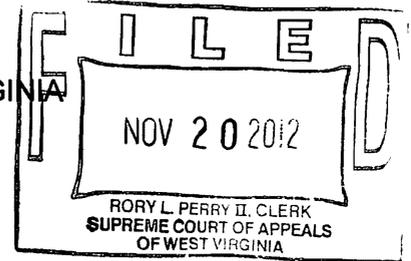


IN THE SUPREME COURT OF APPEALS, WEST VIRGINIA



PATRICIA HUDSON,

Petitioner Below, Petitioner,

vs.

Docket No. 12-0775

MICHAEL J. LEWIS, Secretary, West Virginia
Department of Health & Human Resources, and
STEPHEN M. BAISDEN, State Hearing Officer,
West Virginia Department of Health & Human
Resources,

Respondents Below, Respondents.

REPLY BRIEF ON BEHALF OF PETITIONER PATRICIA HUDSON

Bruce Perrone (WVSB 2865)
Counsel for Petitioner Patricia Hudson
Legal Aid of West Virginia
922 Quarrier Street, 4th Floor
Charleston, WV 25301
304-343-4481 ext 2127
bperrone@lawv.net

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I. INTRODUCTION

The DHHR Summary Response asserted that the constitutional adequacy of the Notice of Overpayment is “not relevant” and nevertheless that the Notice complied with the law. No explanation was given for the Relevance argument, and petitioner can perceive none. As to compliance, petitioner responds that the words “because of other eligibility factors” convey no meaningful information whatsoever. Petitioner asks this Court to hold that when a Notice is so defective as to provide no meaningful information whatsoever, then the underlying DHHR action must be dismissed in order to deter such grossly inadequate notices in the future.

The DHHR Summary Response also asserted that the issue of whether petitioner’s constitutional right of access to information in her file was obstructed is “not relevant,” and nevertheless that DHHR acted in compliance with petitioner’s right of access. No explanation was given for the Relevance argument, and petitioner can perceive none. As to compliance, petitioner asserts that DHHR employees directly denied her request for file access four different times, for spurious and mistaken reasons. Petitioner asks this Court to hold that when DHHR willfully obstructs an applicant or recipient’s constitutional right of access to the entire contents of her file, the underlying DHHR action must be dismissed in order to deter such deliberate obstruction in the future.

Finally, the DHHR Summary Response asserted that the conclusion of the court below that the spouses “lived together” was correct. However, the uncontradicted evidence in the record is that, after petitioner Patricia Hudson threw her alcoholic husband out of the house, for the rest of the alleged period of overpayment the husband never again spent a night under the same roof with her. Petitioner Patricia Hudson would not permit her husband to sleep in her house; eat in her house; cook in her kitchen; dress in her house; shower or toilet in her bathroom; or launder his clothes in her house. Petitioner did not purchase food for her spouse; cook for her spouse; or do laundry for her spouse. On these facts, the finding of the court

below that the spouses “lived together” is plainly wrong and should be reversed by this Court.

II. GROSSLY DEFECTIVE NOTICE REQUIRES DISMISSAL OF THE DHHR CLAIM

A. Relevance.

On the Notice issue DHHR's Summary Response began with the startling assertion that this issue was not discussed by the circuit court “because it was not relevant to its decision.” DHHR Summary Response at 3. No authority was cited for the proposition that constitutional Due Process requirements are not relevant to decision of a case. DHHR did not explain how it reached that conclusion.

Petitioner is simply unable to comprehend any law or sense to the assertion. If the Notice was constitutionally defective, then petitioner's constitutional claim should have been upheld. If the Notice was constitutionally sufficient, then petitioner's claim should have been rejected. But either way, the claim of constitutionally defective notice is “relevant” to the court's consideration of the case. The failure by the court below to address the claim is error.

B. Correctness.

After dismissing the notice issue as “not relevant,” DHHR then wrongly asserted the Notice was “correct.” Summary Response at 3. In fact the Notice failed the two most important elements required for every notice: a statement of reasons, and a citation to “all applicable manual sections.” Section 710.14.A.2, DHHR Common Chapters Manual, included in the record at App. Rec. 336.

