

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES

BOARD OF APPEALS

In Re:) Docket No. 10-2022-PA-25760
)
[APPELLANT'S NAME]) REVIEW DECISION AND FINAL ORDER
)
) Temporary Assistance for Needy Families
Appellant) (TANF)

I. NATURE OF ACTION

1. Administrative Law Judge Kimberly Kamienska-Hodge held an administrative hearing regarding this matter on October 26, 2022, and mailed an *Initial Order* on November 4, 2022. In the decision, the Administrative Law Judge (ALJ) concluded that the Department of Social and Health Services (DSHS or Department) had improperly refused to replace the Appellant's Electronic Benefit Transfer (EBT) funds lost through "skimming." Because the Appellant's request was not fraudulent, the ALJ ordered DSHS to replace the Appellant's Temporary Assistance for Needy Families (TANF) cash benefits of \$520.00 to the Appellant's EBT card.

2. The Department filed a *Request for Stay and Petition for Review of Initial Decision (Appeal)* on November 17, 2022.

II. RESULT OF REVIEW

The Board of Appeals **reverses** the *Initial Order*. The rule on replacing TANF funds sets out a finite list of reasons the Department will replace TANF funds. Because having TANF funds stolen, after an individual has received them, is not a reason for which the Department will

replace those funds, the Board of Appeals *affirms* the Department's action in denying the Appellant replacement funds.

III. FINDINGS OF FACT

The undersigned has reviewed the record of the hearing, the documents admitted as exhibits, the *Initial Order*, and the *Request for Stay and Petition for Review of Initial Decision (Appeal)*. The following necessary Findings of Fact were relevant and supported by substantial evidence in the record.

1. The Appellant is [AGE] ([AGE]) years old and a United States citizen. She and one (1) minor child compose her household (assistance unit) of two (2) people. She has been known to the Department since April 2008. She receives Food Assistance, TANF cash, and Apple Health Medical benefits.

2. On June 2, 2021, the Appellant received an EBT card.

3. On October 1, 2022, \$528.00 was deposited to the Appellant's EBT card. This remittance was her October 2022, TANF payment.

4. Skimmers are illegal card readers attached to payment terminals. These card readers grab data off a credit or debit card's magnetic stripe without a card owner's knowledge. Sometimes a tiny camera is planted to record cardholders entering a personal identification number (PIN). PIN numbers can also be stolen via fake keypads placed over a real automated teller machine (ATM) keypad. Skimmers and related technology can be hard to spot because thieves will attempt to make the devices blend in or match the style of the card readers.

5. On October 1, 2022, at 7:20 am, a balance inquiry was completed on the Appellant's EBT account at a [FINANCIAL INSTITUTION] ATM in [CITY 1], Washington. Following

the balance inquiry, \$520.00 in cash was withdrawn from the Appellant's EBT account. The transaction history showed that a card was physically inserted into the ATM and a PIN was entered.

6. On October 5, 2022, the Appellant contacted the Department to report her October TANF cash benefits had been stolen from her EBT account. A referral to the Fraud Early Detection (FRED) was made, and a new EBT card was issued to the Appellant.

7. The Appellant requested an administrative hearing on October 5, 2022.

8. On October 10, 2022, the Appellant again contacted DSHS regarding the theft of her benefits. The Appellant was informed that the Department had determined that her card was skimmed and that the stolen benefits would not be replaced.

9. The Appellant filed a police report, but the police report number was not made part of the hearing.

IV. CONCLUSIONS OF LAW

1. The *Request for Stay and Petition for Review of Initial Decision (Appeal)* was timely filed and is otherwise proper.¹ Jurisdiction exists to review the *Initial Order* and to enter the final agency order.²

2. ALJs and Review Judges must first apply the Department of Social and Health Services (DSHS) rules adopted in the Washington Administrative Code (WAC). If no DSHS rule applies, the ALJ or Review Judge must decide the issue according to the best legal authority and

¹ WAC 388-02-0560 through -0585.

