

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN WILLIAMS,)
)
 Plaintiff,)
)
 vs.)
)
 AIR & HYDRAULIC COMPONENTS, INC.)
)
 Defendant.)

Case No. 93-C-842B

FILED

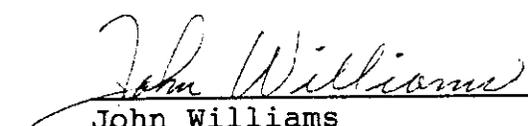
FEB 17 1994

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

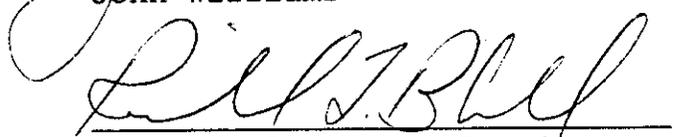
DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, John Williams, and dismisses all claims against the Defendant, Air & Hydraulic Components, Inc., in the above filed and numbered case with prejudice to the refileing of the same.

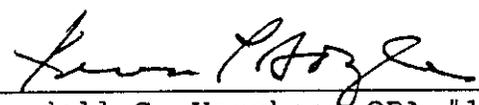
DATED this 17th day of February, 1994.



John Williams



Richard Blanchard, Esquire
320 S. Boston, Suite 1130
Tulsa, Oklahoma 74103-4700
(918) 592-1234
Attorney for Plaintiff



Randall G. Vaughan, OBA #11554
Kevin P. Doyle, OBA #13269
PRAY, WALKER, JACKMAN,
WILLIAMSON & MARLAR
100 West 5th Street
900 ONEOK Plaza
Tulsa, Oklahoma 74103
(918) 581-5500
Attorneys for Defendant

DATE FEB 18 1994

FILED

FEB 17 1994

CLERK OF DISTRICT COURT
NORTHERN DISTRICT OF OK

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

LYNNE G. WHAYNE,

Plaintiff,

vs.

Case No. 93-C-275B

INDEPENDENT SCHOOL DISTRICT
NO. 1 OF TULSA COUNTY,
OKLAHOMA,

Defendant.

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

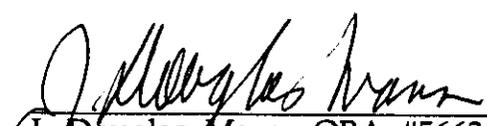
The plaintiff, Lynne G. Whayne, and the defendant, Independent School District No. 1 of Tulsa County, Oklahoma, advise the court of a settlement between the parties and pursuant to Rule 41(a)(1)(ii), FED. R. CIV. P., jointly stipulate that the plaintiff's action against the defendant, Independent School District No. 1 of Tulsa County, Oklahoma, be dismissed with prejudice, the parties to bear their respective costs, including all attorney's fees and expenses of this litigation.

Dated this 17 day of February, 1994.



Jeff Nix, OBA #6688
2121 South Columbia
Suite 710
Tulsa, Oklahoma 74114
(918) 742-4486

Attorneys for Plaintiff



J. Douglas Mann, OBA #5663
ROSENSTEIN, FIST & RINGOLD
525 South Main, Suite 300
Tulsa, Oklahoma 74103
(918) 585-9211

Attorneys for Defendant

DATE 2-18-94

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
FEB 17 1994
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

DAVID W. RICHARD,)
)
 Petitioner,)
)
vs.)
)
MICHAEL CODY, et al.,)
)
 Respondent.)

No. 93-C-993-E

ORDER

Before the Court are respondent's motion to dismiss for failure to exhaust state remedies, and petitioner's response.

Respondent has moved to dismiss petitioner's application for a writ of habeas corpus as a mixed petition. Respondent argues that the petitioner has not presented to the Oklahoma Court of Criminal Appeals three of his grounds for relief: (1) that he was deprived of procedural due process; (2) that he was denied effective assistance of counsel after sentencing or at the evidentiary hearing; and (3) that he was unlawfully released by the Washington County District Court. Although the Petitioner does not dispute that he failed to exhaust his state remedies as to his ineffective assistance of counsel claim, see Petition at 8, he argues that any further attempts to exhaust his state remedies would be futile because his appellate counsel refused to raise that issue on direct appeal, and a writ of habeas corpus cannot be used as a substitute for a direct appeal. See Response, docket #5 at 3.

In Rose v. Lundy, 455 U.S. 509 (1982), the United States Supreme Court held that a federal district court must dismiss a

habeas corpus petition containing exhausted and unexhausted grounds for relief. The Court stated:

In this case we consider whether the exhaustion rule in 28 U.S.C. § 2254(b), (c) requires a federal district court to dismiss a petition for a writ of habeas corpus containing any claims that have not been exhausted in the state courts. Because a rule requiring exhaustion of all claims furthers the purposes underlying the habeas statutes, we hold that a district court must dismiss such "mixed petitions," leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court.

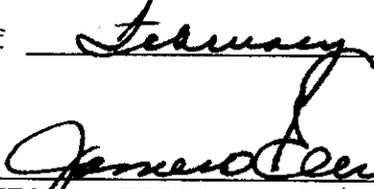
Id. at 510 (emphasis added).

After carefully reviewing respondent's motion to dismiss and petitioner's response, the court concludes that the petitioner has not exhausted his state remedies as to all his grounds for relief. Although a strong argument could be made that petitioner's unexhausted claims are barred because they could have been raised in the petitioner's direct appeal, the court chooses not to predict what the state courts will do in this case. See Darr v. Burford, 339 U.S. 200, 204 (1950) (the exhaustion requirement is based on the doctrine of comity); Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam) (requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights"). Accordingly, petitioner's application for a writ of habeas corpus is subject to dismissal as a mixed petition. See id.

ACCORDINGLY, IT IS HEREBY ORDERED that respondent's motion to dismiss for failure to exhaust state remedies [docket #3] is

granted, and the petition for a writ of habeas corpus is dismissed.

SO ORDERED THIS 16th day of February, 1994.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

DATE 2-17-94

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

F I L E D

LARRY DALE,)
)
Plaintiff,)
)
vs.)
)
LARRY FIELDS,)
)
Defendant.)

FEB 17 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

No. 93-C-420-E
"Base File"
Consolidated with
93-C-465-E

JUDGMENT

In accord with the Order granting defendants' motion for summary judgment, the court hereby enters judgment in the above consolidated action in favor of all defendants and against the plaintiff, Larry Dale. Plaintiff shall take nothing on his claim. Each side is to pay its respective attorney fees.

SO ORDERED THIS 17TH day of February, 1994.


JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 2-17-94

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DARRIN L. JONES,

Plaintiff,

v.

CITY OF TULSA,

Defendant.

)
)
)
)
)
)
)
)
)
)

Case No. 93-C-691-E

FILED
FEB 17 1994
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Upon application of the parties, this action is dismissed without prejudice pursuant to Rule 41(a)(ii) of the Federal Rules of Civil Procedure.

Dated this 16th day of February, 1994.

James O. Ellison

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

H

ENTERED ON DOCKET

DATE 2-17-94

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB 16 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

TERRY WILLIAM TOWLER,)
)
Plaintiff,)
)
vs.)
)
RONALD J. CHAMPION, et al.,)
)
Defendants.)

No. 93-C-177-B
(Base File)
Cons. w/93-C-178-B
93-C-180-B
93-C-888-B

JUDGMENT

In accord with the Order granting Defendants' motions for summary judgment, the Court hereby enters judgment in favor of all Defendants and against the Plaintiff, Terry Willila Towler and Benny Southworth. Plaintiffs shall take nothing on their claims. Each side is to pay its respective attorney fees.

SO ORDERED THIS 16 day of Feb, 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

SECRET
FEB 16 1994

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 CHARLES MORRELL, et al.,)
)
 Defendants.)

