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WELFARE FAIR HEARINGS AND CLIENT ADVOCACY:
A ROLE FOR SOCIAL WORKERS

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ABSTRACT

As a legally mandated grievance mechanism, welfare fair hearings provide a formal recourse for applicants and recipients of welfare dissatisfied with agency decisions. Fair hearings may be viewed as an example of one agency's attempt to foster fairness and to control administrative discretion. However, as a mechanism for redressing grievances, welfare fair hearings have a number of severe limitations. Social workers practicing with potential and actual recipients of public welfare are in a position to reduce these limitations through client advocacy.

Advocacy, a concept social work borrowed from the legal profession, includes advancing the client's cause through the presentation of facts and arguments. Securing benefits to which the client is legally entitled is often the goal of these advocacy efforts.¹ One arena for case advocacy frequently overlooked by social workers is the administrative grievance machinery established by agencies charged with dispensing governmental benefits. These agencies have placed considerable reliance on the development of adjudicatory procedures to insure administrative justice. A variety of adjudicatory procedures have been developed by government

agencies including ombudsmen, civilian review boards, investigative tribunals, and fair hearings. Social work practitioners in family service agencies, public social services, and mental health agencies may encounter these diverse adjudicatory procedures as they and their clients draw on environmental resources and entitlements.

Considerable attention has been directed in the last several years to the appeals procedure for disability claims administered by the Social Security Administration in its programs of Disability Insurance and Supplemental Security Income. As a non-adversarial model of conflict resolution, this appeals process is an investigative one conducted by an administrative law judge.² Fair hearings represent another model of grievance mechanism. To disseminate information about adjudicatory procedures generally and welfare fair hearings specifically, this article discusses welfare fair hearings as one example of grievance mechanisms. Findings from an observational study on hearings which outline the hearing format and process are presented. Social work activities which may be undertaken to address limitations of the hearing as a mechanism for redressing client grievances within public welfare agencies are delineated.

WELFARE FAIR HEARINGS

As a legally mandated grievance mechanism, welfare fair hearings provide a formal recourse for applicants and recipients of welfare who are dissatisfied with agency decisions. A wide variety of issues may be raised on appeal. In general, issues may be of two types: questions about the level of benefit and questions about program exclusion. The level of benefit may be appealed if it has been reduced, if a benefit level is insufficient, or if a

request for supplemental aid has been denied. Appeals related to program exclusion involve termination from a program or denial of program eligibility.³ In bringing appeals on these questions, challenges to an agency decision may be based on 1) facts and the application of standards to those facts, 2) the meaning of a regulation, a statute, or constitutional provisions, or 3) a challenge to the wisdom of a particular policy.⁴

For example, a client may appeal the agency's decision to deny a particular medical or dental service which was requested. A more complex appeal would be to challenge a denial of AFDC benefits to a mother who has joint custody of the children. In this instance, a decision would be made about the provision of parental care in relation to the AFDC program requirement that a child be not only financially needy but also deprived of parental support or care to be eligible for the program. Because the federal regulations do not specifically address children who are in joint custody, states have had to develop their own policies and in some instances, the arena for policy development has been welfare fair hearings.⁵ Thus, not only may individuals benefit by gaining or recovering benefits, but also agency policy may be established through the fair hearing mechanism or a subsequent court appeal. For individual clients, the gain may be substantial and while estimates on the likelihood of winning an appeal vary, a recent Massachusetts study found that more than half of the appeals were decided in the client's favor.⁶

As the examples illustrate, decisions about program benefits often involve professional opinions or judgements based on the available facts. The regulations and procedures allow for some discretion in their application to specific situations.

Thus, fair hearings may be viewed as an example of one agency's attempt to foster fairness and to control administrative discretion. Unlike some other grievance mechanisms, welfare fair hearings are trial-type hearings and are based on the adversarial model of conflict resolution. This model assumes that a fair and truthful decision will be reached when the two opposing parties openly present their views before an impartial, passive decision maker. Through this contest, it is assumed that the truth will emerge and the values of accuracy and fairness will be served.

