

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearings No. 12,424,) 12,353, 12,415, 12,387,

Appeal of) 12,404, & 12,474

)

INTRODUCTION

The common legal issue in these consolidated appeals is whether the Department of Social Welfare's denial or reduction of benefits under the Low-Income Home Energy Assistance Program (LIHEAP) to the petitioners, who are all beneficiaries of federally funded housing assistance programs, is authorized by and consistent with the mandates of the federal statute which created the program. The specific issue is whether the Department is treating subsidized tenants equally with other fuel assistance applicants when it deems a standardized amount for utility allowances and shelter payments made on their behalf as unearned income in computing both their eligibility and benefit levels.

FINDINGS OF FACT

In lieu of hearings, the parties have entered separate stipulations of fact in each of the above captioned hearings. Those stipulations follow and are adopted as the findings of fact for each particular appeal by the Board. Exhibits referred to in the stipulations are only reproduced once (for economy's sake) and will be found appended to the first stipulation for D.L.

ORDER

The sections of the Departments LIHEAP regulations which include the value of subsidized housing and utility allowances as unearned income are struck as violative of the federal statute and each petitioner's case is remanded for a calculation of their eligibility and benefits without attribution of the standardized income amount until such time as the Department may revise its regulations.

REASONS

This appeal is not about extending the class of persons who are eligible to receive home energy assistance. Rather, this appeal asks for a ruling as to whether a static pot of heating assistance money has been distributed among needy individuals in the manner directed by the federal statutes.

The Low-Income Home Energy Assistance Act was originally enacted in 1981 for the purpose of

assisting "eligible households to meet the costs of home energy." 42 U.S.C. § 8621. States could apply for the money allocated by Congress and would be granted energy money if they met certain requirements. Among those requirements was a certification that the State would agree to

[M]ake payments under this subchapter only with respect to----

(A) households in which 1 or more individuals are receiving--

(i) aid to families with dependent children under the State's plan approved under part A of title IV of the Social Security Act [42 U.S.C.A. Sec. 601 et. seq.] (other than such aid in the form of foster care in accordance with section 408 of such Act) [42 U.S.C.A. Sec. 608];

(ii) supplemental security income payments under title XVI of the Social Security Act [42 U.S.C.A. Sec. 1381 et. seq.];

(iii) food stamps under the Food Stamp Act of 1977 [7 U.S.C.A. Sec. 2011 et. seq.]; or

(iv) payments under section 415, 521, 541, or 542 of Title 38, or under section 306 of the Veterans' and Survivors' Pension Improvement Act of 1978; or

(B) households with incomes which do not exceed the greater of----

(i) an amount equal to 150 percent of the poverty level of such State; or

(ii) an amount equal to 60 percent of the State median income;

42 U.S.C. § 8624(b)(2)⁽¹⁾

The statute also required states to "provide, in a manner consistent with the efficient and timely payment of benefits, that the highest level of assistance will be furnished to those households, which have the lowest incomes and the highest energy costs in relation to income, taking into account family size." 42 U.S.C. § 8624(b)(5)⁽²⁾. The statute did not (and still does not) define income.

In formulating their plans for assisting low-income persons, some states decided to eliminate persons who received federally subsidized housing payments from eligibility for fuel assistance under the theory that they were already being assisted by one fuel assistance program and that they should not be allowed to "double-dip" into another program covering the same area. The states argued that those low-income persons were the least in need of assistance with energy and that they had a right to reserve the scarce program resources for the most needy. In South Dakota, which had adopted a policy of excluding subsidized renters under its heating program, subsidized applicants sued for eligibility. The Eighth Circuit Court of Appeals agreed with the subsidized tenants that there was no statutory basis for categorically denying them consideration for assistance and that 42 U.S.C. § 8624(b)(5) cited above required the states to consider whether the subsidized tenants, in spite of their subsidies, were in fact households in the targeted assistance group--those which have the lowest incomes and the highest energy costs. Crawford v. Janklow, 557 F. Supp. 1146 (D.S.D. 1983), aff'd, 710 F.2d 1321 (8th Cir. 1983). (The findings in this opinion included the fact that those who receive subsidies are frequently in the very lowest echelons of income groups and that their subsidies do not always cover their entire

energy costs.)

