

STATE OF NEW YORK
OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE

REQUEST: July 25, 2012

AGENCY: Monroe
FH #: 6153968Y

In the Matter of the Appeal of
[REDACTED]

from a determination by the Monroe County
Department of Social Services

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**DECISION
AFTER
FAIR
HEARING**

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 September 7, 2012, in Monroe County, before an Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant

[REDACTED]

For the Social Services Agency

Laurie Follette, Fair Hearing Representative

ISSUE

Was the Agency's determination to discontinue the Appellant's Public Assistance on the ground he failed to verify that he had consulted a surgeon regarding a leg injury correct?

FINDINGS OF FACT

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, [REDACTED], has been in receipt of Public Assistance benefits for himself only.
2. On or about March 15, 2012, the Appellant suffered a gunshot wound. The Appellant was determined to be exempt from work activities due to the injury.

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3. On May 2, 2012, the Appellant was seen by an Agency physician who examined the Appellant and reviewed documentation from his personal physician. The Agency physician also determined that the Appellant was exempt from work activities. The Agency physician also referred the Appellant for a consultation with a surgeon.

4. By letter dated June 14, 2012, the Appellant was advised by the Agency that he had been referred for a consultation with a surgeon for a leg injury. The Appellant was advised that pursuant to 18 NYCRR 385.2(e) he was required to follow through with his doctor's recommendation to seek treatment from a surgeon for the leg injury as a means of restoring himself to self-sufficiency. The Appellant was advised that he must provide verification that he has followed through by June 28, 2012 to avoid negative action on his case.

5. The Appellant failed to submit the requested verification that he met with a surgeon about his leg injury.

6. On July 6, 2012 the Agency sent a Notice of Intent setting forth its determination to discontinue the Appellant's Public Assistance benefits because he failed to verify follow up with a surgeon regarding leg injury.

7. On July 25, 2012, the Appellant requested this fair hearing. The Appellant is in receipt of continued aid.

APPLICABLE LAW

Section 131.5 of the Social Services Law provides that no Public Assistance shall be given to an applicant for or recipient of Public Assistance who has failed to comply with the requirements of the Social Services Law, or has refused to accept employment in which he or she is able to engage. Section 131(7)(b) of the Social Services Law provides that where a person is judged employable or potentially employable, a social services official may require such person to receive suitable medical care and/or undergo suitable instruction and/or work training. A person who refuses to accept such care or undergo such instruction or training is ineligible for Public Assistance and care.

Regulations at 18 NYCRR 385.2(e) provide that an individual exempted from participation in work activities due to disability who the social services official determines has the potential to be restored to self-sufficiency through rehabilitation, may be required to:

- o provide information from the individual's practitioner or submit to an examination by the district's practitioner to determine whether the individual can recover from the mental or physical impairment.
- o accept medical care to assist in recovery from the mental or physical impairment and in restoring self-sufficiency;

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- o accept referral to and enrollment in a program of vocational rehabilitation, training and other essential rehabilitation designed to restore an individual to self-sufficiency, and
- o give evidence, as requested by the social services official, that he/she is participating in a program assigned by the social services official in accordance with the provisions of this subdivision.

Pursuant to the Employability Manual's discussion of 18 NYCRR 385.2, pages 26 through 29, an individual should be determined to be exempt due to health factors if he or she is not currently capable of employment in any capacity. Individuals who have been determined to be exempt by the district through the disability review procedure may not be required to participate in the work activities described in 18 NYCRR 385.9. Districts may assign individuals determined to be exempt from participation in work activities to treatment that has been determined by a health care practitioner as appropriate and necessary to improve the individual's ability to work.

Exempt: Potentially Non-Exempt

An individual who is currently exempt due to significant physical or mental health barriers to employment such that an assignment to work activities would be inappropriate may be considered potentially "non-exempt" to the extent that treatment, as determined necessary by a health care professional, is expected to improve the individual's health so he or she is able to participate in work activities or employment. This category includes those individuals with significant developmental barriers who are currently incapable of competitive employment but have the ability to participate in sheltered workshops as determined appropriate and necessary by treating professionals. These individuals may not be required to participate in work activities. These individuals are required to participate in an employment assessment as required by Sections 385.6 and 385.7 of 18 NYCRR. These individuals are required to accept any medical care or treatment deemed necessary to recovery and to comply with any prescribed treatment plans or evaluations. Any treatment plan must be appropriate and beneficial to the individual's needs and consistent with his or her limitations. Treatment intensity should correspond to the severity of the individual's limitations. Treatment may include work-like activities, if part of a treatment assignment prescribed by a health care professional. Districts may not independently assign such individuals to work activities. An SSI application should be filed and actively pursued if appropriate.

Exempt: Permanently Unable to Participate

The individual possesses severe and permanent barriers to employment and would not currently benefit from rehabilitation or treatment. This category may include individuals who voluntarily participate in a sheltered workshop setting and are not currently expected to become able to work in the future. The individual may not be required to participate in work activities or any other employment-related activities. The individual is required to participate in an employment assessment as required by Sections 385.6 and 385.7 of 18 NYCRR (see Note below). An SSI application should be filed and actively pursued.

