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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **SUZANNE CALLES,**

3 Plaintiff-Appellant,

4 v.

NO. 32,076

5 **NEW MEXICO HUMAN**
6 **SERVICES DEPARTMENT,**

7 Defendant-Appellee.

8 **APPEAL FROM A FINAL DECISION OF THE NEW MEXICO HUMAN**
9 **SERVICES DEPARTMENT**

10 **Aldo Jadnicek, Administrative Law Judge**

11 New Mexico Legal Aid

12 Alicia Clark

13 Silver City, NM

14 for Appellant

15 New Mexico Human Services Department

16 Nathan A. Adams, Special Assistant Attorney General

17 Santa Fe, NM

18 for Appellee

1 **MEMORANDUM OPINION**

2 **KENNEDY, Judge.**

3 Suzanne Calles (Plaintiff) appeals the Human Services Department's (HSD)
4 denial of benefits under the Temporary Assistance for Needy Families (TANF)
5 program. On June 5, 2012, this Court filed a notice of proposed summary disposition,
6 proposing to reverse HSD's Decision. HSD filed a memorandum in opposition to
7 proposed summary affirmance, which we have given due consideration. We reverse
8 HSD's denial of TANF benefits to Calles.

9 Calles raises two issues, which we address together: (1) whether it was
10 reversible error for HSD to deny Calles's application for TANF based on ISD Policy
11 Clarification ISD-PC-FS-PC-09-14, where undisputed testimony and other evidence
12 demonstrated that her child, R.G., resided primarily with her and that she exercised
13 parental control over him and was primarily responsible for his care and support; and
14 (2) whether it was reversible error for HSD to deny Calles's application for TANF
15 where HSD has the burden to prove its action was reasonable by a preponderance of
16 the evidence, and Calles presented an un rebutted prima facie case demonstrating that
17 she resided with R.G. and was the party primarily responsible for providing care and
18 support for him and that she exercised parental control over him. [DS 6, 9]

1 “The court shall set aside a decision and order of the director only if found to
2 be: (1) arbitrary, capricious[,] or an abuse of discretion; (2) not supported by
3 substantial evidence in the record as a whole; or (3) otherwise not in accordance with
4 law.” NMSA 1978, § 27-2B-13(K) (1998); *see* 8.100.970.14(C)(2) NMAC.
5 “Although we accord deference to an agency’s interpretation of its own statutes, we
6 will, nevertheless, reverse an agency determination in order to correct a misapplication
7 of the law.” *Carter v. N.M. Human Servs. Dep’t*, 2009-NMCA-063, ¶ 8, 146 N.M.
8 422, 211 P.3d 219 (internal citations omitted). “HSD has the burden of proving the
9 basis to support its proposed action by a preponderance of the evidence. The action
10 or proposed action being appealed will be upheld if the evidence supporting the action
11 is more convincing than the evidence offered in opposition to the action.”
12 8.100.970.11(F) NMAC.

13 On January 23, 2012, Calles applied for benefits under the SNAP (formerly,
14 Food Stamps), Medicaid, and TANF programs. [RP 3] Only the TANF benefits are
15 at issue in the present appeal. After benefits were denied the same day, Calles
16 requested a fair hearing on February 1, 2012, and the hearing was held on March 2,
17 2012. [RP 1, 32] Among other things, the hearing officer found that the Children,
18 Youth and Families Department (CYFD) had taken R.G. into custody on May 24,
19 2011, and placed him in the household of his father (Father). [RP 33] R.G. had

1 previously been on Calles's TANF case and was removed from her case effective June
2 30, 2011. [Id.] Father applied for TANF benefits on behalf of himself and R.G. on
3 January 3, 2012, twenty days before Calles applied, and benefits were approved the
4 same day. [RP 34 ¶ 3]

5 On January 13, 2012, R.G. was taken into custody by police due to allegations
6 of battery against a household member. [RP 34 ¶ 4] The district court ordered him
7 conditionally released to his parents on January 17, 2012. [RP 34 ¶ 5] Only Calles,
8 not Father, signed the order of conditional release, in which she agreed to provide for
9 R.G.'s supervision and care. [Id.] Although R.G. spends at least one day per month
10 with Father, he spends the majority of his time with Calles or at school. [RP 34 ¶ 8]

11 Based on the above factual setting, the hearing officer recommended that
12 Calles's application on behalf of herself and R.G. should have been approved. The
13 acting director of HSD's Income Support Division disagreed with the
14 recommendation and denied Calles's application. The acting director's Hearing
15 Decision states:

16 To be eligible for TANF[,] a dependent child must be living in the
17 home of a parent or specified relative[,] and the caretaker must be living,
18 or considered to be living, in the home with the child, as per regulation
19 at 8.102.400.14(A) NMAC. However, certain circumstances may
20 require the child or caretaker temporarily reside elsewhere to meet
21 specific needs identified as essential to the care and support of the child
22 as per regulation at 8.102.400.14(B).

1 Testimony heard during the hearing validates [R.G.] was placed
2 in . . . [F]ather’s custody by CYFD, receives benefits as a member of . . .
3 [F]ather’s SNAP, TANF[,] and JUL Medicaid cases[,] thus indicating he
4 resides with . . . [F]ather. Documentation and testimony presented
5 during the hearing indicates [R.G.] is a household member on [Calles’s]
6 lease; that [Calles is] responsible for his school attendance and the
7 responsible party for his conditional release from police custody. In this
8 instance, [R.G.’s] primary residence and caretaker status remain
9 questionable. Therefore, . . . [HSD] was correct in denying [Calles’s]
10 application for TANF on [R.G.’s] behalf.

