N.Y.L.J. October 15, 1993

SUMMARY **New York County**

Class Action Status Is Denied; Matter Referred to Special Referee

IN AN ARTICLE 78 proceeding and an action for declaratory relief, petitioners sought, among other things, class action status for public assistance applicants or recipients in the city who were denied access to their Human Resources Administration records when they sought a Department of Social Services fair hearing. The court referred the action to a special referee and held that telling the agencies to inform applicants of their rights to records would have the same effect as a class action.

★ *Rivera v. Bane, Supreme Court, IA Part 18, Justice D. Saxe (p. 22, col. 1).*

IA PART 18

Justice D. Saxe

★ RIVERA v. BANE—In this combined Article 78 proceeding and action for declaratory relief, the petitioners challenge policies and procedures of the New York State Department of Social Services and the New York City Human Resources Administration, alleging that those agencies consistently fail to provide public assistance applicants with the access required by law to public assistance case records.

In motion sequence 002, petitioners seek an order determining that this action may be maintained as a class action on behalf of all applicants for and recipients of public assistance in the City of New York who have requested a fair hearing from respondent New York State Department of Social Services ("DSS"), but who, before the fair hearing, have been denied access to or copies of their case record by respondent New York City Human Resources Administration ("HRA"). Motion sequence 008 is request by petitioners for preliminary injunctive relief.

The Contentions of the Parties

This proceeding was originally brought on behalf of petitioner Jenny Rivera in December 1992. By stipulation and order dated March 31, 1993, respondents consented to the intervention motions of Eileen Tyler, Olga Laker, Ida Kravitz and Patricia Taylor.

Petitioner Jenny Rivera is a recipient of AFDC benefits and food stamps. On or about October 14, 1992, her AFDC benefits and food stamps allotment were reduced. The only notification Rivera received of a change in her benefits was a written notice from HRA on or about October 1, 1992 advising her that her food stamp allotment was being increased. Petitioner alleges that although the October 1, 1992 notice advised her of her rights to see the entire contents of her case file, the notice did not state who she should call or write in order to have a copy of case file documents mailed to her or that she has the right to obtain copies of the documents HRA plans on submitting at the fair hearing.

On October 14, 1992, petitioner's representative requested from DSS a fair hearing to contest HRA's reduction of her benefits. On November 4, 1992, DSS sent petitioner a notice advising that her fair hearing had been scheduled for November 18, 1992. This notice states:

5) If you want to review your case record, contact your local Social Services department for instructions. While you may examine your case record at a fair hearing, if you believe that the information in your case record may be helpful to you at your hearing, we recommend that you review it before your hearing date. Hearings will not be adjourned for the purposes of reviewing your record unless you have made such a request. You do not have to request a fair hearing in order to review your case record. Any denial of review or access to your case records should be brought to the attention of the Administrative Law Judge.

6) You have the right upon request to obtain copies of documents which the agency will present at the hearing as well as copies of other documents you need for your hearing at no cost. *The documents will not be sent to you unless you make a specific request for them.* Failure of the agency to provide you with such copies should be brought to the attention of the Administrative Law Judge. (Emphasis in original).

On November 10, 1992, petitioner spoke to her HRA caseworker and requested that she forward a copy of petitioner's complete case file to her counsel. The caseworker told petitioner that HRA would not send copies of any documents either" to petitioner or her attorney, but that they would have to review the case file at the HRA public assistance center. On November 13, 1992, petitioner's counsel contacted DSS and requested an adjournment of petitioner's fair hearing, scheduled for November 18, 1992, because of HRA'S failure to provide petitioner with copies of her case file documentation.

Also on November 18, 1992, petitioner's counsel requested, by telephone, that HRA mail her office a complete copy of petitioner's case file and the documents HRA planned on submitting at the DSS fair hearing. The caseworker responded by saying that HRA never mails copies of any case file documentation or the evidence HRA plans on submitting at the fair hearings either to clients or their attorneys and that this information can only be reviewed in person at the HRA public assistance center under the supervision of an HRA employee.

