

STATE OF NEW YORK
OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE

REQUEST November 23, 2004
CASE # P
CENTER # Nassau
FH # 4232326R

In the Matter of the Appeal of :

I M

DECISION
: **AFTER**
FAIR
HEARING

from a determination by the Nassau County
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 January 18, 2005, in Nassau County, before Susan Lerner, Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant

D. Ruff, Esq., Nassau Suffolk Law Services

For the Social Services Agency

R. Forbes, Fair Hearing Representative
W. Denson, Fair Hearing Representative

ISSUE

Was the Agency's determination to impose a recoupment of prior Aid Continuing benefits, without notice, 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 had been in receipt of Public Assistance benefits.
2. A prior fair hearing had been scheduled for June 28, 2004. The Appellant received Aid Continuing and failed to appear on June 28, 2004. The Appellant's Public Assistance case was closed pursuant to a May 7, 2004 discontinuance notice which was to be in issue at the June 28, 2004 fair hearing.
3. The May 7, 2004 discontinuance notice advised the Appellant that his benefits will not be changed if he requests a fair hearing by May 31, 2004, but that "if you lose the hearing you will have to pay back any Public Assistance which you got, but should not have gotten, while you were waiting for the decision".

4. The Appellant reapplied for Public Assistance on August 11, 2004.

5. By notice dated October 16, 2004 the Agency determined to approve the Appellant's application of August 11, 2004. That notice did not indicate that a recoupment of the above-referenced Aid Continuing benefits was being applied to his opening grant. That notice did not include an opening budget.

6. On November 23, 2004, the Appellant requested this fair hearing.

APPLICABLE LAW

A recipient of Public Assistance, Medical Assistance or Services has a right to an adequate notice when the Agency proposes to discontinue, suspend, reduce or change the manner of payment of such benefits. 18 NYCRR 358-3.3(a). In addition, in most circumstances, a Food Stamp recipient has a right to an adequate adverse action notice when the Agency proposes to take any action to discontinue, suspend or reduce the recipient's Food Stamp benefits during the certification period. 18 NYCRR 358-2.3; 18 NYCRR 358-3.3(b). However, pursuant to 18 NYCRR 358-3.3(e), there is no right to an adverse action notice when, for example, the change is the result of a mass change, the Agency determines that all members of the household have died or the household has moved from the district or when the household has failed to reapply at the end of the certification period.

An adequate notice is a notice of action, an adverse action notice or an action taken notice which sets forth the action that the Agency proposes to take or is taking, and if a single notice is used for all affected assistance, benefits or services, the effect of such action, if any, on a recipient's other assistance, benefits or services. In addition, the notice must contain:

- o for reductions, the previous and new amounts of assistance or benefits provided;
- o the effective date of the action;
- o the specific reasons for the action;
- o the specific laws and/or regulations upon which the action is based;
- o the recipient's right to request an agency conference and fair hearing;
- o the procedure for requesting an agency conference or fair hearing, including an address and telephone number where a request for a fair hearing may be made and the time limits within which the request for a fair hearing must be made;
- o an explanation that a request for a conference is not a request for a fair hearing and that a separate request for a fair hearing must be made;
- o a statement that a request for a conference does not entitle one to aid continuing and that a right to aid continuing only arises pursuant to a request for a fair hearing;
- o the circumstances under which public assistance, medical assistance, food stamp benefits or services will be continued or reinstated until the fair

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- hearing decision is issued;
- o a statement that a fair hearing must be requested separately from a conference;
 - o a statement that when only an agency conference is requested and there is no specific request for a fair hearing, there is no right to continued public assistance, medical assistance, food stamp benefits or services;
 - o a statement that participation in an agency conference does not affect the right to request a fair hearing;
 - o the right of the recipient to review the case record and to obtain copies of documents which the agency will present into evidence at the hearing and other documents necessary for the recipient to prepare for the fair hearing at no cost;
 - o an address and telephone number where the recipient can obtain additional information about the recipient's case, how to request a fair hearing, access to the case file, and/or obtaining copies of documents;
 - o the right to representation by legal counsel, a relative, friend or other person or to represent oneself, and the right to bring witnesses to the fair hearing and to question witnesses at the hearing;
 - o the right to present written and oral evidence at the hearing;
 - o the liability, if any, to repay continued or reinstated assistance and benefits, if the recipient loses the fair hearing;
 - o information concerning the availability of community legal services to assist a recipient at the conference and fair hearing; and
 - o a copy of the budget or the basis for the computation, in instances where the social services agency's determination is based upon a budget computation.

