

DISTRICT OF COLUMBIA
OFFICE OF ADMINISTRATIVE HEARINGS
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E _____ S. N _____
Petitioner,

v.

DISTRICT OF COLUMBIA
DEPARTMENT OF HUMAN SERVICES

and

DISTRICT OF COLUMBIA
OFFICE OF THE STATE
SUPERINTENDENT OF EDUCATION
Respondents

Case No.: 2011-DHS-00600

FINAL ORDER

I. Introduction

In this case, the Petitioner E _____ S. N _____ challenges a decision of the Department of Human Services (“DHS”) that terminated her subsidized child care benefits, effective November 9, 2011. Because Ms. N _____ filed a timely hearing request, she had a right to continuation of those benefits until the issuance of a Final Order in this case.

After a hearing on November 17, 2011, I issued an Order with findings of fact and conclusions of law on December 12, 2011 (the December 12 Order). As explained in that Order, additional information was necessary before I could issue a Final Order. Accordingly, the December 12 Order required Ms. N _____ to file a copy of her 2010 federal income tax return or a statement saying that she did not file a return for that year. The Order also required the

Respondents, DHS and the Office of the State Superintendent of Education (“OSSE”) to file written responses to three questions:

1. Should Ms. N____’s eligibility for a child care subsidy be based on the adjusted gross income reported on any 2010 tax return?
2. If Ms. N____’s eligibility for a child care subsidy is not based upon the adjusted gross income reported on her 2010 tax return, should her “total annual income” be calculated for 2010 or 2011?
3. Why should child support income be counted in “total annual income” when it is not counted as part of “adjusted gross income”?

On December 19, 2011, Ms. N____ filed a copy of her 2010 federal income tax return. That document has been marked as Petitioner’s Exhibit (“PX”) 103 and is admitted into evidence. On January 11, 2012, DHS filed a response to the three questions above.¹ The record is now complete. Set forth below are supplemental findings of fact and conclusions of law that, together with the findings of fact and conclusions of law in the December 12 order, require reversal of the decision to terminate Ms. N____’s benefits.

II. Supplemental Findings of Fact

Ms. N____’s 2010 federal income tax return shows an adjusted gross income of \$31,742. PX 103.

¹ A copy of that response was e-mailed directly to me on an earlier date. OAH Rules allow filing by e-mail, but only to the OAH mailbox designated for e-mail filings. OAH Rule 2941.6, 1 DCMR 2941.6. The e-mail, therefore, was not a proper filing, although the January 11 fax was properly filed.

III. Supplemental Conclusions of Law

A. Should Ms. N____'s Eligibility Be Based Upon Her 2010 Tax Return?

As explained in the December 12 Order, both Ms. N____'s eligibility for subsidized child care benefits and the amount of any co-payment that she must contribute are based upon her income. "Income" is a defined term in the regulations that govern child care benefits. The applicable regulation defines "income" as follows:

Income - the combined total adjusted gross income of the parent(s) with primary responsibility for the child, declared in the joint and/or individual annual federal income tax filing for the most recent calendar year; or in the event such filing is not required with the federal government, other appropriate documentation to establish the total annual income of the parent(s). Examples of income sources include, but are not limited to revenues from: wages, salaries, tips, partnership income, interest, dividends, capital gains, fringe benefits, IRA distributions, pensions, annuities, royalties, trusts, rental income, S corporations, farm income, alimony, child support, Social Security, unemployment compensation, and disability compensation.

29 DCMR 380.13.

The definition of "income" unambiguously requires use of the "total adjusted gross income . . . declared in the joint and/or individual annual federal income tax filing for the most recent calendar year . . .;" use of any other source to determine income is allowed only if "such filing is not required with the federal government." 29 DCMR 380.13. Because Ms. N____ filed a federal income tax return for 2010, DHS and OSSE were required to use the adjusted gross income reported on that return in calculating her eligibility for child care benefits during

the fall of 2011, when DHS issued the termination notice. They must continue to use that amount until Ms. N____ files her federal income tax return for 2011.²

Despite the unambiguous language of the regulation, DHS argues that it did not have to base its calculations for Ms. N____'s eligibility upon her 2010 tax return. It relies upon the September 2009 Manual entitled "Eligibility Determination Policies for Subsidized Child Care," issued by OSSE (the "Eligibility Manual"). DHS argues that the Eligibility Manual requires that an applicant's current income, not the income from the previous year, must be used in determining eligibility and co-payment amounts.

There may be good reasons for using the income calculation method set forth in the Eligibility Manual. An applicant's current income, instead of the income reported on a previous year's tax return, may be a better way to evaluate her present need for subsidized child care services. Nevertheless, the Eligibility Manual contradicts the subsidized child care regulations found at 29 DCMR 380. Those regulations are validly adopted rules, and neither DHS nor OSSE is free to ignore them. *Macouley v. District of Columbia Taxicab Comm'n*, 623 A.2d 1207, 1209 (D.C. 1993); *Seman v. District of Columbia Rental Housing Comm'n*, 552 A.2d 863, 866 (D.C. 1989); *Dankman v. District of Columbia Bd. of Elections*, 443 A.2d 507, 513 (D.C. 1981). A rule can be changed only by the notice and comment rulemaking procedures established by the Administrative Procedure Act, not by adopting contrary "policies." D.C. Official Code § 2-505. I therefore must decide this case by applying the definition of "income" in the subsidized child care regulations.

² As Ms. Norde remained employed at the time of the hearing, with an annual salary of more than \$35,000, it is unlikely that she will not be obligated to file a federal income tax return for 2011.

As noted in the December 12 Order, DHS concluded that Ms. N____'s annual income was \$42,530.94, based upon her September 2011 income. That was error. The law required DHS to use \$31,742, her adjusted gross income for 2010. Based on that income, she was eligible for subsidized services, with a daily co-payment of \$10.91. 29 DCMR 380.11.

B. The Remaining Questions

Because the answer to the first question in the December 12 Order is dispositive of this case, it is not necessary to reach the remaining two questions, which would be relevant only if Ms. N____ did not file a 2010 tax return.

IV. Order

Based on the above findings of fact and conclusions of law, the findings of fact and conclusions of law in in December 12 Order, and the entire record in this matter, it is this 7th day of **March** 2012:

ORDERED, that the decision to terminate Ms. N____'s subsidized child care benefits is **REVERSED**. Ms. N____ was eligible for benefits, with a daily co-payment amount of \$10.91; and it is further

ORDERED, that Ms. N____ remains eligible for benefits at that level until she files her 2011 federal income tax return. At that time, DHS and OSSE may recalculate her eligibility and co-payment level based upon the adjusted gross income shown in that return. If Ms. N____ does not file a 2011 return, DHS and OSSE may calculate her eligibility based upon the alternatives specified in 29 DCMR 380.13; and it is further

ORDERED, that nothing in this Order shall prevent DHS and OSSE from changing the method of determining income for the purpose of calculating subsidized child care benefits, provided that they do so by properly amending or repealing the definition of “income” in 29 DCMR 380.13; and it is further

ORDERED, that any party may ask for reconsideration or relief from this Order as described below, and it is further

ORDERED, that any party may appeal this Order by following the instructions below.

_____/s/_____
John P. Dean
Principal Administrative Law Judge