STATE OF NEW YORK
DEPARTMENT OF LABOR

REQUEST February 1, 1999
CASE #
CENTER # OES
FH # 3070472Q

In the Matter of the Appeal of :

DECISION
: AFTER
FAIR
HEARING

from a determination by the New York City
Department of Social Services :

JURISDICTION

Pursuant to Section 22 of the New York State Social Services Law (hereinafter Social Services Law) and Part 358 of Title 18 NYCRR, (hereinafter Regulations), a fair hearing was held on March 22, 1999, in New York City, before Temitayo Adelekun, Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant

Appellant

Esq., Supervising Attorney, The Legal Aid Society

For the Social Services Agency

Brenda Perry, Fair Hearing Representative

ISSUE

Was the Agency's determination to discontinue the Appellant's Public Assistance on the grounds that Appellant refused to comply with work experience requirements correct?

FACT FINDING

An opportunity to be heard having been afforded to all interested parties and evidence having been taken and due deliberation having been had, it is hereby found that:

1. The Appellant has been in receipt of a grant of Public Assistance.

2. On March 19, 1998 the Agency notified the Appellant of its intent to discontinue the Appellant's Public Assistance for 90 days and until Appellant is willing to comply with work experience requirements on the grounds that Appellant refused to cooperate with work experience requirements.

3. The Appellant requested a fair hearing on March 25, 1998, to review the Agency's determination to discontinue her Public Assistance.

4. On August 6, 1998, FH# 2872248M was held, on the issue of the Agency's determination to discontinue the Appellant's Public Assistance.

5. In the Decision After Fair Hearing# 2872248M, issued August 25, 1998, the Commissioner of the New York State Department of Labor affirmed the Agency's determination to discontinue the Appellant's Public Assistance.

6. The Appellant appealed to the Commissioner for a reopening of the aforementioned fair hearing for the purpose of submitting additional testimony. The Commissioner consented to reopen the hearing to the extend of accepting additional testimony and documentation from all parties with respect to the Appellant's claim that she did not willfully fail to comply with employment requirements.

7. Pursuant to Appellant's request for a review of the fair hearing record and decision dated August 25, 1998, the Commissioner of the New York State Department of Labor agreed to re-open and vacate FH# 2872248M and to conduct a new fair hearing under FH# 3070472Q to the extend of accepting additional testimony and documentation from all parties with respect to the Appellant's claim that she did not willfully fail to comply with employment requirements.

8. The decision issued from FH# 2872248M is vacated and superseded by the present fair hearing decision.

9. The Appellant did not receive the Agency's notice dated February 7, 1998 to report to employable initial appointment on March 2, 1998, because the notice was addressed to a wrong borough.

10. On February 1, 1999, the Appellant requested this fair hearing.

APPLICABLE LAW

Section 131.5 of the Social Services Law provides that no Public

Assistance shall be given to an applicant for or recipient of Public Assistance who has failed to comply with the requirements of the Social Services Law, or has refused to accept employment in which he or she is able to engage. Section 131(7)(b) of the Social Services Law provides that where a persons is judged employable or potentially employable, a social services official may require such person to receive suitable medical care and/or undergo suitable instruction and/or work training. A person who refuses to accept such care or undergo such instruction or training is ineligible for Public Assistance and care.

Pursuant to Section 336-c of the Social Services Law and 12 NYCRR 1300.9, work experience programs meeting State and federal requirements may be established by social services districts. Work experience programs may include the performance of work for a federal office or agency, county, city, village or town or for the State or in the operation of or in an activity of a nonprofit agency or institution.

Work experience opportunities are limited to projects which serve a useful public purpose in fields such as health, social services, environmental protection, education, urban and rural development and redevelopment, welfare, recreation, operation of public facilities, public safety, and child day care.

The number of hours of work activities a participant may be assigned under section 336-c of the Social Services Law and 12 NYCRR 1300.9 may not exceed a number which equals the amount of assistance payable with respect to such individual (inclusive of the value of food stamps received by the public assistance household of such individual) divided by the higher of (a) the federal minimum wage or (b) the state minimum wage. The limitation of the number of hours of work experience to which a participant may be assigned is a calculation of allowable hours in a work activity and does not mean that such participant is receiving a wage for the performance of such activities. The participant is not working off the grant but is engaged in work activities as an element of his or her plan to become self sufficient.

