

## STATE OF VERMONT

## HUMAN SERVICES BOARD

In re ) Fair Hearing No. 13,632

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Appeal of )

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INTRODUCTION

The petitioner appeals a decision by the Department of Social Welfare finding that she was overpaid ANFC benefits based upon benefits paid to her pending two appeals which were dismissed by the Board in 1990 for lack of progress. The petitioner seeks to vacate the Board's order in those two cases and reopen the appeals for a hearing on the merits.

FINDINGS OF FACT

1. In April of 1995, the petitioner applied for ANFC for herself and her three children. She was found eligible for \$695 per month in benefits but was notified on May 2, 1995, that she had an outstanding balance of \$480 on a previously established overpayment and that the Department proposed to deduct \$65 per month from her benefit to recover that overpayment.
2. The petitioner immediately appealed that decision and asked to be provided with a statement showing the source of the overpayment. She was told that the overpayment arose from ANFC payments made to her from February to September of 1989, which the Department had determined were not owing to her but which had continued to be paid at her request pending two appeals. When those appeals were dismissed by the Human Services Board, the overpayment was established and had to be recovered.
3. The petitioner does not dispute that she was paid the \$480 in benefits during the period at issue. She does, however, believe that she had a right to receive those benefits and that she should have a hearing on the Department's decision in 1989 denying her those benefits. In support of her contention, the petitioner presented evidence upon which the following factual findings are made.
4. The petitioner has had a long, complicated, frustrating and bitter struggle with her ex-husband over his refusal to cooperate in establishing and paying child support for their three children who are in the petitioner's custody. The petitioner has during the last ten years or so variously worked and received unemployment compensation and child support. When all other sources have dried up, the petitioner has been an ANFC recipient, usually for no more than a few months at a time. While receiving ANFC

benefits, she has been involved with employees from the Office of Child Support (OCS) and has been unhappy with their management of her case. She has particularly objected to attempts by the Department to modify her support orders downward and its failure to aggressively pursue enforcement of the orders. Her dissatisfaction had led her to become actively involved with legislative efforts to strengthen child support enforcement mechanisms and protect ANFC families who use OCS services.

5. In early 1989, the petitioner applied for ANFC benefits for herself and her children. At the time of her application she refused to sign a form assigning her rights to the collection of child support to the Department. She filed a request for a waiver from cooperation with child support enforcement and was denied because she had failed to show "good cause" for her request. On March 10, 1989, she appealed the Department's denial of her waiver. About one month later, the petitioner was notified that her needs would be removed from her ANFC grant because her waiver had been denied. She appealed that decision on April 19, 1989. Because both of those appeals involved the same facts, they were consolidated (Fair Hearings No. 9098 and 9169) and set for hearing on June 1, 1989.

6. At the time of these appeals, the petitioner was involved in a court action involving her support in which the court had appointed an attorney to represent her. That same attorney filed an appearance in the actions before the Human Services Board and was sent copies of the notice of hearing and the Commissioner reviews in the consolidated fair hearings, although the originals continued to be sent to the petitioner. It appears that at the request of the petitioner's attorney, the hearing scheduled for June 1, 1989 was indefinitely postponed. In October of 1989, the petitioner returned to work and stopped receiving ANFC benefits.

7. On January 15, 1990, the administrative assistant to the Board sent a letter to the petitioner's attorney, which was not copied to the petitioner, asking that the hearing be set or that some explanation of the status be offered within the next ten days. The letter warned that failure to respond to the letter would result in a dismissal for lack of progress.

8. On February 10, 1990, the Board issued an order dismissing both of the petitioner's appeals for lack of progress. No direct evidence was offered as to which persons were mailed copies of the order but other evidence indicates that at least the Department and the petitioner's attorney received copies of the order. The petitioner asserts, and there is no reason to find otherwise, that she was not mailed a copy of that Board order dismissing both of her appeals.

9. On March 19, 1990, the Department sent a notice to the petitioner advising her that she had received a \$480 overpayment for the period from February 1, 1989 through September 30, 1989, because she had received benefits pending appeal which she should not have gotten. The petitioner, who apparently was again receiving ANFC benefits, sent a letter to the Department on March 29, 1990, asking for the "Notice of Decision" made by the Human Services Board in Fair Hearings No. 9098 and 9169, stating that she had not received notification of the results of those appeals. She also asked that the Department not reduce her grant to recover the overpayment, indicating in her request that a proposal to take \$60 per month had been made to her.