² WAC 388-02-0217, -0530(2), and -0570.

reasoning available, including federal and Washington State constitutions, statutes, regulations, and court decisions.³

3. In an adjudicative proceeding involving the reimbursement of TANF financial assistance, the undersigned Review Judge has the same decision-making authority as the ALJ to decide and enter the *Final Order*, in the same way as if the undersigned had presided over the hearing.⁴ RCW 34.05.464(4) grants the undersigned Review Judge the same decision-making authority as the ALJ.⁵ This includes the authority to make credibility determinations and to weigh the evidence.⁶ If the ALJ has identified any Findings of Fact in the *Initial Order* as being based on the credibility or demeanor of the witnesses per RCW 34.05.461(3), then the undersigned is required to give due regard to the ALJ's opportunity to observe the witnesses. The undersigned reviewing officer does not have the same relationship to the presiding officer as an Appellate Court Judge has to a Trial Court Judge; and the case law addressing that judicial relationship does not apply in the administrative hearings forum.

4. The Washington Administrative Procedure Act directs Review Judges to personally consider the entire hearing record.⁷ Consequently, the undersigned has considered the adequacy, appropriateness, and legal correctness of all initial Findings of Fact and Conclusions of Law, regardless of whether any party has asked that they be reviewed. Because the ALJ is directed to decide the issues *de novo* (as new), the undersigned has also decided the

³ WAC 388-02-0220.

⁴ WAC 388-02-0600(2)(a), RCW 34.05.464(4).

⁵ WAC 388-02-0600(3)(e), which purported to limit the scope of the undersigned's authority, has been declared invalid. *Kabbae v. Dep't of Soc. & Health Servs.*, 2008 Wash. App. LEXIS 1037 (2008).

⁶ See also *Kathleen Hardee v. State of Washington, Department of Social and Health Services, Department of Early Learning*, (No. 62436-9-I Division I, filed July 27, 2009, and published September 3, 2009).

⁷ RCW 34.05.464(5).

issues *de novo*. The undersigned has given due regard to the ALJ's opportunity to observe the witnesses but has otherwise independently decided the case.

5. The ALJ had jurisdiction to hear and determine the issue of whether the Appellant should be reimbursed for stolen TANF financial assistance.⁸

6. The legal authority regarding the replacement of EBT cash and food benefits is found at WAC 388-412-0040. This rule allows a recipient's TANF cash assistance benefits to be replaced in the specific circumstances set out in subsection (1):

Under certain conditions, we may replace your benefits.

(1) You may get your EBT cash and/or food assistance benefits replaced if:

(a) We make a mistake that causes you to lose benefits;

(b) ***The EBT card mailed to you is stolen from the mail; you never had the ability to use the benefits; and you lost benefits;***

(c) You left a drug or alcohol treatment facility on or before the fifteenth of the month and the facility does not have enough food assistance benefits in their EBT account for one-half of the allotment that they owe you;

(d) Your EBT benefits that were recently deposited into an inactive EBT account were canceled by mistake; or

(e) The food that your household purchased with food assistance benefits was destroyed in a household disaster or misfortune.

(i) For us to replace your benefits, you must report the loss to the department within ten days from the date of the loss.

(ii) We replace the amount of your loss, up to a one-month benefit amount.⁹

In short, subsection (1) sets out the ***reasons that qualify for replacement***. Unfortunately, for the Appellant, her reason for replacement, that the funds were stolen from her account after she had received them, is not included in the plain language of the list of reasons for replacement set out in (a) – (e).

⁸ RCW 74.08.080, Chapter 34.12 RCW, and Chapter 388-02 WAC.

⁹ WAC 388-412-0040 (2022) (emphasis added).

7. Alternatively, the plain language of subsection (2) of that same rule, sets out the reasons or circumstances that ***do not qualify for replacement***:

(2) ***We will not replace your benefits if*** your loss is for a reason other than those listed in subsection (1) above if:

(a) We decided that your request is fraudulent;

(b) Your food assistance benefits were lost, stolen or misplaced after you received them;

(c) You already received two replacements for food destroyed in household disaster or misfortune within the last five months; or

(d) You received disaster supplemental nutrition assistance program (D-SNAP) benefits for the same month you requested a replacement for food assistance.¹⁰

Mangled as it is, the plain language of the main clause of this subsection states plainly that the Department “*will not replace your benefits if your loss is for a reason other than those listed in subsection (1) above . . .*” Though the sentence continues, the next word in the sentence, the conjunction “*if,*” does not change the main clause of the sentence, which disallows replacement for reasons other than those set out in subsection (1). Given that this subsection (2) sets out the reasons that do not qualify for replacement, then the “*if*” before the colon must be read to the same effect as the first “*if*” in the main clause, “*We will not replace your benefits if*” one of the circumstances set out in (2)(a) through (2)(d) apply. Subsection (2) cannot be read to mean “*if your circumstance is not one of those set out in (2)(a) through (2)(d) then your reason qualifies for the replacement of funds.*” Again, subsection (2) is plainly intended to set out reasons that ***do not qualify for replacement***.

