

STATE OF VERMONT
HUMAN SERVICES BOARD

In re) Fair Hearing Nos. 9043,
) 9123, 9136, 9168, 9192,
Appeal of) 9161, 9083, & 9311

INTRODUCTION

The petitioners appeal the decision by the Department of Social Welfare to count the value of their public housing utility subsidies as income in determining their ANFC grants for the months February through June, 1989. The issues are whether the Department validly could "phase in" a change in policy regarding ANFC computations and then "withdraw" that policy after only a few people had received its benefit.

FINDINGS OF FACT

The facts, though complicated, are not in dispute. The following background is taken directly from the parties' memoranda.

"The petitioners are Vermont families who receive Aid to Needy Families with Children (ANFC) from the Vermont Department of Social Welfare (the Department) as well as federal utility subsidies through local housing authorities established by the United States Department of Housing and Urban Development (HUD). These families seek to benefit from a policy partially implemented by the Department in February of 1989 and then withdrawn a month later, that disregarded the value of their utility

subsidy in determining their family income and establishing the level of their ANFC grant."

(Petitioner's Memorandum of Law, p 1).

. . .

"Prior to the events which ultimately led to consideration of this matter by the Human Services Board, fuel and utility subsidies received by ANFC families living in Section 8 subsidized housing were considered by the Vermont Department of Social Welfare to be "unearned income" and were included in determining the assistance group's ANFC benefits.

(Exhibit A)

. . . (T)he department notified the district offices via a Mail Message issued January 30, 1989 that effective February 1, 1989 the fuel and utility subsidy would be excluded from consideration as income for ANFC purposes for all new applicants. (Exhibit B). The department's memo further directed the districts to treat all recipients who move into subsidized housing the same as ANFC applicants. Finally the department directed the districts to exclude the fuel and utility subsidies for all ANFC recipients whose cases were scheduled for review between February 1, 1989 and June 30, 1989 from the time of that review. All ANFC recipients whose cases were regularly scheduled for review after June 30, 1989 would receive the benefit of

the change at that time. All subsidized housing assistance groups would, therefore, be budgeted under the new policy by the end of July, 1989.

The department's Mail Message was followed by PP&D Interpretive Memo 2245.31 dated February 1, 1989. This PP&D Memo was received by the districts on or about February 3, 1989 and was intended to supersede the prior policy of July 1, 1988.

On February 17, 1989, Veronica Celani, DSW Commissioner, received a letter from Stephen Norman, Staff Attorney for Vermont Legal Aid. In his letter, Mr. Norman informed Commissioner Celani of his intention to pursue a class action lawsuit challenging the department's "phase-in" of the new ANFC policy unless the department agreed to grant benefits under the new policy for all affected recipients retroactively to March 1, 1989. (Exhibit C).

The Commissioner was fiscally unable to grant the relief Mr. Norman requested. However, she agreed to rescind the February 1, 1989 policy believing that by doing so she was eliminating the basis for the litigation described in the February 17 letter. Letter of Commissioner Celani dated February 22, 1989. (Exhibit D). Immediately, the department sent a Mail Message to the districts directing the districts to take prompt action in response to the policy change rescinding the prior policy. The Mail Message

indicated that, pending legislative approval of the FY90 ANFC appropriation as budgeted, the new fuel and utility policy would be implemented for all families effective July 1, 1989 as part of the regularly scheduled desk review. (Exhibit E). Through the Mail Memo the department instructed the districts not to recoup benefits paid to families in accordance with the February 1, 1989 PP&D memo. The Mail Message clearly stated that the policy change was made in order to avoid litigation in federal court. A PP&D Interpretive Memo was issued February 23, 1989 and received in the districts on or about March 6, 1989. This PP&D memo superseded the one issued February 1, 1989. (Exhibit F). A final PP&D memo was issued July 1, 1989; effective that date fuel and utility subsidies were excluded from consideration as income in ANFC and ANFC-related Medicaid program. (Exhibit G).

In April 1989, petitioners requested fair hearings before the Human Services Board challenging the inclusion of Section 8 fuel and utility subsidies in their ANFC grants. Shortly thereafter, petitioners attempted to bring a class action suit in Superior Court, and requested a stay from the Human Services Board. The superior Court declined to certify the class and dismissed the case on February 23, 1990.

The petitioners then moved to consolidate the fair hearings. The department agreed not to object to the

consolidation when petitioners agreed that the differences in facts may require individual decisions in each petitioner's case." (Department's Memorandum, pp. 1-4.)

. . .

"These cases, although intertwined, involve different claims. Petitioners Diel, Parrott, Arbuckle, Kirkpatrick, Cushion and Lafleur all claim that they should receive the same benefit that any others received as a result of the Department's "phase-in" plan. Therefore, since the Department disregarded the utility subsidy in determining some ANFC grants starting in February 1989, these petitioners claim the same right and argue that their utility subsidies should also have been disregarded. Petitioner McSweeney is one of the few who received the benefit of the disregard from the beginning. Therefore, McSweeney does not claim to have been harmed by the Department's discriminatory implementation of the change. However, all of the petitioners, including McSweeney, were harmed by the Department's summary withdrawal of the benefit. Essentially, all of the petitioners claim that once the benefit was created for some, all had a right to receive it, and that the withdrawal of the benefit, without notice or opportunity to comment, was in violation of law and due process and therefore null and void. Therefore, all of the petitioners claim the

right to have utility subsidies disregarded in the determination of their ANFC grants for the entire period from February 1, 1989 through June 30, 1989."

