Supreme Court of the United States

OCTOBER TERM, 1969

In the Matter of:

MAE WHEELER, et al.,

Appellants;

vs.

JOHN MONTGOMERY, DIRECTOR OF THE STATE DEPARTMENT OF SOCIAL WELFARE, and RONALD BORN, GENERAL MANAGER OF THE SAN FRANCISCO CITY AND COUNTY DEPARTMENT OF SOCIAL SERVICES,

Appellees.

Docket No. 14

Place Washington, D. C.

Date October 13, 1969

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

ORAL ARGUMENT OF:	PAGE
Peter E. Sitkin, Esq., on behalf of Appellants	2
Elizabeth Palmer, Esq., on behalf of Appellees	20

- - -

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1969

MAE WHEELER, et al.,

Appellants;

vs. No. 14

JOHN MONTGOMERY, DIRECTOR OF THE STATE DEPARTMENT OF SOCIAL WELFARE, and RONALD BORN, GENERAL MANAGER OF THE SAN FRANCISCO CITY AND COUNTY DEPARTMENT OF SOCIAL SERVICES,

Appellees.

Washington, D. C.
October 13, 1969

The above-entitled matter came on for argument at 10:25 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

PETER E. SITKIN, Esq.
1095 Market Street
San Francisco, California 94103
Counsel for Appellants

ELIZABETH PALMER, Esq.
Deputy Attorney General
6000 State Building
San Francisco, California 94102
Counsel for Appellees

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: The first case is No. 14, Wheeler and others against John Montgomery and others.

xxxx ARGUMENT OF PETER E. SITKIN, ESQ.

ON BEHALF OF APPELLANTS

MR. SITKIN: May it please the Court, my name is Peter E. Sitkin.

MR. CHIEF JUSTICE WARREN: Mr. Sitkin, you may proceed.

MR. SITKIN: This case involves the question of what procedural rights are to be afforded the most dependent members of our society -- the aged, the disabled, the blind, and the children of the poor.

The basic issue presented by this case is whether welfare recipients, after being found eligible, after full and vigorous investigation, are to have their benefits terminated without an opportunity for a full and fair adjudicative hearing.

In California at the present time, there is a hearing which comports with the requirements of due process after the termination of welfare benefits. Under the regulations adopted by the Department of Health, Education, and Welfare, this hearing should take place within 60 days from the date of termination of benefits. In point of fact, the hearing takes place long after that 60-day period, as has been conceded by appellees in this case.

Q Is this a federally funded program?

A Yes, it is. The appellants who I am representing specifically are old age security recipients who are recipients under the categorical aid program funded by the Social Security Act.

The regulation at issue in this case concerns all of the categorical aid programs, that is, the aid to families with dependent children, aid to the blind, aid to the disabled, as well as old age security.

Prior to termination of benefits, a welfare recipient is not afforded an adjucative hearing to contest the reasons upon which the department has based its decision to terminate. A welfare recipient is only provided with an opportunity to confer informally, usually with the very individual who has made the initial decision to terminate, at a conference which can take place at a minimum of three days before a check will be terminated or a check will be withheld.

There is no opportunity within this short period of time to adequately prepare for this conference; nor is there an opportunity at the conference to have an opportunity to fairly and fully adjudicate the questions which might involve continuing eligibility, questions, for example, such as whether an individual has intended to transfer property to remain on public assistance, questions which have been traditionally decided in adjudicative hearings with the procedural preceptions usually

connected with such hearings.

Q Mr. Sitkin, you have said that a person becomes eligible after a full investigation. What is the procedure? That is not a trial-type hearing, is it? A person applies for old age assistance. There is no trial-type hearing before he is found to be eligible, is there?

A No, there is no trial-type hearing prior to eligibility.

Q What is the procedure?

A An individual applies to the Welfare Department and information is provided by that individual. The regulations of the Department of Health, Education, and Welfare indicate that the recipient himself is to be the primary source of the information regarding his eligibility.

The Department obtains consents from the individual and, if necessary, investigates the individual's eligibility by contacting collateral sources with respect to the income that the individual might have, or with respect to other particulars that concern his eligibility.