10. The petitioner does not contend that the Department failed to send her copies of the Board's order in Fair Hearings No. 9098 and 9169 which she requested on March 29, 1990. In addition, the petitioner called her attorney to ask for an explanation of the dismissal sometime in the Spring of 1990. She was told that the failure to respond to the January 15 letter had been an oversight on the attorney's part and that her attorney had assumed that the petitioner had been notified of the dismissal of her two cases by

the Board in February of 1990. The petitioner stated that both she and her attorney had been intensely focussed on the child support proceedings in court and had been somewhat distracted from the action before the Human Services Board. Although the petitioner was not happy with the attorney's failure to respond to the January letter and the resulting dismissal, she was pleased with the non-compensated work she had done on her child support case and decided not to pursue the Board dismissal issue any further with her.

11. Between March of 1990 and July of 1991, there is a gap in time which is not explained in the record. Apparently the appeal of March 1990 was abandoned, most likely because the petitioner was no longer on ANFC and no recoupment was being made on the overpayment amount. It appears that the petitioner did reapply for ANFC in the spring of 1991 and again refused to assign her rights to the Department and asked for a waiver which was denied and appealed. The Commissioner's review letter dated July 11, 1991, indicates that the Department had again determined to exclude the petitioner's needs from the grant based on her failure to make the assignment. A copy of that review letter was also sent to an attorney (a different one from the attorney who helped the petitioner in 1990) who was assisting the petitioner at that time in her child support proceedings. This matter apparently also dragged on for some time but eventually the attorney indicated to the Board that she no longer represented the petitioner in the HSB matter. The matter was set for hearing on July 14, 1992, but the petitioner did not appear at the hearing (Fair Hearing No. 9833). She was mailed a letter on July 17, 1992, advising her that the case would be dismissed unless she showed good cause to reset the hearing in the next ten days. The petitioner did not respond to the letter because she had been off of ANFC since the end of July 1991, and was employed full time when the matter finally came on for hearing. Her case was dismissed by the Board on August 19, 1992. It does not appear that the petitioner received any further benefits pending appeal as the \$480 overpayment figure has remained constant since March of 1990.

12. The petitioner asserts that she should be allowed to reopen the appeals dismissed in February of 1990, because the Board did not personally send her either the letter warning of the impending dismissal or the Board's actual order of dismissal. Notice to her attorney, in her view, was insufficient and prejudiced her. She also asserts that she can put on evidence at an appeal which would show that the Office of Child Support does not respect her child support orders, does not attempt to collect the full amount of the order and may attempt to modify the order to require a lesser amount thereby giving her good cause for refusing to assign her rights to support.

### ORDER

The petitioner's request to vacate the Board's orders in Fair Hearings No. 9098, 9169 and 9833 is denied. The establishment of an overpayment of \$480 based on payments made to the petitioner pending decision in those appeals which were subsequently decided against her is affirmed.

### REASONS

The Board has ruled in the past that in spite of the lack of a specific rule authorizing the vacation of its orders, it has the inherent power to do so in order to carry out its functions. Fair Hearing No. 9403. In Fair Hearing No. 11,218, the Board chose to be guided by the standards for vacating orders set out in the Vermont Rules of Civil Procedure which provide as follows:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise

or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reason (1), (2), and (3) not more than one year after the judgment, order, or proceedings was entered or taken.

#### V.R.C.P. 60

This rule of civil procedure has been adapted by the Board to require applicants for the vacation of orders to make a timely request for relief based on good cause of the type set forth in VRCP 60, accompanied by some showing that the petitioner would have a likelihood of success on the merits if the matter were reopened. Fair Hearing No. 11,281.

The petitioner's request to reopen her dismissed hearings is based on a claim of surprise or mistake, namely that she was unaware that her appeals were in danger of being dismissed in January of 1990, and that she did not receive a copy of the Board's order finally dismissing them in February of 1990. Clearly, her representative was aware both of the warning and the Board's order. Arguably, notice to her attorney in this circumstance is legal notice to her. Her attorney was not mistaken about or surprised by the Board's dismissal of the case. If her attorney stands in her place in terms of notice, the attorney's failure to act or to keep the petitioner informed as to what was occurring in her appeal might give the petitioner some ground for recourse against her attorney but would not necessarily provide her with any independent right to have the matter reopened.

