

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 14,951

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Appeal of)

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INTRODUCTION

The petitioner appeals a decision of the Department of Social Welfare to close her ANFC grant based on a determination that her assistance group is over-income. The issue is whether her companion's income from the Jobs Training Partnership Act should have been included as unearned income to her.

FINDINGS OF FACT

The parties have agreed to the following stipulation of facts:

1. The petitioner lives with her minor son, C.P., her boyfriend, C.M., and their minor daughter, K.M.
2. The petitioner is assigned to Group 1.
3. Prior to September, 1996, the petitioner was receiving ANFC for herself and her two minor children based on the absence deprivation factor. (Although each child has a different father, neither father was present in the home.)
4. On September 15, 1996, C.M. joined the household. Therefore, the household began receiving ANFC for a household of four based on the Unemployed Parent (UP) deprivation factor.
5. In early January, 1997, C.M. began working for a home weatherization company as a Limited Work Experience (LWE) participant.
6. As an LWE participant, C.M. received \$200.00 per week, working forty hours per week at \$5.00 per hour.
7. C.M. was paid this money directly by the Department of Employment and Training (DET) with funds allocated by the Job Training Partnership Act (JTPA).
8. No social security or other taxes were taken out of the LWE money paid to C.M.

9. The weatherization company's site supervisor had full responsibility for directing C.M.'s work, including assignments, monitoring and evaluation.

10. A case manager from DET received written evaluations from the site supervisor and met with C.M. monthly in order to help him decide how to make necessary improvements to his work habits.

11. The site supervisor has the right to terminate an LWE participant in the LWE program for unsatisfactory performance.

12. On January 24, 1997, the Department of Social Welfare (Department), sent notice to the petitioner advising her that her monthly ANFC grant of \$407.00 would be terminated due to excess unearned income.

13. The Department calculated unearned income by multiplying C.M.'s weekly LWE payment of \$200 by 4.3, for a monthly unearned income figure of \$860.00. (Needs for a household of four was \$913.00 plus shelter expenses were \$363.00, for a total need of \$1276.00. At the time of this decision the Department paid 53.2% of needs of \$678.83.)

14. On February 16, 1997, the petitioner's ANFC grant was terminated.

15. If the Department had considered C.M. "employed" based on his 40 hour per week LWE activities then he would not be working under 100 hours per month and therefore, would not be considered an "unemployed parent" (UP) under relevant DSW regulations. If C.M. did not meet UP criteria then he and his minor daughter, K.M., could be excluded from the petitioner's household. The petitioner and her son, C.P. would then be eligible for an ANFC grant on the basis of "absence."

16. This appeal is limited to ANFC eligibility for the time period from February 15, 1997 through May 14, 1997 because C.M. has discontinued his LWE activities.

ORDER

The decision of the Department is affirmed.

REASONS

The regulations governing the ANFC program define income as "any cash payment or equivalent 'in kind' which is actually available to the applicant or recipient." W.A.M. 2250. All income which is available to an assistance unit must be "evaluated to establish net income available to meet need" unless it is specifically excluded under the regulations. W.A.M. 2250. The petitioner does not argue that the income her boyfriend received through the Limited Work Experience (LWE) program from the Department of Employment and Training (DET) which was funded through the Job Training Partnership Act (JTPA) is excludible under the regulations.⁽¹⁾ She concedes that the income must be counted but argues that it should be counted as "earned" wages from employment and not as an "unearned" training stipend which was the designation given the income by the Department.

The designation of "earned" and "unearned" in terms of income is an important distinction for two reasons. The first is that "earned" income is treated favorably in terms of disregards and deductions

representing the costs of employment (i.e. taxes, insurance, retirement, union dues, fees, transportation, uniforms, tools, etc.) and dependent care expenses. W.A.M. 2253.11-2254.1. The second is that a finding that income is "earned" indicates that a member of the household is "employed" which impacts on that member's categorical ANFC eligibility as an "unemployed parent." If a parent in Group 1 is "employed" more than 100 hours per month, the assistance group is ineligible for ANFC even though their "earnings may be insufficient to meet family need" because the parent is no longer unemployed. W.A.M. 2333.1. The result is a lack of categorical eligibility of the employed parent and any of his dependents for both ANFC and Medicaid.

