

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ROBERT C. TILLMAN,)
)
 Petitioner,)
)
vs.) Case No. 02-3119
)
DEPARTMENT OF REVENUE, CHILD)
SUPPORT ENFORCEMENT PROGRAM,)
)
 Respondent.)

)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on January 17, 2003, in Tallahassee, Florida, before the Division of Administrative Hearings, by its designated Administrative Law Judge, Barbara J. Staros.

APPEARANCES

For Petitioner: Jeffrey S. Richardson, Esquire
6753 Thomasville Road
Tallahassee, Florida 32312-3893

For Respondent: Robert Leher, Esquire
Department of Revenue
Child Support Enforcement Program
Post Office Box 8030
Tallahassee, Florida 32314-8030

STATEMENT OF THE ISSUES

The issues in this proceeding are: What is the amount of child support arrearages and/or past-due support presently owed by Petitioner? Whether the Department of Revenue, Child Support

Enforcement Program is authorized to employ the remedy of garnishment as set forth in Section 409.25656, Florida Statutes.

PRELIMINARY STATEMENT

On August 15, 2001, Respondent, Department of Revenue, Child Support Enforcement Program (the Department) sent a Notice of Intent to Levy (NOIL) to Petitioner, Robert C. Tillman. The NOIL advised Petitioner that the Department intended to levy on Petitioner's personal property in the form of liquid assets in the control of South Atlantic Federal Credit Union in Boca Raton, Florida. The NOIL further advised Petitioner that this action was being taken because of Petitioner's nonpayment of child support in the amount of \$2,254.96. The NOIL informed Petitioner that he could contest the agency's action by either filing an action in circuit court or by requesting an administrative hearing within 21 days.

Petitioner challenged the Department's intended action and filed a Florida Petition for Hearing. The Department forwarded the case to the Division of Administrative Hearings on or about August 7, 2002. A formal hearing was scheduled for October 22, 2002. On October 18, 2002, the Department issued an Amended NOIL to Petitioner advising him that it intended to levy on his liquid assets in the amount of \$6,094.12 as the result of his nonpayment of child support. The Amended NOIL advised Petitioner that he had 21 days in which to either file a

petition in his existing court case in circuit court or to request an administrative hearing. The Department filed a motion requesting that the Amended NOIL be considered at the hearing scheduled for October 22, 2002.

The hearing commenced as scheduled on October 22, 2002. At hearing, Petitioner requested the 21 days to which he was entitled and made an ore tenus motion to continue the hearing. The hearing was rescheduled for November 18, 2002. Petitioner obtained counsel who filed a Motion for Continuance, which was granted. The hearing was then rescheduled for January 17, 2003.

At hearing, Petitioner did not present the testimony of any witness. Petitioner's Exhibits 1 through 5 were admitted into evidence.^{1/} Respondent presented the testimony of two witnesses, Denise Buchanan and Alisha Agnew (the latter appeared by telephonic connection from West Palm Beach, Florida). Respondent's Exhibits 1 through 15 were admitted into evidence.

A Transcript of the commencement of the hearing on October 22, 2002, was filed on November 5, 2002. However, the hearing conducted on January 17, 2003, was not transcribed. The parties requested more than 10 days in which to file proposed recommended orders and that request was granted. The parties filed proposed recommended orders which were considered in the preparation of this recommended order.

FINDINGS OF FACT

Stipulated Facts

1. On January 29, 1982, a Final Judgment was issued in the case of Linda Tillman v. Robert C. Tillman, Case No. 81-20402, in the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida (Broward County Circuit Court).

Pursuant to this Final Judgment, Petitioner, Robert C. Tillman, was ordered to pay \$103.00 per week in current child support commencing January 22, 1982, for three minor children.

2. On June 12, 1985, the Broward County Circuit Court issued an Order to Transfer in Linda Tillman v. Robert C. Tillman, Case No. 81-20402, to Palm Beach County, Florida.

3. On August 18, 1987, an Order Granting Respondent's Motion for a Decrease in Child Support was filed in the case of Linda Tillman and the Department of Health and Rehabilitative Services v. Robert Tillman, (hereinafter Tillman v. Tillman) Case No. 85-5064, in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County (Palm Beach County Circuit Court), under which Petitioner's current child support obligation was reduced to \$65.00 per week because one of the parties' children had come to live with Petitioner. Additionally, child support arrearages of \$4,121.64 were established and Petitioner was ordered to pay an additional \$10.00 per week in liquidation of the arrearages.

4. On July 20, 1990, an Order Adjudicating Respondent in Contempt was filed in the Palm Beach Circuit Court in Tillman v. Tillman, under which Petitioner was found in civil contempt of court for willfully failing to satisfy his child support obligations. Petitioner's child support arrearages were determined to be \$3,935.42 as of May 10, 1990, and he was ordered to continue to pay \$65.00 per week in current child support and increased arrearages payments of \$15.00 per week.

