

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. B-08/17-419
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Appeal of)
)

INTRODUCTION

Petitioner appeals the calculation of a 3SquaresVT overpayment by the Vermont Department for Children and Families ("Department"). The following facts are adduced from a hearing held September 26, 2017, documents submitted therein, a status conference on November 28, and memoranda submitted by the parties, with the record closing on December 14, 2017.

FINDINGS OF FACT

1. Petitioner applied for 3SquaresVT for her household (including her partner and infant son) on March 10, 2016. On the application, she reported that both she and her partner earned income. For her partner, she listed a specific amount of income that he earned from employment every two weeks. For herself, she listed "IRR" (meaning irregular) income from her employer. Because her income was irregular, she did not list a specific amount of income.

2. As requested by the Department, petitioner subsequently (on March 24, 2016) submitted paystubs from her employer, with the understanding that this information would be used to arrive at an average income for the purposes of calculating her benefit.

3. Petitioner's household began receiving benefits based on her March application. However, unbeknownst to her, the Department had failed to count her income in the calculation of benefits.

4. On July 24, 2016, the Department mailed petitioner an Interim Report form, in order to verify her continuing eligibility. This form states at the top that "[t]his notice is to review your eligibility for continued assistance for Economic Services Division programs. In order for you to continue to receive benefits, we need to know *if there have been any changes* in your household's situation. . . For 3SquaresVT, *if your income has changed*, you must send proof of all income received in the last 30 days." (emphasis added)¹

¹ The form also states that "Reach Up and Reach Ahead participants must answer question #3 (Income) even if your income has not changed or you have no income." While - despite the Department's arguments - this language is not determinative, in any event petitioner's household was not a Reach Up participant.

5. The form also states, (boldface type in original):
**"Listed below is what you told us about your household.
Please tell us if anything has changed."** (emphasis added)

6. In the Interim Report's section on petitioner's income, which stated "[t]his is the information we have about your income," only her partner's income was listed - and underneath the listing of his income, the form asks "has income gone up or down?" Petitioner checked "no."

7. Further below, the form asks "[p]lease explain any change in the income your household receives." (emphasis added) Based on testimony from the Department's witness, as well as how the form is laid out, the opportunity to explain a change in income is intended to be (or reasonably appears to be) in direct response to the question of whether the income of the listed individual (in this case, petitioner's partner) has changed. Not included in the Interim Report form is any reference to petitioner's income, nor did petitioner re-report her income on the Interim Report form. Petitioner credibly indicates that she understood the form as requesting her to report "changes" to her income, and it did not occur to her to report the same income information that she had already reported (and which she understood to be averaged, in any event). As noted below, when petitioner

reapplied for 3SquaresVT in 2017, she again reported her income as requested in the application.

8. It is undisputed that the Department erroneously failed to include petitioner's income in the household's determination of benefits, following her March of 2016 application. It is furthermore determined that the failure to include this income in the Interim Report form was also in error, as an extension of that initial error. And, to the extent petitioner's failure to re-report her income on the Interim Report form may be construed as her error, this is inextricable from the fact that the form itself was erroneous.

9. Petitioner's household continued to receive 3SquaresVT benefits at the same level at least through January of 2017. In March of 2017, she reapplied and again reported that she was earning income. The eligibility and benefits determination of this application are not at issue.

10. However, in June of 2017, the Department became aware, through a wage match from the Department of Labor, that petitioner had earned income - in effect, the income she had reported but which had not been included by the Department - which may have resulted in an overpayment.

11. The Department initiated an investigation of petitioner and subsequently verified on July 11, 2017, that she had earned income in 2016 which resulted in an overpayment. The Department further alleged (at the time) that petitioner had committed an Intentional Program Violation, by intentionally withholding income information.

12. During the process of following up on this allegation, the Department became aware that petitioner had reported her income (as described above) when she applied in March of 2016. As a result, the Department withdrew its allegation that her overpayment concerned an Intentional Program Violation.

