STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

ADMINISTRATIVE HEARINGS FOR THE
DEPARTMENT OF HUMAN SERVICES

IN THE MATTER OF: [redacted]

Claimant

Reg. No: 2009-22289
Issue No: 1038
Case No: [redacted]
Load No:
Hearing Date:
June 30, 2009
Calhoun County DHS

ADMINISTRATIVE LAW JUDGE: Robert J. Chavez

HEARING DECISION

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and MCL 400.37 upon claimant's request for a hearing. After due notice, a hearing was held on June 30, 2009.

ISSUE

Did the Department of Human Services (DHS) correctly impose a negative case action and three month sanction upon the claimant for noncompliance with work-related activities?

FINDINGS OF FACT

The Administrative Law Judge, based upon the competent, material and substantial evidence on the whole record, finds as material fact:

(1) Claimant was an FIP recipient in Calhoun County.

(2) On 11-7-08, claimant was referred to triage for a failure to meet required participation hours with the JET program.

(3) Claimant was employed at the time.

(4) Claimant was working on opening up a small business, which, after net expenses, was only paying her around two hundred dollars per month.

(5) Claimant was not participating in any other approved activity.

(6) On 12-19-08, claimant was sent a DHS-2444, Notice of Noncompliance, which scheduled claimant for triage on 12-30-08.

(7) Claimant did not attend the triage, allegedly because she did not receive the notice of noncompliance.

(8) This is claimant's first alleged incident of noncompliance.

(9) Claimant was not awarded good cause after an independent good cause determination was made.

(10) On 4-1-09, claimant's case was sanctioned and closed.

(11) On 4-13-09, claimant requested a hearing, stating that she disagreed with the department action, and that she had not been noncompliant.

CONCLUSIONS OF LAW

The Family Independence Program (FIP) was established pursuant to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Public Law 104-193, 8 USC 601, *et seq.* The Department of Human Services (DHS or department) administers the FIP program pursuant to MCL 400.10, *et seq.*, and MAC R 400.3101-3131. The FIP program replaced the Aid to Dependent Children (ADC) program effective October 1, 1996. Department policies are found in the Program Administrative Manual (PAM), the Program Eligibility Manual (PEM) and the Program Reference Manual (PRM).

All Family Independence Program (FIP) and Refugee Assistance Program (RAP) eligible adults and 16- and 17-year-olds not in high school full-time must be referred to the Jobs,

Education and Training (JET) Program or other employment service provider, unless deferred or engaged in activities that meet participation requirements. These clients must participate in employment and/or self-sufficiency-related activities to increase their employability and to find employment. PEM 230A, p. 1. A cash recipient who refuses, without good cause, to participate in assigned employment and/or self-sufficiency-related activities is subject to penalties. PEM 230A, p. 1. This is commonly called "noncompliance". PEM 233A defines noncompliance as failing or refusing to, without good cause:

> …Appear and participate with the Jobs, Education and Training (JET) Program or other employment service provider... PEM 233A pg. 1.

However, a failure to attend work related activities can be overcome if the client has "good cause". Good cause is a valid reason for failing to attend employment and/or self-sufficiency-related activities that are based on factors that are beyond the control of the claimant. PEM 233A. A claim of good cause must be verified and documented. The penalty for noncompliance is FIP closure. However, for the first occurrence of noncompliance, on the FIP case, the client can be excused, with certain conditions, as outlined on a DHS-754, First Noncompliance Letter; unfortunately, this was claimant's second alleged incident of noncompliance, and thus, she was not eligible for a DHS-754. PEM 233A.

JET participants can not be terminated from a JET program without first scheduling a "triage" meeting with the client to jointly discuss noncompliance and good cause. At these triage meetings, good cause is determined based on the best information available during the triage and prior to the negative action date; should a determination of no good cause be made, claimants may agree to the conditions set forth in the DHS-754 to avoid a sanction. PEM 233A.

The fact pattern for the current case was difficult; however, by the conclusion of the hearing, the undersigned has determined that several facts are uncontested.

During the month of October, claimant was not meeting her required job participation hours with JET; it appears that claimant should have been moved to the EFIP program at some point (based on internal Department communications), but the verification of her actual work participation hours remained unconfirmed. Claimant was not meeting her job participation hours because claimant was working to start up a new business. This business absorbed most of claimant's time, and she was working 80-90 hour weeks; however, because this business was relatively new, claimant was only paid around 200 dollars for the time in question. Verification of the income was turned in to DHS, but was not turned over to JET, which then subsequently referred claimant to triage for failing to participate in required job participation hours. JET referred claimant to triage after some confusion regarding whether claimant had verified her hours or not. The triage was then held on 12-30-08, but claimant did not attend. Claimant had been notified of the triage. Good cause was subsequently denied and claimant's case was sanctioned and closed. Because claimant did not attend the triage, no DHS-754 was offered.

