

STATE OF NEW YORK
DEPARTMENT OF SOCIAL SERVICES

REQUEST January 3, 1997
CASE#
CENTER# OES
FH# 2605196H

In the Matter of the Appeal of :

A F

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 the Regulations of the New York State Department of Social Services (Title 18 NYCRR, hereinafter Regulations), a fair hearing was held on June 17, 1997, in New York City, before Tomas Rodriguez, Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant

A F , Appellant, via telephone; Eugene Doyle, Appellant's Representative

For the Social Services Agency

Ruth Berelowitz, Fair Hearing Representative

ISSUE

Was the Agency's determination that the Appellant was employable 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 Home Relief.

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2. On December 17, 1996, the Agency sent the Appellant an employable initial appointment on January 2, 1997 as an employable recipient of Public Assistance.

3. The Agency has not made any determination to reduce the Appellant's Public Assistance in connection with the failure to report to her initial appointment on January 2, 1997.

4. The Agency did not establish that it had provided the Appellant with a notice of employability with right to contest prior to determining that the Appellant was employable and not exempt from the employment program requirements.

5. At the hearing, the Appellant's Representative withdrew the supplemental issue of Agency's failure to exempt J F from work rules due to medical reason.

6. On January 3, 1997 the Appellant requested this fair hearing.

APPLICABLE LAW

Section 131.5 of the Social Services Law provides that no assistance or care shall be given to an employable applicant for or recipient of home relief who has failed to comply with the requirements of the Job Opportunities and Basic Skills Training Program (JOBS) which is found in Title 9-B of the Social Services Law, who has failed to comply with work relief requirements under section 164 of the Social Services Law, who has failed to accept medical care, a program of instruction or work training under section 131(7)(b) of the Social Services Law or who has refused to accept employment in which he or she is able to engage.

All applicants for and recipients of Aid to Dependent Children, Home Relief or Veteran's Assistance must participate in JOBS as required by the agency unless they are exempt under section 385.2(b) of the Department's Regulations. 18 NYCRR 385.2, 18 NYCRR 385.4(b).

Section 332 of the Social Services Law and Section 385.2(b) of the Department's Regulations provide that an applicant for or recipient of Aid to Dependent Children, Home Relief, or Veteran's Assistance is not considered to be employable and is exempt from participation in the JOBS program if he/she is:

- (1) ill or injured to the extent that he/she is unable to engage in employment and training programs for a period of up to three months. This temporary condition must be medically verified; except that inability to engage in JOBS activities will be presumed to exist for a period of eight weeks following childbirth;

- (2) incapacitated, when it has been determined that a physical or mental impairment prevents an individual from engaging in employment or training when such impairment is expected to exist for a continuous period of at least three months. Physical impairment must be determined by a physician. Mental impairment must be determined by a physician, a certified psychologist or a certified social worker. Incapacity may include a period of recuperation after childbirth if prescribed by a woman's physician;
- (3) 60 years of age or older;
- (4) a resident in an area of the State where a JOBS program is not available;
- (5) a resident in an area of the State where a JOBS program is available, but in a location which is so remote that effective participation by such resident is precluded. Effective participation is precluded if a round trip of more than two hours by reasonably available public or private transportation, exclusive of the time necessary to transport children to and from child care, would be required for a normal work or training day. However, if the normal round trip commuting time, exclusive of the time necessary to transport children to and from child care, in the area is more than two hours, then effective participation is precluded if a round trip would exceed the generally accepted community standard.
- (6) under the age of 16;
- (7) under the age of 19 and attending, full time, an elementary, secondary, vocational or technical school;
- (8) needed in the home because another member of the household requires his/her presence due to a medically verified mental or physical impairment or illness verified by a physician or a licensed or certified psychologist, and it is determined that no other appropriate household member is available to provide necessary care;
- (9) parents or other relatives of a child under three years of age who are personally providing care for the child; however, if they are not yet 20 years of age and who have not completed a high

school education (or its equivalent) and are not otherwise exempt, they shall be required to participate in educational requirements in accordance with section 385.5 of the Department's Regulations. In a household receiving Aid to Dependent Children due to the unemployment of a parent, only the parent or relative who is not the principal wage earner in the household may be exempted under this provision;

- (10) parents or other relatives of a child between the ages of three and six who are personally providing care for the child. Such persons will not be exempt if appropriate day care is guaranteed and participation in the JOBS program is limited to 20 hours per week; however, if they are not yet 20 years of age and who have not completed a high school education (or its equivalent) and are not otherwise exempt, they shall be required to participate in educational requirements in accordance with section 385.5 of the Department's Regulations. In a case receiving Aid to Dependent Children due to the unemployment of a parent, only the parent or relative who is not the principal wage earner in the household may be exempted under this provision;
- (11) working 30 or more hours per week. An individual qualifies for this exemption if the individual is working an average of at least 30 hours per week and is earning at least the higher of the State or federal minimum wage; or the average weekly gross wage received, calculated on a monthly basis, is at least the dollar equivalent of 30 hours times the higher of the State or federal minimum wage; or if the individual is working at least 30 hours per week as a self-employed person or in a small business owned or operated by the individual which is not subject to liquidation under the applicable regulations of the Department.
- (12) pregnant, and it has been medically verified that the child is expected to be born in the month in which participation in the JOBS program would be required or within the following six-month period; or
- (13) full-time volunteers serving under the Volunteers In Service To America (VISTA) program.