For public welfare claims, however, concerns are raised about the client's ability to function effectively as an equal adversary in the contest and about the passivity of the decision maker. In addition to understanding a complex system and its regulations, clients must be willing to risk confronting those directly involved in determining their benefits.⁷ Although the adversary model assumes an impartial, passive decision-maker, the decision-maker in welfare adjudications is charged with correctly implementing the program and must seek needed information if it is not presented.⁸ In fulfilling this role, the decision-maker becomes an investigator and compromises the adversary model.⁹

Furthermore, welfare fair hearings are not required for every agency action which is adverse to the client. The client must specifically request a fair hearing by either notifying his or her eligibility worker or the state welfare department. A rather consistent research finding has been that clients are either not informed about their right to appeal or have forgotten.¹⁰ Obviously, lack of awareness about their rights to fair hearings is a serious impairment to the clients' effective use of the adversary process. Additionally, it has been established that the rate of the appeal

is very low. The Massachusetts study noted earlier estimated an appeal rate of one percent in the AFDC program.¹¹ This also works against assuring accuracy and fairness within the welfare system¹² and has led several studies to conclude that welfare hearings have severe limitations as a mechanism for redressing grievance.¹³

PROCEDURAL SAFEGUARDS

Although fair hearings were required for all public assistance titles in the Social Security Act of 1935, it was not until the 1970 U.S. Supreme Court decision in Goldberg v. Kelly¹⁴ that the procedural due process safeguards for welfare hearings were clearly delineated. The Court held that welfare recipients had a right to an evidentiary hearing prior to the termination of welfare benefits. To insure due process, the Court required certain procedural safeguards: timely and adequate notice which specifies the reasons for a proposed agency action; an opportunity to confront and cross-examine adverse witnesses; an opportunity to present evidence and argument orally; the right to retain counsel; and an impartial decision maker whose conclusions must rest on legal rules and the evidence presented at the hearing.¹⁵ An opportunity for fair hearings must be provided by the states for federally funded public assistance programs and the hearings must comply with the due process procedures delineated in Goldberg and further specified in the federal regulations.

A previously reported study¹⁶ on the clients' use of due process procedures found that petitioners were represented by counsel, predominately legal aid attorneys, in 41 percent of the hearings. In 39 percent of the hearings, petitioners represented themselves. Petitioners with as well as without attorney representation used the procedural safeguards for the

presentation of evidence, including witnesses. However, petitioners without attorney representation were not as likely to cross-examine adverse witnesses or to present a closing argument advancing their cases. These findings support the contention that petitioners without legal representation were either unable or unwilling to use the available procedural safeguards of cross-examination and argument which are perhaps the most adversarial components of the hearing process. The availability of a legal representative thus enhanced the petitioner's use of the procedural safeguards. The study concluded that welfare fair hearings do appear to serve adequately petitioners with legal representation, either an attorney or a paralegal.

HEARING FORMAT AND PROCESS

In addition to the difficulties in the area of procedural safeguards, there are limitations imposed on welfare fair hearings by the format and process of the hearing itself. To provide a context for this discussion, a description of the format and process for the hearings is presented. Based on observations of sixty-six welfare fair hearings, the data for this study were collected using a pretested, structured instrument as well as supplemental field notes. The observed hearings were state level welfare hearings held in spring, 1981, in Hennepin County (Minneapolis), Minnesota. All Minnesota state level hearings follow the same procedure regardless of the welfare program upon which the appeal is based. As state level hearings, the procedures followed were those outlined in the federal regulations.¹⁷ The observed hearings were conducted by two separate referees, both professional social workers with extensive experience in the Minnesota Department of Public Welfare. Although limited by the size and urban

location of the sample, the findings further the information available about the fair hearing process.¹⁸

