

STATE OF VERMONT
HUMAN SERVICES BOARD

In re) Fair Hearing No. 9830
)
Appeal of)

INTRODUCTION

The petitioner appeals two decisions of the Department of Social Welfare regarding her ANFC grant. The first is the Department's finding that the petitioner had been overpaid due to the Department's error in computing her grant. The second is the Department's decision to close her grant because the assisted child was no longer in her home.

FINDINGS OF FACT

1. In early 1990, the petitioner received ANFC payments on behalf of her two minor sons who both lived with her. In February of 1990, the unemployed father of the petitioner's younger son, moved into her home. She reported that change to the Department and on February 15, 1990 she received a notice from her worker informing her that her younger son, whose father lived in her home, would be removed from her grant because the child was no longer deprived by the absence of a parent and that her grant would decrease from \$608.00 to \$502.00 on March 1, 1990.

2. Over two months after this notice was sent, a supervisor reviewed the petitioner's file and advised the worker that the action taken in February was incorrect. The

unemployed father, should have been added to the grant and his unemployment insurance of \$131.00 per week should have been included in the calculations. The petitioner's grant would have been \$164.00 had it been properly calculated, amounting to a \$338.00 per month overpayment.

3. On March 21, 1990, prior to the discovery of the overpayment, the petitioner's older son had gone to visit his father while his mother was ill. The older boy's father, who was under an order dated November 28, 1989 to pay child support to the petitioner, hired an attorney who reported to the Department on April 4, 1990 that the child was with the father, that the father felt that his support obligation had thereby ceased, and that a hearing on the matter had been scheduled in Superior Court for late April, 1990.

4. Sometime in the next few days, the worker spoke with the petitioner who told him that she had sent the child for a visit with the father while she was hospitalized and that she had experienced some problems getting him back home. However, she expected him back by April 13. In fact, the petitioner had asked the father to return the child but he had refused and she had attempted to force his return, with no success, through the local police.

5. In the meantime, sometime during April 4, 1990, the younger boy's father who resided with the petitioner had returned to work. At that same time, the overpayment had

been discovered and a notice was sent to the petitioner on May 7, 1990 that she had been overpaid for April and May of 1990 due to Department error and now owed \$676.00 (\$338.00 for each month).

6. A hearing on the older child's custody placement was held on April 23, 1990. Following the hearing, but before a decision was reached, the child remained in the home of his father against his mother's wishes. On May 17, 1990 the petitioners' worker notified her that her ANFC grant would close based on the fact that the only child in the home eligible for ANFC, the older child, was no longer "residing" there.

7. On June 4, 1990, the Superior Court entered a new order and modified its previous order to provide that the child would reside with the father, and that the mother would be allowed restricted visitation subject to a guardian ad litem's report. That order was subsequently amended to allow the child to visit with his mother two nights and three days of each week. The petitioner is continuing to contest the Court's decision.

ORDER

The Department's decision in #9830 that the petitioner was overpaid \$676.00 which is subject to recoupment is affirmed based on a \$338.00 overpayment for the months of March and April. The Department's decision in #9836 closing the petitioner's grant as of May 31, 1990 is reversed and remanded for a new closure date based on an actual change of

residence occurring on June 4, 1990 and not before.

REASONS

The actions taken by the Department in this matter indicate a good deal of confusion, and more than a little lack of care, in dealing with the petitioner's situation. The petitioner who appeared pro se does not contest that her benefits were calculated incorrectly for April and May 1990 but rather protests that she should not be penalized by the Department's error. However, the facts presented at hearing indicate that the petitioner was in fact overpaid for March and April but not for May of 1990. The applicable regulations provide in pertinent part as follows:

An "assistance group" is defined as one or more individuals whose requirements, income and resources are considered as a unit to determine need for ANFC.

An ANFC assistance group must include one or more eligible dependent children. In addition, the assistance group must include all siblings (including half-siblings) who live with the dependent child or children, who are also deprived of parental support and who qualify under the ANFC age criteria, as defined in policy. The parent(s) of each and every child included in the ANFC assistance group must also be included in the ANFC assistance group if he or she lives in the home with the children.

(emphasis added) W.A.M. § 2242

The notice sent February 15, which decreased her benefits as of March 1, was indeed erroneous because her younger child was deprived of parental support due to his father's unemployment (see W.A.M. § 2333) and lived with a dependant half-sibling, the older child. As such, both the unemployed father and his child had to be included in the assistance group. See Fair Hearing No. 8190. The notice

should have changed the family's benefits as of March 1, to reflect inclusion of the unemployed father's benefits which would have resulted in a decrease of ANFC benefits to \$164.00 per month. Therefore, the petitioner was overpaid through administrative error for the month of March.

