STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing No. 19,845
	)	
Appeal of	)	

INTRODUCTION

The petitioner appeals a decision of the Office of Child Support Enforcement (OCS) to retain child support payments made on her behalf to offset payments made to her in error by OCS during the last year.

FINDINGS OF FACT[1]

1. On July 18, 2001 a Vermont Court established a child support order in favor of the petitioner and her two children in the amount of $243.34 per month. The order established that the obligor (the children's father) was not in arrears on any prior support order.

2. Since that time, OCS received, recorded and disbursed payments made by the obligor under this court order. The records show that during this time the obligor

[1] These facts were assembled from allegations made by the petitioner and OCS in their memoranda and those found in the Administrative Review Decision dated November 16, 2005. Although the parties have characterized their disagreement as a factual dispute, none of the pertinent facts are inconsistent in any of these documents.

had no arrearage accruing and actually paid in excess of the amounts ordered by the Court by $477.68 as of March 2004.

3. The obligor is not involved in the present appeal and there is no indication by either party that he has asked for the return of these excess payments.

4. In November 2002, the petitioner became a Reach Up Financial Assistance (RUFA) recipient and assigned her rights to support to the Department for Children and Families (DCF). Under state and federal law, OCS acts as a collection agent for DCF under this assignment.

5. OCS expected that one of the petitioner's children would not be on her RUFA grant because he received SSI benefits. For that reason, OCS determined that one-half of the total support amount each month would be disbursed to the petitioner for the non-RUFA child and it would retain the remainder to pay DCF its assignment share.

6. In fact both children were on the RUFA grant for some time and the entire amount of each monthly payment should have been disbursed to DCF. By the time OCS discovered its error, some eight months later, $1,049 of support payments had been disbursed to the petitioner which she should not have gotten. OCS recorded these erroneous disbursements as an "overpayment".

7. In March of 2004, the obligor sent $730.02 in three separate checks of $243.34, his monthly obligation amount, to OCS for disbursement. OCS distributed one-half of each check for a total of $365.01 to the petitioner for her SSI child (by this time her SSI child was actually off of the grant). OCS retained one half of the first check for disbursement to DCF and one-half of each of the remaining two checks to recover part ($243.34) of the $1,049 overpayment.

8. The obligor was not in arrears on his child support payments at the time he sent in the three checks.

9. The petitioner ceased receiving RUFA benefits at the end of March 2004. The obligor paid the full amount of his support in April, May and July but made no payment in June or August. Although he missed these payments, OCS did not consider the obligor to be in arrears because he had overpaid his support in the past.

10. In late August of 2004, the petitioner reapplied for RUFA benefits and received a benefit of $23 for herself and one of the children. Although no support payment was made in that month, OCS recorded an assignment amount for DCF of $121.67, half of the child support payment payable in that month.

11. The petitioner filed an appeal and an internal administrative hearing was held on the matter. She argued that OCS should not have kept more than the monthly assignment amount of $121.67 in the month of March because the obligor had no arrearage. The balance, she believes, should have been paid to her for application to future months. She noted that, in fact, no support payment came to her in June and August of 2004. She also argued that OCS was wrong to record the assigned amount as $121.67 for August because it only paid her $23 in that month. She believed that the assigned amount should be $23 only. She asked for a payment of $121.67 for the month of June and the same amount minus the $23 for the month of August.

12. An administrative review decision dated November 16, 2005 concluded that OCS had acted properly with regard to disbursement of the support payments and denied any additional payments to the petitioner.

13. The petitioner has made it clear that she does not agree to any overpayment being taken from any excess payments made by the obligor.

ORDER

The decision of OCS to apply the excess payments received in March of 2004 to reduce overpayments made to the petitioner is reversed. OCS is ordered to pay $121.67 to the petitioner as child support for the month of June and $98.67 to the petitioner for the month of August.

REASONS

The principal issue in this case is whether the Office of Child Support has the authority under law to keep any payments in excess of the ordered monthly child support payment to recover past disbursements of support it has made in error ("overpayments") to the custodial parent. The legislature requires OCS, in general, to enforce all support obligations with regard to the "best interests of the child." 33 V.S.A. § 4101(b). With specific regard to disbursement of child support received, the legislature requires OCS to use the requirements found in federal law: "any money received by the department [OCS] from, or on behalf of a responsible parent, shall be distributed and credited as required by Title IV of the Social Security Act." 33 V.S.A. § 3904.