5. On March 11, 1993, an Order Adjudicating Respondent in Contempt was filed in the Palm Beach Circuit Court in Tillman v. Tillman under which Petitioner again was found in civil contempt of court for willfully failing to satisfy his child support obligations. Petitioner's child support arrearages were determined to be \$5,102.59 as of February 18, 1993, and he was ordered to continue to pay \$65.00 per week in current child support, increased arrearages payments of \$35.00 per week, and \$500.00 as a partial lump-sum payment on arrearages to purge his contempt.

6. On November 6, 1995, an Order Adjudicating Respondent in Contempt was filed in the Palm Beach Circuit Court in Tillman v. Tillman under which Petitioner again was found in civil contempt of court for willfully failing to satisfy his child support obligations. Petitioner's child support arrearages were determined to be \$8,298.93 as of October 17, 1995. He was

ordered to continue to pay \$65.00 per week in current child support and \$10.00 per week plus a \$150.00 lump-sum payment on arrearages to purge his contempt.

7. On March 19, 1996, an Order Adjudicating Respondent in Contempt was filed in the Palm Beach Circuit Court in Tillman v. Tillman under which Petitioner again was found in civil contempt of court for willfully failing to satisfy his child support obligations. Petitioner's child support arrearages were determined to be \$8,829.74 as of May 25, 1995. He was ordered to continue to pay \$65.00 per week in current child support and \$20.00 per week plus a \$500.00 partial lump-sum payment on arrearages to purge his contempt.

8. On August 8, 2001, the Department mailed a Notice of Freeze (NOF) in an amount up to \$2,254.96 to the South Atlantic Federal Credit Union in Boca Raton, Florida, by certified mail, return receipt requested, regarding any accounts of Petitioner. The credit union received the NOF on August 10, 2001.

9. On August 15, 2001, the Department mailed a Notice of Intent to Levy (NOIL) in an amount up to \$2,254.96 to Petitioner by certified mail, return receipt requested. Petitioner received the NOIL on August 18, 2001.

10. The NOF and NOIL mailed by the Department satisfied the statutory notice requirements of Section 409.25656, Florida Statutes.

11. Petitioner filed a Request for Administrative Hearing dated August 30, 2001, which was received by the Department on September 18, 2001.

12. The Department sent a Notice of Extension of Freeze (NOEOF) in an amount of up to \$2,254.96 to South Atlantic Federal Credit Union on September 12, 2001.

13. The Department dismissed Petitioner's August 30, 2001, Request for Administrative Hearing as legally insufficient.

14. Petitioner filed a timely and legally sufficient Revised Petition for Hearing dated January 7, 2002, which was received by the Department on January 16, 2002.

15. On June 10, 2002, a Recommendation of Hearing Officer and an Order Granting Motion to Correct Ledger and to Determine Arrears were filed in the Palm Beach Circuit Court in Tillman v. Tillman, under which Petitioner's child support arrearages were determined to be \$6,344.12, all of which was past due as of May 15, 2002. Petitioner was ordered to pay \$50.00 per month in liquidation of his arrearages.

16. The official payment records of the Palm Beach County Clerk of Court established that Petitioner owed child support arrearages/past-due child support in Tillman v. Tillman of \$6,194.12 as of November 25, 2002.

17. The Department faxed and mailed by certified mail, return receipt requested, an Amended Notice of Freeze (Amended NOF) in an amount up to \$6,094.12 to South Atlantic Federal Credit Union on October 16, 2002. The credit union received the Amended NOF on October 18, 2002.

18. The Department faxed an Amended NOIL to Petitioner in an amount up to \$6,094.12 on October 18, 2002, and mailed a copy to Petitioner on October 19, 2002.^{2/}

19. The Department faxed and mailed an Amended Notice of Extension of Freeze (Amended NOEOF) in an amount up to \$6,094.12 to South Atlantic Federal Credit Union on December 20, 2002.

Facts Based Upon the Evidence of Record

20. Petitioner made five timely monthly payments of \$50.00 in Tillman v. Tillman between May 15, 2002, and November 25, 2002.

21. Petitioner made two more timely monthly payments of \$50.00 between November 25, 2002 and January 17, 2003, reducing the amount he owed in child support arrearages/past-due in Tillman v. Tillman to \$6,094.12 as of January 17, 2003.

CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. Section 120.57(1), Florida Statutes.

23. The Department of Revenue, Child Support Enforcement Program is the state agency responsible for the administration of the state's child support enforcement program. Section 409.2557(1), Florida Statutes.

24. As the party asserting the affirmative of an issue before this administrative tribunal, the Department has the burden of proof. Florida Department of Transportation v. J.W.C. Company, 396 So. 2d 778 (Fla. 1st DCA 1981). In this case, the Department has met its burden.

