STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 14,952

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Appeal of)

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INTRODUCTION

The petitioner appeals a decision by the Department of Social Welfare denying her application for replacement of her oil boiler through the crisis assistance program operated by the office of home heating fuel assistance.

FINDINGS OF FACT

1. The petitioner owns a two-story single family home with her husband who no longer lives with her. They are in the process of getting a divorce and he is required to pay the mortgage and taxes on the home until a decision is made by the Court over ownership of the property. The petitioner continues to live in the house although it is expensive to heat due to poor insulation and inefficient heating systems. The home has an oil operated forced hot water heating system and a back-up wood burning system which is vented to the first floor but does not heat the second floor.

2. The petitioner is self-employed as a baker in a shop located in her garage and clears about $180 per month from that enterprise. She has severe arthritis in one of her hands and back and has been assisted by Vocational Rehabilitation since February of 1997 in developing her business and paying for physical therapy to help her use her hand and equipment to accommodate for her disability. In addition to her earnings, she gets $300 per month in alimony from her estranged husband.

3. Last summer, the petitioner was notified by her fuel dealer that she had a leak in her oil furnace boiler and that the boiler, which is over 40 years old, needed to be replaced before winter. She received an estimate of $4,000 for that job which money she did not have and was reluctant to spend because she was not certain she would end up owning the house. She asked if anything else could be done. She was told that a sealer could be put on the boiler for $100.00 but the fuel dealer could not guarantee that it would last through the winter. She had the sealer put on and also had the chimney of her back-up wood heating system checked to be sure that she could use that if need be.

4. Although it appears that she might have been eligible for the fuel assistance program, the petitioner did not apply for that or any other social welfare programs because she is trying to be self-supporting through her bakery. In November of 1996, she ran out of oil because her oil company would not deliver

due to a $400 overdue payment. The company put her in touch with the Community Action Program to get crisis fuel assistance. She was granted and requested that they give her wood for the wood furnace because she did not know how long the oil boiler would last. She also applied for and was told that she was eligible for the home weatherization program operated by the CAP and that an energy audit would be done and she would be placed on a waiting list for services. During that process she was also told about the furnace replacement program and was encouraged to apply for it. On January 8, 1997, the petitioner asked for and received one hundred gallons of heating oil and applied for replacement of the furnace. 5. Pursuant to the petitioner's application, an energy auditor from the home weatherization agency, the agency which carries out the furnace replacement program with funds provided by DSW and OEO, went to inspect the petitioner's systems and reported to the CAP, the administrator of the program, that the petitioner had an adequate back-up heating system in the form of a wood heat furnace and that she should be denied. No written notice was sent of this denial although the Department claims the petitioner was notified orally on January 10 or 13, 1997.

6. At some point, the petitioner discovered that her request was denied and she asked for a new energy audit on her furnace which was performed on March 12, 1997. The audit was done of the wood stove and it was found to be safe and to have four ducts running to the first floor. No assessment was made as to the adequacy of that furnace since the BTU output was unknown. It was also noted on the inspection report that the petitioner had reported that she was disabled and that using the wood furnace was difficult for her. The report further noted that the oil furnace was operating at the time of the inspection and was being used for heat as it had been during the prior inspection in January. However, the oil unit was not inspected. Based on that report, the CAP informed the petitioner by letter dated March 19, 1997, that her application for a furnace replacement had been denied based on "an adequate heating source within your household." The only fact cited in that denial was the established safety of the wood burning unit.

7. Following that denial, the petitioner invoked an internal appeal process and met with the weatherization director, the energy auditor and the fuel coordinator. After that hearing, the petitioner was mailed a letter dated March 26, 1997, stating that the denial would stand because "there is an adequate and safe heating source within your household."

8. The petitioner appealed that decision saying that she has no adequate heat source because her oil burner repair is only temporary and can break at any time and because the wood furnace is inadequate because it cannot heat her upstairs and because her disability prevents her from using it easily, two factors which she says the Department failed to consider in its decision. She provided verification thereafter that she has been a Vocational Rehabilitation client due to severe arthritis of the right hand which she did not provide to the Department before because no one asked her for it.

9. The fuel director reviewed the appeal and upheld the case on the basis that although the petitioner had been determined income eligible there was no emergency because of the existence of two heating systems which were operating either independently or together and were not a danger to the petitioner. Furthermore, he found that no crisis existed based on the fact that the petitioner knew more than six months before her request that the boiler would have to be replaced and did nothing to avert the crisis. The petitioner only learned of that ground at the hearing. Finally, the director said that no evidence was presented at the time of the hearing verifying the petitioner's disability but if such information had been presented he might have considered whether there was an emergency situation which made it necessary to switch fuel systems. However, that request was not made.

10. The director presented evidence that he had sent a written memorandum to the CAP agencies advising them as follows:

Furnace Replacements (and Temporary Repairs Leading to Replacement) - are an eligible service under a separate agreement between OEO and DSW that OEO pays to the participating Weatherization office. The CAP Crisis Staff is responsible for initiating a request for assistance to the local Weatherization office by a) finding the applicant income eligible, and b) confirming the crisis need. . . .

