

STATE OF VERMONT
HUMAN SERVICES BOARD

In re) Fair Hearing No. 11,012
)
Appeal of)

INTRODUCTION

The petitioner appeals the decision by the Department of Social Welfare terminating his Refugee Cash Assistance (R.C.A.) benefits as of January 15, 1992. The issue is whether the Department's notice was both adequate and timely and whether the Department had the authority to issue such a notice.

FINDINGS OF FACT

The facts in this matter are not in dispute:

1. The petitioner is a sixty-two-year-old man who arrived in the United States with his spouse from what was then the Soviet Union on May 18, 1991. For the first four months of their stay, they were assisted by the Hebrew Immigrant Aid Society. After that assistance ended, the petitioner and his wife applied for assistance through the Department of Social Welfare and were granted benefits of \$567.00 per month through the R.C.A. program beginning September 1, 1991.

2. Sometime before January 2, 1992, the Department of Social Welfare received notice from the federal office of refugee resettlement at H.H.S. that appropriations for the

R.C.A. program had been cut and that benefits would therefore only be payable to persons who had been in the country for eight months or less rather than twelve months or less as the regulations then provided. The Department was informed that the above change would become effective via an emergency rule to be published in the federal register on January 10, 1992 which would be effective immediately on that date.

3. On January 2, 1992, the Department, anticipating the change, notified the Burlington office to notify affected persons at once.

4. On January 7, 1992, the petitioner and his wife were mailed a notice (which had been dated January 6, 1992) informing them in pertinent part as follows:

A.N.F.C./Refugee Cash Assistance Program, Your A.N.F.C. benefit of \$567.00 will be closed as of January 15, 1992 because: There are no eligible children in the home.

. . .

The office of Refugee Resettlement anticipates a reduction in funding and have ordered us to reduce the length of the cash assistance/A.N.F.C. eligibility from 12 months to 8 months . . . Your refugee case is beyond allowable terms of eligibility beginning with your entry date into the United States.

The last sentence was handwritten, the others were computer generated. The notice also contained the petitioner's right to appeal. The entire notice is appended hereto as Exhibit No. 1 and incorporated herein by reference.

5. The petitioner met with his caseworker on January

8, 1992 and January 10, 1992 to question and discuss the reason for his termination. He did not receive an R.C.A. benefit payment on January 15, 1992.

6. The petitioner orally requested a fair hearing on January 28, 1992. His attorney made a second written request dated February 2, 1992. He has continued to receive Medicaid but not R.C.A. benefits pending appeal.

7. The petitioner and his wife subsequently applied for and have been determined to be ineligible for General Assistance (G.A.) based on the lack of two employment barriers required by the regulations. They currently have no income.

ORDER

The Department's decision is modified to extend benefits to the petitioner for the period of time he would have received benefits if the notice mailed to him January 6, 1992 had given him a full ten days of advance notice from that date.

REASONS

The petitioner raises two issues in this matter: (1) the timeliness and adequacy of the notice mailed to the petitioner, and (2) the Department's authority to issue such a notice before the effective date of the emergency rule.

The R.C.A. is a federally funded program set up through Title IV of the Immigration and Nationality Act, 8 U.S.C. § 1522, and administered in this state by the Department of Social Welfare. The federal regulations governing this

program (which were promulgated by the office of Refugee Resettlement at the Department of Health and Human Services) require that participating states provide certain procedures for applicants and recipients including hearing requirements:

Hearings.

(a) A State must provide applicants for, and recipients of, assistance and services under the Act with an opportunity for a hearing to contest adverse determinations using hearing procedures set forth in § 205.10(a) of this title for public assistance programs.

45 C.F.R. § 400.23

The federal requirement is reflected in the Department's R.C.A. regulations as follows:

Fair Hearings and Appeals

Refugees are entitled to the right of a fair hearing and appeal as accorded to applicants and recipients in all programs administered by the Department of Social Welfare. The provisions and procedures relevant to fair hearings and appeals shall apply.

W.A.M. § 2505

Section 205.10(a) referred to in the federal regulation above provides, in pertinent part, as follows:

4) In cases of intended action to discontinue, terminate, suspend or reduce assistance or to change the manner or form of payment to a protective, vendor, or two-party payment under § 234.60:

(i) The State or local agency shall give timely and adequate notice, except as provided for in paragraphs (a)(4)(ii), (iii), or (iv) of this section. Under this requirement:

(A) Timely means that the notice is mailed at least 10 days before the date of action, that is, the date upon which the action would become effective;

(B) Adequate means a written notice that includes a statement of what action the agency intends to take, the reasons for the intended agency action, the specific regulations supporting such action, explanation of the individual's right to request an evidentiary hearing (if provided) and a State agency hearing, the circumstances under which assistance is continued if a hearing is requested, and if the agency action is upheld, that such assistance must be repaid under title IV-A, and must also be repaid under titles I, X, XIV or XVI (AABD) if the State plan provides for recovery of such payments.

