Legal Opinion: GMP-0083

Index: 6.425
Subject: Garnishment

June 5, 1992

MEMORANDUM FOR: Hal Morrison
Director of Evaluation and Assistance Division

FROM: Sam Hutchinson, Assistant General Counsel for Personnel and Ethics Law

SUBJECT: Garnishment

You have requested guidance on the implementation of the Department's present policy on garnishment of HUD employees' salaries for satisfaction of commercial debt.

Ordinarily the wages of a federal employee are not subject to garnishment for commercial debt. This premise is based on the doctrine of sovereign immunity which provides that the federal government may not be sued without its express permission. Buchanan v. Alexander, 45 U.S. 19 (1845). The garnishment process involves suit against an employer to require payment to the garnishor, of wages owed an employee.

As you are aware, in 1986, the Department adopted its current policy of garnishing for commercial debt only when the employee is an FHA employee. Between 1980 and 1986, however, the Department had honored commercial garnishments of all HUD employee's salaries as the result of an adverse decision of the district court of the Northern District of Illinois, General Office Credit Union v. Bettye C. McNeil and HUD, No. 78 C 4960 (N.D. Ill. 1979). In that case, the court held that HUD had waived its sovereign immunity by virtue of its incorporation of the Federal Housing Administration which had been created by the 1934 Housing Act, amended in 1935 to include an express waiver of sovereign immunity with respect to FHA matters. (12 U.S.C.1702). Prior to 1980, HUD's policy had been to seek the dismissal of all garnishment orders on the grounds that the HUD Act of 1965 (42 U.S.C 3531) et seq., did not contain a provision waiving sovereign immunity to suit. Clearly, at various periods of time, HUD has espoused different policies with respect to garnishment for commercial debt.

While FHA was a separate entity, FHA employees' salaries were subject to garnishment because of the specific consent to suit in the National Housing Act, 12 U.S.C. 1702. Essentially, the United States agreed to waive its immunity to suit with

respect to FHA matters, the same as any commercial entity. FHA v. Burr, 309 U.S. 242 (1940).

The current confusion over whose salaries are subject to garnishment arises because of the absence of a similar waiver of sovereign immunity in the legislation creating HUD (42 U.S.C. 3531). When Congress provided that the newly created Department of HUD assume responsibility for the programs of the Federal Housing Administration, it did not amend the 1935 legislation regarding the waiver of sovereign immunity. It appears therefore that the waiver is still effective so far as FHA matters are concerned. It is much less clear that the surviving waiver applies to matters of employment, FHA, or otherwise.

Almost immediately after taking office in 1966, the first Secretary of HUD delegated back to the Federal Housing Commissioner, the authority to employ FHA personnel. Those employees retained their separate payroll status, under Title 1 of the National Housing Act, until 1969. In 1969, the Housing Commissioner's authority to hire was revoked and the Assistant Secretary for Administration was delegated all responsibility for hiring and personnel matters, Department of HUD Act, 42 U.S.C. 35325(d), Section 7(d). Although there continued to be separate funding for FHA programs, there was no longer an exclusive FHA personnel office nor was there any longer separate funding for the payment of salaries of HUD employees who work on FHA related matters. The salaries of all HUD employees are now paid from the general treasury out of the salaries and expense appropriation for the Department of HUD.

As mentioned above, since 1986, the Department's policy has been to honor garnishment orders issued only against FHA employees and to move for dismissal of those with respect to any other HUD employees. Implementation of this policy has been difficult because there are few, if any, HUD employees, especially in the field offices, whose position descriptions cover only tasks that come within the purview of the National Housing Act, Titles I, II, III, V, VI, VII, VIII, IX, and XI. Consequently, each time the Department is presented with an order of garnishment for commercial debt, it is necessary to make a determination whether that employee engages, to any degree, or wholly, or substantially, in FHA related work. This also involves a determination of what percentage constitutes a substantial portion of one's workday. This task has placed the heavy burden on your staff of garnering sufficient information about an employee's duties from supervisors who often are not themselves aware of the distinctions between FHA and non-FHA related programs.

We believe that HUD's present policy should be revisited and that consideration should be given to treating all HUD employees alike for garnishment purposes. Application of the commercial

garnishment laws to all federal employees has been the subject of proposed legislation in the past. Another Bill was introduced this term and Congressional hearings were held in March, 1992. The Bill has at least tacit support from the Administration.

Passage of this legislation would dispense with the necessity for the present case-by-case scenario and would most certainly be viewed as a more equitable treatment of HUD employees.

