

STATE OF VERMONT

HUMAN SERVICES BOARD

In re ) Fair Hearing No. V-10/17-554  
 )  
Appeal of )  
 )

INTRODUCTION

Petitioner appeals a denial of reenrollment into the Senior Community Service Employment Program ("SCSEP") by the Department of Disabilities, Aging and Independent Living ("DAIL"). The following is based upon numerous filings of the parties, several telephone status conferences, and two evidentiary hearings, with the record closing on October 16, 2019. The Department filed a motion to dismiss for lack of HSB jurisdiction, which was granted in part and denied in part by the hearing officer.

FINDINGS OF FACT

1. Petitioner's appeal stems from events occurring in 2015, when she was a participant in the SCSEP, as administered by Vermont Associates for Training and Development ("VATD").

2. The SCSEP is a federally-funded program the purposes of which "are to foster individual economic self-

sufficiency and promote useful part-time opportunities in community service assignments for unemployed low-income persons who are 55 years of age or older, particularly persons who have poor employment prospects, and to increase the number of older persons who may enjoy the benefits of unsubsidized employment in both the public and private sectors.”<sup>1</sup> The ultimate purpose of the program is to enable participants to find or be prepared for unsubsidized employment.

3. Vermont has both a “state” and “national” SCSEP. Funding for the state SCSEP (through the U.S. Department of Labor) is received by DAIL and then granted to VATD to administer the program. Vermont’s national SCSEP is also administered by VATD as a direct sub-grantee of the U.S. Department of Labor.

4. Vermont has a state plan regarding the operation of both its SCSEP programs, which contemplates that the two programs “work as one to deliver services at the highest level of collaboration and mutual support.”<sup>2</sup>

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<sup>1</sup> 20 C.F.R. § 641.120.

<sup>2</sup>[https://dail.vermont.gov/sites/dail/files/documents/SCSEP\\_Modified\\_PY\\_2016-2019\\_Plan\\_4-04-18.pdf](https://dail.vermont.gov/sites/dail/files/documents/SCSEP_Modified_PY_2016-2019_Plan_4-04-18.pdf).

5. Although the services provided under the state and national SCSEP are generally comparable, the programs have different avenues for grievances and appeals. While the state SCSEP falls under the auspices of DAIL (the Vocational Rehabilitation division), the national SCSEP does not. The legal implications of the distinction between the state and national SCSEP grievance and appeals processes will be further addressed below.

6. In Vermont, an applicant for SCSEP does not choose whether to apply for the state or national program; there is a single application, and following approval, an applicant is assigned by VATD to either the state or national program based on budgetary and other considerations (for example, such as geography).

7. Petitioner was enrolled into the SCSEP on September 4, 2014. She was assigned into the "national" program. Although participants are not informed of whether they are enrolled into the state or national program (because services provided are seamless), a national program enrollee receives program materials during their orientation that are specific to that program. In petitioner's case, she received an orientation and related materials on August 26, 2014 (a document submitted by the Department established that

petitioner signed an acknowledgment of receipt of the materials and the orientation). These orientation materials included a description of the national SCSEP's "Complaint and Grievance" procedure - which involves making a complaint within and up through the organizational hierarchy of VATD. The grievance procedure makes no reference to DAIL involvement or review (as opposed to the state SCSEP grievance process).

8. Following petitioner's commencement of her SCSEP enrollment in September 2014, she began a work placement at a private non-profit business. The SCSEP is intended to assist participants in finding and maintaining work at host placements.

9. In April 2015, and as contemplated by the program, petitioner participated in an "Individual Employment Plan & Assessment" with a supervisor from her host job site and a staff person from VATD (for the SCSEP). This assessment was signed by petitioner on April 2, 2015 and deemed petitioner to be "job-ready" for her chosen field of "customer service representative."

10. On July 29, 2015 petitioner was terminated from her host job placement, by the employer, for alleged cause.

11. On August 22, 2015 petitioner signed an SCSEP "exit form" indicating and establishing that she was leaving the program as of August 24, 2015 for "health/medical" reasons. VATD subsequently mailed petitioner a letter dated August 28, 2015 confirming her exit from the program.

12. Throughout calendar year 2016, petitioner attempted to reenroll into the SCSEP. Petitioner was denied reentry into the program by the VATD director. At no point in time did petitioner (in any direct manner) avail herself of the complaint and grievance procedure contained within the "national" SCSEP orientation procedures.

13. Petitioner did file a discrimination complaint with the U.S. EEOC regarding her termination of employment from her host placement. This matter was settled without findings or admission of liability from the employer.

