

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. B-09/20-569
)
Appeal of)
)

AMENDED ORDER

INTRODUCTION

The petitioner appeals a decision by the Department for Children and Families (Department) that she is ineligible for the General Assistance (GA) Temporary Housing program for a 15-day period based on a violation of the motel "no-smoking" rule. The matter was originally scheduled on September 17, 2020; petitioner failed to appear for that hearing. After petitioner called the Human Services Board office, the hearing officer rescheduled the case. Petitioner obtained counsel for the rescheduled hearing and the hearing was commenced on September 25th and was completed on September 28th. **Post issuance of the initial Order in this case, the appeal was reopened for the limited purposed of considering the issue of "continuing benefits" under policy GA-120.** The following facts are based on evidence presented at hearing and the written documentation from the Department.

FINDINGS OF FACT

1. During the last year, petitioner has applied for and been granted housing at area motels for herself and, at times, a caregiver. Her most recent housing grant was from September 4th through October 1, 2020. After being asked to leave the motel on September 11th, petitioner contacted the Department to obtain alternate housing. The Department denied her request based on current temporary housing rule GA-120 [Period of Ineligibility]. Petitioner's request for a fair hearing was received by the Human Services Board on September 15th.

2. At hearing, the motel manager testified that guests are provided a copy of the motel rules at check-in. The rules provide, in pertinent part,

Our entire property is NON smoking. This includes cigarettes, marijuana, vapes, etc. If you are smoking in the room OR on the balcony, you will be asked to leave immediately and will incur a \$300 fee. If we suspect you are smoking, the staff may request to inspect your room immediately, denying entry will result in removal. Smoking is only permitted outside and you must be at least 50 feet away from the entry way. Please make sure cigarette butts are put out and placed in the trash receptacle.

3. Petitioner does not contest receiving this notice and acknowledges that she was aware that smoking was prohibited in the motel.

4. The motel manager testified that in August 2020, motel housekeeping staff reported that there was an odor of cigarette smoke coming from the corridor near petitioner's room. The motel also received a complaint from a guest in the room directly above petitioner's room, a room that shares a bathroom air vent with petitioner's bathroom, that the odor of cigarette smoke was coming into the other guest's bathroom room during nighttime hours. Housekeeping staff also reported that they found burn marks in the coverlet in petitioner's room.

5. As a result, on August 14, 2020, the manager delivered a written warning to petitioner that the motel believed she was smoking in her room, that the motel reserved the right to inspect her room, and that she would be asked to leave if any further violations occurred. At hearing, petitioner denied smoking in her room in August. Petitioner indicated that the burn marks were from a piece of incense that she dropped on the coverlet. The manager testified that the coverlet that had the burn holes had to be discarded by the motel.

6. On September 9, 2020, the night housekeeper reported that he believed that petitioner was again smoking in her room based on the odor of cigarettes in the hallway

directly outside her room. The night housekeeper's shift is from 9:00 p.m. until 7:00 a.m. The parties agree that at some point during his shift the housekeeper knocked on petitioner's door. Petitioner and her daughter (acting as her caregiver on that occasion) both testified that it was likely sometime after 1:00 a.m. The motel manager was unable to provide information about the time of this contact.

7. The parties have different accounts of what happened next regarding the contact between petitioner and the housekeeper. The parties both stated that petitioner had a towel(s) wedged into the bottom of the door to her room, and that the door was not opened very widely when petitioner answered the door. Petitioner had a plausible explanation for the presence of the towel (light and noise from the hallway and proximity to the elevator). There was a verbal exchange between the housekeeper and the petitioner about the cigarette smoke and petitioner told the housekeeper that she had been burning incense. The housekeeper did not enter the room at that time, but the parties agree that he told petitioner he was reporting the smell of cigarette smoke to the motel manager.

8. On the next night, September 10th, the night housekeeper again reported that he could smell cigarette

smoke coming from petitioner's room. He reported both incidents in the motel log.

