STATE OF NEW YORK
DEPARTMENT OF LABOR

REQUEST January 16, 1998
CASE #
CENTER # OES
FH # 2828606H

In the Matter of the Appeal of :

J E K : 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 June 30, 1998, in New York City, before Ann Marie Connelly, Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant

Eugene Doyle, representative

For the Social Services Agency

Marcia Nissenson, Fair Hearing Representative
William Ash, Fair Hearing Representative
Richard Kahn, Agency Representative

ISSUE

Was the Agency's determination that the Appellant is 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 Public Assistance and Food stamp benefits.

2. On December 4, 1997 the Agency sent the Appellant an "Employable Joint Initial Appointment", advising the Appellant that as an employable recipient of assistance, he was required to report to the Office of Employment Services on December 16, 1997.

3. On January 16, 1998, the Appellant requested this fair hearing to review the Agency's determination that the Appellant is employable.

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.

Section 332 of the Social Services Law and 12 NYCRR 1300.2 provides that an applicant for or recipient of Public Assistance shall not be required to participate in work activities if such individual is determined by the social services district to be exempt because such individual is:

(1) ill or injured to the extent that he/she is unable to engage in work activities for up to three months, as verified by medical evidence;

(2) 60 years of age or older;

(3) under 16 years of age or under the age of 19 and attending full-time a secondary, vocational or technical school;

(4) disabled or incapacitated in accordance with 12 NYCRR 1300.2(c);

(5) needed in the home because another member of the household requires his/her presence due to a verified mental or physical impairment, and the social services official has determined that no other member of the household is appropriate to provide such care. "Verified" means that a licensed physician or certified psychologist has made the determination that such an impairment exists and that the household member is in need of care;

(6) pregnant beginning thirty days prior to the medically verified date of delivery of her child.

(4) the parent or other caretaker relative in a one parent household of a child who is under 12 months of age who is personally providing care for such child. This exemption must last no longer than twelve months for any parent or caretaker relative's life. The exemption can last no longer than three months for any one child, unless extended up to the total twelve month maximum for the life of such parent or caretaker relative by the social services official;

> To the extent that the total of 12 months of exemption have not been exhausted by such parent or caretaker relative, the social services official is required to apply the exemption to the parent or caretaker in the case of a child under two months of age, but shall determine whether to apply such exemption for children more than three months old.

Regulations at 18 NYCRR 358-3.3(a)(2)(vii) provide that an individual has the right to adequate notice when the Agency determines that such individual is employable.

DISCUSSION

The Agency presented documentation, marked as Agency's Exhibit #1, entitled "Employable Joint Initial Appointment", which advised the Appellant that as an employable recipient of assistance, he was required to report to the Office of Employment Services on December 16, 1997. The Appellant's representative argued that the Appellant should not be considered employable without an Agency determination regarding employability. In addition, the Appellant's representative stated that at the time of such determination, the Agency must issue a Notice of Employability. The Appellant's representative submitted documentation, marked as Appellant's Exhibit #3, which indicates that the Appellant is coded "20" by the Agency. Code "20" is an internal code used by the Agency which indicates that the Appellant is employable.

The evidence in this case establishes that the Agency considers the Appellant employable. At the hearing, the Agency presented no evidence to support this determination. The evidence in this case also establishes that the Agency determined that the Appellant is employable without first sending notice of such determination to the Appellant as required by 18 NYCRR 358-3.3(a)(2)(vii) of the Regulations. Under the circumstances, the Agency's determination cannot be sustained.

It is noted that at the hearing, the Appellant's representative contended that the Agency's determination that the Appellant is employable should be reversed pursuant to the judgement in the case of Rivera v. Bane, because the Agency failed to send the Appellant's representative all documents that were requested in order to prepare for this fair hearing. However, inasmuch as the Agency's determination is being reversed for the reasons set forth above, that issue need not be decided at the present time.

It is also noted that on January 23, 1998, the Agency determined to reduce the Appellant's Public Assistance and Food Stamp benefits on the grounds that the Appellant did not appear for the appointment at the Office of Employment Services scheduled for December 16, 1997. Although the Appellant's representative stated that he did not want the issue of the Notice of Intent dated January 23, 1998 addressed, this Agency determination was incorrect because the Appellant had not been previously sent a notice of employability as required by 18 NYCRR 358-3.3(a)(2)(vii). Therefore, the Agency must withdraw its Notice of Intent dated January 23, 1998 and restore all assistance and benefits lost as a result of such notice.

DECISION AND ORDER

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

1. The Agency is directed to exempt the Appellant from work activities until such time as a proper determination of the Appellant's employability is made, and notice of such determination is sent to the Appellant as required by 18 NYCRR 358-3.3(a)(2)(vii).

2. The Agency is also directed to withdraw its Notice of Intent dated January 23, 1998 to reduce the Appellant's Public Assistance and Food Stamp benefits and to restore all assistance and benefits lost by the Appellant as a result of such determination.

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

DATED: Albany, New York
July 27, 1998

NEW YORK STATE DEPARTMENT
OF LABOR

By Steven J. Bilmes

Commissioner's Designee