Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2021-039

JULY TERM, 2021

In re Appeal of Ramona Lawrence*	}	APPEALED FROM:
	}	
	}	Human Services Board
	}	
	}	DOCKET NO. B-09/20-569

In the above-entitled cause, the Clerk will enter:

Applicant appeals the Human Services Board's decision affirming a determination by the Department for Children and Families (DCF) imposing a period of ineligibility for housing assistance under the General Assistance (GA) program. We conclude that the appeal must be dismissed because it is moot.

The GA program provides emergency housing assistance for homeless Vermonters. During the COVID-19 pandemic, the Legislature authorized DCF to waive or vary its rules to provide greater assistance to such individuals. In response, in August 2020, DCF issued a General/Emergency Temporary Housing Waiver and Variance of Rules (2020 GA Rules). Under 2020 GA Rule 120, a person asked to leave a hotel or motel for use of lighted tobacco products on the property would be subject to a fifteen-day period of ineligibility, which could be reduced to seven days if the person was working to find permanent housing. The rule provided that a person placed on a period of ineligibility who asked for a fair hearing could ask to be housed while awaiting the recommendation from the fair hearing officer.

Applicant is sixty-six years old and homeless. The record shows that during 2020, applicant applied for and received housing through the GA program at area motels for herself and, at times, a caregiver. Relevant here, she was approved for a temporary stay at a motel from September 4 to October 1, 2020. On September 11, applicant was asked to leave the motel based on a violation of the motel's no-smoking policy. Applicant contacted DCF to obtain alternative housing. DCF denied her request, concluding that she was subject to a period of ineligibility under the 2020 GA Rules. Applicant requested a fair hearing before the Board, which was scheduled for September 17. She did not appear on that date. The Board rescheduled the hearing for September 25. The hearing began that day and concluded on September 28. Applicant appeared and was represented by counsel. The Board issued a written decision on October 23, 2020, affirming DCF's imposition of a seven-day period of ineligibility from September 30 to October 6, 2020.

The Board subsequently reopened the appeal for the limited purpose of considering whether applicant had been improperly denied housing pending the September hearing. It found that after applicant requested a fair hearing before the Board, she was granted housing on September 15 and 16, but did not appear at the motel. She was not granted housing for the rest of September. The Board found that applicant was improperly denied housing for the nights of

September 28 and 29 while the Board's decision was pending, but was not otherwise entitled to housing during September. The Board disagreed that applicant had been denied due process and declined to vacate the period of ineligibility based on the denial of housing. Instead, it directed DCF to enter a case note that applicant was entitled to a credit of two days' housing if she should again be disqualified from temporary housing. This appeal followed.

On appeal, applicant argues that DCF violated 2020 GA Rule 120 and her right to due process by denying her housing during the pendency of her appeal to the Board. She argues that this violation entitles her to have the period of ineligibility removed from her record. She further argues that the Board's decision that she violated program rules was unsupported by admissible evidence.

DCF argues that this matter is moot because the period of ineligibility has expired and the program rules have been amended such that the September 2020 penalty will not affect applicant's future eligibility for housing assistance. "An issue becomes moot once either the issue is no longer 'live' or 'the parties lack a legally cognizable interest in the outcome.' " In re Durkee, 2017 VT 49, ¶ 11, 205 Vt. 11 (quoting State v. Curry, 2009 VT 89, ¶ 11, 186 Vt. 623 (mem.)). "The actual controversy must be present at all stages of review, not just when the case was filed." In re P.S., 167 Vt. 63, 67 (1997). Here, applicant's period of ineligibility expired on October 6, 2020, and she subsequently received housing assistance from DCF. Thus, her appeal is moot unless an exception to mootness applies.

There are two exceptions to mootness: "when negative collateral consequences are likely to result from the action being reviewed," or "when the underlying situation is capable of repetition, yet evades review." Id. Applicant argues that both exceptions apply here because the challenged action is too short for adequate review and is likely to occur again, and because if her first period of ineligibility is upheld, she will be subject to a longer period of ineligibility for subsequent violations. We conclude that neither exception applies here due to DCF's recent amendments to the GA program rules and associated guidance.

