

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 13,954 &

) No. 13,955

Appeal of)

)

INTRODUCTION

The petitioners in these consolidated appeals challenge

the Department of Social Welfare's decisions denying them assistance with the purchase of air-conditioners under the Low-Income Home Energy Assistance Program (LIHEAP) contingency funds for cooling assistance.

FINDINGS OF FACT

The following findings of fact are derived from documents and agreements submitted by the parties. No hearing was held in this matter.

1. On July 21, 1995, the Vermont Department of Social Welfare was notified that it had been granted a "contingency fund allocation" through an emergency provision of the LIHEAP program triggered by an unusually intense heat wave that resulted in several hundred deaths in the midwestern and eastern parts of the country. The amount of the allocation was \$246,448 and it could be used for any purpose authorized by LIHEAP without restriction (cooling and heating assistance, crisis assistance, weatherization and administrative costs) as long as ninety percent of the funds were obligated by September 30, 1995.
2. On August 3, 1995, the Department's fuel program chief issued a memorandum to the District Directors explaining the receipt of the emergency funds and setting "criteria" for assistance. A copy of that memorandum is attached hereto as Exhibit No. One and incorporated herein by reference.
3. The Department did not issue any formal notice to the general public or to the petitioners of its criteria nor were any kind of hearings held thereon. The criteria were implemented strictly through internal processes. The Community Action outreach programs were notified of the existence of the funds and some publicity was placed in the newspapers.

4. On August 17, 1995, petitioner T.C. applied for an air-conditioner and produced a letter from her physician which stated "medically necessary for her to have air conditioning--heart disease and congestive heart failure". Her letter was followed up via telephone by an employee of the Agency on Aging acting on behalf of the Department. He reported a phone call with the petitioner's physician in which the physician allegedly agreed that T.C.'s needs were not "life-threatening" and that the air conditioner would make her more comfortable. Based on that information, petitioner T.C. was denied on August 22, 1995, for failure to show an emergency need. On March 1, 1996, the petitioner's physician provided a full written opinion of the petitioner's condition which is found to accurately reflect her situation:

Mrs. T.C. is my patient. Her cardiac status is serious and she could deteriorate and become compromised in terms of congestive heart failure. Air conditioning would provide comfort and decrease symptoms but is not a life threatening issue nor can one guarantee the degree of benefit.

5. In August of 1995, petitioner F.C. found out about the program through a newspaper article. On August 31, 1995, he applied for the program and provided a letter from his doctor prescribing an air conditioner because "[T]he chronic lung condition and medical status of Mr. F.C. would benefit from a home air conditioner". On September 8, 1995, the Department issued a notice of decision denying his application because

- This program closed August 31, 1995. The severe heat which created a crisis situation has passed.

- It was determined that to be medically eligible there must have been an extreme medical need with a life threatening condition. The statement provided by your physician does not describe a level of need that meets this criteria.

Following this decision the petitioner submitted further evidence on November 22, 1995, as follows:

I am writing on behalf of Mr. F.C. in order to clearly state that he is at risk of difficulty breathing secondary to his chronic obstructive pulmonary disease as well as his cardiac disease and congestive heart failure. Given his difficulty breathing which is exacerbated during hot humid days during the summer, a cooling system in his home would be most helpful. Extremely high temperatures and humidity can greatly and adversely affect his breathing. Therefore, I do suggest that he receive a cooling unit for his home. If there is anything else I can help you with, please contact me.

The above letter is found to be an accurate reflection of the petitioner F.C.'s condition.

6. It cannot be concluded that at the time of application either T.C. or F.C.'s physician described a life-threatening condition which would have qualified either of them for an air conditioner under the criteria used by the Department. It is also difficult to conclude that the two letters subsequently supplied by the petitioners describe a life-threatening condition as required in the criteria.

7. Following the close of the program, the Department filed an amendment to the State Plan for the LIHEAP program as it was required to do under the provisions of the emergency grant. That plan stated that 6% of the funds were provided to clients with "chronic medical problems". It further stated that "[e]ligible clients met Emergency Fuel guidelines and were required to have a prescription/physician statement that their medical need warranted placement of an air conditioning unit in the home". Thirty households in all received assistance under the air-conditioning/fan program. A full copy of the

amendment is attached hereto as Exhibit No. Two and incorporated herein by reference.

ORDER

The decisions of the Department is affirmed.

REASONS

The cooling assistance funds at issue came to the Department of Social Welfare pursuant to section 2604 (g) of the Low-Income Home Energy Assistance Act of 1981, 42 U.S.C. § 8623(g) as a result of an emergency measure signed by the President in the wake of record breaking heat wave. There was no extant program of cooling assistance into which the Department could put these funds. The program was created in a few days out of whole cloth and had a duration of but a few weeks.

