted to get paid.[19] Tr. 151.

15. On September 3 and 4, 2008, Koch's delivered five truckloads containing 8,708 ABF hen turkeys weighing 140,900 pounds with a value of $98,630.00 to Empire's processing plant. CX-12.

16. On September 4, 2008, Koch's delivered four truckloads containing 5,586 ABF hen turkeys weighing 97,200 pounds with a value of $68,040.00 to Empire's processing plant. CX-13.

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[16] The exact reason for the Plant rejects is unclear from the evidence. Empire claimed that the rejections were made by USDA Inspectors for Airsacculitis; however, the space on the form for that specific entry was left blank. Tr. 257. Neither the Authorized Plant Official nor the Inspector testified.

[17] Invoice No. 130201, CX-11.

[18] Invoice No. 130200, CX-10.

[19] At this point in time, the unpaid invoices amounted to over $243,000.00.

17. Empire failed to pay for the turkeys it received from Koch's on September 3 and 4, 2008 within the time period required for payment in a cash sale as set forth in Section 410 of the Act.

18. On September 8, 2008, Koch's delivered three truckloads containing 5,502 ABF hen turkeys weighing 101,660 pounds with a value of $71,162.00 to Empire's processing plant. CX-14.

19. As with all prior loads, Empire failed to pay for the turkeys it received from Koch's on September 8, 2008 within the time period required for payment in a cash sale as set forth in Section 410 of the Act and Invoices for the September 3 and 4 shipments were sent on September 10, 2008 and the September 8, 2008 shipment was invoiced on September 18, 2008.[20] Again, payment was still not made within the requested 14 day remittance period.

20. Despite Empire's continued failure to timely remit payment for the turkeys purchased, received and accepted by Empire, Koch's continued to pay its growers in a timely fashion, but was forced to delay payments to its feed suppliers and was faced with the prospect of not being able to make payroll disbursements. Tr. 131-132, 134.

21. On September 24, 2008, faced with Empire's continued failure to pay the approximately $400,000.00 in outstanding invoices for the tens of thousands of turkeys which Empire had received and accepted and being under mounting financial pressure by his own suppliers after deferring payments for feed, Koch's contacted the hotline maintained by the Grain Inspection, Packers and Stockyards Administration (GIPSA) for assistance. Tr. 23-24, 38-39.

22. Following contact by GIPSA concerning the non-payment of Koch's invoices, Empire initially indicated that the company had been experiencing cash flow problems and that payment to Koch's would be forthcoming. Tr. 24.

23. On September 26, 2008, Empire sent Koch's a proposed extended payment plan which was accepted and installment payments to Koch's were commenced by Empire. CX-6, Tr. 138-139.

24. Faced with a desperate need for funds, Koch's agreed to the deferred payments, but final and complete payment of the amounts owed by Empire was not received by Koch's until November 3, 2008. Tr. 138-139, 155, 166.

25. After receiving final payment from Empire, Koch's indicated its satisfaction with the resolution of their dispute, their business

[20] Invoice Nos. 130290, 130291 and 130346, CX 12, 13, and 14.

relationship with Empire has continued, and Duane Koch expressed his desire not to harm Empire in any way. Tr. 155, 165-167.

26. Empire had previously received a "Notice of Violation" which specified the payment requirements of Section 410. CX-4.

26. Empire is a large operating concern, earning in excess of $5,000,000.00 in 2009 and the recommended sanction is unlikely to have any impact upon Empire's continued ability to do business. CX-3, Tr. 332-333, 335, 351, 359.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. GIPSA has a valid interest in preventing poultry processors from ignoring the cash sale payment deadline, deferring poultry debts to alleviate cash flow problems, or to extract concessions from sellers under threats or coercion. Once having sought and received GIPSA assistance in obtaining payment from Empire, Koch's is without standing to withdraw its report of Empire's conduct in violation of the Act.

2. Despite there being no advance expectation by Koch's that payment would be by the end of the next business day, no express agreement as to payment terms existed at the time of the transactions. Accordingly, the transactions between Koch's and Empire were cash sales under the Act requiring payment within the time established by Section 410. 7 U.S.C. §228b-1.

3. Koch's ultimate acceptance of deferred credit payment terms after complaint to and intervention by GIPSA does not alter the nature of the cash sale transactions when they were negotiated and the poultry purchased, received and accepted.

4. Empire's failure to pay for poultry purchased, received and accepted within the time period required for payment in a cash sale as set forth in Section 410 of the Act was without justification and constitutes an unfair practice in willful violation of the Act.

Order

1. Empire Kosher Poultry, Inc., its agents and employees, directly or through any corporate or other device, in connection with the corporation's activities subject to the Act, shall cease and desist from

failing to pay for poultry purchases within the time period required by Section 410 of the Act. 7 U.S.C. §228b-1.

2. Empire is assessed a civil penalty of eighteen thousand dollars ($18,000.00) pursuant to Section 411(b) of the Act. 7 U.S.C. §228b-2(b). The payment shall be made out to the "U.S. Department of Agriculture" and sent to:

USDA-GIPSA
P.O. Box 790335
St. Louis, Missouri 63179-0335

The Docket No. 10-0109 shall be noted on the payment instrument.

3. This Decision and Order shall become final and effective without further proceedings thirty-five days (35) after service on Respondent, unless appealed to the Judicial Officer by a party to the proceeding within thirty (30) days, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies of this Decision and Order will be served upon the parties by the Hearing Clerk.

CHARLES JEFFERS.
Docket No. 10-0455.
Decision and Order.
Filed June 30, 2011.

PS

Decision and Order

This disciplinary proceeding was instituted under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq*.) (Act), by a Complaint filed on September 29, 2010, by the Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration (GIPSA), United States Department of Agriculture (Complainant), alleging that Charles Jeffers (Respondent), willfully violated the Act and the regulations promulgated thereunder by the Secretary of Agriculture (9 C.F.R. § 201.1 *et seq*.) (Regulations).

The Complaint and a copy of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary under Various Statutes (7 C.F.R. § 1.130) (Rules of Practice), were served on Respondent by certified mail on October 20, 2010. Respondent was informed in the accompanying letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the Complaint.

Respondent submitted an untimely response to the Hearing Clerk dated November 7, 2010, on his own behalf which was received by the Hearing Clerk on November 15, 2010. In his reply letter, Respondent admitted that he tried to satisfy some of the debt owed to sellers of livestock named in the Complaint, but Respondent failed to indicate whether he extinguished any of his debt. Blame for his financial problems was placed upon his purchase of a "lemon" from the Ford Motor Company. The Response fails to contain any legitimate defense to the allegations in the complaint that he purchased and failed to pay the full purchase price for livestock and did not admit, deny, or otherwise respond to the remaining allegations of the complaint. The Complainant has moved for entry of a Decision without Hearing.

Even were the Respondent's failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) not deemed an admission of the allegations in the complaint (7 C.F.R. § 1.136(c)), Section 1.136(b) of the Rules of Practice, 7 C.F.R. § 1.136(b), requires that any Answer "(c)learly admit, deny or explain each of the allegations in the Complaint." The failure to "deny or otherwise respond to an allegation" is deemed to be an admission of it. 7 C.F.R. §1.136(c). As Respondent's reply letter constitutes an admission of the material allegations contained in the Complaint, the following Findings of Fact, Conclusions of Law and Order will be entered without the need for further proceedings.

Findings of Fact

1. Charles Jeffers (Respondent) is an individual residing in Somerset, Ohio.

2. Respondent at all times material to this decision was:

Engaged in the business of buying and selling livestock in commerce as a dealer for its own account or account of others; and

Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for its own account.

3. Respondent, on or about the dates and in the transactions set forth below, Respondent purchased livestock and failed to pay the full purchase price of such livestock. *[Editor's Note: In the original version the data table appeared here]*

4. As of the date of issuance of this decision, all of the $23,600.44 referred to in Finding of Fact 3 remains unpaid.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. By reason of the facts found in Findings of Fact 3 and 4, Respondent has willfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

Order

1. Respondent Charles Jeffers, directly or through any corporate or other device, in connection with his activities subject to the Act, shall cease and desist from failing to pay the full purchase price of livestock.

2. In accordance with section 312(b) of the Act, Respondent is suspended as a registrant under the Act for a period of five (5) years. This suspension may be modified to permit Respondent's salaried employment by another registrant or packer after the expiration of the initial 120 days of the suspension term upon demonstration to the Packers and Stockyards Program, GIPSA, of circumstances warranting modification of the suspension. In this case, circumstances that may warrant modification of the suspension include proof that full payment has been made to the unpaid livestock sellers or consignors named above or secure the approval of the unpaid seller to a plan for payment.

3. This Decision and Order shall become final and effective without further proceedings thirty-five (35) days after service on Respondent, unless appealed to the Judicial Officer by a party to the proceeding within thirty (30) days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, 1.145).

Copies of this Decision and Order shall be served upon the parties.

PURCH'D FROM	PURCH'D DATE	DUE DATE PER §409 (A)	NO. OF HD	LIVESTOCK AMOUNT	CHECK DATE	CHK NO	STOP PAYMENT DATE
UNITED PRODUCERS, INC.	9/17/2008	9/18/2008	18	$1,319.501	N/A	N/A	N/A
BUSSERT & SONS, INC	9/19/2008	9/22/2008	48	$2,931.80	10/3/2008	3061	10/10/2008
	9/27/2008	9/29/2008	47	$2,646.47	N/A	N/A	N/A
UNITED PRODUCERS, INC.	10/1/2008	10/2/2008	19	$824.452	N/A	N/A	N/A
S&S FARMS	10/2/2008	10/3/2008	55	$2,105.153	10/3/2008	3062	10/15/2008
	10/2/2008	10/3/2008	102	$4,901.824	10/3/2008	3063	10/10/2008
BUSSERT & SONS, INC	10/3/2008	10/6/2008	15	$491.40	N/A	N/A	N/A
UNITED PRODUCERS, INC.	10/6/2008	10/9/2008	12	$509.00	N/A	N/A	N/A
UNITED PRODUCERS, INC.	10/9/2008	10/10/2008	82	$5,582.805	10/9/2008	3066	10/15/2008
BUSSERT & SONS, INC	10/10/2008	10/14/2008	41	$2,288.05	N/A	N/A	N/A
TOTALS			439	$23,600.446			

———

[1] A miscellaneous deduction of $2.78 made the total purchase amount $1,316.72.
[2] A miscellaneous deduction of $5.98 made the total purchase amount $818.47.
[3] A commission charge of $137.50 made the total purchase amount $2,242.65.
[4] A commission charge of $255.00 made the total purchase amount $5,156.82
[5] A miscellaneous deduction of $47.07 made the total purchase amount $5,535.73
[6] The total purchase amount equaled $23,937.11.

[Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Miscellaneous Orders] with the sparse case citation but without the body of the order. Miscellaneous Orders issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported - Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: www.dm.usda.gov/oaljdecisions

PACKERS AND STOCKYARDS ACT

MISCELLANEOUS ORDERS

MICHAEL R NORRIS d/b/a BROKEN.
Docket No. PS 11 – 0070.
Miscellaneous Order.
Filed June 23, 2011.

[Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Default Orders] with the sparse case citation but without the body of the order. Default Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported - Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: www.dm.usda.gov/oaljdecisions]

PACKERS AND STOCKYARDS ACT

DEFAULT DECISIONS

APNA BAZAAR INTERNATIONAL.
Docket No. PS 11 – 0028.
Default Decision.
Filed January 7, 2011.

ROYAL HALAL MEAT INC.
Docket No. PS 10 – 0379.
Default Decision.
Filed March 1, 2011.

KENSAL FARMERS ELEVATOR.
Docket No. GSA 11 – 0063.
Default Decision.
Filed March 8, 2011.

LONNIE AND KAREN MARTIN.
Docket No. PS – 0234.
Default Decision.
Filed March 10, 2011.

EDDIE BENNETT d/b/a PREFERRED.
Docket No. PS 10 – 0234.
Default Decision.
Filed May 25, 2011.

BERRY & SONS RABABEH ISLAMIC.
Docket No. PS 11 – 0175.
Default Decision.
Filed June 8, 2011.

MARK V PORTER d/b/a MVP FARMS.
Docket No. PS 11 – 0110.
Default Decision.
Filed June 16, 2011.

Consent Decisions

Packers and Stockyards Act

Jeremy T. Gorham d/b/a Euclid Stockyards, P&S-D-09-0183, 11/01/13.
Allen County Livestock Auction, LLC, John Adams and Dale Peterson, P&S-D-09-0160, 11/01/13.
Eugene Thompson, P&S-D-10-0079, 11/01/19.
Superior Livestock Auction Inc, P&S-D-11-0111, 11/03/24.
Gailal Sbeta and Mohammad Mesallem d/b/a islamic Meat and Poultry, P&S-D-10-0081,11/03/28.
WW Boer Goats, Inc., aka Boer Meat Goats, LLC and Frank Willis, P&S-D-10-0238, 11/04/13.
Curtis Walton d/b/a Walton Livestock, P&S-D-10-0066, 11/05/18.
Duane Schmidt, P&S-D-10-0205, 11/04/22.
Vermilion Ranch Co., d/b/a Northern Livestock Video Auction, P&S-D-10-0295, 11/06/22.

AGRICULTURE DECISIONS

Volume 70

January - June 2011
Part Three (PACA)
Pages 435 - 501

THIS IS A COMPILATION OF DECISIONS ISSUED BY THE SECRETARY OF AGRICULTURE AND THE COURTS PERTAINING TO STATUTES ADMINISTERED BY THE UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

Agriculture Decisions is an official publication by the Secretary of Agriculture consisting of decisions and orders issued in adjudicatory administrative proceedings conducted for the Department under various statutes and regulations. Selected court decisions concerning the Department's regulatory programs are also included. The Department is required to publish its rules and regulations in the *Federal Register* and, therefore, they are not included in *Agriculture Decisions*.

Beginning in 1989, *Agriculture Decisions* is comprised of three Parts, each of which is published every six months. Part One is organized alphabetically by statute and contains all decisions and orders other than those pertaining to the Packers and Stockyards Act and the Perishable Agricultural Commodities Act, which are contained in Parts Two and Three, respectively.

The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket number, e.g., AWA Docket No. 99-0022, and the use of such references generally indicates that the decision has not been published in *Agriculture Decisions*. Decisions and Orders found on the OALJ Website may be cited as primary sources.

Consent Decisions entered subsequent to December 31, 1986, are no longer published in *Agriculture Decisions*. However, a list of Consent Decisions is included in the printed edition. Since Volume 62, the full texts of Consent Decisions are posted on the USDA/OALJ website (See url below). Consent Decisions are on file in portable document format (pdf) and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges (OALJ).

Beginning in Volume 63, all **Initial Decisions** decided in the calendar year by the Administrative Law Judge(s) will be arranged by the controlling statute and will be published chronologically along with decisions from appeals (if any) of those ALJ decisions issued by the Judicial Officer.

Beginning in Volume 60, each part of *Agriculture Decisions* has all the parties for that volume, including Consent Decisions, listed alphabetically in a supplemental List of Decisions Reported. The Alphabetical List of Decisions Reported and the Subject Matter Index (from the beginning of the annual Volume) are included in a separate volume, entitled Part Four.

Volumes 57 (circa 1998) through the current volume of *Agriculture Decisions* are available online at http://www.dm.usda.gov/oaljdecisions/ along with links to other related websites. Volumes 39 (circa 1980) through Volume 56 (circa 1997) have been scanned but due to privacy concerns there are no plans that they appear on the OALJ website. Beginning on July 1, 2003, current ALJ Decisions will be displayed in pdf format on the OALJ website in reverse chronological order. Decisions and Orders for years prior to the current year are also available in pdf archives by calendar year.

Beginning in Volume 69 (Circa 2010), Miscellaneous Orders and Default Decisions by the Administrative Law Judges will continue to be cited, but without the full text of the Order/Decision. The full context of the Order/Decision will be published on the OALJ website (see above).

Selected individual softbound volumes from Vol. 59 (Circa 2000) of *Agriculture Decisions* are available until current supplies are exhausted.

Direct all inquiries regarding this publication to: Editor, Agriculture Decisions, Office of Administrative Law Judges, U.S. Department of Agriculture, Room 1057 South Building, Washington, D.C. 20250-9200, Telephone: (202) 720-6645, Fax (202) 690-0790, and e-mail address of Editor.OALJ@usda.gov.

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PERISHABLE AGRICULTURE COMMODITIES ACT

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Cheryl A. Taylor and Steven C. Finberg.
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PERISHABLE AGRICULTURAL COMMODITIES ACT

COURT DECISION

CHERYL A. TAYLOR AND STEVEN C. FINBERG v. USDA.
No. 09–1270.
Filed January 7, 2011.
As Amended on Rehearing in Part March 2, 2011.

[Cite as: 629 F.3d 241].

United States Court of Appeals,
District of Columbia Circuit.

[Editor's Note: *The opinion of the United States Court of Appeals, District of Columbia Circuit, in Taylor v. United States Department of Agriculture, was amended. For amended opinion, see 636 F. 3d 608 (below).]*

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CHERYL A. TAYLOR AND STEVEN C. FINBERG v. USDA.
No. 09–1270.
Argued Sept. 20, 2010.
Decided Jan. 7, 2011.
Filed March 2, 2011.

[Cite as: 636 F.3d 608].

PACA – Defense, "powerless to curb" the wrongdoing – Defense, lack of actual and significant power and authority to direct and affect company operations – Defense, requires more than person's title, background, and knowledge .