14. Petitioner continued to seek reentry into the SCSEP in 2017, at one point contacting the Governor's Office, which referred her to DAIL/Vocational Rehabilitation. Petitioner's request to reenroll was eventually reviewed by DAIL's General Counsel presumptively acting on behalf of the Department. This review, dated September 29, 2017 and addressed to petitioner's representative, "denied" her request to reenroll, on the following grounds:

- Petitioner was deemed "job ready" prior to her withdrawal from the program;
- There are waiting lists of SCSEP applicants who have not received the level of training that petitioner was already afforded;
- There are current jobs in the "customer service" field for which petitioner (being "job-ready") could apply; and
- Petitioner was not compliant with SCSEP rules and procedures while she was enrolled in 2015.

15. At hearing, the Department presented credible evidence that petitioner did not meet SCSEP priorities for reenrollment because she had previously been in the program and determined job ready; that there remained a waiting list of applicants ahead of her who had not yet received any SCSEP services; and that petitioner's geographic location was not a priority (based on the need and demand for services across the entire state). In particular, the Department presented credible evidence that SCSEP funding only meets the needs of 1 percent of the potentially eligible population and there is presently a 7-year waiting list for services.

16. For her part, petitioner disputes numerous elements of her enrollment and separation from SCSEP in 2015. For one, petitioner disputes that she was aware of the implications of all of the documents she signed - the receipt of her orientation materials and grievance process, her acknowledgment of being "job-ready" in April 2015, and her apparent voluntary "exit" from the program in August 2015 (petitioner indicates she intended to take a sabbatical from the program with the understanding that she could return once her medical issue had been resolved).<sup>3</sup> Petitioner also makes allegations of racial discrimination in her exit from the program and denial by VATD of reentry.

17. In the first place, it is noted that the documents petitioner signed speak clearly for themselves, and there is no credible evidence that petitioner was ever misled regarding the implication(s) of these documents. Even so, all the issues raised by petitioner relate to her enrollment in the national SCSEP, and petitioner never availed herself

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<sup>3</sup> Petitioner argues further that she was "waiting for a placement" following her separation from her employment placement on July 29, 2015 and prior to her exit from the program on August 22, 2015. To the extent a material issue, this short period of time without a placement does not establish that petitioner never "exited" the program in August 2015.

of the grievance procedure available to her with respect to that program.

18. However, to the extent DAIL has denied petitioner reentry into the program, and given that SCSEP applications are considered through a single process (and applicants are then assigned to either the state or nation SCSEP), DAIL's decision must be presumed to apply - at least in part - to the state SCSEP.

ORDER

The Department's decision denying petitioner's reenrollment into the SCSEP is affirmed; to the extent petitioner's appeal concerns issues relating to her previous (2015) enrollment in the national SCSEP, it is dismissed.

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 - when an appeal concerns an initial denial of eligibility - the petitioner bears the burden. See Fair Hearing Rule 1000.3.0.4.



In this case, as further explained below, an "abuse of discretion" standard applies to DAIL's decision. The Board's general grant of jurisdiction provides that:

(a) An applicant for or a recipient of assistance, benefits, or social services from the Department for Children and Families, of Vermont Health Access, of Disabilities, Aging, and Independent Living, or of Mental Health, or an applicant for a license from one of those departments, or a licensee may file a request for a fair hearing with the Human Services Board. An opportunity for a fair hearing will be granted to any individual requesting a hearing because his or her claim for assistance, benefits, or services is denied, or is not acted upon with reasonable promptness; or because the individual is aggrieved by any other Agency action affecting his or her receipt of assistance, benefits, or services, or license or license application; or because the individual is aggrieved by Agency policy as it affects his or her situation.

3 V.S.A. § 3091.

Petitioner makes numerous claims and grievances regarding her prior enrollment in the SCSEP. However, that enrollment was in the national SCSEP and was subject to a completely independent (of DAIL or any state Department or Agency) grievance process. Nothing about petitioner's prior enrollment triggered or involved DAIL. As such, the Board does not have jurisdiction to hear any appeal regarding petitioner's enrollment into and exit from the national SCSEP.

However, DAIL's September 29, 2017 denial of

petitioner's requested reentry into the SCSEP must be presumed to be DAIL's decision (as it was on its face) and must also be presumed to apply to the state SCSEP, given DAIL's own evidence that a single application into the program could result in assignment to either the state or national SCSEP.<sup>4</sup> As such, the Board does have jurisdiction over an appeal of this decision under 3 V.S.A. § 3091.