Both of the above petitioners were denied air-conditioners based on the criteria adopted by the Department in its memorandum of August 3, 1995. Neither petitioner submitted proof with his or her application which would have met the criteria of "extreme medical need, with life threatening health condition" used by the Department. Both proofs submitted several months after the close of the program by the petitioners express more serious health problems but neither reaches the level of "life-threatening". Even if those letters could be characterized as showing a life-threatening condition, they are of dubious relevance since they were submitted well beyond the termination date (August 31, 1995) of this temporary program. The petitioners' failure to prove their eligibility under the criteria correctly resulted in their denial of benefits. See Fair Hearings No. 13,832 and 13,861.

The petitioners claim, however, that the criteria adopted by the Department were done so illegally, that those regulations should be declared ineffective and the petitioners should be granted under the less specific language found in the amended state plan. The petitioners illegality argument rests on both the provisions of the Low Income Home Energy Assistance Program (LIHEAP) 42 U.S.C. §

8624 *et seq.* and the requirements of the state Administrative Procedures Act, 3 V.S.A. §§ 801-849.

The LIHEAP program contains provisions which require states to conduct "public hearings with respect to the proposed use and distribution of funds to be provided" under each fiscal year allotment. 42 U.S.C. § 8624 (a)(1) and (2). The regulations also require that each state plan prepared as part of the annual application and "each substantial revision thereof shall be made available for public inspection within the State involved in such a manner as will facilitate timely and meaningful review of, and comment upon, such plan or substantial revision". 42 U.S.C. § 8624 (c)(2).

The Administrative Procedures Act requires rulemaking when an agency makes a "statement of general applicability which implements, interprets, or prescribes law or policy". 3 V.S.A. § 801(b)(9). The Vermont Supreme Court has specifically held that this provision is applicable to the Department of Social Welfare when it "prescribes and implements" a policy intended to apply generally to a class of ANFC recipients". *In re Diel* 158 Vt. 549, 554. There is no reason to suppose that the same is not true with regard to a class of fuel assistance recipients. The fact that only thirty households were served under this program does not change the fact that the program was aimed at all members of the general public who were in need of air-conditioners for medical reasons. It must be concluded that the Department was subject to the requirements of the APA with regard to the use of the funds allocated in

this emergency program.⁽¹⁾

The Department argues that there was not sufficient time for it to go through the steps of filing, publishing, holding public hearings and receiving comments, filing a final proposal, responding to the legislative committee on administrative rules and filing the adopted rules that is ordinarily required under the APA. 3 V.S.A. § 836. That is undoubtedly true given the very short time span involved in this program, little more than a month from the time of the grant to its close. However, the APA specifically contemplates that problem in its rules on emergency procedures:

(a) Where an agency believes there is an imminent peril to public health, safety or welfare, it may adopt an emergency rule. The rule may be adopted without having been prefiled or filed in proposed or final proposed form, and may be adopted after whatever notice and hearing that the agency finds to be practicable under the circumstances. The agency shall make reasonable efforts to insure that emergency rules are known to persons who may be affected by them.

3 V.S.A. § 844

The Department offers no reason why it could not have followed the above emergency process in its implementation of the program. Had it used that process, it undoubtedly would have fulfilled all of the requirements of both the state APA and the LIHEAP statute with regard to public notice and input.⁽²⁾ Its failure to do so was an error which under the statute would result in the failure of the rule to take effect. 3 V.S.A. § 846.

Therein lies a problem for the petitioners with regard to relief, because the invalidation of those criteria means there are no criteria whatsoever under which to disburse the funds. It is impossible in that instance to ascertain whether the petitioners would have been eligible for the program or not. Although they argue that the language in the amended plan contains the applicable criteria, that plan was not adopted through the APA or LIHEAP procedures either. Even if it had been, the plan's criteria ("medical need warranted placement of an air conditioning unit in the home") do not express a standard necessarily different from that actually used in implementing the program and the adopted language can claim as its only virtue a certain vagueness of expression which could be interpreted to mean anything. To obtain the relief the petitioners are requesting, it would be necessary for the Human Services Board to set standards for eligibility for the cooling program, a form of relief which the Board has no authority to grant. 3 V.S.A. § 3091(d).

The petitioners may have had some avenue of relief at the time the criteria directive was issued, such as injunctive relief in a judicial forum. It is difficult to see at this point what remedy they can obtain with regard to last summer's emergency program. The petitioners should be aware that if they can actually show that they have life-threatening medical conditions, they can apply for the cost of an air-conditioner under the catastrophic situation provisions of the General Assistance program. W.A.M. 2602(d).

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1. The Department's argument that it already had cooling assistance fund regulations in place is rejected in light of two facts: that the relied on emergency fuel regulations found at W.A.M. 2950 concern "lack of heating capacity"; and the memorandum adopting the criteria contains additional substantive provisions not found in the regulations.

2. It cannot be found for purposes of this appeal that the petitioners have live claims with regard to lack of individual notice of the existence of the program as both were aware of and applied for the program in a timely fashion. The Department's determination that petitioner F.C. did not make a timely application is clearly erroneous but does not affect the outcome of this matter as it is decided on other grounds.