

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Brad Berman,	:	
	:	
Petitioner	:	
	:	
v.	:	
	:	
Pennsylvania Housing Finance Agency,	:	No. 395 C.D. 2014
Respondent	:	Submitted: August 22, 2014

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY  
JUDGE COVEY

FILED: February 18, 2015

Brad Berman (Berman), pro se, petitions this Court for review of the Pennsylvania Housing Finance Agency (Agency) Hearing Examiner’s January 22, 2014 decision affirming the Agency’s November 20, 2013 denial of Berman’s application for emergency mortgage assistance under the Homeowners’ Emergency Mortgage Assistance Program (HEMAP).<sup>1</sup> The sole issue for this Court’s review is whether the Agency erred when it concluded that there was no reasonable prospect of Berman resuming full mortgage payments within thirty-six (36) months from the date of the mortgage delinquency and paying the mortgage by maturity.<sup>2</sup> After review, we affirm.

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<sup>1</sup> Act of December 3, 1959, P.L. 1688, added by Section 2 of the Act of December 23, 1983, P.L. 385, *as amended*, 35 P.S. §§ 1680.401c-1680.412c.

<sup>2</sup> Berman raised a second issue for review in his questions presented: “Whether the [Agency] and the Mortgage Assistance program as a whole is flawed, because of [a] lack of guidelines being offered to applicants for the HEMAP program? [The Agency’s] decisions being based on estimates with few concrete hard facts.” Berman’s Br. at 7. However, other than expressing dissatisfaction with the manner in which the program is administered and its perceived unfairness, Berman offers no legal argument or citation to relevant law, and thus, there is no issue

Berman owns property located at 100 Schoolview Lane in Oxford, Pennsylvania (the Property). The Property is subject to a mortgage held by Ocwen Loan Servicing LLC. The \$2,300 monthly mortgage payment has been delinquent since August 2013. On November 13, 2013, Berman applied for mortgage assistance under HEMAP. On November 20, 2013, the Agency notified Berman that his application was denied because it had been determined that there was no reasonable prospect of Berman resuming full mortgage payments within 36 months from the date of delinquency and paying the mortgage by maturity. Berman appealed from the Agency's denial and requested a hearing.

An Agency Hearing Examiner held a hearing on December 13, 2013. At the hearing, Berman testified that he has been unemployed since March 2009 when his employer Sharpe Electronics laid off its entire sales force. During his 2½ years with Sharpe Electronics, Berman earned \$53,000 plus an annual bonus of approximately \$6,000. Before Sharpe Electronics, Berman was employed by Next Generation, an alarm company, where he earned approximately \$35,000 per year during the 4 years he worked there. Prior to Next Generation, Berman had been employed for 6½ years by Microsoft, earning \$93,000 per year plus bonuses. After his Microsoft position was eliminated, Berman searched for employment for 2½ to 3 years before accepting the position with Next Generation. Berman testified that he has continuously searched for employment since Sharpe Electronics laid him off, but given the economy and the job market he has had difficulty finding a job. He admitted that at one point during his search, he was offered but did not accept a job paying \$27,000 per year with no benefits. Berman expressed his belief that he would soon find a job because he has significant experience, a good work history, and has

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for this Court to address. *See Hill v. Kilgallen*, \_\_\_ A.3d \_\_\_ (Pa. Cmwlth. No. 38 C.D. 2014, filed January 6, 2015) (“[W]hen a party fails to develop an issue in the argument section of its brief, the Court may consider the issue to have been waived.”). To the extent that Berman challenges the sufficiency of the evidence, it is encompassed in the first issue.

been diligently trying to find a position. He estimated that he would be able to resume full mortgage payments once he finds employment with a minimum salary of \$40,000 to \$50,000 per year.

Berman further testified that he and his wife divorced in June 2010. His now ex-wife earned \$65,000 per year when she left the household in January or February 2011. Berman has custody of his two sons, one of whom is autistic. He believes it is important that he be permitted to stay in the home because it provides much-needed comfort and stability for the children, especially given the family situation and his son's autism.

The Hearing Examiner considered Berman's monthly household income which was reported to be \$1,351 at the time of his application.<sup>3</sup> The Hearing Examiner also reviewed Berman's three prior tax returns. In 2010 (based upon a joint tax return), the family's annual income was \$79,776 (including \$30,141 in unemployment compensation benefits). In 2011, Berman's annual income was \$3,440 (\$3,241 was from unemployment compensation benefits). In 2012, Berman's annual income was \$0. The Hearing Examiner also evaluated Berman's monthly expenses and found at the time of Berman's application his total monthly expenses were \$3,231, and at the time of his appeal were \$3,146. Given these numbers, the Hearing Examiner concluded that "[t]he entire net monthly income of \$1,351 is insufficient to pay the monthly mortgage payment, alone, of \$2,300." Supplemental Reproduced Record (S.R.R.) at 5b.<sup>4</sup>

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<sup>3</sup> That monthly income consists of \$898 in child support received from his ex-wife, and \$453 in Social Security benefits for his son.