Section 385.2(f)(1) of the Department's Regulations provides that when an applicant for or recipient of Aid to Dependent Children, Home Relief or Veteran's Assistance indicates that he/she is not employable, the social services official must examine any evidence presented by the individual together with any other information available prior to making any determination or redetermination of the individual's employability.

Section 385.2(f)(2) of the Department's Regulations provide that when an applicant or recipient indicates that he/she is not employable due to a medical condition, or when the social services official suspects that a

medical barrier to employment or to participation in employment related activities exists, a medical examination and a medical opinion regarding employability must be obtained. If the applicant or recipient provides a physician's or psychologist's statement which is in conflict with the physician's or psychologist's statement obtained by the social services district, the social services official must evaluate both statements and any other relevant information in making a determination of employability.

Section 385.2(f)(3) of the Department's Regulations provide that an applicant who indicates that he/she is not employable or who the social services official suspects may not be employable must provide such evidence as the social service official determines is necessary in accordance with Department Regulations at 18 NYCRR Part 351 in order for an employability determination to be made. An applicant who fails to provide necessary evidence, the applicant will be deemed to have failed to meet the eligibility requirements for public assistance.

Section 385.2(f)(4) of the Department's Regulations provide that a recipient who previously has been determined not to be employable and continues to indicate that he/she is not employable, must, whenever deemed necessary by the social services official, provide new or additional evidence of continued unemployability. A recipient who fails to provide such evidence will be deemed to have failed to meet the requirements for continued eligibility for public assistance. A recipient may not be required to repeatedly produce a document already in the social service's district's files regarding a condition which is not subject to change.

Section 385.2(e)(5) of the Department's Regulations provide that a recipient who has previously been determined employable may request a review of this determination and the recipient will not be required to comply with the employment related requirements of section 385.4 of the Department's Regulations until and unless a redetermination of employability has been made and the recipient has been notified in writing that the he/she continues to be an employable person. The social services official must notify the recipient of the evidence which may be necessary to make such redetermination. If the recipient fails to provide any evidence, the redetermination will be made based on the information available.

Section 358-3.3(a)(2)(vii) of the Department's Regulations provides that a recipient of Public Assistance and Medical Assistance has a right to adequate notice when a social services agency determines that the recipient is employable.

DISCUSSION

The record establishes that on December 17, 1996, the Agency sent the Appellant an employable initial appointment, which was scheduled for January 2, 1997. The Appellant did not keep her appointment and instead through her representative, requested a fair hearing on January 2, 1997, to appeal the following Agency determination: "Classification of Ms. F as "employable" and imposition of employment program requirements, absent Ms. F 's receipt of the State-prescribed, adequate notice of the Agency's employability determination and of her right to contest such a determination." It should be noted that although the Appellant did not report to the January 2, 1997 initial appointment, the Office of Employment Services has not issued any Notice of Intent to discontinue the Appellant's Public Assistance.

As to the Appellant's claim of the Agency's failure to provide her with the State-prescribed, adequate notice of the Agency's employability determination and of her right to contest such a determination (DSS Form 4005), the Agency did not establish that the Appellant was provided with such notice. The Appellant asserted that she was not provided with any notice of employability by the Agency.

The Appellant claims that she is exempt from the Agency's employment program requirements due to her medical condition. The Agency alleged that it cannot determine whether the Appellant is exempt as the Appellant has submitted no evidence or attended appointments to provide such documentation for evaluation. The Agency asserts that the Appellant was considered employable, however there was no notice of employability determination produced advising the Appellant of such determination of employability with fair hearing rights to contest such determination.

Accordingly, the Agency's determination that the Appellant is employable cannot be sustained.

DECISION AND ORDER

The Agency's determination that the Appellant was employable is not correct and is reversed.

1. The Agency is directed to exempt the Appellant from the employment program requirements.

2. If the Agency determines in the future that the Appellant is employable, it is directed at that time to provide the Appellant with requisite notice of employability as provided by 18 NYCRR 358-3.3.

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

DATED: Albany, New York
October 27, 1997

NEW YORK STATE DEPARTMENT
OF SOCIAL SERVICES

By

Robert D. Mc Donnell

Commissioner's Designee