FEB 15 1994

Richard M. ... Court Clerk
U.S. DISTRICT COURT

CIVIL ACTION NO. 93-C-0062-B

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 15 day of Feb, 1994, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on November 29, 1993, pursuant to an Order of Sale dated August 31, 1993, of the following described property located in Tulsa County, Oklahoma:

Lot Thirty-five (35), Block Four (4),
LAKEVIEW HEIGHTS AMENDED ADDITION to the City
of Tulsa, County of Tulsa, State of Oklahoma,
according to the recorded Plat thereof.

Appearing for the United States of America is Kathleen Bliss Adams, Assistant United States Attorney. Notice was given the Defendants, Charles Morrell; Linda Morrell; City Finance Company of Oklahoma, Inc.; Lomas Mortgage USA, Inc., through Barry D. Mock, Esq.; Emigrant Savings Bank; and County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, through J. Dennis Semler, Assistant District Attorney, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon

statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Veterans Affairs, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Veterans Affairs, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

B/JEFFREY S. WOLSB
U.S. MAGISTRATE JUDGE

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:
STEPHEN C. LEWIS
United States Attorney

KATHLEEN BLISS ADAMS, OBA #13625
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

KBA/esr

Report and Recommendation of United States Magistrate Judge
Civil Action No. 93-C-62-B

FILED
FEB 15 1994

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 CHARLES R. YORK aka CHARLES)
 RICHARD YORK; JUANITA YORK;)
 COUNTY TREASURER, Washington)
 County, Oklahoma; and BOARD OF)
 COUNTY COMMISSIONERS, Washington)
 County, Oklahoma,)
)
 Defendants.)

FILED

FEB 15 1994

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

CIVIL ACTION NO. 93-C-463-B

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this ¹⁵~~9~~th day of February, 1994, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on December 1, 1993, pursuant to an Order of Sale dated September 1, 1993, of the following described property located in Washington County, Oklahoma:

A part of the SE $\frac{1}{4}$ of the NE $\frac{1}{4}$ of Section 21, Township 28 North, Range 13 East, Washington County, Oklahoma, described as follows: Beginning at a point that is 165 feet North of Southwest corner of the SE $\frac{1}{4}$ of the NE $\frac{1}{4}$ of Section 21, Township 28 North, Range 13 East; thence North along West line of said SE $\frac{1}{4}$ of the NE $\frac{1}{4}$ for a distance of 67.5 feet; thence East 130 feet; thence South 67.5 feet; thence West 130 feet to the point of beginning, "subject, however, to all valid outstanding easements, rights-of-way, mineral leases, mineral reservations, and mineral conveyances of record".

Appearing for the United States of America is Phil Pinnell, Assistant United States Attorney. Notice was given the

Defendants, **Charles R. York aka Charles Richard York; Juanita York; County Treasurer, Washington County, Oklahoma; and Board of County Commissioners, Washington County, Oklahoma; and the Purchasers, William E. Mitchell, Sr.; Martha B. Mitchell; William E. Mitchell, Jr.,** by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Examiner-Enterprise, a newspaper published and of general circulation in Washington County, Oklahoma, and that on the day fixed in the notice the property was sold to **William E. Mitchell, Sr.; Martha B. Mitchell; and William E. Mitchell, Jr.,** Route 1, Box 157, Wann, Oklahoma 74083, they being the highest bidders. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to purchasers, **William E. Mitchell, Sr.; Martha B. Mitchell; and William E. Mitchell, Jr.,**

Route 1, Box 157, Wann, Oklahoma 74083, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchasers by the United State Marshal, the purchasers be granted possession of the property against any or all persons now in possession.

**S/JEFFREY S. WOLFE
U.S. MAGISTRATE JUDGE**

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



PHIL PINNELL, OBA #7169
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

PP/css

Report and Recommendation of United States Magistrate Judge
Civil Action No. 93-C-463-B

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 GEORGE W. ANDERSON a/k/a)
 GEORGE WAYNE ANDERSON; EVELYN)
 ANDERSON; LYDELL L. ANDERSON)
 a/k/a LYDELL LAMAR ANDERSON;)
 TERRY ANDERSON a/k/a TERRY M.)
 ANDERSON a/k/a TERRY McDONALD)
 ANDERSON; STATE OF OKLAHOMA)
 ex rel. OKLAHOMA TAX)
 COMMISSION; TULSA TEACHERS)
 CREDIT UNION; COUNTY)
 TREASURER, Tulsa County,)
 Oklahoma; and BOARD OF COUNTY)
 COMMISSIONERS, Tulsa County,)
 Oklahoma,)
)
 Defendants.)

FILED

FEB 15 1994

Richard M. Lawson, Court Clerk
U.S. DISTRICT COURT

CIVIL ACTION NO. 93-C-69-B

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 15 day of Feb, 1994, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on November 29, 1993, pursuant to an Order of Sale dated September 9, 1993, of the following described property located in Tulsa County, Oklahoma:

Lot Seventeen (17), Block Nineteen (19)
VALLEY VIEW ACRES ADDITION to the City of
Tulsa, Tulsa County, Oklahoma, according to
the recorded plat thereof.

Appearing for the United States of America is Peter Bernhardt, Assistant United States Attorney. Notice was given the Defendant, Terry Anderson a/k/a Terry M. Anderson a/k/a Terry

McDonald Anderson, by publication; the Defendants, George W. Anderson a/k/a George Wayne Anderson; Evelyn Anderson; Lydell L. Anderson a/k/a Lydell Lamar Anderson; State of Oklahoma ex rel. Oklahoma Tax Commission, through Kim D. Ashley, Assistant General Counsel; Tulsa Teachers Credit Union; and County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, through J. Dennis Semler, Assistant District Attorney, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Veterans Affairs, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the

United States of America on behalf of the Secretary of Veterans Affairs, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

S/JEFFREY S. WOLFE
U.S. MAGISTRATE JUDGE

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

~~STEPHEN C. LEWIS
United States Attorney~~

~~PETER BERNHARDT, OBA #741
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463~~

PB/esf

Report and Recommendation of United States Magistrate Judge
Civil Action No. 93-C-69-B

DATE FEB 16 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB 15 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

GERALD J. MCLAMB, Trust Officer)
of UNITED INSURANCE GROUP TRUST)
and UNITED INSURANCE GROUP TRUST,)
Trustee for SJNS TRUST,)

Plaintiffs,)

vs.)

Case No. 93-C-1012-B ✓

UNITED STATES DEPARTMENT OF)
TREASURY, INTERNAL REVENUE SERVICE,)
MS. BRENDA JONES and MR. GARY)
COLLINS, Revenue Officers, Internal)
Revenue Service, and the ATTORNEY)
GENERAL OF THE UNITED STATES,)

Defendants.)

O R D E R

Now before the Court is the Defendants' Motion to Dismiss the Complaint or, in the Alternative, Motion for Summary Judgment (Docket #2).

Undisputed Facts¹

Plaintiffs Gerald J. McLamb and United Insurance Group Trust bring this action for "conversion, wrongful levy, extortion and for injunctive relief." Plaintiffs do not allege any jurisdictional statute in their Complaint. Plaintiffs allege that SJNS Trust holds lawful title to certain real property with the following legal description:

¹ The undisputed facts relied on by the Court are those set forth in Defendants' memorandum in support of their motion. Because of Plaintiffs' failure to respond to Defendants' motion for summary judgment, those facts are deemed admitted pursuant to Rule 7.1C of the Rules of the United States District Court for the Northern District of Oklahoma. However, it is also noted that the undisputed facts are supported by the record before the Court.

Part of the NW 1/4, SW 1/4, SW 1/4, of Section 30, Township 24 North, Range 24 East; more particularly described as follows: From the Northwest corner of said NW 1/4, S/W 1/4, S/W 1/4, run North 89 degrees 45' 37" East 354.00 feet to the point of beginning; thence South 132.54 feet; thence North 89 degrees 25' 55" East 355.57 feet; thence North 45.44 feet to the West right of way of a country road; thence North 42 degrees 17' 43" West 36.99 feet along said right of way, thence North 32 degrees 11' 27" West 67.88 feet along said right of way; thence South 89 degrees 45' 37" West 294.49 feet to the point of beginning.