. . .

(iii) When changes in either State or Federal law require automatic grant adjustments for classes of recipients, timely notice of such grant adjustments shall be given which shall be "adequate" if it includes a statement of the intended action, the reasons for such intended action, a statement of the specific change in law requiring such action and a statement of the circumstances under which a hearing may be obtained and assistance continued.

The Department's regulations reflect these federal requirements as follows:

Applicants for and recipients of ANFC shall be furnished, prior to implementation of any decision affecting their receipt of such aid or benefits, a written notice which:

1. Specifies the type of action to be taken, and explains the action with reference to dates, amounts, reasons, etc.
2. Includes clear explanation of individual rights to confer with Department staff to request reconsideration of a decision, to request a fair hearing, and to request continuation of benefits pending a fair hearing decision if requested within specified time limits.

Unless specifically exempt, a decision resulting in termination or reduction in the amount or scope of aid or benefits or changing a grant to a protective payment system requires advance written notice of the proposed action. Advance notice must be mailed no less than 10 days prior to the effective date of the proposed action.

W.A.M. § 2228

Money Grant

. . .

Written notice of assistance closed shall include the following specific information:

1. Amount of current award
2. Effective date of closure
3. Reason for closure.

W.A.M. § 2228.2

From the above it must be concluded that the ten day advance notice requirement in the ANFC program is also applicable to the R.C.A. program. See also Chu Drua Cha v. Noot, 696 F. 2d 594 (8th Cir. 1982).

The Board has already considered and determined that an ANFC notice mailed nine days before the date of the proposed effective action was untimely with regard to the requirements at W.A.M. § 2228. Fair Hearing No. 10,780. The Board concluded in that A.N.F.C. closure case that the Department, by characterizing the date of closure of benefits as the "effective date" of the action, had in essence only given nine calendar days of notice to the recipient before closure occurred. The Board concluded in that case that the Department's lack of a full ten day notice entitled the petitioner to the benefits he would have received if he had received the full ten days of notice, which in that case amounted to benefits for the next two week pay period. The Board made it clear that the

Department could avoid this problem either by mailing the notice one day earlier or characterizing the "effective" date as a day later. In addition, at least two federal court decisions have made it clear that the ten day period is triggered by the mailing date, not the date on the notice. Almeida v. Chang, 434 F. Supp. 1177 (U.S.D.C. Hawaii 1977), Brown v. Wolgemulth, 371 F. Supp. 1035 (W.D. Penn 1974), Aff'd 492 F. 2d 1238 (3rd Cir. 1974). In this case then under the Board's prior analysis, the petitioner actually received only eight days advance notice, an even worse situation than that found to violate the regulations in Fair Hearing No. 10,780.

The Department in its memorandum neither acknowledges the binding effect of the Board's prior decision nor attempts to distinguish this case from Fair Hearing No. 10,780 in any way. Neither does the Department concede or even mention the applicability and controlling authority of the federal and its own regulations with regard to the timeliness and adequacy of the notices it sends to R.C.A. applicants and recipients. In light of the very clear language in the R.C.A. regulations adopting the hearing requirements at 45 C.F.R. § 205.10(a), this lack of analysis is troubling.

Without conceding the lack of timeliness in this case, the Department does raise a lack of harm as a reason for upholding the closure notice citing Fair Hearing No. 3505. In 1979, the Board did hold in a case that an inadequate

notice will not cause dismissal of the Department's proposed action unless there is a showing that the petitioner is prejudiced thereby. The Board found in that case that the petitioner did in fact have notice of the ground for the Department's action through other means by the time of the hearing. That decision, however, did not concern untimely notices. The Fourth Circuit Court of Appeals specifically found in a case decided that same year involving an untimely notice, that lack of the required advance notice always involves substantive harm. Kimble v. Salomon, 599 F 2d 599 (4th Cir.) cert. denied 444 U.S. 950, 100 S. Ct., 422, 622 L. Ed. 2d 320 (1979). The Court based its analysis in part on a quotation from the then Secretary of Health, Education and Welfare¹ (the predecessor agency of H.H.S.) who stated that the agency adopted the ten day notice rule because recipients "ought to be informed in advance if their payments are to be cut for any reason, so that they may be able to plan for the cut, and to the extent possible adjust to it". Id. at 604. The Department put forth no caselaw in support of its position and the Board could itself discover no case in which lack of timely notice was considered de minimis.¹ Based on the above caselaw, then, it must be concluded that failure to give timely notice is always per se harmful to the petitioner since it cuts short the period provided for adjustment (as well as the period for appeal and continuation of benefits.)

