BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL BY THE COMMISSIONER OF HEALTH AND SOCIAL SERVICES

In the Matter of	)	
	)	OAH No. 14-2009-ADQ
D E. S	)	DPA/FCU No.
	)	Agency No.

DECISION

I. Introduction

D E. S has received Alaska Temporary Assistance (ATAP) in May and June of 2014 in reliance on an eligibility review form she had submitted in March of 2014. On November 19, 2014, the Department of Health and Social Services, Division of Public Assistance (DPA) initiated this Administrative Disqualification case against her, alleging she had committed a first Intentional Program Violation (IPV) of the ATAP program by misrepresenting a material fact on the March recertification application.[1]

A hearing convened in this case on January 16, 2015. DPA was represented at the hearing by Dean Rogers, an investigator employed by DPA's Fraud Control Unit. Amanda Holton, a DPA Eligibility Technician, testified on behalf of DPA; Ms. S and her mother, N N, also testified. Exhibits 1-5 and 7-11 were admitted without objection, while Exhibit 6 was admitted over Ms. S's objection.

The record was left open at the end of the hearing because Ms. S asked to be able to submit medical documentation providing additional proof of her mental health limitations. However, because it is clear that Ms. S prevails in this case even without additional evidence from her, there is no point is wasting time and resources gathering these documents.[2] The record is hereby closed.

This decision concludes that DPA did not prove by clear and convincing evidence that Ms. S committed a first Intentional Program Violation of the ATAP program. Although it is likely that Ms. S received ATAP benefits to which she was not entitled, and she is going to have to repay those benefits, no IPV penalty can be imposed in the circumstances presented by this case.

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1 Ex. 2.

2 In determining that the request for additional evidence is moot, it is important to note that DPA did not seek to have these documents admitted; it asked only for an opportunity to object to them when they were offered.

II. Facts

Ms. S had received ATAP benefits in the months leading up to March 2014.[3] On March 28, 2014, she submitted an eligibility review form.[4] On the application form, she listed her daughter, Q E, as living with her.[5]

There was no eligibility interview in connection with this review, and therefore Q's living situation was not discussed with an eligibility technician.[6] A rights and responsibilities document was attached to the application, reminding recipients that they must report when "Someone moves into or out of your home."[7] There is no dispute that Ms. S knew of this obligation. However, neither the rights and responsibilities document nor the application form itself addressed how much residency time was required for someone to be "living" in the home.

Earlier in March, a court order had been entered on custody of Q.[8] The record does not reveal what the arrangement was before—indeed, it is not even clear that anything had changed significantly—but after the March order Q was going to reside in Ms. S's house about 30 percent of the time, and in the father's house (five minutes away) the remainder of the time.[9]

DPA paid ATAP benefits to Ms. S in May and June of 2014 predicated on a household that included Q.[10] These included job training and other support services.[11] Ms. S probably should not have received ATAP benefit for May and June, since as a legal matter a child's "home" is where the child resides "more than half the time in a month," and caretaker relatives who have the child less than that amount of time are not *usually* able to receive ATAP benefits.[12] DPA has calculated the excessive benefits as $1,942.[13]

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3 Ex. 9.

4 Ex. 6, p. 1. Ms. S's signature bore an April date, but evidence at the hearing established that she simply wrote the wrong month.

5 Ex. 6, p. 1.

6 Holton testimony.

7 Ex. 6, p. 6.

8 Ex. 10.

9 *Id*., p. 17; N testimony. This could be varied by agreement. *Id.*, p. 30. Apparently it was varied during one of the months at issue, June 2014, while the father was studying for the CPA exam; Ms. S's residency percentage may have been close to 50 percent that month.

10 Ex. 9; Holton testimony.

11 Holton testimony.

12 This was not disputed actively in the present case, and DPA did not provide a relevant legal citation. The law on this issue, discussed below, is at 7 AAC 45.225.

