STATE OF NEW YORK
OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE

REQUEST August 16, 1994
and May 17, 2001
CASE #
CENTER # 53
FH # 2168102J
3521896L

In the Matter of the Appeal of :

K L. S

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 July 15, 2003, in New York City, before Glenn E. Harris, Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant

Eugene Doyle, Appellant's Representative

For the Social Services Agency

Valerie Dolvin-Joseph, Fair Hearing Representative;
Aronda Watson, Fair Hearing Representative

ISSUES

Has the Agency acted correctly with respect to its July 29, 1994 determination to reduce the Appellant's Public Assistance benefits?

Has the Agency acted correctly with respect to its August 5, 1994 determination to reduce the Appellant's Public Assistance and discontinue the Appellant's Medical Assistance benefits?

Was the determination of the Agency to discontinue the Appellant's Medical Assistance benefits without notice effective August 8, 1994 correct?

Was the Appellant's request for a fair hearing to review the Agency's March 16, 2001 determination to discontinue the Appellant's Public Assistance, Medical Assistance and Food Stamp benefits timely?

Assuming the request was timely, has the Agency acted correctly with respect to its March 16, 2001 determination to discontinue the Appellant's Public Assistance, Medical Assistance and Food Stamp benefits?

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, Medical Assistance and Food Stamp benefits.

2. On July 29, 1994, the Agency sent a Notice of Intent to the Appellant setting forth its intention to reduce the Appellant's Public Assistance benefits because Appellant received an overpayment of assistance in the amount of $16,977.10.

3. On August 5, 1994, the Agency sent a Notice of Intent to the Appellant setting forth its intention to reduce the Appellant's Public Assistance benefits and discontinue the Appellant's Medical Assistance benefits because Appellant failed to comply with child support enforcement requirements.

4. Effective August 8, 1994, the Agency discontinued the Appellant's Medical Assistance benefits, without notice.

5. On March 16, 2001, the Agency sent a Notice of Intent to the Appellant setting forth its intention to discontinue Appellant's Public Assistance, Medical Assistance and Food Stamp benefits because Appellant failed to report to a face to face recertification appointment.

6. On August 16, 1994, the Appellant requested a hearing to review the Agency's determination.

7. On May 22, 2001, which was more than five business days before the hearing, the Appellant requested that the Agency provide copies of documents which it intended to present at the fair hearing in support of its March 16, 2001 determination and copies of documents which the Appellant specifically identified as necessary in order to prepare for the hearing but the Agency did not provide such documents to the Appellant.

APPLICABLE LAW

A party to a hearing may make a request to a hearing officer that the hearing officer remove himself from presiding at the hearing. The grounds for removing a hearing officer are that such hearing officer has: previously dealt in any way with the substance of the matter which is the subject of the hearing except in the capacity of hearing officer; or, any interest in the matter, financial or otherwise, direct or indirect, which will impair the independent judgment of the hearing officer; or, displayed bias or partiality to any party to the hearing. The request for removal made by a

party must be made in good faith; and, be made at the hearing in writing or orally on the record; and, describe in detail the grounds for requesting that the hearing officer be removed. 18 NYCRR 358-5.6(c).

Regulations at 18 NYCRR 358-3.7(a) provide that an appellant has the right to examine the contents of the case record at the fair hearing. At the fair hearing, the agency is required to provide complete copies of its documentary evidence to the hearing officer. In addition, such documents must be provided to the appellant and appellant's authorized representative where such documents were not provided otherwise to the appellant or appellant's authorized representative in accordance with 18 NYCRR 358-3.7. 18 NYCRR 358-4.3(a). In addition, a representative of the agency must appear at the hearing along with the case record and a written summary of the case and be prepared to present evidence in support of its determination. 18 NYCRR 358-4.3(b). Except as otherwise established in law or regulation, in fair hearings concerning the discontinuance, reduction or suspension of Public Assistance, Medical Assistance, Food Stamp benefits or Services, the Agency must establish that its actions were correct. 18 NYCRR 358-5.9(a).

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.