Q But it is not an open hearing with confrontation, cross-examination, and that sort of thing.

A Not for an individual who is applying for assistance.

The issue before this Court is whether or not an individual who has already been found eligible prior to the

withholding of those benefits should be afforded an opportunity.

Q I understand what the issue is. I am only talking about the process by which somebody already eligible becomes ineligible.

A Right.

Q My question was directed to how he became eligible in the first place. That is, as I understand it, not anything like a trial-type hearing.

A There is no hearing. There is a full investigation, though, with respect to the individual. I might add that as an individual remains on public assistance, he is periodically reinvestigated and required to provide the department with information to maintain his eligibility.

Q Who determines the eligibility?

A Initially?

Q Yes.

A The County Welfare Department. In California, the welfare programs are administered locally by County Welfare Departments, although the overall supervision rests with the State Department of Social Welfare. But it is the individual County Welfare Department, usually in the person of the social worker or the social work supervisor, who initially approves the application for eligibility.

If there is a dispute with respect to eligibility, the individual is afforded an opportunity for a hearing to

contest the reasons why the department has refused to grant assistance in the first instance.

Q Is that a trial-type hearing?

A Yes, that is a trial-type hearing.

Q Is it your contention that once a person has been declared eligible by these county authorities, that he cannot be cut off without depriving him of a constitutional privilege?

A Yes, it is our position that once a person is found eligible for public assistance, if he is not afforded an opportunity to be heard with respect to the reasons for discontinuance, then his rights under the due process clause would be violated, since he is not being afforded a fair opportunity to contest the very reasons upon which the governmental agency has made its decision to terminate benefits.

Q And there never was any contest of that originally, of the eligibility?

A At the time that the individual applied for aid, he did meet the qualifications.

Q He met the qualifications, but was there any trial-type procedure?

A Well, there would be no need --

Q Was there any trial-type procedure when he was first declared eligible?

A There would only have been a trial-type procedure if the Welfare Department had initially found the

individual to be ineligible and then he took an appeal from that initial determination.

Q Is your answer, then, that there was no trial-type procedure in these cases?

A There is no trial-type procedure when an individual applies for welfare.

Q He is declared eligible without any trial-type procedure, and your argument is that it is unconstitutional to cut him off without a trial-type procedure.

A That is our position.

Unless an individual is able to convince the very individual who made the initial determination that a person is ineligible, unless he is able to convince that person at this informal conference held, as I mentioned, three days prior to the date that a check will be held, he has no opportunity to have his aid continue until the State administrative hearing is provided at least 60 days after the termination of his benefits.

In determining the extent to which procedural protection should be afforded a welfare recipient, this Court on numerous occasions has indicated one must examine the system in which the procedural protections will operate, examine the interests of the individual concerned, and examine the interests of the State or the governmental agency involved.

The one overwhelming and unique factor which is

present in the welfare programs, which is present in no other Government program, is that maintenance of the welfare grant is the difference between survival, between starvation and continuation of some type of sustenance. It is this fundamental interest on the part of the individual that we assert must be protected by those procedures which this Court has considered to be appropriate in adjudicative hearings -- protections such as the right to cross-examine and confront, where appropriate; the opportunity to have a decision made by at least a relatively impartial arbiter, not the very individual who made the initial determination to withhold benefits; that an individual be afforded a reasonable opportunity to prepare for a hearing, a hearing which might, in many instances, involve the preparation of some documentation

For example, in the case of Mrs. Wheeler, the appellant in this case, Mrs. Wheeler had to submit one or two affidavits to the Welfare Department. This would take some time. If she is given just a 3-day period, she must, in many instances, retain a representative or counsel. Mrs. Wheeler was 77 years of age when her benefits were terminated and did need the assistance, first, of a lay representative, and ultimately of an attorney.

Q The real issue between you and your adversary, unless I am mistaken, is when this hearing need be given, isn't it?

A That is the basic issue in the case.

Q Because a hearing of the kind and quality that you are talking about is ultimately given under the law, isn't it, a so-called "fair hearing."

A Yes, it is. The hearing is ultimately given, but it is our contention that given the injuries that occur to an individual when benefits are withdrawn, that in those relatively few cases -- and I have underscored that -- in the relatively few cases where the question of eligibility is contested, an individual should be given an opportunity to have this type of hearing prior to the withdrawal of benefits.