18 NYCRR 358-2.2

Regulations at 18 NYCRR 358-3.3(a) provide that a recipient of Public Assistance, Medical Assistance or services has a right to notice when the agency:

- (i) proposes to take any action to discontinue, suspend, or reduce a Public Assistance grant, Medical Assistance authorization or services; or
- (ii) proposes to change the manner or method or form of payment of a Public Assistance grant; or
- (iii) determines that the recipient of Public Assistance or Medical Assistance is not eligible for an exemption requested from work requirements as described in 12 NYCRR Part 1300; or
- (iv) determines to restrict a Medical Assistance authorization.

- (v) accepts or denies an application for Public Assistance, Medical Assistance or services; or
- (vi) increases a Public Assistance grant; or
- (vii) determines to change the amount of one of the items used in the calculation of a Public Assistance grant or Medical Assistance spenddown although there is no change in the amount of the Public Assistance grant or Medical Assistance spenddown; or
- (viii) denies an application for an exemption from or an increase in a Medical Assistance utilization threshold and the recipient has reached such utilization threshold.
- (ix) makes changes in the manner of payment of supportive services provided to enable an individual to participate in work activities.

DISCUSSION

The Appellant requested this hearing to review the Agency's determination to apply a recoupment against the Appellant's Public Assistance benefits. Although the Agency's determination is based upon a computation of the Appellant's budget, the Agency's notice did not set forth or include a copy of the budget or the basis for such computation as required by 18 NYCRR 358-2.2, above.

In addition, the Agency's notice did not contain any indication that a reduction was being applied to reflect a recoupment of Aid Continuing benefits which the Appellant had received pursuant to a previous fair hearing request.

The Agency's position is that the Appellant was put on notice in May, 2004, that any Aid Continuing benefits he received pending a fair hearing scheduled pursuant to a May 7, 2004 discontinuance notice would be recovered if he lost that hearing. The Appellant defaulted on June 28, 2004, in effect, losing his fair hearing, and therefore the Agency is correct to recover the Aid Continuing benefit provided. There is no dispute between the parties on this point.

The Appellant's representative's position is not that the Aid Continuing benefits cannot be recovered. His position is that although the Appellant was notified in May, 2004 that his Aid Continuing benefits were subject to a recovery, that did not eliminate the Agency's responsibility to provide adequate notice of the amount and rate of the recoupment when it was ultimately applied, several months later. The October 16, 2004 opening notice provided upon the Appellant's reapplication includes a standard, pre-printed section regarding recoupments being applied, which the Agency has failed to complete. Additionally, they have failed to provide the Appellant with the budget being applied.

The Appellant's representative is correct in stating that the applicable regulations require the issuance of an adequate notice and budget when a recoupment is imposed. In addition, he points out that in the absence of adequate notice, the Appellant is unable to understand, accept, or contest, the Agency's determination. In this case, there happens to be a disagreement regarding the amount to be recouped. Clearly, the regulations require

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adequate notice for this very reason.

The Appellant's representative has asked for a directive in this and in similar cases. While the Agency has taken the position that they were not required to issue a notice of recoupment in this case, there is no evidence of similar action, or inaction, in any other case.

The Agency's failure to give notice of its proposed actions violates the above cited regulations. The above-noted defects in the Agency's notice render such notice void. Therefore, the Agency's determination as to the Appellant's Public Assistance benefits cannot be sustained.

DECISION AND ORDER

The Agency's determination to impose a recoupment of prior Aid Continuing benefits, without notice, is not correct and is reversed.

1. The Agency is directed to restore any Public Assistance already recouped, retroactive to the date of such action, and continue assistance unchanged until such time as proper notice is sent.

2. The Agency is directed to redetermine the amount of any recoupment to be applied.

3. The Agency is directed to issue adequate notice as to the Appellant's Public Assistance benefits and any recoupment to be applied.

4. The Agency is directed to provide the Appellant with the budget being implemented.

Should the Agency need additional information from the Appellant in order to comply with the above directives, it is directed to notify the Appellant promptly in writing as to what documentation is needed. If such information is required, the Appellant must provide it to the Agency promptly to facilitate such compliance.

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

DATED: Albany, New York
May 21, 2005

NEW YORK STATE OFFICE OF
TEMPORARY AND DISABILITY ASSISTANCE

By

Commissioner's Designee