Section 22 of the Social Services Law provides that applicants for and recipients of Public Assistance, Emergency Assistance to Needy Families with Children, Emergency Assistance for Aged, Blind and Disabled Persons, Veteran Assistance, Medical Assistance and for any services authorized or required to be made available in the geographic area where the person resides must request a fair hearing within sixty days after the date of the action or failure to act complained of. In addition, any person aggrieved by the decision of a social services official to remove a child from an institution or family home may request a hearing within sixty days. Persons may request a fair hearing on any action of the social services district relating to food stamp benefits or the loss of food stamp benefits which occurred in the ninety days preceding the request for a hearing. Such action may include a denial of a request for restoration of any benefits lost more than ninety days but less than one year prior to the request. In addition, at any time within the period for which a person is certified to receive food stamp benefits, such person may request a fair hearing to dispute the current level of benefits.

Regulations at 18 NYCRR 358-3.7(b), which summarize an Appellant's rights regarding examination of a case record before the hearing, provide as follows:

(1) Upon request, you have a right to be provided at a reasonable time before the date of the hearing, at no charge, with copies of all documents which the social services agency will present at the fair hearing in support of its determination. If the request for copies of documents which the social services agency will present at the hearing is made less than five business days before the hearing, the social services agency must provide you with such copies no later than at the time of the hearing. If you or your representative request that such documents be mailed, such documents must be mailed within a reasonable time from the date of the request; provided however, if there is insufficient time for such documents to be mailed and received before the scheduled date of the hearing such documents may be presented at the hearing instead of being mailed;

(2) Upon request, you have the right to be provided at a reasonable time before the date of the hearing, at no charge, with copies of any additional documents which you identify and request for purposes of preparing for your fair hearing. If the request for copies of documents is made less than five business days before the hearing, the social services agency must provide you with such copies no later than at the time of the hearing. If you or your representative request that such documents be mailed, such documents must be mailed within a reasonable time from the date of the request; provided however, if

there is insufficient time for such documents to be mailed and received before the scheduled date of the hearing such documents may be presented at the hearing instead of being mailed;

(3) Your request for copies of documents pursuant to paragraphs (1) and (2) of this subdivision may at your option be made in writing, or orally, including by telephone;

(4) If the social services agency fails to comply with the requirements of this subdivision the hearing officer may adjourn the case, allow a brief recess for the appellant to review the documents, preclude the introduction of the documents where a delay would be prejudicial to the appellant, or take other appropriate action to ensure that the appellant is not harmed by the agency's failure to comply with these requirements.

Pursuant to the judgment entered in the case of Rivera v. Bane on December 22, 1995, the New York City Human Resources Administration (HRA) is required to "provide within three business days, at no charge and by first class mail, to all public assistance fair hearing appellants or their authorized representatives, upon request, either by telephone or in writing, a copy of the evidence package and copies of any other specifically identified documents from the appellant's case record that are requested to prepare for the fair hearing. If any such request for evidence packages or specifically identified documents is made less than five business days before the scheduled State administrative fair hearing, [HRA must] provide fair hearing appellants or their authorized representatives with such documents within three business days of the request or at the time of the scheduled hearing." The judgment requires that HRA withdraw its notice "whenever it fails to provide any individual or his or her representative, upon request and at no charge, with copies of documents that the HRA will present into evidence at the fair hearing, and any other specifically identified documents from an individual's case record within three business days of the request when the request is made more than five days before the fair hearing."

18 NYCRR 358-3.9(a) states that an organization or an individual other than an attorney or employee of a law firm must have written authorization to represent an Appellant in any conference or fair hearing and to review the Appellant's case record. An employee of an attorney will be considered an authorized representative if such employee presents written authorization from your attorney or if such attorney advises the social services agency by telephone of such employee's authorization. There is no requirement that an attorney provide written authorization to represent an Appellant in a fair hearing.

Once a social services agency and the department have been notified that a person or organization has been authorized to represent an Appellant at a fair hearing, such representative will receive copies of all correspondence from the social services agency and the department relating to the conference and fair hearing. 18 NYCRR 358-3.9(b)

DISCUSSION

At the hearing, the Agency representative requested that the hearing officer presiding over the hearing recuse himself. The Agency representative stated that the Administrative Law Judge engaged in ex-parte communications with the Appellant's representative prior to the instant fair hearing. The Agency representative alleged that this act displayed bias and partiality.

Regarding the Agency representative's request that the Administrative Law Judge remove himself from conducting the hearing, a review of the record of the hearing reveals no grounds to justify such removal. At the hearing, it was established that the Administrative Law Judge had not previously dealt in any way with the substance of the matter which was the subject of the hearing, except possibly in his capacity as a hearing officer; that the hearing officer did not have any interest in the matter that would impair his independent judgment; and that the hearing officer had not displayed bias or impartiality to any party to the hearing. Further, it was explained on the record at the fair hearing, that the Administrative Law Judge's communications with the Appellant's representative in no way related to the merits of the case. Therefore, the request for recusal was properly denied.