(Petitioner's Memorandum, pp. 2-3.)

The parties have also indicated to the hearing officer the following areas of agreement:

1) The petitioners do not maintain that any of the Department's regulations, as written, require the Department to disregard public housing utility subsidies as income for ANFC purposes. The petitioners concede that under the state and federal regulations the treatment of such subsidies is a matter of Department discretion, or "policy".¹ The petitioners argue, however, that once the Department changed its policy (as of February 1, 1989) to disregard these subsidies as income, it was bound to continue to do so unless and until the provisions of the Administrative Procedure Act (APA) were followed in withdrawing the policy.

2) The Department admits that the increased ANFC payments it made in February, 1989, to the few ANFC recipients (like the one in Fair Hearing No. 9123) whose cases were reviewed that month were not in "error," that those individuals were not "overpaid," and that they are not (and will not be) subject to any "recoupment" of the increased benefits paid to them in February, 1989.

3) The petitioners have not contested the Department's assertion that its decision to suspend the implementation of the policy change from March 1 through

June 30, 1989 was based on a valid and accurate assessment of its fiscal inability to pay all eligible ANFC recipients this increase as of February 1, 1989.

ORDER

The Department's decision is modified. In all the cases except Fair Hearing No. 9123 the petitioners shall have their February, 1989, ANFC grants adjusted disregarding their public housing utility subsidies as income for that month. In all the cases, the Department's decisions regarding ANFC payments from March 1 through June 30, 1989, are affirmed.

REASONS

As the petitioners point out, federal regulations clearly require states to apply conditions of ANFC eligibility "on a consistent and equitable basis throughout the state," 45 C.F.R. § 233.10(a)(1)(iv), and to take all types of income "into consideration in the same way", 45 C.F.R. § 233.20(a)(1)(i). Although the Department's motives in implementing its change in policy appear to have been benevolent, any "phasing in" of benefits based solely on an extrinsic consideration like a recipient's date of review (or, e.g., birthdate, first letter of last name, etc.) is per se arbitrary and, thus, violative of the above regulations and constitutional "equal protection". Clearly, the Department's change in policy was directed at all ANFC recipients who received public housing utility subsidies. There was no reason related to the purpose of the policy

change justifying granting the benefit in any month to some ANFC recipients but not to others who were identically situated. See Colchester Fire District No. 2 v. Sharrow, 145 Vt 195 (1984). As a legal matter, the Department's rationale (that, lacking the funds to pay everybody, it was better to pay some), though perhaps well-intentioned, is wholly unavailing.²

Because the Department chose to pay some individuals (like the petitioner in Fair Hearing No. 9123) a higher ANFC benefit for February, 1989, based on the change in policy concerning public housing utility subsidies, and since the Department concedes that the payments to those individuals were not in "error" (i.e., that these individuals were not "overpaid," see W.A.M. § 2234.2), it must be concluded that the Department is required by federal regulation and constitutional equal protection to pay ANFC to all similarly-situated individuals for that month. Therefore, all the cases except Fair Hearing No. 9123 should be remanded to the Department for the recalculation of ANFC benefits for February, 1989, according to the same policy that was in effect for individuals like the one in Fair Hearing No. 9123.³

It is further concluded, however, that the Department is not legally bound under the Vermont APA to pay any of the petitioners in these cases (or any others) a higher ANFC benefit for the months March through June, 1989.

3 V.S.A. § 801(b)(9) contains the following definition:

"rule" means each agency statement of general applicability which implements, interprets, or prescribes law or policy. . ."

3 V.S.A. § 831(a) provides:

"Where due process or a statute directs or permits an agency to adopt rules, regulations or both, . . . it shall be construed as requiring or permitting the agency to adopt rules in the manner provided in this chapter".

The APA also prescribes specific procedures for the filing of proposed rules with the legislature and for the opportunity for public comment. 3 V.S.A. §§ 817, 839-43. The petitioners maintain that since the Department did not follow these procedures in withdrawing its prior-announced (and partially-implemented) policy change, it was required by law to continue the change. The petitioners acknowledge that the Department also did not follow APA procedures when it first implemented the policy change. However, they assert that since the revocation of the policy change (but not its implementation) "jeopardized their interests," APA "notice-and-comment rulemaking" was required at that time.⁴

As support for their position the petitioners rely on the oft-cited case of National Association of Home Health Agencies v. Schweiker, 690 F 2d 932 (D.C. Cir. 1982).

Putting aside the question of whether Vermont's APA should be interpreted the same way as its federal counterpart, the hearing officer concludes, however, that the instant cases

are distinguishable on their facts from the federal cases cited by the petitioners, and that the general rule articulated by the courts in those cases is inapplicable to the circumstances presented herein.