We are not talking about a hearing procedure which is going to be available for all 1 million welfare recipients in California, nor the 23,000 old age security recipients who have been discontinued from assistance, for the figures bear out that is is a relatively few number of welfare recipients that appeal the determination of the Welfare Department.

In many instances there is agreement. An individual obtains employment, and is no longer eligible for assistance. His income now exceeds the welfare limitations. In another instance, an individual may have remarried and may no longer be in need of additional public assistance. So we are only concerned about those situations where serious questions of fact have arisen between the welfare recipient and the County Welfare Department.

It is to that issue that we assert an adjudicative hearing having basic protections is necessary.

Q Mr. Sitkin, suppose California said after this 3-day hearing, we will continue, but if you don't successfully meet the appeal procedure within 60 days, you are out.

A If that administrative decision was made by the State of California, that would be satisfactory to the appellants in this case. The real problem about --

Q To make it finer, your real criticism is the cut-off of the money for two months.

A Yes. If, in fact, California was adhering to the 60-day requirement --

Q Suppose California said you lose in the first instance and you win in the second instance, and so we give you the two months if you win.

A You are saying if we lose in the first instance and we win in the second instance, and then we get retroactive benefits, that is not sufficient to fully make whole, if you will, the individuals who were terminated from assistance.

As this Court has noted in a case decided last term, Nash versus the Florida Industrial Welfare Commission, the fact that an individual ultimately can recoup through retroactive payments is not a satisfactory answer when the funds are necessary to provide the difference between continuing subsistence and possible starvation.

Q What is the case you are referring to?

A The case was a case in Florida where an individual was, under Florida law, precluded --

Q Did the case reach this Court?

A Yes, it did.

Q What is the citation?

A Nash versus Florida Industrial Welfare Commission.

Q What is the citation?

A The citation to the case is 389 U.S. 235.

In addition, if the Court would review particularly the affidavit of Henry Frazier which is contained in the record -- not in the appendix -- in the record at pages 137 through 140, the Court will graphically appreciate the circumstances that individuals are placed in when benefits are withheld even for a period of 60 days.

In the situation of a number of the intervenors in this case, the individuals were reduced to a diet of potatoes, to not having the ability to purchase any type of clothing is a severe injury. But it must be made plain that in California at the present time, not even the 60-day requirement is being met. One would assume, however, that if the hearing preceded termination, that the 60-day requirement would be met; indeed, the experience in a number of States who have instituted a continuation pending the hearing has resulted in a situation where hearing decisions are rendered within two weeks.

So when there is the additional interest on the part of the State both to rapidly adjudicate the decisions so that additional monies are not paid out -- in some instances to potentially ineligible persons -- the hearings are held expeditiously and rapidly, this flexibility is available within the administrative agencies involved, and the individual, the recipient, can be afforded those rights which are traditionally associated.

Q May I ask you: Suppose a pension has been granted to a recipient, or whatever you call it, and the Congress or the Legislature wants to repeal it. Is it your position that the Constitution forbids it?

A No, it is not our position. Our position is that an individual does not have -- we use the term -- a "vested right" to the benefits which he is receiving. However we characterize that interest, it is a substantial one and it is an interest which should not be taken from the individual without according that individual basic elements of procedural fairness and due process.

Q Has that question ever been tested with reference to any of the pensions, Revolutionary pensions, Civil War pensions, Spanish American pensions, or the First and Second World War Pensions?

A I don't believe that the specific issue before this Court in this case has been tested with respect to the procedural rights that are to be afforded individuals, but there

have been cases that have been decided by this Court that have indicated that however one characterizes the interest, that Government must act in a fair and reasonable way in the administration of programs where basic interests are involved, whether one characterizes it as a right, as a vested right, or as a privilege.

Q Well, would it be your position that a pension cannot be cut off where it has once been decided that a man gets a pension without giving him some kind of hearing before it is cut off?

A To answer that question directly, one would have to be aware of the circumstances under which the pension was granted --

Q Just a pension; just granted because he was in the Army, unless the Government doesn't have to grant it.