Plaintiffs also allege that SJNS Trust engaged the services of Steven Bale, as the Manager of plaintiff SJNS Trust, and executed a lease of the above described real property.

On September 21, 1992, and October 5, 1992, the IRS assessed penalties against Steven Bale and Janice Bale, respectively, in the amount of \$86,514.83 each under Section 6672 of the Internal Revenue Code (26 U.S.C. §6672), for their failure to remit trust fund taxes for the third quarter of 1989, the second quarter of 1990 and all four quarters of 1991, with respect to Glenn Berry Operating Co., Inc. After notice and demand for payment, Steven Bale and Janice Bale failed to make any payments toward the assessments against them, and there remains due and owing to the United States the amount of \$86,514.83, plus interest and penalties accruing according to law after the date of assessment.

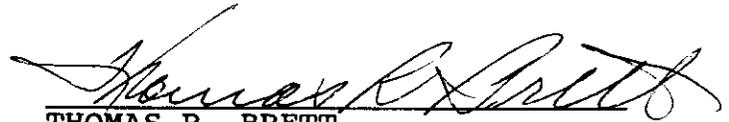
By virtue of the failure of Steven and Janice Bale to pay the amounts assessed against them, federal tax liens arose as a matter of law as of the dates of assessment and attached to all property and rights to property then belonging to or thereafter acquired by them. Notices of the federal tax liens were duly filed with the

County Clerk in Delaware County, Jay, Oklahoma on July 19, 1993 (Steven Bale) and March 1, 1993 (Janice Bale). At the time of the assessments, Steven and Janice Bale had an interest in the real property described above, to which the federal tax lien attached.

Legal Analysis

The Internal Revenue Code (26 U.S.C. §7426) allows a person claiming an interest in property (other than the taxpayer) to bring suit against the United States in the appropriate district court when an IRS tax levy has been made on the property. The plaintiff in an action for wrongful levy must show (1) that it has an interest in, or a lien upon the property, and (2) that the property was "wrongfully levied upon." 26 U.S.C. §7426(a)(1). In the present case, it is undisputed that the first requirement is met. However, the second requirement is not satisfied. The Government has not issued a levy against the property; nor have the Plaintiffs so alleged. Therefore, the Defendants' Motion to Dismiss (Docket #2) should be and is hereby GRANTED.

IT IS SO ORDERED THIS 15 DAY OF FEBRUARY, 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA**

**REGINALD J. BUTLER,
LONNIE BUTLER, and
J. W. BUTLER**

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendants.

)
)
) **F I L E D**
)
) FEB 15 1994
)
) Richard M. Lawrence, Court Clerk
) U.S. DISTRICT COURT
)
)
) **CASE NO. 93-C-975-B**

NOTICE OF DISMISSAL

The plaintiffs, Reginald J. Butler, Lonnie Butler, and J. W. Butler, hereby dismiss the above-styled action, pursuant to F.R.Civ.P. 41(a)(1), with prejudice. The Plaintiffs show the Court that the Defendant, the United States of America, has not served upon the Plaintiffs an answer or otherwise entered an appearance in this action. The Plaintiffs stipulate that this dismissal shall bar any and all claims known or unknown, arising from the subject matter of this action.

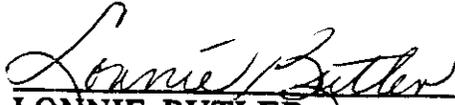
APPROVED BY:



REGINALD J. BUTLER

P.O. 6367

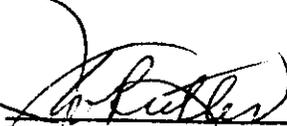
Tulsa, OK 74148-6367



LONNIE BUTLER

P.O. 6367

Tulsa, OK 74148-6367


J. W. BUTLER

P.O. 6367

Tulsa, OK 74148-6367

ENTERED ON DOCKET

DATE FEB 16 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB 14 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ATLANTIC RICHFIELD COMPANY,)
)
 Plaintiff,)
)
 vs.)
)
 AMERICAN AIRLINES, INC., et al.,)
)
 Defendants.)
 _____)
 AND CONSOLIDATED ACTIONS.)
 _____)

Case No. 89-C-868-B
 89-C-869-B
 89-C-859-B

ORDER AND JUDGMENT

The Court, upon consideration of the Motion for Good Faith Determination and Entry of Contribution Bar on ARCO/U.S. Postal Service Settlement, and Memorandum in Support, having examined the files and records of the proceedings herein, having reviewed and considered the terms and conditions of the settlement in question, and being fully advised and informed in the premises, does hereby DETERMINE, ORDER and DECREE as follows:

1. The settlement between ARCO and defendant U.S. Postal Service, as set out in the Consent Order Regarding Claims Asserted by ARCO Against . . . the U.S. Postal Service (Docket # 1097, October 13, 1993) ("Consent Order"), is found to be in good faith, reasonable, fair and consistent with the purposes that CERCLA is intended to serve.

2. ARCO's recovery against any other party for response costs at the Sand Springs Petrochemical Superfund Site is reduced by \$15,919.81 pursuant to the *pro tanto* credit rule, as adopted by

NOTE: THIS ORDER IS TO BE MAILED
 BY ALL PARTIES TO ALL COUNSEL AND
 PRO SE LITIGANTS IMMEDIATELY
 UPON RECEIPT.

this Court's prior Order of August 3, 1993 (Docket # 913).

3. Each and every claim, counterclaim and cross-claim (including the "deemed filed" claims) by ARCO or any other party against defendant U.S. Postal Service, or by the defendant U.S. Postal Service against ARCO or any other party, is hereby dismissed, such claims to be dismissed in their entirety on the merits, with prejudice and without costs, except as set forth in ¶¶ 3, 4 and 9.d. of the Consent Order.

4. ARCO and defendant U.S. Postal Service shall each bear and be responsible for its own expenses, attorneys' fees and legal costs incurred herein.

5. All contribution claims against defendant U.S. Postal Service for costs incurred by any other party in performing the actions set forth in the September, 1987 ROD for the Source Control Operable Unit ("ROD I"), and the June, 1988 ROD for the Main Site Operable Unit ("ROD II"); or for any other costs incurred before the effective date of the Consent Order under the contribution and indemnity provisions of Oklahoma law, the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), the Resource Conservation and Recovery Act ("RCRA") or any other state and federal laws (including, but not limited to, any and all claims for recovery of response costs based upon theories of contract, negligence or any other theory), are barred.

IT IS SO ORDERED this 14th day of February, 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

COPIES ON DOCKET
FEB 16 1994

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

CECELIA M. BAILEY,)
)
 Plaintiff,)
)
 v.)
)
 SAND SPRINGS GROUP HOMES, INC.,)
)
 Defendant.)

FEB 14 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

91-C-156-C

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on before the court for trial on its merits this 4th day of February, 1994, and trial having been completed, the court makes findings of fact and draws conclusions of law as follows.

Findings of Fact

Any Finding of Fact that might be properly characterized a Conclusion of Law is incorporated herein.

The Court finds:

1. The court has jurisdiction of the parties and subject matter herein, as it is a proper case under the Fair Labor Standards Act, 29 U.S.C. § 201, et seq.
2. Defendant is a non-profit corporation which cares for mentally and physically impaired and developmentally handicapped individuals who are not self-sufficient. Defendant owns three houses in Sand Springs, Oklahoma, and in each house several clients live in a group where they are cared for by defendant's direct care employees.
3. Plaintiff was hired by defendant on May 29, 1990, as a full-time hourly employee. On May 30 and 31, 1990, she went through two days of orientation. On June

44

1, 1990, plaintiff and defendant signed a contract which stated plaintiff would be compensated at the rate of \$5.00 per hour. The employment contract was silent as to whether plaintiff would be paid for her "sleep time", but the employment contract (Plaintiff's Exhibit 1) did make reference to the defendant's Staff Policies and Procedures (Plaintiff's Exhibit 3), which provided:

.... The Relief Staff and Direct Care Staff will be paid an hourly rate. Sleep time for Group Homes is not considered work time; however, time up due to job related demands (client ill, fire, etc.) will be compensated. If an employee is unable to get five (5) hours total sleep (not necessarily consecutive) due to job related demands, the entire eight (8) hour period will be compensated.