A long standing line of cases relating to who is "responsibly connected" now has less clarity requiring a balancing of facts shown and less reliance on statutory thresholds or definitions of "nominal officer" both of which tend to increase the burden of proof required by the Agency. Upon review of the same facts, the court reversed the judgment of the Judicial Officer.

United States Court of Appeals,
District of Columbia Circuit.

Vacated and remanded.
Opinion, 629 F.3d 241, superseded.
Brown, Circuit Judge, filed dissenting opinion.
Before: BROWN, Circuit Judge, and EDWARDS and RANDOLPH, Senior Circuit Judges.
Opinion for the Court filed by Senior Circuit Judge EDWARDS.
Dissenting opinion filed by Circuit Judge BROWN.
EDWARDS, Senior Circuit Judge:

The Perishable Agricultural Commodities Act ("PACA") requires persons who buy or sell specified quantities of perishable agricultural commodities at wholesale in interstate commerce to have a license issued by the Secretary of Agriculture, *see* 7 U.S.C. §§ 499a(b)(5)-(7), 499c(a), 499d(a), and makes it unlawful for a licensee to engage in certain types of unfair conduct, *see id.* § 499b. The statute requires regulated merchants, dealers, and brokers to "truly and correctly ... account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had." 7 U.S.C. § 499b(4). It also provides that PACA licensees may not employ, for at least one year, any person found " responsibly connected" to any person whose license has been revoked or suspended, or who has been found to have committed any flagrant or repeated violation of 7 U.S.C. § 499b. *See* 7 U.S.C. § 499h(b).

In January 2007, an Administrative Law Judge ("ALJ") at the Department of Agriculture ("Department") found that Fresh America, a national produce wholesaler licensed to do business under PACA, had willfully, repeatedly, and flagrantly violated Section 2(4) of PACA, 7 U.S.C. § 499b(4), by failing to promptly make full payment to produce sellers between February 2002 and February 2003. *In re Fresh Am. Corp.,* 66 Agric. Dec. 953, 959 (U.S.D.A.2007). Fresh America did not contest this decision. While the case against Fresh America was pending, the Chief of the PACA Branch of the Fruit and Vegetable Division of the Agricultural Marketing Service determined that the petitioners in this case, Cheryl Taylor and Steven Finberg, who were officers of Fresh America, had been responsibly connected to Fresh America during the

violations period and were therefore subject to the statute's employment restrictions. Taylor and Finberg sought administrative review of this determination.

In March 2009, following a two-day hearing, an ALJ issued a decision affirming the PACA Branch Chief's determinations and concluding that both Taylor and Finberg had been responsibly connected to Fresh America during the violations period. In September 2009, a Judicial Officer rejected the petitioners' administrative appeals. *In re Taylor,* PACA App. Docket Nos. 06–0008, 06–0009 (U.S.D.A. Sept. 24, 2009) ("*Judicial Officer Decision* "), *reprinted in* 1 Joint Appendix ("J.A.") 7. In holding against the petitioners, the Judicial Officer found that the petitioners were not merely nominal officers of Fresh America. The Judicial Officer also found that Fresh America was not the alter ego of its chairman of the board, Arthur Hollingsworth. Petitioners now seek review in this court.

We agree with petitioners that the Judicial Officer erred in rejecting their claims that they were merely nominal officers of Fresh America. Under 7 U.S.C. § 499a(b)(9), an "officer" of the offending company is not considered to be "responsibly connected" to a violating licensee if that person was not actively involved in the PACA violation and was "powerless to curb it," *Quinn v. Butz,* 510 F.2d 743, 755 (D.C.Cir.1975). *See also Bell v. Dep't of Agric.,* 39 F.3d 1199, 1202 (D.C.Cir.1994). The Judicial Officer in this case "paid little heed to circuit law on nominal officers," *id.,* for his decision is devoid of any analysis of the actual power exercised by Taylor and Finberg at Fresh America. The disputed decision is thus fatally flawed for want of reasoned decision making. Accordingly, the petition for review is granted in part, and the case is remanded to the Department for further proceedings consistent with this decision.

I. BACKGROUND

A. Statutory Background

PACA prohibits certain conduct by merchants, dealers, or brokers of perishable agricultural commodities in order to "help instill confidence in parties dealing with each other on short notice, across state lines and at long distances." *Kleiman & Hochberg, Inc. v. U.S. Dep't of Agric.,* 497

F.3d 681, 685 (D.C.Cir.2007) (quoting *Veg–Mix, Inc. v. U.S. Dep't of Agric.,* 832 F.2d 601, 604 (D.C.Cir.1987)). PACA is "admittedly and intentionally a tough law." *Kleiman & Hochberg,* 497 F.3d at 693 (quoting S. REP. NO. 84–2507, at 3 (1956), *reprinted in* 1956 U.S.C.C.A.N. 3699, 3701 (internal quotation marks omitted)). As noted above, the statute forbids, *inter alia,* any merchant, dealer, or broker of perishable agricultural commodities from "fail [ing] or refus[ing] truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had." 7 U.S.C. § 499b(4). In addition, PACA prevents licensees from employing, for a minimum of one year, "any person who is or has been responsibly connected" to a flagrant or repeated PACA violator. 7 U.S.C. § 499h(b).

Under this statutory scheme,

> [a]n officer, director, or holder of more than ten percent of the stock of a corporation licensed under the PACA is presumed ... to be 'responsibly connected' to that corporation. 7 U.S.C. § 499a(b)(9). For many years the circuits were divided over whether the presumption of § 499a(b)(9) is irrebuttable ... or, as we held, rebuttable. See *Quinn v. Butz,* 510 F.2d at 757.

Hart v. Dep't of Agric., 112 F.3d 1228, 1230 (D.C.Cir.1997). Under the law of this circuit, a person could rebut the presumption that he or she was "responsibly connected" to a PACA violator in either of two ways:

> The first involve[d] cases in which the violator, although formally a corporation, [was] essentially an alter ego of its owners, so dominated as to negate its separate personality.
>
> ...
>
> The second way of rebutting the presumption [was] for the petitioner to prove that at the time of the violations he was only a *nominal* officer, director, or shareholder. This he could establish by proving that he lacked an actual, significant nexus with the violating company. Where responsibility was not based on the individual's personal fault it would have to be based at least on his failure to counteract or obviate the fault of others.

Bell, 39 F.3d at 1201 (emphasis in original) (citations and internal quotation marks omitted).

"In 1995 the Congress amended § 499a(b)(9) to make it clear that the presumption is rebuttable." *Hart,* 112 F.3d at 1230. The statute now provides:

> The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

7 U.S.C. § 499a(b)(9). Thus, under the current version of the statute, it is presumed that an officer of a corporation is responsibly connected to the violating company unless the officer can show that he or she (1) was not actively involved in the PACA violations, and (2) was either a nominal officer of the violating PACA licensee or a non-owner of a licensee that was the alter ego of its owners.

B. Factual Background

Cheryl Taylor joined Fresh America as a consultant in April 2001. Her primary tasks were to prepare and review Fresh America's filings for the Securities and Exchange Commission ("SEC"), confer with company accountants, and assist the company in its efforts to secure refinancing of existing debts. Shortly after signing a consulting agreement with Fresh America, Taylor was given the titles of executive vice president, chief financial officer, and secretary of the company, albeit without any additional compensation. According to Taylor, she was assigned these titles because the company "needed [her] to sign documents"; however, she stated that she did not do "any of the normal things that a CFO" does. Hearing Tr. (Jan. 29, 2008) at 362, 364, *reprinted in* 1 J.A. 142, 144.

In 1989, when he was a college student, Steven Finberg first started working with Gourmet Packing, a predecessor company to Fresh America. In 1999, after several promotions, Finberg was given the position of vice president of sales and marketing for Fresh America. His job responsibilities included managing Fresh America's national accounts and developing a marketing message on behalf of the company. In 2001, Finberg was given the title of executive vice president, although his job responsibilities remained the same. Hearing Tr. (Jan. 30, 2008) at 791–92, *reprinted in* 1 J.A. 277–78. In explaining his job, Finberg testified as follows: he never assumed any authority over the purchase of produce; he never was involved in a payment for produce; and he did not recall ever signing a check on behalf of the company. *Id.* at 799–800.

During the period when Fresh America committed the PACA violations that gave rise to this case, Arthur Hollingsworth, the co-founder and partner of the venture-capital and private-equity fund North Texas Opportunity Fund LP ("NTOF"), was chairman of the board. In 2001, NTOF invested $5 million in Fresh America and, as part of a financial restructuring of Fresh America, appointed four of the five members of the board. The record indicates that the company was largely run by the board. As one board member testified, under NTOF's leadership, "board meetings became the management of the company." Hearing Tr. (Jan. 29, 2008) at 146, 1 J.A. 96. And there is evidence that the board, not company officers or managers, made all decisions governing the company's bills, capital expenditures, and personnel. *Id.* at 146–49, 1 J.A. 96–99.

Both Taylor and Finberg attended most of the company's board meetings, but they were not members of the board. And even though they carried "officer" titles at Fresh America, there is evidence that neither Taylor nor Finberg had any measurable power or authority in board deliberations. For example, when the board addressed problems relating to the payment of bills, Taylor and Finberg stressed the need for the company to pay its bills on time. *Id.* at 91, 1 J.A. 84. However, the board rejected the advice offered by Taylor and Finberg. Instead, the board followed a policy of having Fresh America pay its bills when the company had the capacity to do so. *Id.* at 92, 1 J.A. 85. Both Taylor and Finberg remained with Fresh America until at least January 2003, when

the company ceased operations.

C. The Proceedings Before the Agency

In 2005, the Department filed a complaint against Fresh America, alleging that the company had committed PACA violations between February 2002 and February 2003 by failing to promptly pay a total of more than $1.2 million to 82 sellers of perishable agricultural commodities. The company defaulted on these charges. *In re Fresh Am. Corp.,* 66 Agric. Dec. 953 (U.S.D.A.2007). In the summer of 2006, the Chief of the PACA Branch of the Fruit and Vegetable Programs Division of the Agricultural Marketing Service made an initial determination that, pursuant to 7 U.S.C. § 499a(b)(9), Taylor and Finberg were responsibly connected to Fresh America. *In re Taylor,* PACA App. Docket Nos. 06–0008, 06–0009 (U.S.D.A. Mar. 19, 2009) ¶¶ 12–13, *reprinted in* 1 J.A. 31. Taylor and Finberg petitioned the agency for review of these determinations, and the agency joined the two cases for a hearing before an ALJ.

After a two-day hearing, the ALJ found that Taylor, but not Finberg, was actively involved in the PACA violations. However, the ALJ found that both Taylor and Finberg were responsibly connected to Fresh America within the meaning of PACA. The ALJ concluded that the evidence presented by Taylor and Finberg did not demonstrate, as they claimed, that they were merely nominal officers of Fresh America. *Id.* ¶¶ 52–57, 82–85, 1 J.A. 46–47, 57–59. In reaching this conclusion, the ALJ found that Taylor was "vital to Fresh America Corp. and an important and influential officer," *id.* ¶ 56, 1 J.A. 47, and that Finberg "was a valuable member of the team that tried to keep Fresh America Corp. in business," *id.* ¶ 82, 1 J.A. 57. Petitioners appealed within the agency, and the ALJ's decision was reviewed by a Judicial Officer. Although the Judicial Officer did not adopt the ALJ's reasoning, he did affirm the judgments against Taylor and Finberg.

The Judicial Officer relied on three grounds to support his finding that Taylor and Finberg were responsibly connected to Fresh America. First, the Judicial Officer pointed to the petitioners' backgrounds, noting that "each had the experience, training, and education to serve in their positions as officers." *Judicial Officer Decision* at 13, 1 J.A. 19. Second,

he noted that the annual reports and proxy statements filed with the SEC listed Taylor and Finberg as officers. *Id.* at 11–14, 1 J.A. 17–20. He apparently thought this to be decisive, stating: "[T]he fact that each was identified in the SEC filings as an officer makes it difficult for me to conclude that they were only nominal officers." *Id.* at 14, 1 J.A. 20. Finally, the Judicial Officer relied on the fact that "Ms. Taylor and Mr. Finberg knew of Fresh America Corp.'s financial difficulties." *Id.*

The Judicial Officer also expressed the view that, although Taylor and Finberg told the board of directors about the payment provisions in PACA, their "only option to avoid a responsibly connected determination was to resign as officers of Fresh America Corp. prior to Fresh America Corp.'s PACA violations." *Id.* Because the Judicial Officer found that Taylor was not a nominal officer of Fresh America, he chose not to address her separate argument that the ALJ erred in finding her actively involved in the company's PACA violations. *Id.* at 14–15, 1 J.A. 20–21.

Finally, the Judicial Officer rejected the petitioners' argument that Fresh America was the alter ego of Hollingsworth:

> The record makes clear that, while Mr. Hollingsworth was a dominant chairman, the decisions attributed to Mr. Hollingsworth were made by the board of directors. The concept of alter ego goes well beyond the evidence presented in the instant proceeding. Fresh America Corp. had regular board meetings at which non-board members were present and reported to the board. The board of directors, with Mr. Hollingsworth as chairman, ran Fresh America Corp. While Mr. Hollingsworth and the board of directors made decisions usually reserved for individuals at a lower level of authority, it is understandable, considering Fresh America Corp.'s financial position and the recent investment made by [NTOF], which was managed by Mr. Hollingsworth, that such decisions came before the board of directors.

Id. at 15–16 (accompanying parenthetical omitted), 1 J.A. 21–22.

In their petition for review, Taylor and Finberg contest the Judicial Officer's findings that they were not merely nominal officers of Fresh America and that Fresh America was not the alter ego of Hollingsworth.

II. ANALYSIS

A. Standard of Review

"[W]e must uphold the Judicial Officer's decision unless we find it to be arbitrary, capricious, an abuse of discretion, not in accordance with law, or unsupported by substantial evidence." *Kleiman & Hochberg,* 497 F.3d at 686 (quoting *Kirby Produce Co. v. U.S. Dep't of Agric.,* 256 F.3d 830, 833 (D.C.Cir.2001)) (internal quotation marks omitted). "[A]n agency rule would be arbitrary and capricious if the agency ... entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983); *see also Allentown Mack Sales & Serv., Inc. v. NLRB,* 522 U.S. 359, 374, 118 S.Ct. 818, 139 L.Ed.2d 797 (1998) ("The Administrative Procedure Act ... establishes a scheme of 'reasoned decision making.' Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." (quoting *State Farm,* 463 U.S. at 52, 103 S.Ct. 2856)). In this case, the petitioners argue that the Judicial Officer's decision defies this requirement of reasoned decision making, because it pays no heed to the controlling law on nominal officers.

Although not stated explicitly, Taylor and Finberg also argue that the Judicial Officer's decision should be set aside for want of substantial evidence, which governs "on-the-record agency fact finding." *Allentown Mack,* 522 U.S. at 377, 118 S.Ct. 818. Under section 706(2)(E) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(E), substantial evidence review requires a court to consider the whole record upon which an agency's factual findings are based. *See Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488, 71 S.Ct. 456, 95 L.Ed. 456 (1951).

> In describing the whole record review of § 706(2)(E), the Court acknowledged that the requirement "does not furnish a calculus of value by which a reviewing court can assess the evidence." [*Universal Camera,* 340 U.S. at 488 [71 S.Ct. 456].] It also noted that substantial evidence review does not negate the "respect" with which courts are to

review decisions based on agency expertise. *Id.* Nor, the Court explained, does whole record review mean that a court can displace an agency's "choice between two fairly conflicting views," even though the reviewing court "would justifiably have made a different choice had the matter been before it *de novo*." *Id.* Rather, a reviewing court must "ask whether a reasonable mind might accept a particular evidentiary record as adequate to support a conclusion." *Dickinson v. Zurko,* 527 U.S. 150, 162 [119 S.Ct. 1816, 144 L.Ed.2d 143] (1999). Or, put differently, a court must decide whether, on the record under review, "it would have been possible for a reasonable jury to reach the [agency's] conclusion." *Allentown Mack Sales & Serv., Inc. v. NLRB,* 522 U.S. 359, 366–67 [118 S.Ct. 818, 139 L.Ed.2d 797] (1998).

> HARRY T. EDWARDS & LINDA A. ELLIOTT, FEDERAL STANDARDS OF REVIEW—REVIEW OF DISTRICT COURT DECISIONS AND AGENCY ACTIONS 176 (2007) (second brackets in original).

B. The Judicial Officer's Decision that Petitioners Were Not Nominal Officers

PACA defines a "responsibly connected" person as one who is "affiliated or connected with a [licensee] as ... [an] officer, director, or holder of more than 10 per centum of the outstanding stock." 7 U.S.C. § 499a(b)(9). There is no dispute that Taylor and Finberg were officers and thus come within this definition. As noted above, however, PACA also provides that:

> A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of [PACA] and that the person either was only nominally ... [an] officer, director, or shareholder of a violating licensee.

Id. The question here is whether the petitioners met their burden of demonstrating by a preponderance of the evidence that they were not actively involved in the PACA violations and that they were merely nominal officers of Fresh America.

Before Congress amended PACA in 1995 to include an express exception for *nominal* officers, this circuit had for a number of years applied an "actual, significant nexus" test to determine whether a person was responsibly connected to an offending PACA licensee.