The Agency also contended that the Appellant's representative was not authorized to represent the Appellant. The Agency contended that the Appellant's written authorization was not valid because it was dated October 1, 1998 and was therefore too old to be considered valid. The Regulations state that organizations or individuals other than attorneys must have written authorization to represent an Appellant in a fair hearing. The determination of whether an authorization to represent an Appellant is valid is within the discretion of the presiding Administrative Law Judge.

There is nothing in the Regulations which would support the Agency's contention that the authorizations are no longer valid based on their age. The record contains two executed authorizations, from 1992 and 1998. These authorizations state that they are valid until revoked in writing. Nothing in the record indicates that these authorizations were revoked by the Appellant. Therefore, it is found that the Appellant's Representative was authorized to represent the Appellant in accordance with the requirements of the Regulations.

The evidence establishes that the Agency sent a Notice of Intent to the Appellant, dated July 29, 1994, advising the Appellant that it had determined to reduce the Appellant's Public Assistance benefits because Appellant received an overpayment of assistance.

The evidence further establishes that the Agency sent a Notice of Intent to the Appellant, dated August 5, 1994, advising the Appellant that it had determined to reduce the Appellant's Public Assistance benefits and discontinue the Appellant's Medical Assistance benefits because Appellant failed to comply with child support enforcement requirements.

The Agency was duly notified of the time and place of the hearing. The Agency appeared at the hearing, but failed to present any documentation concerning the July 29, 1994 and the August 5, 1994 determinations. The Agency requested that this hearing be adjourned because the records were not available. The Agency further contended that they were not obligated to retain such records because they were more than six years old. The Agency's ground for requesting an adjournment and the explanation for not producing the relevant case record are without merit for the following reasons.

First, the Agency Representative stated that, even if the hearing was adjourned, the Agency could not produce the relevant records. There is nothing to be gained by adjourning a hearing in order to obtain records which cannot be produced.

Second, the Agency is required to "provide complete copies of its documentary evidence to the hearing and to the appellant or appellant's authorized representative, where such documents were not provided previously. . ." 18 NYCRR 358-4.3(a). Except as provided in the Regulations, "a representative of the social services agency must appear at the hearing along with the case record and a written summary of the case." 18 NYCRR 358-4.3(b) Such representative must "be prepared to submit evidence in support of the action." 18 NYCRR 358-4.3(b)(2) Such documentation includes:

> (iv) the determination regarding which the hearing request was made.
>
> (v) a brief description of the facts, evidence and reasons supporting such determination, including identification of the specific provisions of law, department regulations and approved local policies which support the action.
>
> (vii) a copy of the applicable action taken notice, adverse action notice, expiration notice or notice of action, including any notices produced on the Client Notices System(CNS) when that system is operational.

In a fair hearing concerning the discontinuance or reduction of Public Assistance, Medical Assistance, and Food Stamp benefits, the Agency has the burden of proving that its actions were correct. 18 NYCRR 358-5.9.

The Appellant requested a hearing on the July 29, 1994 and August 5, 1994 determinations on August 16, 1994. The Agency therefore knew that a hearing was pending on these issues. The hearing request related to such actions had never been withdrawn or deemed abandoned at any time since the request for hearing was filed.

The Agency failed to meet its obligations under 18 NYCRR 358-4.3(b) and failed to establish that its determinations were correct pursuant to 18 NYCRR 358-5.9(a). Therefore neither the July 29, 1994 or August 5, 1994 determination can be sustained.

The Appellant also requested this hearing on the grounds that the Agency, without sending any notice, discontinued the Appellant's Medical Assistance benefits effective August 8, 1994 (prior to the effective date of the August 5, 1994 determination to do so). The Agency was duly advised of the time and place of the hearing, and failed to present any evidence which would rebut the Appellant's contention. The Agency's failure to give notice of its proposed actions violates 18 NYCRR 358-3.3(a)

The evidence establishes that the Agency sent a Notice of Intent to the Appellant dated March 16, 2001, advising the Appellant that it had determined to discontinue the Appellant's Public Assistance, Medical Assistance and Food Stamp benefits because Appellant failed to report to a face to face recertification appointment. The Appellant requested a hearing to review the Agency's determination on May 17, 2001.

