

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<b>RICHARD WEEKS,</b>	)	
	)	
<b>Plaintiff</b>	)	
	)	
<b>v.</b>	)	<b>Civil No. 93-178-P-H</b>
	)	
<b>DONNA E. SHALALA,</b>	)	
<b>Secretary of Health</b>	)	
<b>and Human Services,</b>	)	
	)	
<b>Defendant</b>	)	

**REPORT AND RECOMMENDED DECISION <sup>1</sup>**

This Supplemental Security Income ("SSI") appeal raises the question whether the Secretary properly concluded that the plaintiff's retroactive payments should be reduced by one-third due to his past receipt of in-kind income in the form of food and shelter. The plaintiff claims that the Secretary erred in failing to find that the food and shelter he received constituted a loan not countable as income.

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<sup>1</sup> This action is properly brought under 42 U.S.C. 1383(c)(3). The Secretary has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 26, which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the Secretary's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on May 20, 1994 pursuant to Local Rule 26(b) requiring the parties to set forth at oral argument their respective positions with citation to relevant statutes, regulations, case authority and page references to the administrative record.

## I.

The plaintiff filed for SSI benefits on September 30, 1986. Record p. 100. After a number of denials, the plaintiff eventually secured a favorable decision on July 27, 1990. *Id.* at 100-07. In November 1990 he received a retroactive payment of \$10,081.49 for the period September 30, 1986 through October 1990. *Id.* at 113-17. This payment included a one-third reduction in the amount of his benefits due to the Secretary's determination that the plaintiff had been receiving in-kind income and support from September 30, 1986 through August 1990. *Id.* at 131-33. During this period the plaintiff was living in the home of his girlfriend, Mabel Smith, and was not contributing to the household expenses. *Id.* The Secretary's regulations provide that an SSI recipient living in another person's household, from whom he receives in-kind support in the form of food and shelter, must have his benefits reduced by one-third. 20 C.F.R. 416.1131. A recipient is considered to be living in his own household and not receiving in-kind support, and thus not subject to a one-third reduction in his benefits, if he pays his pro rata share of the monthly household operating expenses. *Id.* 416.1133.

The plaintiff appealed the one-third reduction in his benefits. Citing his monthly payments of the pro rata share of the household expenses before becoming disabled and his resumption of those payments upon obtaining his award, the plaintiff claimed that he had a continuing obligation to repay Mabel Smith for his share of the household expenses for the time period in which he had not contributed. Her extension of support during that period, therefore, constituted a loan of his pro rata share of the household expenses. If a loan situation existed, Mabel Smith's advancement of food and shelter would not count as in-kind income to the plaintiff and his benefits would not be reduced by one-third. 20 C.F.R. 416.1103(f), 416.1130.

On March 27, 1992 an Administrative Law Judge denied the plaintiff's appeal. Record pp. 15-18. The Administrative Law Judge first ruled that an SSI recipient can only be considered to be

living in his own household based on a sharing arrangement for months in which he actually began contributing his pro rata share of the household expenses. *Id.* at 16. In other words, the Administrative Law Judge concluded that a recipient is considered to be living in another's household and receiving in-kind support from that person, *see* 20 C.F.R. 416.1131, unless the recipient is making actual monthly payments for his portion of the household expenses, *see* 20 C.F.R. 416.1133. Such a situation precludes an individual from establishing an advancement of food and shelter, i.e., a loan, as the means through which he satisfies his pro rata share of household expenses.

Notwithstanding this legal conclusion, the Administrative Law Judge also determined that there was no evidence supporting the existence of an actual loan agreement, that is, a contractual or business arrangement for the plaintiff to repay Mabel Smith his share of the household expenses incurred during the period of retroactivity. Record p. 16. Stating that Mabel Smith had not recorded or tabulated the amount of monthly rent owed during that period, the Administrative Law Judge found that there was no objective evidence indicating a business arrangement. *Id.* at 16-17. In addition, the Administrative Law Judge noted the conspicuous absence of any references by the plaintiff to a contractual agreement to repay household expenses prior to his learning of the one-third reduction, citing his September 30, 1986 SSI application and an August 1990 interview. *Id.* at 16.