As to the requirement of “manual citation,” DHHR in its Summary Response says that the Notice “clearly indicated she had been issued more S.N.A.P. benefits than she was eligible to receive pursuant to the S.N.A.P. policy contained in Chapter 20 of the West Virginia Income Maintenance Manual....” Summary Response at 3. But that is an incorrect citation. Chapter 20 does not define the amount of benefits a recipient is eligible to receive. Chapter 20 is a purely

procedural provision which covers “repayment and corrective procedures for all programs” including Food Stamps, Cash Assistance, and Medicaid. See § 20.1, “Introduction,” Chapter 20, Income Maintenance Manual.¹ The regulations defining eligibility and amount of food stamp benefits are spread through (among other locations) Chapter 10 (“Income”), Chapter 11 (“Assets”), Chapter 14 (“Specific SNAP Program Requirements”), and Chapter 25 (“SNAP Employment & Training”) on the Income Maintenance Manual.² The notice did not cite to any of these substantive regulations.

As to the statement of reasons for the adverse action, the DHHR Summary Response pointed to a number of things the Notice did get right: the notice told Ms. Hudson that DHHR alleged there was an overpayment (but not why); that she had the right to inspect her file (so maybe she could guess ‘why’ on her own); that she had a right to hearing (to contest whatever it was DHHR was claiming); and that she had the right to bring a lawyer (to help her figure out what DHHR was claiming). These points are true, but unimportant.

The Summary Response did not discuss the single most important function of a notice, i.e., the requirement to state “the reasons for the action *provided in terms readily understandable by the applicant or recipient*” Section 710.14.A.2, DHHR Common Chapters Manual [emphasis added]. The Summary Response does not identify a single word of the notice that meets this requirement of law and common sense, because there is none. There is not a fact to be found in the words “because of other eligibility factors.” No one, regardless of their sophistication or education or expertise in food stamp law, could determine from those words the reasons why DHHR believed an overpayment of food stamp benefits had occurred.

¹ Available on line at: http://www.wvdhhr.org/bcf/policy/imm/new_manual/IMManual/Manual_PDF_Files/Chapter_20/ch20_1.pdf

² The Income Maintenance Manual, including all of these referenced chapters, is posted on line at: http://www.wvdhhr.org/bcf/policy/imm/new_manual/default.asp

The Notice was not “correct,” and the failure by the circuit court to address the claim was wholly insupportable.

C. Dismissal of DHHR Claim Where Notice Provides No Meaningful Information

The circuit court’s failure to address petitioner’s claim of defective notice is obvious error. If there were facts in dispute to be weighed and balanced before applying the correct rule of law, then this Court should remand for further proceedings by the circuit court. However, this is not such a case.

First, there can be no dispute as to the facts. The words “because of other eligibility factors” are set forth on the page of the notice as the statement of reasons. App. Rec. 83. There were no other words in the Notice giving further explanation or information.

Second, there can be no dispute as to the correct rule to apply. The *Miller v. Lipscomb* Consent Decree and the Department’s own regulations are plain and straightforward. A Notice must state “the reasons for the action *provided in terms readily understandable by the applicant or recipient*”

Third, there can be no dispute as to whether the words of this Notice were legally inadequate. The words “because of other eligibility factors” do not convey any meaningful information whatsoever as to the reasons for the Department’s actions.

The only question to be decided is what remedy is appropriate, to penalize and to deter such gross violations of Due Process. Here again, if there were facts to be weighed to determine whether merely flawed or inadequate words amounted to “substantial compliance” or “good faith attempt” to comply, then it would be appropriate for this Court to remand to permit the court below to exercise its discretion. But this is not such a case.

What distinguishes the present case is that the words used in this Notice convey no meaningful information at all. This explanation wasn’t just too short, or too long, or too bureaucratic, too “jargony,” or incomplete. This notice simply conveys *no meaningful*

information. Petitioner therefore suggests the standard of “no meaningful information” as the dividing line between cases for which dismissal is the appropriate remedy, and cases for which other remedies should be considered.

There must be some sanction or penalty for the Department’s misconduct. Otherwise the “law” winds up being followed only in the rare instances where violations are caught. If the only remedy is the admonishment to “henceforth follow the law,” it would be tantamount to a traffic cop whose only option with speeding drivers is to pull them over and tell them to obey the limit. After which the speeder drives carefully over the hill, and then resumes excessive speed.

A sanction system must be practical, and it must be sufficient to deter future misconduct. For the first criterion, the judgment as to “no meaningful information” is practical. It does not require inquiry to state of mind or subjective intent or good faith or bad motive, or further evidentiary proceeding to address any of those factors. It can be determined from the face of the document.

For the second criterion, only dismissal of the DHHR action would suffice to deter in the future such complete failure to follow the law. Anything less, permitting the Department to have a “do-over” by writing a satisfactory notice once the defective one is “caught,” is no sanction at all.³ It would permit the attitude of “Let’s just do it the quick easy way, with no explanation at all. Most people won’t even know they’re entitled to more. Every now and then, when we run into someone who gets a lawyer, we’ll do what we’re supposed to do. For everybody else, fuhgeddaboutem.”