The federal statute referenced by the legislature requires the state as a condition to receiving federal

assistance to require a public benefits recipient to "assign to the state" any rights he or she may have to receive child support. 42 U.S.C. § 608(a)(3)(A). In the case of a family who is currently receiving RUFA (public assistance) benefits, the state has an assignment of their monthly child support payment up to the amount of assistance actually paid out.[2] See 42 U.S.C. §§ 608(8)(a) and 657(a)(1)(B).

The federal statute is very detailed about what can be done with support payments collected by the state under these assignment procedures. See generally 42 U.S.C. § 657. With regard to those families currently receiving public assistance the state may make only the following disbursements of child support it receives:

> (A) pay to the federal government the Federal share of the amount so collected; and
>
> (B) retain, or distribute to the family, the State share of the amount so collected. In no event shall the total of the amounts paid to the Federal government and retained by the State exceed the total of the amounts that have been paid to the family as assistance by the State.
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> 42 U.S.C. § 657(a)(1)

[2] As will be discussed later, this assignment is further restricted to the total amount of current payments and arrearages due under the child support order.

To the extent that the amount so collected exceeds the amount required to be paid to the family for the month in which collected, the State shall distribute the amount so collected as follows:

> (iii) Distribution of arrearages that accrued while the family received assistance;
>
> In the case of a family described in this subparagraph, the provisions of paragraph (1) shall apply with respect to the distribution of support arrearages that accrued while the family received assistance.
>
> 42 U.S.C. § 657(a)(2)(iii)

This latter section, which refers to that set forth above at Section 657 (a)(1)(B), provides that excess amounts that are paid by an obligor to a family on assistance can be either paid to the family or retained by the State in order to repay any “assistance by the state” of its “share”, meaning its share of the public assistance (RUFA in Vermont) benefits paid out. There is nothing in the language of the statute which allows a support payment to be retained for debts owed to the collection unit for overpayments.

These disbursement restrictions are echoed in the federal regulations adopted by the agency in charge of administering the statute, the U.S. Department of Health and Human Services, Administration for Children and Families, Office of Child Support Enforcement:

Distribution of Support Collections

(a)(1) For purposes of distribution in a IV-D case[3], amounts collected . . . shall be treated first as payment on the required support obligation for the month in which the support was collected and if any amounts are collected which are in excess of such amount, these excess amounts shall be treated as amounts which represent payment on the required support obligation for previous months.

. . .

(b) If an amount collected as support represents payment on the required obligation for future months, the amount shall be applied to such future months. However, no such amounts shall be applied to future months unless amounts have been collected which fully satisfy **the support obligation assigned under Section 403(a)(8) of the Act[4] for the current month and all past months.**

45 C.F.R. § 302.51
(emphasis supplied)

OCS seizes on the language in the last sentence of the above regulation for its authority to disburse funds to itself for administrative overpayments made to the custodial parent. OCS argues that it has not been fully satisfied with regard to the support obligation because of the overpayment to the custodial parent and thus could retain these support payments to recover its debt.

[3] This means a family receiving RUFA benefits.
[4] This section is codified as Sec. 608 which is set forth in the body of this decision.

OCS's contention must be rejected for two reasons. First, the obligation which must be "fully satisfied" is the "support obligation assigned under 42 USC § 408(a)(8)". That "support obligation" is the court-created debt of the **obligor** not the administratively created debt of the **obligee** (custodial parent). If the federal legislature and agency had intended that overpayments be satisfied as well, they could have added language including them in the distribution scheme. They clearly did not. Second, it is imperative to remember that the assignment which must be satisfied refers to a debt owed to the state Division for Children and Families which paid a share of the RUFA benefits, not a debt owed to the Office of Child Support Enforcement as the collection entity. OCS may indeed be owed a debt and may have remedies to collect on it but disbursement to itself of excess child support payments is not one of them.

If any doubt could still remain about the meaning of the above law and regulations, the petitioner has presented an interpretive memorandum prepared by HHS, Administration for Children and Families, Office of Child Support regarding this very issue. See PIQ-02-01, August 5, 2002. That memorandum contains the following directive:

> The Office of Child Support Enforcement (OCSE) has received several inquiries from states asking for policy guidance regarding options available for a state to recoup a child support overpayment. An overpayment can be a misdirected payment (payment sent to the wrong custodial parent by the state disbursement unit (SDU) vendor or state) or an erroneous payment based on a bad check or the reversal of an electronic payment due to insufficient funds. OCSE realized that parents should not keep overpayments made in error. **However, distribution rules for child support collections do not allow a state to recoup an overpayment of support through the intercept of a subsequent child support payment unless the custodial parent agrees.** Many states require the state disbursement unit vendors to absorb overpayment errors when the vendor causes the error.
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> (emphasis supplied)