4. On June 1, 1990, plaintiff signed the contract which acknowledges her receipt of the Staff Policies.

5. Sheila Diane Hueste hired plaintiff on May 29, 1990 and at that time she gave plaintiff the Staff Policies. Pauline Brock, who had been the house manager and became an hourly weekend employee at the time plaintiff was hired, was present when plaintiff was interviewed. Hueste explained the basis for payment of wages to plaintiff and stated that sleep time would not be compensated. Hueste signed plaintiff's contract three days later, on June 1, 1990.

6. Jean Bishop, who became house manager at the time plaintiff was hired, was present when plaintiff's contract was signed, and also signed plaintiff's contract on June 1, 1990.

7. The court finds that plaintiff was given a copy of the Staff Policies and Procedures on May 29, 1990, and the policy of non-compensation for sleeping time was

explained to her. Plaintiff had an opportunity to review the Staff Policies and Procedures from May 29, 1990 until June 1, 1990 when the contract was signed. On June 1, 1990, she entered into the contract which she knew included the sleep time provision. From June 1, 1990 until the company's new policy incorporating eight-hour shifts was implemented in September 1990, plaintiff worked and accepted her paychecks omitting payment for sleep time without making complaint to defendant.

8. Pursuant to the employment contract, plaintiff was assigned to work in the group home located at 3102 S. Everett in Sand Springs. During the time period in issue, June 1, 1990 through August 31, 1990, there were six developmentally disabled men living at that group home, whose ages ranged from 19 to 35. These men were high functioning individuals with some mental disabilities. They were generally capable of taking care of their own personal needs, but needed supervision in connection with their day-to-day activities.

9. During the time period in issue, plaintiff generally worked 5 days a week from 4:00 p.m. until 10:00 p.m. and from 6:00 a.m. until 8:00 a.m. the next morning. The time period from 10:00 p.m. to 6:00 a.m. was her scheduled "sleep time". Consequently, she spent 16 hours of each 24 hour day on the premises, with 8 of the 16 hours being considered normal work hours.

10. Plaintiff turned in the sheets showing the amount of time that she worked each day. These sheets also contain detailed notations showing when she was up with clients during scheduled sleep time. Defendant paid plaintiff at her regular hourly rate of \$5.00 per hour for all of the normal work hours shown on her time sheets. It paid her at

the overtime rate for the sleep time shown on her time sheets that she was up and tending to residents. On nights when she did not get at least five hours of rest during sleep time, she was also paid at the overtime rate for all of the scheduled sleep time.

11. The contract of employment entered into between plaintiff and defendant included the Staff Policies and Procedures section concerning sleep time, and plaintiff understood that her compensation would be calculated pursuant to that section of the Staff Policies and Procedures.

12. The group home where plaintiff worked was a single-level structure located in a residential subdivision. No special zoning was necessary for the house. It contained a living room, full kitchen, dining room, den with television, VCR, pool table and extension phone, four bedrooms, 2 1/2 baths and a laundry room on a 1/2 acre lot. There was a swing on the front porch. The four bedrooms were located across the hall from each other at one end of the house. There were two male clients in each of three of the bedrooms.

13. One of the bathrooms in the home contained a 5 1/2 foot vanity and mirror, two light fixtures, a tub with showerhead, commode, and clock. This bath was adjacent to the staff bedroom. The door on the bathroom was equipped with a privacy lock, and soap and towels were provided.

14. Plaintiff testified that the fourth bedroom served as an office and as a place for the staff to sleep overnight and that residents wandered in and out at will. This testimony was directly controverted by Pauline Brock, who said that the bedroom was not used by residents, who respected the rule that they not enter without knocking and being invited to come in. Brock stated that this rule applied to all the bedrooms in the house.

Under the rules, the staff also respected the privacy of residents and knocked before entering their rooms. The court finds that the fourth bedroom was considered by the residents to be the private quarters of the staff, and was treated as such.

15. The room where plaintiff slept was approximately 10 1/2 feet by 10 1/2 feet in size and had the following furniture and lighting:

- a. a fluorescent ceiling light;
- b. one single bed;
- c. a night stand with two drawers;
- d. a lamp;
- e. wall-to-wall carpeting on the floor;
- f. a desk with a telephone;
- g. a four-drawer cream-colored file cabinet which contained forms, checkbooks of the residents, and discontinued medication for the residents;
- h. a two-drawer cream-colored file cabinet;
- i. two windows with mini-blinds and a valance or curtain which coordinated with the peach-colored, flowered, eyelet lace dust ruffle, comforter, and pillow shams on the bed, which were purchased at the time plaintiff started working there;
- j. a mahogany table or desk over which was mounted a mirror;
- k. three chairs;
- l. two attractive pictures on the wall; and
- m. a bulletin board described as "not large."

16. The office/bedroom did not contain a TV or have a connected private bathroom or any running water. However, plaintiff watched TV in the den and occasionally washed her clothes in the laundry room.

17. The room did have a closet with two sliding doors. Inside the closet on the right side was a locked medicine cabinet, built into the back wall, on top of which were client notebook charts and below which was a box of supplies. On the left side, according

to plaintiff, were clients' overflow clothes, light bulbs, tools, oil for the van, and boxes of holiday decorations. According to Pauline Brock, Sheila Hueste, and Jean Bishop, the left side of the closet was free for use by staff and did not contain any of the items described by plaintiff. Pauline Brock testified that she had used the space for her personal items during the time she was the House manager and weekend employee and that there was plenty of space. The court finds that plaintiff had sufficient closet space in which to store her clothing and personal belongings.

18. Plaintiff testified that she did not have any place to lock up any of her personal belongings. However, Pauline Brock controverted this testimony when she said there was one empty drawer in the two-drawer file cabinet that could be locked, in addition to an empty drawer in the night stand and space in the closet, which plaintiff could have used. The court concludes that there was one empty file cabinet drawer that could be locked, and an empty night stand drawer available for plaintiff's use, and that these facilities were roughly equivalent in function to the chests of drawers contained in the clients' bedrooms.

19. Plaintiff stated that there was not a lock on the door. Hueste testified that fire regulations prohibited locks on bedroom doors, and the Fire Department regularly inspected the residence. Paula Brock testified that privacy was not a concern, there was plenty of privacy, a lock was not needed, and she regularly left the door open unless she was changing clothes. Brock's testimony was in stark contrast to plaintiff's, who said clients regularly wandered in and out of the bedroom at will. The court finds the testimony of Brock to be particularly credible, and that plaintiff was provided with

adequate privacy.

20. Plaintiff testified that the six male residents had a propensity to be violent. She complained of one assault, but this did not take place during the relevant time period, and no details surrounding the nature of the alleged assault were brought out at trial. The record does not reveal whether any of the six men residing at the home during the relevant time period were involved in that incident. Sheila Hueste, Jean Bishop, and Pauline Brock flatly denied that any of the residents had violent tendencies. Sheila Hueste has a bachelors of science degree in special education and a masters degree and had been employed as a special education teacher for fourteen years prior to being employed by defendant. She was capable of expertly assessing the behavioral characteristics of the clients residing in the home, and the court found her testimony particularly credible on this point. The court finds that none of the client residents behaved, or had a tendency to behave violently during the period in question.

21. Even though the large bathroom had a lock, plaintiff testified that she felt uncomfortable using it to shower or change clothes, because 6 men resided in the home. However, this bathroom was used by other women on the staff for those purposes. The court finds it to be an appropriate facility for bathing in private.

22. The parties have stipulated that the number of hours of sleep time occurring between June 1, 1990 and August 31, 1990 for which plaintiff was not compensated is 379.75 hours; the value of such uncompensated sleep time, calculated at an overtime rate of pay of \$7.50 per hour, equals \$2,848.13.