"Earned income" is a term of art which is defined in the regulations as follows:

Earned income shall include all wages, salary (cash or in kind), commissions or profit from activities in which the individual is engaged as an employee or a self-employed person, including but not limited to active management of a capital investments (e.g. rental property).

Earned income is defined as income prior to any deductions for taxes, FICA, insurance or any other deductions voluntary or involuntary except that in determining earned income for self-employed individuals, allowable business expenses shall be deducted first, see W.A.M. 2253.2.

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Payments to individuals under the following programs shall be treated, as described below:

D. Job Training Partnership Act - 1982 (JTPA)

Monthly income of any dependent child applying for or receiving ANFC from any program carried out under the Job Training Partnership Act (JTPA) is disregarded. This applies to earned or unearned income except that in the case of earned income this disregard may not exceed six months per calendar year. JTPA earned income is income from On-the-Job Training (OJT).

The disregard of JTPA income will also apply in determining an applicant's or recipient's eligibility based on whether the family's income exceeds 185 percent of the State's need standard.

This income cannot be disregarded for adults.

The \$10 per day allowance given to individuals in JTPA training is also always disregarded as income for ANFC purposes.

Up to \$200 per month of JTPA employment and training stipends paid to any individual in Group 2 or Group 3 and not disregarded in policy described above is disregarded when calculating need and amount of assistance under ANFC.

W.A.M. 2253

The above regulation makes it clear that JTPA funding is not always to be treated as "earned" income. The regulations specifically include as "earned income" only JTPA funding for the On-the-Job Training (OJT) program. No specific mention is made of the LWE program in that section. Neither is the LWE

program specifically mentioned in the definition of "unearned income":

Unearned income includes the following:

- A. Income from pension and benefit programs, such as Social Security, Railroad Retirement, veteran's pension or compensation, Unemployment Compensation, employer or individual private pension plans and/or annuities, etc.
- B. Income from capital investments in which the individual is not actively engaged in managerial effort.
- C. Time payments on mortgages or notes resulting from a casual sale (i.e., a sale not related to self-employment) of real or personal property.
- D. Voluntary contributions from others.
- E. Child support in excess of \$50 per month . . .
- F. \$70.00 of a Housing and Urban Development fuel or fuel and utility subsidy . . .

The full amount of available unearned income shall be applied to the payment standard, except for disregards specified under certain Federal programs, see Exempt Income.

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W.A.M. 2252

The petitioner argues that the payment received by her boyfriend fits into none of the "unearned" categories above and so it must be "earned" income. Contrary to her assertion, the first group contains the general listing "income from. . .benefit programs" which could describe the payment which DET makes to her boyfriend. The use of the words "such as" and "etc." in that section make it clear that the benefit programs which are listed were not meant to be inclusive but merely illustrative of the kinds of benefits which are considered unearned. Moreover, the reference to JTPA programs found in the "earned income" section above clearly contemplates that some programs are to be treated as "unearned income." The classification of this income, then, comes down to whether the payment made by DET to the petitioner's boyfriend is a training stipend or "benefit" (unearned income) as the Department argues, or "wages from activities in which the individual is engaged as an employee" (earned income), as the petitioner asserts.

The program in which the petitioner's boyfriend is engaged is described in the regulations as follows:

Work Experience

Work experience is available to all participants. The purpose of work experience is to improve the employability of participants with little or no recent employment experience through their acquisition of specific work-related behaviors, attitudes, or skills, such as good work habits, appropriate workplace behavior, or a competitive level of productivity. Work experience is conducted at public or private

nonprofit worksites under local supervision.

Work experience is limited to projects which serve a useful public purpose.

The maximum number of hours that a participant may be required to participate in work experience each month is the number of hours which result from dividing the monthly ANFC grant amount by the greater of the federal or applicable state minimum wage.

Nothing contained in this section shall be construed as authorizing the payment of ANFC as compensation for work performed, nor shall a participant be entitled to a salary or to any work or training expense provided under any other provision of law by reason of his or her participation in work experience.