13 Ex. 11.

DPA seems to contend that the issue regarding Q's residency was discovered in November of 2014 through a citizen complaint.[14] This is puzzling, because ATAP benefits were terminated at the end of June, and no explanation has been provided of how this came about. In any event, the November complaint triggered an investigation, and this proceeding ensued. Ms. S testified credibly that she was surprised when DPA contacted her about alleged fraud, because she had thought that Q was still part of the "household" on the basis of the time she spent there.[15]

III. Discussion

It is illegal to obtain ATAP benefits by misrepresenting, concealing, or withholding facts.[16] In this case, DPA seeks to establish an IPV on the basis of such conduct by Ms. S. To do so, DPA must prove the elements of that IPV by clear and convincing evidence,[17] *i.e.*, that Ms. S intentionally misstated, concealed, or withheld a material fact "for the purpose of establishing or maintaining a family's eligibility for ATAP benefits."[18]

In order to qualify for ATAP benefits, an applicant must have a dependent child living in his or her home.[19] Whether there is a dependent child living in the home is therefore material facts for the purpose of determining ATAP eligibility. DPA contends that the listing of Q as a member of the S household on the Eligibility Review Form was incorrect, because Q was not in the home sufficiently to be legally part of that household.

To establish an IPV, however, the agency must also show by clear and convincing evidence that Ms. S *intended* to misrepresent, conceal, or withhold. Clear and convincing evidence is stronger than a preponderance of evidence but weaker than evidence beyond a reasonable doubt. "If clear and convincing proof is required, there must be induced a belief that the truth of the asserted facts is highly probable."[20] Therefore, DPA must show that it is not merely possible, nor even merely likely, that Ms. S intended to deceive; it must show such a deceptive intent to be "highly probable." The facts surrounding this case do not support such a finding.

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14 Ex. 1, p. 3.
15 S testimony.
16 7 AAC 45.580(n).
17 7 AAC 45.585(e).
18 7 AAC 45.580(n).
19 AS 47.27.010; 7 AAC 45.210(a)(4); 7 AAC 45.225(a).
20 *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

DPA presented this case under the theory that the listing of Q as a household member on page 1 of the Eligibility Review Form was an affirmative misrepresentation, because a child must be in the home 51 percent of the time to be a household member.[21] The weaknesses of this theory include the following:

- Nothing on the Eligibility Review Form indicates that an individual must spend a certain minimum amount of time in the home to be a household member. An applicant could think that 30 percent is sufficient, and Ms. S's testimony that she did think so was plausible. DPA did not challenge that testimony on cross examination.
- In this particular review process (in contrast to most disqualification cases), there was no eligibility interview in which these issues could be explored or explained to the applicant more fully.
- The law pertaining to ATAP benefits actually does not contain an absolute 51 percent minimum presence for household membership in all cases.[22]
- If it made a significant change in the prior custody division, the Superior Court's March 2014 order should have been reported to, and discussed with, DPA. However, failure to report it *independent of the Eligibility Review Form* is not part of the violation DPA alleged in its notice framing this case.[23] Moreover, DPA, which had the burden of proof, did not establish what the prior custody split was, nor did DPA establish that the March 2014 changed the custody arrangement significantly. Thus, there may have been no material change to report.

In light of these weaknesses, it is not possible to find that DPA has proven, to a clear and convincing standard, that the Eligibility Review Form contained a material misrepresentation that Ms. S intended as such.

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[21] Ex. 2, p. 2 (DPA's notice, which defines the theory of the case); Holton testimony ("has to reside in their household at least 51 percent of the time").

[22] In Ms. S's case, Q probably could not be considered to be residing in the home if she did not ordinarily reside there "more than half the time." *See* 7 AAC 45.225(a). However, in certain split custody situations, which parent has the child the majority of the time is only one of multiple factors in determining the household that can claim the child for ATAP purposes. *See* 7 AAC 45.225(d). This complexity may explain why no bright-line rule is laid out in the Eligibility Review Form.

[23] DPA is bound by its notice. 7 AAC 45.585(a)(2).

IV. Conclusion

No IPV has been established. This decision does not prevent DPA from seeking reimbursement of benefits paid to the S household beyond those to which the household was entitled.[24]

Dated this 20th day of January, 2015.

Signed
Christopher Kennedy
Administrative Law Judge

Adoption

The undersigned, by delegation from the Commissioner of Health and Social Services, adopts this Decision, under the authority of AS 44.64.060(e)(1), as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 9th day of February, 2015.

By: *Signed*
Name: Christopher Kennedy
Title: Administrative Law Judge

[This document has been modified to conform to the technical standards for publication.]

[24] *See, e.g., In re K.C.*, OAH Case No. 13-1054-ATP (Comm'r of Health & Soc. Serv. 2013), available on line at: http://aws.state.ak.us/officeofadminhearings/Documents/ATP/ATP131054.pdf.