In February, 1989, the Department, after paying increased benefits to a limited number of ANFC recipients, learned (from VLA) that it had embarked on a course that might require it to pay out benefits in excess of funds it believed were available for this purpose. There is little question that if the Department had followed APA procedures before temporarily revoking the policy change it could not have continued to pay every eligible ANFC recipient the increased benefit before its funds ran out--i.e., it is unlikely the APA process would have worked fast enough to avoid what would have been the premature commitment of Department resources. It is reasonable to conclude that if the Department was to avoid spending funds that it believed were not available, it had no choice but to promptly and unilaterally suspend the policy change it had prematurely--and, thus, "erroneously"--implemented.

33 V.S.A. § 2703(a), relating to the Department's administration of the ANFC program, provides:

(a) "Aid shall be given for the benefit of a dependent child to the relative with whom the child is living unless otherwise provided. The amount of aid to which an eligible person is entitled shall be determined with due regard to the income, resources and maintenance available to him and, as far as funds are available, shall provide him a reasonable subsistence compatible with decency and health. The commissioner may fix by regulation maximum amounts of aid, and act to insure

that the expenditures for the programs shall not exceed appropriations for them. In no case may the department expend state funds in excess of the appropriations for the programs under this chapter."

The Vermont Supreme Court, in In re Telesystems Corp, 143 Vt 504 (1983) held that the definition of a "rule" under 3 V.S.A. § 801(b)(9) (see supra) should not be so literally or strictly construed that an agency's powers are limited to a degree leading to irrational consequences. Id. at P. 510.

The instant cases are certainly distinguishable from Telesystems on their facts and in the context in which the APA is being considered. However, in light of § 2703(a), supra, the cited reasoning from that case appears apt.

A strict application of the APA statutes in these cases would have the dubious effect of "locking in" the Department's "error" of committing unavailable funds to certain individuals. Although these individuals claim to be "adversely affected" by the Department's temporary suspension of its previously-announced and partially-implemented policy change, the only "benefit" they have lost is one they had gained temporarily, and only as a result of the Department's "error". None of the petitioners herein is worse off than before the single month that the Department's policy change was temporarily in effect. The Department's "discovery" of and its response to this "error" was prompt (within one month). If the Board upholds the earlier part of this recommendation (that all similarly-situated individuals were entitled to equal treatment by the

Department for February, 1989) the Department's March 1, 1989, suspension of its policy change will have affected all the petitioners in these cases equally.

The Board concludes that the expectation or even a "promise" of a benefit does not, in and of itself, create a "property right" to which "due process", in the form of "notice and comment" attaches (assuming that an individual "right" to notice and comment exists at all, independent of the statutory provisions of the APA--an assumption which is, at best, problematic). In all the cases cited by the petitioners the "benefit" that was withdrawn by the agency was material and long-standing. That simply was not the case herein.

Federal regulations and "equal protection" dictate that the Department not be allowed to leave intact a status quo of having determined the ANFC eligibility of certain individuals for February, 1989, in a manner different from others who were identically situated. However, once those individuals' circumstances have been equalized, it must be concluded that the APA did not prevent the Department from taking prompt and reasonable steps to correct an administrative "error" that would have resulted in an over commitment of the Department's resources.

The Department's decisions in these cases are modified accordingly. 3 V.S.A. § 3091(d) and Fair Hearing Rule No. 19.

FOOTNOTES

¹See W.A.M. ¶ 2244, 2245.31-33, 2250, and 2250.2. Because of the parties' stipulation of issues, the board deems it unnecessary to reproduce or analyze any of these regulations. See letter to hearing officer from Department's attorney dated July 16, 1990, which is appended to the Department's memorandum.

²The Department also alleges that a "phase-in" based on review dates was "administratively convenient" and, therefore, not arbitrary. (See Department's memo, p 8.) The Department cites no case (and the hearing officer is not aware of any) that upholds "unequal treatment" based solely on either lack of funds, administrative convenience, or both. The hearing officer is also incredulous at the Department's assertion that "the phase-in method is consistently used by the Department to implement policy changes and has never been challenged." (Id.) Again, no examples are cited and the hearing officer is unaware of any. (To the contrary, however, see Fair Hearing No. 9900.)

³Although it exceeds the Board's authority to so order, it would appear the Department is also obligated to identify and notify all other similarly-situated individuals who may be entitled to the same February, 1989, benefit. The total of such payments would still be less than amount of increases the Department was originally prepared to pay out between February 1 and June 30, 1989.

⁴The Board feels compelled to comment that had the Department followed the clear dictates of the APA in the first place, the problems that arose in these cases would have been avoided. Again, the Department's motives appear to have been benevolent (i.e., it wanted to implement a change in policy that was beneficial to recipients as soon as practicable). However, such "changes in policy" that amount to a significant amendment to the manner in which the Department calculates benefits should, by law, be subject to the APA process prior to implementation. 33 V.S.A. § 2505(c)(2) and 3 V.S.A. § 831(a) (see supra).

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