A The Government doesn't have to grant it in the first instance, but once it does grant it, and assuming that the legislation remains in effect, then the individual should be entitled to continue to receive that pension unless there is a determination which is reached, after a reasonable opportunity to adjudicate the matter, that the individual is no longer eligible for a pension.

Q You are not suggesting that the legislature would have to consult with anyone if the legislature decided to repeal the entire program, are you?

A No, not at all. I am not suggesting at all that the legislature does not have within its power the right to withdraw any government benefit program. The issue is whether or not, once the legislation has been passed, and once benefits are being provided to individuals, before a specific individual's welfare assistance is removed, he should be afforded those opportunities which have been afforded individuals in like circumstances by this Court.

Q In regard to employment termination, if you are working for the Federal Government, do you have a constitutional right not to be terminated before there has been a trial-type hearing?

A It is my position that you do have a right to have a hearing which has the basic elements of due process before termination.

Q What has this Court said about that?

A This Court, in the case of Greene versus McElroy, which admittedly was not a constitutional decision, but spoke in constitutional terms, indicated that basic procedural protections are indeed essential before the right to public employment is withdrawn.

Q In cafeteria workers, that was not made quite as rigid, was it?

A No, in cafeteria workers it was not made as rigid, but the Court clearly indicated that due process applied and that

the analysis that I suggested earlier should be undertaken. In that case, it was felt that the interest of the Government in national security, and the fact that the interest of the individual involved in that case was not so substantial that procedural safeguards of the type we are seeking here should be afforded.

In that case, the individual was only stopped from working at one particular base. What we have in this particular situation is the withdrawal of the very means of subsistence to an individual.

Q Do you mean that the pay of a Federal employee may not be stopped pending a hearing; before he can be suspended from the job and his pay stopped, there must be a trial-type hearing? You say this Court has held that?

A This Court has held in cases where there has not been the overriding interest of national security that a public employee does have an opportunity to be afforded an opportunity to be heard --

Q Before his pay is stopped?

A Before his wages are taken.

Q In what case did the Court hold that?

A As I indicated, in the case of Greene versus McElroy.

Q That didn't deal, did it, with the question of when the pay could be stopped in relation to the time of the

hearing? If I recall it correctly, McElroy was put on suspended status and his pay was stopped. Such hearing as he was given was given at a later date. When he was ultimately reinstated, he got back pay retroactive to the date of the suspension.

It seems to me that is the point to which Mr. Justice White is addressing himself, and I am not sure you have answered it.

A In the case of Sloucher versus the City of New York, where an individual had been working for the City of New York, the individual in that particular case was afforded an opportunity to be heard before his wages were withdrawn.

Q Did the Court hold that the State had to do that, to afford such a hearing?

A I believe so.

Q Well, let's assume, for example, that there is no requirement, constitutional requirement, for a trial-type hearing before termination of employment, at least before termination of a man's pay, although he may have ultimately a right to a trial-type hearing. Would you say that, nevertheless, the welfare recipient is entitled to a trial-type hearing prior to termination of benefits?

A I would say that the welfare recipient is entitled to such a hearing.

Q Regardless of what the employee is entitled to.

A Regardless of what the employee is entitled to,

because, again, the individual who is on public assistance really is receiving the last public defense.

Q I would like to be absolutely clear about this part of your argument. Is it your position that when Congress or a State enacts a gratuity piece of legislation, giving somebody something out of the treasury, and declares that they should be found eligible by certain agencies, that they can never be declared ineligible without going through a type of trial procedure?

A Not at all. Our position is that an individual can be found initially ineligible by the Welfare Department, but he must be notified of that fact, and if he contests that determination, then he should be entitled to a hearing which affords him basic procedural safeguards since such a vital interest is involved.

Q Maybe my question was right. I don't quite understand your answer.

Is it your position that when there is a gratuity given, such as has been given in many wars, after many wars, bread, meat, gratuities of various kinds, somebody is found eligible by an agency, that the Government cannot deprive that person of that gratuity thereafter without going through a trial-type procedure?

A If there is an individual dispute regarding eligibility, then the individual should be afforded a hearing. The

problem I have with the question is the term "trial-type". I am not asking for a hearing which has all of the --

Q I understand you to say they have to have notice before they cut it out.