As claimant did not attend the triage, she was not able to present evidence of good cause. However, it is clear from the facts of the case that good cause was never at issue. Claimant's entire case was based on the argument that claimant had met the required job participation hours, and thus, did not require good cause. If claimant was meeting her hours, good cause need not be determined; if claimant was not meeting her hours, claimant has admitted that she did not have good cause. Claimant's only real harm from not attending the triage was that claimant was not offered a DHS-754, and thus, lost the ability to avoid a sanction.

While the Administrative Law Judge has his doubts as to whether good cause was actually determined independently, given that there are several references in the file to claimant's no-call/no-show with regard to good cause, the undersigned must conclude that this issue is generally irrelevant to the current case. There was no good cause to determine; claimant has at

no time alleged that she had good cause. As claimant has made no allegations of good cause, and has focused her case instead on the argument that she was meeting her participation hours, the undersigned feels that a lack of a good cause determination (and to be fair, the Department has testified credibly that a determination was made) is not fatal to the Department's case.

Furthermore, the undersigned sees no reason to disregard the results of the triage, though claimant alleges that she did not receive notice of the meeting. While the undersigned believes that in all probability, claimant did not receive notice, claimant has not provided evidence that she did not receive notice. It is a basic tenant of law that a mail recipient who wishes to allege that they did not receive a critical piece of mail has the burden of proof in providing of evidence of its failed delivery. A proper mailing and addressing of a letter creates a presumption that the letter was received; the presumption can only be rebutted if the claimant provides the evidence to the contrary. *Good v Detroit Automobile Inter-Insurance Exchange*, 67 Mich App 270 (1976). The great weight of the evidence in the file shows that the notice of triage was addressed properly. Claimant admitted that the notice letter was addressed to her address at the time.

Therefore, the burden of proof must fall upon the claimant to rebut the presumption that she received notice. No evidence was offered. Therefore, the undersigned must conclude, with no evidence to the contrary, that claimant received the letter. As claimant therefore had notice of the triage, the undersigned cannot disregard the results of the triage, even though claimant did not attend.

Part of this result is that claimant could not be offered a DHS-754. While it is unfortunate that claimant was not offered this second chance, the undersigned has no power to compel the Department to do so. While the Department could have offered a DHS-754 at a later date, it was under no obligation to offer the DHS-754 to the claimant subsequent to the triage. Therefore, the undersigned can find no error in the triage process, and the results must stand.

This brings us to the issue of whether claimant was meeting her job participation hours. If, as alleged, the claimant's 80-90 hours per week of self employment was sufficient to meet participation hours, it would have been inappropriate to refer claimant to triage in the first place.

Policy is itself silent as to how exactly self-employment hours are counted. The closest the policy comes to explicitly stating the requirements for self-employment are in discussions of the definition of participation—a claimant must be working a federally prescribed number of hours per week **at the federal minimum wage**. PEM 228.

This last part is the most important—in order to be considered as participating, a claimant must be making at least the federal minimum wage. Furthermore, federal and state policy interpretations have reiterated that presumption. Bureau of Workforce Programs/Transformation (BWP/BWT), Policy Issuance (PI): 06-34 states that he following formula must be used to determine self-employment hours:

> Net business sales (gross revenues - expenses) per month divided by the federal minimum wage = total actual hours per month.

The calculated actual self-employment hours per month must be converted to average actual hours per week.

Using this formula, if claimant was making 200 dollars per month, as was verified, after dividing by the federal minimum wage of $6.55/hour, this would average out at roughly 7.1 hours of participation per week, far below the required participation average of 20 hours per week that the claimant was required to do.

Under this formula, it is clear that claimant was not meeting her required participation hours. Claimant argued that as she was working on starting a new business, her initial income was slow, and she did not see how the success of her business should at all be the determining factor of whether or not claimant was compliant with work related activities.

The undersigned, in principal, agrees with this characterization. The regulations as stated are unfairly slanted against small business owners and rely on the success of the business instead of whether the claimant is actually working the required hours. This seems to violate the spirit of Department's programs, and discourages clients from taking risks that could ultimately result in the removal of the need for benefits.