In June 2021, DCF amended the emergency housing rules and procedures governing the motel voucher program. See Dep't for Children and Families, Emergency Housing Waiver and Variance of Rules (June 1, 2021), https://dcf.vermont.gov/sites/dcf/files/CVD19/ESD/Emergency-Housing-Rules-6-1-21.pdf [https://perma.cc/RXG7-AFQV] [hereinafter Emergency Housing Rules]; Dep't for Children and Families, General Assistance COVID-19 Procedures (June 1, 2021), https://dcf.vermont.gov/sites/dcf/files/CVD19/ESD/GA-COVID-Procedures-6-1-21.pdf [https://perma.cc/A7Z6-W8ZS] [hereinafter 2021 GA COVID-19 Procedures]. New Emergency Housing Rule EH-765 continues to impose a fifteen-day period of ineligibility for a first violation of the housing rules and a thirty-day period of ineligibility for a second violation. Emergency Housing Rule, § EH-765. However, the rule no longer lists smoking as a violation that will lead to a period of ineligibility. Id. Furthermore, the accompanying procedural guidance promulgated by DCF states that "[a]ny Period of Ineligibility incurred prior to July 1st, 2021 will not count after July 1st, 2021 for applicants in housing on May 31st, 2021." GA COVID-19 Procedures at 13. The guidance also provides that "[i]f a guest is asked to leave a hotel and requests a fair hearing, they should be housed pending the hearing. Any nights not housed by [the Economic Services Division of DCF] pending a fair hearing count toward the [period of ineligibility]." Id.

Under these new rules and procedures, applicant's September 2020 period of ineligibility will not count against her for future violations. She will therefore not suffer negative collateral consequences as a result of the period of ineligibility. The new rules and procedures also prevent applicant's case from falling within the exception to mootness for cases that are capable of

repetition yet evading review. "This exception applies only if: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." In re P.S., 167 Vt. at 67–68. As noted above, smoking has been removed from the list of violations that will cause a period of ineligibility. Even if applicant is asked to leave a motel for a different violation of EH-765, DCF's current procedures clarify that she would be entitled to housing pending a hearing and that any days during which she was not housed would count towards the period of ineligibility. Accordingly, the questions applicant presents for appeal—whether DCF must grant housing pending a request for a fair hearing and whether DCF must count days a person is unhoused pending a hearing towards a period of ineligibility if it is upheld—are moot.

Applicant argues that the matter remains live despite the amendments to DCF's rules and procedures, citing City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982). In City of Mesquite, the Supreme Court held that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." Id. at 289. However, this holding appears to be limited to situations where a defendant announces its intention to reenact a challenged provision held unconstitutional by a district court. Valero Terrestrial Corp. v. Paige, 211 F.3d 112, 116 (4th Cir. 2000); see City of Mesquite, 455 U.S. at 289 n.11. Otherwise, "the repeal, amendment, or expiration of challenged legislation is generally enough to render a case moot and appropriate for dismissal." Bd. of Trs. of Glazing Health & Welfare Tr. v. Chambers, 941 F.3d 1195, 1198 (9th Cir. 2019); see, e.g., U.S. Dep't of the Treasury, Bureau of Alcohol, Tobacco & Firearms v. Galioto, 477 U.S. 556, 559-60 (1986) (dismissing as moot challenge to firearms statute by former mental patient, because, after certiorari had been granted but before case was decided, Congress amended statute to permit former mental patients to apply for exemption from bar on firearms purchases by current and former mental patients). There is no evidence that DCF intends to reenact the prior versions of its emergency housing rules and procedures or to resume the practices challenged by applicant. Accordingly, we dismiss applicant's appeal as moot.

Dismissed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

William D. Cohen, Associate Justice