A Yes; right.

Q Now, after the Civil War there were large numbers of gratuities given in this country of food and meat and raiment of various kinds. Was there ever any case like that involved in those gratuities?

A Not to my knowledge.

Q Has there ever been one before, with reference to a gratuity, where it has been insisted that a pure gratuity, a man has such a right to it after he once gets it that he must have notice before the Government cuts it off? Has it ever been directly held, and if so, where?

A There is no direct holding with respect to a welfare --

Q I am not talking about this statute. I am talking about any statute in the history of the Government.

A In the case of Goldsby versus Garfield, which was decided in 1908 --

Q What is that?

A Goldsby versus Garfield.

Q What report? What report is the case in?

A I don't have the citation. I will attempt to

furnish it to you.

Q In what court was it?

A The United States Supreme Court.

Q Is it in your table of cases in your brief?

A No, it is in the amicus brief in the companion case. The citation to the case is 211 U.S. 249.

Q What is that about?

A In that case it was a question of the Government providing to individuals Indian lands. Mr. Goldsby in that case was initially found eligible for an allotment of this land provided by the Federal Government, and the Court held in that case that the action of the Secretary in removing Mr. Goldsby from the rolls of the individuals who were entitled to that land without affording Mr. Goldsby an opportunity to be heard, and notice, was a violation of due process.

Q They held to cut him off from land that he had been legally held to own, didn't they?

A That was the issue. The question was whether or not he did, in fact, have the right --

Q They found that he legally owned it.

A The Court did not find that he did or did not legally hold the land. That was an issue to be left for the administrative determination. The Court was only dealing with whether the Secretary could, absent any type of an opportunity to be heard on the issue of whether or not Mr. Goldsby did, in

fact, have proper title to that land, whether he could continue on that land.

MR. CHIEF JUSTICE BURGER: Mr. Sitkin, I remind you that you are now cutting into your rebuttal time.

MR. SITKIN: Yes. I think I will conclude at this particular point.

I would just like to make clear to the Court that what we are dealing with here is not a large mass number of individuals who will be continuing aid. It is only in those situations where there is serious issues of fact involved that we are asserting that there is a right to continuation of assistance.

Given the vital interest of the individuals who were involved here, and given the fact that administrative procedures have already been developed by the State, it is our position that due process requires the procedural protections which we assert are required in this case.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Sitkin.

Mrs. Palmer?

xxxx ARGUMENT OF ELIZABETH PALMER, ESQ.

ON BEHALF OF APPELLEES

MRS. PALMER: Mr. Chief Justice, and may it please the Court: If I may directly rebut what my colleague has brought to the Court's attention in Goldsby, in the Goldsby case there was a hearing prior to the determination of

eligibility to be placed on the list for the allotment of land; that the Secretary struck the name from the list without any hearing; and that is not comparable to the situation that is before this Court.

I ask the Court to take a close look at the pre-withholding termination-of-aid procedures. It isn't a 3-day notice, just "There we are. Three-day notice. You are going to be cut off aid." It is preceded by an investigation, discussion with the case worker as soon as there is any hint of ineligibility.

The recipient is the primary source of information. Collateral sources are only consulted with the consent of the recipient, who is also explained why we want to see Mr. X, or whoever, the reasons for that.

If the notice does go out of withholding, of contemplated withholding, it is only sent out when the evidence of ineligibility is both substantial in nature and reliable in source, not hearsay on hearsay on hearsay, or gossip, rumor, or surmise. It must be substantial in nature and reliable in source.

Q Mrs. Palmer, how can the recipient test that out as to how reliable it is and how non-hearsay it is, and how can the recipient test that out?

A With the assistance of the Office of Economic Opportunity attorneys, Your Honor.

Q I didn't hear you.

A I am not being facetious, Your Honor, but with counsel as able as my opponent here, and with the offices of the Office of Economic Opportunity, they are supposedly scrutinizing this, and also Mr. Montgomery, the appellee is -- I beg your pardon.

Q Excuse me, Mrs. Palmer. I am talking about before the end of this 3-day period, how can the recipient test all this out?