Later that same court invalidated an attempt by the same state to count subsidized tenants as only partly vulnerable by subtracting their utility allowance from the maximum benefits otherwise payable and paying only the difference, if there was one, on the basis that such a scheme violated the mandate to provide the highest benefits to those with the highest energy costs in relation to income as required by 42 U.S.C. § 8624(b)(5); and a finding that the use of housing subsidies to reduce fuel eligibility ran afoul of 42 U.S.C. § 8624(f).⁽³⁾ Clifford v. Janklow, 733 F.2d.534 (8th Cir.1984). Several years later, the Second Circuit Court of appeals interpreting that same regulation at 42 U.S.C. § 8624(b)(5) and those at § 8624(b)(2) cited above found that the exclusion of tenants with heat included in their rent in the New York LIHEAP program was not a violation of the Act, and called into question the petitioner's assertion that the heating assistance act was intended to be supplemental to assistance already being received. Rodriguez v. Cuomo 953 F.2d. 33, (2nd Cir. 1992).

In direct response to these decisions⁽⁴⁾, Congress enacted Section 927 of the Housing and Community Development Act of 1992:

Clarification on Utility Allowances

(a) Eligibility--Tenants who--

(1) are responsible for making out-of-pocket payments for utility bills; and

(2) receive energy assistance through utility allowances that include energy costs under programs identified in subsection (c); shall not have their eligibility or benefits under programs designed to assist low-income people with increases in energy costs since 1978 (including but not limited to the Low-Income Home Energy Assistance Program) reduced or eliminated.

(b) Equal treatment in benefit programs--

Tenants described in subsection (a) shall be treated identically with other household eligible for such assistance, including in the determination of the home energy costs for which they are individually responsible and in the determination of their incomes.

(c) Applicability--This section applies to programs under the United States Housing Act of 1937 [section 1401 et seq. of this title], the National Housing Act [section 1701 et seq. of Title 12, Banks and Banking], section 101 of the Housing and Urban Development Act of 1965 [section 1701s of Title 12}, section 202 of the Housing Act of 1959 [section 1701q of Title 12] and title V of the Housing Act of 1949 [section 1471 et seq. of this title].

42 U.S.C. § 8624 note

Congress made it clear by this act that persons receiving federally subsidized housing allowances could still be eligible for LIHEAP benefits. It also clearly calls for the equal treatment of those applying for and receiving benefits under the act, although equal treatment is not defined. Whether or not this Act also intended under Section (a) to prohibit the states from considering the amount of any housing subsidies when determining eligibility for heating assistance and benefit amounts is less than clear. In

fact, it is patently ambiguous when read with the mandate at 42 U.S.C. § 8624 (b)(5) to identify those families with the lowest incomes and the highest energy costs in relation to income. If that phrase is to have any meaning in relation to the overall program goals it would have to be read as the highest unmet energy costs. If it were so read, then amounts already allowed or paid for utility costs by other programs would have to be deducted to find the real costs still burdening the low-income applicant.

In October of 1993, the Department of Social Welfare adopted regulations pursuant to this "clarification" of the federal policy which instituted an "equalization" scheme in which federal rent subsidies and fuel allowances are defined as unearned income in determining both eligibility and benefit levels:

Definition of Income

Household income is all income of every household member from whatever source, excluding only items specified in Section 2904.3

...

Unearned income is the gross amount available from sources which include, but are not limited to:

...

1. . . .

The unearned income from rent and utility allowances (subsidies) to residents of Federally assisted housing is determined by the use of a standard based on the number of bedrooms and classification of households as fuel purchase or heated rental households. No exceptions to the standard will be allowed. (See Procedures section on Fuel Tables.) The standard will be updated annually for inflation based on the Consumer Price Index for residential rent and for fuel and other utilities.

...

W.A.M. 2904.2

The Bulletin accompanying this change (No. 93-36F, dated September 22, 1993) indicates that the Department interpreted the federal "clarification" as requiring it to treat all subsidized tenants who are responsible for the payment of utility bills "identically with other households eligible for Fuel Assistance." In its brief, the Department argues that it promulgated the above regulation in order to treat subsidized and non-subsidized tenants equally. The brief does not offer an explanation as to why a standardized amount was adopted⁽⁵⁾ but the bulletin states that

"...the Department believes it would be inconsistent to apply a highly individualized benefit determination process to this subgroup of program participants when this approach is not used in determining the fuel needs of other applicant households. For example, benefits are based on standards based on fuel and housing types. The administrative burden is, in our view, not justified when one takes into consideration the nearly universal assessment that these newly potentially eligible households have the lowest relative need for fuel assistance of all potentially eligible households, due to their receipt of

income-adjusted rents and fuel and utility subsidies in addition to their potential receipt of fuel assistance.