> Prior to the amendment of § 499a(b)(9) we held that an officer, director, or ten percent shareholder could rebut the presumption against her by showing either that the corporate violator is nothing more than the alter ego of its owner or that she was only a nominal officer, director, or shareholder of that corporation. *Bell v. Department of Agriculture,* 39 F.3d 1199, 1201 (D.C.Cir.1994). In order to prove that the corporation is the alter ego of its owner one must show that the owner so dominated the corporation as "to negate its separate personality." *Quinn,* 510 F.2d at 758. In order to prove that one was only a nominal officer or director, one must establish that one lacked any "actual, significant nexus with the violating company" and, therefore, neither "knew [n]or should have known of the [c]ompany's misdeeds." *Minotto v. USDA,* 711 F.2d 406, 408–409 (D.C.Cir.1983). *See also Quinn,* 510 F.2d at 756, n. 84 (observing that situation in which "the affiliation is purely nominal and the so-called officer had no powers at all" is "radically different" from one in which a genuine officer simply "does not use the powers of his office.")

Hart, 112 F.3d at 1230–31 (brackets in original); *see also Quinn,* 510 F.2d at 755 ("[T]he Perishable Agricultural Commodities Act was designed to strike at persons in authority who acquiesced in wrongdoing as well as the wrongdoers themselves."); *id.* (persons who carry the title of officer are not subject to the statute's employment restrictions if they demonstrate that they were "powerless to curb" the wrongdoing). The law of this circuit thus laid the foundation for the nominal officer exception enacted by Congress in 1995.

In this case, the Judicial Officer cited *Hart* and purported to apply the "actual, significant nexus" test in determining that Taylor and Finberg were responsibly connected to Fresh America. *Judicial Officer Decision* at 9, 1 J.A. 15. The petitioners do not take issue with the applicability of the "actual, significant nexus" test. Rather, they argue that the Judicial Officer reached the wrong conclusion because he misapplied the legal standard. We agree.

Under the "actual, significant nexus" test, "the crucial inquiry is whether an individual has an actual, significant nexus with the violating company, rather than whether the individual has exercised real authority." *Veg–Mix, Inc. v. U.S. Dep't of Agric.,* 832 F.2d 601, 611 (D.C.Cir.1987) (internal quotation marks omitted). Although we have consistently applied the 'actual, significant nexus' test, our cases make clear that what is really important is whether the person who holds the title of an officer had actual and significant power and authority to direct and affect company operations. For example, in *Kleiman & Hochberg,* the court found that the petitioner "did not prove that he qualified for the 'nominal' exception, nor could he do so[, because he] ... concede[d that] he owned 31.6 percent of the corporation's outstanding stock, was the company's President, and was 'actively engaged in the day-to-day operations, management, *and control* of [the company].' " 497 F.3d at 692 (emphasis in original). The court also tellingly rejected the suggestion that a person cannot be responsibly connected to a violating licensee unless he either knew or should have known about the violations and then failed to take action to counteract the actions of others constituting the violations. On this point, the court noted that "neither the statutory definition of 'responsibly connected' nor the statutory 'nominal' and 'alter ego' exceptions suggest such a knowledge requirement." *Id.* (accompanying parenthetical omitted).

This case stands in stark contrast to *Kleiman & Hochberg.* The Judicial Officer's decision gives lip service to the "actual, significant nexus" test, but it fails to apply the test in any coherent fashion. Under the applicable legal standard, the agency must carefully assess a person's actual power and authority at the violating company—not merely the person's title, background, and knowledge of PACA violations—in order to determine whether the person was responsibly connected to an offending PACA licensee. The Judicial Officer failed to do this.

As noted above, in reaching the conclusion that Taylor and Finberg were not merely nominal officers of Fresh America, the Judicial Officer relied primarily on three factors: the petitioners' professional backgrounds; annual reports and proxy statements that listed the petitioners as officers; and petitioners' knowledge of Fresh America's financial difficulties. Each of these factors may be relevant in

determining whether a person is merely a nominal officer. However, none of these factors, without more, is dispositive. Indeed, even taken together, these three factors do not demonstrate a person's actual power and authority within a company. Petitioners may have possessed impressive professional backgrounds and officer titles, and they may have been aware of the company's financial woes, and yet still have had no power or authority to alter the course of company operations.

The decisions in *Quinn,* 510 F.2d at 747, *Minotto,* 711 F.2d at 407, and *Bell,* 39 F.3d at 1200, make it clear that an individual's background may be *relevant* to the determination of whether he or she is a nominal officer. But we have never found this factor to be *dispositive.* If an individual has past experience in upper-level management, this would be consistent with a finding that the individual is currently working in upper-level management. But past experience is not proof of one's current station.

Similarly, although an individual's title can be relevant to a consideration of a person's current situation, title alone is not dispositive. Indeed, the statute makes this absolutely clear. Section 499a(b)(9) states that an "officer" "shall not be deemed to be responsibly connected" if the person demonstrates that he or she was only "nominally" an officer of the violating licensee. Obviously, title alone is not conclusive, unless the officer fails to demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of PACA and that he or she was only nominally an officer of a violating licensee. The nominal officer exception plainly contemplates situations in which a person's title is not consistent with the person's actual responsibilities.

The Judicial Officer erred in holding that, "absent very extraordinary circumstances, an individual who is an officer of a publicly traded company, and identified as an officer in the company's filings with the SEC, cannot be found to be a nominal officer as that term is used in the PACA." *Judicial Officer Decision* at 14, 1 J.A. 20. This is not a correct statement of the governing law. "[A]n officer may be 'nominal' even though the corporate records ... make him out to be a real one." *Bell,* 39 F.3d at 1202. The Department characterizes the Judicial Officer's opinion on this point as mere dictum or as an alternative holding. Resp'ts' Br. at

39–40. We disagree, for it is clear that the Judicial Officer viewed Fresh America's SEC filings as a critical factor in his decision.

Finally, the Judicial Officer cited Taylor and Finberg's knowledge of Fresh America's financial difficulties in determining that they were responsibly connected to the licensee. This, too, resulted in an erroneous application of the law. Knowledge may be relevant with respect to a consideration of whether a person was "actively involved in the activities resulting in a violation" of the statute. However, knowledge, without more, surely does not give compelling evidence of a person's actual power and station within a company. This court has made it clear that "neither the statutory definition of 'responsibly connected' nor the statutory 'nominal' and 'alter ego' exceptions suggest such a knowledge requirement." *Kleiman & Hochberg,* 497 F.3d at 692 (accompanying parenthetical omitted).

In *Minotto,* this court found that there was no evidence to "support the [Department Hearing Officer's] conclusion that Minotto knew or should have known of the Company's misdeeds." 711 F.2d at 409. But this statement was offered to confirm that Minotto "had no policy or decision-making role" and "was essentially a clerical employee." *Id.* This is very different from saying that it must be assumed that a person with knowledge of a company's wrongdoings has meaningful power and authority within the company. There are many people in company operations who may be aware of bad deeds by virtue of where or for whom they work, but nonetheless decline to participate in these deeds and have no power or authority to effect change. Indeed, in this case, Taylor and Finberg knew that Fresh America was in danger of violating PACA, but they failed to convince the board to promptly pay produce sellers. Just as a lack of knowledge cannot save a non-nominal officer from the consequences of PACA, *Kleiman & Hochberg,* 497 F.3d at 692, mere knowledge of PACA violations cannot turn a nominal officer into a full-fledged one.

As our decisions have made clear, actual power and authority are the crux of the nominal officer inquiry. In *Bell,* the petitioner "seem[ed] to have been made an officer and a director of Sunrise for the administrative convenience of the company" and "never participated in the formal decision-making structures of the corporation, such as board

meetings." 39 F.3d at 1204. Similarly, Minotto "had no policy or decision-making role," *Minotto,* 711 F.2d at 409, and Quinn "did not to any extent participate in the management of the company's affairs," *Quinn,* 510 F.2d at 753.

In this case, the Judicial Officer specifically found that "[t]he board of directors, with Mr. Hollingsworth as chairman, ran Fresh America." *Judicial Officer Decision* at 15, 1 J.A. 21. He also tellingly found that "Mr. Hollingsworth and the board of directors made decisions usually reserved for individuals at a lower level of authority," *id.* at 15–16, 1 J.A. 21–22. Yet, the Judicial Officer failed to take this into account in assessing whether the petitioners were merely nominal officers.

In sum, the Judicial Officer purported to apply the "actual, significant nexus" test, yet failed to consider whether Taylor or Finberg had actual power and authority at Fresh America. This defies reasoned decision-making. As the Court noted in *Allentown Mack:*

> Reasoned decision-making, in which the rule announced is the rule applied, promotes sound results, and unreasoned decision-making the opposite. The evil of a decision that applies a standard other than the one it enunciates spreads in both directions, preventing both consistent application of the law by subordinate agency personnel (notably ALJ's), and effective review of the law by the courts.

522 U.S. at 375, 118 S.Ct. 818. Because the Judicial Officer did not faithfully apply the applicable legal standard in determining whether the petitioners were responsibly connected to Fresh America, we vacate and remand to the agency to apply the correct legal standard as we articulate it today. "It is hard to imagine a more violent breach of [the reasoned decision-making] requirement than [when an agency] appl[ies] a rule of primary conduct or a standard of proof which is in fact different from the rule or standard formally announced." *Id.* at 374, 118 S.Ct. 818. We express no opinion on whether Taylor was actively involved in Fresh America's PACA violations, because the Judicial Officer never reached this issue.

C. The Judicial Officer's Decision that Fresh America Was Not the Alter Ego of Arthur Hollingsworth

Section 499a(b)(9) states:

> A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of [PACA] and that the person ... was not an owner of a violating licensee ... which was the alter ego of its owners.

The petitioners claim that the Judicial Officer erred in holding that Fresh America was not the alter ego of its chairman of the board, Arthur Hollingsworth. We disagree.

As we noted in *Kleiman & Hochberg,* "the 'alter ego' exception applie [s] to cases in which the violator, although formally a corporation, is essentially an alter ego of its owners, so dominated as to negate its separate personality. A petitioner who [is] not a true owner of such a corporation [will] be spared the consequences of the responsibly connected determination." 497 F.3d at 692 n. 8 (brackets in original) (internal quotation marks omitted). In this case, the Judicial Officer found that "the record contains no evidence that Mr. Hollingsworth and Fresh America Corp. were viewed as one and the same." *Judicial Officer Decision* at 16, 1 J.A. 22. This finding is clearly supported by substantial evidence. A fair reading of the entire record reveals that Fresh America was dominated by the board and its chairman, not by Hollingsworth alone. We therefore find no merit in petitioners' arguments on this point.

III. CONCLUSION

The petition for review is granted in part. The Judicial Officer's decision on the nominal officer issue is vacated and the case is hereby remanded to the agency for further proceedings consistent with this opinion.

BROWN, Circuit Judge, dissenting:

The court vacates the Judicial Officer's determination that Taylor and Finberg were responsibly connected to Fresh America because my colleagues believe the Judicial Officer "misapplied" our "actual, significant nexus" test. Maj. Op. 615. I respectfully disagree. It is the

court that misapplies the test in two respects: First, the court fails to defer to the Judicial Officer's legitimate focus on Taylor and Finberg's actual knowledge of their company's violations, in combination with other relevant indicators of their "responsibly connected" status, even though we have previously suggested such knowledge may be dispositive. Second, the court makes "power and authority" the *sine qua non* of responsible connection to the PACA-violating company, even though we have previously denied such a requirement.

I

The Judicial Officer found that Taylor and Finberg were "responsibly connected" to Fresh America under the "actual, significant nexus" test, in part because "they knew, or should have known, about the violation being committed and failed to counteract or obviate the fault of others." *Judicial Officer Decision* at 13–14, 1 J.A. 19–20. Specifically, the Judicial Officer found, "Ms. Taylor and Mr. Finberg knew of Fresh America Corp.'s financial difficulties. Although they told the board of directors of the prompt payment provisions of the PACA, they failed to convince the board of directors to comply with the provisions of the PACA." *Id.* at 14, 1 J.A. 20. The record amply supports this finding. Finberg testified that at one point he called a meeting of the board without the chairman's permission, and he and Taylor talked to the board about Fresh America's late produce payments for "ten or fifteen minutes." Hearing Tr. (Jan. 30, 2008) at 813, 1 J.A. 289. Taylor testified that she discussed "PACA payables" with Hollinger, but he responded, "PACA people [who] want to get paid in ... 30 days" were "crybabies." *Id.* at 545, 1 J.A. 215. She recalled that when a $5 million investment came in, it was made clear "that additional money ... was not to be used to pay down PACA payables." *Id.* at 546, 1 J.A. 216.

Contrary to the court's suggestion, the Judicial Officer did not hold that "mere knowledge of PACA violations [can] turn a nominal officer into a full-fledged one." Maj. Op. 617. We need not decide whether knowledge of company wrongdoing is sufficient by itself, because the Judicial Officer also relied in part on the officers' high levels of compensation—a detail the court does not mention. *Judicial Officer Decision* at 11–12, 1 J.A. 17–18. The Judicial Officer found Taylor and Finberg earned salaries of $175,000 and $145,000, respectively, and compensation packages that included "bonus potential, stock options,

and other 'fringe benefits.' " *Id.* Compensation is a relevant consideration under the "actual, significant nexus" test. *See Minotto v. USDA,* 711 F.2d 406, 408–09 (D.C.Cir.1983).

Moreover, the Judicial Officer expressly considered Taylor and Finberg's "experience, training, and education," *Judicial Officer Decision* at 13, 1 J.A. 19, which were consistent with genuine officers'. *Id.* at 10–13, 1 J.A. 16–19. Like compensation, professional qualifications are relevant to the "actual, significant nexus" test. *See Veg–Mix, Inc. v. USDA,* 832 F.2d 601, 612 (D.C.Cir.1987) ("[The officer's] legal training put him on notice of the responsibilities of a corporate director.... Thus his case is easily distinguishable from those of the nominal officer and corporate director in *Quinn* and *Minotto,* who were unsophisticated persons employed by the wrongdoers."); *Minotto,* 711 F.2d at 409 (reversing the Department's "responsibly connected" determination because, among other reasons, the so-called officer "lacked both the training and the experience to be an active director").

Taylor is a certified public accountant with prior experience as a "chief financial officer and vice president of finance and administration" at The Great Train Store, a company she helped to take public. Immediately before coming to Fresh America, she worked with the CEO of another troubled company, Intellisys Group, to get it refinanced. When Intellisys was purchased by another company, Taylor stayed on to help it through the transition. *Judicial Officer Decision* at 11, 1 J.A. 17.

Finberg was also well qualified to serve as an officer. He rose up through the ranks of Fresh America over several years, starting with summer jobs at its predecessor company. While still in college, Finberg worked full-time as general manager of two locations. After graduating, Finberg earned a series of promotions, serving variously as corporate liaison with the company's primary customer, director of customer service, director of national programs, and general manager of a distribution center. Only after gaining this leadership experience was Finberg elevated to vice president of sales and marketing, and eventually vice president of business development. *Id.* at 12, 1 J.A. 18.

This case therefore presents the question whether the Department's "responsibly connected" determination is an arbitrary and capricious

application of the "actual, significant nexus" test when the officer has actual knowledge of her company's PACA violations and a salary and résumé in keeping with her title. I think not.

We have previously recognized that an officer's knowledge of her company's PACA violations may be decisive under the "actual, significant nexus" test. In *Bell v. USDA*, the possibility that knowledge of company wrongdoing might confer "responsibly connected" status on an otherwise nominal "officer" led us to remand the Department's decision "for further consideration." 39 F.3d 1199, 1202 (D.C.Cir.1994). Bell was a produce salesman who performed no duties "that can be specifically attributed to his being vice-president." *Id.* at 1200. He had heard, however, "that some of the company's checks had bounced." *Id.* at 1200. We suggested that even where the employee was dubbed an "officer" only "for the administrative convenience of the company" and even where he "never participated in the formal decision making structures of the corporation," the Department could find him " responsibly connected" by virtue of his knowledge of the company's PACA violations. 39 F.3d at 1204. Although the Judicial Officer in *Bell* had made no finding about Bell's knowledge, we observed "Bell's awareness of some company wrongdoing may provide a distinction between this case and *Quinn* and *Minotto*." *Id.* at 1204. We rejected the Department's litigation position that under our prior cases "ignorance of company wrongdoing is a *sine qua non* of a finding that an officer's or director's relation to the corporate licensee was nominal," *id.,* but we implied that the Department could reasonably interpret some kinds of knowledge as establishing responsible connection *per se,* and asked the Department on remand to "formulate some principle delineating the role of differing degrees of knowledge of general corporate difficulties, or of 'transactions which gave rise to the underlying violations', or of the violations themselves, consistent with our cases." *Id.* at 1204–05.

Although the Judicial Officer in this case did not set out the full taxonomy we requested in *Bell,* he did make an acceptable judgment about how to treat "knowledge ... of the violations themselves." *Id.* Remember, Taylor and Finberg were found to have actual—not just constructive—knowledge of the PACA violations. The Judicial Officer said that when Taylor and Finberg "failed to convince the board of directors to comply with the provisions of PACA," their "only option to

avoid a responsibly connected determination was to resign as officers of Fresh America." *Judicial Officer Decision* at 14, 1 J.A. 20. In other words, direct knowledge of a PACA violation, in the mind of an "officer" whose compensation, "experience, training, and education" are commensurate with the title, constitutes "responsible connection" to the violating company.

The court is hard-pressed to call this an unreasonable interpretation of the statute, especially since we have stated an even harsher rule in dicta. *Hart v. USDA,* 112 F.3d 1228, 1231 (D.C.Cir.1997) ("In order to prove that one was only a nominal officer or director, one must establish that one lacked any 'actual, significant nexus with the violating company' and, *therefore, neither 'knew nor should have known* of the company's misdeeds.' " (emphasis added) (quoting *Minotto,* 711 F.2d at 408–09)). The Judicial Officer's remedy is certainly "consistent with our cases." *Bell,* 39 F.3d at 1204–05. In fact, it comes straight from *Martino v. USDA*:

> "The fact that an individual has not exercised 'real' authority in the sanctioned company is not controlling: certainly the individual could have resigned as an officer and director.... It was his free choice not to do so. Having made that choice, the appellant[s] assumed the burdens imposed by the Act."