The Appeals Council granted the plaintiff's request for review on March 3, 1993. Record pp. 149-50. In so doing, the Appeals Council noted that the Secretary's policy regarding the treatment of advancements of food and shelter had changed since the Administrative Law Judge had rendered his decision in this case. *Id.* On September 8, 1992 the Secretary promulgated Social Security Ruling 92-8p, which set forth the new policy for evaluating advancements of food and shelter as possible loans of household expenses. *See* 57 Fed. Reg. 40,919-01 (1992). Prior to this ruling, as reflected in the Administrative Law Judge's decision, the policy of the Secretary was to

treat as a loan only those arrangements that involved an actual advance of cash. *See* Social Security Ruling 78-26, reprinted in *West's Social Security Reporting Service* at 329 (1983). Because the Fifth and Ninth Circuits had struck down this policy, *see Ceguerra v. Secretary of Health & Human Servs.*, 933 F.2d 735 (9th Cir. 1991); *Hickman v. Bowen*, 803 F.2d 1377 (5th Cir. 1986), the Secretary reinterpreted its loan policy to include loans in the form of in-kind support, *see* Social Security Ruling 92-8p, reprinted in *West's Social Security Reporting Service*, at 43 (1993 supp.). The chronology of this policy change is set forth in *Niesse v. Shalala*, 17 F.3d 264, 265-66 (8th Cir. 1994).

In reviewing the Administrative Law Judge's decision, the Appeals Council first recognized that a household's advance of food and shelter to a household member could now be considered a loan, a correct statement of the Secretary's new loan policy. Record pp. 6, 149. Nevertheless, the Appeals Council affirmed the Administrative Law Judge's decision because "there is no credible evidence that the [plaintiff] and Mabel Smith contracted a bona fide loan agreement to repay her for the food and shelter she provided from September 30, 1986 through August 31, 1990." *Id.* at 6-7. As did the Administrative Law Judge, the Appeals Council found that Mabel Smith's lack of a bookkeeping record for the value of the food and shelter she allegedly advanced to the plaintiff was inconsistent with the contention that they had an agreement for him to repay the support provided to him. *Id.* at 7. Citing various times throughout the administrative process where he had not mentioned any loan agreement, the Appeals Council concluded that the plaintiff concocted this agreement after learning of the reduction in his benefits in an attempt to circumvent application of the one-third reduction rule. *Id.*

## II.

This court reviews the Secretary's decision to ascertain whether the correct legal standards were applied and whether her determination is supported by substantial evidence. 42 U.S.C.

1383(c)(3); *Lizotte v. Secretary of Health & Human Servs.*, 654 F.2d 127, 128 (1st Cir. 1981). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support the conclusions drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

In light of the Secretary's promulgation of Social Security Ruling 92-8p, it is now settled that an advancement of food or shelter that an SSI recipient receives from someone in whose household he lives can represent a loan for his pro rata share of household operating expenses. Social Security Ruling 92-8p at 44. Such an advancement constitutes a bona fide loan if it was founded on an understanding that it must be repaid and is enforceable under state law. *Id.* If a bona fide loan of household expenses in fact exists, the recipient's benefits are not subject to the one-third reduction rule. 20 C.F.R. 416.1133; *see also Ceguerra*, 933 F.2d at 741-42; *Hickman*, 803 F.2d at 1381-82; *Allen v. Sullivan*, 780 F. Supp. 750, 754 (D. Kan. 1991); *Ruppert v. Secretary of Health & Human Servs.*, 671 F. Supp. 151, 167-69 (E.D.N.Y. 1987), *on appeal*, 871 F.2d 1172, 1177-78 (2d Cir. 1989).

In reviewing the Secretary's determination in this case, I note that the Appeals Council evaluated the Administrative Law Judge's findings in light of the recent change in loan policy. It need not be vacated, therefore, on the grounds that it was based on an incorrect interpretation of the regulations. *Cf. Niesse*, 17 F.3d at 267 (not clear that Appeals Council evaluated loan under new policy). Nevertheless, the Secretary's determination cannot be upheld on the factual grounds asserted by her. Based on the Secretary's reliance on objective factors of dubious relevance and her rejection of the plaintiff and Mabel Smith's testimony on specious grounds, I find that her determination that the plaintiff and Mabel Smith did not have a bona fide loan agreement is not supported by substantial evidence.