Bulletin No. 93-36F, Sept.22,1993 Page 4

The regulations do not require that any other payments made on behalf of applicants or that any other "in-kind" payments be counted as income to individuals. In fact, the regulations go on to specifically exclude all other "in-kind" income, except public housing subsidies, from income:

Income Exclusions, Disregards, Deductions and Adjustments

Income shall not include the following:

...

10. Food Stamp Cash-Out payments, value of food stamps and other in-kind income (earned or unearned). This income exclusion does not apply to the rent or fuel and utilities subsidies provided to residents of Federally assisted (subsidized) housing.

...

W.A.M. 2904.3

The above regulation was used to calculate the incomes of all the petitioners in this case. When calculating the household's income, the Department added a standardized figure to the household's income based on the size of their apartment unit and whether heat was a component of their rent or paid by them separately. (See footnote 5). No actual figures on the real amount of the subsidies received by the tenants were obtained or used in calculating their benefits. For five of the six petitioners, the addition of the standardized amount resulted in a finding that they had incomes over the maximum amounts for threshold eligibility. A sixth petitioner (D.L.) passed the threshold test, even with the standardized figure added in, but had his benefits reduced based on the income attributed to him by that standard.

The petitioners argue that the above scheme violates federal law for two reasons. The first argument is that the Department's regulations violate the mandate found in paragraph (b) of Section 927 of the Housing and Community Development Act of 1992 to treat applicants who receive housing and utility subsidies equally with other applicants. The unequal treatment occurs in two ways: (1) in the Department's failure to determine the subsidized applicant's actual income as it does for all other applicants, and (2) in the Department's failure to count any "in-kind" income which may be received by non-subsidized applicants when calculating their total income. The petitioner's second argument is that the Department is forbidden by paragraph (a) of the statute cited above and 42 U.S.C. § 8624(b)(5) from using the subsidy figures to deny eligibility and reduce benefits in the LIHEAP program.

In early January 1994, after the briefs were filed in this matter, the petitioners notified the Board that an emergency amendment to Section 927 of the Housing and Community Development Act of 1992 had been passed and signed into law effective December 14, 1993. The text of that Act, as amended, reads as follows:

Sec. 927 CLARIFICATION ON UTILITY ALLOWANCES

(a) Eligibility--Tenants who--

(1) are responsible for making out-of-pocket

payments for utility bills; and

(2) receive energy assistance through utility allowances that include energy costs under programs identified in subsection (c);

shall not have their eligibility or benefits under other programs designed to assist low-income people with increases in energy costs since 1978 reduced or eliminated except as provided in subsection (d).

(b) Equal treatment in benefit programs--

Tenants described in subsection (a) shall be treated identically with other households eligible for or receiving energy assistance including in the determination of the home energy costs for which they are individually responsible and in the determination of their incomes for any program in which eligibility or benefits are based on need, except as provided in subsection (d).

(c) Applicability--This section applied to programs under the United States Housing Act of 1937 [section 1401 et seq. of this title], the National Housing Act [section 1701 et seq. of Title 12, Banks and Banking], section 101 of the Housing and Urban Development Act of 1965 [section 1791s of Title 12], section 202 of the Housing Act of 1959 [section 1701q of Title 12], and title V of the Housing Act of 1949 [section 1471 et seq. of this title].

(d) Special rule for low-income home energy assistance program--For purposes of the Low-Income Home Energy Assistance Program, tenants described in subsection (a)(2) who are responsible for paying some or all heating or cooling costs shall not have their eligibility automatically denied. A State may consider the amount of the heating or cooling component of utility allowances received by tenants described in subsection (a)(2) when setting benefit levels under the Low-Income Home Energy Assistance Program. The size of any reduction in Low-Income Home Energy Assistance Program benefits must be reasonably related to the amount of the heating or cooling component of the utility allowance received and must ensure that the highest level of assistance will be furnished to those households with the lowest incomes and the highest energy costs in relation to income, taking into account family size, in compliance with section 2605(b)(5) of the Low-Income Home Energy Assistance Act of 1981 (42 U.S.C. 8624(b)(5)).

Pub. Law 103-185, Title IX, § 927, Dec. 14, 1993

The legislative history of this amendment shows that it originated in the house and was enacted in response to complaints from States which interpreted the former law as prohibiting them from considering public housing utility allotments when calculating benefits for LIHEAP programs. The result was that some persons who did not need fuel assistance benefits were getting them. See 139, Cong. Rec. 9616 (November 15, 1993). The Section Summary indicates that it was the intent of the bill to make it clear that subsidized tenants "cannot have their eligibility or benefits under other energy

assistance programs reduced or eliminated, except as provided for in the new section 927(d)." Congressman Barney Frank, who introduced the bill, stated in the record:

In the housing bill that we passed, actually not last year but two years ago, we meant to give the States flexibility, so that people who lived in assisted housing and who were otherwise eligible for low income heating assistance could get it. The problem has been that the law was being interpreted to say that if one was in public housing, or assisted housing, they could not get any home heating assistance, even if they had to pay part of their heating bill.