801 F.2d 1410, 1414 (D.C.Cir.1986) (quoting *Birkenfield v. United States,* 369 F.2d 491, 494–95 (3d Cir.1966)).

II

The court recognizes that an officer's knowledge of his company's PACA violations is relevant to whether he is responsibly connected, Maj. Op. 616, but concludes that it cannot be dispositive because "actual power and authority are the crux of the nominal officer inquiry," *Id.* at 617. This turns the doctrine on its head. Under our case law, "the crucial inquiry is whether an individual has an 'actual, significant nexus with the violating company,' *rather than whether the individual has exercised real authority.*" *Veg–Mix,* 832 F.2d at 611. In other words, "[t]he fact that an individual has not exercised 'real' authority in the sanctioned company is not controlling." *Martino,* 801 F.2d at 1414. The court now

contradicts these statements by superimposing a "power and authority" requirement on the "actual, significant nexus" test.

Until today, that test contained no such requirement. Instead, managerial control was a sufficient—but not necessary—indicator of the requisite nexus with the violating company. *See Siegel v. Lyng,* 851 F.2d 412, 417 (D.C.Cir.1988). We have recognized an officer may be responsibly connected to a violating company in multiple ways, of which real managerial power is only one. For example, a minority shareholder may not have actual power or authority to prevent (or even discover) the company's PACA violations, but our cases have approved a sort of strict liability for so-called "officers" who hold a certain percentage of the violating company's stock. *See Veg–Mix, Inc. v. USDA,* 832 F.2d 601, 611 (D.C.Cir.1987) ("In *Martino,* we found that ownership interest of 22.2 percent of the violating company's stock was enough support for a finding of responsible connection." (citing 801 F.2d at 1414)).

Even if the court's new "power and authority" test were one reasonable interpretation of the statute, it is not the interpretation employed by the Judicial Officer in this case, nor is it required by our precedent. After telling the Department it could find at least some kinds of knowledge of company wrongdoing to be dispositive evidence of an officer's "actual, significant nexus" to the violating company, *see Bell,* 39 F.3d at 1204–05, we cannot now declare arbitrary and capricious the Judicial Officer's decision based on Taylor and Finberg's actual knowledge of Fresh America's consummated PACA violations, along with compensation and qualifications commensurate with the officers' titles. We must defer to the Department's reasonable interpretation. *See Coosemans Specialties, Inc. v. USDA,* 482 F.3d 560, 564 (D.C.Cir.2007).

III

I do not mean to suggest the Department is bound forever to apply the "actual, significant nexus" test. We have previously indicated the 1995 amendment to 7 U.S.C. § 499a(b)(9) might call for different criteria. *See Norinsberg v. USDA,* 162 F.3d 1194, 1199 (D.C.Cir.1998). Perhaps, we could have viewed *Kleiman & Hochberg, Inc. v. USDA,* 497 F.3d 681 (D.C.Cir.2007), as a paradigm shift rendering the old test obsolete. Instead, the court treats that case as discerning a "power and

authority" requirement in the "actual, significant nexus" test even though we neither mentioned that test nor suggested the officer's managerial control was the cause-in-fact—much less a necessary condition—of his responsible connection to the company. *See* 497 F.3d at 692. He also owned 31.6 percent of the company's stock, *id.,* which is more than "enough support for a finding of responsible connection," *Veg–Mix, Inc.,* 832 F.2d at 611. I have no objection in principle to a demand for evidence of "power and authority." But the Judicial Officer in this case explicitly employed the "actual, significant nexus" test, *Judicial Officer Decision* at 13, 1 J.A. 19, and neither the parties nor my colleagues have seen fit to challenge its applicability.[1FN1] If the "actual, significant nexus" test applies, as the court holds it does, the Judicial Officer reasonably determined Taylor and Finberg's direct knowledge of their company's PACA violations, combined with their officer-appropriate salaries and qualifications, makes them responsibly connected to the violating company. Only if that test does *not* apply may a finding of "power and authority" be required instead. We cannot have it both ways.

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[1] We have the authority to consider the propriety of the Department's continued application of the "actual, significant nexus" test even if the parties do not object. "[T]he appellate court ... always possesses discretion to reach an otherwise waived issue logically 'antecedent to and ultimately dispositive of the dispute before it.' " *Crocker v. Piedmont Aviation,* 49 F.3d 735, 740 (D.C.Cir.1995) (quoting *United States Nat'l Bank of Oregon v. Independent Ins. Agents of America,* 508 U.S. 439, 447, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993)).

PERISHABLE AGRICULTURE COMMODITIES ACT

DEPARTMENTAL DECISIONS

SAMUEL S. PETRO,
PACA APP Docket No. 09-0161
and
BRYAN HERR,
PACA APP Docket No. 09-0162
Decision and Order
Filed April 7, 2011

PACA –

Decision and Order

Richard M. Kaplan, Esq. and Tanya N. Garrison, Esq. for the Petitioners
Ciarra A. Toomey, Esq. and Christopher Young, Esq. for AMS.
Decision and Order by Chief Administrative Law Judge Peter M. Davenport.

Preliminary Statement

This proceeding was initiated under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §499a, *et seq.*) (Act) by the petitions for review filed by the Petitioners Samuel S. Petro (Petro) and Bryan Herr (Herr) of the determinations made by Karla D. Whalen, Chief of the PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service (Respondent) that they were "responsibly connected" (as that term is defined in Section 1(b)(9) of the Act (7 U.S.C. §499a(b)(9))) to Kahil Fresh Marketing, Inc., d/b/a Houston's Finest Produce Co. (Houston's Finest), during the period of time that Houston's Finest violated Section 2 of the Act (7 U.S.C. §499b).

Houston's Finest, a PACA licensee, was the subject of a disciplinary complaint that resulted in a Default Decision and Order being entered against it on March 23, 2010.[1] The Default Decision and Order authorized publication of the finding that Houston's Finest willfully, flagrantly, and repeatedly violated Section 2 of the Act (7 U.S.C.

[1] *In re: Kalil Fresh Marketing, Inc., d/b/a Houston's Finest Produce Co.*, Docket No. 09-0095, 69 Agric. Dec. _____(March 23, 2010)

§499b(4)) by failing to make full payment promptly to 55 sellers of the agreed purchase prices in the amount of $1,617,014.93 for 645 lots of perishable agricultural commodities which Houston's Finest purchased, received, and accepted in the course of interstate commerce during the period October of 2007 through February 2008.

The petitions for review were consolidated for hearing and an oral hearing was held in Washington, DC on January 20 and 21, 2011. Samuel S. Petro and Bryan Herr were represented by Richard M. Kaplan, Esquire and Tanya N. Garrison, Esquire, Weycer Kaplan Pulaski & Zuber, PC, Houston, Texas and the Respondent was represented by Ciarra A. Toomey, Esquire and Christopher Young, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, DC.

At the hearing, the two Petitioners and three other witnesses testified on the Petitioners' behalf. Two witnesses were called by the Respondent.[2] 14 exhibits were introduced and admitted by the Petitioners and the certified Agency records containing 14 exhibits for Petro and 15 exhibits for Herr were admitted on behalf of the Respondent.[3] Briefs have been filed on behalf of all of the parties and the matter is now ripe for disposition.

Statutory Background

The Perishable Agricultural Commodities Act, 1930,[4] was enacted to suppress unfair and fraudulent practices in the marketing of perishable agricultural commodities in interstate or foreign commerce.[5] When enacted, the legislation had the approval of the entire organized fruit and vegetable trade, including commission merchants, dealers and brokers, all of whom benefit from the Act's protections.[6] The Act was

[2] The transcript of the proceedings is contained in two volumes. References to the Transcript will be indicated as Tr. And the page number.

[3] Petitioner's Exhibits are indicated as PX 1-14 and the Agency exhibits as SPRX 1-14 (Petro) and BHRX 1-15 (Herr).

[4] 7 U.S.C. §499a-499s.

[5] HR Rep No 1041, 71st Cong, 2d Session 1 (1930)

[6] *Id.* 2,4. In 1949, both the House and Senate found that the PACA regulatory program had "become an integral part of the marketing of fruit and vegetables and it has the unanimous support of both producers and handlers in the fruit and vegetable industry." HR Rep No 1194, 81st Cong, 1st Session 1 (1949); *accord,* S Rep No 1122, 1st Session 2 (1949).

intentionally a "tough" law enacted for the purpose of providing a measure of control over a branch of industry which is engaged almost exclusively in interstate commerce, which is highly competitive, and in which the opportunities for sharp practices, irresponsible business conduct, and unfair methods are numerous.[7] *Kleiman &. Hochberg, Inc. v. U.S. Dep't of Agric.*, 497 F.3d 681, 693 (D.C. Cir. 2007).

Under the Act, persons who buy or sell specified quantities of perishable agricultural commodities at wholesale in interstate commerce are required to have a license issued by the Secretary of Agriculture. 7 U.S.C. §499a(b)(5)-(7), 499c(a), and 499d(a). The Act makes it unlawful for a licensee to engage in certain types of unfair conduct and requires regulated merchants, dealers, and brokers to "truly and correctly…account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had." 7 U.S.C §499b(4).

Orders suspending or revoking a license, or a finding that an entity has committed a flagrant or repeated violation of Section 2 of the Act have significant collateral consequences in the form of employment restrictions for persons found to be "responsibly connected" with the violator.[8] Prior to 1962, the employment restrictions found in the Act were imposed on individuals connected with the violator "in any responsible position.[9]" 1962 amendments replaced the "in any responsible position" language with a "responsibly connected" provision. The term "responsibly connected" is currently defined as follows:

(9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 percentum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not

[7] S Rep No 2507, 84th Cong, 2d Session 3-4 (1956), *reprinted in* 1956 U.S.C.C.A.N. 3699, 3701; HR Rep No 1196, 84th Cong, 1st Session 2 (1955).

[8] 7 U.S.C. §499h(b). Under the Act, PACA licensees may not employ, for at least one year, any person found "responsibly connected to any person whose license has been revoked or suspended, or who has been found to have committed any flagrant or repeated violation of 7 U.S.C. §499b.

[9] 7 U.S.C. §499h(b) (1958).

an owner of a violating licensee or entity subject to license which was the alter ego of its owners. 7 U.S.C. §499a(9).

A second sentence was added to the provision by a 1995 amendment[10] and affords those who would otherwise fall within the statutory definition of "responsibly connected" an opportunity to demonstrate that they were not responsible for the violation. Extensive analysis of and comment upon the amendment has been made in a number of decisions, including *Michael Norinsberg v. United States Department of Agriculture and United States of America,* 162 F.3d 1194, 1196-1197 (D.C. Cir. 1998), 57 Agric. Dec. 1465, 1465-1467 (1998); *In re Lawrence D. Salin,* 57 Agric. Dec. 1474, 1482-1487 (1998); and *In re Michael J. Mendenhall,* 57 Agric. Dec. 1607, 1615-1619 (1998).

The amendment created a two prong test for rebutting the statutory presumption of the first sentence:

…the first prong is that a petitioner must demonstrate by a preponderance of the evidence that petitioner was not actively involved in the activities resulting in a violation of the PACA. Since the statutory test is in the conjunctive ("and"), a failure to meet the first prong of the statutory test ends the test without recourse to the second prong. However, if a petitioner satisfies the first prong, then a petitioner must meet at least one of two alternatives: that a petitioner was only nominally a partner, officer or director, or shareholder of a violating licensee or entity subject to license which was the alter ego of its owners. *Salins,* 57 Agric. Dec. 1474, 1487-1488.

Norinsberg articulated the standard for the first prong as follows:

The standard is as follows: A petitioner who participates in activities resulting in a violation of the PACA is actively involved in those activities, unless the petitioner demonstrates by a preponderance of the evidence that his or her participation was limited to performance of ministerial functions only. Thus, if a petitioner demonstrates that he or

[10] Prior to the amendment, the circuits were divided as to whether the presumption of §499a(b)(9) was irrebutable. Most adopted a per se rule. *See, e.g., Faour v. United States Dep't of Agric.,* 985 F. 2d 217, 220 (5th Cir. 1993); *Pupillo v. United States*, 755 F. 2d 638, 643-644 (8th Cir. 1985); *Birkenfield v. United States,* 369 F.2d 491, 494 (3rd Cir. 1966); *Zwick v. Freeman,* 373 F.2d 110, 119 (2d Cir. 1967), *cert. denied,* 389 U.S. 835 (1967). The DC Circuit however had adopted a rebuttable presumption test. *See Quinn v. Butz,* 510 F.2d 743 (D.C. Cir. 1975), 34 Agric. Dec. 7 (1975).

she did not exercise judgment, discretion, or control with respect to the activities that resulted in a violation of PACA, the petitioner would not be found to have been actively involved in the activities that resulted in a violation of the PACA and would meet the first prong of the responsibly connected test. *Norinsberg,* 58 Agric. Dec. at 610-611.

This case accordingly turns upon whether the Petitioners met their burden of proof and rebutted the statutory presumption.

Discussion

Initially, it is clear that the statutory threshold contained in the first sentence of §499a(b)(9) is met in this case as the evidence is uncontroverted that the Petitioners each purchased a 25% stock interest in Houston's Finest. Tr. 349, SPRX-8, BHRX-8. Both Petro and Herr argue however that they were only passive investors in the corporation, asserting that even after their stock purchase the entity was dominated by John Kalil (Kalil), who then owned 50% of the corporate stock, served as the Chief Executive Officer of the company, and ran the corporation's day to day operations. Tr. 152-153, 349-350. Their position is only partially confirmed as to day to day operations by Kalil's testimony that he ran the corporation after the stock purchase by Petro and Herr and supervised the individuals responsible for sales, purchasing, the warehouse operations and the necessary bookkeeping functions which would include the payments made to suppliers. Tr. 349-350, 382-386.

Thus, by reason of their professed lack of involvement with the violating corporation, the Petitioners claim that at the time of the violations, they were only *nominal* directors and shareholders, lacking any actual, significant nexus with the violating company. *See, Bell v. Dep't of Agric.,* 39 F.3d 1199 at 1201(D.C. Cir. 1994) (emphasis in original).

The test for determining whether an individual had an "actual, significant nexus with the violating company" was recently revisited by the DC Circuit in the case of *Cheryl A. Taylor and Steven C. Finberg v. United States Dep't of Agric. and United States of America,* No. 09-1270 (January 7, 2011; *Resubmitted* March 2, 2011), 2011 WL 710460, 629 F.3d 241 (D.C. Cir. 2011). In that case, Senior Circuit Judge Edwards, writing the majority opinion, indicated "[u]nder the actual, significant nexus" test, "the crucial inquiry is whether an individual has an actual,

significant nexus with the violating company, rather than whether the individual has exercised real authority." *Id., Slip Op. at* 13 (citing *Veg-Mix, Inc. v. U.S. Dep't of Agric*., 832 F.2d 601, 611 (D.C. Cir. 1987) (internal quotation marks omitted). Citing *Quinn v. Butz*, 510 F.2d 743, 755 (D.C. Cir. 1975) and *Bell,* the Court agreed with the Petitioners that an officer of the offending company is not considered to be "responsibly connected" to a violating licensee (even though the statutory 10% threshold was met) if that person was not actively involved in the PACA violation **and** was "powerless to curb it." *Id.* The court went on, "…our decisions have made clear, actual power and authority are the crux of the nominal officer inquiry." *Id., Slip Op.* at 17.

Well prior to the 1995 amendment to Section 499(a)(9), the DC Circuit had considered the statutory presumption of the section to be rebuttable. *Quinn,* at 757. *Hart v. Dep't of Agric.,* 112 F.3d 1228, 1230 (D.C. Cir. 1997). Where responsibility was not based on an individual's personal fault, it could be based upon his or her failure to counteract or obviate the fault of others. *Bell,* at 1201. In the past, knowledge of the violations, whether actual or constructive, was found to be highly significant. In discussing the actual, significant nexus test in *Minotto v. USDA,* 711 F.2d 406 (D.C. Cir. 1983) the court indicated that "…In order to prove that one was **only** a nominal officer or director, one must establish that one lacked any 'actual, significant nexus with the violating company' and therefore, neither '**knew [n]or should have known of the [c]ompany's misdeeds.**'" *Minotto* at 408, 409. (emphasis added) An affiliation would however be considered nominal if a so-called officer was unsophisticated and the position had no powers at all. *Bell,* at 1201, *Minotto,* at 408, *Quinn,* at 756.

A significant difference was found to exist however between situations where the affiliation was purely nominal with the so-called officer having no authorized powers at all and those in which a genuine officer [or director] simply did not use the powers of his office.[11] *Quinn at* 756, n.84. In *Hart v. Dep't of Agric.,* 112 F.3d 1228 (D.C. Cir. 1997), the court made it clear that the Act was designed to strike at persons in authority who acquiesced in the wrongdoing as well as the wrongdoers themselves and that individuals seeking to avoid employment restrictions must demonstrate that they were "powerless to curb" the wrongdoing. *Hart at* 1230-1231.

[11] During the hearing, Petro conceded that he could have used the authority set forth in the Stock Purchase Agreement, stating "Yes, I had the authority, I could have." Tr. 93.

Not surprisingly, while Petro conceded that he did have some authority,[12] both Petro and Herr raised their individual 25% shareholder interest as indicia of their impotence to alter any wrongdoing. Tr. 160-161. Indeed, Herr testified:

I - - there was nothing I could do. There was absolutely nothing I could do as I had no control over anything. John ran that company and basically he let everybody know that this is his baby, it's what he does, it's all about him.

