

3. The petitioner's request was reviewed by the Department's operations chief who, after determining that there was no additional evidence, decided that the submitted evidence was insufficient to show that physical harm could reasonably be anticipated as to the child or the petitioner.

The decision was based on the fact that the petitioner had made a previous request for a waiver contemporaneous with the restraining order which had been denied in early 1990; that no new evidence existed to enhance that prior claim; that the petitioner's statements regarding the child's father's potential for violence were not corroborated by other witnesses; that there was no claim that the 1989 restraining order had been violated or renewed; and that the evidence was stale and concerned situations (the recent birth of the child) and parties (the father's girlfriend) which may not be factors at the present.

4. On February 7, 1992, the Commissioner notified the petitioner that her request would be denied because, "You failed to provide sufficient evidence that pursuit of child support might result in serious physical and/or emotional harm to you or your child."

5. The petitioner appealed the Department's decision and asked for a hearing. At the hearing she appeared with her attorney to testify and to put into evidence the documents she had already presented to the Department. At a supplemental hearing she called her sister as a witness. Based upon her testimony, that of her sister, and admissible

documents, the following facts are found:

(a) The petitioner who has never been married conceived her child in September of 1988. She believes the father of her child to be, D.J., a man with whom she lived from May through October of 1988. During the time they lived together the petitioner felt that D.J. was a violent man who was upset by little things and who threw objects when he was angry.

(b) As soon as she discovered her pregnancy in late September, the petitioner told D.J. who initially responded favorably to the news, and then a few days later changed his mind and told her to "get lost". The petitioner and D.J. separated and as she moved out, D.J. laughed in the petitioner's face. The petitioner moved to another town some distance away.

(c) The petitioner did not see or speak with D.J. again until after the birth of her son on July 3, 1989. D.J., who then had returned to his former girlfriend, was told of the birth by a relative who reported to the petitioner that he was uninterested in the event and didn't care if the child was alive or dead.

(d) Shortly after the child's birth, the Department initiated child support collection proceedings because the petitioner was an ANFC recipient.

(e) After being contacted by the child support collection division, D.J. called the petitioner and told her that he was planning to deny paternity. He encouraged the petitioner to tell the Department that she was unaware of the identity of her child's father because the child had been conceived at a party where she "messed around with a bunch of guys". When the petitioner balked, D.J. told her he would "come after" her and her son. D.J.'s girlfriend also called the petitioner and threatened to kill her and her son if she pursued child support.

(f) Because of his threats and his girlfriend's threats and her belief that D.J. was a violent person, the petitioner applied to the District Court for an order for relief from abuse alleging that D.J. placed herself and her son in fear of imminent serious physical harm. She asked that he be required to leave them alone and stop threatening them.

(g) The petitioner saw D.J. face to face for the first time in over a year at the Court hearing. While outside the courtroom, D.J. yelled and swore at her and had to be escorted out by the police. After a hearing at which the petitioner and D.J. appeared, as well as

the petitioner's sister and her husband, who is D.J.'s brother, the Court found that the petitioner had shown an immediate danger of further abuse and issued a temporary order that D.J. not interfere with the petitioner or her son.

(h) Following the issuance of this order, the petitioner's sister had a confrontation with D.J.'s girlfriend who also damaged her car. D.J. also got into an altercation with his brother (the one married to the petitioner's sister). Wherein he tried to choke him. There appeared to be no police records of any of these events.

(i) The final hearing held on November 17, 1989 was not attended by D.J. The Court continued the order until November 17, 1990. Thereafter, the petitioner continued to live in Vermont, though in a town some distance from the one she had lived in with D.J. She first filed for the waiver from the Department in February of 1990 which was denied in March, 1990 and was not appealed. The petitioner apparently continued to receive ANFC for about another year although support collection activity was inexplicably suspended.

(j) In February of 1991, the petitioner moved to New Hampshire where she got a job which lasted for a couple of months. When she was laid off, she moved back to Vermont and in December of 1991 applied for ANFC and filed the waiver at issue here.

(k) The petitioner has not seen D.J. since the first hearing in October of 1989 although she believes that he knows where she is. She has not renewed the restraining order since its November 1990 expiration date. The petitioner received one threatening call from D.J. shortly after she got the restraining order but otherwise has not heard from him.

(l) The petitioner's sister, who lives with D.J.'s mother and has seen him on a daily basis for some seven years, supports her sister's belief that she is likely to be harmed by him. However, her credible testimony was that she has never observed an assault or even heard that D.J. has ever assaulted any of his several girlfriends even though he is also paying child support to at least one of those women. Although she described D.J. as a "violent" person who throws things when angry, and often threatens people, in seven years she has observed him in a physical altercation on only two occasions, both with his brother (her husband). She also observed him on one occasion grab a ten year old nephew by the throat who had spoken to him disrespectfully. She testified, however, that D.J. had

encouraged his girlfriend to fight with her because he did not himself wish to fight with a woman. It was her belief based on her knowledge of D.J. and conversations with him that he was reluctant to and in fact did not violate the Court restraining order in 1990 because he did not want to get in trouble with the police. He continues, however, to threaten, among family members, that he will "get" the petitioner if she ever takes him "back to Court".

5. In addition to the petitioner's case, which is on hold pending the outcome of these procedures, the Department is currently pursuing support against D.J. for children whom he fathered with two other women, including his current girlfriend. The Department's support specialist has not encountered any hostility or lack of cooperation from D.J. during this process. The Department has received no waiver requests from either mother even though both are currently receiving ANFC.