There can be no doubt that an R.C.A.-A.N.F.C. notice

which does not provide at least ten days' advance warning before the action is taken is ineffective because it violates both federal and state regulations. See Rosas v. McMahon, 945 F.2d 1469 (9th Cir. 1991); Chu Drua Cha v. Noot, supra; Brown v. Wolgemuth, supra; and Harrell v. Haider, 369 F. Supp. 810 (1974). This is true even when benefits are being cut across the board for a group of recipients. Rochester v. Baganz, 479 F.2d 603 (3rd Cir. 1973).

The question which arises at this juncture what relief is appropriate when a notice is found to be ineffective for lack of timeliness? Under 3 V.S.A. § 3091(d) the board "may affirm, modify or reverse decisions of the agency; . . . and it may make orders consistent with this title requiring the agency to provide appropriate relief including retroactive and prospective benefits". This statute clearly gives the Board the legal authority to either reverse the Department's decision to cut benefits off on that date and send it back for a new notice, as the petitioner requests, or modify the result by requiring that the petitioner be paid the same as he would have if he had received a timely notice. The only questions remaining are whether the Board is precluded by federal law from granting the second form of relief and, if not, what relief appears to be most appropriate under the circumstances.

Most notice cases arise in the context of federal class actions in which a large group of persons have failed to

receive appropriate notices. The usual remedy in these actions is to invalidate all the notices and send the matter back to the welfare department to issue new notices to all the individuals. See, e.g., Kimble v. Solomon, supra, Turner v. Ledbetter, 906 F.2d 606 (11th Cir. 1990). Given the number and varying facts of the petitioners in these cases, this is probably the only kind of relief that makes sense. There is nothing, however, in any of these cases which would prevent a court or any other tribunal from retroactively modifying the result to reflect the amount which would have been received if the notice had been valid.

While there does not appear to be a case exactly on point, it is clear that individual appeals to state court tribunals have been dealt with in more specific ways than the class action suits. For example, a New York court ordered the welfare department to pay benefits through an advance notice period when the Department sent notice of the right to receive benefits through the ten day period but refused to actually pay it. Mallia v. Webb, 481 NYS 2d 805 (A.D. 3 Dept. 1984).

It must be concluded, then, that the Board has the legal authority to either reverse or modify the Department's invalid and ineffective notice and is apparently not precluded by federal law from taking either step. The final and most critical question is which remedy is most appropriate.

The Board decided in Fair Hearing No. 10,780 to modify

the result of an ineffective order and to pay benefits (two weeks' worth) which would have accrued to the petitioner if the full ten days' advance notice were given. In this case, if the request is modified to give the petitioners the amount they would have received if they had gotten the full advance period before termination, the petitioners would probably also get two weeks more in benefits. That form of relief will put the petitioners in the same position financially as they would have been if they had received the proper notice, although certainly the timing of the receipt of that two weeks' worth money is different. Unfortunately, there is nothing which the Board can do at this point to retroactively alleviate the suffering the petitioners undoubtedly endured during those first weeks after they were prematurely cut off benefits.

If the matter is instead reversed due to the ineffective notice, the petitioners will have to be paid benefits going all the way back to the original cut off which would not cease until a new and proper notice were issued by the Department. The petitioners would, therefore, receive at least four months of benefits to which they are clearly not entitled on the merits and do not even make a claim of entitlement. The Department will undoubtedly be required by the regulations to then make a claim of overpayment for those amounts.² Because the reversal remedy appears to give the petitioners a windfall in this matter, it must be concluded that such relief is inappropriate and

that a more appropriate form of relief is to modify the payments to the petitioners to reflect amounts they would have received had they received a correct notice.

As for the petitioners' other two arguments for completely reversing the decision--the alleged inadequacy of the notice and the Department's alleged lack of authority to issue the notice--little merit can be ascertained. Unlike notices which are not timely, notices alleging inadequacies do require a showing of some harm. See Fair Hearing No. 3505. Inadequate notices mailed to persons who subsequently obtained attorneys and demonstrated at hearing that they clearly understood the basis for the action have been found not to be fatally inadequate. See e.g., Collins v. D'Elia, 480 N.Y.S. 2d 948 (1984); Regan v. D'Elia, 440 N.Y.S. 2d 290 (1981). In this case, it is obvious that any defect which may have existed in the notice as to the basis for the action, was more than cured well before the date of hearing through discussions between the Department and the petitioner's attorney.

Finally, it cannot be found that the Department was without authority to send out a notice of a grant closure before the date of the program's termination as long as the proposed date of closure came after the program termination date. The petitioner has advanced no legal argument which would militate against the common sense action taken by the Department.

FOOTNOTES

¹This quotation came from another case, Rochester v. Baganz, 479 F 2d 603 (3rd Cir. 1973).

²The advance notice period is the due process requirement which prevents the cessation of benefits before ten days notice is given. However, that notice requirement does not create a substantive eligibility for those benefits and they may still be recovered through a proper proceeding. See Rosas v. McMahon, (supra).

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