STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 15,059

)

Appeal of)

)

INTRODUCTION

The petitioner appeals a determination by the Department of Social Welfare that she has a balance owed on an ANFC overpayment which occurred in 1989 and 1990. The issues are whether the Department is precluded by an order in the criminal court from collecting the balance and whether the Department can collect on that overpayment seven years after it occurred.

FINDINGS OF FACT

1. The petitioner received both ANFC and Food Stamp benefits to which she was not entitled from October 1, 1989 through September 30, 1990, because she failed to report her employment during that period. The petitioner agrees that the total overpayments were $1,399 in the Food Stamp program and $5,162 in the ANFC program. She currently continues to receive Food Stamps and ANFC benefits. She has no other source of income.

2. The overpayment was discovered in late 1990, and after investigation by the fraud unit it was referred to the State's attorney for prosecution on June 12, 1991. On April 12, 1993, the petitioner was convicted of "welfare fraud" by the Vermont District Court and the petitioner received a suspended sentence. The order also contained a provision that:

Restitution shall be made as follows, to be paid as directed to your probation officer: $4,766.00 in restitution through P&P [probation and parole].

Nothing further regarding repayment was contained in the order.

3. The petitioner does not know why the amount of restitution was not the full amount of the overpayment but thinks her public defender may have bargained the amount down as part of the plea agreement.

4. During the pendency of the fraud investigation and criminal prosecution, the Department took no action to establish an overpayment amount. Subsequent to the fraud conviction, the fraud division determined that the petitioner should be disqualified from Food Stamps for six months and that

payments made to probation and parole would be allocated to repay the overpayments in the amount of $3,765.14 for ANFC and $1,000.86 for Food Stamps. An inter-office memorandum dated June 4, 1993, also indicated that the balance still owed after restitution was paid would be recouped from future ANFC and Food Stamp payments.

5. There was some confusion in the District Office as to whether a recovery of overpaid benefits should be initiated when a client was already paying restitution through probation and parole. A memo dated June 22, 1993, was sent by the fraud unit to the district office advising them as follows:

As a general rule we do not initiate recovery if a client is paying restitution via probation. In some of these cases the district does discuss the situation with the probation officer and agreement is made where by DSW does the recovery while the case is active.

In this case 50 percent of 4,766 (sic) or $2,383 must be paid back within the first year and the other half in the second. This is probably more than we would recoup administratively anyway so it may be best to let probation do the collection.

In summary we should not do recoupment if probation is collecting unless agreement is made otherwise. When probation is finished we can pick up the balance of ANFC and FS losses.

6. On June 15, 1993, the petitioner was mailed a notice that the Department had determined that she had been overpaid $5,162.00 in ANFC benefits due to unreported income from October 1, 1989 to September 30, 1990. A printed portion of the notice stated that "federal law now requires the overpayment be repaid to the Department. You may repay this amount to the district office indicated above by mail or in person." Above that sentence a handwritten note appeared which stated "Repayment through Probation."

7. On that same day, June 15, 1993, a second notice was sent to the petitioner with regard to her Food Stamps stating as follows:

You were convicted of Welfare Fraud in Vermont District Court for the months of 10/1/89 through 9/30/90 and were ordered to repay $1000.86. Federal regulations require [petitioner's name] only be disqualified for six months. This disqualification will start on July 1, 1993 and end on December 31, 1993. . . .

A handwritten note on the side of that notice added

"total loss $1399 F.S."

8. A third notice went to the petitioner on June 15, 1993 which advised her in pertinent part as follows:

It has been determined that you or your household received $1399 more food stamps than you were eligible to receive for the period from 10/89 to 9/30/90 because:

The Department did not receive correct, complete or timely information from you. Because of federal regulations, the Department requires that you repay this overpayment.

The notice contained several methods of repayment but notified the petitioner that if she did not make an arrangement in 30 days that her Food Stamps would receive another notice that her Food Stamps would be automatically reduced every month by a certain amount. No explanation was offered at the hearing as to why the Food Stamp recoupment was initiated contrary to the inter-office memorandum of June 22, 1993.

9. The petitioner made no arrangement and did not appeal these notices, so recoupment of her Food Stamps began on September 1, 1993. No recoupment was initiated from her ANFC payments which went on without interruption. In the meantime, probation and parole had assisted the petitioner in obtaining a job to earn money for repayment of the court ordered restitution. Over the next two years, the petitioner paid restitution which was completed by November 14, 1995, although she continued to work for nine more months. During this time she heard nothing further from the Department about recovery of the ANFC payments. The petitioner believed, based on her reading of the notices, that her Food Stamps were being paid through recoupment but that her entire ANFC debt was being covered through probation.