Petitioner therefore asks this Court to find the notice constitutionally defective; to find that it conveys no meaningful information about the reasons for adverse action; and to dismiss the Department’s case in order to assure future compliance with the requirement.

³ See discussion in Petitioner’s Initial Brief, at pages 14 and 17, of the “Catch 22” aspects of this circular logic.

III. DISMISSAL OF DHHR CLAIM WHERE DEPARTMENT HAS WILLFULLY OBSTRUCTED FILE ACCESS

A. Relevance.

As with the Notice issue, the Department asserts in the Summary Response that the Access to File issue was not discussed by the circuit court “because it was not relevant to its decision.” Summary Response at 3. Again no authority or discussion was offered in support of this conclusion. And again, petitioner is at a loss to find any legal justification for this notion.

The Department for over thirty years has agreed by federal court consent decree that Due Process of Law requires that people have “the right to access ... to the contents of the entire case file at any time....” *Miller v. Lipscomb* Consent Decree, submitted by petitioner in the administrative hearing, App. Rec. 113-124. If the facts demonstrate this constitutional right was interfered with, then petitioner’s claim should have been upheld by the court below. If the facts demonstrate otherwise, then petitioner’s claim should have been denied. But either way the constitutional claim should have been addressed and decided.

B. Obstruction of the Right of Access To File.

The facts of interference are set forth in Petitioner’s Initial Brief at pages 15-16, and need not be repeated in detail. The DHHR Summary Response asserts the Department “communicated with her frequently and by letter about their legitimate concerns.” Summary Response at 3. This “spin” ignores the following:

- the first DHHR denial of petitioner’s request for the file was by providing only “a few pieces of paper” instead of the entire file; and did not even include the evidence DHHR planned to use at hearing. App. Rec. 385.
- the second denial of access asserted (1) wrongly, that the proffered signed Release covered only medical records, and (2) that the worker who sent the notice and would be present at hearing on behalf of the Department was the wrong bureaucrat to handle the release of file contents. App. Rec. 377.
- the third refusal of access was because the proffered Release was not a “proper release,” although the reasons for insufficiency were not identified. App. Rec. 387.

- the fourth denial of access was delivered in person, to the petitioner herself when she went to DHHR to get her papers, and was told she was not allowed to have the information. App. Rec. 387.

Those denials were not communications about “legitimate concerns.” They were nothing more than attempts to evade a lawful and proper request.

The DHHR Summary Response further asserts that “providing access ... without a determination that a client’s purported representative is in fact a client’s representative would be inappropriate....” Summary Response at 4. This may be true, *but this was not a concern asserted by DHHR during its four denials of access to the file.* DHHR’s first response was to provide “a few pieces of paper,” which would have been wholly inappropriate if DHHR doubted the authenticity of claimant’s representative. DHHR’s second denial also accepted the representative’s capacity, but claimed (wrongly) that the proffered Release applied only to medical records. DHHR’s third denial asserted the Release was not proper, without stating why. DHHR’s fourth denial was a flat denial to the petitioner in person without her representative, when she was told she couldn’t have the information she sought. The Summary Response assertion of a need to verify a representative’s status is simply a misstatement of what actually happened in this case.

Next, DHHR attempts to wash away the record of evasions and obstructions with the limited observation that “Mrs. Hudson was given a copy of her record before the administrative hearing.”⁴ Summary Response at 4. Apparently DHHR believes that delivery at any moment before the start of a hearing would be sufficient. Never mind whether a recipient may need time to read and digest the material, and to locate witnesses and other supporting evidence to participate meaningfully in the hearing process. That isn’t fairness. That isn’t Due Process of Law. And it is not a suitable standard for the State of West Virginia to conduct legal

⁴ Without mentioning the sustained, persistent efforts by petitioner’s representative to force that to happen.

proceedings involving citizens whom it is charged with assisting.

Finally, DHHR tries the straw man argument that “on any given day the needs of a client who appears and requests to review an entire record must be balanced against the needs and interests of the multiple other clients “ in the office that day. Again true, but a distortion of what actually happened in this case. Of the four denials of petitioner’s right of access, only one of them involved a personal trip to the DHHR office. As for that one trip petitioner’s complaint is that she was told directly that she was not entitled to have her information. She wasn’t told “Yes, we’ll copy it for you but it will take a couple of hours.” She was told “No, you can’t have that.” Her response was to “occupy” the waiting room for hours, until her rights were honored.

