

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

In the Matter of	)	
	)	OAH No. 12-0245-MDE
B M	)	Agency No.
_____	)	

**DECISION**

**I. Introduction**

B M was admitted to a long term care facility. The Division of Public Assistance (division) calculated the amount she was required to contribute towards her Cost of Care at that facility. Ms. M appealed that action to the extent it was made retroactive. The division granted the hearing request and referred this matter to the Office of Administrative Hearings.

A hearing was held on August 20, 2012. Ms. M was represented by her son, M M, who has power of attorney to handle her legal affairs. The division was represented by Jeff Miller. The hearing first addressed the division's motion to dismiss the hearing. That motion was taken under advisement and evidence was taken regarding the merits of Ms. M's appeal.

Based on the evidence in the record, the motion to dismiss should be denied, but the division's decision regarding the Cost of Care should be affirmed.

**II. Facts**

Notices were sent to Ms. M on May 15, 2012, advising her that she owed \$545 for her Cost of Care in December of 2011, and \$567.90 per month beginning on January 1, 2012.<sup>1</sup> It is not disputed that Ms. M was admitted to the long term care facility in November of 2011, or that a Cost of Care calculation should have been made earlier than it was.

After his mother was admitted to the long term care facility, Mr. M had several communications with staff at that facility to determine what the Cost of Care obligation would be. He was unable to get an answer until he received the division's May 15, 2012 notice.

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<sup>1</sup> Division's documents, pages 6 – 8. The division's documents are identified by the page numbers in the fax header at the top of each page. The date in the fax header is August 1, 2012.

### III. Discussion

#### A. *Timeliness*

In referring this matter to the Office of Administrative Hearings, the division also transmitted a memorandum asking that the request for a hearing be denied.<sup>2</sup> Because the division had already effectively granted the hearing request by referring this matter,<sup>3</sup> that memorandum is treated as a motion to dismiss. The division has the burden of establishing that the request for a hearing was untimely.<sup>4</sup>

A hearing is only available if a request for a hearing is made “within 30 days after receipt of notice of the division action[.]”<sup>5</sup> The division did not present any evidence that directly shows when Ms. M received the notice setting the Cost of Care amount. However, there was evidence presented that the notice was mailed first class to Ms. M on May 15, 2012. Mr. M testified that he did not recall when he or his mother received this notice, but did say that he didn’t know what the Cost of Care amount would be until he started receiving mail from the division in April or May. Mr. M requested the hearing on July 27, 2012,<sup>6</sup> 73 days after the notice was mailed. While this is a close factual question, it is more likely true than not true that the notice was received before June 27, 2012, which is 43 days after the notice was mailed. Thus, the hearing request was not made within 30 days of receipt of the notice.

The thirty day time only begins to run, however, if the notice sent by the division contains the required information. The notice must contain information specified by regulation, including information about the right to a hearing and how to request a hearing.<sup>7</sup> Mr. Miller testified that the notice sent to Ms. M was identical to what is shown in the division’s documents sent with the referral. Nothing in the division’s notice explains the right to a hearing, how to request a hearing, or that a hearing must be requested within 30

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<sup>2</sup> Division’s documents, page 1.

<sup>3</sup> When an agency grants a request for a hearing, it provides a completed notice of referral along with other specified information to the Office of Administrative Hearings. 2 AAC 64.120. When it denies a hearing request, the agency issues a denial notice and sends that notice to the Office of Administrative Hearings. 2 AAC 64.130. In this case, the division completed a notice of referral pursuant to 2 AAC 64.120.

<sup>4</sup> 2 AAC 64.290(e) (burden of proof is on party who made the motion under consideration).

<sup>5</sup> 7 AAC 49.040 (emphasis added).

<sup>6</sup> Division’s documents, pages 9 and 10.

<sup>7</sup> 7 AAC 49.070.

days.<sup>8</sup> Because Ms. M was not informed of her hearing rights, her request for a hearing is deemed to be timely.<sup>9</sup>

**B. *Retroactive Cost of Care***

At the hearing, Mr. M clarified that he was not disputing that the amount of the Cost of Care was calculated correctly, or that the ongoing amount after receiving the notice was a valid obligation. He only disputed the retroactive application of this obligation.

The division is required to determine whether a Medicaid recipient is obligated to pay a portion of his or her long term care services.<sup>10</sup> A person with a Cost of Care obligation is expected to pay that amount to the Medicaid provider.<sup>11</sup> The division may, at any time

make a retroactive adjustment to a recipient's cost-of-care liability to compensate for a previously understated or overstated cost-of-care determination. If retroactive adjustment results in a larger liability for the recipient, the department will notify the recipient of the amount of the adjustment before making the adjustment.<sup>[12]</sup>

Making a retroactive adjustment to a previously determined Cost of Care obligation is different than retroactively establishing the obligation in the first place. There is no regulation that specifically states whether the original notice establishing the obligation can be made retroactively. However, 7 AAC 100.554(e) states that there is no Cost of Care obligation in the first month of admission to the long term care facility. This suggests that there is an obligation after the first month. Since there is no regulation specifying that the department must make its determination within 30 days, there will be occasions when the obligation will be set retroactively, and there is implied authority to do that.

Mr. M testified that had he known the Cost of Care amount sooner, he could have taken steps to try to pay it. By the time he received the notice indicating the amount, that money had been spent on other bills. His concern is understandable, and the delay in calculating the Cost of Care has placed some burden on him and Ms. M. However, the

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<sup>8</sup> Division's documents pages 6 – 8.

<sup>9</sup> 7 AAC 49.100 lists the allowable reasons for denying a request for a hearing. These reasons do not include an untimely request. Because the request is deemed to be timely, it is not necessary to rule on whether 7 AAC 49.100 contains the only reasons for not granting a hearing, or whether 7 AAC 49.070 implies an additional reason for denying a hearing.

<sup>10</sup> 7 AAC 100.550.

<sup>11</sup> 7 AAC 100.552(c).

<sup>12</sup> 7 AAC 100.570.

situation is not substantially different than if the division had retroactively increased a Cost of Care obligation; something that is specifically authorized by regulation.<sup>13</sup>

#### **IV. Conclusion**

Because the notice sent to Ms. M did not inform her of her hearing rights, the request for a hearing is deemed to be timely. The division is required to make Cost of Care determinations, and is authorized to impose that obligation retroactively. Accordingly, the division's determination is affirmed.

Dated this 21<sup>st</sup> day of August, 2012.

*Signed*

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Jeffrey A. Friedman  
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 6<sup>th</sup> day of September, 2012.

By: *Signed*

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Name: Jeffrey A. Friedman  
Title: Administrative Law Judge

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

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<sup>13</sup> See 7 AAC 100.570