Now, where the individual tenant pays none of the heating bill, it seemed unnecessary for them to get this assistance. We wrote legislation, which was intended to give flexibility, but in the drafting process I made a mistake. And we wound up with too much rigidity.

...

We now have a situation where, if we do not move quickly and change this, not only will the States be able to give home heating assistance to those who need it, it will be mandated to some people who do not need it. That is, some people who, in fact, get all of their heating bills paid for as part of their public assistance will get a windfall. That windfall will come out of a limited pot that cost other people money.

...

What this bill does is what we should have done in the first place. It gives the States the flexibility, and what it says is that a State may give partial heating assistance to people who pay part of their bills, or whatever is appropriate.

Id p. 9617

The petitioners maintain that the above amendment does not change their argument for eligibility for periods after December 14, 1993, since the statute still retains general provisions regarding equal treatment and prohibitions against using benefits as income to determine eligibility. The petitioner also points out that the new statute also allows, but does not require, States to promulgate benefit offsets for utility allowances and that Vermont has not yet done so by regulation. The Department has not responded to the petitioner's post December 14 argument in the context of this appeal or through amendment of its regulations, and, in truth, has had little time to do so.

Given this mid-heating season statutory change, the validity of the Department's regulations and the actions taken pursuant thereto must be measured against both the mandates of the statutes as they existed before and after December 14, 1993. The parties have both agreed that the pre December 14, 1993 statutes at the very least require that assisted tenants be treated equally with non-assisted tenants under the old statutes. Sec. 927(b) of the Housing and Community Development Act of 1992, 42 U.S.C. § 8624 note. The amended statute continues to impose that same requirement of equality with the exception of permitting states to offset public housing heating and cooling allowances against benefits to be paid in the LIHEAP program.

In the first analysis, then, the Department's regulations can only stand under either version of the law if

they treat non-assisted applicants and assisted applicants equally. Although the Department states that it has attempted to put these two groups on an equal footing by counting the subsidies as unearned income, the Department's attempt is seriously flawed. The petitioners are correct in their assertion that they are the only group under the Department's regulations which has any in-kind income (the subsidies) whatsoever included as income to them in determining their eligibility or benefit amounts. Non-subsidized applicants who may receive other similar benefits such as free or reduced cost housing from relatives or friends do not have the value of such housing counted as income to them. There are numerous other forms of assistance a household may receive which may decrease its monthly expenses but which are not included as income under the Department's scheme. The Department has offered no explanation for such disparate treatment.

Similarly, the petitioners are correct when they assert that they are the only group which is assigned a "standardized" figure in determining their income, whereas all other applicants have their actual income figures used. The justification offered by the Department for the use of this "standardized" method is convenience. The Department asserts that it is administratively burdensome to make an individual determination with regard to subsidies actually received by these applicants. This justification is puzzling in light of the fact that public housing authorities keep records of the subsidy amounts which are presumably no more difficult to get than income and wage verifications obtained for other applicants. In spite of the Department's assertions to the contrary, every other kind of applicant does get a highly individualized calculation of his or her income. No attributions of income are made to any non-subsidized applicants based on their membership in a class or on the characteristics of their dwelling units. Only publicly subsidized tenants are treated in this manner. As the fact stipulations show, such class treatment can result in an attribution of income to an individual far in excess of the in-kind income actually received. (See particularly the stipulations involving G.P. and D.V.)

As the Department's regulations clearly do not treat non-subsidized and subsidized applicants equally in determining their incomes, the portions of the regulations requiring that rent and utility subsidies be included as unearned income at W.A.M. 2904.2(1) and 2904.3(10) must be struck from the text as violating the federal statutes authorizing the heating programs.

Since the regulations are invalid for lack of equal treatment, it is not necessary to decide here whether the Department is permitted under the LIHEAP statute and either the old or newly amended Section 927 of the Housing and Community Development Act to use rent and fuel subsidies to calculate income. It must be noted, however, that the new amendment certainly appears, at least at first glance, to allow the use of only the heating component of these subsidies for the sole purpose of offsetting benefit amounts to be paid. However, as the provisions of the amendment have only recently come to the parties' attention and no briefs have been filed on their interpretation and impact, no formal ruling will be made on that issue.