C. Dismissal of DHHR Claim Where Right of Access To File Is Willfully Obstructed

As with the Defective Notice issue, the failure by the circuit court to even address petitioner’s claim of obstruction of her right of Access to File is error. And as with the Defective Notice issue, petitioner believes this Court should not remand the matter for further proceedings. The only effective remedy for willful deliberate obstruction is to dismiss the action altogether.

As with the Notice issue, there is no dispute as to the facts;⁵ there is no dispute as to the

⁵ The facts of the Department’s conduct were not disputed in the proceedings below. The documents detailing the facts of obstruction were attached as exhibits to petitioner’s initial brief to the circuit court. App. Rec. 368 - 389. Petitioner’s initial brief below included this request:

If respondent DHHR does not dispute the authenticity of the documents, petitioner asks this Court to consider the inadequacy of the DHHR response to petitioner’s efforts to examine the “entire contents” of her file prior to the hearing held November 21, 2011.

App. Rec. 365. DHHR did not dispute the attachments. App. Rec. 389. This Court has frequently noted a lower court’s task on Writ of Certiorari review is to conduct *de novo* proceedings to “make an independent review of both law and fact,” and that such independent review may include the taking of additional evidence. *Harrison v. Ginsberg*, 169 W.Va. 162, 286 S.E.2d 276 (1982); *Wysong v. Walker*, 224 W. Va. 437, 686 S.E.2d 219 (2009). Thus acceptance of the attachments as additional evidence is fully appropriate.

law; and there should be no dispute that DHHR's actions in this case were not acceptable. The sole legal question is determining appropriate remedy.

In the end, petitioner's stance is that there must be some sanction for the Department's misconduct. Merely noting that the Department's conduct was improper is not likely to deter future misconduct. This Court's ruling should provide an incentive for the Department's employees to pay attention to the rights of clients and the requirements of law. The Department's refusal to honor the Due Process requirement in this case was not accidental, negligent, or unintended. The facts of repetition show it was conscious, willful, and repeated through multiple denials, right to the precipice of hearing. For deliberate obstruction, petitioner believes that dismissal of the Department's action is the only appropriate remedy.

IV. THE CONCLUSION BELOW THAT THE SPOUSES WERE "LIVING TOGETHER" WAS PLAINLY WRONG

The uncontradicted evidence in the record is that, after petitioner Patricia Hudson threw her husband out of the house, he never again spent a night under the same roof with her. She did not cook for him; did not feed him; did not do his laundry; did not permit him to use her bathroom or her shower. On these facts, the finding of the court below that the spouses "lived together" is plainly wrong.

The Summary Response at page 2 recited most of the facts the circuit court noted in ruling that the spouses "lived together." Those recited facts were:

- The case involved an alleged overpayment of food stamps;
- The matter was referred to the Fraud Management Unit;
- An income maintenance worker testified that the husband said he "lived behind" the wife "on the same property," and "that he took care of her and she took care of him;"
- Husband and wife shared the cost of utilities;
- Husband renewed his license using wife's address;
- Husband listed the phone at wife's property; and
- Husband and wife had a joint bank account.

Summary Response at 2. See *also* Circuit Court decision at page 3 (App. Rec. 392). Not one

of these facts contradicts petitioner's assertion that the spouses were not "living together."

The spouses used the same address. However, as discussed in more detail in petitioner's Initial Brief at pages 19-20, the Department may not apply a simplistic "same address" test. The legal issue under 7 U.S.C. § 2012(n)(2) is not whether the spouses were sharing an address; it is whether the spouses were "living together."

Nothing in the Summary Response establishes that the spouses "lived together." If anything, the cited income maintenance worker's testimony supported petitioner's case, when she testified "I remember as their caseworker they had a trailer, and that was the way it was worded, that he lived behind her...." App. Rec. 285.⁶

As discussed in petitioner's Initial Brief at pages 21-22, the fixation on the camper trailer obscures the full context of the period of alleged overpayment. The camper was present on the wife's property only for the first 4 months of the 17 month period during which DHHR alleges the spouses were living together. During those four months, the undisputed testimony is that the wife lived in her house, and the husband lived in the camper when he was in Boone

⁶ DHHR Income Maintenance Worker Loretta Hiles testified as follows:

[Ms. Hiles]:so it was at the end of 2009 or early 2010, and that's when they told me they had separated and said they were still taking care of each other. He had been in the hospital I'm thinking with a heart attack, heart surgery or something.

MR. HUDSON: Two stents.

