CCWRO New Welfare NEWS

CCWRO New Welfare News #2005 - 19, October 24, 2005 - Page 1

In Brief

✓ **Office of Administrative Law (OAL) to provide report on underground regulations** - The 2005-2006 State budget Supplemental Report provides in Item 8910-001-0001, that OAL shall report to the Legislature for the next two years, "... an accounting of the number and nature of any underground regulations detected... " The state budget provides:

"Underground Regulation Workload. The Office of Administrative Law (OAL) shall provide to the Chair of the Joint Legislative Budget Committee and the chairs of the fiscal committees of the Legislature by April 1, in each of the years of 2006 and 2007, a report that provides an accounting of the number and nature of any underground regulations detected, the course of actions taken by OAL to address the issue, and a brief explanation of any fiscal disposition of the situa-tion. The report shall also include the benefit to the state of truncating each practice."

✓ **Heritage Foundation distorts the truth about poverty in America**

Some 2.9 million fewer children live in poverty today than in 1995 reports the Heritage Foundation, a Republican propaganda machine. Meanwhile, the United States government reported that the official poverty rate in 2003 rose from 12.5 % to 12.7 % in 2004. According to the U.S. Census Bureau, in 2004, 37.0 million people were in poverty, up 1.1 million from 2003.

✓ **Main changes sanction process to be more family friendly** - This year Maine's Legislature passed legislation addressing TANF sanctions. The bill puts into place some procedural protections against sanctions for people in the ASPIRE Program, which is Maine's TANF program. Typically, people in the Program have been sanctioned for missing meetings or not being able to comply with other requirements. Under the new bill, caseworkers must take some extra steps before they can impose a sanction. Now, caseworkers must:

1. Review the file to look for possible good cause to explain why the ASPIRE participant did not comply with a requirement;

2. Notify the participant in writing and in detail about good cause;

3. Give the participant a chance to respond to the caseworker; and

4. Get supervisory approval before imposing a sanction.

✓ **Australia also attacks the poor** - "Proposals to cut welfare payments for 135,000 parents and their 200,000 children and 75,000 people with disabilities and to place people on income support payments that are riddled with workforce disincentives will impede the fight against poverty in Australia' said the National Welfare Rights Network (NWRN) today. NWRN Vice President, Mark Leahy, said: "It is appropriate to reflect on the potential negative consequences of the Federal Government's welfare reforms and industrial relations changes during anti-poverty week."

In This Issue

Publisher: CCWRO.
Reporters: Kevin Aslanian and Grace Galligher.
Contributors: Steve Goldberg and Diane Aslanian.

DSS State Hearings Meeting Report

October 6, 2005 meeting with State Hearings Division.

Meeting Attendants :

DSS Representatives

John Castello, Deputy Director, DSS State Hearings Division,
Lonnie Carlson, Presiding Judge, DSS State Hearings Division,
Rosie Morefield, Analist , DSS State Hearings Division,

Advocates

Steve Bingham, BALA
Tara Davis, CRLA
Grace Gallagher, CCWRO
Steve Goldberg, LSNC
Dora Lopez, WCL&P
Marjorie Shelvy, LAFLA

John Castello, Chief ALJ, gave presentation as follows:

The fiscal situation dictates what services and programs can continue and what must be eliminated. This year's fiscal situation is very challenging because incurring a $1.5 million deficit in the division. There is a $630,000 salary savings requirement. SHD was funded at 100% employee salaries less 5% (salary savings), so must keep vacancies open with the greatest number of vacancies in LA County. There are 8 judges for LA and Orange Counties.

Calendars were cut from 6 to 3 in Orange. In Los Angeles there are 4 judges 3 days/week, but still have the same number of cases.

SHD is also implementing new projects be more efficient and provide better customer services.

SHD just implemented electronic transferring of decisions, instead of doing it by hard copy. SHD looking at on-line requests for hearings, electronic transfer of decisions and telephonic hearings. Texas holds 99% of their hearings via telephone.

SHD utilizes interpreters which costs $300,000, but cannot do anything about reducing this number.

SHD is experimenting with video conferencing, and has already purchased equipment for Sacramento and Los Angeles (pilot for disability cases). Video conferencing will begin with disability hearings, only. SHD will save money on travel. The ALJ will be in Sacto, the claimant and rep will be at the Hearing office in Los Angeles.

SHD meeting with Clear 2, who are the recording tape folks, on November 2nd for a briefing to insure that tapes of state hearings won't be blank. This company has provided services in Unemployment Insurance cases in Texas.