W.A.M. 2346.6⁽²⁾

Although the petitioner is not entitled to any payment for this experience under the regulations, he was paid \$5.00 per hour for a forty hour work week, not by the weatherization agency, but by the Department of Employment and Training through JTPA funding. The weatherization agency directed his work, monitored him and provided written evaluations which were discussed with him monthly by his case manager at DET. He could be discharged by the weatherization agency for unsatisfactory performance. The petitioner was not required to pay any taxes on the money received, and according to an IRS memo dated November 23, 1992, relied on by the Department (attached hereto as Exhibit No. One.), DET was not required to report money paid to LWE participants as wages paid to an employee.

It is useful to compare this program with the "On-the Job Training" program also administered by DET and funded through JTPA, payments from which are classified as "earned income" under W.A.M. 2253, supra:

On-the-job training (OJT) opportunities are available to all participants for whom it is deemed appropriate. OJT is paid employment for which the employer receives a training subsidy, funded by either the Department of Employment and Training under Job Training Partnership Act (JTPA) or by the Department of Social Welfare under Title IV-A grant diversion for work supplementation for up to 50 percent of the wages paid. Because OJT is employment, a principal wage earner would be subject to the 100-hours criterion for ANFC eligibility when placed in an OJT activity.

Principal earners in Group 2 of Group 3 are exempt from the 100-hours criterion for ANFC eligibility.

The participant is hired by a private or public employer and while engaged in productive work, receives training that provides knowledge or skills essential to the full and adequate performance of that job. The participant must be placed in a job for which he or she would not have otherwise been hired because of a lack of work experience or occupational skills. The employer must agree to retain the participant full time after a specified training period.

The length of OJT training shall be governed by the skills necessary for the participant to qualify for the

position but shall not exceed twelve consecutive months.

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W.A.M. 2346.7⁽³⁾

The OJT program, unlike the LWE program, specifically labels the participants as paid employees of the organizations they work for who are expected to perform significant productive work and to learn skills specific to that job. The LWE program, in contrast, is labeled as training assignment to gain experience with basic work requirements. That program describes no employer-employee relationship and gives no right to compensation in the form of salary or expenses.

The facts above lead to the conclusion that the money received by the petitioner's boyfriend in this case was not wages paid in employment. The money he received was not paid to him by the weatherization program.⁽⁴⁾ The payment he got was paid to him by the state job training agency (DET) from federal funds as an incentive to participate in this job training program, and not because he performed any particular service for the weatherization agency.

The petitioner has made much of the fact that the weatherization agency directed, monitored and evaluated the petitioner for the purpose of assisting him in the development of work-related skills which she believes qualifies the weatherization agency as an employer of the petitioner under the IRS Rules at 26 C.F.R. § 31,3121(d)(1). The rule cited by the petitioner uses definitions to distinguish between persons who are employees of an employer as distinct from independent contractors or self-employed persons. What the petitioner totally avoids in her argument is an analysis of whether the petitioner actually provides a service for the weatherization agency for which it or someone acting on its behalf compensates him.

The description of employment wages found in the opinion letter (Exhibit No. One) issued by the IRS to DET says that "in order for payments to be subject to federal employment taxes, they must be made by an employer to an employee for services rendered or to be rendered." The payments made under this program were deemed not subject to taxes precisely because they are not made by the assigned "employer" to the participant for services rendered by him. Rather DET pays him money, which payment the IRS has characterized in that same opinion as "payments made to or on behalf of a trainee who performs no services." The IRS does not consider DET liable to pay taxes as an employer because, citing Revenue Ruling 75-246, it considers DET payments under LWE to be "in the nature of relief payments made for the promotion of the general welfare and are excludible from the gross income of the recipient." See Exhibit No. One

Under this ruling, the petitioner's boyfriend was not required to pay any taxes on the JTPA money he received since it was not considered wages from employment. It cannot be found on any of the above facts that the petitioner ever had an employer-employee relationship with the weatherization program in which he earned wages for his work. As such it cannot be concluded that the money received by the petitioner was "earned" income but rather must be classified as "unearned" benefits, that is, a training stipend furnished to him in the nature of relief.