Conclusions of Law

Any Conclusion of Law that might be properly characterized a Finding of Fact is incorporated herein.

The court draws conclusions of law as follows:

1. Defendant provided plaintiff with sleeping quarters that equated to private quarters in a home-like environment as required by the Department of Labor in its Wage and Hour Memorandum 88.48:

'private quarters' - means living quarters that are furnished; are separate from the 'clients' and from any other staff members; have as a minimum the same furnishings available to clients (e.g. bed, table, chair, lamp, dresser, closet, etc.) and in which the employee is able to leave his or her belongings during on- and off-duty periods.

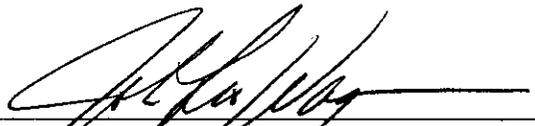
'home-like environment' - means facilities including 'private quarters' as above and also including on the same premises facilities for cooking and eating; for bathing in private; and for recreation (such as TV). The amenities and quarters must be suitable for long-term residence by individuals and must be similar to those found in a typical private residence or apartment, rather than those found in institutional facilities such as dormitories, barracks, and short-term facilities for travelers.

2. Defendant paid plaintiff according to the terms of her employment contract and in accordance with the Fair Labor Standards Act, 29 U.S.C. §§ 201, et seq., 29 C.F.R. §§ 785.22(b) and 785.23, applicable portions of the Code of Federal Regulations, Interpretive Bulletins, and Department of Labor memorandums and enforcement policies relating thereto. These include 29 C.F.R. Parts 785.2 through 785.23, Interpretive Bulletin, Part 785: Hours Worked Under the Fair Labor Standards Act of 1938, As Amended, and U. S. Department of Labor Employment Standards Administration, Wage and Hour Division, Wage and Hour Memorandum 88.48, Subject: Community Residence (Group

Homes) for the Mentally Retarded and similar residential care facilities -- Enforcement Policy, with attached clarification memorandum.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the court that plaintiff, Cecelia M. Bailey, take nothing by reason of her complaint and that defendant, Sand Springs Group Homes, Inc., have judgment against plaintiff.

Dated this 14th day of February, 1994.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

r:bailey.ff

ENTERED ON DOCKET
FEB 16 1994

FILED

FEB 14 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

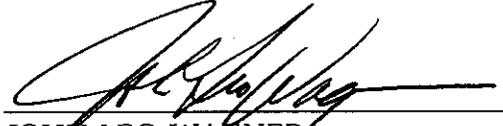
CECELIA M. BAILEY,)
)
Plaintiff,)
)
v.)
)
SAND SPRINGS GROUP HOMES, INC.,)
)
Defendant.)

Case No. 91-C-156-C

JUDGMENT

Judgment is entered in favor of Defendant, Sand Springs Group Homes, Inc.

Dated this 14th day of February, 1994.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

45

ENTERED ON DOCKET
DATE 2-15-94

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB 14 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

RONALD G. MARTIN,)
)
 Plaintiff,)
)
 v.)
)
 STATE FARM FIRE AND)
 CASUALTY CO., et al.,)
)
 Defendants.)

Case No. 90-C-1048-W ✓

ORDER

This order pertains to the court's order of January 18, 1994 that plaintiff's counsel show cause in writing why this case should not be dismissed for failure to prosecute, the Response of Plaintiff's Attorney to Court's Order to Show Cause Why Case Should Not Be Dismissed (Docket #43)¹, and Defendant's Reply to Plaintiff's Response to this Court's Order Directing Plaintiff to Show Cause Why This Case Should Not Be Dismissed With Prejudice (#44).

The parties stipulated to the trial of this case before the Magistrate Judge in June of 1993. On June 30, 1993, the case was set for pretrial on January 18, 1994, and for jury trial on January 24, 1994. The defendant's attorney's secretary, and the Court Clerk, mailed the order to plaintiff's counsel, Mr. Swanson. Neither the plaintiff nor plaintiff's attorney appeared at the scheduled pretrial conference on January 18, 1994. As a result, the court ordered plaintiff to show cause why the case should not be dismissed for plaintiff's failure to appear at the pretrial conference and due to the representation by

¹ "Docket numbers" refer to numerical designations assigned sequentially to each pleading, motion, order, or other filing and are included for purposes of record keeping only. "Docket numbers" have no independent legal significance and are to be used in conjunction with the docket sheet prepared and maintained by the United States Court Clerk, Northern District of Oklahoma.

plaintiff's counsel to the court in telephone calls the week before that plaintiff would not appear for trial because he could not be located.

In his response, plaintiff's attorney alleges that he has been unable to contact his client by telephone, regular mail, certified mail, and restricted delivery mail. Plaintiff's attorney agrees that the case should be dismissed for failure to prosecute, but asks that his client's right to pursue the litigation not be prejudiced.

Rule 16 of the Federal Rules of Civil Procedure provides that a court, upon motion, or on the court's own initiative, may dismiss an action for a party's failure to appear, through counsel or otherwise, at a pretrial conference.² Rule 16 allows the court to make such orders in the situation as are just, among which may be those provided in Rule 37(b)(2)(B), (C), and (D). Rule 37(b)(2)(C) allows the court to enter an order "dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party."

In Link v. Wabash R.R. Co., 370 U.S. 626 (1962), the parties were notified by the court that a pretrial conference would be held on October 12, 1960. Neither plaintiff nor plaintiff's attorney appeared at the scheduled conference, and the court dismissed the action with prejudice. The Supreme Court upheld the trial court's order, finding: "There is

² Rule 16 of the Federal Rules of Civil Procedure reads in part:

(a) **PRE-TRIAL CONFERENCES; OBJECTIVES.** In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial...

* * *

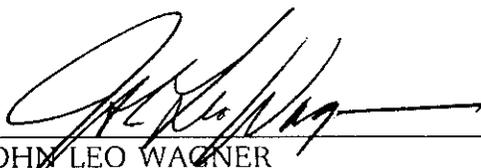
(f) **SANCTIONS.** If a party or party's attorney fails to obey a scheduling or pre-trial order, or if no appearance is made on behalf of a party at a scheduling or pre-trial conference, ... the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D).

certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequence of the acts or omissions of this freely selected agent." Id. at 633-34. See also, Stanley v. Continental Oil Co., 536 F.2d 914 (10th Cir. 1976) (affirming dismissal with prejudice for failure to prosecute).

The defendant will obviously be prejudiced by wasted legal expense if this action is not dismissed with prejudice. To allow plaintiff to refile the action and continue to expend court resources is not fair.

This case is dismissed with prejudice.

Dated this 11th day of February, 1994.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

n:martdism.ord

FEB 15 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB 14 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

LESTER STEVE CLARK,)	
)	
Petitioner,)	
)	
vs.)	No. 93-C-799-B
)	
STEVE HARGETT,)	
)	
Respondent.)	

ORDER

Before the Court are respondent's motion to dismiss for failure to exhaust state remedies, and petitioner's response.

Respondent has moved to dismiss petitioner's application for a writ of habeas corpus as a mixed petition pursuant to Rose v. Lundy, 455 U.S. 509 (1982). Respondent argues that the petitioner has not presented to the Oklahoma Court of Criminal Appeals two of his grounds for relief: (1) that he was deprived of his presentence investigation report, and (2) that his sentence is excessive. Although the Petitioner does not dispute that he failed to exhaust his state remedies as to those two grounds, see Petition at 8, he argues that any further attempts to exhaust his state remedies would be futile because the state court is biased toward his case. See Response, docket #7 at 2.

In Rose v. Lundy, 455 U.S. 509 (1982), the United States Supreme Court held that a federal district court must dismiss a habeas corpus petition containing exhausted and unexhausted grounds for relief. The Court stated:

In this case we consider whether the exhaustion rule in 28 U.S.C. § 2254(b), (c) requires a federal district court to dismiss a petition for a writ of habeas corpus

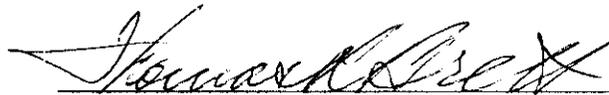
containing any claims that have not been exhausted in the state courts. Because a rule requiring exhaustion of all claims furthers the purposes underlying the habeas statutes, we hold that a district court must dismiss such "mixed petitions," leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court.

