

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

In the Matter of:)
)
GRAHAM SMITH) OAH No. 14-1848-MDA
d/b/a Priority Health Care, LLC)
_____)

DECISION

I. Introduction

The Department of Health and Social Services, Program Integrity Unit seeks recovery of \$30,200.36 in overpayments from Graham Smith, the owner of Priority Health Care, a Personal Care Assistant (PCA) agency. Program Integrity based its overpayment finding on its determination that Jeanette Kookesh, a Priority PCA, no longer held a valid criminal history check.

Priority challenged the overpayment finding and the matter was referred to the Office of Administrative Hearings. A hearing was held on January 27 – 28, 2015. Attorney Mark Choate represented Mr. Smith, who testified on his own behalf. Scott Friend, Assistant Attorney General, represented Program Integrity and called Doug Jones, Lynne Keilman-Cruz, and Karen Benson as witnesses.

Because it is not clear that Ms. Kookesh’s criminal history check was no longer valid, the overpayment finding is reversed.

II. Facts

Priority Health Care is a consumer-directed PCA agency, in business since 2001. Priority is recertified by the Department every two years. Priority’s most recent certification ran from 2012 through 2014. At the time of hearing, it was operating under a one-month extension while the Department reviewed its next certification application. Priority has never been the subject of any claims or allegations of fraud.

As a Medicaid provider, Priority agrees to comply with all relevant statutes and regulations.¹ One requirement is that Priority requests criminal history checks for its

¹ 7 AAC 105.210; See R. 253 for an example of the agreement to comply with regulations and statutes.

PCAs.² The Department will not pay for services provided by a PCA who does not pass a criminal background check or for whom a criminal background check was not requested as required by regulation.³ Another requirement is that Priority provides proof of valid criminal history checks at recertification.⁴

Jeannette Kookesh began working for Priority in 2002. Ms. Kookesh provided PCA services to one client, her grandmother. Ms. Kookesh worked as a PCA through 2014, the same year her grandmother passed away. On December 9, 2005, Ms. Kookesh received her fingerprint background check clearance from the State of Alaska, Department of Public Safety.⁵ The background check had no expiration date.⁶

In 2007, the Department established a background check unit (BCU) and adopted a number of regulations pertaining to criminal history checks and barrier crimes.⁷ Prior to 2007, criminal history check information was kept by many different divisions.⁸ The BCU now maintains information on all criminal history checks completed after its creation.⁹ Criminal history checks completed before the creation of the BCU were not added to the BCU's database.¹⁰

The new regulations also established a six-year limit on a fingerprint-based criminal history check's validity.¹¹ The six-year period runs from the date the criminal history check became valid under 7 AAC 10.910(h).¹² The BCU sends providers notice of when its employees' background checks are close to expiring.¹³ Because the BCU does not have criminal history checks completed before 2007 in its database, it does not notify providers when those checks are about to lapse.¹⁴ The Department gave notice that the regulations

² 7 AAC 10.910.

³ 7 AAC 125.090(c).

⁴ 7 AAC 10.910(d).

⁵ Ex. C. On December 29, 2005, the Department of Public Safety issued Priority a letter stating that the FBI determined Ms. Kookesh did not have a criminal record.

⁶ Smith testimony; uncontested by the Division.

⁷ 7 AAC 10.900 – 10.990

⁸ Benson testimony.

⁹ Jones testimony; Benson testimony.

¹⁰ Benson testimony.

¹¹ 7 AAC 10.910(c).

¹² 7 AAC 10.910(c).

¹³ Jones testimony. BCU now offers web-enabled access to BCU information, enabling providers instant access to criminal history check status.