It appears that the younger child's live-in father continued to be unemployed through at least part of April. Therefore, the family was also overpaid for that month. However, sometime in April, the unemployed father went back to work, a fact which was admittedly known to the Department. At that time, the Department should have removed both the live-in father and his child from the grant because that child was no longer deprived of parental support. For the month of May, the petitioner should have received a grant for herself and her older child whose father was not in the home. Presumably, the originally calculated grant amount of \$502.00 for a family of two should have been paid at that time. It cannot be concluded, then, that the petitioner was overpaid for May 1990.

That conclusion leaves the issue of whether the petitioner should have been closed at the end of May, as the Department asserts, because the evidence showed that her oldest son had been living at his father's house since March 21, 1990. The Department's regulations provide that:

Federal and State law (section 406 of the Social Security Act; 33 V.S.A 2701 and 2702) require that, to be eligible for public assistance (ANFC), a dependent child shall be living with a relative in a residence maintained as a home by such relative(s), unless the child is committed by a Juvenile Court to the care and

custody of the Commissioner of Social Welfare and placed in foster care (ANFC-FS).

W.A.M. § 2302.1 The regulations further provide:

A "home" is defined as the family setting maintained, or in process of being established, in which the relative assumes responsibility for care and supervision of the child(ren). However, lack of a physical home (i.e. customary family setting), as in the case of a homeless family is not by itself a basis for disqualification (denial or termination) from eligibility for assistance.

The child(ren) and relative normally share the same household. A "home" shall be considered to exist, however, as long as the relative is responsible for care and control of the child(ren) during temporary absence of either from the customary family setting.

The above regulation is essentially identical to its federal counterpart. See 45 C.F.R. § 233.90(c)(i)(v)(B)

The "key factor" in determining eligibility under the above regulations is which parent has "the continued responsibility for day to day care of the child". See Fair Hearing No. 9202. In making such a determination, the Board has held that the Department must look to the petitioner's legal status regarding the custody of her child. See Fair Hearing Nos. 5553, 5683, 6345, 7337 and 7534. In this matter, there is no argument that the petitioner had physical custody of her son¹ at least until June 4, 1990, in spite of the fact that he was living with his father. Clearly, she had the legal responsibility for the day to day care of that child even though he was temporarily and, at least initially, voluntarily placed with his father. There is no evidence that the petitioner ceased to provide a home

for her child, or had intended that he reside elsewhere, except on a temporary basis. Therefore, it must be concluded that until June 4, 1990 the child continued to live with his mother in a residence maintained by her as his home, in spite of his temporary absence.

The Department offered no explanation as to why it decided on May 7 to find that the child was no longer just temporarily away but had ceased residing with his mother altogether.² The Department knew on May 7th both that the child was at the father's home against the mother's will, and that the mother desired that the child return to her home and had taken steps to achieve that return. The Department was also aware that the custody dispute had been heard by the Superior Court some two weeks earlier and that a decision was likely to be made as to custody in the near future. Given the facts, it is difficult to see why the Department felt the need to usurp the Court's authority and to make its own decision with regard to which parent had the responsibility for the care of that child.

On June 4, 1990, the Court put the issue to rest by explicitly changing the physical residence of the child to that of the father's. At that time, and not before, the Department had sufficient facts to conclude that the child would no longer be residing with his mother and, it was only at that time that a decision on eligibility should have been made by the Department.

The net effect of this decision is that the petitioner

was overpaid for two months and that her grant was wrongfully closed on May 31, 1990, all due to administrative errors on the part of the Department. The petitioner says that she should not have to repay the overpaid amounts because the money came to her due to the Department's error.

However, the Department's regulations make no distinction between who committed the error for purposes of payback.

Overpayments of assistance, whether resulting from administrative error, client error or payments made pending a fair hearing which is subsequently determined in favor of the Department, shall be subject to recoupment.

W.A.M. § 2234.2

It must be concluded, then, that the petitioner is liable to have the two months she was overpaid (plus any amounts she has continued to receive as a result of her filing the fair hearing, most probably benefits paid for July 1990) recouped from future ANFC payments at a rate of 10 percent per month.

See generally W.A.M. § 2234.2.

FOOTNOTES

¹The Court's prior order was not introduced into evidence. However, the Court's subsequent order made it clear that the child's father had been ordered to pay support under the prior order and specifically modified the physical residence of the child from that contained in the prior order.

²In the past, the Department had adopted a "30 day absence policy" which, combined with a lack of a plan for return of the child, that the child was no longer in the home. That policy was rejected by the Board as being without authority in the statutes and regulations and was found arbitrary and inappropriate. Such decisions had to be made on a case by case basis considering all the facts. See Fair Hearing No. 8190.

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