9. Based on the housekeeper's report of the strong odor of cigarette smoke outside petitioner's room on September 9th and September 10th, the motel manager prepared and delivered to petitioner a *Notice to Vacate*, based on a violation of the no-smoking ban.

10. At hearing, petitioner and her adult daughter (who was sleeping in the room on the night of September 9th) both testified that they were not smoking in the room on September 9th and petitioner denied smoking in the room on September 10th. They both acknowledged that they were smokers but said that they only smoked in the outside smoking area. When asked about the explanation for the smell of cigarettes directly outside her room, petitioner stated that she had no explanation except that because she is a smoker, her clothes smell of cigarette smoke.

11. While the evidence from the motel staff is circumstantial, the evidence is credible. The motel staff had no reason to fabricate information about the odor of cigarette smoke coming from petitioner's room in August or on two consecutive nights in September but do have reason to enforce the "no-smoking" rule and state law. The reports

from the hotel staff were that the smell of cigarette smoke outside petitioner's room (and not others' rooms) was very obvious. And, they did not report the smell of incense, which is a very distinct smell from cigarette smoke.

12. On the other hand, petitioner is facing the loss of her temporary housing grant if found to be in violation. Prior to leaving the motel, petitioner did not request, during daytime hours, a reinspection of her room to demonstrate that there was no cigarette odor in the room. Petitioner's account she was burning incense is not a credible explanation for the presence of the odor of cigarette smoke outside petitioner's room on September 9th and 10th.

13. Based on petitioner's appeal of the Department's decision, the Department's rules provide that petitioner may receive granted continued housing pending the appeal. Initially, the Department had trouble reaching petitioner, but did grant her housing for two (2) nights, September 15-16, before the initially scheduled hearing; unfortunately, petitioner did not use the room as she testified that she was unable to find the motel. Petitioner was housed on September 25th at the direction of the hearing officer, and on September 26th-27th by 211.

14. Per Human Services Board practice in expedited housing cases, on September 30th the hearing officer issued a Memorandum to the parties upholding the Department's decision and noting petitioner's right to appeal that preliminary ruling to the Human Services Board. Again, per practice in expedited cases, based on the preliminary ruling, the Department imposed the POI beginning September 30th. As the Department determined that petitioner was still working with her caseworker to obtain permanent housing (a program requirement), consistent with its rule, it reduced the POI to seven (7) days. Therefore, the POI ended October 6th¹.

15. While petitioner's POI ended on October 6th, petitioner argues that because there is a graduated penalty in the GA-120 for a second offense, she could have a further potential penalty as a result of this case if she faces a further POI for a new offense.

AMENDED ORDER

16. Post-issuance of an Order in this case on November 10, 2020, the hearing officer reopened the case for the limited purpose of considering the petitioner's argument that she had not been granted full "due-process" as required by

¹ The Board finds that any housing granted to petitioner pending the fair hearing should not be counted in calculating petitioner's POI.

GA-120 during the pendency of her appeal, i.e. continued housing for all nights after she filed her request for fair hearing until the issuance of the hearing officer's preliminary Recommendation in the case.

17. The hearing officer treated the matter as a motion to reopen the proceeding and notified the parties of a hearing on that issue. That hearing was held on November 13, 2020, and the hearing officer issued a preliminary Memorandum on the matter on December 1, 2020, providing petitioner with a right to appeal the preliminary ruling to the Board. On December 8, 2020, petitioner requested that the matter be referred to the Board and the case was placed back on the Board's Agenda for the next available meeting on January 6, 2021.

18. At the hearing officer's request, both parties submitted information of the timeline of dates from petitioner's filing of her appeal until the issuance of the hearing officer's (first) preliminary Memorandum on September 30th.