11 The two sections of the New Mexico Administrative Code cited in the first paragraph
12 quoted above provide as follows:

13 A. For a NMW benefit group to exist, a dependent child must
14 be living in the home of a parent or specified relative as specified in
15 8.102.400.15 NMAC. The relative must be the primary caretaker for the
16 child and must be within the fifth degree of relationship, as determined
17 by New Mexico’s Uniform Probate Practice Code (see Subsection A of
18 8.102.400.16 NMAC). To be considered as the caretaker, the specified
19 relative in a NMW benefit group, the participant must be living, or
20 considered to be living, in the home with the child.

21 B. A child or the caretaker relative may in certain situations be
22 temporarily domiciled away from home, but nonetheless be considered
23 as living at home. Such situations result when the parent or caretaker
24 relative has decided to domicile the child elsewhere because of a specific
25 need identified by the parent or caretaker relative and provided that the
26 parent or caretaker relative remains responsible for providing care and
27 support to the child and retains parental control over the child.

28 8.102.400.14 NMAC.

29 We propose to conclude that the acting director’s decision is “not supported by
30 substantial evidence in the record as a whole[.]” § 27-2B-13(K). The decision does

1 not identify, nor do we find, any evidence that R.G. is merely “temporarily domiciled
2 away” from Father’s home and plans to return there as his primary residence, or that
3 Father “remains responsible for providing care and support to the child and retains
4 parental control over the child.” Rather, Calles specifically took on these
5 responsibilities in the conditions of release she signed and in a school attendance
6 contract. [RP 18, 23-24] To the extent that the acting director may have relied on the
7 fact that CYFD placed R.G. in Father’s custody in May 2011, we find no court order
8 requiring that placement as an ongoing matter. Further, we find essentially nothing
9 concerning Father’s present intent or suitability to retake custody of R.G. at any point,
10 other than the fact that HSD approved his application for benefits twenty days before
11 receiving Calles’s application.

12 Calles’s docketing statement mentions Policy Clarification ISD-PC-FS-PC-09-
13 14. In relevant part, this states: “Upon verification of all eligibility factors, if they
14 have no contact (are not spending at least one day a month) with the existing
15 household, the child can be removed and placed on the new case for the ongoing
16 month.” [RP 37] The hearing officer noted that R.G. had been on Calles’s benefits
17 cases before CYFD took him into custody in May 2011. [RP 38] Father applied for
18 and was granted benefits on January 3, 2012. [RP 34 ¶ 3] Twenty days later, HSD
19 then refused to add R.G. back onto Calles’s case after she provided evidence that she

1 again had custody of and responsibility for him upon his release by the Sixth Judicial
2 District Court. [RP 38] Given this sequence of events, we propose to conclude that
3 the Policy Clarification in these circumstances is inconsistent with HSD regulations
4 providing that “[a] child lives with a participant when . . . the participant’s home is the
5 primary place of residence for the child, as evidenced by the child’s customary
6 presence in the home[.]” 8.102.400.15(A) NMAC.

7 In its memorandum in opposition, HSD asserts that “[a]bsolutely no evidence
8 was presented from which it could be found that [Calles] was ever given custody of
9 R.G., in contrast with the clear and formal CYFD order placing R.G. in [Father’s]
10 custody.” [MIO 5] As noted above, the formal CYFD order in question does not
11 appear in the record, and we thus cannot determine whether the order specified any
12 time frame or placed any restrictions on Calles’s contact with R.G.

13 HSD’s memorandum also asserts that Calles’s docketing statement claimed that
14 HSD had relied on Policy Clarification FS-PC-03-033 for its decision denying TANF
15 benefits. HSD asserts that this Policy Clarification applies only to the SNAP program,
16 not TANF. We find no mention of the specified Policy Clarification in Calles’s
17 docketing statement, but to the extent that HSD meant ISD-PC-FS-PC-09-14, which
18 Calles does cite, we observe that Calles had applied for TANF, SNAP, and Medicaid.
19 It seems likely that HSD would have found R.G.’s residence for TANF purposes to

1 be consistent with his residence for SNAP purposes. Further, if ISD-PC-FS-PC-09-
2 14 in fact does not apply to TANF, the only one of the three programs before us, then
3 neither the Department nor this Court is bound by that document's suggestion that
4 R.G. must remain on Father's TANF case if he spends at least one night a month with
5 Father. [RP 37]

6 Calles presented ample evidence that R.G. now lives with her and she is
7 responsible for his supervision and care. HSD presented essentially no evidence that
8 R.G. actually lives with Father and is merely "temporarily domiciled away" with
9 Calles. We conclude that Calles's application for TANF benefits should have been
10 approved.

11 For the reasons stated above, we reverse the hearing decision and remand to
12 HSD for further proceedings consistent with this Opinion.

13 **IT IS SO ORDERED.**

14 _____
15 **RODERICK T. KENNEDY, Judge**

1 **WE CONCUR:**

2

3 _____
3 **LINDA M. VANZI, Judge**

4

5 _____
5 **J. MILES HANISEE, Judge**