8. Rather than trying to glean the “*legislative intent*” motivating a rule that an administrative agency promulgated, something akin instead to legislative history clarifies the second “*if*” in subsection (2). This rule has been substantially the same since 2004. Though some

¹⁰ WAC 388-412-0040 (2022)(emphasis added).

details of the rule have changed over the years, one subsection has always set out the reasons that qualify for replacement and another subsection has always set out the reasons that do not qualify for replacement.

9. In 2004, the rule stated:

Under certain conditions, ***we may replace your benefits.***

(1) You may get your EBT benefits replaced if:

- (a) We make a mistake that causes you to lose benefits;
- (b) Both your EBT card and personal identification number (PIN) are stolen from the mail; you never had the ability to use the benefits; and you lost benefits;
- (c) You left a drug or alcohol treatment on or before the fifteenth of the month and the facility does not have enough Basic Food benefits in their EBT account for one-half of the allotment that they owe you;
- (d) Your EBT benefits that were recently deposited into an inactive EBT account were canceled by mistake along with your state benefits; or
- (e) Your food that was purchased with Basic Food benefits was destroyed in a disaster.

* * *

(4) ***We will not replace your benefits if*** your loss is for a reason other than those listed in subsection (1) above ***or:***

- (a) We decided that your request is fraudulent;
- (b) Your Basic Food benefits were lost, stolen or misplaced after you received them;
- (c) You already got two countable replacements of Basic Food benefits within the last five months; or
- (d) You got disaster food stamp benefits for the same month you requested a replacement for Basic Food.¹¹

Here, the same division of one section setting out reasons to replace and another section setting out reasons to decline replacement are shown to be just as they have been from 2004 to 2022.

10. In 2012, the Department revised the rule to nearly resemble the current rule, with subsection (1) setting out the reasons for replacement and subsection (2) setting out the reasons

¹¹ WAC 388-412-0040 (2004) (emphasis added).

for not replacing funds. This is also the version when the “or” in subsection (2) was changed to “if”:

(2) We will not replace your benefits if your loss is for a reason other than those listed in subsection (1) above **if**: (a) We decided that your request is fraudulent; (b) Your food assistance benefits were lost, stolen or misplaced after you received them; (c) You already received two replacements for food destroyed in household disaster or misfortune within the last five months; or (d) You received disaster supplemental nutrition assistance program (D-SNAP) benefits for the same month you requested a replacement for food assistance.¹²

It might have been better in 2012 and forward to use both words, “or if,” so that the sentence stated that the Department would “*not replace your benefits if your loss is for a reason other than those listed in subsection (1) above or if*” the circumstances in (a) through (d) apply. But the substitution of the word “if” does not change the meaning of the sentence and certainly does not change it to mean that *any* reason not listed in (2)(a) through (d) is a qualifying reason to replace benefits.

11. Further, even if subsection (2) were construed to allow for replacement for reasons other than those set out in subsection (1), we are not free to devise our own list of good or qualifying or bad or disqualifying reasons. This is especially true here. Subsection (2)(b) states that an assistance recipient is not qualified for replacement funds if the recipient’s “*food assistance benefits were lost, stolen or misplaced after you received them.*” It would be a strange outcome if we were to conclude because of the “if” before the colon in subsection (2), that the rule now allows for TANF cash assistance – but not food assistance - funds to be replaced even if they “*were lost, stolen or misplaced after*” a recipient received them.

¹² WAC 388-412-0040 (2012) (emphasis added).