6. Based on the above facts, it cannot be found that there is evidence which shows that it is reasonably anticipated that physical harm will result to the petitioner if she is required to cooperate in establishing a support obligation as to D.J.

7. It is reasonable to anticipate based on past experience that the petitioner will receive threats from D.J. if child support collection resumes. However, as no medical evidence has been presented that such threats seriously interfere with the petitioner's ability to care for her son, it cannot be found that emotional harm exists either.

ORDER

The Department's decision is affirmed but the Department should take actions, including those set forth below, to protect the petitioner from reprisals by D.J.

REASONS

Any person who receives ANFC automatically assigns his/her rights to support to the Department and is expected as a condition of eligibility to cooperate in establishing paternity and collecting child support benefits unless s/he has good cause for failing to do so. W.A.M. § 2331.32.

Good cause is defined in the Department's regulations, in pertinent part, as follows:

To show that cooperation may be "against the best interests of the child" the applicant or recipient must produce some evidence that cooperation in establishing paternity or securing support is reasonably anticipated to result in any one of the following:

1. Serious physical or emotional harm to the child for whom support is being sought.
2. Physical or emotional harm to the mother or caretaker relative which is so serious it reduces her ability to care for the child adequately.

NOTE: Physical or emotional harm must be of a serious nature in order to justify finding of good cause.

W.A.M. § 2331.33

These regulations closely track those found in the federal regulations at 45 C.F.R. § 232.42. A determination of reasonable anticipation of harm is a factual decision which must be made on "a case by case basis on the weight

sufficiency and quality of the gathered evidence. The final decision requires a subjective judgement on the part of hearing examiner." Bootes v. Cmmr. of Penn. Dept. of Public Welfare 439 A. 2d 883, 885 (1982). When the criteria for this exception were set by the Department of Health and Human Services, (at that time known as the Department of Health, Education and Welfare), it was expected that it would be an exception used in those few extraordinary circumstances where the parent or child faced a risk so real that it would outweigh the emotional, physical and financial benefits of the child's receiving parental support. See 43 Fed. Reg. 2176, (January 16, 1978).

Under these regulations, a reasonable anticipation that threats will occur is not sufficient to grant a waiver unless those threats will result in emotional harm to the child or to the parent to the extent that it would debilitate the parent so that s/he cannot care for the child. The Board has held in the past that proof of emotional harm requires expert testimony. Fair Hearing No. 3072. As the petitioner has the burden of proof (see Fair Hearing No. 10,877) and has not presented the latter, a determination must be made as to whether she has presented evidence that serious physical harm either towards herself or her child could be reasonably anticipated to occur.

The best and most reliable evidence of anticipated harm is usually the opinion of the parent who is either the potential victim or parent of a potential victim. That

person is usually in the best position to know the behavior of her or his child's parent because of her or his unique and intimate relationship with this person. In most cases, but not all, that opinion is also supported by at least some other evidence corroborating or supporting the parent's opinion.

In this matter, there is plenty of evidence that the absent father is a hot-headed and threatening individual. However, there is no evidence that he has ever physically harmed either the petitioner or her child, any of his girlfriends or their children (even though he is required to pay child support for at least one of those children) or indeed any woman or child. The petitioner herself has admitted that this is so. Although this corroboration is not essential to her case, it does prompt a closer look at the remaining evidence--her feelings--to try and discern the reliability of those feelings as an indicator of the petitioner's probable actions.

In this case, the petitioner was unable to articulate, even though urged to do so, why she believes she will actually be physically harmed, as opposed to threatened and harangued, if she is required to cooperate with child support. She offered very little insight into the character of D.J. or her relationship with him. Perhaps this is because the petitioner has in reality only spent a brief time with the petitioner well over two years ago. Given these above facts, it is very difficult to find in this case

that the petitioner's opinion alone is of sufficient weight or quality to conclude that physical harm is reasonably anticipated to occur.

It is important to emphasize, however, that while the evidence may not be sufficient to conclude here that physical harm is reasonably expected to occur, it does not mean that there is not at least a possibility that harm may occur. The failure to meet the former standard only means that the petitioner and D.J. will be required to participate in support collection activities. It does not mean that the petitioner is deemed safe or in no need of further protection. It is the Board's opinion that the Department has an obligation to take the actions necessary to protect the petitioner from physical harm or even verbal harassment when a waiver is not granted but potential harm cannot be totally ruled out. Protection in instances such as this could be easily accomplished by assisting denied persons in getting legal assistance with obtaining a restraining order.

It should be noted that under Vermont law, a Court may protect a person both from an attempt at physical harm and threat of serious physical harm. See 15 V.S.A. § 1101.

The waiver claimant should also be assisted by informing the absent parent when support proceedings are begun that the ANFC assisted parent has requested a waiver that has been denied, and that the ANFC assisted parent has no further control over the situation.

The petitioner here has an attorney and presumably

knows that she can obtain a restraining order. However, the Department should take the other step described above and any others which it perceives might protect the petitioner from harm.

RULINGS ON DEPARTMENT'S REQUEST FOR FINDING

The Department's request for findings of fact are all granted with the exception of Paragraph 12 as it appears from the evidence that D.J. called the petitioner on one occasion shortly following the issuance of the restraining order.

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