Recipients may be assigned to work experience programs provided that appropriate federal and State standards of health, safety and work conditions are maintained and the participant is provided with appropriate workers' compensation or equivalent protection for on-the-job injuries and tort claims protection on the same basis, but not necessarily at the same benefit level, as they are provided to other persons in the same or similar positions.

Assignment cannot not result in:

- the displacement of any currently employed worker or loss of position (including partial displacement such as reduction in the hours of non-overtime work, wages or employment benefits) or result in the impairment of existing contracts for services or collective bargaining agreements;

- the employment or assignment of a participant or the filling of a position when any other person is on layoff from the same or any equivalent position or the employer has terminated the employment of any regular employee or otherwise reduced its workforce with the effect of filling the vacancy so created with a participant;

- any infringement of the promotional opportunities of any current employed person; or

- the performance, by such participant, of a substantial portion of the work ordinarily and actually performed by regular employees; or

- the loss of a bargaining unit position as a result of work experience participants performing, in part or in whole, the work normally performed by the employee in such position;

An assignment cannot be at any work site at which the regular employees are on a legal strike against the employer or are being subjected to lock out by the employer.

In assigning a recipient who is a student attending CUNY, SUNY or other approved non-profit education, training or vocational rehabilitation agency, the social services district must, after consultation with officials of CUNY, SUNY or other non-profit education, training or vocational rehabilitation agency, assign the student to a work site on campus, where the recipient is enrolled, if a work experience assignment approved by the social services official is available. Where such work experience assignment is not available, the social services district shall, to the extent possible, assign the student to a work site within reasonable proximity to the campus where the recipient is enrolled. Provided, however, in order to qualify for a work experience assignment on-campus, or in close proximity to campus, a student must have a cumulative C average, or its equivalent. The district may waive the requirement that the student have a cumulative C average or its equivalent for undue hardship based on:

(i) the death of a relative of the student;

(ii) the personal injury or illness of the student; or

(iii) other extenuating circumstances.

Social services officials are required by Section 341 of the Social Services Law and 12 NYCRR 1300.11 to establish a conciliation procedure for applicants and recipients of Public Assistance.

A social services official must issue a notice to each applicant or recipient who refuses or fails to comply with Public Assistance employment program requirements of Article 9-B of the Social Services Law (Sections 330 - 342). Such notice must advise the individual of his or her refusal or failure to comply, that the individual has the right to provide reasons for such failure or refusal to participate and that he or she has a specified number of days to request conciliation. Applicants and recipients for Safety Net Assistance have seven days to request conciliation and applicants and recipients for Family Assistance have 10 days to request conciliation.

If the individual requests conciliation within the specified number of days, conciliation shall not last longer than 14 days from the date of the conciliation request in the case of an applicant or recipient of Safety Net, and 30 days from the date of the conciliation notice in the case of a Family Assistance applicant/recipient and it will be the individual's responsibility to provide reasons for such refusal or failure to comply.

If the district determines that the individual's refusal or failure to comply was willful and without good cause, then the social services official must issue a notice of denial or 10 day notice of intent to reduce or discontinue assistance.

If the participant does not respond to the conciliation letter issued by the social services official within the specified number of days then the social services official must issue a notice to deny Public Assistance or a ten day notice of intent to discontinue or reduce Public Assistance.

Social services officials are responsible for determining good cause where the individual has failed to comply with Public Assistance and Food Stamp employment requirements. The official must consider the facts and circumstances, including information submitted by the individual subject to such requirements. Good cause includes circumstances beyond the individual's control, such as but not limited to, illness of the member, illness if another household member requiring the presence of the member, a household emergency, or the lack of adequate child care for children who have reached the age of six but are under age 13. 12 NYCRR 1300.12(c). The applicant or recipient is responsible for notifying the Agency of the

reasons for failing to comply with an eligibility requirement and for furnishing evidence to support any claim of good cause. The Agency must review the information and evidence provided and make a determination of whether the information and evidence supports a finding of good cause. 18 NYCRR 351.26.