Petitioner Patricia Taylor received no notice that HRA was reducing her grant from $535.20 per month to $466.40 per month but because she suspected that her grant had been reduced improperly, she requested a fair hearing from DSS. She then received a hearing notice, similar to that received by petitioner Rivera, scheduling her hearing for January 25, 1993. Thereafter, petitioner Tyler attempted on four separate occasions to obtain access to her case record at HRA's income support center #48, but each time she was refused access. She then consulted a legal services attorney who called the center on her behalf and requested copies of the documents that HRA would introduce at the fair hearing and other documents. Her attorney was also refused the documents. On January 25, 1993, her fair hearing was held, at which time HRA requested an adjournment over Ms. Tyler's objection. The DSS administrative law judge granted the request without directing that HRA cease its reduction of petitioner Tyler's public assistance grant.

Petitioners Eileen Tyler and Olga Laker are both recipients of Medicaid and home care benefits from HRA. In the fall of 1992, both petitioners received a "Notice of Intent to Discontinue Medical Assistance" from HRA. This notice informed the petitioners of the following:

Upon your request, you have the right to free copies of documents which we will present into evidence at the fair hearing. Also, upon request, you have the right to free copies of other documents from your case record which you need for your fair hearing. To request such document or to find out how you may review your case record, call (212) 790-3517 or send a written request to Medical Assistance Program (MAP) Conference Unit, 330 West 34th Street, New York, NY 10001.

On behalf of both petitioners Tyler and Laker, Yisroel Schulman, Attorney-in-Charge of the New York Legal Assistance Group, duly requested fair hearings to contest the discontinuance of coverage. In addition, Mr. Schulman attempted to call the telephone information number provided in the above notice on four separate days but got a continuous busy signal from 8:30 a.m. to 6: p.m. Mr. Schulman also sent via certified return receipt mail a letter to the address listed in the above notice requesting:

1) copy of all documents from the past year in [petitioner's] Medicaid eligibility case file; and 2) copies of all documentation which the Agency plans to place into evidence at [petitioner's] upcoming fair hearing.

Included with the letter was an original authorization signed by the petitioners permitting Mr. Schulman to obtain copies of the requested documents. HRA has allegedly denied and/or ignored these requests.

On or about November 2, 1992, petitioner Ida Kravitz received a "Notice of Decision of Initial Authorization of Home Care Services" indicating that she had been approved for daily home care services. Admittedly this notice advised petitioner Kravitz of the right to review her case record, to request free copies of documents that HRA will present into evidence at the fair hearing, and to request other documents from the case record that she needs for her hearing. However, the notice made no mention of her right to receive the documents by mail, and even worse, the spaces in which the telephone number and address for her to call or write to request the documents were left blank, as were the spaces for calling or writing to obtain additional information about her case, to gain access to her case record, and/or additional copies of documents. Although petitioner Kravitz wrote "I hereby request access to all listed here" next to the pertinent paragraph and returned the form to DSS's fair hearing section, she has not received any of the documents.

In addition, petitioners have submitted affidavits from various legal services organizations documenting HRA's refusal and/or failure to provide applicants for, and recipients of, public assistance with access to their case record and copies of documents located therein. Petitioners contend that the situation is especially egregious when the individual does not have the benefit of counsel, which is the case in 90 percent of all fair hearings.

Petitioners seek an order requiring respondents to provide all applicants for, and recipients of, public assistance with: (a) access to their case records; (b) the right to timely receive, at no charge and by mail, all documents that HRA will use at the fair hearing; (c) the right to timely receive, at no charge and by mail, any other documents from the case record that are requested to prepare for the fair hearing; (d) notices that adequately set forth these rights regarding access to case records and obtaining copies of documents; and (e) notices which contain an address and a telephone number where they can obtain additional infornation about their case, how to obtain a fair hearing, access to case records and obtaining copies of documents. Petitioners also seek an order requiring HRA to withdraw a notice whenever an applicant for, or recipient of, public assistance is denied any of the above rights. Finally, petitioners seek damages and an award of costs and fees, including attorneys fees.