Clients were informed of their right to appeal an agency decision on the back of the notice sent by the agency which informed the client of the proposed agency action. This notice of the right to appeal clearly stated the client's right to an "appeal hearing" and that the client, legal counsel, friend, or other spokesman "will be permitted to present any facts or information relating to the proposed action." Procedures for initiating the appeal were outlined. The notice also highlighted potential consequences to the client: "If you lose this appeal, Federal Law permits the County Welfare Department to recover any overpayment made which occurs with this continuation of the grant." If they initiated an appeal, they received, prior to the hearing, written information about the hearing process from the state agency. This information described the hearing as a "fact-finding, adversary proceeding in which the petitioner and representatives of the state and county agencies attempt to determine what the petitioner's situation is and what mandatory policies and laws are applicable...". The procedures followed by the referees in conducting the hearings were described as well.

Prior to the hearing, petitioners also received a notice of an appeal. In addition to giving details about the time and place of the hearing, the notice of appeal instructed petitioners to be prepared to present evidence bearing on their cases. Additionally, a summary of the facts and the rationale used by the agency in arriving at its decision were enclosed. The applicable public assistance manual procedures, regulations, or statutes may be cited by the agency as justification for its decision. These may become complex as illustrated by

the federal regulation regarding deprivation of parental support or care due to continued absence of the parent from the home. Continued absence exists when:

the parent is out of the home, the nature of the absence is such as either to interrupt or to terminate the parent's functioning as a provider of maintenance, physical care, or guidance for the child, and the known or indefinite duration of the absence precludes counting on the parent's performance of the function of planning for the present support or care of the child. If these conditions exist, the parents may be absent for any reason, and may have left only recently or some time previously...¹⁹

Although the styles of referees varied, the general format for the hearings was similar. The referee, after noting who was in attendance and in what capacity, started the tape recording which provided the official transcript of the hearing should one be needed in subsequent court actions. Testimony, taken under oath, was presented first by the agency and included a summary of issues and basis for the agency's action. Upon completion of agency testimony, the petitioner or his/her representative was offered the opportunity to cross-examine the agency representatives. Unlike most counties in Minneapolis, the Hennepin County public welfare agency was usually represented at the hearings by the county advocate, a professional social worker whose primary function was to represent the county agency and defend its action in welfare appeals. Of the 66 appeals observed, 41 (62 percent) were in relation to county agency decisions in programs such as AFDC and general assistance. For appeals involving county decisions, the most frequent witnesses were the financial worker and the financial

supervisor involved in making the decision. They were present at 36 (88 percent) of the hearings involving county decisions. Of the remaining five cases, social service workers were present as county witnesses in three cases and in two cases, no witnesses were available due to administrative error. The remaining appeals involved state agency decisions in programs such as Medical Assistance and state agency personnel were present to represent the state agency and to defend its action. This individual from the state agency was, with one exception, the only witness as well.

Following the cross-examination of the agency representatives, the petitioner was given the opportunity to present or have presented his/her case and any supporting evidence including presentations by witnesses and written documents. In addition to legal representation (41 percent) and self-representation (39 percent) at the hearing, petitioners were represented by paralegals (14 percent), friends or family members (3 percent), and a social worker (1 percent). As might be anticipated, representatives for petitioners were more often rated as highly effective (48 percent, n=19) than petitioners acting on their own behalf (23 percent, n=6). In 14 (21 percent) of the hearings, petitioners had witnesses present oral evidence. A friend or family member served as a witness in 12 percent (n=8) of the hearings; medical personnel in 5 percent (n=3); social workers in 3 percent (n=2); and others such as teachers and psychologists in 8 percent (n=5) of the hearings. Petitioners and/or their witnesses were then cross-examined by the agency representative. Finally, closing arguments were presented; first, by the agency representative and then by the petitioner or his/her representative. The referee then closed the hearing and, at a later date, prepared a written report of the hearing and his recommendations.