**A.**

First, the Secretary faulted the plaintiff with not mentioning a loan agreement at any time during the administrative process before receiving his award notice. Record pp. 7, 16, 132. Certainly, the fact that evidence of a loan agreement first surfaces after the recipient receives notice of his reduction is some evidence that the loan agreement may have been fabricated to avoid application of the one-third reduction rule. The Secretary goes far beyond this, however. She faults the plaintiff with failing to report his alleged loan agreement on the applications and forms he was required to complete during the benefits process, even though these forms do not request such information. *Id.* at 7, 16, 85-97, 121-24, 132.

This is a bit of a Catch-22. The Secretary's forms mostly require the SSI applicant to check off boxes of predetermined questions, none of which relate to loan agreements for household expenses. Indeed, perhaps recognizing the failings of these forms in this regard, the Secretary apparently changed this procedure following the adoption of the new loan policy. The Secretary's emergency SSI instructions for implementation of the new loan policy required claims representatives to *affirmatively ask* someone in the plaintiff's living situation whether he has to repay his household expenses and then to document the response. Record p. 147 (OSSSI-92-008) ("Asking about a loan agreement -- initial claims and reinstatements -- If an individual who is applying for benefits or being reinstated after a period of ineligibility is not paying a pro rata share of the household food and/or shelter expenses, ask if he or she will have to pay the householder back for it. Document the answer over the individual's signature. A yes answer is a loan allegation."). Absent evidence that the Secretary asked him about an obligation to repay, I cannot fault the plaintiff for failing to note, through a narrative addition to mostly boilerplate forms, that he was obligated to repay his household expenses.

Moreover, I recognize that the plaintiff's responses on these boilerplate forms were not contrary to his present assertion that he is obligated to repay his share of the household expenses, as the Secretary apparently thought. Record p. 7, 16. For example, on his application for SSI benefits

the plaintiff checked the boxes indicating that he had no rental liability for the place where he lived and that he was receiving support of food and shelter from someone in his household. *Id.* at 88. In August 1990, when he was apparently interviewed for the effectuation of the favorable disability determination, he again answered "no" to paying rent or having rental liability and answered "yes" to living with someone who provided him with room and board. *Id.* at 132. These responses are not inconsistent with an assertion that a loan agreement existed; in fact, they are quite consistent because they evidence the potential creation of a debt. Indeed, I note that on his SSI application the plaintiff indicated that he had not received any non-cash gifts, which is what in-kind support would be in the absence of an obligation to repay. *Id.* at 93.

The Secretary, as stressed at oral argument, relies heavily on a June 26, 1991 reconsideration determination report, completed by a representative of the Social Security Administration ("SSA"). Record pp. 131-32. Of greatest significance to the Secretary, this report recounts the purported substance of the plaintiff's August 1990 interview. *Id.* at 132. To support her one-third reduction determination, the Secretary points to the report's reference to the plaintiff's having "answer[ed] 'yes' to living with someone who was providing *free* room/board" during his August 1990 interview. *Id.* (emphasis added). I find, however, that this reference cannot be credited as reliable evidence, let alone substantial evidence, demonstrating the absence of a loan agreement. First, the report in which the reference appears was prepared by the SSA ten months after the interview in which the statement was allegedly made. There is no indication as to where the individual completing the report came up with the statement he or she attributes to the plaintiff ten months before. If it was based on notes or written statements from the interview, they are not in the record.