OCS does not dispute that this is the current interpretation of the statute and regulations by the agency charged with its administration; that the petitioner has an overpayment to which it applies; nor that the petitioner has refused to voluntarily repay the debt. Rather it tries to avoid the application of this interpretation by arguing that the checks intercepted were all received in the same month not in succeeding months; therefore, they cannot be the "subsequent" checks referred to in the memorandum which cannot be intercepted. OCS offers no rationale or policy

reason for such a narrow reading of the above language.[5] Subsequent means nothing more than the next payment, not payment in the next month. OCS got three separate payments in the month of March 2005. After the current support was paid, there were two more checks. Those checks are exactly the subsequent checks to which the above interpretation refers and from which any recoupment of an overpayment is forbidden.

It should have been clear to OCS that the two extra checks written for exactly the amount due each month were intended by the non-custodial parent to cover future months and should have been applied to future months pursuant to 45 CFR 302.51(b), set forth above on page 9. The only authority OCS had to retain those checks was to satisfy any unpaid assigned support obligation of the obligor. Since the obligor indisputably had no unpaid support obligation, the money had to be turned over the family. As it turned out, the non-custodial parent did not pay any support during two of the five subsequent months. The hardship to the family was, no doubt, grave as they received neither RUFA benefits

[5] Nothing in the Vermont statutes regarding the assignment of support rights can be read as inconsistent with the federal statutes regarding distribution of support payments collected by the state. See e.g., 15 V.S.A. § 786.

nor child support during most of those two months. Given the circumstances, OCS would be hard pressed to argue that it was acting in the "best interests" of the two children involved in this matter when it kept their child support payments to pay its debt.[6] The only action which OCS can take now to comply with the law is to apply the two checks to the unpaid months of June and August of 2004. The result for June when the petitioner was not a RUFA is that she should be paid the remaining half of $121.67 for her non-SSI child. The result for August is the subject of the second dispute between the parties.

OCS recorded an assignment for $121.67 (one-half of the court-ordered support) in August of 2004 when the petitioner and her non-SSI child once again became RUFA recipients. The petitioner says this should not have occurred because the federal statute at 42 U.S.C. § 657(a)(1)(B), set forth above, prevents the state from taking an assignment in excess of the actual assistance paid. OCS agrees not only that it cannot take an assignment in excess of the amount DCF pays as

[6]OCS has attempted to characterize these children as having received a "windfall" due to the overpayment and the receipt of extra child support from their father. As these children were eligible for SSI and RUFA, programs which help only the most needy citizens, it is hard to fathom a characterization of these children as having more than they need. In addition, although the amount of the overpayment is not in issue here, it is not clear why amounts paid by the obligor are considered overpayments to the petitioner owed to OCS unless he is asking for them back.

assistance but also that it cannot collect on any amount greater than that ordered by the Court as child support. See HSS, Department for Children and Families, OCSE Transmittal AT-9304, March 22, 1993.[7] OCS argues that it has not violated these precepts because it figures debts owed under the support order for aggregate periods of time, not on a month by month basis.

Assuming that OCS is correct that it can assign for periods of time in increments other than monthly, it was wrong to make the assignment in this case in August of 2004 because no support debt was owed by the obligor **for any period of time**. Again, OCS is using the overpayment to the petitioner to create the "support debt" which, for all the reasons set forth above, it cannot do. There being no support debt due from this obligor, OCS has no authority to assign support to DCF other than for that which was actually paid out in the month of August 2004, namely $23. See 42 U.S.C. § 657(a)(2)(iii), set out above. Therefore, the petitioner is correct that not only should the $121.67 be applied towards the obligor's August payment (instead of to

[7] In another interpretation of its regulations, HHS informed state agencies that they could not collect the difference between the amount paid out as assistance and the child support amount through IV-D processes. The states were informed that a court or administrative order would have to be obtained which established a debt on the part of the obligor for this amount.

her debt) but that all but $23 of it, or $98.67 should be paid directly to her.

It is true, as the 2002 HHS memorandum set out above stated, that custodial parents should not keep overpayments made in error. The petitioner has not agreed to voluntarily repay these amounts no doubt because she is in difficult financial straits. Nevertheless, the obligation to repay does remain although the enforcement of that obligation cannot include seizure of the petitioner's assets (future child support payments) to pay her debts no matter how equitable or convenient it may seem to do so. The petitioner is urged to work with OCS with regard to repaying this money in some way that would take her situation into consideration. The petitioner, as she is represented by counsel, is no doubt aware as well that DCF may find that she was overpaid in RUFA benefits during the period she received the excess support payments and could take action to recover those benefits through its own processes.

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