<sup>4</sup> Berman has a total of \$1,000 in savings available to apply to the mortgage.

On January 22, 2014, the Hearing Examiner mailed her decision affirming the Agency's decision denying Berman's mortgage assistance loan application. Berman appealed to this Court.<sup>5</sup>

Berman argues that the Agency erred when it concluded that there was no reasonable prospect he would be able to resume full mortgage payments within 36 months, "because there is no way to know what financial position the Petitioner will be in within 3 years, especially based on Petitioner's previous high level jobs and salaries." Berman's Br. at 6. Berman contends that "the [Agency] made an assumption, as through a crystal ball that [P]etitioner after 3 years would not be gainfully employed. That is a judgment call with no concrete evidence . . . ." *Id.* at 11. We disagree.

An applicant for emergency mortgage assistance through HEMAP has the burden of establishing the facts necessary to qualify. *Koch v. Pennsylvania Hous. Fin. Agency*, 505 A.2d 649 (Pa. Cmwlth. 1986).

[Section 406c of HEMAP] requires that loans made thereunder be repaid in a timely fashion. 35 P.S. § 1680.406c ('Upon approval of mortgage assistance, the agency shall enter into an agreement with the mortgagor for repayment of all mortgage assistance made by the agency . . . .') [Section 404c(a) of HEMAP] requires the [Agency] to establish an application process that allows assistance to be granted only in cases where applicants are likely to resume mortgage payments and correct delinquencies within specified time limits. 35 P.S. § 1680.404c(a) ('No assistance may be made with respect to a mortgage under this article unless . . . (5) The agency has determined that there is a reasonable prospect that the mortgagor will be able to resume full mortgage payments within thirty-six (36) months . . . .') The [Agency] has a duty to conduct a

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<sup>5</sup> "This Court's scope of review is limited to determining whether constitutional rights were violated, an error of law was committed, or necessary findings of fact are not supported by substantial evidence." *R.M. v. Pennsylvania Hous. Fin. Agency*, 740 A.2d 302, 305 n.2 (Pa. Cmwlth. 1999).

thorough review of each applicant's financial position. 35 P.S. § 1680.404c(a)(6) (assistance not to be granted unless the 'mortgagor has applied to the agency for assistance on an application form prescribed by the agency for this use which includes a financial statement disclosing all assets and liabilities of the mortgagor, whether singly or jointly held, and all household income regardless of source.')

See also 35 P.S. § 1680.404c(a)(9) (assistance to be granted only where '[e]xcept for the current delinquency, the mortgagor shall have had a favorable residential mortgage credit history for the previous five (5) years.');

35 P.S. § 1680.404c(a)(1) (property securing the mortgage must be the principal residence of the mortgagor).

*Anela v. Pennsylvania Hous. Fin. Agency*, 690 A.2d 1157, 1159-60 (Pa. 1997). This Court has noted that:

Section 31.206(b)<sup>[6]</sup> sets forth four factors to be considered by the Agency in making determinations as to whether

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<sup>6</sup> The Agency's "Policy Statement on [HEMAP,]" 12 Pa. Code § 31.206, provides in relevant part:

(a) In general, the Agency will consider all relevant factors when evaluating whether the homeowner has a reasonable prospect of being able to resume full mortgage payments within 24 months after the beginning of the period for which assistance payments are provided [by] the Agency and of being able to pay the mortgage in full by maturity or by a later date agreed to by the mortgagee, including the following:

- (1) The homeowner's prior work history, experience, training, opportunities for retraining and similar factors which may affect the homeowner's future employment opportunities.
- (2) Potential for future changes in the homeowner's financial prospects through re-employment, schooling, training or debt reduction or other income changes sufficient to enable the homeowner to resume full mortgage payments.
- (3) Noncash benefits that may reduce household expenses, such as food stamps, free medical services for military or low-income families, a company-provided automobile or receipt of food or clothing from family members living outside the household.

applicants are suffering financial hardship due to circumstances beyond their control and whether they demonstrate a reasonable prospect of resuming full mortgage payments within 36 months and paying the mortgage in full by the maturity date under Section 404-C(a)(5) of the [HEMAP]. Satisfaction of these factors, however, does not necessarily compel the conclusion that a

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(4) Changes in income or recurring expenses, or both, that may be affected by changes in the age, composition or employment of members of the household.

(5) Potential for repayment of short-term or installment debt.

(6) Delinquencies in other debts which seriously jeopardize continued ownership of the home, which cannot be cured by a mortgage assistance loan.

(7) A homeowner's demonstrated ability to make regular monthly mortgage payments, even though those payments represented most of the homeowner's income. In determining whether the homeowner's future job and income prospects will be sufficient to enable the homeowner to pay the mortgage debt -- including principal, interest, taxes and insurance -- the Agency will take into consideration the amount of household income available to the homeowner prior to the circumstances which caused the mortgage delinquency and whether the income was sufficient.

(b) The Agency will generally determine that a homeowner demonstrates a reasonable prospect of resuming mortgage payments and paying the mortgage by maturity, despite his current unemployment, if the homeowner is suffering a financial hardship through no fault of his own and can demonstrate the following:

(1) A favorable work and credit history.