13. The Department maintained, however, the overpayment determination. Based on its policies, the Department looks back 12 months from the "date of discovery" of the overpayment, in order to calculate the period of overpayment. The Department initially determined that because the potential income (through the wage match) was reported on June 21, 2017, the period of overpayment started in June, 2016 (ending in January of 2017), but included the entire month of June (3SquaresVT benefits are typically disbursed on the 1st of the month).

14. The Department furthermore determined that the period of June 1, 2016 through August 31, 2016 was "agency error" and the period from September 1, 2016 through January 31, 2017 was "inadvertent household error" due to the fact that petitioner had not corrected the income listed on her Interim Report Form (filed on August 24, 2017).²

15. This appeal initially involved three issues: (1) what date the Department must consider the "date of discovery," (2) how far the Department may "look back" to determine the overpayment period, and (3) whether the period following petitioner's submission of the Interim Report should be considered agency error or inadvertent household error.

16. Following discussions with the parties and the hearing officer, the Department now agrees that the "date of discovery" of the overpayment is July 11, 2017, and that it must "look back" no further than July 11, 2016 to calculate the overpayment.³

² The nature of the error can determine how much of the overpayment can be "compromised" and potentially the inclusion of certain deductions in the overpayment calculation; thus, it can make a significant difference in the amount of the overpayment sought to be repaid.

³ This appears to amount to the same result sought by petitioner, if for slightly different reasons. If this amounts to a different result on remand of the appeal (as specified *infra*), petitioner is free to appeal and raise that issue.

17. The sole remaining question is whether the period of overpayment from September of 2016 through January of 2017 should be considered "agency error."

ORDER

The Department's decision is reversed and remanded consistent with this Order.

REASONS

Review of the Department's determination is de novo. The Department has the burden of proof at hearing if terminating or reducing existing benefits; otherwise the petitioner bears the burden. See Fair Hearing Rule 1000.3.0.4.

The Department is mandated by federal law to pursue overpayments of 3SquaresVT benefits, regardless of whether they are the result of agency error or household error. See 7 C.F.R. § 273.18. However, whether the overpayment is determined to be the result of agency error or household error can affect both calculation of the overpayment and how much the Department is allowed to "compromise" (or reduce) the overpayment. See 3SquaresVT Rules § 273.18e (Interpretive Memorandum dated 10/1/17).

The Department's procedures have a specific provision regarding "simultaneous errors":

[A] client error and an agency error occur at the same time and it is not possible to determine how much of the overpayment to attribute to each, consider the entire claim an agency error claim. If it is possible to attribute the amount of overpayment to each type of claim, establish two claims. If there is any doubt about whether the claim is agency or client, consider it an agency error claim.

3SquaresVT Procedures P-2540.B.1.a (emphasis added).

The Department here acknowledges its error in failing to incorporate petitioner's income at the outset, but places this error wholly on the petitioner following submission of her Interim Report form. This belies the inescapable conclusion that the form itself was erroneous, that - when coupled with petitioner's credible representation that she was reporting whether there had been any *changes* to the listed income, and it did not occur to her to re-report her income - at a minimum leaves doubt as to where the error should lie, and at best was a "simultaneous error" as to her benefits going forward from the Interim Report, with respect

to which - due to the inextricable nature of the errors - it is impossible to allocate between the agency and petitioner.⁴

For these reasons, the Department's determination of inadvertent household error is inconsistent with the rules and must be reversed, and remanded for a new overpayment determination consistent with the above. See 33 V.S.A. § 3091(d); Fair Hearing Rule No. 1000.4D.

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⁴ Left unaddressed and unnecessary to reach here is whether petitioner was obligated to re-report her income - as opposed to report new income or reduced income (i.e., "changes") - on the Interim Report form, and the related issue of whether she committed any error to begin with. The Department's procedures clearly call for a finding of agency error in cases where there is "any doubt" about who was at fault.