12. In addition to being supported by the plain language in WAC 388-412-0040, the Department convincingly argued that any other interpretation of the WAC, requiring the Department to reimburse funds stolen **after** their transfer to the recipient would be outside the commonly accepted legal responsibilities between a payer and payee. Specifically, the Department argued:

“... Once deposited the Department has no control over where the card holder chooses to use their card nor does it have control over whether or not the card holder is being vigilant about risks to their security, i.e. identity theft via their EBT card. The Department cannot be held responsible for lost benefits after they are deposited onto the EBT card. This is no different than an employer depositing a paycheck into an employee’s bank account, the employer has no control over what happens to the funds once deposited into the employee’s account. Should the employee’s account be breached, as may happen when entering debit card information on an unsecured website, and their funds are stolen from the bank account, the employee would not demand the employer replace the funds...”

As shown by the Department’s example, the payer’s responsibility in a payer/payee relationship generally ends in the completed transfer of funds into the payee’s control. Any rule requiring greater responsibility on the part of the Department (the payer) would need to be clearly written to set forth the scope of the additional responsibilities. WAC 388-412-0040, does not provide this clear guidance or create these additional responsibilities.

13. Although poorly written, the plain language of WAC 388-412-0040, does not allow for the reimbursement of TANF funds to TANF recipients, when those funds are stolen or lost **after** the funds were transferred to the recipient. This plain language also reflects the generally accepted responsibilities in any payer/payee relationship.

14. Though not replacing someone’s stolen TANF funds may seem inequitable - and Appellant’s frustration is understandable - the likely policy for the rule is that one’s recourse when

something is stolen from them is to law enforcement, the governmental agency that has the power to investigate criminal activity and to make arrests. The court system can then get involved and upon conviction can order restitution of the lost funds. It is a longer path to replacing the stolen benefits, but it is the path better suited to the task.

15. If the theft of the Appellant's EBT funds has caused her to have difficulties paying her housing or utility expenses, she may qualify for the Additional Requirements for Emergent Needs (AREN) assistance program. The AREN program is provided by DSHS to families with an emergency. The AREN program provides assistance paying housing or utility expenses. An AREN payment is in addition to the regular monthly cash grant received by the family. To get an AREN payment, the household must be eligible for TANF, state family assistance (SFA), or refugee cash assistance (RCA). The household must also have an emergency housing or utility need **and** demonstrate a good reason for not having enough money to pay their housing or utility costs.¹³

16. Previously, individual Review Judges at this Board of Appeals have read and interpreted WAC 388-412-0040, differently, and have reached conflicting conclusions regarding whether DSHS is required to reimburse a client's EBT funds lost through "skimming." To provide consistency in future decisions regarding this issue, these different interpretations have been discussed by this DSHS Board of Appeals "En banc,"¹⁴ and the Conclusions of Law reached in this *Review Decision and Final Order* reflect the interpretations and conclusions that will be adopted by the DSHS Board of Appeals in future cases regarding this issue. Additionally, this

¹³ WAC 388-436-0002.

¹⁴ "En banc" means by the full court.

case will be added to the Department's *Index of Significant Decisions*, so parties to an administrative hearing involving DSHS, regarding this issue, can rely on, use, or cite to this *Review Decision and Final Order*.¹⁵

17. Although the Department's request for review was captioned "*Request for Stay and Petition for Review of Initial Decision (Appeal)*," nowhere in the request was there an actual request for, or any discussion regarding, a stay in this matter. Because the Department has not actually requested, nor given any reasons for a stay of this matter, the undersigned will not address the "*Request for Stay*" included in the title of the Department's request for review.

18. The undersigned has considered the *Initial Order*, the *Request for Stay and Petition for Review of Initial Decision (Appeal)*, and the entire hearing record. The initial Findings of Fact are adopted pursuant to the additions and modifications outlined above. Initial Conclusions of Law 1 through 8 cited and applied the governing law correctly and are adopted and incorporated as conclusions for this decision. Initial Conclusions of Law 9 through 13, contained an error of law or were based on prior erroneous Findings of Fact or Conclusions of Law and are not adopted and incorporated as conclusions for this decision. Any arguments in the *Request for Stay and Petition for Review of Initial Decision (Appeal)* that are not specifically addressed have been duly considered, but are found to have no merit, or to not substantially affect a party's rights. The procedures and time limits for seeking reconsideration or judicial review of this decision are in the attached statement.

V. DECISION AND ORDER

1. The Board of Appeals **reverses** the *Initial Order*.

¹⁵ See RCW 42.56.070(6) and WAC 388-02-0221(1).