Id. at 510 (emphasis added).

After carefully reviewing respondent's motion to dismiss, the state record, and petitioner's response, the court concludes that the petitioner has not exhausted his state remedies as to all his five grounds for relief and that petitioner's allegations of bias is unsupported at best. Accordingly, petitioner's application for a writ of habeas corpus is subject to dismissal as a mixed petition. See id.

ACCORDINGLY, IT IS HEREBY ORDERED that respondent's motion to dismiss [docket #5] is **granted**, and the petition for a writ of habeas corpus is **dismissed**.

SO ORDERED THIS 14th day of Feb., 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 2-15-94

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN S. CARPENTER,)
)
 Petitioner,)
)
 vs.) No. 93-C-592-E ✓
)
 L.L. YOUNG,)
)
 Respondent.)

FILED

FEB 14 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Before the court are respondent's motion to dismiss for failure to exhaust state court remedies [docket #4], petitioner's response [docket #6], and petitioner's motion for summary disposition and immediate release [docket #7].

In his motion to dismiss, respondent asserts that petitioner has not exhausted his state court remedies because his direct appeal is presently pending before the Oklahoma Court of Criminal Appeals. Petitioner does not dispute that his direct appeal is presently pending, but argues that it is very likely that his appeal will be unconstitutionally delayed. Petitioner also argues the merits of his claims.

The Supreme Court "has long held that a state prisoner's federal petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims." Coleman v. Thompson, 111 S. Ct. 2546, 2554-55 (1991). To exhaust a claim, a petitioner must have "fairly presented" that specific claim to the Oklahoma Court of Criminal Appeals. See Picard v. Conner, 404 U.S. 270, 275-76 (1971). The exhaustion requirement is based on the doctrine of comity. Darr v. Burford,

339 U.S. 200, 204 (1950). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam).

It is clear from the record in this case that the petitioner has not exhausted his state remedies as he has a pending direct appeal. See Sherwood v. Tomkins, 716 F.2d 632, 634 (9th Cir. 1983) (even if the claim petitioner raises in federal court has been fairly presented once to the highest state court, petitioner has not exhausted his state remedies if he has a pending direct appeal in state court); Parkhurst v. State of Wyoming, 641 F.2d 775, 776 (10th Cir. 1981) (court properly denied habeas corpus relief for failure to exhaust state remedies because direct criminal appeal was pending). Petitioner's allegations of appellate delay are speculative at best. [Docket #6 at 3.] Therefore, the Court concludes that this petition for a writ of habeas corpus should be dismissed.

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) Respondents' motion to dismiss [docket #4] is **granted**.
- (2) Petitioner's motion for summary disposition and immediate release [docket #7] is **denied**.
- (3) The petition for a writ of habeas corpus is **dismissed**.

SO ORDERED THIS 14th day of February, 1994.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 2-15-94

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

BOBBY LESTER CULBREATH,)
) Petitioner,)
vs.)
))
JOHN MEDDLETON,)
) Respondent.)

No. 93-C-778-E

FILED

FEB 14 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Before the court is respondent's motion to dismiss for failure to exhaust state remedies [docket #5]. Respondent asserts the petitioner has neither filed a direct appeal with the Oklahoma Court of Criminal Appeals nor an application for post-conviction relief. Petitioner has not responded.

The Supreme Court "has long held that a state prisoner's federal petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims." Coleman v. Thompson, 111 S. Ct. 2546, 2554-55 (1991). To exhaust a claim, a petitioner must have "fairly presented" that specific claim to the Oklahoma Court of Criminal Appeals. See Picard v. Conner, 404 U.S. 270, 275-76 (1971). The exhaustion requirement is based on the doctrine of comity. Darr v. Burford, 339 U.S. 200, 204 (1950). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam).

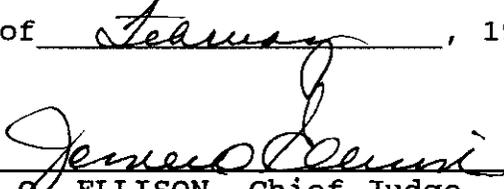
It is clear from the record in this case that the petitioner has not exhausted all the various grounds for relief he has

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has not exhausted all the various grounds for relief he has alleged. In addition, petitioner's failure to respond to respondent's motion to dismiss constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C.

Accordingly, respondents' motion to dismiss for failure to exhaust state remedies (docket #5) is granted. The petition for a writ of habeas corpus is hereby dismissed.

IT IS SO ORDERED this 14th day of January, 1994.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET
DATE FEB 15 1994

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB 14 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FRED MARVEL, ET AL)
)
 Plaintiffs,)
)
 vs.)
)
 AMERICAN GENERAL FINANCIAL)
 CENTER THRIFT CO., ET AL)
)
 Defendants)

92-C-0206-B ✓

ORDER

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed October 4, 1993 in which the Magistrate Judge recommended that American General Financial Center Thrift Co.'s Motion for Partial Summary Judgment (docket #46) be granted, and judgment be entered in Defendant's favor as to Plaintiff's Third Cause of Action.

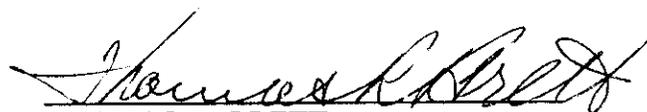
No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the Court has concluded that the Report and Recommendation of the United States Magistrate Judge should be and hereby is adopted and affirmed.

It is, therefore, Ordered that the recommendations of the Magistrate Judge are hereby adopted as set forth above.

153

SO ORDERED THIS 14 day of Feb., 1994.

A handwritten signature in cursive script, appearing to read "Thomas R. Brett".

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

FILED

FEB 14 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WORLD HIGH INVESTMENTS, INC.,)
)
 Plaintiff(s),)
)
 v.)
)
 JAMES W. McCABE, et al.,)
)
 Defendant(s).)

No. 91-C-892-B

ORDER

The Report and Recommendation of United States Magistrate Judge filed January 18, 1994, is before the Court for decision, along with the briefs of the respective parties in objection or support thereof.

Following a thorough review of the United States Magistrate Judge's said Report and Recommendation, as well as this case's history and applicable legal authority, the Court hereby adopts and approves the Report and Recommendation incorporating by reference herein the Findings and Recommendations set out on pages 5, 6, 7 and 8 thereof. The various claims in the case are those present previous to November 2, 1993.

IT IS SO ORDERED this 14th day of February, 1994.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

187

DATE 2-14-94

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CITY FINANCE COMPANY OF OKLAHOMA,)
INC. an Oklahoma Corporation)

Plaintiff,)

v.)

EDGAR R. ANDREWS JR. and MARGARET)
A. ANDREWS, husband and wife,)

U.S. DEPARTMENT OF)
HOUSING AND URBAN DEVELOPMENT)

JOHN CANTRELL, COUNTY TREASURER)
OF TULSA COUNTY OKLAHOMA;)

BOARD OF COUNTY COMMISSIONERS)
OF TULSA COUNTY;)

Defendants.)

Case No. 93-C 1035E

FORECLOSURE

FILED

FEB 11 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER GRANTING SUMMARY JUDGMENT

This matter comes before the Court on the Plaintiff City Finance Company of Oklahoma, Inc.'s ("City") Motion for Summary Judgment filed November 30, 1993 against Defendant's Edgar R. Andrews Jr. and Margaret A. Andrews ("Andrews").