The California Association of Counties (CSAC) purchased 54 audio video sets for counties. SHD hopes that the counties will allow them to use the equipment for the hearing. For example, San Diego has the hearing responsibility for Imperial County and San Bernardino. So an ALJ may be able to use San Diego's and Imperial's video equipment, and not travel to Imperial County for a hearing.

At least 5 counties up north are interested in video conferencing.

Rene Quintanilla is acting head for disability, and will be setting up a group to discuss issues related to video conferencing, and how to implement.

Discussed problems with audio-video taping and SHD said that they would be willing for advocates to have input into development of the procedures. SHD also willing to made an introductory video tape about the audio-visual taped hearing. There are many issues to consider, including cultural and mental disability issues. We stressed that ALJs will need training on how to handle disabled clients who may panic with the use of video. ALJs will also need training on credibility assessment in a video medium.

Video hearing is optional, and claimants can always request in-person hearings.

There was a discussion on ways to reduce the 70,000 hearing requests per year in order to get the budget under control. There is a delay in scheduling hearings for up to 45 days to give time to the counties to resolve the issues. Cases not negotiated go to hearing. This eliminates about _ of all cases.

Advocates suggested that there should be an effort at avoidance of hearing by 1) more training of DAPD so they get it right the first time; and 2) training appeals specialists and their supervisors better so thy catch more county errors.

Precedent Hearing Decisions

Steve mentioned that hearing decisions ought to have precedential value if adopted by the director. John said that decisions have not been utilized by SHD, but there is a process to establish precedent decisions. Per the APA, every agency can establish a precedent decision process. The APA defines a precedent decision as pertaining to a matter of general application and be recurring. Both conditions must exist. If advocates believe they have a case that should be a precedent decision, submit it to the presiding judge for the region for review by counsel. Using the guidelines, explain why the decision should be a precedent decision, and why it could resolve further conflict. If Counsel agree, the decision will be given to the Director for review. Once the Director approves the decision as being precedential, the ALJs will receive notice. Lonnie knows that there is one precedent decision but can't remember what it is or when it was issued. DSS handed out a copy of the precedent decision procedures. This information is available from CCWRO upon request.

SHD wants to give access to advocates and counties to all decisions. DSS is planning to place all hearings decisions on the internet without the names of the claimants.

Also want to develop web based requests for hearings.

SHD conducts trainings throughout the year. In December will be training Los Angeles Department of Children Services appeals staff in Los Angeles. Larry Geller, who retired last year, may be doing this training. In August, SHD trained 1200 Social workers on IHSS. SHD provides training every 2 months to supervisory staff. SHD can provide training to legal services staff.

The group then started dealing with the agenda items. The first issue for discussion was the proposed questions and answers as a proposed ACL.

1. Discussion of proposed Q&As.

Advocates presented a list of proposed Q&As for SHD for consideration.

Q&A # 1 and Q&A #2.

#1. Q: Can a hearing decision dismiss an overpayment(s)/overissuance(s) claim if the county has deducted from the claimant's benefits but has never sent a Notice of Action and has no documents to support the overpayment(s)/overissuance(s) at the time of the hearing?

A: Yes, if the claimant states s/he is willing to waive notice. The deduction itself is an adverse action and the county must be prepared to support its action at the hearing.

#2. Q: Is the answer to #1 above different if the county has not deducted from the claimant's benefits?

A: If no notice was issued and the claimant's benefits have not been reduced, there is no adverse action on which to base a hearing decision.

DSS RESPONSE: DSS okay with it.

Q&A #3. Other than the instance of an overpayment claim, if the county does not send a notice, is there an adverse action?

A: Claimants are permitted to challenge any action with which they are not satisfied. MPP § 22-003.1. This includes a county's failure to act, e.g. failure to accept or to process an application for benefits. Individuals may also challenge any program requirement or Welfare-to-Work assignment. MPP § 42-721.5.

DSS RESPONSE: The first part of the example is clearly hearable issue. Failure to act, failure to accept or process an application may not be a triable issue, it depends upon the individual facts. SHD wants to avoid a declaratory deci-

sion. If no viable action, it won't issue a decision. Per the section for challenge any program requirement or WtW assignment, Lonnie didn't know what it meant. If the facts of the case does not present a hearable issue, it is not ripe for adjudication and SHD won't issue a decision. Okay to include examples to clarify.

Q&A #4. Q: If it is determined that the county has reduced the claimant's benefits in error, is there a limit on the time period for reimbursement of those deductions?

A: There is no time limit on the county's obligation to reimburse the claimant for all deductions taken without adequate notice or otherwise found to be taken in error.