Respondent HRA denies the petitioners' allegations. It contends that HRA's Division of Liaison and adjustment is the division which has the responsibility for providing appellants with documents from their case file and for responding to an appellant's request for documents by mail. It denies that it has a policy of prohibiting access to case records and that any of its notices are inadequate. Furthermore, respondents contend that the petitioners have an adequate remedy at law because they may raise the alleged failure of HRA to provide them with the requested documents at the fair hearing.

With respect to petitioner Rivera, HRA contends that sometime after petitioner's public assistance grant was adjusted to reflect her move into public housing, petitioner's counsel contacted petitioner's caseworker and requested a copy of petitioner's entire case file. In response, the caseworker advised petitioner's counsel that she is not authorized to release case records and advised petitioner's counsel to contact HRA's Division of Liaison and Adjustments. HRA points out that petitioner Rivera does not allege that she ever did this or attempted to review her case file at the HRA public assistance center. Furthermore, petitioner has not alleged that she has been required to proceed to a fair hearing before DSS without the requested documents.

With respect to the allegations of petitioner Tayler, HRA contends that her attorney, not HRA, requested an adjournment of the January 25, 1993 hearing. The hearing was held on February 24, 1993, at which time petitioner Tyler prevailed by decision dated April 4, 1993.

The Fair Hearinq Process and Access to Records

In New York, DSS is the state agency that supervises the administration of all public assistance, i.e., Aid to Families with Dependent Children ("AFDC"), Medicaid, food stamps, and home relief. The daily administration of public assistance in New York State is vested in social services districts. The City of New York constitutes a social services district. HRA is the agency responsible for the day-to-day administration of all public assistance in the City of New York.

Under federal and state law, applicants for and recipients of public assistance must be provided with an opportunity for a "fair hearing" to challenge determinations relating to their public assistance. In New York State, applicants and recipients may appeal to DSS from decision of social service officials. DSS must review the case and give the applicant or recipient who seeks an appeal — that is, an appellant — an opportunity for a fair hearing.

DSS regulations require that social services districts maintain a case record for each application for, and case of, public assistance (18 NYCRR §354.1[b]). DSS regulations, in accordance with federal law, provide that the appellant or her authorized representative has the right, at any reasonable time before the fair hearing and also at the fair hearing, to examine the contents of her case record and all documents and records to be used by the social services agency at the fair hearing (18 NYCRR §358-3.7[a][1].

In addition, subdivision (b)(1) of Part 358-3.7 of DSS's regulations provide that, upon request, the appellant or her representative has the right to be provided, at no charge, with copies of all documents that the "agency will present at the fair hearing in support of its determination" (18 NYCRR §358-3.7[b][1]; see also, 18 NYCRR §358-4.2[c]). Subdivision (b)(1) provides that the appellant or her representative has the right to be provided "with copies of any additional documents which you request for purposes of preparing for your fair hearing" (see also, 18 NYCRR §358-3.7[b][3]). If the request is made less than five business days before the hearing, the agency must provide the copies within three days of the request or at the time of the hearing, whichever is earlier (18 NYCRR §358-7[b][1][2]). Otherwise the documents must be provided within three business days of the request (18 NYCRR §358-3.7[b][1][2]). The appellant has the option to have the requested documents mailed to her within the state time periods (18 NYCRR §358-3.7[b][1][2][4]; 18 NYCRR §358-4.2[c][d]).

Statutory Provisions and Reglations Relatingto Notice

Social Services Law §22(12)(e) provides that every appellant shall be informed, in writing, through the distribution of an informational pamphlet, at the time of the application and at the time of any action affecting her receipt of assistance, of the nature of the procedures to be followed throughout an appeal or fair hearing. In addition, the appellant must be informed of "any additional information which would clarify the appeals or fair hearings procedure. and would assist such persons in more adequate preparation for such hearings" (Social Services Law §22[e][g]).