Although there were a number of expectations to this format, one of the most noteworthy was the asking of questions by the referee of the parties to the hearings. This questioning was usually done just before the closing arguments and involved further clarification and elaboration of the points raised at the hearing. At times, questioning also occurred throughout the hearing. This questioning by the referees occurred more frequently when the petitioner did not have a legal representative and had given a very brief statement about his or her case. It is also interesting to note that, at times, the petitioner's case was also clarified through cross-examination of the self-represented petitioner by the agency representative.

HEARING LIMITATIONS

These observations of the hearing process point out several further limitations of welfare fair hearings. The first concerns the documents which petitioners receive prior to the hearing. The document explaining the hearing format is a relatively detailed, somewhat technical explanation of the process. For some petitioners, this document might be difficult to understand and, therefore, intimidating. The accompanying document that describes the action taken against the petitioner and the basis for that action is often highly technical and includes citations from the public assistance manuals and state or federal regulations. Such a document might appear to make an appeal futile and result in a petitioner's not following through on an appeal. Although there may be a variety of explanations, in this study about one-third of the petitioners did not attend their hearings.

A second limitation in the hearing process concerns petitioners who are self-represented. The relevance and

effectiveness of presentations for the petitioners were highly variable but were clearly separated on the basis of legal representation and self-representation. Self-represented petitioners tended to be less effective and less relevant in their presentations. Although petitioners generally were able to present factual information, they were disorganized in those presentations. These petitioners often appeared somewhat confused by the format of the hearing and, in general, were unable to use the available procedural safeguards or to clearly advance their cases without some help. Frequently help was forthcoming through direct questioning by the referees or cross examination by the agency representative and, thus, the petitioner's case was elaborated and clarified. In such instances, however, the adversarial model is compromised. The agency representative no longer function as an adversary to the petitioner and the decision maker is no longer passive. Additionally, although this informal procedure may facilitate the accuracy and fairness of a hearing outcome, it rests entirely on the astuteness and goodwill of the referee and the agency representative. This procedure, although admirable, is insufficient to properly insure a fair hearing for self-represented petitioners.

Petitioners who represented themselves also were unable to engage in a truly adversarial contest. Petitioners infrequently used the available procedural safeguards of cross-examination and the presentation of arguments. Additionally, they were unable to challenge agency decisions on the basis of the rules and regulations. The ability to address the rationale for the agency's adverse action demands some understanding of and familiarity with welfare law and regulations. For this function in the decision-making process, self-represented

petitioners were dependent upon the hearing referee.

IMPLICATIONS FOR PRACTICE

In all observed hearings, the required procedural safeguards built into the hearing process by the Goldberg decision and the federal regulations did appear to be implemented adequately by the agencies involved in the study. In fact, the Minnesota state level hearings may be particularly noteworthy for the careful attention given to providing petitioners with an opportunity to challenge agency decisions in a forum that is unhurried and respectful of the petitioner. Nonetheless, the observations of the hearings point out several limitations of this method for redressing client grievances. Social workers practicing with potential and actual recipients of public welfare are in a position to reduce some of these limitations.

One concern about welfare appeals which is raised repeatedly is the low rate of appeal. This is particularly noteworthy given an estimated high rate of error in public welfare. Social workers are often in a position to help a client faced with an adverse agency action to decide whether to appeal that decision. Having some support in reaching this decision as well as in initiating the process for the appeal may help reduce the barriers involved in confronting the agency and its representatives who provide the benefits. Once a request for an appeal has been made, the worker can assist the client in locating legal services. Establishing linkages with legal aid services as a resource for clients would be particularly beneficial. Based on hearing observations, legal aid personnel, both the attorneys and the paralegals, are very familiar with the welfare hearing format, welfare law, and applicable federal regulations.