DSS RESPONSE: Generally true but Notes from the Training Bureau instructs judged to look back to the last adequate notice, even though the last adequate notice of action is unrelated to the deductions, and compute 90 days from that day. Lonnie said that there is some litigation re this issue in SF, and have to mindful of that (advocates don't know about this litigation).

Q&A #5. Q: Can an ALJ render a hearing decision based solely on hearsay evidence?

A: No. Since the county has the burden of proof, it cannot take any adverse action, including a denial, reduction, reduction or termination of benefits, etc. without substantial evidence, i.e. without "the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs." MPP § 22-050.2. Unsubstantiated hearsay evidence, on its own, is not sufficient to meet the county's burden.

DSS RESPONSE: The answer is yes. Government Code § 11513(d).

Q&A # 6. Q: Are computer system printouts (i.e. LEADER and/or CalWIN) admissible as evidence?

A: Such computer printouts are, at best, hearsay evidence. They are insufficient by themselves to prove issuance of a notice, an overpayment/ overissuance, an admission by the claimant, or otherwise form the basis to infer non-compliance by the claimant. So, for example, the county must at least be able to produce the notice of adverse action. (See #4 above.)

DSS RESPONSE: The ALJ must weigh the evidence. SHD won't tell the ALJs make presumptions. Must look at the probative value. We will change language to reflect that ALJs may not make evidentiary presumptions about these printouts. Steve suggested that ALJ's be instructed not to make presumptions of CalWIN accuracy just because it is an official system.

Lonnie opines that computer printouts, in absence of other probative evidence, is not very useful. Lonnie will talk to Barry about training judges re probative value of computer printouts. SHD has requested that the legal division deal with some questions on these broad based issues. Steve Goldberg volunteered to research these issues.

We had discussion of whether advocates could gather data showing CalWIN defects and submit at hearings if CalWIN accuracy is an issue.

Q&A #7-Q&A #8.

Q# 7: What is the process if the Appeals Officer/Hearing Specialist (AHS) has not prepared a Statement of Position, often claiming s/he anticipated a Conditional Withdrawal? The claimant may believe she did not agree to a Conditional Withdrawal, or has decided to go ahead with the hearing. Should the hearing proceed?
A: Unless there is a Conditional Withdrawal (or Withdrawal) signed by both parties, the county must be prepared to present its prima facie case on the day of the hearing. It is also required to have the position statement available 48 hours prior to the hearing. The hearing will proceed on the scheduled date, unless the claimant agrees to postpone the hearing. ALJs are instructed not to keep the record open for additional evidence that the county could have presented at the hearing, absent compelling good cause.

Q#8. Q: What if the Appeals Officer/Hearing Specialist (AHS) does not appear for the #hearing, then later states s/he thought the case was settled? Should the ALJ postpone the hearing?
A: As with question #6 above, unless the county appeals worker has a signed Conditional Withdrawal (or Withdrawal), the county must be prepared to present its prima facie case at the hearing. The regulation protecting a claimant's right to a hearing should be read as protecting his/her right to

a timely hearing on the merits. MPP § 22-000.12. Counties are presumed to have all the information and evidence supporting the action at the time the county acts and thus, absent unanticipated exigent circumstances, there is no reason why the county would not be prepared to proceed. If the county believes the default was taken improperly, it can request reconsideration.

DSS RESPONSE: The problem with these Qs and As is that they require judgment calls on the part of the ALJ concerning the facts, behavior, etc. One must trust the judgment of the ALJs without hard and fast rules. Lonnie will put this on agenda to bring up to the presiding judges' meeting coming up.

Q&A #9. Q: To qualify as "adequate," a Notice of Action must cite "the specific regulations supporting" the action. MPP § 22-001a.(1). Sometimes the Notice cites an entire section, without specifying an applicable sub-section, e.g. MPP § 45-202 (14 pages, subsections .1 to .62). How specific must the regulatory cite be?
A: The Notice must cite the specific section and/or sub-section on which the county relied in making its decision. The purpose of the Notice is to inform the applicant/recipient of the precise reason for the adverse action, so that individual can make an informed decision as to whether or not to appeal the action.

DSS RESPONSE: An adequate notice should focus on the specific area of the regulations which pertain to the action being taken. There is a presumption that if a NoA was issued by the department, it is adequate. SDH will take a look at our revised language. Lonnie said NoA must cite to authority specifically enough to give client notice of specific basis of the county action. He cited Wheeler v. Montgomery.