In addition, the notices that must be sent whenever state and local agencies take action relating to an appellant's public' assistance benefits must be "adequate" (18 NYCRR §358-3.3). An adequate notice must set forth:

the right of the [appellant] to review the [appellant's] case record and to obtain copies of documents which the agency will present into evidence at the hearing and other documents necessary for the [appellant] to prepare for the fair hearing at no cost. The notice must contain an address and telephone number where the [appellant] can obtain additional information about: the [appellant's] case; how to request a fair hearing; access to the case file; and/or obtaining copies of documents (18 NYCRR §358-2.2[9]).

A Hearing is Necessary to Resolve The Disputed Issues of Face

An action may be maintained under CPLR 7803 where it is alleged that a governmental body or officer has failed to perform a duty enjoined upon it by law. If a triable issue of fact is raised by the pleadings, the court shall hold a hearing forthwith (CPLR 7804[h]).

At the outset, the court notes that although petitioner Rivera does not allege that she or her counsel were denied the right to examine her case record at the HRA public assistance center as required by 18 NYCRR §35803.7(a)(1), petitioner Tyler was allegedly denied this right on four separate occasions. However, factual issues common to all five petitioners include the adequacy of notices issued by DSS and HRA and the alleged failure of DSS and HRA to ensure that public assistance appellants receive, by mail, copies of documents in their case file as required by DSS regulations.

Accordingly, all factual issues raised by the pleadings will be severed and referred to a Special Referee to determine if HRA does indeed, as petitioners claim, routinely deny requests for access to, and copies of, documents from their case records, especially when made by appellants who are not represented by counsel. The Referee will also hear evidence on the practicality and expense to the public of photocopying entire case records and the inconvenience or impracticality involved in requiring appellants to make a prior review of the case record and to designate relevant documents for copying.

Class Certification

Petitioners seek an order determining that this action may be maintained as a class action on behalf of all applicants for and recipients of public assistance in the City of New York who have requested a fair hearing from DSS, but who, before the fair hearing, have been denied access to or copies of their case record by respondent HRA.

CPLR 901 lists five requirements which are prerequisite for certification of a class action. Respondents' objections to class certification focus on the fifth requirement, which is, that a class action is superior to other available methods for fair and efficient adjudication of the controversy (CPLR 901[a][5]).

It is settled law that the maintenance of a class action case is ordinarily not necessary in a situation where governmental operations are involved and future petitioners may rely on the determination and will be adequately protected under the principles of stare decisis (Bryant Avenue Tenants' Association v. Koch, 71 NY2d 856

[1988]; Martin v. Levine, 39 NY2d 72 [1976]; Jones v. Berman, 37 NY2d 42 [1975]; Matter of Rivera v. Trimarco, 36 NY2d 747 [1975]). The reason for this rule is that "a governmental body, once directed to act in a certain fashion, should treat all citizens equally and thus it would be sufficient to determine the issues posed without incurring the administrative problems of a class action" (2 Weinstein-Korn-Miller, NY Civ Prac 901.20; see also, Martin, 39 NY2d at 75, supra).

The presumption of superiority may and has been overcome in certain situations. Class action certification has been allowed in cases where the proposed class members are elderly individuals with a limited ability to bring separate actions (Tindell v. Koch, 164 AD2d 689 [1st Dept 1991]; Kunnersmith v. Perales, Sup Ct NY Co 5/11/87, Index No. 4042/86, affd 145 AD2d 1005 [1st Dept 1988]). In addition, courts have certified class actions where there has been a showing that the governmental entity will not abide by the principles of stare decisis and will continue the challenged practice (Lamboy v. Gross, 126 AD2d 265 1st Dept 1987]; Eisenstark v. Anker, 64 AD2d 924 [2nd Dept 1978]).[1]

Petitioners' argument that the governmental operations rule should not apply here is based on their assertion that the class in this case encompasses individuals who lack sufficient access to the courts to avail themselves of the stare decisis effect of a favorable determination. It is alleged that many class members are elderly, infirm, disadvantaged, incompetent and not mobile.