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Exempt Consequences of Noncompliance

An exempt individual, who the district has determined has the potential to restore his/her employability, who without good cause fails to accept referral to or participate in reasonable medical care, treatment or rehabilitation is ineligible for assistance (removed from the case) until compliance (see 18 NYCRR Part 385.2 (e)).

An exempt recipient who willfully and without good cause fails to comply with assessment requirements is subject to conciliation and a pro-rata sanction in accordance with Section 385.12 of 18 NYCRR.

An exempt public assistance applicant who fails without good cause to comply with an assessment is not eligible for public assistance and the household's application for public assistance shall be denied.

A recipient who has been determined to be exempt from participation in work activities in accordance with the requirements of this Part due to being disabled pursuant to this section, who in the judgment of the social services official has the potential to be restored to self-sufficiency through rehabilitation, is ineligible to receive public assistance until such time as he/she is willing to comply with such requirements. 18 NYCRR Section 385.12(a)(1)(ii).

Willing to comply means that an individual, as required by a district, reports to an assigned work activity site or other location as assigned by the district on time and prepared to engage in the assigned activity.

DISCUSSION

The Agency's determination to discontinue the Appellant's Public Assistance benefits may have been correct when made, but in view of the facts presented at the hearing, cannot be sustained.

The uncontroverted evidence at the hearing established that the Appellant, [REDACTED], has been in receipt of Public Assistance benefits for himself only. It was undisputed that the Appellant was exempt from work activities due gunshot wound in his leg. The record showed that by letter dated June 14, 2012, the Appellant was advised by the Agency that a physician indicated that he had been referred for a consultation with a surgeon for a leg injury. Agency Ex. 1 page 8. The Appellant was advised that pursuant to 18 NYCRR 385.2(e) he was required to follow through with his doctor's recommendation to seek treatment from a surgeon for the leg injury. Id. The Appellant was advised that he must provide verification that he has followed through by June 28, 2012 to avoid negative action on his case. Id. It was undisputed that the Appellant failed to submit the requested verification that he met with a surgeon about his leg injury. The record showed that on July 6, 2012 the Agency sent a Notice of Intent setting forth its determination to discontinue the Appellant's Public Assistance benefits because he failed to verify follow up with a surgeon regarding leg injury. Agency Ex. 2.

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At the hearing, the Appellant testified that he had good cause for his failure to submit the requested verification. He testified that in March when he had the original gunshot the consulting surgeon in the emergency room determined that he did not need surgery because the wound was "in and out" and "clean." In April, he did see his primary care physician for what he thought was an infection in the wound. He testified that his doctor referred him to see a surgeon to see if he needed surgery because of recurrent infection. He stated that he did not have a relationship with a surgeon to consult so the following day, April 12, 2012 he went back to the Emergency Room where he was initially treated and requested a consultation with a surgeon. He testified that Dr. [REDACTED], a surgeon, did come down to the Emergency Room for a consultation and told him that the infection could be treated with topical antibiotics, which were prescribed, but did not require further treatment or surgery. He testified that he did not speak with the surgeon again. He testified that when he received the letter from the Agency requesting verification of his surgical consultation that it was difficult to obtain because he did not have any patient relationship with a surgeon. He testified that he went back to [REDACTED] Hospital to request the verification from Dr. [REDACTED], but he was told that he was no longer worked at the hospital. He testified that he could not get an appointment to see a new surgeon at [REDACTED] because the surgery department had already determined that he did not need surgery. He testified that he went to the basement of the hospital to try to get the medical records of his consultation in the Emergency Room, but he was told that it could take weeks to get the documents and that he would be charged. In response, he went back to his primary doctor and asked for those records and submitted them to the Agency. However, the Agency did not find the documents adequate because they were not from a surgeon.

The Appellant's testimony was consistent, detailed and plausible. He also displayed an open and candid demeanor while testifying.. The Appellant's testimony is fully credited. The Appellant establish that despite his due diligence in attempting to comply with the Agency's request to obtain verification that he was unable to do so due to factors beyond his control. Further, it was undisputed that the Appellant does not require additional surgery for the gunshot wound and therefore further surgical intervention would not restore the Appellant to self-sufficiency, the underlying reason for the Agency's request for the verification. Based on the foregoing the Agency's determination to discontinue the Appellant's Public Assistance may have been correct when made, but in view of the facts presented at the hearing, cannot be sustained.

DECISION AND ORDER

The Agency's determination to discontinue the Appellant's Public Assistance benefits may have been correct when made, but in view of the facts presented at the hearing, cannot be sustained.

1. The Agency is directed to continue the Appellant's Public Assistance.

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

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DATED: Albany, New York
11/06/2012

NEW YORK STATE OFFICE OF
TEMPORARY AND DISABILITY ASSISTANCE

By

A handwritten signature in black ink, consisting of a large, stylized initial 'C' followed by several loops and a final flourish.

Commissioner's Designee