10. In November of 1995, the Department of Probation and Parole contacted the Department to report that it felt the restitution was complete and to ask for a review of the Department's records to confirm that. At that time it was discovered that instead of allocating the restitution payments to Food Stamps in the amount of $1000.86 and ANFC $3,765.14 as had been originally directed by the fraud unit, all of the payments had been applied to ANFC. A request was made of the bookkeeping unit to reallocate the payments which reallocation was not accomplished for several months. Since the petitioner had already repaid $622 of the $1399 Food Stamp overpayment through recoupment, only $777 of the restitution paid was allocated to the Food Stamp repayment. The balance of the restitution paid, $3,989, was used to reduce the $5,162 ANFC overpayment for a balance of $1173.

11. During the summer of 1996, the petitioner and her worker had discussions in which the petitioner was told that the Department felt there was a balance due and payable on the overpayment. On August 20, 1996, the Department sent the petitioner a notice closing her ANFC for another reason and included as part of the notice the following sentence:

You have a balance of $1173 on your ANFC overpayment

that you still owe the Department. You are required to repay this amount and may do so by continuing to make monthly payments . . . if you reapply for ANFC, payments on the balance still owed will be deducted from your ANFC grant.

12. Although the petitioner was able to re-establish her eligibility in response to that notice and her ANFC was not in fact closed, no action was taken to deduct payments from her ANFC grant at that time. The petitioner heard nothing further from the Department until June 4, 1997, when the Department sent the petitioner a notice which stated in pertinent part:

You were previously overpaid ANFC by the Department. You have an outstanding balance due of $1173. Based on your ANFC benefit, $49.00 will be deducted from your ANFC each month [the total grant is $499] until you no longer owe the Department money.

13. The petitioner has appealed this notice because she believes that the action is being taken in an untimely manner and that the Department should have tried to collect it from her when she was working,

which she did up until one year ago (August of 1996). She did not work or go to school during the last year but starting this Fall, she is enrolled full-time in a nursing program and has no ability to work part-time and cannot afford to lose ten per cent of her already small grant. The Department offered by way of explanation as to why the recoupment was not initiated in August of 1996, as she was notified, that this was an unusual case for the office in that there was a simultaneous collection action going on through probation and parole which caused a good deal of confusion and letters back and forth as to whether recoupment could be initiated.

ORDER

The decision of the Department is affirmed.

REASONS

The petitioner's first argument is that the Department is barred from attempting to establish a claim for recovery against her by the criminal court's terms of restitution which set a lesser amount than the actual claim against her. The Board has heard similar arguments in Fair Hearing Nos. 4,513, 10,442, 11,263 and 12,682 and rejected them. While three of those cases had somewhat different facts from those found here,[(1)] the fourth also involved a fraud conviction in which a Court order for restitution was made in a lesser amount than the entire overpayment (11,263). There is no reason not to apply the principles announced in all those decisions to the case here.

The Board noted in those decisions that two distinct remedies exist in the statute for recovering stolen benefits: the first provides for fines up to twice the amount of the wrongfully paid benefits via a court order in a criminal action (33 V.S.A. § 143(a)(3); the second allows the Commissioner to recoup amounts of ongoing assistance from convicted persons as allowed by law (33 V.S.A. § 143(b). It was the Board's opinion that barring the second remedy would probably require some specific statement from a judge disallowing that remedy and some agreement by the State's Attorney that it was representing the interests of the Commissioner of Social Welfare so that she could be a party bound by the order. See Fair Hearing 4,513, pages 5 and 6. The Board has consistently concluded in these cases that a Court's order on "restitution" in the criminal context does not alter the Commissioner's right under 33 V.S.A. § 143(b) to recoup from ongoing ANFC or Food Stamp benefits wrongfully obtained by the convicted person. See Fair Hearing No. 11,263, p. 3. It cannot be concluded that the Commissioner's statutory right to deduct overpaid amounts from future benefits was an issue that was at all before the criminal court so that collateral estoppel would apply. See Trepanier v. Getting Organized, Inc., 155 Vt. 259 (1990).