As described above, the purposes of the SCSEP are:

...to foster individual economic self-sufficiency and promote useful part-time opportunities in community service assignments for unemployed low-income persons who are 55 years of age or older, particularly persons who have poor employment prospects, and to increase the number of older persons who may enjoy the benefits of unsubsidized employment in both the public and private sectors.

20 C.F.R. § 641.120.

As noted by DAIL, applicants who are "job-ready" and can be placed directly into unsubsidized employment are not generally considered eligible for enrollment into the SCSEP. See 20 C.F.R. § 641.512. Furthermore, there is no legal basis to conclude that the SCSEP is an "entitlement" - meaning that all "eligible" applicants meeting defined

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<sup>4</sup> It is not clear to what extent, if any, DAIL disputes this characterization of its September 29, 2017 decision. DAIL initially sought to dismiss petitioner's appeal in its entirety on the grounds that petitioner's previous enrollment had been into the national program.

eligibility criteria are automatically entitled to services (such as with an entitlement program like Medicaid). Rather, the governing regulatory structure establishes that the SCSEP is a grant-based program (see 20 C.F.R. Part 641, generally) and that grant administrators (i.e. states and non-profit organizations) must consider a variety of factors in making application and enrollment determinations. See 20 C.F.R. § 641.520.<sup>5</sup> Finally, there are no specifically mandated federal grievance procedures; such processes are left to SCSEP grantees. See 20 C.F.R. § 641.910.

While apparently an issue of first impression for the Board, based on the above it must be concluded that decisions on whether to enroll an applicant into the SCSEP are discretionary, and the issue before the Board is whether DAIL abused its discretion in making the decision at issue here. Lending further credence to this standard is guidance (cited by DAIL) from the U.S. Department of Labor:

*Re-enrollment is at the discretion of the sub-grantee. Former participants do not have an automatic right to re-enroll. You should consider the circumstances of the participants' prior exit from SCSEP, e.g., whether they*

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<sup>5</sup> These priorities include, among other things, age, disability, limited English proficiency, employment prospects, geography (prioritizing rural areas), veteran status, and homelessness. While these factors should be at play here, petitioner's status as a prior enrollee must also be considered.

were terminated for cause and whether they are now job-ready. Former participants who have had employment since leaving SCSEP may be presumed to be job-ready and thus ineligible. They should be referred to an American Job Center.

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*Re-enrollment is discretionary. Grantees are not required to provide anyone a second opportunity to participate in SCSEP, especially when there are so many eligible seniors who have never had the benefit of the program.* In deciding whether to exercise their discretion to re-enroll any former participant who otherwise satisfies the eligibility criteria (including the requirement that the individual needs additional time in a community service assignment in order to become job-ready), grantees should consider whether the individual:

- has taken full advantage of the opportunity afforded by the prior enrollment.
- has demonstrated a commitment to the program's objectives.
- has violated any conduct standards during the prior enrollment.

Focusing exclusively on these considerations, which permit the program to take into account the participant's behavior during the prior enrollment and the circumstances of the participant's leaving the program, is likely to protect the interests of the SCSEP program without violating either the law or the participant's rights. To ensure that these considerations are not used in a discriminatory fashion, they should be applied in all cases in which a former participant seeks re-enrollment.

U.S. Department of Labor *SCSEP Data Collection Handbook*,  
Version 7 - March 2017 (Topics 42 and 98, in pertinent part)  
(emphasis added).

The inevitable conclusion from all of the above is that DAIL's September 29, 2017 decision is subject to an "abuse of discretion" standard on appeal. Abuse of discretion arises when the decision is made for untenable reasons or the record contains no reasonable basis for the decision. *State v. Putnam*, 164 Vt. 558, 561 (1996); *USGen New England, Inc. v. Town of Rockingham*, 177 Vt. 193 (2004). Abuse of discretion can extend to a failure to exercise authority. *In Re: T.S.*, 144 Vt. 592, 593 (1984). If the Department has a reasonable basis for its decision, the Board must affirm the Department's decision, even in those situations in which the Board or another trier of fact may have reached a different conclusion based on the information at hand.

Here, the Department states many reasons for the decision to deny petitioner reenrollment into the SCSEP. At a minimum, petitioner's prior receipt of services, her unchallenged (at the time) "job-ready" evaluation, and most importantly the unrebutted, credible and compelling proof of unmet demand for SCSEP services for those who have yet to receive any subsidized assistance from the program establishes more than a reasonable basis for the Department's decision here.

For all of the above reasons, the Department's decision denying petitioner's reenrollment into the SCSEP is consistent with the applicable rules and must be affirmed; to the extent petitioner's appeal is a grievance relating to her prior enrollment into the national SCSEP, it must be dismissed as beyond the Board's jurisdiction. See 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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