In the interim, the Department has several options available: We could honor all garnishment orders on the theory that because the 1935 statute was enveloped into the HUD enabling statute, its provisions, including the waiver of sovereign immunity, pertain to all HUD transactions, including the payment of employees' salaries. Although there appears to have been ample authority to the contrary, Johnson v. Secretary of HUD, 710 F2d 1130 (1983), this was the position the Department adhered to between 1981 and 1986, a policy structured on the U.S. Attorney's refusal, as a result of the McNeil case, to defend against Illinois State court garnishment orders. On the other hand, the Department could take the position that although Congress did not specifically repeal the sue and be sued clause of Section l702 of the 1935 Act when it created HUD, it was Congress' intent that all the functions of the FHA be performed by HUD employees in accordance with the HUD Act. Since the statute creating HUD does not contain a waiver of sovereign immunity, the waiver provision of the 1935 act is rendered moot with respect to employment and any other non-FHA matter. This was HUD's position prior to 1980.

Nevertheless, we presently operate under the policy adopted in 1986 and you have requested that we provide you with some guidelines to be followed in determining who is, and who is not, an FHA employee for garnishment purposes.

In the recent past, we have advised that only garnishment orders relating to HUD employees whose payroll codes are within the Housing Organization will be honored and then only after confirmation by the Administrative Officer in the appropriate office, that a substantial portion of the employee's duties are related to FHA programs. We recognize that this procedure can be confusing for those who are not familiar with the distinction between FHA and other HUD programs.

The Federal Housing Act of 1935 created the Federal Housing Authority and authorized it to establish an insurance program to enable the public to purchase affordable housing. Thus, any function that relates to the insurance programs of HUD would be a position subject to garnishment procedures. The insurance programs created by the Housing Act and subsequent amendments include: Mortgage insurance on single and multi-family loans, renovation and modernization loans, rental housing loan insurance, manufactured housing loan insurance, loans for housing for the elderly, insurance on rehabilitation loans for 1-4 family

residences and rehabilitation of multi-family rental projects in blighted areas, moderate income housing loan insurance, insurance on loans to servicemen, insurance on loans for critical defense housing, insurance on loans to refinance existing hospitals and nursing homes, insurance on investment rental housing, rental housing for the elderly and rental housing for low income

families with children, loan insurance for the construction of nursing homes and intermediate care facilities, loan insurance for experimental housing using advanced technology, condominium mortgage insurance, insurance on loans to lower income families unable to meet usual credit requirements for home ownership, rental assistance for lower income families (Section 235 and 236), insurance on loans for the construction or purchase of hospitals, assistance payments for middle income families through interest subsidy payments to FNMA (Federal National Mortgage Association) or FHLMC (Federal Home Loan Mortgage Corporation), co-insurance loans for which a mortgagee assumes part of the risk, insurance on variable rate mortgages, insurance on loans for cooperative housing developed from the sale of existing multifamily units to non-profit corporations, insurance on single-family residences located on Indian Reservations, insurance on shared appreciation mortgages, and insurance on home equity conversions for elderly homeowners. This list may not be exhaustive.

Unfortunately, not all of these functions are performed within the Office of Housing. For example, we have recently been informed that the Section 8 Moderate Rehabilitation program has been transferred to the Office of Public and Indian Housing. Additionally, we must be aware that there are employees in the Office of Financing and Accounting (OFA), within the Office of Administration, whose workload is substantially related to FHA. Within the General Counsel's Office, the Office of Insured Housing and Finance as well as the Office of Assisted Housing often perform legal work related to FHA programs. The Office of Program Enforcement, OGC, also engages in FHA related work before the Mortgagee Board. Additionally, employees in the Government National Mortgage Association (GNMA), frequently deal with FHA insured properties. Finally, the courts have held that programs that are "piggybacked" onto the FHA programs specifically enumerated in Section 1702 of the National Housing Act, also fall within the purview of the waiver of immunity to suit. Thomas v. Pierce, 662 F.Supp. 519 (D.Kan. 1987).

In the past, we have confined our inquiries relating to FHA duties to employees who work in the Office of Housing. Clearly, this procedure is no longer adequate (and perhaps never was). In view of this analysis, we recommend that, until such time as Congress relieves the Department of dual categories of employees for garnishment purposes, the Department investigate the essence of the work performed by every HUD employee against whom a State court order of garnishment for commercial debt has been issued.

We recognize that implementation of this recommendation will add substantially to an already heavy burden on your staff. Therefore, I suggest that you educate all Administrative Officers, in Headquarters, as well as in the Regional and Field Offices as to the programs authorized by the National Housing Act, listed above, and direct that they make an expedited determination about the nature of an individual's duties and forward that determination to you on a priority basis

once an order for garnishment has been served on the Department.

This recommendation does not apply to orders issued by the Illinois Courts. We should continue to honor Illinois State garnishment orders regardless of the employee's status, i.e., FHA, until such time as the U. S. Attorney agrees to challenge the McNeil decision.