A Oh. The case record is open, Your Honor. There is the investigator's reports. There are the names of the sources of information.

Q That is all given to the recipient?

A The case record is right there, to be opened to the recipient at any time, with counsel, Your Honor.

Q Well, the recipient without counsel.

A The recipient without counsel can walk in and look at his or her record, too.

Q Is it turned over to them?

A Absolutely, the law requires it.

Q Or is it handed to him and they say, "If you want to look at it, you can look at it"?

A I beg your pardon, sir?

Q Is it just said, "Here it is. If you want to look at it, you can look at it"?

A They walk in, they ask for their case record, which is required to be kept, and it is immediately made available to them to look through, take notes, with or without counsel.

Q What do they get in writing?

A In the case record, sir?

Q Yes, please.

A In the case record there is the narrative of every --

Q I mean, what is the recipient handed that tells the recipient "This is what you were wrong about"?

A Oh, all right. The notice says, and must include, according to the resolution, must include the grounds for the contemplated withholding of aid, what information is needed to maintain eligibility. Now, no longer can there be the cryptic notice of "Essential information is lacking," because what essential information has to be put right there on the notice, plus the fact that they are advised that they may have counsel, they are advised that they may come in at a specified time, at a specified place, for a conference with a case worker, eligibility worker, or other county representative.

In the event no agreement can be reached between the case worker -- and I must say that in the large county the interview would not normally be with the case worker because there is a special Complaint and Review Unit that is set up; that the interview would be with an impartial referree.

But you must realize that California's 58 counties vary greatly in size. Alpine County has a welfare caseload of 84. Los Angeles County has well over half a million. So there is the availability of staff for these interviews.

Q What county was that you said had a half a million?

A Los Angeles County, Your Honor, with around 11,500 welfare workers. Alpine County has three.

Q 11,000 welfare workers?

A 11,500 welfare workers in Los Angeles County, and over half a million welfare recipients. So California cannot blanket, and that is why Mr. Montgomery, in promulgating regulations, has to consider the varying problems of these counties.

Regulations of the Department of Social Welfare are only adopted after public hearing where interested individuals, organizations, including the welfare directors who don't always get together on what they want, as you can very plainly see, because of their differing problems. Consequently, the regulation that is being attacked here is a result of compromise, as most legislation is.

Then follows the fair hearing. That is a full, trial-type adjudicatory hearing which is required under the Social Security Act.

Q What happens in the pre-termination stage where

there is this conference and there is a flat conflict of fact, the recipient saying "These are the facts that entitle me to relief," and the agency saying, "No, our information is that that is not correct"? What happens?

A Well, if it is a factual situation, Your Honor, it is a difficult question. It is whether the Review Unit of the Department feels that the evidence is substantial as to ineligibility.

Q That is the situation that your adversary is talking about, at least one of the situations.

A Then, if it is on a policy matter, there is immediate review by the State Department, not as a hearing, but on whether, under these facts, this policy should be applicable.

Q I am not talking about policy. The policy is already set. But if the recipient is right in his statement of the facts, then the policy, whatever it may be, is satisfied. If he is not right, then the policy is not satisfied. It is just a plain issue of fact.

A Your Honor, the Wheeler case is a perfect example of conflicting evidence, but if the State Department had been consulted, there was a misapplication of regulations to the fact, even with the dispute. Did she get rid of this money to remain eligible on aid?

The regulation said that you have to consider her purpose. She is the primary source of whether she did or did not

get rid of this money to remain eligible for welfare. Consequently, on the very same facts, the referee held that she was eligible for aid.

Normally in factual disputes, surely they say "I did" and somebody else says "You don't," and someone has to decide and the Review Unit of the county is the one that decides at this initial stage.

Q This case, in fact, involved the kind of factual issue to which my brother Harlan referred, did it not?

A Yes, Your Honor.

Q This Mrs. Wheeler received the proceeds of her deceased son's veteran's insurance policy; at least was the beneficiary under that.

A That is true.

Q And the son died and the Department claimed that she had received the proceeds and she claimed that she had transferred the proceeds to a nephew, first claiming that it was a debt from her son to the nephew and then amending her story to say that it was carrying out her son's --

A Dying wish.