That being said, it appears that the federal regulators who placed this into code have already considered the question. On Page 6812 of the Final TANF Regulations from February 5, 2008 the provision of dividing self-employment income by the federal minimum wage is described:

> *Comment:* Some commentators expressed concern because the regulations limit the hours a State can count for self-employed recipients to the number derived by dividing the individual's self-employment income (gross income less business expenses) by the Federal minimum wage. They explained that some types of self-employment take time before income is generated. Another commenter noted that some types of self-employment are affected by seasonal factors, so that income is only generated in some months, even though the work is ongoing. They recommended various approaches that would take into account hours needed to prepare for employment and sporadic work schedules, including criteria based on self-attestation, earnings, and preparation time.
>
> *Response:* We think the best approach for calculating hours of self-employment is to rely on the net income (gross income minus business expenses) of the individual. We adopted this method because States already calculate net income when determining the eligibility of the self-employed for TANF benefits and thus our approach minimizes the administrative burden on States. We do not believe it is necessary to modify the rule to address these suggestions. The regulation allows a State to 'propose an alternative method of determining self-employment in its Work Verification Plan.' This description should indicate how the State plans to monitor and supervise this activity to ensure that it reports actual hours and that the self-employment progresses to the point where the individual can effectively earn more than the minimum wage. We will not approve alternative plans that provide for an individual's self-reporting of participation without additional verification. We believe the rule's provision for

> approximating hours using the Federal minimum wage is a reasonable approach and minimizes administrative burdens.

From this passage, it is clear that federal regulators have considered changing the regulations to allow the counting of self-employment hours in a manner more reasonable towards a small business owner, and ultimately rejected any such changes. The comment in the above paragraph directly addresses the issue before the Administrative Law Judge. The fact that changes to the regulation were rejected in favor of the current formula renders any personal opinion of the undersigned null and void. The simple fact of the matter is that the federal regulators who determine participation hours (and how those participation hours are counted with regard to self-employment) have come up with a formula. This formula may seem unfair to the claimant, given the amount of work she has undoubtedly put into her business.

However, the fairness of a law is beyond the scope of the Administrative Law Judge. The Administrative Law Judge can only determine whether the Department properly applied the regulations in any decision it made.

In the current case, the Department clearly applied the rule correctly. As the rule was applied correctly, it therefore follows that the claimant was not meeting her participation hours. If the claimant was not meeting her participation hours, she would need to provide evidence of good cause for her failure to do so. Claimant has not made any allegations of good cause. The definition of noncompliance is a failure to meet required participation hours without good cause. Therefore, the evidence of the current case indicates that the claimant was noncompliant and the actions of the Department in the current case were correct.

As an aside, the undersigned realizes that in all actuality, the claimant thought she was compliant at the time the action took place. The Administrative Law Judge notes that there is nothing in the policies that JET gave to the claimant that specifically states the federal minimum wage requirement of her participation hours. This does not necessarily implicate the Department;

the situation is both specific and rare enough that it may not have come up before. However, intent is not an element of noncompliance. The fact that claimant did not meet her participation hours, without good cause, is noncompliance in itself, regardless of whether the claimant thought she was compliant or not.

Given that this is claimant's first incident of noncompliance, and the factors involved, the Department, subsequent to the receipt of this decision, may wish to offer the claimant a DHS-754; it is certainly within their power to do so. However, as stated previously, the regulations do not compel them to do so, and the Department is equally within policy to refuse to make such an offer.

DECISION AND ORDER

The Administrative Law Judge, based upon the above findings of fact and conclusions of law, decides that the claimant failed to participate in work-related activities, without good cause, and is therefore, noncompliant.

Accordingly, the Department's decision in the above stated matter is, hereby, AFFIRMED.

/s/_____
Robert J. Chavez
Administrative Law Judge
for Ismael Ahmed, Director
Department of Human Services

Date Signed: August 4, 2009

Date Mailed: August 5, 2009

NOTICE: Administrative Hearings may order a rehearing or reconsideration on either its own motion or at the request of a party within 30 days of the mailing date of this Decision and Order. Administrative Hearings will not order a rehearing or reconsideration on the Department's motion where the final decision cannot be implemented within 90 days of the filing of the original request.

The Claimant may appeal the Decision and Order to Circuit Court within 30 days of the mailing of the Decision and Order or, if a timely request for rehearing was made, within 30 days of the receipt date of the rehearing decision.

RJC/cv

cc: [redacted]