The parent or care taker relative of a child under thirteen years of age shall not be subject to the ineligibility provisions of Section 342 of the Social Services Law if the individual can demonstrate, in accordance with the regulations of the Office of Children and Family Services Department, that lack of available child care prevents such individual from complying with the work requirements. The parent or caretaker relative shall be responsible for locating the child care needed to meet the work requirements; provided, however, that the relevant social services district shall provide a parent or caretaker relative who demonstrates an inability to obtain needed child care with a choice of two providers, at least one of which will be a regulated provider.

Section 342 of the Social Services Law and 12 NYCRR 1300.12 provides that in the case of an individual who is a member of a household without dependent children applying for or in receipt of safety net assistance the Public Assistance benefits otherwise available to the household of which such individual is a member shall be reduced pro-rata:

(a) For the first such failure or refusal to comply, a period of ninety days and thereafter until willing to comply;

(b) For the second such failure or refusal to comply, a period of 150 days and thereafter until willing to comply; and

(c) For the third and all subsequent such failures or refusals, a period of 180 days and thereafter until willing to comply.

Willing to comply means that an individual, as required by a district, reports to an assigned work activity site or other location as assigned by the district on time and prepared to engage in the assigned activity.

DISCUSSION

The evidence in this case establishes that, by notice dated March 19, 1998, the Agency determined to discontinue the Appellant's grant of Public Assistance for 90 days and until Appellant is willing to comply with work experience requirements on the grounds that Appellant refused to cooperate with work experience requirements.

The Appellant requested a fair hearing on March 25, 1998, to review the Agency's March 19, 1998 determination to discontinue her Public Assistance. On August 6, 1998, FH# 2872248M was held, on the issue of the Agency's

determination to discontinue the Appellant's Public Assistance.

In the Decision After Fair Hearing# 2872248M, issued August 25, 1998, the Commissioner of the New York State Department of Labor affirmed the Agency's determination to discontinue the Appellant's Public Assistance. The Appellant appealed to the Commissioner for a reopening of the aforementioned fair hearing for the purpose of submitting additional testimony. The Commissioner consented to reopen the hearing to the extend of accepting additional testimony and documentation from all parties with respect to the Appellant's claim that she did not willfully fail to comply with employment requirements.

Pursuant to Appellant's request for a review of the fair hearing record and decision dated August 25, 1998, the Commissioner of the New York State Department of Labor agreed to re-open and vacate FH# 2872248M and to conduct a new fair hearing under FH# 3070472Q to the extend of accepting additional testimony and documentation from all parties with respect to the Appellant's claim that she did not willfully fail to comply with the employment requirements. The decision issued from FH# 2872248M is vacated and superseded by the present fair hearing decision.

At the reopened hearing on March 22, 1999, the Agency representative testified that a notice to report to the initial employable appointment was mailed to the Appellant on February 17, 1998, for a March 2, 1998 appointment. Inasmuch as the Agency has presented evidence establishing that the notice was mailed in the regular course of business and not returned to the Agency, there is created a presumption of receipt of mail. However, in this case, the Appellant testified that the notice was not received and that in fact the letter was addressed to a wrong borough. The Appellant submitted proof consisting of a notarized letter from her landlord which indicated that the Appellant did not receive the letter of February 17, 1998, and it confirmed that the Appellant's borough was Brooklyn and not New York City as shown in the Agency's letter. The Appellant further submitted photocopy of checks issued by the Agency to the Appellant's Landlord with Brooklyn borough. The Appellant has rebutted the presumption of receipt of mail, as the Appellant's contention of non-receipt of the notice in question is found to be credible. The Appellant established good cause for her failure to comply with the employment. Therefore, the Agency's determination to discontinue the Appellant's grant of Public Assistance because the Appellant failed to comply with employment requirements cannot be sustained.

DECISION AND ORDER

The Agency's determination to discontinue the Appellant's Public

Assistance on the grounds that Appellant refused to comply with work experience requirements was not correct and is reversed.

1. The Agency is directed to continue the Appellant's grant of Public Assistance and to restore any assistance withheld as a result of the Agency's action retroactive to the date of discontinuance.

As required by 18 NYCRR 358-6.4, the Agency must comply immediately with the directives set forth above.

DATED: Albany, New York
March 31, 1999

NEW YORK STATE DEPARTMENT
OF LABOR

By

Commissioner's Designee