(2) The ability and history of paying the mortgage when employed.

(3) The lack of an impediment or disability that prevents reemployment.

(4) That he is actively seeking work, as evidenced by a written statement to that effect.

12 Pa. Code § 31.206(a)-(b). In *R.M. v. Pennsylvania Housing Finance Agency*, 740 A.2d 302, 308 (Pa. Cmwlth. 1999), this Court held that "Section 31.206 is a statement of policy, not a regulation, and thus does not have the force and effect of law."

homeowner is qualified for mortgage assistance. Rather, the Agency is free to consider in toto those four factors, as well as others, and then, based on that guidance and their own judgment, decide whether an applicant is qualified for mortgage assistance.

*R.M. v. Pennsylvania Hous. Fin. Agency*, 740 A.2d 302, 307 (Pa. Cmwlth. 1999). In evaluating an applicant's qualifications, "the Agency cannot base its determination on speculative income[.]" *Id.* at 308; *see also Cullins v. Pennsylvania Hous. Fin. Agency*, 623 A.2d 951 (Pa. Cmwlth. 1993). "It is within the discretion of the Hearing Examiner to conclude that [an applicant does] not meet the Section 404-C(a)(5) eligibility criterion." *Mull v. Pennsylvania Hous. Fin. Agency*, 529 A.2d 1185, 1188 (Pa. Cmwlth. 1987).

In the instant matter, the Hearing Examiner considered Berman's household income reported at the time of his application and during the appeal hearing as well as reviewed Berman's 2010, 2011 and 2012 federal income tax returns. She further considered Berman's monthly expenses, including monthly housing expenses, installment debts and living expenses. The Hearing Examiner concluded:

The Agency reviews the last 3 years of income to determine whether the Applicant has a reasonable prospect of resuming full mortgage payments within the maximum limit of the [HEMAP], which is 36 months from the date of the mortgage delinquency. Based on the historical income and current income, [Berman]'s income has been insufficient to meet total monthly expenses of \$3,146 since January 2011, when [Berman]'s ex-wife left the subject property. Even with the reduced expenses at appeal, total monthly expenses of \$3,146 exceed net monthly income of \$1,351 by \$1,795. Therefore, the mortgage assistance loan was properly denied on the basis: No reasonable prospect of Applicant resuming full mortgage payments within thirty-six (36) months from the date of the mortgage delinquency and paying the mortgage(s) by maturity based on: Applicant's income is insufficient to maintain mortgage. (Act 91, Section 404-C(A)).

[Berman] has been unemployed since March 2009, or 59 months. [Berman]'s months of unemployment exceed the maximum limit of the [HEMAP] by 23 months. Although he is seeking employment, he was offered employment with a salary of \$27,000 and he declined the offer. After deducting 25% to cover tax deductions, [Berman] would have a net monthly income of \$1,688. Adding his current income from [Supplemental Security Income] and child support of \$1,351 equates to total net monthly income of \$3,039. Even with net monthly income of \$3,039, the monthly mortgage payment, alone, of \$2,300, would encumber 75.6% of the entire net monthly income of \$3,039.

[Berman] declined the job offer, preferring to wait for a position where he can earn \$40,000 to \$50,000. It remains speculative to assume [Berman] will be able to obtain employment at that level, after being unemployed for 59 months. [Berman] is considering renting out a room in the subject property to increase income and reducing the cable bill to decrease expenses. However, even if [Berman] implements these measures, it remains unlikely that the two changes will bridge the \$1,795 gap between net monthly income and total monthly expenses.

Based on the historical income and current income versus expenses, the mortgage assistance loan was properly denied on the basis: No reasonable prospect of Applicant resuming full mortgage payments within thirty-six (36) months from the date of the mortgage delinquency and paying the mortgage(s) by maturity based on: The circumstances do not qualify as an emergency mortgage assistance situation but rather an ongoing situation which severely limits the probability of resumption of payments and payment of mortgage by maturity. Applicant's net monthly income, alone, has been insufficient to maintain the total monthly expenses for the past three years. Future ability to generate sufficient income remains uncertain. (Act 91, Section 404-C(A)).

S.R.R. at 5b.

The Hearing Examiner's opinion demonstrates that the Agency satisfied its "duty to conduct a thorough review of [Berman]'s financial position." *Anela*, 690

A.2d at 1159. Berman had the obligation to establish that there was a reasonable prospect of his resuming full mortgage payments within 36 months from the date of the mortgage delinquency and paying the mortgage by maturity. *See Koch*. He failed to satisfy his burden, and despite Berman's insistence that he will find employment, the Agency was not permitted to grant approval on speculative income. *See Cullins*. While we are sympathetic to Berman's circumstances, we are constrained to affirm the Agency's decision.

For all of the above reasons, the Agency's order is affirmed.

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ANNE E. COVEY, Judge

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ORDER

AND NOW, this 18<sup>th</sup> day of February, 2015, the Pennsylvania Housing Finance Agency's January 22, 2014 order is affirmed.

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ANNE E. COVEY, Judge