So basically, I just watched money disappear. You know, I - - it was a bad deal.

Tr. 182.

Petro similarly testified:

I believe John just believed that he could handle it all and didn't need anybody's advice, is the only thing I can come up with. Tr. 59-60.

….

John ran the company. I didn't have…I did not have that authority. Tr. 68.

….

…John ran the company. I didn't have access to things. Tr. 72.

Prior caselaw would appear to have suggested that although Petro and Herr both claim to have been powerless to stop the wrongdoing, liability might nonetheless have been imposed upon them once they were joined as co-defendants in litigation in December of 2007. Once served as defendants, they had actual knowledge of the corporation's failure to pay suppliers and neither of them acted to divest themselves of or surrender their stock, resign from the board of directors or to otherwise take immediate decisive action to close down the business. *Martino v. USDA,* 801 F.2d 1410, 1414 (D.C. Cir. 1986). Instead, (a) despite their close relationship as partners in Country Fresh, (b) their combined ownership of half of the stock of the company, (c) their status as directors (at least according to the terms of the Stock Purchase Agreement), and (d) even

[12] See prior footnote. Tr. 93.

after being joined in December of 2007 in a lawsuit alleging non-payment they permitted Kalil to continue to make produce purchases for which it could not pay for over another month before the corporation finally shut its doors and filed for bankruptcy in February of 2008.[13] Tr. 396.

The *Taylor and Finberg* majority opinion appears to represent a volte-face departing somewhat from the prior standard, indicating:

…However, knowledge, without more, surely does not give compelling evidence of a person's actual power and station within a company. This court has made it clear that "neither the statutory definition of 'responsibly connected' nor the statutory 'nominal' and 'alter ego' exceptions suggest such a knowledge requirement. *Kleiman & Hochberg,* at 692.

The dissent, written by Circuit Judge Brown, disagreed, criticizing the majority for failing to defer to the Judicial Officer's legitimate focus on Taylor and Finberg's actual knowledge of the company's violations, in connection with other relevant factors of their responsibly connected status even though the circuit had previously suggested that such knowledge would be relevant. Judge Brown suggested that the majority made "power and authority" the *sine qua non* of responsible connection to the violating company, even though the circuit had previously denied such a requirement. *Slip Op.* at 20.

Although the *Taylor* decision is still potentially subject to modification, as a DC Circuit decision, it has effective nationwide applicability. The decision appears to significantly lessen a Petitioner's burden of rebuttal of the statutory presumption, and in so doing, casts a note of uncertainty into an area of the law that heretofore had been predictable; however, I consider it to be binding upon me in evaluating the two cases presently before me.

During the hearing, Petro suggested that his motivation for becoming involved with Houston's Finest had been prompted by his family relationship with his cousin John Kalil. He wanted to help Kalil because he had worked with John's father Charles Kalil who had been "like a second dad to him." Tr. 32, 34-35, 157. The evidence is conflicting as to who first approached whom about a sale of an interest in the

[13] Kalil testified that during the last month of operation, the corporation's payable grew about $600,000.00. Tr. 396.

corporation;[14] however, it is apparent that possibly a couple of months before July of 2002, Kalil, then in need of financial assistance, had discussed with Petro the corporation's need for additional capital. Tr. 33, 157. Petro saw the overture as an opportunity to get the company on a solid footing and to provide an opportunity for his son Michael Petro to work with Kalil to build something for the future. Tr. 34-35, 157. While the evidence strongly suggests that Petro could easily have loaned money to Kalil without acquiring an ownership interest, for reasons which remain unclear, he opted to take an equity position in the financially troubled corporation. During the same time frame Petro approached his business partner Bryan Herr and persuaded him to join in becoming a shareholder in Houston's Finest. Tr. 156. Based upon Herr's faith and trust in Petro as his partner, Herr agreed to make the investment.[15] Tr. 156-158.

What emerged from the discussions was a Stock Purchase Agreement which was prepared by Petro's accountant Jerry Paul.[16] Tr. 42, 358, 439. Executed on July 10, 2002, the Stock Purchase Agreement included the following in its provisions:

1. Petro and Herr would receive 50% of the stock of Kalil Fresh Marketing, Inc. (25% each) for the sum of $75,000.00. Tr. 54-55, 90, 158-160, 227, 230.

2. Petro and Herr would assist (with personal guarantees, if required) in obtaining a line of credit from Southwest Bank in the amount of $500,000.00, to be increased to $1,000,000.00 as business improved.

3. The corporation would effective January 1, 2003 henceforth do business as Houston's Finest Produce Company, Inc. Tr. 377.

4. Petro's son Michael Petro would be hired as a Vice President at compensation specified in the agreement. Tr. 51-55, 114-115, 353.

5. Kalil, Petro and Herr were named to the board of directors so long as corporate status was maintained.[17] In the event of conversion of the

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[14] Petro claimed that Kalil approached him. Tr. 156. Kalil testified that selling part of the corporation was Petro's idea. Tr. 439.

[15] One is reminded of the character Ben Rumson's (played by Lee Marvin) articulation of the duties of a partner expected of a partner to Pardner (Clint Eastwood) in the 1969 Paramount Pictures film *Paint Your Wagon.*

[16] Paul was also involved in keeping the books for Houston's Finest. Tr. 387.

[17] The agreement envisioned dissolving the corporation and forming a limited partnership; however, the necessary steps to effect such a change were never undertaken. The evidence is abundantly clear that the usual corporate formalities were not observed, such as the issuance of stock certificates, annual or more frequent formal meetings of the

corporation to a limited partnership, Kalil, Petro and Herr would then be placed on the partnership's Board of Management.

6. Petro and Herr were given specific **input and authority** over several areas, including deciding what accounts to sell to and upon what terms, equipment purchases, major personnel changes, sales strategies, and buying strategies. Tr. 93, 114.

7. The right of any of the owners to cause an independent audit by an independent accounting firm. Tr. 134.

SPRX-8; BHRX-8 (Emphasis supplied)

Both Petro and Herr have significant experience and lengthy involvement in the produce industry and testified that at the time of their purchase they both were heavily engaged with Country Fresh[18] and considered their stock ownership of 50% of Houston's Finest as merely an investment.[19] Tr. 35-36, 44, 156-158. Both individuals are very successful and astute businessmen with excellent reputations in the produce industry, with Petro's self characterization of having been "born in the produce industry" with nearly 50 years in the industry and Herr's briefer, but still lengthy experience of a quarter of a century. Tr. 27, 31, 89, 149, 150-151, 153-155. Over their many years in the industry, neither individual had ever been associated with any entity cited for a violation of the Act, and both acknowledge that they are well aware of its stringent requirements for paying suppliers. Tr. 30, 66, 88-90, 153-154.

Despite Petro's asseveration of lack of participation in Houston's Finest, it is clear that his involvement exceeded that of a passive investor. Direct involvement in the particular transactions that were left unpaid is not required. *In re: Charles R. Brackett, et al.,* 64 Agric. Dec. 942, 956 (2005). Participation in corporate decision-making has been enough to

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board of directors and or shareholders, keeping of minutes with board approval of certain corporate actions and similar activities. Tr. 44-49, 158-167. With the existence of such delicts, board members and shareholders may in many jurisdictions be subjected to individual liability under a theory of "piercing the corporate veil." The decision in *Quinn* might suggest that where a company was not really a corporation, it might become an alter ego of its owner(s). 34 Agric. Dec. 7, 26-29(1975).

[18] Country Fresh was involved in the sale of fresh cut fruits and vegetables which would be packaged, whereas Houston's Finest's market was characterized as the more traditional buying and selling of fruits and vegetables in the same form it was purchased. Tr. 150. As the two entities served different markets, they were not competitors.

[19] Herr indicated that from the outset he would not have had any time to devote to Houston's Finest as he was spending as many as 120 hours per week running Country Fresh and "didn't have time to go down there." Tr. 169.

find active involvement. *In re: Lawrence D. Salins,* 57 Agric. Dec. 1474, 1489 (1998). In addition to placing his son Michael Petro with the corporation in a well paying position with the title of the Vice President of Sales where he could serve as Petro's "eyes and ears" (Tr. 51, 378.), Petro was instrumental in bringing Avendra, a large account that was the buying arm for the Hyatt and Marriott hotel chains to Houston's Finest. Tr. 350-352. Later when Kalil complained that the contract was not as profitable as it should be, Petro renegotiated the subsequent extension on more favorable terms. Tr. 436. Petro discussed with Kalil which customers Houston's Finest was selling to, which price lists were being used and what type of services were being offered. Tr. 352, 356. Petro acknowledged discussing the Avendra account with Kalil and made regular visits to the business where he would discuss sales strategies with his son Mike and the other sales staff. Tr. 58, 123, 360. Although it was Herr that actually signed the loan documents for the line of credit at Southwest Bank, the evidence indicates that Herr's involvement was at Petro's request as he was out of town and it was Petro who had arranged the transaction. Tr. 136, 353-354. Petro also monitored whether payments were being made on the loan. Tr. 61-63. On other occasions, as contemplated in the Stock Purchase Agreement, he exercised his authority in personnel decisions, recommending that "Rosanna" be hired. Tr. 358-359. Petro also visited Houston's Finest's customers, entertaining them with meals and season tickets for which he was reimbursed his travel and other expenses. Tr. 120-122, 360-361. Even the decision as to the type of bankruptcy that the violating corporation would file was influenced, if not dictated by Petro. Tr. 371-372.

By way of contrast, it is apparent that Herr had far less contact with Houston's Finest than did Petro. The evidence establishes only ministerial involvement with the line of credit which Petro had arranged[20] and providing Kalil with information about refrigeration well before the violations period when changes were made to the warehouse operation to expand the amount of refrigerated space the corporation had. Tr. 357-358. His testimony that Country Fresh required 120 hours of his

[20] As Petro was unavailable at the time of the loan closing, he asked Herr to sign the loan documents for Houston's Finest's line of credit at Southwest Bank as President of Country Fresh, Inc. Tr. 62-63, BHRX-9. Herr testified that he co-signed the note "Because Sam asked me to." Tr. 170. and "Because I knew that Sam would stand behind it, yes." Tr. 171. When asked: "You weren't concerned about signing it personally because Sam would pay it if you had to? Herr answered: "That is correct." and "That's exactly what happened." Tr. 171.

time per week, although possibly hyperbole, sounded genuine and credible.[21] Devotion of even less time to Country Fresh would have been manifestly inconsistent with any real ability to have had any significant involvement with Houston's Finest's operations. Tr. 169. Moreover, Herr was not involved in negotiating the Stock Purchase Agreement, had no intentions of performing any duties for Houston's Finest, and although the Stock Purchase Agreement named Herr as a director, never attended any board meetings, never received a stock certificate, never signed any document as a corporate officer or director of Houston's Finest, and never received a salary, dividend, K-1, or reimbursement from the corporation. Tr. 160-167. The testimony throughout the hearing established him as a passive participant, distanced from any significant nexus to any "exercise of judgment, discretion, or control with respect to the activities that resulted in a violation of the PACA" related to any violations of the Act and relying upon his partner Petro to pass on any information concerning the investment he had made only at Petro's urging, confident that Petro would stand good for any problems. *Norisberg,* 58 Agric. Dec. at 611, Tr. 168, 170-172.

Unlike the unsophisticated individuals and the faux corporate positions found in *Bell, Minotto* and *Quinn*, the facts in this case demonstrate that Petro participated in the very corporate decision making activities enumerated in the Stock Purchase Agreement. As an experienced and sophisticated businessman fully familiar with the payment provisions of the Act, Petro elected to take both an equity position and director's seat in the violating company and participated actively in its activities. Given that active participation, Petro should not escape liability with claims of inability and impotence to act based upon a claim of minority ownership.[22] The evidence is compelling that Petro exercised substantial influence in corporate decision making and activites, but failed when necessary to exercise the authority that he admitted that he possessed.[23] Tr. 66-67, 93. Nor may Petro claim

[21] Country Fresh is a large operation with 800-1000 employees. Tr. 30, 152.

[22] Petro admitted that he would have removed Kalil had he known the full extent of the corporation's financial problems. Tr. 67. Petro indicated that he paid the entire line of credit liability off as "…that was my responsibility because - - it was - - it wasn't Bryan's fault and, as a partner, I put him in that position…" Tr. 76-77. Petro went on: "Bryan signed that note because I was his partner. If Bryan had asked me to do something, I would have said yes…." Tr. 78.

[23] Petro testified that he should have "stepped forward and gone into the company and put people in there to find out what the problem was." Tr. 66-67.

ignorance. Indeed, Petro's liability is consistent with the long recognized principle that corporate officers and directors are fiduciaries, and "in the discharge of his responsibilities must at least use the degree of diligence that an 'ordinarily prudent' person under similar circumstances must use."[24] *Minnoto,* at 408; *Hanson Trust PLC v. MLSCM Acquisition, Inc.,* 781 F.2d 264 (2d Cir. 1986).

Petro's decision to acquire an equity position in Houston's Finest turned out to be a very expensive one. To his credit, he lived up to his partner's expectation[25] and assumed the responsibility for the entire $817,000.00 line of credit note and together with his partner settled the 40-60 lawsuits brought by PACA creditors for $250,000.00. Tr. 63, 72.

A contrary conclusion can be reached as to Herr who although ostensibly a 25% shareholder never received a stock certificate; who while also ostensibly a director never attended a directors meeting or otherwise acted in any corporate capacity to exercise any "power and authority" in the violating corporation;[26] and who the evidence establishes made the investment solely because of his partnership relationship with Samuel Petro. *Cf., Taylor* at 14.

As the facts in *Taylor* involved officers who had no ownership interest in the corporation, it is unclear whether the court in articulating an "actual power and authority" standard intended to eviscerate all remaining vestiges of the *per se* liability imposed in the line of cases where ownership has been used in determining liability. *See, Birkenfield v. United States,* 369 F. 2d 491, 494 (3rd Cir. 1966); *Siegel v. Lyng,* 851 F.2d 412, (D.C. Cir. 1988) (a large percentage of the corporate stock citing *Martino*); *Veg-Mix, Inc.,* 832 F.2d at 611 (finding 31.6 percent of the company's stock is more than enough support for a finding of responsible connection); *Martino,* 832 F.2d at 1401 (ownership of 22.2 percent of the violating company's stock was enough support for a finding of responsible connection); *Beucke v. U.S. Dep't of Agric.,* 314 Fed. Appx. 10 (9th Cir. 2008) (ownership of 33 1/3%); *Jacobson v. Dep't of Agric.*, 99 Fed. Appx. 238 (D.C. Cir. 2004) (ownership of 11.95%);

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[24] Petro's concession that it was "not typical" for him to acquire a 25% ownership of a company and then just let it run on its own lends casts further doubt on his denial of active involvement. Tr. 91.

[25] Petro made it clear that he was solely responsible: "Same thing with this note. I asked Bryan to sign it. When it came time to pay it, it should not have been Bryan's responsibility, and that's why he's not on that note." Tr. 78.

[26] While the same reasoning as to corporate formalities might be applied to Petro, his more active involvement precludes him from being considered only nomial.

Conforti v. U.S., 74 F.3d 838 8th Cir. 1996); *In re: Joseph T. Kocol,* 57 Agric. Dec. 1517 (1998); and *In re: Anthony L. Thomas,* 59 Agric. Dec. 367, 386 (2000).

Even if unintended, under the actual power and authority standard articulated in *Taylor*, ownership of more than a 10% ownership interest without more, like the requirement of knowledge which previously had been considered significant, is insufficient absent active involvement in the activities resulting in a violation of the Act.

Accordingly, on the basis of all of the evidence before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. Samuel S. Petro is an individual residing in Houston, Texas. SPRX-3. Mr. Petro considers himself to have been born in the produce business. Tr. 27. During the violation period alleged in the disciplinary complaint, Petro owned 50% of Country Fresh, a fresh fruit and vegetable company and PACA licensee. Tr. 27-30. When he retired in 2008, selling his interest in the partnership to Herr, he had been in the industry for approximately 50 years. Tr. 27, 89, 171-172.

2. Bryan Herr is an individual residing in Conroe, Texas. During the violation period alleged in the disciplinary complaint, Herr owned 50% of Country Fresh, a fresh fruit and vegetable company and PACA licensee. Herr became the sole owner of Country Fresh in September of 2008 when he purchased the interest of his former partner Samuel S. Petro. He has been in the produce business in excess of 25 years. Tr. 151.

3. In existence since 1999, Country Fresh is a large successful fruit and vegetable business employing 800-1,000 employees in September of 2008. Tr. 30, 152. Country Fresh is considered highly regarded, with an excellent reputation and high Blue Book rating. Tr. 150-154.

4. Both Petro and Herr are well aware of the Act's stringent requirements concerning prompt payment for produce and neither individual had ever been previously associated with any entity having any violations of the Act. Tr. 66, 88-90, 154.

5. Kalil Fresh Marketing, Inc. is a Texas corporation, incorporated on August 11, 2000. Prior to July 10, 2002, all outstanding shares of stock of the corporation were owned by John Kalil. SPRX-3, BHRX-3.

6. John Kalil is Samuel S. Petro's cousin. Tr. 31. Petro had worked in the produce industry for many years with Kalil's father Charles Kalil

who was considered by Petro to have been like a second dad to him. Tr. 32.

7. Sometime around May or June of 2002, Kalil discussed with Petro his need for additional capital. Tr. 33. Petro in turn discussed the possibility of acquiring an ownership interest in Kalil's corporation and persuaded his partner Herr to join him in the eventual purchase of half of the corporation. Tr. 36, 439.