19. Petitioner raised three (3) time periods when she did not receive continued housing during this period. The first time-period is September 11th through September 15th. The petitioner indicates and case notes confirm that

petitioner called the Department on September 11th to re-apply for temporary housing after the issuance of the NTV by the motel. However, the approval process, particularly when an applicant has been issued an NTV, is not automatic; rather, the Department typically has to complete the application verification process with a return call to the applicant. The case notes reflect that the Department was unable to complete the application and verification process because it could not reach petitioner despite multiple efforts. While petitioner did again call the Department on September 14th, the notes reflect that this request was referred for review to a Benefits Specialist. When the Benefit Specialist attempted to reach the petitioner on September 15th, she was unable to reach her or leave a message. However, the Benefit Specialist tried again and reached the petitioner and approved her for two nights of housing (September 15 and 16) along with her caregiver. Apparently, the petitioner never arrived at the motel and the reasons for that are unclear, but there was no evidence that it was the fault of the Department. Therefore, petitioner was not improperly denied housing up to the date of the hearing scheduled for September 17th.

20. The second time-period at issue is September 17th through September 25th. Petitioner's fair hearing was scheduled for September 17th, however, she failed to appear for the hearing. The Department appeared and had witnesses present to testify. Petitioner later contacted the Human Services Board Clerk and requested that the hearing be rescheduled. Rather than scheduling the case for a "show cause" hearing as requested by the Department, which would have resulted in a further delay in hearing the merits of the case, the hearing officer, without making a finding that there was good cause for petitioner's failure to appear, had the case reset for a hearing on the merits for the next available expedited slot in the schedule, which was Friday, September 25th. This was done to allow a hearing on the merits of petitioner's case at the earliest opportunity. Due to the case being rescheduled, petitioner asserts she should have been rehoused by the Department pending the new hearing date. Department policy GA-120 provides "[f] you don't show up to the hearing, the Department will not continue to house you and your POI will begin right away." While the current situation points to the use of a best practice of scheduling a "show cause" hearing so that an appellant can be heard on the question of whether good cause for a failure to appear

existed, as noted above, that would also have delayed the hearing on the merits of the NTV. In any event, under the specific circumstances presented here, under GA-120 petitioner was not entitled to housing by the Department once she missed her hearing.

21. The final time-period at issue was September 28th through September 30th. As noted above, the hearing officer rescheduled petitioner for hearing on Friday, September 25th and the hearing began on that date. However, the Department notified the hearing officer that one of its witnesses, the motel manager where petitioner had been housed, was not available on that day; that witness had been present when the hearing was first scheduled on September 17th. Therefore, the hearing began and some evidence was presented but the case was then continued to allow the Department's additional witness to testify on the following Monday. Petitioner was housed on that date because the hearing was not completed on that date. Petitioner was housed by 211 over the weekend of September 26th-27th. The hearing recommenced and was completed on Monday, September 28th. A Memorandum upholding the POI was issued to the parties on September 30th (and a corrected Memorandum, to correct a typographical error in the period of the POI was issued on October 2, 2020.) However,

petitioner was not housed from September 28th through September 30th.

22. The hearing officer found that the failure to house petitioner from September 28th through September 30th was inconsistent with the language of GA-120. GA-120 provides that an appellant should be housed pending the issuance of a Memorandum issued by the hearing officer. Therefore, petitioner was not provided housing for two (2) days (September 28th and September 29th) when she should have been housed pursuant to GA-120. The remedy for this issue is discussed below.

ORDER

The decision of the Department imposing a period of ineligibility (POI) due to violation of a motel "no-smoking" rule is affirmed.

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.

On August 11, 2020, the Department promulgated a

comprehensive policy, referred to here as the GA Covid-19 Rules, to govern the administration of the "motel voucher program" during the pandemic. The GA Covid-19 Rules include a penalty provision if an individual is issued a Notice to Vacate by a motel due to the violation of a motel rule, as follows:

GA-120 Period of Ineligibility

You will not be eligible to be placed in a hotel/motel by the Department for a period of time if you are asked to leave a hotel/motel for:

. . . .

- Use of lighted tobacco products, tobacco substitutes, or marijuana, in any form, in any space on the property.

If it is determined by the Department that you are not eligible for a period, the Department will not pay for you to stay in a hotel/motel during that time. This is called a Period of Ineligibility (POI).