¹⁴ Benson testimony.

were going into effect, but no special training or notice regarding the status of pre-BCU criminal history checks was given.¹⁵

Mr. Smith knew of the BCU and its requirements, but believed that there were two parallel systems, one for pre-BCU employees and one for post-BCU employees.¹⁶ In November 2011, a Department employee emailed Mr. Smith that he was not shown as having a background check with the BCU system.¹⁷ Department staff thought it possible that he had clearance from the “old system.”¹⁸ The email stated, “Would you please provide verification to DSDS/Gail Clinch or Carol Downey that you were cleared under the “pre-BCU” system or get your application into the BCU for your PCG#015 compliance. One of these actions needs to be completed by November 30, 2011.”¹⁹

Mr. Smith responded that he would certainly be pre-BCU, but because he was not sure what documents were applicable, he would get into the BCU system.²⁰ He registered and got BCU clearance.²¹ A follow up email stated that employees were expected to have at least provisional clearance before providing services.²²

On December 10, 2013, Senior and Disabilities Services’ certification and compliance staff conducted a random on-site review of Priority.²³ The reviewer determined that Ms. Kookesh did not have a valid background check.²⁴ SDS knew of Ms. Kookesh’s 2005 clearance, but determined that it was only valid for six years.²⁵ SDS staff estimated Priority’s overpayment, based on Ms. Kookesh’s lapsed background check, and referred the matter to Program Integrity.²⁶

¹⁵ Ms. Keilman-Cruz referenced a letter from April 16, 2006, that notified providers of the newly created background program. This letter is not in the agency record. There is no evidence that the letter or any trainings explained the Department’s interpretation that pre-BCU criminal checks expired in six years.

¹⁶ Smith testimony.

¹⁷ Ex. D.

¹⁸ Ex. D.

¹⁹ Ex. D.

²⁰ Ex. D.

²¹ Ex. D.

²² Ex. D.

²³ R. 870.

²⁴ R. 878. The review also stated two other employees did not have valid background checks. Issues with the other employees were resolved prior to hearing.

²⁵ Keilman-Cruz testimony.

²⁶ R. 695; Keilman-Cruz testimony.

On August 26, 2014, Program Integrity sent Priority a Notice of Overpayment.²⁷ The notice identified \$48,056.80 in overpayments for claims from April 1, 2011 through September 30, 2013.²⁸ The notice stated:

It appears services were billed for recipient(s) while the Personal Care Assistant was not registered under Priority Healthcare LLC with the Background Check Unit. In accordance with 7 AAC 125.909(c)(1) A personal care agency is subject to the applicable requirements of AS 47.05.300 - 47.05.390 and 7 AAC 10.900 – 7 AAC 10.990 (barrier crimes, criminal history checks, and centralized registry). The personal care agency shall submit to the department a request for a criminal history check for each personal care assistant as required under 7 AAC 10.910. The department will not pay for services provided by a personal care assistant (1) for whom a criminal history check was not requested.²⁹

The notice also stated Priority's appeal rights under 7 AAC 160.130.³⁰

On September 25, 2014, Mr. Smith requested the Commissioner dismiss PIU's request for payment.³¹ Mr. Smith explained that the State of Alaska performed Ms. Kookesh's criminal history check dated December 5, 2005.³² His letter also stated that in response to an April 25, 2014, Notice of Correct, Ms. Kookesh provided fingerprints and was enrolled with the BCU in May 2014.³³

On December 3, 2014, Program Integrity issued a revised Notice of Overpayment.³⁴ The Department found that part of the time under review was covered by a background check that expired December 8, 2011.³⁵ The revised overpayment amount was \$30,200.³⁶ The parties proceeded to hearing.

III. Discussion

An overpayment occurs when the department pays a provider incorrectly for services that do not meet standards established for payment of services.³⁷ Federal law requires the Division to seek recoupment of overpayments.³⁸ The basis for Program Integrity's

²⁷ R. 26.
²⁸ R. 26; Stipulated facts.
²⁹ R. 26.
³⁰ R. 26 – 27.
³¹ R. 25.
³² R. 25.
³³ R. 25.
³⁴ R. 12.
³⁵ R. 12.
³⁶ R. 12.
³⁷ 7 AAC 105.260.
³⁸ 42 CFR § 431.1002; Jones testimony.

overpayment finding is its determination that Ms. Kookesh did not have a valid criminal history check. Program Integrity argues that criminal history checks are valid for six years and that regulation required Priority to submit a new criminal history check for Ms. Kookesh. It asserts that Medicaid services performed by Ms. Kookesh between the lapse of her 2005 background check and the issuance of her new background check in 2014 are not compensable.³⁹

Program Integrity is correct that payment for services performed by a PCA that does not have a valid criminal history check could be considered overpayments. However, the regulations relied on by Program Integrity do not clearly establish that Ms. Kookesh's criminal history check expired on December 8, 2005.