If legal assistance is unwanted or unavailable, social workers are also in a position to help clients prepare to represent themselves. This could be done by preparing clients for the adversarial format of the hearing. Just knowing what is to occur when may help clients to more effectively present evidence and arguments advancing their cases. In addition, clients can be assisted in thinking through and organizing what it is they wish to present at the hearing. Techniques such as behavioral rehearsal or role playing would be particularly helpful in preparing clients for hearings. An additional task in helping clients prepare for the hearing is to obtain, or help clients obtain, needed documentation including information from the agency files and from the agency's manuals specifying eligibility criteria and policies. Support at this point, before the hearing itself, may help reduce the number of clients who fail to follow through on their appeals.

A little braver stance for the social worker would be to actually represent the client during the hearing, if the client wants this. Although few social workers were involved in the hearings observed, those who did accompany clients to the hearing most often came to support the client before and after, rather than during, the hearing. The social workers appeared extremely hesitant to become involved in the hearing itself -- they were not even willing to present supplemental information as witnesses for the client. Although welfare regulations are complex, and at times mystifying, a clear presentation of the client's case and thoughtful questioning of the agency's rationale for action would facilitate the likelihood of fair and just hearing outcomes. As exemplified by the referees and the county advocate, one need not be an attorney to function effectively within the format of welfare fair hearings.

Although no longer responsible for determining financial assistance, social workers in public welfare regulate the dispensing of material services such as day care, chore services, and homemaker services. The procedural safeguards listed in Goldberg v. Kelly apply to these services as well. The social worker is responsible for being informed about the clients' rights and for following carefully the required procedures including giving adequate notice for any termination and informing the client of the right to appeal any agency decision. It can be anticipated that the worker's professional judgment as to who is eligible for such services as day-care for children with special needs will probably come under increasing scrutiny as social services are brought into compliance with the federal regulations. The general impression obtained during the study was that social workers, unlike the eligibility workers, either were not well informed or chose to ignore the client's legal rights in providing some of the personal social services.

Social workers frequently function in an in-service training capacity in public welfare organizations. By designing and implementing in-service training programs related to the fair hearing mechanism for social workers as well as for financial workers, in-service training coordinators could greatly increase the workers' knowledge about the appeals process and its procedures. In addition to general information about client's rights, specific attention could be given to functioning as the client's advocate, providing appropriate referrals for legal assistance, and preparing clients to function effectively as their own advocates in the adversarial proceedings. Although the type of techniques and knowledge might vary, this type of in-service training appears

appropriate for both social workers and financial workers.

In the educational domain, content on grievance mechanisms might be included in courses on law and social work as well as social policy. The field practicum is an additional arena in which students can be taught about the implications of social policy and the methods for facilitating their clients' use of available grievance machinery. A recent example of integrating students' experiences in the field with the dimensions of social policy was Project Fair Play. This project, conducted under the auspices of Case Western Reserve University in Cleveland, attempted to familiarize students and agency personnel with welfare fair hearings and to train students to function as advocates on behalf of their clients.²⁰

CONCLUSION

Welfare fair hearings appear to function adequately for petitioners with legal representation, particularly if that representation is from legal aid services. For self-represented petitioners, however, the hearings have a number of severe limitations such as the client's willingness or ability to function as an adversary and the compromising of the decision-maker's passivity in his attempts to gather information at the hearings. Through brokerage, education, and advocacy, social workers serving actual and potential recipients of public welfare are in a position to reduce the impact of these limitations upon the hearing process and thus facilitate the rendering of a fair and accurate hearing decision. Although other mechanisms for considering client grievances may vary in terms of the specific procedures and formats, social workers need to consider these forms of recourse as an appropriate arena for advocacy efforts.

NOTES

1. Beulah R. Compton and Burt Galaway, Social Work Processes, Revised Edition (Homewood, Illinois: The Dorsey Press, 1979): 342-3.

2. For a discussion of social security disability claims, see, for example, Shirley L. Zimmerman, "Families and Economic Policies: An Instrumental Perspective," Social Casework 66 (September 1985): 424-431.