8. Although Petro and Herr were heavily involved with the activities of Country Fresh, Petro viewed the acquisition as a family obligation to help his cousin as well as an opportunity for his son Michael Petro to work with Kalil and "do some things here, do some good." Tr. 34. At Petro's suggestion and urging, Herr agreed to participate. Tr.

9. On July 10, 2002, Kalil, Petro and Herr executed a Stock Purchase Agreement (previously summarized in the Discussion, *supra.*) which had been prepared by Petro's accountant Jerry Paul. SPRX-8; BHRX-8

10. Petro exercised input and authority contemplated by the Agreement in many different areas, including the change of the business name, negotiating a new line of credit for the corporation with Southwest Bank, monitoring of payments made on the line of credit loan, assistance in acquiring significant new accounts for Houston's Finest, including Avendra, the purchasing arm for the Hyatt and Marriott hotel chains,[27] discussions and advice with Kalil concerning which customers Houston's Finest was selling to, what price lists were used, and what types of services were being offered, discussions concerning sales strategy with his son Michael and the other sales staff, input in personnel matters, resulting in the hiring of an employee, and Petro's travel to, visiting with and entertaining of Houston's Finest's customers with meals and season tickets for which he was reimbursed his expenses. Tr. 58, 61-63, 121, 123, 136, 145, 161, 352-354, 356, 358, 360-361, 377, 400-403, 405-408, SPRX-6

11. Herr had significantly less contact with Houston's Finest than did Petro, with the evidence establishing only his titular involvement with the line of credit which Petro had arranged and the advice he provided to Kalil well before the violations period in making changes to the warehouse operation expanding the amount of refrigerated space the corporation had. Tr. 357-358.

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[27] When Kalil approached Petro about the lack of profitability of the Avendra account, Petro assisted in the negotiation of an extension of the contract with Avendra at new, more favorable terms. Tr. 436-437.

12. Herr's responsibilities with Country Fresh required as many as 120 hours per week, leaving insufficient time for him to have had any significant involvement with Houston's Finest's operations. Tr. 169.

13. Herr was not involved in negotiating the Stock Purchase Agreement, had no intentions of performing any duties for Houston's Finest, and although the Stock Purchase Agreement named him as a director, never functioned as a director, never attended any board meetings, never received a stock certificate, never signed any document as a corporate officer or director of Houston's Finest, and never received a salary, dividend, K-1, or reimbursement from the corporation. Tr. 160-167. More specifically, Herr was neither consulted about nor exercised any power or authority concerning what payables were paid or in what order.

14. Herr relied exclusively upon Petro to pass on any information concerning the investment he had made only at Petro's urging, confident that Petro would stand good for any problems. Tr. 168, 170-172.

15. Petro assumed total responsibility for Houston's Finest's line of credit note, paying the bank the $817,000.00 owed and with Herr settled the 40-60 lawsuits brought by PACA creditors for $250,000.00.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Samuel S. Petro is an individual responsibly connected to Kalil's Fresh Marketing, Inc. by virtue of his active participation in corporate operations, his ownership of 25% of the shares of the corporation and his status as a director.

3. By virtue of being responsibly connected to a violating corporation, Petro is subject to the employment restrictions of the Act.

4. Bryan Herr, although ostensibly an owner of 25% of the shares of the violating corporation (no shares were ever actually issued) did not actively participate in any activity resulting in a violation of the Act and had no actual, significant nexus to the corporation. As a result, he was not responsibly connected to the violating corporation.

5. Herr, by not being found to be responsibly connected, is not subject to the employment restrictions of the Act.

Order

1. The determination of the Chief of the PACA Branch that Samuel S. Petro was responsibly connected to Kalil Fresh Marketing, Inc., d/b/a Houston's Finest during the period of October 2007 through February 2008 when the corporation was committing willful, flagrant and repeated violations of the Act is **AFFIRMED.**

2. The determination of the Chief of the PACA Branch that Bryan Herr was responsibly connected to Kalil Fresh Marketing, Inc., d/b/a Houston's Finest during the period of October 2007 through February 2008 when the corporation was committing willful, flagrant and repeated violations of the Act is **REVERSED**.

3. Samuel S. Petro is accordingly subject to the licensing restrictions and employment sanctions contained in Section 4(b) and 8(b) of the Act (7 U.S.C. §499d(b) and §499h(b)).

4. This Decision and Order shall become final and effective without further proceedings thirty-five days (35) after service on Respondent, unless appealed to the Judicial Officer by a party to the proceeding within thirty (30) days, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies of this Decision and Order will be served upon the parties by the Hearing Clerk.

PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATIONS

DEPARTMENTAL DECISIONS

NEW GENERATION PRODUCE CORP. v. ROSSI FOODS, INC. (KISSENA FARMS).
PACA Docket No. R-10-005.
Decision and Order.
Filed January 19, 2011.

PACA-R -- Agency – Settlement Negotiated by Collection Agent – Ratification by Principal

Although Respondent failed to establish the collection agent was bestowed by Complainant with either actual or apparent authority to negotiate a settlement on Complainant's behalf, Complainant's acceptance of funds the collection agent received from Respondent raised the question as to whether Complainant ratified the settlement agreement the collection agent negotiated with Respondent. It was, however, determined that all the necessary elements of ratification had not been met, as there was no indication Complainant intended to ratify the settlement agreement, nor did it appear Complainant had full knowledge of the terms of the agreement at the time it accepted the funds from the collection agent.

Patrice Harps, Presiding Officer.
Leslie Wowk, Examiner.
Meuers Law Firm, P.C., Counsel for Complainant
Winograd & Winograd,P.C., Counsel for Respondent
Decision and Order issued by William G. Jenson, Judicial Officer

Decision and Order

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.), hereinafter referred to as the Act. A timely Complaint was filed with the Department, in which Complainant seeks a reparation award against Respondent in the amount of $18,890.50 in connection with 31 trucklots of mixed produce shipped in the course of interstate commerce.

A copy of the Complaint was served upon the Respondent, who was afforded twenty days from receipt of the Complaint to file an Answer. Respondent failed to submit a timely Answer, so a Default Order was issued on August 8, 2008, awarding Complainant $14,631.75, plus interest and handling fees.[1] The Department subsequently received from Respondent a Petition to Reopen after Default. In the Petition, Respondent offered a defense that could at least mitigate the award requested by Complainant. Therefore, in order to properly determine the validity of the allegations made by the parties, and to weigh all the facts on the merits, it was necessary to reopen the Complaint. Accordingly, on April 3, 2009, an Order granting Respondent's Petition to Reopen after Default was issued.

The amount claimed in the Complaint does not exceed $30,000.00, therefore, the documentary procedure provided in section 47.20 of the Rules of Practice under the Act (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's Report of Investigation (ROI). In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file briefs. Complainant filed an Opening Statement. Respondent filed an Answering Statement. Neither party submitted a brief.

Findings of Fact

1. Complainant is a corporation whose post office address is 195 Lombardy Street, Brooklyn, NY 11222. At the time of the transactions involved herein, Complainant was licensed under the Act.

2. Respondent is a corporation whose post office address is 72-15 Kissena Boulevard, Flushing, NY 11367. At the time of the transactions involved herein, Respondent was licensed under the Act.

[1] In the Default Order, the $18,890.50 claimed by Complainant was stated to include payments made by Respondent totaling $4,258.75, and $550.00 for chestnuts, a commodity that is not subject to the Secretary's jurisdiction under PACA. These items were therefore deducted from the amount claimed, reducing the award amount to $14,631.75. It appears, however, that Complainant had already deducted the $550.00 for chestnuts from the amount claimed, as the invoices attached to the Complaint total $19,440.50 ($19,440.50 - $550.00 = $18,890.50). See Compl. Ex. 1-31.

3. Between September 6, 2007, and October 15, 2007, Complainant sold and shipped to Respondent 31 trucklots of mixed produce, as set forth more fully below:

Inv. No.	*Date*	*Description*	*Price*	*Total*
80982	9/06/2007	5 CTNS FUJI APPLES	$22.00	$110.00
		24 CTNS BANANAS	$12.00	$288.00
		5 CTNS GALA APPLES	$27.00	$135.00
		5 CTNS GOLDEN DEL	$30.00	$150.00
		40 CTNS CLEMENTINES	$6.50	$260.00
		Invoice Total		*$943.00*

Inv. No.	*Date*	*Description*	*Price*	*Total*
81108	9/07/2007	24 CTNS BANANAS	$11.00	$264.00
		60 CTNS HAMI MELONS	$18.00	$1,080.00
		Invoice Total		*$1,344.00*

Inv. No.	*Date*	*Description*	*Price*	*Total*
81159	9/08/2007	30 CTNS BANANAS	$12.50	$375.00
		24 CTNS WHITE PEACHES	$17.00	$408.00
		Invoice Total		*$783.00*

Inv. No.	*Date*	*Description*	*Price*	*Total*
81280	9/09/2007	24 CTNS BANANAS	$12.00	$288.00
		Invoice Total		*$288.00*

Inv. No.	*Date*	*Description*	*Price*	*Total*
58573	9/10/2007	30 CTNS BANANAS	$12.00	$360.00
		Invoice Total		*$360.00*

Inv. No.	*Date*	*Description*	*Price*	*Total*
58656	9/11/2007	24 CTNS BANANAS	$11.00	$264.00
		Invoice Total		*$264.00*

Inv. No.	*Date*	*Description*	*Price*	*Total*
58740	9/12/2007	24 CTNS BANANAS	$10.50	$252.00
		Invoice Total		*$252.00*

Inv. No.	*Date*	*Description*	*Price*	*Total*
58894	9/14/2007	30 CTNS BANANAS	$12.50	$375.00
		60 CTNS HAMI MELONS	$18.00	$1,080.00
		16 CTNS PLUMS	$15.00	$240.00
		Invoice Total		*$1,695.00*

Inv. No.	*Date*	*Description*	*Price*	*Total*
59037	9/15/2007	24 CTNS BANANAS	$14.00	$336.00
		Invoice Total		*$336.00*

nv. No.	*Date*	*Description*	*Price*	*Total*
59148	9/17/2007	20 CTNS BANANAS	$14.00	$280.00
		12 CTNS PAPAYAS	$29.00	$348.00
		Invoice Total	*$628.00*	

Inv. No.	*Date*	*Description*	*Price*	*Total*
59284	9/18/2007	15 CTNS BANANAS	$16.00	$240.00
		Invoice Total	*$240.00*	

Inv. No.	*Date*	*Description*	*Price*	*Total*
59348	9/19/2007	10 CTNS BANANAS	$16.00	$160.00
		1 BIN WATERMELONS	$240.00	$240.00
		Invoice Total		*$400.00*

Inv. No.	*Date*	*Description*	*Price*	*Total*
59509	9/21/2007	60 CTNS HAMI MELONS	$17.50	$1,050.00
		Invoice Total		*$1,050.00*

Inv. No.	*Date*	*Description*	*Price*	*Total*
59584	9/22/2007	24 CTNS BANANAS	$15.00	$360.00
		Invoice Total		*$360.00*

Inv. No.	*Date*	*Description*	*Price*	*Total*
59660	9/23/2007	24 CTNS BANANAS	$15.50	$372.00
		Invoice Total		*$372.*

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Inv. No.	*Date*	*Description*	*Price*	*Total*
10091	9/24/2007	30 CTNS BANANAS	$15.00	$450.00
		Invoice Total		*$450.00*

Inv. No.	*Date*	*Description*	*Price*	*Total*
10195	9/25/2007	10 CTNS BANANAS	$15.00	$150.00
		60 CTNS HAMI MELONS	$17.50	$1,050.00
		Invoice Total		*$1,200.00*

Inv. No.	*Date*	*Description*	*Price*	*Total*
10273	9/26/2007	15 CTNS BANANAS	$15.00	$225.00
		Invoice Total		*$225.00*

Inv. No.	*Date*	*Description*	*Price*	*Total*
10335	9/27/2007	20 CTNS BANANAS	$12.50	$250.00
		60 CTNS HAMI MELONS	$7.00	$420.00
		Invoice Total		*$670.00*

Inv. No.	*Date*	*Description*	*Price*	*Total*
10505	9/29/2007	25 CTNS BANANAS	$14.50	$362.50
		Invoice Total		*$362.50*

Inv. No.	*Date*	*Description*	*Price*	*Total*
106	10/01/2	10 CTNS BANANAS	$14.50	$145.

11	007			00
		60 CTNS HAMI MELONS	$18.00	$1,080.00
		Invoice Total		*$1,225.00*

Inv. No.	*Date*	*Description*	*Price*	*Total*
10704	10/02/2007	10 CTNS FUJI APPLES	$16.00	$160.00
		20 CTNS BANANAS	$13.50	$270.00
		Invoice Total		*$430.00*

Inv. No.	*Date*	*Description*	*Price*	*Total*
10789	10/03/2007	12 CTNS BANANAS	$13.50	$162.00
		8 CTNS BANANAS	$14.50	$116.00
		Invoice Total		*$278.00*

Inv. No.	*Date*	*Description*	*Price*	*Total*
10850	10/07/2007	20 CTNS BANANAS	$13.50	$270.00
		60 CTNS HAMI MELONS	$15.00	$900.00
		Invoice Total		*$1,170.00*

Inv. No.	*Date*	*Description*	*Price*	*Total*
11022	10/06/2007	24 CTNS BANANAS	$13.50	$324.00
		Invoice Total		*$324.00*

Inv. No.	*Date*	*Description*	*Price*	*Total*
11069	10/07/2007	24 CTNS BANANAS	$13.50	$324.00
		56 CTNS CANTALOUPES	$8.00	$448.00
		Invoice Total		*$772.0*

			0

Inv. No.	*Date*	*Description*	*Price*	*Total*
11159	10/08/2007	20 CTNS BANANAS	$13.50	$270.00
		54 CTNS HAMI MELONS	$15.00	$810.00
		Invoice Total		*$1,080.00*

Inv. No.	*Date*	*Description*	*Price*	*Total*
11314	10/10/2007	10 CTNS BANANAS	$13.50	$135.00
		5 CTNS CHESTNUTS	$110.00	$550.00
		Invoice Total		*$685.00*

Inv. No.	*Date*	*Description*	*Price*	*Total*
11548	10/13/2007	24 CTNS BANANAS	$14.00	$336.00
		14 CTNS GRAPES	$6.00	$84.00
		15 CTNS BANANAS	$14.00	$210.00
		Invoice Total		*$630.00*

Inv. No.	*Date*	*Description*	*Price*	*Total*
11663	10/14/2007	24 CTNS BANANAS	$13.00	$312.00
		Invoice Total		*$312.00*

Inv. No.	*Date*	*Description*	*Price*	*Total*
11731	10/15/2007	24 CTNS BANANAS	$13.00	$312.00
		Invoice Total		*$312.0*

			0

(Compl. Ex. 1-31.)

4. On March 14, 2008, and April 15, 2008, Respondent issued check numbers 2110 and 2416, respectively, each made payable to Cox, Wells & Associates in the amount of $4,258.75. (Answer Ex. D, E.) On or about May 7, 2008, Complainant was paid $2,129.38 of the funds Cox, Wells & Associates collected from Respondent. (Compl. ¶ 26; Opening Stmt. Ex. C.)

5. The informal complaint was filed on December 31, 2007, which is within nine months from the date the cause of action accrued.

Conclusions

This dispute concerns Respondent's liability for the unpaid balance of the invoice price for 31 trucklots of mixed produce purchased from Complainant. Complainant states Respondent accepted the commodities in compliance with the contracts of sale, but that it has since paid only $7,697.00 of the agreed purchase prices thereof, leaving a balance due Complainant of $18,890.50. (Compl. ¶ 8.) Respondent asserts, in response, that the transactions in question were settled for $8,517.50, which amount was remitted to Complainant's collection agent, Cox, Wells & Associates, in two separate installments. (Answer ¶¶ 14, 15.)

We will first consider Respondent's allegation that an agreement was reached to settle the transactions for $8,517.50. Respondent, as the proponent of this claim, has the burden to prove its allegations by a preponderance of the evidence. Respondent's bookkeeper, Ms. Theresa Lapetina, asserts in Respondent's sworn Answer that on March 13, 2008, she was contacted by Ronald Hager, a representative of Cox, Wells & Associates, who stated that Respondent's open account had been sent to collections. (Answer ¶ 12.) After speaking with Mr. Hager, Ms. Lapetina states she called "Linda" of Complainant to inquire as to why the account had been sent to collections. According to Ms. Lapetina, Linda stated "I had to do what I had to do" because Respondent "was not paying fast enough." (Answer ¶ 13.) Ms. Lapetina states she then called Cox, Wells & Associates and discussed a compromise of the open balance. Ms. Lapetina states Cox, Wells & Associates then sent her a

letter detailing the terms of the settlement agreement. (Answer ¶ 14.) The letter, which is attached to Respondent's Answer as Exhibit C, reads as follows:

Pursuant to our phone conversation this afternoon, please be advised that my firm represents New Generation Produce, on a past due account in the amount of $17,035.80.

On behalf of my client my firm will accept the sum of $8,517.50 as settlement in full of any and all monies due.

It is my understanding that for this settlement to be in effect, a check in the amount of $4,258.75 must be picked up at your office no later than tomorrow, March 14, 2008, between the hours of 12:00 p.m. and 3:00 p.m., via my courier Federal Express at my firm's expense. I will make the necessary arrangements. My firm's Federal Express account # is 3690-5020-6. Additionally, a second check for the amount of 4,258.75 must be picked up at your office on April 14, 2008. Please call me when the check is available so I can make the necessary arrangements.