7 AAC 10.910 controls the process for requesting criminal history checks. Pertinent to this case is its instruction as to when an entity must request a criminal history check.

An entity must request a criminal history check on or before April 10, 2007, for each individual who is associated with an entity or provider operating under a current... certification... and who (A) does not have a valid criminal history check; or (B) passed a criminal history check before February 9, 2007 that (i) was not fingerprint-based; or (ii) was fingerprint-based and conducted more than six years before February 9, 2007.⁴⁰

Priority would not have had to request a criminal history check for Ms. Kookesh before April 10, 2007, because she passed a fingerprint-based criminal history check that was conducted within six years of February 9, 2007. Program Integrity does not even argue that Ms. Kookesh was required to get a new criminal history check before April 10, 2007. Instead, Program Integrity argues that Ms. Kookesh's criminal history check was valid for six years from its issue date.

It is uncontested that when Ms. Kookesh's criminal history check was issued it did not have an expiration date. Program Integrity's view is that 7 AAC 10.910(c) establishes a six-year validity period for all fingerprint-based criminal history checks. But that is not what the regulation states. The six-year validity period runs from the date the criminal history check became valid under 7 AAC 10.910(h).⁴¹ That section reads:

³⁹ This appeal only covers the timeframe from August 1, 2011 through September 30, 2013.

⁴⁰ 7 AAC 10.910(a)(6). The regulation lists a number of triggering events that require an entity to submit a criminal history check. Other sections are not relevant to the facts of this case.

⁴¹ See 7 AAC 10.910(c).

A valid criminal history check means that, within the applicable timeframes referred to in this section: (1) the person submitted all items listed under (b) of this section; (2) the department determined that a barrier crime or condition did not exist; (3) the person's name has been marked in APSIN on a continuous basis; and (4) if applicable, any variance granted under 7 AAC 10.935 is still in effect and authorized by the department, and the individual who was the subject of the variance is associated with the same entity or provider.⁴²

7 AAC 10.910 was adopted February 9, 2007.⁴³ Ms. Kookesh's criminal history check cannot expire six years after its issuance in December 2005, because it could not have "become valid" under a regulation that was not in existence at the time. Likewise, regulations may only have prospective effect, except in limited circumstance.⁴⁴ If Ms. Kookesh's criminal history does have a six-year validity period, it could not have begun prior to February 9, 2007, in which case hers expired on February 9, 2013.⁴⁵

However, it is not clear that Ms. Kookesh's criminal history check ever became valid under section (h). Ms. Kookesh's background check could not have been completed, "within the applicable timeframes referred to in this section." As mentioned, if the "applicable timeframes" refer to when an entity must request a criminal history check, then these are unclear as to which date, if any, applies to Ms. Kookesh. There was also no evidence presented that the items required for BCU criminal history checks are the same as what was required when Ms. Kookesh was given clearance. Overall, it is ambiguous under the regulation when, if ever, the six-year validity period began to run for Ms. Kookesh's criminal history check. Therefore, Program Integrity's assertion the her criminal history check expired on December 8, 2011, is not clearly supported by regulation and cannot be relied upon for an overpayment determination.

Program Integrity's testimony establishes that the regulations' intent was to incorporate all persons required to have criminal history checks into the BCU system within six years of the regulation's adoption. However, the regulation does not actually convey this. Because the regulation does not establish that Ms. Kookesh's criminal history check

⁴² 7 AAC 10.910(h).

⁴³ 7 AAC 10.910 was amended in 2010, but the amendment is not relevant as to when an entity was required to submit for a criminal history check.