- For a first violation, the POI is 15 days. *You will be rehoused after serving 7 days of the POI if your case worker informs the Department that you are working with them to find permanent housing.*
- *For a second and any other violations, the POI will be 30 days.*

GA COVID-19 Rules, GA-120 Period of Ineligibility.

<https://dcf.vermont.gov/sites/dcf/files/CVD19/ESD/TempHousing-COVID19.pdf>.

Despite the fact that petitioner's POI ended on October

6th, petitioner argues that the case is not moot because the case meets an exception to the mootness doctrine; petitioner argues that because there is a further threat of injury due to the graduated POI penalty in GA-120 her case is "capable of repetition yet evading review."

Under Vermont law, there are two (2) exceptions to the mootness doctrine: (1) the case is capable of repetition by evading review², or (2) there are negative collateral consequences that are likely to result from the action being reviewed. *Paige v. State*, 205 VT 287, ¶11.

Assuming *arguendo* that petitioner's situation meets the exception to the mootness doctrine regarding negative collateral consequences, the evidence reported by the housekeeping staff supports the Department's imposition of a POI for a motel smoking violation. See Fair Hearing No. B-01/19-08 (assuming an exception to the mootness doctrine, evidence of motel violation supports Department's

²To meet this first exception of being "capable of repetition yet evading review," it must be demonstrated that (1) the challenged action must be "in its duration too short to be fully litigated prior to its cessation or expiration", and (2) that must be a "reasonable expectation that the same complaining party will be subjected to the same action again." *Paige v. State*, 205 Vt 298, ¶11 (citations omitted). While the first requirement is met in this case as petitioner's POI has expired, petitioner did not present any evidence to suggest that she was facing another POI at this time for the same behavior. Therefore, the first exception is not applicable under the facts presented.

disqualification decision).

AMENDED REASONS

The remaining question is the remedy that is available to acknowledge the finding that petitioner did not receive housing for two (2) nights (September 28th and September 29th) during the pendency of her appeal. This question is made more complex give the fact that petitioner's POI has expired (October 6th) and petitioner has been again re-housed by the Department.

Petitioner argues that the failure to afford petitioner "due process" in the form of continuous housing during the appeal period requires the removal of the entire POI as the remedy. In support of that position, petitioner cites to the case of *White v. Roughton*, 530 F. 2nd 750 (1975). There, the Seventh Circuit Court of Appeals ordered that a petitioner whose General Assistance "food orders" had been unilaterally terminated by the town supervisor without any advance explanation, notice or hearing be restored pending a hearing on the merits. In contrast, petitioner in this case was afforded an expedited fair hearing on the merits of her case and was granted, albeit with an error of two days, continued housing during her appeal.

However, the Vermont Supreme Court case of *In re Durkee* is instructive as to the appropriate remedy here. While the circumstances of the case related to an initial eligibility determination for temporary housing rather than a termination of housing due to a rule violation, the Court addressed the appropriate remedy for an error in denial of temporary housing once the "time for immediate relief has passed." *In re Durkee*, 2017 VT 49. The Court found that declaratory relief, a ruling on the merits of the claim, was appropriate under the circumstance presented in that case. *Id.* at ¶22. Based on the factual finding that petitioner was entitled to an additional two (2) days of housing, the Department is directed to enter a case note that should petitioner again become disqualified from temporary housing, she would have a credit of two (2) days for which she would be granted housing by the Department.³ While this remedy is appropriate to the facts presented here and the applicable rules, it is not determinative of whether petitioner states a claim for damages against the Department, which the Board would clearly lack jurisdiction to hear. *See, e.g., Fair Hearing No. B-03/08-104, citing Scherer v. DSW, Unreported, (Dkt. No. 94-*

³To be clear, this two-day credit will be in addition to any other credit granted to petitioner based on the change in the Department's "self-pay" policy.

206, Mar. 24, 1999) and *In re Buttolph*, 147 Vt. 641 (1987).

As the Department's denial of temporary housing for a POI for violation of a motel rule is consistent with its Rules, the decision must be affirmed. **The Department is further directed to make the case note regarding a credit to petitioner for two-days of temporary housing in the future.**

See 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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