The petitioner argues, finally, that such a classification is contrary to the stated purpose of the Welfare Restructuring Project which is to "assist families to obtain the opportunities and skills necessary for self-sufficiency" and "to encourage economic independence by removing barriers and disincentives to work and providing positive incentives to work." W.A.M. 2200B. She claims that it is necessary to count such income as earnings in order to get people off welfare. The result of her argument, though, is to subject persons who are just beginning the process of learning the most basic work skills to a lack of categorical eligibility for the ANFC program as an unemployed parent if they are involved with work experience for more than one hundred hours per month, regardless of how much or little they may be paid for that work. See W.A.M. 2333.1. Along with that categorical ineligibility, of course, comes a categorical ineligibility for Medicaid.⁽⁵⁾ While that may work to her particular family's advantage (since the petitioner wants her boyfriend to be found ineligible for ANFC so she and her younger child can be eligible as a separate unit), the vast majority of persons in Group 1 who are involved in basic job skill training would probably prefer to remain at least categorically eligible for these programs while they are learning job skills even if they become financially ineligible due to the stipends. The characterization of this income as "unearned" by the Department is consistent with its goals and is not unfair to the petitioner's boyfriend who has fewer work-related expenses than those who earn income and must pay taxes on it. Indeed, to characterize someone who is in a training program designed to teach the most rudimentary job skills as an "employed" person who cannot meet categorical eligibility for ANFC is an absurd result which is arguably patently inconsistent with the goals of the program. The Department's characterization of DET's payments as a training stipend countable as unearned income is supported by the facts and law and is upheld.

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1. Some JTPA income is actually excluded in certain circumstances:

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16. Monthly income of any dependent child applying for or receiving ANFC from any program carried out under the Job Training Partnership Act (JTPA) is disregarded. This applies to earned or unearned income except that in the case of earned income this disregard may not exceed six months per calendar year.

The disregard of JTPA income will also apply in determining an applicant's or recipient's eligibility based on whether the family's income exceeds 185% of the State's need standard.

This income cannot be disregarded for adults.

The \$10 per day allowance given to individuals in JTPA training is also always disregarded as income for ANFC purposes, and in this case the disregard applies to both dependent children and adults.

Up to \$200 per month of JTPA employment and training stipends paid to any individual in Group 2 or Group 3 and not described above is disregarded when calculating need and amount of assistance under ANFC.

W.A.M. 2255.1

As the petitioner's boyfriend is an adult and is an individual in Group 1, the assessment that the income funded through JTPA cannot be excluded is correct.

2. The federal regulation which provides funding for "work experience" describes that program similarly:

Work experience.

(a) Definition--Work Experience means a short-term or part-time training assignment with a public or private nonprofit organization for a participant who needs assistance in becoming accustomed to basic work requirements. It is prohibited in the private for-profit sector.

(b) Suitability. Work experience should be designed to promote the development of good work habits and basic work skills.

(c) Duration of work experience. Participation in work experience shall be for a reasonable length of time, based on the needs of the participant. The duration of work experience shall be recorded in the participant's ISS.

(d) Combination with other services. Work experience under titles II-A and C shall be accompanied either concurrently or sequentially to other services designed to increase the basic education and/or occupational skills of the participant, as recorded in the ISS.

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20 C.F.R. § 627.245

3. The federal regulations governing the "On-the-job training" program describe it as

... training by an employer in the private or public sector given to a participant who, after objective assessment, and in accordance with the ISS, has been referred to and hired by the employer following the development of an agreement with the employer to provide occupational training in exchange for reimbursement of the employer's extraordinary costs. On-the-job training occurs while the participant is engaged in productive work which provides knowledge and skills essential to the full and adequate performance of the job.

20 C.F.R. § 627.240

This regulation goes on to list in pages-long detail, the duration, payment requirements, labor standards and employer and participant eligibility for this program. See generally 20 C.F.R. § 627.240.

4. The petitioner argues by analogy that persons who work for temporary agencies are not paid by the persons they actually work for, yet the payments they receive are considered wages. This argument misses the distinction that the persons for whom the services are actually performed pay the temporary agencies who in turn pay their employees. The weatherization agency here has contributed nothing to be paid to the petitioner by DET.

5. The petitioner points out that "wages" from participation in the Limited Work Experience Program under the JTPA are included under the definition of "earned income" in the Medicaid program. M241 (3). However, categorizations mandated under the Medicaid program are not binding on the ANFC program which has different policy considerations. It should also be pointed out that the characterization of these payments as "wages" is directly contrary to the IRS opinion which was issued some months after this regulation was enacted (July, 1992) and which specifically characterizes these payments as non-taxable relief stipends. The Board is persuaded that the IRS characterization is a more accurate reflection of the nature of these payments.