Fuel System Switching - the practice of switching fuel systems should be avoided as part of a solution to a heating crisis. Should an applicant household desire to switch heating systems, they should work directly with Weatherization staff, outside of the crisis request, to explore the feasibility of a fuel switch. . . .

Heating systems must represent a clear danger to occupants in terms of no heat or dangerous conditions such as a cracked heat exchanger.

ORDER

The decision of the Department is reversed and remanded for consideration of the factors outlined in this decision.

REASONS

The crisis assistance program has as its purpose the alleviation of an "emergency due to lack of heating capacity" in a household. W.A.M. 2950. The program is not one of strict "entitlement", i.e. persons who are income and resource eligible and meet certain requirements have a right to assistance, but rather one which requires "judgment" by the director based on the "framework" found in the regulations. W.A.M. 2951. The regulations provide that

In making this judgment staff will consider the individual situation; income, resources, prior applications, and what led to the crisis. Staff shall determine eligibility for crisis assistance based on whether there is an extenuating or unpredictable circumstance. An extenuating or unpredictable circumstance is defined as: death in the family which results in additional expenses to the applicant household; illness of a family member which results in the household incurring additional expenses; an unanticipated work-related expense necessary to preserve employment; extraordinary housing expenses which are required to remove life-threatening hazards or to keep the home habitable; or other unanticipated circumstances or occurrences which could not have been foreseen or prevented by the applicant household.

To make such a determination the department will complete a careful assessment of past income; uses made of income and resources; relative necessity of such uses including consideration of age, health, and other factors having impact on necessity; and adequacy of planning (past and future) to avoid such emergency.

Among the purposes for which the department examines the circumstances that precipitated the fuel emergency and assess how past income was used are to determine the likelihood that a similar fuel emergency will recur in the future and the degree to which the fuel emergency was preventable. It is to the benefit of both the applicant and the department to attempt to prevent the recurrence of fuel

emergencies.

Staff will also consider what potential income and resources are available and the extent to which the household can commit all or a portion of such potential toward meeting or partially meeting their current heating crisis. This potential shall include all members of the household and not simply those bearing direct responsibility for the purchase of fuel.

Households will be expected to decline or delay payment for non-essentials in favor of assuring themselves an adequate fuel supply and to make reasonable efforts to conserve fuel to avoid an emergency. This includes exploring options for heating system replacements, including home equity loans or other forms of assistance. The decision to recommend a heating system replacement through referral to a local Weatherization operator shall be based on assessment of malfunctions in the heating system that represent a danger to the health and safety of the household. Such decisions shall be made by the director of his/her designee.

Within this framework, staff will determine eligibility on the basis of conserving program funds and utilizing client resources to the maximum extent reasonably possible. Staff will make every effort to assist those who are denied eligibility to find alternative solutions to their problem.

W.A.M. 2951

Although these regulations vest a good deal of discretion in the Department to make a determination as to whether a replacement is warranted in any given situation, that discretion is not unfettered. Discretion exercised by a governmental agency is always subject to review for arbitrariness, that is, whether the decision was based on sound principles of review, such as consideration of all the pertinent facts.

It cannot be said that the decision in this matter was based on all of the pertinent facts. Three glaring omissions occur in the assessment of this matter: (1) There was no assessment made as to whether or not the main system used by the petitioner was presenting what the Director called a "clear danger" to the petitioner in terms of providing no heat or a dangerous condition. The fact that it was being used when the auditor visited was not probative of whether it was about to break down or had begun to leak; (2) There was no finding as to whether the back up heating system was capable of providing adequate heat to the house or whether the petitioner was capable of operating it on an ongoing basis given her handicap. The Department was certainly on notice from the auditor's letter of March 12, 1996 that the petitioner was claiming a handicap and should have gotten verification of the facts and assessed them as part of that decision; (3) The Department did not develop facts as to whether the petitioner could have avoided her crisis. The mere fact that she was apprised of the situation in June of 1996 is not enough of a basis to conclude that she could have avoided the problem, especially in light of testimony that she did take temporary steps to alleviate the problem and was without any funds to buy a new furnace herself. More needed to be developed on this final issue before such a conclusion could have been reached.

The most likely reason that this final area was not developed is that the issue was not even raised until the hearing. The petitioner had no opportunity to respond to that reason or develop facts regarding that issue before the internal hearing which could have been considered by the Department. In fundamental fairness to her, she should be allowed to present the facts to the Department on that issue before a decision is made, as well as the former two issues. It is not the function of the Board to act as the decision maker in these cases and is in no position to develop information on the condition of the heating systems. It is therefore appropriate to return this matter to the Director for a reassessment which

insures that all relevant factors have been considered before a discretionary judgment is reached. Once all the factors have been considered, the Board will only overturn the Director's decision if it is clearly unreasonable. The Director should review all the facts and make a new decision which, if negative, can be reviewed again by the Board if the petitioner so desires.

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