It is now the province of the Department to determine how the new amendment will be carried out in light of its understanding of its terms and the rulings in this case. Although the Department has largely justified its past non-individualized treatment of subsidized tenants on "the nearly universal assessment" that subsidized tenants have the "lowest relative need for fuel assistance", a careful reading of the information presented by the parties in the court cases cited herein and the Congressional record, as well as the facts presented by these petitioners⁽⁶⁾ reveals that assumption to be untrue. The facts show that subsidized tenants are frequently among the very poorest of persons, have high energy costs in relation to their incomes even after subsidies are applied, and often have unmet heating costs. These subsidized applicants deserve the same reasonable and fair consideration received by non-subsidized applicants.

Such treatment is guaranteed by a relief Act which has expressly and repeatedly set forth its intention to benefit them equally as needed.

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1. 42 U.S.C. Sec. 8624(b)(2)(B)(ii) was amended in 1984 by the addition of the following phrase after the semi-colon: "except that no household may be excluded from eligibility under this subclause for payments under this subchapter for fiscal year 1986 and thereafter if the household has an income which is less than 110 percent of the poverty level for such State for such fiscal year.

2. This section of the statute was amended again in 1984 and 1986 and now reads as follows:

As part of the annual application required by subsection (1) of this section, the chief executive officer of each State shall certify that the State agrees to . . .

. . .

(5) provide, in a timely manner, that the highest level of assistance will be furnished to those households which have the lowest incomes and the highest energy costs in relation to income, taking into account family size, except that the State may not differentiate in implementing this

section between the households described in clause (2)(A) and (2)(B) of this subsection;

42 U.S.C. § 8624(b)

3. At the time in question, that section provided:

Notwithstanding any other provision of law, the amount of any home energy assistance payments or allowances provided to an eligible household under this subchapter shall not be considered income or resources of such household (or any member thereof) for any purpose under any Federal or State law, including any law relating to taxation, food stamps, public assistance, or welfare programs.

42 U.S.C. Sec. 8624(f)

The Court reasoned that counting housing subsidies as income was not expressly forbidden by the statute but that in doing so, the intent of the statute was violated as counting subsidies against heating assistance eligibility had the same net effect as counting heating subsidies against eligibility for housing payments, the latter of which is clearly prohibited by the statute. See, Clifford v. Janklow, *supra*, 733 F.2d at 538. To the best of the hearing officer's knowledge, this opinion has not been followed by any other Court, was criticized and specifically rejected in Rodriguez v. Cuomo, 953 F.2d 33 (2d.Cir. 1992) and is overruled by implication in recent Congressional

pronouncements which specifically approve offsets of utility allowances against benefits. See 1993 amendments to Sec. 927 of the Housing and Community Development Act below.

The current version of 42 U.S.C. 8624(f) as amended in 1984 and 1986 reads as follows:

(1) Notwithstanding any other provision of law unless enacted in express limitation of this paragraph, the amount of any home energy assistance payments or allowances provided directly to, or indirectly for the benefit of, an eligible household under this subchapter shall not be considered income or resources of such household (or any member thereof) for any purpose under any Federal or State law, including any law relating to taxation, food stamps, public assistance, or welfare programs.

(2) For purposes of paragraph (1) and for purposes of determining any excess shelter expense deduction under section 2014(e) of Title 7--

(A) the full amount of such payments or allowances shall be deemed to be expended by such household for heating or cooling expenses, without regard to whether such payments or allowances are provided directly to, or indirectly for the benefit of, such household; and

(B) no distinction may be made among households on the basis of whether such payments or allowances are provided directly to, or indirectly for the benefit of, any of such households.

4. See remarks of Representative Maxine Waters , 138 Cong. Rec. 11,471 (October 5, 1992) which indicate that the "Crawford" and "Clifford" case principles were being affirmed by the statute and that it was enacted, in part to settle matters called into question by the "Rodriguez" case.

5. The standard adopted for deeming income to subsidized tenants is as follows:

Unearned Income Standard - Federally Assisted (Subsidized Housing (2904.2 P. 3)

Number of Bedrooms

Household

Classification 0 1 2 3 or more

Fuel Purchase \$331 \$392 \$458 \$597

Heated Rental \$328 \$328 \$376 \$482

P-2905(G.)

6. Three of the six applicant households are disabled persons with incomes of approximately \$6,000 per year.