The Court finds that the Defendants Andrews have failed to timely file with the court clerk a Response Brief in opposition of Plaintiff's Motion for Summary Judgment as required under the Rules for District Courts, Rule 7.1(C). Additionally, Defendants Andrews requested and were granted an extension of such time to respond to the petition and summary judgment motion of Plaintiff City up to January 13, 1994 and have failed to respond by such extended period. Further, the Court finds, pursuant to Rule 56.1 of the Rules for the District Courts and F.R.C.P. 56(c), that it appears to the Court that there is no substantial controversy as

to any material fact and that Plaintiff is entitled to judgment as a matter of law against the Andrews, and that the Court shall therefore render Judgment for the Plaintiff in this matter.

WHEREFORE, based upon the above premises;

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff City Finance Company of Oklahoma, Inc.'s Motion For Summary Judgment as against Defendants Edgar R. Andrews Jr. and Margaret A. Andrews is granted.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Plaintiff, City Finance Company of Oklahoma, Inc. is granted Judgment against the Defendants Edgar R. Andrews Jr. and Margaret in the principal sum of \$ 14,950, together with interest thereon at the rate of 20.94% per annum from August 8, 1992 until paid, title report expense of \$ 125.00, service and court costs accrued and accruing during the pendency of this action, and a reasonable attorney's fee in the amount of \$ 2,242 as provided in the Mortgage.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that the mortgage and lien of the Plaintiff in the amounts hereinabove found and adjudged to be foreclosed, and that the real property the subject of this action in foreclosure is ordered to be sold as provided by law after due and legal appraisement with the proceeds subject to distribution as to be determined by further order of this Court.

 / JAMES O. ELLISON

James O. Ellison
U.S. District Court Judge,
Northern District of Oklahoma

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB 11 1994

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

THRIFTY RENT-A-CAR SYSTEM,
INC., an Oklahoma corporation,

Plaintiff,

vs.

COLORADO RENT-A-CAR, INC., a
Colorado corporation, and
DENNIS M. CAIN, an individual,
CHARLES J. HOWARD, M.D., an
individual, WILLIAM H. FAGAN, M.D.,
an individual, and RAUL SEPULVEDA,
M.D., an individual,

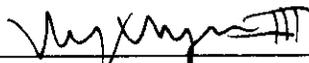
Defendants.

Case No. 92-1085-E

STIPULATION OF DISMISSAL

Pursuant to Fed.R.Civ.Pro. 41(a)(1)(ii), plain-
tiff, Thrifty Rent-A-Car System, Inc., by counsel, and
defendants, Colorado Rent-A-Car, Inc., Dennis M. Cain,
Charles J. Howard, M.D., William H. Fagan, M.D., and Raul
Sepulveda, M.D., by counsel, hereby stipulate to the
dismissal, with prejudice, of this action in its entirety
including all claims and counterclaims asserted between
plaintiff and defendants, with each party to bear its own
costs.

Stipulated to:


MACK J. MORGAN III, OBA #6397

- Of the Firm -

CROWE & DUNLEVY
A Professional Corporation
1800 Mid-America Tower
20 North Broadway
Oklahoma City, Oklahoma 73102
(405) 235-7700

ATTORNEYS FOR PLAINTIFF


SAM P. DANIEL, III

-Of the Firm-

Harris, Turner, Daniel,
McMahan & Peters, P.C.
1924 South Utica, Suite 700
Tulsa, Oklahoma 74104

ATTORNEY FOR DEFENDANTS

31.94A.MJM

FEB 14 1994
FILED

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FEB 11 1994
Clerk
DISTRICT COURT
DISTRICT OF OKLAHOMA

MICHAEL LOMBARDO,)
)
 Plaintiff(s),)
)
 v.)
)
 DEPARTMENT OF HEALTH & HUMAN)
 SERVICES,)
)
 Defendant(s).)

92-C-1157-B ✓

ORDER

Now before the Court is Plaintiff Michael Lombardo's appeal of the Secretary Donna E. Shalala's denial of Social Security benefits. On appeal Mr. Lombardo raises the issue of whether substantial evidence support the Secretary's finding. For the reasons discussed below, the United States Magistrate Judge recommends the Secretary's decision should be **remanded**.

I. Standard of Review

In examining whether the Secretary erred this Court's review is limited in scope by 42 U.S.C. §405(g). The Court's role "on review is to determine whether the Secretary's decision is supported by substantial evidence". *Cambell v. Bowen*, 822 F.2d 1518, 1521 (10th Cir. 1987). Substantial evidence is what "a reasonable mind might deem adequate to support a conclusion". *Jordan v. Heckler*, 835 F.2d 1314, 1316 (10th Cir. 1987). A finding of "no substantial evidence" is where a conspicuous absence of credible choices or no contrary medical evidence exists. *Trimiar v. Sullivan*, 966 F.2d 1326 (10th Cir. 1992).

15

II. Legal Analysis

This is Plaintiff's fourth application for social security and Supplemental Security Income disability benefits. This Court was asked to review the decision of the Secretary of Health and Human Services by a complaint filed by the Plaintiff on December 18, 1992.

Michael Lombardo is 43 years of age, and has a high school education with one semester of college. He has held various occupations, and was last employed as a salesperson for Target in the spring of 1987. The Plaintiff suffers from grand mal and petite mal seizures secondary to alcohol abuse. In 1974 he had seizures every two months lasting 5 to 30 minutes, however, by 1992 his seizures had increased to 3 to 4 times per week. In the applications, Lombardo states that he cannot work because of his seizures and other medical problems. The Secretary denied the applications initially and on reconsideration. The Administrative Law Judge ("ALJ") held a hearing and found Lombardo not to be disabled. The ALJ also made the specific finding:

The medical evidence establishes that the claimant has severe seizures secondary to voluntary alcohol abuse, but otherwise controlled by Dilantin, neck and back pain exacerbated secondary to seizures, but otherwise mild to moderate on exertion, mild endogenous depression, but that he does not have an impairment or combination of impairments listed in, or medically equal to one listed in Appendix 1, Subpart P, Regulations No. 4. (Emphasis added.)

The Vocational Expert ("VE") made the finding that "all jobs would be eliminated secondary to the frequency and the duration of the seizures". The significant issue on appeal is whether the ALJ properly evaluated Mr. Lombardo's problems with alcohol.

Alcoholism, alone or in combination with other impairments, can be a disabling condition. *Metcalf v. Heckler*, 800 F.2d 793, 796 (8th Cir. 1986). Mr. Lombardo's record

is sprinkled with evidence of alcohol abuse, and he has a history of addictive behavior. The medical record of November 6, 1990, by Dr. Biddle, reflects that Mr. Lombardo was drinking 3 to 4 beers per day, by June 12, 1991, the medical record of Mr. Lombardo reflects that he was drinking up to 12 beers per day. As early as 1987 Mr. Lombardo was testing positive for alcohol, and receiving medical attention for accidents related to alcohol. In 1988, Mr. Lombardo's own attorney referred to him as an alcoholic, and attributed his memory loss to this problem.

Although carrying no precedential value, this Court concurs with the recent decision in *Avalos v. Secretary of Health and Human Services*, 2 F.3d 1160 (10th Cir. 1993). "When the record contains evidence that a claimant suffers from alcoholism, the ALJ must make specific inquiry concerning the claimant's ability to control his drinking and whether the alcoholism has had a disabling effect". *Id.*

In *Ferguson v. Heckler*, 750 F.2d 503 (5th Cir. 1985), the Court stated:

While it is not disputed that there is substantial evidence to support the finding that Ferguson could do light or sedentary work, it is abundantly clear that he can do no work at all if he cannot control his abuse of alcohol. *Id.* at 505.

Likewise, Mr. Lombardo's seizures are disabling secondary to his alcohol abuse, and the ALJ must fully develop the record as to whether the alcoholism is alone or in combination a disability. "It is well-settled that alcoholism alone or combined with other causes, can constitute a disability if it prevents a claimant from engaging in substantial gainful activity." *Id.*

In the instant case, the ALJ concluded that Mr. Lombardo's drinking was voluntary. Similarly, the ALJ in *Orphey v. Secretary of Health and Human Services*, 962 F.2d 384 (5th

Cir. 1992):

[c]oncluded that *Orphey* had the potential to hold a job if he could conquer his drug and alcohol problems, but that his ability to handle daily work was all but nil if he failed to do so. *Id.* at 386.