Please make your check payable to the firm of Cox Wells & Associates and forward to the above referenced address.

In accordance with the settlement referenced in this correspondence, Ms. Lapetina states Respondent remitted to Cox, Wells & Associates the sum of $4,258.75 on March 14, 2008, with check number 2110, and the sum of $4,258.75 on April 15, 2008, with check number 2416. Ms. Lapetina states that at that point in time she reasonably believed that Respondent had settled the open balance with Complainant. (Answer ¶ 14.)

In response to Respondent's allegation of a settlement agreement, Complainant's President, Katherine Chau, asserts in a sworn statement submitted as Complainant's Opening Statement that Complainant neither hired Cox, Wells & Associates nor any other collection agency to act on its behalf. Ms. Chau explains that on or about March 12, 2008, Complainant received a solicitation call from Frances Gennino, who said she was associated with a company identified as Creditors Service Bureau, a collection agency that had developed a very successful program to recover past due accounts receivable. (Opening Stmt. ¶ 20.)

Ms. Chau states Ms. Gennino indicated that Creditors Service Bureau would review Complainant's past due statements, determine the potential for collection and then make a proposal to represent Complainant on the accounts. (Opening Stmt. ¶ 21.) Ms. Chau states Complainant decided to give Creditors Service Bureau the opportunity to review five of its delinquent accounts, including Respondent, although Creditors Service Bureau was not hired to collect the accounts. Ms. Chau states she intended to make a decision on whether to hire Creditors Service Bureau based upon their proposal after reviewing the accounts. (Opening Stmt. ¶ 22.) Instead of providing an opinion on the potential for collection and a proposal, Ms. Chau states Creditors Service Bureau sent correspondence with Power of Attorney forms under the name of Cox, Wells & Associates. (Opening Stmt. ¶ 23.) The form pertaining to Respondent reads as follows:

Please accept this letter as appointment to act as agent for New Generation Produce, on all matters relating to the $21,964.50 owed by Kessina [sic] Farms. We hereby grant you Power of Attorney to carry out your duties to resolve this claim.

Very Truly Yours,

Katherine Chau

Since what Complainant received was something quite different from what Ms. Gennino had originally proposed, Ms. Chau states that neither she nor anyone from Complainant signed the Powers of Attorney for Cox, Wells & Associates or agreed to hire Creditors Service Bureau. (Opening Stmt. ¶ 24.) Despite the fact that they were neither hired nor authorized to contact Respondent, Ms. Chau states Cox, Wells & Associates apparently did just that, claiming to represent Complainant. Ms. Chau states Complainant was never informed by Creditors Service Bureau or Cox, Wells & Associates that they were attempting to collect against any delinquent accounts, including Respondent. (Opening Stmt. ¶ 25.) On or about May 7, 2008, Ms. Chau states Complainant received a letter from Creditors Service Bureau informing Complainant that it had collected the sum of $4,258.75 from Respondent, from which the sum of

$2,129.37 was deducted, and a check made payable to Complainant in the amount of $2,129.38 was enclosed. (Opening Stmt. ¶ 26.) A copy of this letter is attached to Complainant's Opening Statement as Exhibit C. On the same date, Mr. Chau states Complainant sent a fax to Creditors Service Bureau informing them to cease all collection efforts as of May 7, 2008. (Opening Stmt. ¶ 27.) A copy of the fax is attached to Complainant's Opening Statement as Exhibit D. Ms. Chau states neither she nor anyone from Complainant ever advised Respondent that Creditors Service Bureau or Cox, Wells & Associates were authorized to act on behalf of Complainant. (Opening Stmt. ¶ 28.)

Initially, we note that the exact relationship between Creditors Service Bureau and Cox, Wells & Associates is not disclosed in the record, and the two appear to have acted interchangeably in their dealings with Complainant and Respondent. Therefore, for the remainder of this discussion, the firms will be collectively referred to as "CSB/Cox." There is no dispute that CSB/Cox informed Respondent that it was acting as agent for Complainant, after which CSB/Cox negotiated a settlement with Respondent for the transactions at issue in this dispute. The issue to be determined here is whether this settlement agreement is binding upon Complainant. As CSB/Cox was purportedly acting as agent for Complainant when the settlement was negotiated, the effect of the settlement on Complainant depends on whether CSB/Cox had actual or apparent authority to act on Complainant's behalf.

The Restatement of Agency (Third) § 2.01, provides that an agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act. While we note that Complainant admittedly sent copies of its receivables to CSB/Cox, including those for Respondent, Complainant has also stated that further discussions were to take place and that no agreement for CSB/Cox to handle collections on behalf of Complainant was ever reached. This claim is supported by the fact that the Power of Attorney form that Complainant received from CSB/Cox is not signed by Complainant. (Opening Stmt. Ex. B.) We also note that the past due amount of $21,964.50 referenced in the Power of Attorney does not match either the past due amount of $17,035.80 that CSB/Cox mentioned in its correspondence to Respondent, or the past due amount of $18,890.50 which Complainant seeks to recover through this Complaint. These discrepancies suggest a lack of communication

between Complainant and CSB/Cox, i.e., if Complainant had hired CSB/Cox to collect the past due amount owed by Respondent, we presume Complainant would have provided CSB/Cox with an accurate figure of the amount due. Consequently, in the absence of any other manifestations on the part of Complainant indicating that it wished for CSB/Cox to act on its behalf, we conclude that CSB/Cox did not have actual authority to negotiate a settlement with Respondent concerning the receivables owed to Complainant.

On the issue of apparent authority, it has long been held that the necessary elements to establish apparent authority are: (1) that the principal has given indicia of authority to the agent or has knowingly permitted or caused another to appear to be its agent; (2) that there has been a representation of the agency by the principal to a third party; (3) that there was a reliance upon such representation by the third party; and (4) that such representation was acted upon in good faith to the injury of the third party. *Sunny Sally, Inc. v. Ray Burke Farmer*, 23 Agric. Dec. 268 (1964).

While the accounts receivable that Complainant provided to CSB/Cox allowed CSB/Cox to contact Respondent and appear to be acting as Complainant's agent, there is no evidence indicating that Complainant directly communicated to Respondent that CSB/Cox had authority to act on Complainant's behalf. Rather, Respondent's bookkeeper, Theresa Lapetina, has testified that she was contacted by Ronald Hager, a representative of CSB/Cox, who reportedly informed Ms. Lapetina that he was representing Complainant. To show apparent authority or the scope of authority in general, it is the acts and conduct of the principal, and not those of the agent, that must be relied upon. *Louis Caric & Sons v. Garden Fresh Markets, Inc. and/or Maure Solt Company*, 35 Agric. Dec. 412 (1976); *Gulf & Western Food Products Company v. Prevor-Mayrsohn International, Inc.*, 34 Agric. Dec. 1911 (1975). While Ms. Lapetina has also testified that she contacted "Linda" of Complainant, who reportedly confirmed that Respondent's account was sent to collection because Respondent was not paying fast enough, Ms. Lapetina has not asserted that CSB/Cox was specifically mentioned in this conversation. This is significant because at the time of the alleged conversation, the Complaint at issue herein was at the informal stages, and telephone calls were being made from PACA representatives to Respondent concerning the alleged balance due. While we hasten to point out that a PACA reparation complaint is *not* equivalent to

collection, the term "collection" is nevertheless often used, however erroneously, to refer to the informal mediation efforts conducted by PACA. Hence, we cannot be reasonably certain that Complainant's representative was aware, or should have been aware, that the collection referenced by Ms. Lapetina was that conducted by CSB/Cox.

On the basis of the evidence submitted and for the reasons cited, we find Respondent has failed to establish that it reasonably relied upon representations made by Complainant when it made the alleged settlement payment to CSB/Cox to satisfy its indebtedness to Complainant. Even assuming that CSB/Cox was under the false impression that it was acting as Complainant's agent, it had no authority to resolve the outstanding invoices with Respondent. When one deals with or through an agent, he assumes all the risks of lack of authority in the agent. *See, e.g., Pasco County Peach Ass'n v. J.F. Solley & Co., Inc.*, 146 F.2d 880, 883 (4th Cir. 1945). The burden of any necessary diligence to ascertain the agent's authority rests on the party dealing with the agent. *Id.* Respondent's submission of testimony from its bookkeeper concerning an alleged telephone conversation with a representative of Complainant inquiring as to whether Respondent's account had been sent to collection is not sufficient to establish that it met the burden of "necessary diligence to ascertain" whether CSB/Cox had authority to settle the transactions in question on behalf of Complainant. Consequently, Respondent's mistaken reliance upon CSB/Cox's representations ordinarily would not relieve it of liability for payment of the outstanding invoices to Complainant.

However, despite the fact that CSB/Cox had neither actual nor apparent authority to settle Respondent's indebtedness to Complainant, the record shows Complainant deposited a portion of the funds that CSB/Cox collected from Respondent. This raises the question as to whether the settlement agreement, although unauthorized, was nevertheless ratified by Complainant. The Restatement of Agency (Third) § 2.01 defines "ratification" as "the affirmance of a prior act done by another, whereby the act is given effect as if done by an agent acting with actual authority." Section 2.01 provides further that a person ratifies an act by: (a) manifesting assent that the act shall affect the person's legal relations, or (b) conduct that justifies a reasonable assumption that the person so consents.

Complainant asserts that the funds received from CSB/Cox were applied to Respondent's past due account (Opening Stmt. ¶ 12.);

however, Complainant fails to explain why it accepted the funds, given its assertion that CSB/Cox was not authorized to act as its collection agent. The act of ratification, whether express or implied, must nevertheless be performed with full knowledge of the material facts relating to the transaction, and the assent must be clearly established and may not be inferred from doubtful or equivocal acts or language. *See* 57 NY Jur Estoppel, Ratification, and Waiver §§ 87, 88.

Complainant was plainly aware that the funds received from CSB/Cox were collected on its behalf from Respondent, as the letter that accompanied the check advised Complainant of the total amount CSB/Cox collected from Respondent and noted the amount CSB/Cox withheld as its collection fee. (Opening Stmt. Ex. C.) If Complainant did not acquiesce to CSB/Cox negotiating a settlement and collecting funds from Respondent on its behalf, Complainant should have returned the funds to CSB/Cox and notified all parties involved that CSB/Cox did not have authority to act on its behalf. Instead, Complainant advised CSB/Cox by fax to "cease and desist all collections as of May 7, 2008" (Opening Stmt. Ex. D.), but it also accepted the funds collected. Complainant cannot have it both ways. Accordingly, we find that Complainant ratified the settlement agreement CSB/Cox negotiated with Respondent when it accepted and deposited the funds CSB/Cox collected from Respondent pursuant to the agreement. As Respondent submitted full payment to CSB/Cox in accordance with the settlement terms, we find that Respondent has fully satisfied its liability to Complainant for the transactions at issue in this dispute. The Complaint should therefore be dismissed.

Order

The Complaint is dismissed.
Copies of this Order shall be served upon the parties.
Done at Washington, D.C.

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JUDY S. ROU D/B/A LAMAR ROU PRODUCE v. SEVERT SONS PRODUCE, INC., D/B/A SEVERT SONS PRODUCE, INC.,
PACA Docket No. R-09-020
Decision and Order
Filed April 19, 2011.

PACA-R -- Offsets

Where Respondent admitted to accepting produce from Complainant, and cited as a defense against paying for that produce an offset agreement reached between Respondent and a third party, and the third party denied the existence of such an agreement (as did Complainant), Respondent could not offset the debt for accepted produce owed to Complainant with the debt owed by the third party under a previous growing arrangement between the third party and Respondent.

Christopher Young, Presiding Officer.
Rynn & Janosky, LLP for Complainant
Meurs Law Firm, P.L. for Respondent
Decision and Order issued by William G. Jenson, Judicial Officer

[Editor's Note: See JO Decision filed November, 10, 2011]

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a et seq.) (the Act). A timely Complaint was filed with the United States Department of Agriculture (the Department) on June 20, 2008, in which Complainant sought a reparation award against Respondent in the amount of $71,541.62, which was alleged to be past due and owing in connection with ten (10) shipments of watermelons sold to Respondent in the course of interstate commerce.

A Report of Investigation was prepared by the Department and served upon the parties. A copy of the Complaint was served upon the Respondent, which filed an Answer thereto, denying liability and requesting an oral hearing.

Although the amount claimed in the Complaint exceeds $30,000.00, the parties waived oral hearing. Therefore, the documentary procedure provided in section 47.20 of the Rules of Practice under the Act (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the

verified pleadings of the parties are considered part of the evidence of the case, as is the Department's Report of Investigation (ROI). In addition, the parties were given the opportunity to file evidence in the form of verified statements, and to file briefs. Complainant filed an Opening Statement and a Statement In Reply, and Respondent filed an Answering Statement. Both parties submitted a brief.

Findings of Fact

1. Complainant, Judy S. Rou d/b/a Lamar Rou Produce (Rou Produce or Complainant), was an individual[1] whose business mailing address is or was 5979 S.E. 39th Avenue, Ocala, Florida 34480. At the time of the transactions alleged in the Complaint, Complainant was licensed under the PACA. (Complaint, p. 1; *See* ROI, PACA License Information.)

2. Respondent, Severt Sons Produce, Inc., d/b/a Severt Sons Produce, Inc. (Severt & Sons or Respondent[2]), is a corporation whose business address is or was 3725-B SR 16, St. Augustine, Florida 32092. At the time of the transactions alleged in the Complaint, Respondent was licensed under the PACA. (Answer, p. 1; *See* ROI, PACA License Information.)

3. Complainant Judy Rou created invoices, for purported f.o.b. sales, reflecting the sale of numerous lots of watermelons to Respondent between May 1, 2007, and May 12, 2007. (Complainant's Opening Statement, Exhibits 1-10, 11c-f, 12 e, 13 c-f.)

4. Each Judy Rou invoice has an accompanying bill of lading. Judy Rou's "letterhead" with address appears at the top of each bill of lading. (Complainant's Opening Statement, Exhibits 1-13f.)

5. Between May 1, 2007 and May 12, 2007, Complainant shipped from its place of business ten loads of watermelons to Respondent's customers in Atlanta, GA, Columbia, SC, and Jacksonville, FL, which were accepted by Respondent's customers without incident. (ROI,

[1] Judy Rou d/b/a Lamar Rou Produce may have become a corporation since the filing of its reparation Complaint in this case.

[2] Respondent's business name on its PACA license is Severt Sons Produce, Inc., d/b/a Severt Sons Produce, Inc. However, throughout the remainder of the decision, the company will be referred to for ease of reference as either Severt & Sons or Respondent.

Exhibits C, E, G, H, I, M, P; Complainant's Opening Statement pp. 2-4, Exhibits 1-13f; Respondent's Answering Statement, pp. 2-5.)

6. Simultaneous to or shortly after the shipment of each load of watermelons, Complainant sent an invoice, mentioned in Finding of Fact No. 3, for each load to Respondent. (Respondent's Answering Statement, affidavit of Daniel Severt, p. 4; Complainant's Opening Statement, Exhibits 1-13f.)

7. Respondent refused to pay Complainant for all ten loads of watermelon, citing a previous agreement between David Herrera, a grower of watermelons in Collier County, Florida and Respondent in which Respondent Severt & Sons was to "offset" the approximately $77,000 worth of debt owed by Mr. Herrera to Severt & Sons under a 2005 growing arrangement, by supplying watermelons to Respondent Severt & Sons through Complainant Rou Produce, Mr. Herrera's 2007 season sales agent, until the $77,000 worth of debt owed by Mr. Herrera was satisfied. (Respondent's Answering Statement, affidavit of Daniel Severt, pp. 2-4.) Respondent based its refusal to pay Complainant for the watermelons at issue in this case on the purported agreement reached by David Herrera and Respondent.

8. Complainant had no involvement with the 2005 growing arrangement between David Herrera and Respondent. (Complainant's Opening Statement, pp. 3-4; Complainant's Statement In Reply, p. 3; Respondent's Answering Statement, pp. 2-3.)

9. During the 2007 season, Complainant acted as David Herrera's sales agent, selling watermelons. (Complainant's Opening Statement, affidavit of Judy Rou p. 4; affidavit of David Herrera, p. 2; Respondent's Answering Statement, affidavit of Daniel Severt, p. 2.)

10. The informal complaint was filed on July 6, 2007, which is within nine months from the date the cause of action accrued.

Conclusions

Complainant alleges that Respondent is liable in the amount of $71,541.72, which is alleged to be past due and owing in connection with ten (10) shipments of watermelons sold to Respondent by Complainant in the course of interstate commerce. (Complainant's Opening Statement, pp. 2-3; Complainant's Statement In Reply, pp. 2-3.) Respondent acknowledges its refusal to pay Complainant for all ten loads of the watermelons, and claims that Complainant was not the owner of the

watermelons and therefore not entitled to payment. (Respondent's Answering Statement, pp 2-5.) Respondent claims that the owner of the 10 watermelon loads sold by Complainant was David Herrera, a grower of watermelons in Collier, County, Florida, and that at the time of the sale, Complainant was acting as David Herrera's agent. (Respondent's Answering Statement, pp 2-6.) Respondent further claims that under an arrangement with David Herrera, made prior to the sale of the watermelons at issue, Mr. Herrera agreed that Respondent could offset the ten loads against a previous debt owed by Mr. Herrera. (*Id.*)

Complainant has the burden of proving by a preponderance of the evidence all of the material allegations of its complaint, including the existence of a contract, the terms thereof, a breach by Respondent, and damages resulting from that breach. *Haywood County Co-operative Fruit, et al. v. Orlando Tomato, Inc.,* 47 Agric. Dec. 581, 582 (1988). *Sun World International, Inc. v. J. Nichols Produce Co.*, 46 Agric. Dec. 893, 894 (1987) *Justice v. Milford Packing Co.*, 34 Agric. Dec. 533, 534-5 (1975). In this case, based on the aggregate of evidence in the record, we find that Complainant has met its burden.

