State of New York Department of Social Services

M E M O R A N D U M
DSS-5246L

TO: All Hearing Officers and Supervising Hearing Officers

DATE: December 11, 1996

FROM: Russell J. Hanks
RJH

SUBJECT: Policy Guidelines

The purpose of this memorandum is to reaffirm Office of Administrative Hearings' (OAH) policy on the development of an adequate hearing record and related matters. Portions of this memorandum were addressed previously in my memorandum of May 1, 1991, concerning policy clarifications. These guidelines are premised upon the recognition that each case is unique and must be addressed in accordance with its particular circumstances. Administrative hearings are designed as a means of efficiently resolving disputes between the parties in a fundamentally fair manner. The State Administrative Procedures Act, federal and Departmental regulations contain procedural provisions which address fundamental fairness. Bearing in mind that administrative hearings require less procedural and evidentiary rigor than civil courts, these guidelines are intended to provide hearing officers with illustrative instructions for ensuring fundamental fairness.

INADEQUATE NOTICES

The content requirements for notices of intent set forth in Part 358 reflect concern for appellants' due process rights. Where a hearing involves a notice of intent, the hearing officer must review the sufficiency of the notice to assess whether it complies with regulatory requirements and whether any deficiencies in the notice impinge on the appellant's due process rights. This assessment must include consideration of the notice's deficiencies, the issues for review, the appellant's circumstances, and the need to direct specific relief. This assessment should be conducted on the record and, where appropriate, reflected in the decision. The hearing officer must determine whether to find a notice void, require the social services district to provide additional information, or grant a recess or adjournment on the appellant's behalf.

In evaluating the adequacy of a notice, the hearing officer should consider if the appropriate notice was sent and if the explanation of the district's intended action, contained in the notice, is understandable by the particular appellant. A notice that fails to provide any reason or explanation for an intended action is void. A notice that cites the wrong regulation as justification for the intended action or an unclear explanation, while deficient, may or may not be void. In every case involving a deficient notice, the hearing officer must ensure that the deficiency does not result in harm to the appellant.

INTRODUCTION OF DOCUMENTS

When documents are introduced at a hearing, by the agency or by the appellant, it is important that they be identified, marked, and verbally noted as they are entered into the record. Each page of the agency's packet should be marked in case the pages should become separated. (The exhibit letter or number should be the only mark made on a submitted document; any other notations made by the hearing officer serve only to compromise the integrity of the document). The hearing officer should ensure that all parties have had an opportunity to see the documents introduced before proceeding. Where the documents have not been seen previously, a brief recess or an adjournment may be necessary, as the hearing officer deems appropriate. This approach is limited in New York City by the decision in Rivera, which requires that if documents or evidentiary packages are not sent out timely where requested, the notice of intent must be withdrawn.

The hearing officer also should ensure that the appellant is given a reasonable opportunity to question the agency representative concerning any documents that the social services district seeks to introduce, and to state any objections to the introduction of such evidence. The agency also should be given the opportunity to question the appellant concerning any documents introduced by the appellant at the hearing.

DEVELOPING THE RECORD

While it can be difficult to focus on its importance in light of heavy calendar assignments, the development of a complete record is an essential element of the hearing officer's responsibilities. In addition to the formal entry of documents discussed above, the hearing officer must ask questions, if necessary, to complete the record, particularly where the appellant demonstrates difficulty or inability to question a witness. (See 18 NYCRR §358-5.6). This may involve the questioning of either party to elicit information that may not have been volunteered due to a lack of understanding of its relevance.

The hearing officer must also consider adjourning or recessing a hearing where, in the judgment of the hearing officer, it would be prejudicial to the due process rights of the parties to go forward with the hearing on the scheduled hearing date. For example, an adjournment may be granted for an appellant to obtain additional relevant supporting documentation, where the hearing officer determines that there was a good reason for the appellant's failure to produce it at the hearing on the first scheduled date. This may include situations where it is found that an appellant did not know that a particular type of document would have an effect on the outcome of the hearing. When such an adjournment is granted and it appears that the appellant is uncertain as to exactly what documents are needed, the hearing officer should make clear to the appellant what types of documents would be preferred forms of evidence in a particular case.

BURDEN OF PROOF

18 NYCRR §358-5.9 provides that the social services agency has the burden of establishing that its determination was correct where the issue for the hearing involves the discontinuance, reduction or suspension of benefits or services. To meet its burden of proof, the agency must establish facts in support of the basis for the action as stated in the notice of discontinuance or reduction. For example, where the agency has determined to impose a sanction for failure to comply with work rules, the agency must produce evidence establishing the elements of the appellant's willful failure to cooperate without good cause, or its determination cannot be affirmed.

The burden is on the appellant to establish that a denial of benefits was incorrect, or that the benefit level determined by the agency is inadequate. When an appellant claims, for instance, that his or her benefits have been inadequate for a long period of time (e.g., "since 1992"), the appellant should be questioned as to exactly how the assistance was inadequate, rather than requiring the agency to establish that it was.

CREDIBILITY

When a decision turns on the credibility of the appellant, the basis for the determination should be included in the decision as specifically as possible. For example, if the appellant's testimony is found to be vague and inconsistent, some explanation should be included to explain why it is so found. Please note that the lack of documentary evidence is not a per se basis for finding an appellant's testimony incredible. A hearing officer may find uncorroborated testimony to be credible, especially where it is found to be uncontradicted or internally consistent.

OTHER CONCERNS

Hearing officers must always demonstrate appropriate demeanor and maintain, and appear to maintain, their impartiality prior to, during, and after hearings. This includes avoiding ex-parte conversations with either the agency or the appellant, or suggesting to the parties how the case may be decided. Off-the-record discussions should also be avoided; where such discussions do take place, a precise summary of the conversation should be stated for the record, and agreed upon by the parties, before proceeding. A simpler method would be to leave the tape recorder running at all times. Cassette tapes are cheaper than litigation losses due to incomplete records, and no time need be spent summarizing off the record activity.

RJH:hp

cc: John E. Robitzek
Sebastian Addamo