In Kuppersmith v. Perales, supra, the First Department upheld, without opinion, a lower court decision granting class certification to Medicaid recipients eligible for home care services. The class consisted of elderly individuals whose physical condition had deteriorated to such a severe degree that they required personal care services at home. Unlike the proposed class members here, the home care recipients in Kuppersmith presented such an extreme case that the court found their situation to constitute an exception to the government operations rule.

Tindell v. Koch (164 AD2d 689, supra), involved the grant of class certification to senior citizens residing in rent stabilized apartments in New York City who were eligible for rent increase exemptions. However, class action certification was only granted with respect to the third cause of action which dealt with the defendants' method of calculating the amount of the exemption. Class action certification was specifically denied with respect to the fourth cause of action which alleged that the defendants have failed to adequately reach out to the senior citizen community and publicize the program. As to this claim for injunctive relief, the First Department stated that:

A direction that the defendants adequately inform the senior citizen community of the SCRIE program and assist them in making their applications in an individual case, will have the same effect as a similar direction in a class action as there will be no need for any action on the part of the members of the proposed class to obtain the benefit of the stare decisis effect of such a direction.

(164 AD2d at 695-696, supra). There can be no doubt that the members of petitioners' proposed class are indigent, disadvantaged individuals, many of whom are elderly, i.e., petitioner Kravitz, for whom the commencement of individual actions would be "oppressively burdensome." However, here, as in the Tindell case, a direction that the respondents adequately inform public assistance appellants of their rights regarding access to, and copies of documents in, their case record and a direction that HRA institute a policy of complying with such requests will have the same effect as a class action.

Petitioners also contend that it is unclear that the doctrine of stare decisis will be observed by the agencies involved here. The burden of demonstrating that the governmental respondents will not comply falls upon the class proponent (McCain v. Koch, 117 AD2d 198 [1st Dept 1986]). Here the record contains no evidence that DSS or HRA have wilfully failed to comply with any court orders regarding access to case records maintained by HRA by public assistance recipients or their representatives nor that they will not abide by any rulings issued in this action. Likewise, there is no support for petitioners' contention that the respondents could provide the named petitioners with the relief sought before this court could issue a ruling with stare decisis effect.

Accordingly, petitioners' motion (#002) for class certification is denied.

Preliminary Injunctive Relief

Petitioners seek a preliminary injunction: (1) requiring HRA to provide all current and future individuals who have fair hearings pending before DSS with an "adequate" notice as that term is described above; (2) requiring HRA to withdraw the HRA's notice whenever HRA fails to provide any individual or her representative with access to her case record and copies of requested documents; (3) requiring DSS to supervise HRA and enforce DSS regulations regarding an individual's right to access her case record and receive copies of requested documents; and (4) requiring DSS to supervise and enforce DSS regulations relating to the content of HRA's notices.

The petitioners' burden on this application for a preliminary injunction includes demonstrating (1) a likelihood of success on the merits; (2) irreparable harm absent the grant of injunctive relief; and (3) a balance of equities in their favor (Aetna Insurance Co. v. Canasso, 75 NY2d 860, 862 [1990]; W.T. Grant v. Srogi, 52 NY2d 496, 517 [1981]). With respect to the first requirement, the moving party is required to show a clear right to the relief sought on the basis of undisputed facts (Schneider Leasing Plus v. Stallone, 172 AD2d 739, 740 [2nd Dept 1991]; appeal dismissed, 76 NY2d 1043; Bizar v. Ohrenstein, 119 AD2d 445, 446 [1st Dept 1986]). Where important material facts are sharply disputed, a preliminary injunction will not be granted (Somers Associates, Inc. v. Corvino, 156 AD2d 218, 219 [1st Dept 1989]). As noted above, respondents have disputed the allegations of the petitioners. While petitioners have presented credible affidavit and documentary evidence of respondents' disregard of the duties imposed upon it by Part 358 of DSS's regulations, a hearing is necessary to resolve the factual disagreements of the parties.