Complainant provided as proof of the allegations the invoices for each of the ten loads of watermelons, which were sent to Respondent simultaneous to or shortly after the shipment of each load of watermelons. (Respondent's Answering Statement, affidavit of Daniel Severt, p. 4; Complainant's Opening Statement, Exhibits 1-13f.) Respondent admits to receiving the invoices. Each shows the transactions were f.o.b.[3] sales. Complainant also provided the accompanying bills of lading to each invoice, which show that between May 1, 2007 and May 12, 2007, Complainant shipped from its place of business 10 loads of watermelons[4] to Respondent's customers in Atlanta,

[3] F.o.b. means that the produce quoted or sold is to be placed free on board the boat, car, or other agency of the [buyer] through land transportation at shipping point, in suitable condition...and that the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed. 7 C.F.R. § 46.43 (i); *Primary Export International v. Blue Anchor, Inc.*, 56 Agric. Dec. 969, 975-976 (1997). The buyer shall have the right of inspection at destination before the goods are paid for to determine if the produce shipped complied with the terms of the contract at the time of shipment. . . . 7 C.F.R. § 46.43 (i).

[4] There is some dispute as to whether Complainant or Respondent arranged for the transportation of watermelons to customers. Complainant claims that Respondent made the arrangements (*See* Complainant's Statement In Reply, affidavit of Christopher

GA, Columbia, SC, and Jacksonville, FL, which were accepted by Respondent's customers without incident. (Complainant's Opening Statement, Exhibits 1-10, 11c-f, 12 e, 13 c-f; Respondent's Answering Statement, pp 2-4.)

Complainant provided the affidavits of Judy Rou, owner of Complainant Rou Produce, and Christopher Collier, salesman of Complainant, who handled the sale of each of the loads at issue in this case. Both Ms. Rou and Mr. Collier state that they were familiar with and recalled the circumstances surrounding the sale of the loads at issue, and Mr. Collier states that he was personally involved in each sale. Both Ms. Rou and Mr. Collier state that Complainant was the owner of the watermelons at issue, that Complainant sold the watermelons at issue to Respondent, and that Respondent failed to pay for the watermelons. (*See* Complainant's Opening Statement, affidavit of Judy S. Rou, pp. 2-4; *see also* Complainant's Statement In Reply, affidavit of Christopher Collier, pp. 2-3.)

Complainant provided accounts of sale showing that it paid David Herrera for the watermelons at issue (Complainant's Opening Statement, Exhibits 11b, 12 b, 12c, 12d), and provided checks dated June 2, 2007 (*Id.* at 12a) and June 27, 2007 (*Id.* at 11a) that show payment to David Herrera and that correspond to the accounts of sale. The accounts of sale identify the loads of watermelons at issue in this case by purchase order number and amount. (Complainant's Opening Statement, Exhibits 11b, 12 b, 12c, 12d.) Respondent admits that it (or its specified customers) received and accepted the ten loads of watermelons from Complainant and that it refused to pay Complainant for all ten loads of watermelons. (Respondent's Answering Statement, affidavit of Daniel Severt, pp. 4-5.) Therefore, based on the foregoing, Complainant has proven by a preponderance of the evidence all of the material allegations of its complaint. *See Haywood County Co-operative Fruit, et al. v. Orlando Tomato, Inc.,* 47 Agric. Dec. 581, 583 (1988); *Sun World International, Inc. v. J. Nichols Produce Co.*, 46 Agric. Dec. 893, 894 (1987); *Justice v. Milford Packing Co.*, 34 Agric. Dec. 533 (1975).

Collier), while Respondent claims that Complainant made the arrangements. (*See* Respondent's Answering Statement, affidavit of Daniel Severt.) Regardless of who arranged for transportation, it seems clear that the watermelons were shipped from Complainant's place of business. (Complainant's Opening Statement, Exhibits 1-13f, affidavit of Judy Rou, p. 3.)

Respondent admits receiving and accepting the ten shipments of watermelons it ordered from Complainant. Respondent, as its defense, points to a previous agreement with David Herrera, a grower of watermelons in Collier County, Florida. (Respondent's Answering Statement, affidavit of Daniel Severt, pp. 2-5.) Respondent asserts that it based its refusal to pay Complainant for the watermelons at issue in this case on a purported agreement reached with Mr. Herrera, which involved a previous 2005 debt owed by Mr. Herrera, for a 2005 growing arrangement between Respondent Severt & Sons and Mr. Herrera. The purported agreement (between David Herrera and Severt & Sons) was to "offset" the approximately $77,000 worth of debt owed by Mr. Herrera to Respondent, by supplying watermelons to Respondent through Complainant Rou Produce, Mr. Herrera's 2007 season sales agent, purportedly for free, until the $77,000 worth of debt owed by Mr. Herrera was satisfied. (Respondent's Answering Statement, pp. 2-5.)

Respondent provides the affidavits of Daniel Severt[5], Vice President of Severt & Sons, as well as the affidavits of Jessica Severt, receptionist and accountant for Severt & Sons; Barbara Severt, Secretary of Severt & Sons; Lee Severt, salesperson for Severt & Sons; and Junior Lazzano, "employee"[6] of Severt & Sons, as support for the claim that an offset agreement was reached with David Herrera. (Respondent's Answering Statement.) Each of the affidavits state that in April 2007, Mr. Herrera came to Severt & Sons' office in Immokalee, Florida to discuss the $77,000 worth of debt owed by Mr. Herrera to Severt & Sons under the 2005 growing arrangement, and that during that meeting, the above-mentioned agreement to offset the debt was made. (Respondent's Answering Statement, affidavit of Barbara Severt, pp. 1-2; affidavit of Jessica Severt, pp. 1-2; affidavit of Lee Severt, pp. 1-2; affidavit of Junior Lazzano, pp. 1-2.) We note, however, that when this case first arose, Respondent, through its counsel, sent a letter dated September 14,

[5] We note that Mr. Severt, in his affidavit, states that prior to the transactions at issue in this case, Respondent had never purchased produce from Complainant. (Respondent's Answering Statement, affidavit of Daniel Severt, p. 3.) This claim was directly rebutted by Complainant, and it is clear that Respondent purchased produce from Complainant in 2003. (Complainant's Statement in Reply, affidavit of Judy S. Rou, p. 3, affidavit of Christopher Collier, p. 1, exhibit A.)

[6] In the affidavit, Mr. Lazzano simply states that he was an "employee" of Severt & Sons.

2007 to the Department, stating that the "offset" agreement was reached between Daniel Severt and David Herrera *telephonically*. (ROI, Exhibit P, pp.3-4.) Respondent did not provide a date for the telephonic agreement in this letter. Further, Respondent does not provide any explanation for this discrepancy.[7]

Complainant provided, in its Opening Statement, the affidavit of David Herrera, wherein Mr. Herrera states that Complainant purchased the 10 loads of watermelons at issue in this case from him, and that he received payment in full for the watermelons. Mr. Herrera further states that "at no time was it his intention that [the] watermelons be used to offset any debt owed to Respondent", and that "at no time did [he] tell Respondent that [the] watermelons were to be used to offset any debt to Respondent". Mr. Herrera also states that "at no time did I tell [Complainant] that [the] watermelons were to be used to offset any debt to Respondent." (Complainant's Opening Statement, affidavit of David Herrera, p. 2.)

Complainant further provided in its Opening Statement the affidavit of Judy S. Rou, owner of Complainant. Ms. Rou states in her affidavit that the sales at issue were f.o.b, and that the purchase agreement was reached with Daniel Severt of Respondent. (Complainant's Opening Statement, affidavit of Judy S. Rou, pp. 2,4.) Ms. Rou further states that Complainant purchased the watermelons at issue from David Herrera, and that at the time of the sale to Respondent, Complainant was the owner of the watermelons and entitled to full payment for them. Ms. Rou states that at the time of the purchase by Respondent, Complainant was not aware that David Herrera allegedly owed money to Respondent, or of any offset agreement. (Complainant's Opening Statement, affidavit of Judy S. Rou, p. 4.) The evidence is unclear as to whether Complainant owned the watermelons in question, or whether Complainant was acting as David Herrera's agent at the time of the sale of watermelons to Respondent. However, in light of our other findings in this case, *see infra*, this issue is moot.

[7] We further note that other than the affidavits of Daniel and Jessica Severt, Respondent's affidavits in this case are all substantively identical (other than the change in name and title in each). In a case such as this, where proof of an agreement with David Herrera is the crux of Respondent's case, a "canned" affidavit that is signed by several individuals, rather than affidavits that provide their own individual accounts of what transpired, will be accorded little weight.

Complainant also provided, in its Statement In Reply, the affidavit of Christopher Collier, Complainant's salesman who handled the watermelon sales transactions at issue in this case. Mr. Collier states in his affidavit that the sales at issue were f.o.b, and that the purchase agreement for the 10 loads of watermelons was reached with Daniel Severt of Respondent. (Complainant's Statement in Reply, affidavit of Christopher Collier, p. 1.) Mr. Collier further states that Complainant paid David Herrera for the watermelons, and that at no time during his dealing with Daniel Severt or any other of Respondent's representatives "was he informed" that Respondent did not intend to pay for the watermelons or of any offset agreement. (Complainant's Statement in Reply, affidavit of Christopher Collier, p. 2.)

The proponent of a claim has the burden of proof. *Sun World International, Inc. v. J. Nichols Produce Co.*, 46 Agric. Dec 893, 894 (1987). The party which has the burden of proof as to a fact must prove the fact by a preponderance of the evidence. *Id.; A.D. McGinnis Produce v. Pinder's Produce Co.*, 28 Agric. Dec. 249 (1969). In this case, Respondent has not met its burden to prove its claim that an offset agreement existed that would affect its obligation to pay Complainant for the ten loads of watermelons Respondent ordered from Complainant. Respondent submits conflicting accounts of when and how the purported agreement with David Herrera was reached. *See supra* at 7-8. Further, Respondent provides no written contract or memorialized agreement to prove the offset arrangement reached between Respondent and David Herrera. However, it seems logical, given Respondent's purported prior dealings with Mr. Herrera, that Respondent would have required that any offset agreement be in writing, particularly when the debt was already two years old and when it involved a third party, who had nothing to do with the debt allegedly owed by Mr. Herrera. Moreover, David Herrera, with whom Respondent claims the offset agreement was reached, flatly denies the existence of any such offset agreement. (Complainant's Opening Statement, affidavit of David Herrera , pp. 1-2.) Based on the ambiguity of Respondent's evidence that any offset agreement was reached, the lack of any written contract or agreement memorializing an offset agreement, and the statements of David Herrera and Christopher Collier, that directly contradict Respondent's claim that an offset agreement was reached between David Herrera and Respondent and communicated to Complainant, we find that there was no offset agreement that could affect Complainant's claim in this case. The

evidence does not support the conclusion that an offset agreement existed that would alleviate Respondent's obligation to pay for the 10 loads of watermelons it (or its customers) received and accepted between May 1, 2007 and May 12, 2007.

Because we find that no offset agreement existed, we need not address the issue of whether Complainant, as David Herrera's agent, could be obligated by Mr. Herrera's agreement to offset a 2005 debt with the 2007 watermelon loads at issue in this case (had such an agreement been made). We further need not address the issue of whether a 2007 growers agent arrangement between Complainant and David Herrera existed at the time of the sale of the 10 loads of watermelons in this case. We note that Complainant provides a "sales contract", which purports to show that at some point in 2007, Complainant acted as David Herrera's selling agent. (Complainant's Opening Statement, Exhibit 14.) There is no date range listed in the contract as to the length of the agreement. The contract is dated March 1, 2007; however, both Judy Rou and David Herrera claim that the contract was "backdated", and that it was not in effect at the time of the transactions in this case. (Complainant's Opening Statement, affidavit of Judy Rou p. 4; affidavit of David Herrera, p. 2.) David Herrera states in his affidavit that the contract was not in place until "several months" after the transactions in this case. (Complainant's Opening Statement, affidavit of David Herrera, p. 2.) Judy Rou never states when the contract was in fact put in place or began. Neither David Herrera nor Ms. Rou provide any explanation for the somewhat extraordinary claim that the contract was backdated, or why it would have been so. We note, as Respondent points out in its brief, that Complainant paid David Herrera for the loads of watermelons in accordance with the "sales contract", *i.e.* the full price of the watermelons minus a selling commission of $0.02 per pound. *(See* Complainant's Opening Statement, exhibit 14.) However, this fact is not relevant to the decision here, since the agreement between Complainant and Mr. Herrera is separate and distinct from the contracts between Complainant and Respondent. Even if Complainant was operating as Mr. Herrera's agent for the transactions at issue, we have determined that no offset agreement was reached between Mr. Herrera and Respondent involving the watermelons sold by Complainant.

Because we find that Respondent failed to prove by a preponderance of the evidence that any offset agreement existed when the 10 loads of watermelons were sold to and accepted by Respondent

and/or its customers between May 1, 2007 and May 12, 2007, we find that Respondent is liable to Complainant for the entire invoice price of the 10 loads of watermelons ordered by Respondent.

Respondent's failure to pay Complainant $71,541.62 for 10 loads of watermelons purchased and accepted between May 1, 2007 and May 12, 2007 is a violation of section 2 of the Act (7 U.S.C. § 499b), for which reparation should be awarded to the Complainant. Section 5(a) of the Act (7 U.S.C. § 499e(a)) requires that we award to the person or persons injured by a violation of section 2 of the Act (7 U.S.C. § 499b) "the full amount of damages . . . sustained in consequence of such violation." 7 U.S.C. § 499e(a). Such damages, where appropriate, include interest. *See Louisville & Nashville R.R. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217, 239-40 (1925); *see also Louisville & Nashville R.R. v. Ohio Valley Tie Co.*, 242 U.S. 288, 291 (1916); *Crockett v. Producers Mktg. Ass'n*, 22 Agric. Dec. 66, 67 (1963). The interest to be applied

shall be determined in accordance with 28 U.S.C. § 1961, i.e., the interest rate shall be calculated . . . at a rate equal to the weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the Order.

PGB Int'l, LLC v. Bayche Cos., 65 Agric. Dec. 669, 672-73 (2006); Notice of Change in Interest Rate Awarded in Reparation Proceedings Under the Perishable Agricultural Commodities Act, 71 Fed. Reg. 25,133 (Apr. 28, 2006).

Complainant in this action paid a $300.00 handling fee to file its complaint. Pursuant to 7 U.S.C. § 499e(a), the party found to have violated section 2 of the Act is liable for any handling fees paid by the injured party.

Order

Within 30 days from the date of this Order, Respondent shall pay Complainant as reparation $71,541.62, with interest thereon at the rate of 0.24% per annum from June 1, 2007, until paid; plus the amount of $300.00.

Copies of this Order shall be served upon the parties.

Done at Washington, D.C.

[Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Miscellaneous Orders] with the sparse case citation but without the body of the order. Miscellaneous Orders issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported - Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: www.dm.usda.gov/oaljdecisions

PERISHABLE AGRICULTURAL COMMODITIES ACT

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NAGI G. HABIB.
Docket No. PACA 09 – 0096.
Miscellaneous Order.
Filed March 7, 2007.

G & T TERMINAL PACKAGING CO.
Docket No. PACA 11 – 0182.
Miscellaneous Order.
Filed May 2, 2011.

[Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Default Orders] with the sparse case citation but without the body of the order. Default Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported - Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: www.dm.usda.gov/oaljdecisions]

PERISHABLE AGRICULTURAL COMMODITIES ACT

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Docket No. PACA 10 – 0308.
Default Decision.
Filed January 10, 2011.

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STOREYS' FRUIT & PRODUCE INC.
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Filed February 24, 2011.

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AGRICULTURE DECISIONS

Volume 70

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THIS IS A COMPILATION OF DECISIONS ISSUED BY THE
SECRETARY OF AGRICULTURE AND THE COURTS
PERTAINING TO STATUTES ADMINISTERED BY THE
UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

Agriculture Decisions is an official publication by the Secretary of Agriculture consisting of decisions and orders issued in adjudicatory administrative proceedings conducted for the Department under various statutes and regulations. Selected court decisions concerning the Department's regulatory programs are also included. The Department is required to publish its rules and regulations in the *Federal Register* and, therefore, they are not included in *Agriculture Decisions*.

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The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket number, e.g., AWA Docket No. 99-0022, and the use of such references generally indicates that the decision has not been published in *Agriculture Decisions*. Decisions and Orders found on the OALJ Website may be cited as primary sources.

Consent Decisions entered subsequent to December 31, 1986, are no longer published in *Agriculture Decisions*. However, a list of Consent Decisions is included in the printed edition. Since Volume 62, the full texts of Consent Decisions are posted on the USDA/OALJ website (See url below). Consent Decisions are on file in portable document format (pdf) and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges (OALJ).

Beginning in Volume 63, all **Initial Decisions** decided in the calendar year by the Administrative Law Judge(s) will be arranged by the controlling statute and will be published chronologically along with decisions from appeals (if any) of those ALJ decisions issued by the Judicial Officer.

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Beginning in Volume 69 (Circa 2010), Miscellaneous Orders and Default Decisions by the Administrative Law Judges will continue to be cited, but without the full text of the Order/Decision. The full context of the Order/Decision will be published on the OALJ website (see above).

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