Q -- dying wish.

A And with the obligation to report these funds and not having done so, despite interviews with her case worker, I presume that that had some human element of doubting the story.

Getting to the fair hearing and the length of time that

it takes for the fair hearing, in appellant's reply brief there is set forth a table that I found shocking of the fair hearings that had been pending from one to two years.

I immediately called the Chief Referee of the Department and he, with very little time, went through the ones that were over a year old. He found that in most of them, if not all of them, they should have been closed out due to being unable to find the claimant, that the matter had been settled at the Department level, that the claimant had asked for an indefinite continuance, and so on.

But due to the terrific increase in fair hearing requests, from 500 normal requests a month to 700 now, in July August, and September, they felt that they should try to meet the 60-day requirement, try to meet the State regulation that the hearing must be held within 17 days of the request for the hearing, and not bother, because they have not had a commensurate increase in clerical staff or referees.

Consequently, they have also adopted the position that when the referee hears it, and the claimant is right, that is going to be the referee's decision. That decision goes out immediately, and less harm to the recipient whose hearing decision is going to be unfavorable to the claimant.

That isn't ideal, but at least it is the best thing that the Department feels that they can do under the circumstances, so I ask you, when you look at that chart, please do not

be as shocked as I was when I looked at it; that there are reasonable explanations for that length of time.

In another table of statistics, the same series as this Table 62, is Table 60 which may give the Court some idea of the number of fair hearings that are filed.

Last year there were 6,218. This is 2,000 more than the preceding year. 5,915 appeals were closed last year. That is 2,769 more than the preceding year.

All I can say is that the State of California is working at it.

Q Is there anything in this record, Mrs. Palmer, about what success the State of California has had in recouping payments improperly made to recipients who were determined not to be eligible?

A No, I don't know of any statistics, Your Honor. I understand that it is not too successful. California does not take liens on property, as some other States do.

I must also -- and I am sorry I forgot to bring to the Court's attention -- that in California, one of the peculiarities of California, I guess, the counties, on general assistance or home relief, whatever you want to call it, it is solely county financed, with solely county standards. We are here talking only about the so-called categorical aid, the Federal-State financed programs which the counties also participate in in California.

So you can have as wide a range in what benefits are received under general assistance as there are 58 counties. As a matter of fact, I assume that and I am pretty sure that there are some gross inadequacies in this program, perhaps equal to $35 a month for a family of four, the average grant in Mississippi.

Q In this case there is no issue about general assistance.

A No. There is in the next case.

Q Either the amount of it or how one becomes eligible or how one becomes ineligible, or anything else. The case does not involve anything except the federally assisted categorical program; is that right?

A Yes, and I wanted to make that clear, Your Honor, because I believe that the New York case does involve general relief or home assistance.

Q It does; yes.

Q May I ask what position you take when a person has been put on the register to get the money, the relief, and the State wants to terminate it. Can it terminate it without a hearing?

A Your Honor, we submit that we do give a hearing.

Q You what?

A We do. This pre-withholding procedure and hearing satisfies due process under the circumstances of the case. This

we conceded that there was statutory entitlement to aid as long as there was eligibility, but if there is substantial evidence of ineligibility, then the procedure that I have outlined to you satisfies due process under these circumstances.

Q Well, do you mean satisfies the requirement for notice?

A Notice and --

Q Hearing?

A -- and a hearing or a conference, as it is termed.

Q There is no dispute that they are not entitled to it or as to the date at which they are entitled to put it into effect.

A Oh, Your Honor, if I understand correctly, following the fair hearing, and if the decision is in favor of the claimant, it is retroactive to the date of termination. There is retroactive payment.

Q Mrs. Palmer, is it part of due process to have a Hearing Officer that has no interest whatsoever in the matter?

A It depends upon the circumstances, Your Honor. There are cases that hold that --

Q Well, is it your idea of due process that the person making the charges should arbitrate it?

A The California Supreme Court has held in Griggs against Board of Education that when --

Q I have great respect for the California Supreme

Court but I still don't believe the California Supreme Court has ever said that the person making the charge has the right to judge it. If they have, I would like to hear that one.