Without at least seeing the source from which the plaintiff's alleged statement came, the report of it suggesting that the plaintiff said that he was receiving *free* room and board, in the sense that he had no obligation ever to pay for it, is unreliable and will not, independently, support an

adverse finding on this issue. Indeed, because the reference to the plaintiff's alleged statement was drafted by the SSA, it could easily have been the SSA's spin or gloss on the plaintiff's response that he was given support by someone in his household, as he had previously indicated on his SSI application, without any mention of an obligation to repay. *See* Record p. 88 (question 20(d)). Moreover, even if he did make this brief statement, the plaintiff could very well have meant that he did not have to pay for the room and board when he received it, even though he was obligated to repay Mabel Smith when he secured income. As discussed earlier, this would be entirely consistent with his other assertions as to rent and support made throughout the administrative process. In any event, in the absence from the record of the actual source from which the plaintiff's alleged statement derived, -line reference to ``free" room and board, has little or no evidentiary value in deciding whether the plaintiff had an obligation to repay the food and shelter provided to him.

## **B.**

At the administrative hearing, both the plaintiff and Mabel Smith testified to the existence of a valid, enforceable loan agreement under Maine law. They both stated that the plaintiff acknowledged his obligation to repay Mabel Smith for his share of the household expenses when she started to cover them. Record pp. 75, 81. This is how it had been all along. *Id.* When he first moved in with her sixteen years previously they had split all the household expenses. *Id.* He continued to pay his share until he was injured in March 1985, became unemployed and lost his income. *Id.* In September 1990, when he began receiving his SSI benefits, he started contributing again for his share of the household expenses, \$263 per month. *Id.* at 123. This resumption of payment was merely a continuation of the way things had been before he became disabled and was unable to pay. *Id.* at 82.

The Secretary rejected Mabel Smith's testimony that she had an agreement with the plaintiff for repayment because she did not keep a bookkeeping record regarding the value of the food and

shelter she advanced to him. *Id.* at 7. Although this is certainly objective evidence the Secretary could consider when determining the bona fide nature of the purported loan, it is by no means conclusive of the absence of an obligation to repay. After all, because the plaintiff and Mabel Smith had known one another and lived together for over sixteen year, strict adherence to formal accounting techniques was probably not their major concern. Nor is any such accounting requirement necessary for a loan to be enforceable under Maine law. *See, e.g., Paris Util. Dist. v. A.C. Lawrence Leather Co.*, 665 F. Supp. 944, 954-57 (D. Me. 1987), *aff'd*, 861 F.2d 1 (1st Cir. 1988). An oral agreement, acknowledged by the two parties to exist, is enough. *See, e.g., Mercier v. Town of Fairfield*, 628 A.2d 1053, 1055 (Me. 1993).

The Secretary also never properly considered the testimony of the plaintiff, the person who had the claimed obligation to repay the household expenses, in conjunction with the objective evidence. As noted before, the Secretary rejected the plaintiff's assertion of a loan agreement in part on the grounds that he had failed to mention its existence until after receiving the November 1990 notice. Record p. 7. This is not that surprising as this is when he first learned of the Secretary's allocation of in-kind support and maintenance to him. *Id.* at 113-14. In any event, however, the record contains ample objective support for the plaintiff's claim that he always had a continuing obligation to repay his share of the household expenses. He had been making his payments until he was injured in March 1985. The plaintiff resumed making these payments in September 1990 after receiving his first SSI payment *but* before learning of the one-third reduction in his benefits. *Id.* at 121-24 (October 1990). Because he resumed his payments before learning of the one-third reduction in November 1990, the Secretary cannot claim that those payments were somehow made disingenuously.

Accordingly, when viewed objectively, the history of past payments and the resumption of those payments before learning of the one-third reduction when funds became available provide substantial, objective evidence to indicate that a continuing obligation to repay in fact existed. The

custom of the parties is a sufficiently clear and objective guide for establishing the plaintiff's contractual obligation to repay his share of the household expenses. *See Ceguerra*, 933 F.2d at 739. The Secretary, however, failed to consider this objective evidence, instead relying conclusively on the plaintiff's failure to mention the loan agreement until after receiving notice of the one-third reduction and Mabel Smith's lack of a formal accounting. In light of this failure, I conclude that substantial evidence does not support the Secretary's determination that the plaintiff did not have a bona fide loan agreement to repay his share of the household expenses.

Accordingly, I recommend that the Secretary's decision be **VACATED** and the cause be **REMANDED**.

#### **NOTICE**

**A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.**

**Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.**

Dated at Portland, Maine this 2nd day of June, 1994

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David M. Cohen  
United States Magistrate Judge