Further, the Court said that the ALJ had:

[m]ade no finding as to whether *Orphey* had the ability to control his drinking and drug abuse. He did not discuss the disabling effects of *Orphey's* substance abuse problem ... he did not explain or even refer to Dr. Downing's comment that until *Orphey* is able to remain sober and drug free, his ability to handle daily work is all but nil. *Id.*

The ALJ must make specific inquiry into whether Mr. Lombardo's alcoholism, to which his seizures are secondary, is a result of voluntary or involuntary substance abuse. "It is true that some alcoholics can stop; more cannot." *Griffis v. Weinberger*, 509 F.2d 837, 838 n. 1 (9th Cir. 1975). "There are specific rules of law that must be followed in weighing particular types of evidence in disability cases, and failure to follow these rules is reversible error." *Baker v. Bowen*, 886 F.2d 289 at 291 (10th Cir. 1989) (Citing *Reyes v. Bowen*, 845 F.2d 242, 244 (10th Cir. 1988)). Here, no such specific inquiry was made.

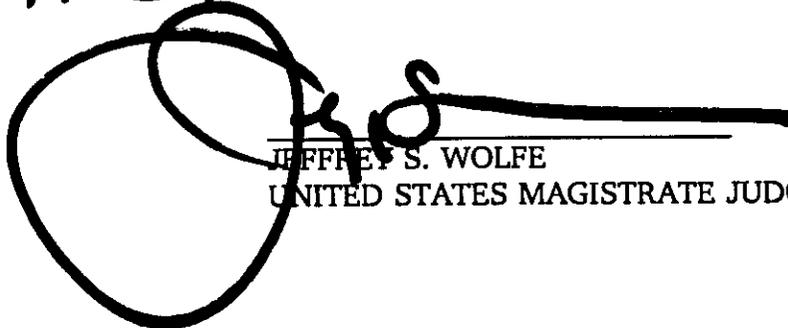
On remand, the ALJ should examine the extent and degree of Thompson's alcoholism and alcohol-treated impairments; the effect of his alcoholism on him physically and psychologically, both alone and in combination with his other impairments; ... along with all other factors relevant to the determination of whether *Thompson* is "disabled" under Title XVI of the Social Security Act. *Thompson v. Sullivan*, 957 F.2d 611, 615 (8th Cir. 1992).

III. Conclusion

Therefore, the United States Magistrate Judge recommends that the case be remanded. On remand, the Secretary must have Mr. Lombardo undergo a psychological and physical examination concerning his alcoholism. In addition, the doctor who examines Mr. Lombardo must personally testify at a supplemental hearing. Furthermore, a V

Vocational Expert should also testify in light of the new evidence submitted by the medical expert.

SO ORDERED this the 17th Feb., 1994.

A large, stylized handwritten signature in black ink, consisting of a large loop followed by a horizontal line and a small flourish.

JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FEB 14 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

1700 CORPORATION,)
)
 Plaintiff,)
)
 vs.)
)
 CUE PAGING CORPORATION,)
)
 Defendant.)

Case No. 93-C-867-B

FEB 14 1994

ORDER OF DISMISSAL WITH PREJUDICE

Currently before the Court is the Motion of 1700 Corporation to dismiss with prejudice the instant litigation pursuant to Federal Rules of Civil Procedure 41(a)(2). There being good cause shown, the Court finds the Motion should be granted. The Court has been advised the parties have settled the lawsuit and now seek its dismissal.

IT IS THEREFORE ORDERED, the case be dismissed with prejudice.

Dated this 14 day of Feb, 1994.

SI THOMAS R. BRETT
HONORABLE THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 2-11-94

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
FEB 10 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

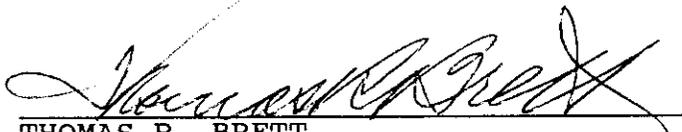
BENJAMIN BREWER,)	
)	
Petitioner,)	
)	
v.)	
)	
DAN L. REYNOLDS, Warden)	
)	
Respondent.)	

No. 92-C-487-B ✓

J U D G M E N T

In accordance with the Findings of Fact, Conclusions of Law and Order entered contemporaneously herewith, Petitioner's First Amended Petition for Writ of Habeas Corpus (Docket #21) filed May 5, 1993, is hereby denied. Judgment is hereby entered in favor of the Defendant, Dan L. Reynolds, Warden, and Plaintiff's action is dismissed.¹ Costs and fees are not assessed herein due to Plaintiff's indigence.

DATED this 10th of February, 1994.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

¹Susan Loving, Attorney General, State of Oklahoma, was named as a Respondent in Petitioner's First Amended Petition for Writ of Habeas Corpus but is not a proper defendant in this action.

DATE 2-11-94

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
FEB 10 1994
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ALBERT RAY GRAGG,
Plaintiff,

vs.

METROPOLITAN LIFE INSURANCE
COMPANY, a foreign
corporation, and METLIFE
SECURITIES, INC., a foreign
corporation,

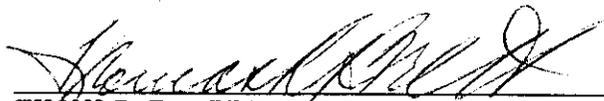
Defendants.

No. 93-C-339-B

ORDER OF DISMISSAL WITH PREJUDICE

Upon the representation of the parties hereto, the Court finds that all issues existing between the Plaintiff and Defendants have been settled and that all Plaintiff's claims against the Defendants herein should be and the same are hereby dismissed with prejudice.

Dated this 9th day of February, 1994.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 2-11-94

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB 10 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

BOSS EINSTEIN-BURNS,)	
)	
Plaintiff(s),)	
)	
v.)	93-C-632-B ✓
)	
DAN MEDDICK,)	
)	
Defendant(s).)	

ORDER

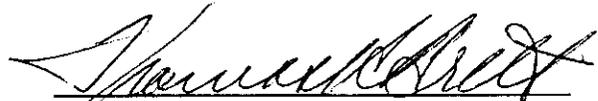
The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed January 19, 1994 in which the Magistrate Judge recommended that the case be **Dismissed** without prejudice.

No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the Court has concluded that the Report and Recommendation of the United States Magistrate Judge should be and hereby is adopted and affirmed.

It is, therefore, Ordered that the recommendations of the Magistrate Judge are hereby adopted as set forth above.

SO ORDERED THIS 10 day of Feb, 1994.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 2-11-94

FILED

FEB 10 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
-vs-)	
)	
JIM H. SCOTT,)	
369-92-9654)	
)	
Defendant,)	

CIVIL NUMBER 93-C-764-B

JUDGMENT BY DEFAULT

Upon application of the Plaintiff, the Court, having examined the records and files in this cause, and being fully advised in the premises, finds that service of process in manner and form provided by law was had upon the defendant, more than twenty days prior to this date.

And it further appearing to the court that the defendant has failed to appear, plead or answer, but has wholly made default, whereupon said defendant is adjudged in default.

And it further appearing to the court that the said plaintiff has filed an Affidavit pursuant to the Soldiers' and Sailors' Civil Relief act of 1940, as amended, and the court finds that the possibility of impairing any right thereunder of the defendant, is remote and that an order should be issued herein directing entry of judgment.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the plaintiff, United States of America, have and recover from the defendant, the sum of \$855.57 with interest at the rate of 3.74 % until paid, plus a surcharge of ten (10) percent of the amount of Plaintiff's claim in accordance with the provisions of 28 U.S.C. 3011, and the costs of this action accrued and accruing.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that this judgment be entered.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

CLIFTON R. BYRD
District Counsel



LISA A. SETTLE
Staff Attorney
Department of Veterans Affairs
Office of District Counsel
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(918) 687-2191