The petitioner's second argument is that the Department has taken too long to recover the overpayment from her. The pertinent part of the ANFC regulations provide that:

Overpayments of assistance, whether resulting from administrative error, client error or payments made pending a fair hearing which is subsequently determined in favor of the Department, shall be subject to recoupment. Recovery of an overpayment can be made through repayment by the recipient of the overpayment, or by reducing the amount of payment being received by the ANFC group of which he is a member.

Except for a case involving fraud, no recoupment need be carried out for individuals no longer eligible

for ANFC if the amount of the overpayment is less than $35.00 . . .

No recoupment shall be attempted if the overpayment took place more than 12 months prior to the date of discovery unless the overpayment was caused by the recipient's willful withholding of information which affected the amount of payment. In such cases, recoupment of overpayments which took place within a three-year period prior to the date of discovery can be attempted.

Recoupment 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 unit of the same composition with no income. For assistance units with no other income, the amount of the recoupment will equal 10 percent of the grant amount.

. . .

W.A.M. § 2234.2

(emphasis supplied)

Under the above regulation, an overpaid amount must be recovered through recoupment of benefits. The regulations also require that recoupment equal ten percent of the monthly grant amount for assistance units, such as the petitioner's, for whom ANFC is the sole source of income.[(2)] The only limitation on a time period for collection in a case which involves willfully withholding information, as this one did, is three years back from the date of discovery of the fraud. The petitioner's fraudulent receipt of benefits began on October 1, 1989. Although the exact date of discovery of this overpayment is not known, by June of 1991, the Department had referred this case for criminal prosecution. Clearly, then, the Department had "discovered" the overpayment well within the three year period. Under the regulations, there is no further time limit or bar to future recovery of the overpayment.

Although the regulations place no limitations on the Department's period of recovery, the petitioner has raised the issue of the fairness of the Department's delay in this matter. She claims she was prejudiced because if she had known that the Department was going to collect this amount, she would had paid it while she was working (from 1993 to 1996) or would have kept working after August of 1996 to pay it off. She asserts that it is too much of a hardship now for her to pay it when she is going to school and has no job.

There can be no doubt that the loss of ten percent ($49) each month from her already relatively small ANFC grant of $499 is not easy for the petitioner. However, it cannot be found on these facts that the petitioner did not have ample notice of the Department's claim against her and ample opportunity to repay it at an earlier time. The petitioner was undoubtedly aware of the amounts which the Department claimed against her well before the first official notices were sent in June of 1993 because those claims formed the basis of her fraud prosecution which had been initiated almost two years before. The June, 1993, notices, sent after the fraud conviction, made it clear that the Department was establishing and expected to be paid on the full amounts of the ANFC and Food Stamp overpayments, not just the amounts established for court restitution. The petitioner did not challenge or appeal those determinations. After the final accounting was done on the amounts paid through Probation and Parole, the petitioner was specifically notified in writing in August of 1996 of the balance owed on her ANFC

overpayment and that the Department expected repayment. She did not challenge or appeal that determination either.

To be sure, there was some confusion on everyone's part between 1993 and 1995 while payments were being made to probation on parole as to the correct allocation between the ANFC and Food Stamp programs and whether simultaneous administrative recoupment could or should take place. Nevertheless, it was always clear, or should have been clear to the petitioner, that the Department was claiming more than the amount of the court ordered restitution and that at some point there was going to be a balance owed which needed to be paid in some way. The petitioner was clearly informed in writing at least by August 20, 1996, as to the exact amount of the balance owed and the Department's expectation of repayment. The petitioner could have made arrangements to pay the overpayment at that point when she was still working (although she was about to leave her employment) and would not enter school for another year. She took no action at that time and has thereby contributed significantly to her own current predicament. It cannot be concluded that the Department was unfair to the petitioner, that it acted outside of its regulations or that it does not have the current right to recoup the overpaid amounts from the petitioner's ongoing ANFC benefits. Therefore, the decision of the Department to initiate recoupment at this time must be upheld. 3 V.S.A. § 3091(d).

# # #

1. Two concerned a stipulated Court order under a nolo plea in which restitution was not sought and no Court order was made (Fair Hearing No. 4513 and 10,442)), and one concerned a court which specifically refused the State's request to order restitution Fair Hearing No. 12,682).

2. If the overpayment had occurred due to Departmental error, the recoupment amount would have been 5 percent. W.A.M. Sec. 2234.2.