⁴⁴ See AS 44.62.240; See also OHA No. 08-FH-0648, p. 7-10 (OHA December 2008); *In re: BL. J*, OAH No. 13-1141-PER, P. 3-4 (OAH January 2014). Available: <http://doa.alaska.gov/oah/Decisions/subjects.html>

⁴⁵ This would limit the overpayment period to February 9, 2013 to September 30, 2013.

expired, Priority did not violate the requirement that it provide proof of valid criminal history checks at recertification.⁴⁶

Mr. Smith assumed that pre-BCU criminal history checks remained valid. His interaction with the Department regarding his own criminal history check did not put him on notice that all employees needed to be entered in the BCU, as argued by Program Integrity. Instead, it put him on notice that his criminal history check was not in the BCU system and that confirmation of pre-BCU approval was a possible option. He only chose to get registered because it was simple and he was not sure which documents were applicable to establish pre-BCU approval. Mr. Smith was not given notice, through the 2011 email, through regulation, or through other Department interaction, that every pre-BCU criminal history check officially expired six years after February 9, 2007.

In addition, the Commissioner considers a number of factors in an overpayment appeal: the provider's error rate, history of similar audits, prior noncompliance and training, submission of false, fraudulent or incomplete information, and any health or safety risk to recipients.⁴⁷ There was no evidence of error rates, similar audits, and prior noncompliance presented. There was no evidence of false, fraudulent, or incomplete information. While criminal history checks are designed to reduce recipient health and safety risks, Ms. Kookesh's situation did not present an increased risk.⁴⁸ These factors, coupled with an ambiguous regulation and no directive outlining the Department's position on pre-BCU

⁴⁶ Mr. Smith argues that Program Integrity or SDS should have notified him of background check concerns during certification. Program integrity argues that SDS could not have confirmed or notified Ms. Smith of lapsed criminal history checks because he only supplied organizational charge, not full employee listings, at certification. But up until recently SDS only required organizational charts. The record also establishes that Mr. Smith did provide SDS with employee listings outside of the organizational chart format. *See* R. 113; R. 151; R. 216; R. 272; R. 278; R. 659.

⁴⁷ 7 AAC 160.130(c)(1)-(5). Program Integrity argues that these considerations are only available on appeal and at the Commissioner level. This argument is unpersuasive. Program Integrity's letter identifies Priority's appeal as a 7 AAC 160.130 appeal. The Commissioner is the final decision maker in this appeal and, these considerations are appropriate. *See In re: C Care Services*, OAH 11-0015-DHS, at p. 9 (Commissioner, Dept. of Health & Soc. Services, May 15, 2012)(overpayment hearings are designed to reach a commissioner-level decision on whether recoupment is due and in what amount); *In re: Yoo Woon*, OAH No. 12-0264- MDA, Decision on Summary Adjudication, at p. 5-6 (Commissioner, Health & Soc. Services, October 8, 2014)(considering 7 AAC 160.130(c) factors).

⁴⁸ Mr. Smith does not have any other pre-BCU employees without updated criminal history checks.

criminal background checks support a decision overturning Program Integrity's overpayment finding.⁴⁹

IV. Conclusion

The regulations do not clearly identify that Ms. Kookesh's background check was invalid after December 8, 2011. Therefore, Program Integrity cannot meet its burden of establishing its overpayment finding. The \$30,200.36 overpayment finding is reversed.

The Department can remedy concerns regarding PCAs or other providers in Ms. Kookesh's situation by sending notice that new criminal history checks are required for any pre-2007 provider.

Dated: April 28, 2015.

Signed

Bride Seifert
Administrative Law Judge

Adoption

The undersigned, by delegation from of 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 10th day of June, 2015.

By: *Signed*

Name: Jared C. Kosin, J.D., M.B.A.
Title: Executive Director
Agency: Office of Rate Review, DHSS

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

⁴⁹ Ms. Smith argues that equal protection prohibits holding Priority to a standard not applied to PCA agencies and that remediation is the better and more equitable remedy if an overpayment is found. Because this decision concludes that the overpayment finding was inaccurate, these arguments are not addressed.