Q&A #10. Q: Is a notice in English adequate and timely if provided to an applicant or recipient who is Limited English Proficient (LEP)?
A: Counties are required to have applicants or recipients self-identify their preferred their primary language for written materials. If the claimant has indicated a non-English language, the counties must provide the notices in this language, if translated by the state or county, whether or not the language meets the 5% threshold of the caseload. If neither state nor county has translated the notice, the county has an obligation to effectively orally communicate with applicants and recipients. At a minimum, the county must inform LEP applicants/recipients how to obtain an interpreter when they get written communications they cannot read.

If a county does not send a NOA in the proper language, or has failed to provide an opportunity for the applicant/recipient to self-select the language for written materials, the ALJs are instructed to find that the 90-days to request a hearing is tolled and jurisdiction exists for the hearing. Further, if the notice was sent in the wrong language or the county did not provide access to an interpreter, the NOA will be deemed inadequate.

DSS RESPONSE: Generally speaking its ok. Look at ACL 03-56. If the LEP client gets an English language notice and files untimely, the ALJ generally grants jurisdiction. Lonnie said that a NoA in the wrong language is "adequate" but "ineffective"

SDH has asked the legal division for the department's position, since the last ACL was issued in 2003. There is a new ACIN coming out on the subject. We mentioned that Jodie clears all these ACLs and ACINs and is the expert re LEP issues.

Q&A #11. Q: Is a Conditional Withdrawal valid if it merely agrees to suspend collection of an overpayment or overissuance?
A: No. A Conditional Withdrawal must substantively resolve the issue for the hearing. Suspension of collection merely suspends the adverse action without resolving the issue of whether the validity of the county's claim. A suspension may be appropriate if, e.g., the claimant is merely questioning the calculation of the amount due. In that case, the dispute must be resolved within 30 days of the signed the Conditional Withdrawal, with a proper notice of action.

DSS RESPONSE: Generally True.

Q&A #12. Q: When a claimant has listed an Authorized Representative (A.R.) on the hearing request, or an A.R. form is subsequently submitted to the state or the county, does the county have the option of discussing settlement with the either the A.R. or the claimant?

A: No. Once the county is made aware of the claimant's appointment of an A.R., the county must immediately cease contact with the claimant, including negotiation of a Conditional Withdrawal, unless the A.R. is present or otherwise included in the discussion. This is true whether the A.R. is a

legal advocate or layperson.

DSS RESPONSE: Don't have a problems with it.

2. Conditional Withdrawal language - DSS won't do anything until Division 22 regulations are implemented. SHD agreed that Taylor v. McKay requires county compliance within 30 days. SHD will include language about asking for rescheduling hearing if county doesn't comply with terms of conditional withdrawal (CW) within 30 days. A new NOA should issue reflecting terms of CW and starting a new jurisdictional time period. Asked about sanction power, SHD said the only known sanction is WIC §10605. However, if the two sides agree to a stipulated decision rather than CW, SHD does monitor compliance. Those at meeting agreed it makes sense to enter into stipulated decision in front of judge rather than do CW if compliance is expected to be an issue.

DSS RESPONSE: County must comply with the conditional withdrawal (CW) within 30 days. Will deal with this issue by Division 22 regs. These are still in the review process so it will be another 6 months. Will also deal with the adequacy of notice issue.

3. Subpoena - Advocates proposed at an earlier meeting that both the letter acknowledging receipt of hearing request and the notice of hearing date include information regarding how to obtain a subpoena and subpoena duces tecum. SHD agreed to put this information only in the acknowledgement letter since the hearing notice issuance date often provides insufficient time to respond to a subpoena duces tecum. SHD agreed there should be no cost for documents produced pursuant to a subpoena duces tecum. SHD is to provide an update on implementation.

DSS RESPONSE: SHD is still working on the language. SHD handed out draft language. Will mention subpoenas in acknowledgement of receipt of hearing requests.

5. Telephone hearings - 45 CFR 205.10 allows a state hearing by phone, but only if the claimant agrees. SHD is doing more telephone hearings to save ALJ travel time so that decisions can be issued on time. It is not SHD's preferred method for hearings. SHD said that the presiding judges are developing a phone hearing process that will be reviewed at the next judges meeting, Advocates will be invited to comment on the draft before implementation. It was also mentioned at last meeting that SHD currently has a video-conference pilot in Mendocino and plans a similar pilot soon to link Los Angeles, Sacramento and Orange via video-conference. Claimant will have the option of receiving a video CD as part of the record.