The Agency contended that the Commissioner was without jurisdiction to review this determination because the Appellant failed to request a hearing in a timely fashion.

With respect to the Appellant's Public Assistance and Medical Assistance benefits, the Appellant's Representative stated that the Appellant had not received the Notice of Intent. The Agency failed to present any evidence which would establish that the March 16, 2001 Notice was mailed in the ordinary course of business. Since the Agency has not established that the notice was mailed to the Appellant, there is no legal basis for presuming that it was received by the Appellant. In the absence of any evidence which would contradict the Appellant's contention, the hearing request was found to be timely.

With respect to the Appellant's Food Stamp benefits, the statute of limitations for requesting a hearing is ninety days. Therefore, this request for hearing was timely.

On May 22, 2001, which was more than five days prior to the scheduled date of this fair hearing, the Appellant requested, in accordance with the above provisions of Section 358-3.7(b), that the Agency provide copies of documents which it intended to present at the fair hearing in support of its determination and copies of documents which the Appellant specifically identified as necessary in order to prepare for the hearing. The Agency did not provide such documents to the Appellant.

At the hearing, the Agency did not withdraw its March 16, 2001 Notice of Intent to discontinue Appellant's Public Assistance, Medical Assistance and Food Stamp benefits as required by the judgment in the case of Rivera v. Bane. Accordingly, the question of the correctness of the Agency's March 16, 2001 determination to discontinue Appellant's Public Assistance, Medical Assistance and Food Stamp benefits cannot be reached in this case.

DECISION AND ORDER

The determination of the Agency to reduce the Appellant's Public Assistance benefits to recover an overpayment of assistance is not correct and is reversed.

1. The Agency is directed to withdraw its Notice of Intent dated July 29, 1994 with respect to Appellant's Public Assistance benefits.

2. The Agency is directed to continue to provide Public Assistance benefits to the Appellant.

3. The Agency is directed to restore Appellant's Public Assistance benefits retroactive to the date of the Agency action.

Should the Agency in the future determine to implement its previous action, it is directed to procure and review the Appellant's case record with respect to a determination relating to the Appellant's Public Assistance benefits, and to issue a new Notice of Intent and to produce the required case record(s) at any subsequent fair hearing.

The determination of the Agency to reduce the Appellant's Public Assistance and discontinue the Appellant's Medical Assistance benefits is not correct and is reversed.

1. The Agency is directed to withdraw its Notice of Intent dated August 5, 1994 with respect to Appellant's Public Assistance and Medical Assistance benefits.

2. The Agency is directed to continue to provide Public Assistance benefits to the Appellant.

3. The Agency is directed to restore Appellant's Public Assistance and Medical Assistance benefits retroactive to the date of the Agency action.

Should the Agency in the future determine to implement its previous action, it is directed to procure and review the Appellant's case record with respect to a determination relating to the Appellant's Medical Assistance benefits, and to issue a new Notice of Intent and to produce the required case record(s) at any subsequent fair hearing.

The determination of the Agency to discontinue the Appellant's Medical Assistance benefits without notice is not correct and is reversed.

1. The Agency is directed to restore the Appellant's Medical Assistance benefits retroactive to the date such benefits were discontinued.

2. Should the Agency in the future determine to implement its previous action with respect to the Appellant's Medical Assistance benefits, it is directed to issue a timely and adequate Notice of Intent.

The question of the correctness of the Agency's determination to discontinue Appellant's Public Assistance, Medical Assistance and Food Stamp benefits, by notice dated March 16, 2001 cannot be reached in this case.

1. The Agency is directed to withdraw its Notice of Intent dated March 16, 2001 with respect to Appellant's Public Assistance, Medical Assistance and Food Stamp benefits.

2. The Agency is directed to continue to provide Public Assistance, Medical Assistance and Food Stamp benefits to the Appellant.

3. The Agency is directed to restore Appellant's Public Assistance, Medical Assistance and Food Stamp benefits retroactive to the date of the Agency action.

Should the Agency in the future determine to implement its previous action, it is directed to issue a new Notice of Intent and, in the event that the Appellant requests a fair hearing to review such determination, to comply with the requirements contained in 18 NYCRR 358-3.7(b) concerning the timely provision of documents.

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

DATED: Albany, New York
October 1, 2003

NEW YORK STATE OFFICE OF
TEMPORARY AND DISABILITY ASSISTANCE

By

Sebastian Addamo
Commissioner's Designee