THE WITNESS: Had two stents put in, and said that he lived behind her, but like I said, he still took care of her, she still took care of him.

BY MR. SHREVE [DHHR representative]:

Q. So if I understand what you're saying, you're saying that she said that he lived behind her, as she lived in the trailer and he lived behind her. Correct?

A. I remember as their caseworker they had a trailer, and that was the way it was worded, that he lived behind her, so I didn't know if it was a camper, if it was a trailer, or what it was, because I had no reason to ask that.

County. The spouses did not purchase or share food together; they did not share a kitchen; they did not share a bathroom; and they did not share a dwelling. In short, in those four months they did not live together.

For the remaining 13 months the camper was removed from the wife's property altogether. The husband never again slept so much as a single night "on the property" or "in the yard" belonging to his wife. During those 13 months the testimony was undisputed that whenever the husband was in Boone County he stayed with his daughter and grandson next door, and not on the property of petitioner. The spouses did not purchase or share food together; they did not share a kitchen; they did not share a bathroom; and they did not share a dwelling. In short, in those remaining thirteen months they did not live together.

The decision of the court below mostly recited facts that suggest the court was applying an erroneous "same address" test: that husband renewed his driver license using the same address as his wife; and that husband gave the same address in a March 2011 "SNAP telephone review." Ultimately, the dispositive sentence in the decision below was that vaguely described "sufficient evidence" indicated that the spouses "shared utilities and property" and therefore the spouses "lived in the same household." Circuit Court decision at 3-4, App. Rec. 392-393. That conclusion is plainly wrong.

To the extent that the decision below rests on the "same address" test, it rests upon legal error. *Robinson v. Block*, 869 F.2d 202, 211 (3rd Cir. 1989). To the extent the decision concludes that husband's 4 months of occasional stays in a camper trailer in the yard outside the wife's dwelling constitutes "living together," it is factually wrong and legally wrong in its definition of "living together." To the extent the decision below concludes that husband's 13 months of occasional residence with his daughter next door, and never on the property of the wife, constitutes spouses "living together" it is both plainly factually wrong and legally erroneous in its definition of "living together."

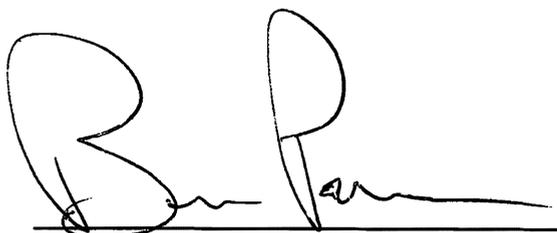
The sad truth in this case is that a long suffering West Virginia wife refused any longer to watch her alcoholic husband drink himself to death. So she threw him out of the house and refused to shelter, cook, feed, clean, or launder for him any more. She still loved him and hoped he would come to his senses and quit drinking. But if he did not, she would at least get him to doctor appointments and try to keep him alive. But in no ordinary common sense of the words was Patricia Hudson "living together" with the alcoholic husband she had thrown out of her house. With as much real food stamp fraud as DHHR could be prosecuting, one is hard put to understand why DHHR has so determinedly pursued Patricia Hudson on these facts.

V. CONCLUSION

The Notice of Overpayment communicated no meaningful information whatsoever. This Court should dismiss the underlying DHHR claim, as a sanction for such gross violation of Due Process.

DHHR on at least four different occasions obstructed petitioner's right of access to the entire contents of her file. This Court should dismiss the underlying DHHR claim, as a sanction for such gross violation of Due Process.

The conclusion of the court below that the spouses were "living together" was plainly wrong and should be reversed by this Court.



Bruce Perrone (WVSB 2865)
Legal Aid of West Virginia
Counsel for Petitioner Patricia Hudson
922 Quarrier Street, 4th Floor
Charleston, WV 25301
343-4481 ext 2127

Respectfully submitted,
PATRICIA HUDSON,
Petitioner Below, Petitioner Herein
By Counsel

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MICHAEL J. LEWIS, Secretary, West Virginia
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West Virginia Department of Health & Human
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Respondents Below, Respondents.

Certificate of Service

The undersigned hereby certifies that a true and accurate copy of the foregoing Reply Brief on Behalf of Petitioner Patricia Hudson, and Appendix Record, was served upon the parties, by depositing the same in the United States mail, first class postage prepaid, to the following address:

Michael Jackson
Assistant Attorney General
DHHR Region II Office
4190 Washington Street, W
Charleston, WV 25313

All of which was done on November 19, 2012.



Bruce Perrone (WVSB #2865)