25. Section 409.25656, Florida Statutes, reads in pertinent part as follows:

Garnishment

(1) If a person has a support obligation which is subject to enforcement by the department as the state Title IV-D program, the executive director or his or her designee may give notice of past due and/or overdue support by registered mail to all persons who have in their possession or under their control any credits or personal property, including wages, belonging to the support obligor, or owing any debts to the support obligor at the time of receipt by them of such notice. Thereafter, any person who has been notified may not transfer or make any other disposition, up to the amount provided for in the notice, of such credits, other personal property, or debts until the executive director or his or her designee consents to a transfer or disposition, or until 60 days after the receipt of such notice. If the obligor contests the intended levy in the circuit court or under

chapter 120, the notice under this section shall remain in effect until final disposition of that circuit court or chapter 120 action. Any financial institution receiving such notice will maintain a right of setoff for any transaction involving a debit card occurring on or before the date of receipt of such notice.

(2) Each person who is notified under this section must, within 5 days after receipt of the notice, advise the executive director or his or her designee of the credits, other personal property, or debts in their possession, under their control, or owed by them and must advise the executive director or designee within 5 days of coming into possession or control of any subsequent credits, personal property, or debts owed during the time prescribed by the notice. Any such person coming into possession or control of such subsequent credits, personal property, or debts shall not transfer or dispose of them during the time prescribed by the notice or until the department consents to a transfer.

(3) During the last 30 days of the 60-day period set forth in subsection (1), the executive director or his or her designee may levy upon such credits, personal property, or debts. The levy must be accomplished by delivery of a notice of levy by registered mail, upon receipt of which the person possessing the credits, other personal property, or debts shall transfer them to the department or pay to the department the amount owed by the obligor. If the department levies upon securities and the value of the securities is less than the total amount of past due or overdue support, the person who possesses or controls the securities shall liquidate the securities in a commercially reasonable manner. After liquidation, the person shall transfer to the department the proceeds, less any applicable commissions or fees, or both,

which are charged in the normal course of business. If the value of the securities exceeds the total amount of past due or overdue support, the obligor may, within 7 days after receipt of the department's notice of levy, instruct the person who possesses or controls the securities which securities are to be sold to satisfy the obligation for past due or overdue support. If the obligor does not provide instructions for liquidation, the person who possesses or controls the securities shall liquidate the securities in a commercially reasonable manner and in an amount sufficient to cover the obligation for past due or overdue support, less any applicable commissions or fees, or both, which are charged in the normal course of business, beginning with the securities purchased most recently. After liquidation, the person who possesses or controls the securities shall transfer to the department the total amount of past due or overdue support.

* * *

(8) An obligor may contest the notice of intent to levy provided for under subsection (7) by filing a petition in the existing circuit court case. Alternatively, the obligor may file a petition under the applicable provisions of chapter 120. After an action has been initiated under chapter 120 to contest the notice of intent to levy, an action relating to the same levy may not be filed by the obligor in circuit court, and judicial review is exclusively limited to appellate review pursuant to s. 120.68. Also, after an action has been initiated in circuit court, an action may not be brought under chapter 120. (emphasis supplied)

26. Petitioner has a past-due child support obligation in the amount of \$6,094.12 as of January 17, 2003, which is subject to enforcement by the Department.

27. The Department gave the statutorily required notice to the financial institution that held personal property owned by Petitioner in its possession and control.

28. The Department issued a NOIL and Amended NOIL which notified Petitioner that the Department intended to levy upon his personal property; stated that the action was being taken for Petitioner's nonpayment of child support; and advised Petitioner of his rights to contest the notice of intent to levy.

29. Section 409.25656(8), Florida Statutes, gives an obligor a choice of contesting the NOIL in the existing circuit court case or by filing a petition under chapter 120, Florida Statutes. Petitioner elected to contest the NOIL by filing a Petition for Hearing under Chapter 120, Florida Statutes. Once he elected to do that, he is prohibited from also filing an action in the proceeding in circuit court. Likewise, after making that election, he cannot now successfully argue that the matter is precluded from being heard in this forum.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law, it is

RECOMMENDED:

That the Department of Revenue, Child Support Enforcement Program enter a final order that levies upon the funds in the

Petitioner's credit union account up to the amount of \$6,094.12; applies the funds to reduce Petitioner's accrued child support arrearage; and credits Petitioner for the amount so applied.

DONE AND ENTERED this 27th day of February, 2003, in Tallahassee, Leon County, Florida.

BARBARA J. STAROS
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of February, 2003.

ENDNOTES

1/ Petitioner's Exhibit numbered 4 was filed late by agreement of the parties.

2/ Petitioner acknowledged receipt and waived the requirement that the Amended NOIL be sent by certified mail during the hearing on October 22, 2002.

COPIES FURNISHED:

Jeffrey S. Richardson, Esquire
6753 Thomasville Road
Tallahassee, Florida 32312-3893

Robert Leher, Esquire
Department of Revenue
Child Support Enforcement Program
Post Office Box 8030
Tallahassee, Florida 32314-8030

Bruce Hoffmann, General Counsel
Department of Revenue
204 Carlton Building
Tallahassee, Florida 32399-0100

James Zingale, Executive Director
Department of Revenue
104 Carlton Building
Tallahassee, Florida 32399-0100

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.