However, if a more liberal approach is taken to the problem and the sins of her attorney (or omissions of the Board) are not visited upon the petitioner, it becomes necessary to determine if the petitioner herself has good cause for reopening the Board's decisions. The petitioner clearly could not take any action to prevent the Board's dismissal if she did not know about the warning, nor could she make a timely appeal if she were unaware of the decision. The petitioner appears to have discovered somewhere in mid to late March of 1990, that the Board had made an adverse decision against her and took steps to obtain a copy of that decision. Had she filed a request to reopen the matter at that time or shortly thereafter, she may have had a sympathetic claim for reopening the matter on mistake or surprise grounds.

However, as the evidence clearly shows, the petitioner did nothing in the Spring of 1990 or any time during that year to have the decision vacated and the matter reset for hearing. When presented with the overpayment problem again in 1991, she appealed but abandoned her appeal in 1992. The letters written by the petitioner and her own testimony clearly indicate that she was a capable person who could have taken such action on her own behalf if she had so wished. The evidence does not indicate that the petitioner was under any sort of a disability from March of 1990 until June of 1995 when she finally made the request to reopen. Although the petitioner was "focussed" on her child support action during the times at issue, she was, or should have been aware, from notices sent to her in March of 1990, that the Board's orders would result in an overpayment decision which would be recouped from her whenever she was found eligible for an ANFC payment. The issues underlying the overpayment resurfaced every time she applied for ANFC and although the petitioner took great care to file appeals and to continue her benefits, she appears to have abandoned those appeals as soon as she was no longer in a situation of imminent recoupment from ANFC benefits because she was no longer receiving such

benefits.

If there actually was a mistake or surprise with regard to the Board's order, the petitioner knew the truth of what had happened as early as March of 1990, yet waited almost five and a half years to take any action. VRCP 60 adopts a "reasonable time" test for making a request to reopen and for allegations of mistake or surprise limits the request to one year after the judgment order. This request was obviously made more than one year after the order and would be precluded by the civil rule. Even were the Board inclined to adopt a more generous limit, however, there is nothing in the petitioner's timing which could be considered "reasonable", by any definition of that word.

Finally, even if the petitioner's request to reopen were supported by good cause and timeliness, the petitioner has alleged no ground upon which she could prevail in her claim. The Department has a regulation which requires that each applicant for ANFC be asked to assign any rights to support for children who are requesting assistance and which requires the exclusion of the applicant who refuses such assignment from receipt of her portion of the ANFC grant. W.A.M. 2331.31. That regulation specifically provides that "no waiver from assignment of support is permitted." W.A.M. 2331.31. Waivers are only allowed for non-cooperation with the pursuit of support after the assignment has been made, and only then if the applicant can show serious physical or emotional harm to the child or custodial parent as a result of cooperating in the pursuit of support. See W.A.M. §§ 2331.32, 2331.33 and 2331.34. The petitioner does not seek waiver from non-cooperation after assignment and has alleged no serious emotional or physical harm from such cooperation. She only seeks waiver from assignment of her rights. Under the Department's regulations, there is no reason which the petitioner can present which would allow a waiver of assignment. Therefore, she has no likelihood of success on the merits if this matter is reopened. For these reasons, the petitioner's request for reopening should be denied.

Under the Department's regulations, overpayments of assistance made "pending a fair hearing which is subsequently determined in favor of the Department, shall be subject to recoupment" which shall "be made each month from any gross income (without application of disregards), liquid resources and ANFC payments so long as the assistance unit retains from its combined income 90 percent of the amount payable to an assistance group of the same composition with no income." W.A.M. 2234.2. Under that regulation, assistance units with only ANFC income can have an amount equal to 10% of their grant taken each month in recoupment.

W.A.M. 2234.2. The May 2, 1995, notice of overpayment and recoupment proposing to deduct \$65 per month from the petitioner's \$659 ANFC payment is correct and in accordance with the Department's regulations.

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