

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 13,148

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Appeal of)

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INTRODUCTION

The petitioner appeals the decision by the Department of Social Welfare (DSW) denying his request for a waiver of the requirement that he cooperate with the Department in attempting to collect child support from his ex-wife with whom he shares custody of his two children. The issue is whether there is "good cause" for the petitioner's refusal to cooperate within the meaning of the pertinent regulations.

FINDINGS OF FACT

1. The petitioner and his ex-wife were granted shared custody of their two small children by an order of the family court made in June of 1993. Pursuant to that order, one child resides with the petitioner and one child resides with his children's mother. The parties stipulated, and the court ordered, that "neither party shall be responsible to pay the other child support or separate maintenance."
2. In February of 1992, after the petitioner and his ex-wife had separated and during the pendency of the parentage proceeding, the petitioner became an ANFC recipient. During the first two years in which he received benefits, the petitioner was contacted twice by the Office of Child Support Enforcement (OCSE) regarding his situation. He agreed to cooperate with that office but was told on both occasions that he had been contacted in error since he already had a court order regarding child support.
3. In December of 1994, the petitioner was again contacted via a letter by OCSE with regard to his child support order. The petitioner called the OCSE office to determine if this letter was yet another error and he was told that it was not. The petitioner was informed that his order was being reviewed because it did not appear to comply with child support guidelines. The petitioner was advised both orally and in the written notice that he had to cooperate with the review unless he applied for a waiver from cooperation with the Department of Social Welfare.
4. On January 9, 1995, the petitioner applied for a waiver of cooperation citing serious emotional harm

to himself and his child as reasons therefore. In support of his application he supplied several letters, including those of colleagues, a psychologist and school and day care providers for his children. He also provided an extensive written statement of his situation.

5. On January 18, 1995, the Director of the district DSW office responsible for the petitioner's case recommended a denial of the waiver due to a lack of strong evidence. His request was denied on January 27, 1995 by a representative of the Commissioner due to his failure to provide sufficient evidence.

6. The evidence presented by the petitioner to the Commissioner and at hearing are not disputed by the Department and are found to be credible. The findings made in the following paragraphs are based on that evidence.

7. The petitioner has been working toward a teaching diploma under the Reach Up program and is currently engaged in a student teaching program. He expects to get his teaching certificate in May of 1995, and to obtain employment in the summer or fall. The petitioner's ex-wife is a nurses' aide and earns about \$16,000 per year. She rents an apartment and provides for the financial needs of their daughter who lives with her. She is barely able to manage that support on her salary.

8. The petitioner has a delicately balanced and carefully nurtured relationship with his ex-wife that has enabled them both to maintain regular contact with both children and to school them together. The petitioner fears that attempts to modify their court ordered agreement will destroy this balance by generating mistrust in his ex-wife and placing her in a financial position which might necessitate her moving to another place or seeking custody of both children. At the very least, he expects that requiring her to make child support payments for the child in his custody would generate a great deal of stress for himself, his ex-wife and their children. He feels that the review of the support issue at this point is particularly unfortunate since he is about to achieve his educational goals and believes he will be off of ANFC in the very near future. He says that he will forego ANFC benefits and survive some other way rather than upset the balance he and his ex-wife created.

9. The petitioner's belief in the necessity of maintaining the status quo for the security and well-being of his children was seconded in letters provided by a long-time friend, a colleague at school and by the director of the day care center attended by his children. Two elementary school teachers attested to his daughter's need for continuity in her schooling, particularly because she is involved and doing well in a remedial reading program.

10. In support of his request, the petitioner also consulted with a clinical psychologist who, after interviewing the petitioner for two hours (but not his children or ex-wife), concluded that "forcing the issue of child support could potentially have serious, deleterious effects on the emotional adjustment of their children as well as on [the petitioner] himself." He based this conclusion on his general experience with children and families in divorce situations. He also concluded that "eliminating [the petitioner's] benefits at this time could also be disastrous (sic) for him personally." This conclusion was based on his knowledge (as a college faculty member) of the demands placed upon students. He concluded that it would be in the children's "best welfare" to forego seeking additional financial support from the children's mother.

11. It cannot be found based on the above evidence that merely requiring the petitioner to cooperate in a review which may or may not result in a request for modification of the child support agreement will lead to serious emotional harm to either the petitioner or to the child in his custody.

ORDER

The decision of the Department denying the request for a waiver from cooperation is affirmed.

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 he/she 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. As the Board noted in Fair Hearings No. 11,046, and 11,649, 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).

In discussing the evidence necessary to support a request for a waiver W.A.M. § 2331.34(2) includes the following:

Whenever the waiver request is based in whole or in part upon the anticipation of emotional harm to the child, the mother or the caretaker relative, the present emotional state and health history of the individual subject to emotional harm must be considered as well as the extent of involvement of the child in the establishment of paternity or support enforcement activity to be undertaken. A finding of good cause for emotional harm may only be based upon a demonstration of an emotional impairment that substantially affects the individual's functioning.

The petitioner asserts that emotional harm will occur to himself and to his children if the family court is persuaded by OCSE to modify his child support order by requiring his ex-wife to make support payments. He has presented a professional opinion that such harm could occur in his situation. However, that evidence does not show that it is reasonable to anticipate that serious emotional harm will occur to the petitioner or his child if he is required to cooperate with the Department's efforts to review or seek modification of the Court order. Such cooperation requires only that the petitioner supply OCSE with information requested and possibly appear as a witness in Court. It does not require the petitioner to agree with OCSE's position nor does it prevent him from taking his own position should a modification motion be made by OCSE. There is nothing in the evidence to indicate that the initiation of a review or motion alone is likely to cause serious emotional harm to his child or to himself which would prevent the petitioner from caring for his child adequately. The issues that the petitioner raises may be valid ones but they should appropriately be raised in the Family Court if a modification is requested. The Department's decision to deny the waiver request is in accord with the above regulation and should be upheld.

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