DSS RESPONSE: This is not the preferred way of doing hearings. But because of reduced staff, will do telephone hearings. Telephone hearings are at the department's discretion, not as a matter of right (this is a big budget issue). Judge Garola is focusing on when to do phone hearings. Will review the proposals at a meeting on November 2nd.

Steve suggested a settlement conference to resolve common issues that don't have to go to hearing. Advocates will discuss this more before giving a proposal to SHD. Lonnie said there is such a process in regs, involving ALJ, appeals specialist, and claimant/AR. Steve found MPP 22-074 et seq., dealing with "preliminary hearings" that are conducted by the appeals specialist.

6. Fines for late hearing decisions - One advocate reports a favorable decision adopted 7/2505 for a hearing begun on 2/01/05 and continued to 3/15/05. She is still waiting for a decision from a 5/31/05 hearing. The Presiding Judge told her it takes six months to process payment of the Ball fine. SHD is requested to provide a status report on compliance with Ball decision deadlines and payment of fines.

DSS RESPONSE: Penalties should not take long to process. If have a late decision call Esther Smithstan, supervisor of State Hearing Support, at (916) 229-4147. Lonnie mentioned that Ed Barnes was counsel on King and Ball cases.

7. Rehearings - CDSS Legal has insisted on being in charge of entire rehearing process. Judge Carlson said that CDSS would look into granting rehearings in cases of defective recordings. SHD is to report back.

DSS RESPONSE: SHD is looking at rehearings. SHD is meeting with Programming and Adult

Services next week. The driving force behind now rehearings is fiscal.

SHD was asked to develop a database to see if SHD can pick up rehearings. John's position is that there are no resources, even if the database cuts the work. Both legal and SHD have a resource issue.

Currently, state's position is to deny by operation of law because of the resource issue.

8. Legal Service Programs 800 Numbers On NOAs

- SHD agreed to consider including on its notices a single state-wide 800 number to call for access to any legal services program in the state. This is especially important for those with ADH fraud hearings. SHD is to report back.

DSS RESPONSE: If legal services arranged to have a single 800 number so that client could call for assistance, DSS would consider adding the number to the NoA.

9. Division 22 Changes UPDATE

- **DSS RESPONSE: Began revisions 4 years ago but stopped until about 6 months ago. Now in the review process. Lonnie doesn't know when the package will be available to advocates but it will be at least six months from now.**

10. Defective Tapes

- At last meeting, SHD said it's a training issue. It's judge's responsibility. SHD willing to put info in Benchbook, reminding judges of importance of preserving a record. Parties can ask that judge listen to tape. Advocates said judges should do a check of recording quality at beginning of hearing. SHD agrees that judges should be doing this anyway, will reiterate importance of doing it. SHD unaware of judges using any county equipment. SHD has its own equipment housed with the county or judge brings equipment. There are no quality standards for recording equipment, which is not high cost. Powered microphone is most important feature. Judge Wilcock said tape recorders are old; SHD is trying to get better equipment. SHD agreed to put this issue on agenda of next judges meeting, including possibly developing specifications for recording equipment and training issues.

DSS RESPONSE: This is being addressed by "Clear2There". See above discussion. Steve mentioned that maybe it is as simple as getting extra power mike so that there are 2 moveable mikes picking up voices.

11. Ex Parte Communication

- Advocates in one county were informed by an ALJ that some judges sometimes meet with County Appeals Reps to discuss general hearing issues and law. The judge thought that advocates should be attending these meetings or scheduling their or own meetings. Division 22 is explicit about ex parte communications with ALJ. ALJ's should be forcefully reminded of these regulations.

DSS RESPONSE: This is a training issue for judges. Conversations with county staff have an appearance of impropriety and violates due process even though the discussion does not pertain to a case.

Maybe all that is needed is a sentence at the beginning of a hearing, where the ALJ explains to the claimant that the county representative does not work for the ALJs, but do have an office at the same location.

10. Web-Based Hearing Requests

- DSS is planning to have web-based hearing requests. The program is being developed at this time and it may be on the SHD web page at the end of the year.

DSS RESPONSE: SHD met October 5 and DSS wants to have this on the internet by November 1. Should be on line in about two months. SHD will update us at the next meeting.

Next Meeting
December 8, 2005
@ 10:00 A.M.
Sacramento, CA

(Dora Lopez of WCL&P contributed to this article)

County Welfare Department Client Abuse Report

Ms. S.H. of **Los Angeles County**, is homeless.9/27/05 Cash aid is increasing from $403 to $516;

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1901 Alhambra Blvd. • Sacramento, CA 95816 • (916) 736-0616 FAX (916) 736-2645