3. Ronald P. Hammer and Joseph M. Hartely, "Procedural Due Process and the Welfare Recipient: A Statistical Study of AFDC Fair Hearings in Wisconsin," Wisconsin Law Review (1978): 188-9.

4. Laura Cooper, "Goldberg's Forgotten Footnote: Is There a Due Process Right to a Hearing Prior to the Termination of Welfare Benefits When the Only Issue Raised is a Question of Law?" Minnesota Law Review (July 1980): 1178-9.

5. George Hoshino and Jan L. Hagen, "AFDC Eligibility and Joint Custody: A Study of the States' Policies and Procedures," National Conference of Social Welfare, March 1984. But also see Michael Lipsky, "Bureaucratic Disentitlement in Social Welfare Programs," Social Service Review 58 (March 1984): 3-27, at p. 15 who indicates that successful appeals have "no significant impact because fair hearings do not establish precedents for future decisions. Moreover, fair-hearing decisions in welfare are not published or publicized."

6. Lipsky, "Bureaucratic Disentitlement," p. 15.

7. Joel F. Handler, "Controlling Official Behavior in Welfare Administration," in Jacobs ten Brock, ed., The Law of the Poor

(San Francisco: Chandler Publishing Co., 1966), pp. 170-71; and Leonard S. Rubenstein, "Procedure Due Process and the Limits of the Adversary System," Harvard Civil Rights - Civil Liberties Law Review 11 (Winter 1976): 69.

8. Jerry L. Mashaw, "The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness and Timeliness in the Adjudication of Social Welfare Claims," Cornell Law Review 59 (June 1974): p. 779.

9. Jeffrey L. Jowell, Law and Bureaucracy: Administrative Discretion and the Limits of Legal Action (Fort Washington, N.Y.: Dunellen Publishing Co., 1975): 60-1.

10. See Scott Briar, "Welfare From Below: Recipients' View of the Public Welfare System," in Jacob ten Brock, ed., The Law of the Poor (San Francisco: Chandler Publishing Co., 1966), pp. 46-61; Joel F. Handler, "Justice for the Welfare Recipient: Fair Hearings on AFDC - The Wisconsin Experiment," Social Service Review 43 (March 1969): 12-34; and Jowell, Law and Bureaucracy.

11. Lipsky, "Bureaucratic Disentitlement," p. 15.

12. Mashaw, "Management Side," p. 785.

13. See, for example, Briar, "Welfare From Below"; Handler, "Justice for the Welfare Recipient"; Jowell, Law and Bureaucracy; Linda W. Ross, "The Fair Hearing as an Adjudicative Mechanism in Welfare Administration: An Analysis of Procedural Policy," (Ph.D. Dissertation, Wayne State University, 1976); and Beatrice I. Valcan, "Fair Hearings in the Public Assistance Programs of the New York City Department of

Welfare," (D.S.W. Dissertation, Columbia University, 1972).

14. 397 U.S. 254 (1970).

15. 397 U.S. at 267-71.

16. Jan L. Hagen, "Justice for the Welfare Recipient: Another Look at Welfare Fair Hearings," Social Service Review 57 (June 1983): 177-195.

17. 45 C.F.R. 205.10 (1980) delineated the federal regulations governing welfare fair hearings at the time this study was conducted. No substantive changes have been made in these regulations in the interim.

18. Further specification of the study methods may be found in Jan L. Hagen, "Justice for the Welfare Recipient," and Jan L. Hagen, "Due Process and Welfare Appeals," Social Work Research and Abstracts 19 (Fall 1983): 3-8.

19. 45 C.F.R. 233.90 (c) (1) (iii)(1982).

20. Further information may be obtained from Project Fair Play, Human Services Design Laboratory, School of Applied Social Sciences and School of Law, Case Western Reserve University, Cleveland, Ohio.