Nor have the petitioners shown irreparable harm absent the granting of the injunctive relief sought. While petitioner Rivera may have been denied her right to receive copies of documents from her case record by mail, she has not been denied the opportunity to examine her case record at the appropriate HRA center. Although petitioner Taylor was forced to accept a reduced public assistance grant pending the adjournment of her fair hearing from January to February 1992, it was ultimately determined that the reduction was improper and thus she is not receiving less than which she is entitled. With respect to petitioner Kravitz, it is admitted that she has not been harmed because she is continuing to receive aid pending her fair hearing and no allegations of irreparable harm has been made with respect to the other named petitioners. Furthermore, in all instances, the failure to gain access to a case record may be brought to the attention of the Administrative Law Judge and an adjournment will be granted.

Preliminary injunctive relief is also inappropriate inasmuch as it would grant to petitioners the ultimate relief they seek (Sportschannel America Associates v. National Hockey League, 186 AD2d 417 [1st Dept 1992]). "Preliminary injunctions which in effect determine the litigation and give the same relief which is expected to be obtained by the final judgment, if granted at all, are granted with great necessity, and upon clearest evidence, as where the undisputed facts are such that without an injunction order a trial will be futile" (Xerox Corp. v. Neises, 31 AD2d 195, 197 [1st Dept 1968]).

For the foregoing reasons, petitioners' motion for a preliminary injunction is denied.

Conclusion

Petitioners' motions for class certification (sequence #002) and a preliminary injunction (sequence #008) are hereby denied.

The following issues are severed and referred to the Legal Support Office for assignment to a Special Referee to hear and report with recommendations:

(1) Whether petitioner Taylor was denied the right to examine her case record at the HRA public assistance center in violation of 18 NYCRR §358-3.7(a)(1)?

(2) Whether respondent HRA has a policy of, or routinely denies or ignores, requests by pro se appellants or their authorized representatives for access to documents from the appellants' case records in violation of 18 NYCRR §358-3.7(a)(1)?

(3) Whether petitioner Rivera or her attorney made, by telephone, a proper request to be sent a complete copy of her case record and whether that request was denied or ignored by HRA in violation of 18 NYCRR §358, et seq?

(4) Whether the attorney for petitioners Tyler and Laker made a proper request in writing to receive copies of "all documents from the past year in [petitioner's] case file" and whether that request was denied or ignored by HRA in violation of 18 NYCRR §358, et seq?

(5) Whether petitioners Rivera, Taylor, Kravitz, Tyler, and Laker or their attorneys made a proper request, by telephone or in writing, to be sent copies of the documents HRA planned to admit at the 055 fair hearing and whether that request was denied or ignored by HRA in violation of 18 NYCRR §358, et seq?

(6) Whether respondent HRA has a policy of, or routinely denies or ignores, requests either by telephone or in writing, by pro se appellants or their authorized representatives, to be sent copies of the documents that HRA plans to submit at the appellant's fair hearing in violation of 18 NYCRR §358, et seq?

(7) Whether the telephone information number listed in the "Notice of Intent to Discontinue Medical Assistance" sent to petitioners Tyler and Laker— (212) 790-3515—was continuously busy on November 9, 1992, November 10, 1992, December 4; 1992, and December 7, 1992 and the reasons therefor?

(8) Whether respondents HRA and 055 are generally in compliance with the requirements of 18 NYCRR §358-3.3 which requires that whenever state and local agencies take action relating to appellant's public assistance benefits that an "adequate" notice be sent to the appellant as defined in 18 NYCRR §358-2.2(9)?

Pending receipt of the report and a motion pursuant to CPLR 4403, final determination of this special proceeding is held in abeyance.

A copy of the order with notice of entry shall be filed with the Legal Support Office, Room 311, for the purpose of obtaining a calendar date.

Settle order.