A I beg your pardon, Your Honor. It isn't a charge. It is questioned eligibility and it is an exploratory and, I contend, a nonadversary proceeding to determine is there eligibility or not.

Q Well, what do you say to Mr. Sitkin's point that it is a question of whether the person eats or not? That is what I understand his point is.

A Your Honor, I can't defend the welfare system and I don't think anyone can. It is indefensible. No one is happy with it. Certainly the poor are not happy with it and the taxpayer is less happy because of the enormous amount of money that goes into it. I am not defending the system.

I am merely saying that the procedure that California has adopted does satisfy, at this stage of the proceeding, due process.

Q Mrs. Palmer, does the Federal law permit a State to terminate benefits pending a full trial-type hearing?

A Yes, Your Honor, they do.

Q Although the Federal law requires a fair hearing.

A Requires the fair hearing and --

Q It is enough to satisfy the Federal law if you grant the fair hearing after the termination of benefits?

A That is correct, Your Honor.

Q But at the same time, I suppose the Federal law would continue to support the State program if the State did not terminate pending the fair hearing?

A That is true, Your Honor. The option is there for the State.

Q If California wanted to, after the informal conference where termination was decided on, continue benefits pending a full trial-type hearing, the Federal Government would contribute?

A That is correct.

Q But also, if California doesn't want to do that, which it doesn't --

A That is the option of the State.

Q So under the Federal statute, the Federal authorities construe the fair hearing provision, I take it, to be satisfied by California's system.

A Yes, that is correct, Your Honor. And the brief of the Solicitor General confirms that.

Q Mrs. Palmer, as I understand it, the State position is that what is now provided before actual termination satisfies due process.

A Yes, Your Honor.

Q And do I understand that implicit in that is a concession that constitutionally something in the way of due

process must be afforded before there may be a termination?

A Yes, Your Honor. That was admitted at the very early stages and that is why the appellee promulgated these regulations to strengthen the procedure.

Q That being so, I gather that the issue for us, if that concession states constitutionally the requirement, is simply whether what you do provide does satisfy the constitutional requirement.

A That is the conflict, really. Do we satisfy due process with the procedure that we have?

May I point out to the Court that in many instances Court judgments are based on just affidavits -- preliminary injunctions, temporary restraining orders, arrest warrants, and so on -- on just affidavits, and this is more than just affidavits.

Q Mrs. Palmer, do I draw that if the recipient says "I need more than these three days to get these affidavits," they would give him that extra time?

A I can't answer that, Your Honor. I am sorry.

Q I suppose that would vary.

A It would vary.

Q But there is nothing in the matter before us that says either way on that; there is nothing in the record.

A No, there is nothing in the record.

I was interested in counsel stating that the only time

they want the full, fair hearing prior to termination is when there are factual conflicts, I believe was the statement. That isn't the prayer that was asked for. The prayer asked for the full, fair hearing whenever a county is contemplating suspending, terminating or withholding aid.

This was the position that counsel took at the public hearing on the regulation. This was our understanding of counsel's position. I am surprised that that is apparently not their position before this Court.

In California, one can file for a fair hearing within one year. However, under the McCullough order -- and you have heard about the McCullough order, which was a somewhat unusual order which ordered the pre-hearing conference to be held, just as I have outlined to you, if the Department was satisfied that aid should be terminated, the recipient was so advised. If the recipient requested a fair hearing, accompanied by an affidavit which specifically negated the reasons given by the county for ineligibility, then aid must be resumed pending the fair hearing.

In the briefs it is pointed out that this has not been used very much -- not that it hasn't been used, but it hasn't cost the State very much, and I contend that it is because it hasn't been used very much. There were only three restorations of aid from Los Angeles County, where there are over half a million welfare cases. So whether this is being one of the most well kept secrets, I don't know, but at least it has not been

used. It is one that takes quite a bit of county time. But regardless of that, it hasn't created much of a stir.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mrs. Palmer.

Does Mr. Sitkin have any time left?

THE CLERK: No, his time has expired, Your Honor.

MR. CHIEF JUSTICE BURGER: The case is submitted.

(Whereupon, at 11:20 a.m. the argument in the above-entitled matter was concluded.)