

Office of Hearings and Appeals
3601 C Street, Suite 1322
P. O. Box 240249
Anchorage, AK 99524-0249
Ph: (907)-334-2239
Fax: (907)-334-2285

**STATE OF ALASKA
DEPARTMENT OF HEALTH AND SOCIAL SERVICES
OFFICE OF HEARINGS AND APPEALS**

In the Matter of)	
)	
[REDACTED] ,)	OHA Case No. 09-FH-258
)	
Claimant.)	Division Case No. [REDACTED]
_____)	

FAIR HEARING DECISION

STATEMENT OF THE CASE

[REDACTED] (Claimant) applied for heating assistance on November 8, 2008. (Ex. 1.0 – 1.3) On December 29, 2008, the Division of Public Assistance (Division) sent the Claimant written notice her application for heating assistance was denied. (Ex. 3) The Claimant initially made a telephonic request for a fair hearing on January 9, 2009, which she telephonically reiterated on January 28, 2009. (Ex. 4) This office has jurisdiction pursuant to 7 AAC 49.010.

After the Claimant made her second fair hearing request, on January 28, 2009, the Division reviewed her application and sent her a March 27, 2009 letter explaining its denial of her November 8, 2008 application.¹ (Ex. 5.0 – 5.1) On April 27, 2009, the Division of Public Assistance scheduled this case for a hearing to occur on May 27, 2009.² The hearing was continued until June 11, 2009 at the Claimant’s request.

The hearing was held on June 11 and July 9, 2009. The Claimant did not attend either hearing, except to telephonically attend the June 11, 2009 hearing for a short period where she authorized **[REDACTED]** to represent her. **[REDACTED]** attended both the June 11 and July 9, 2009 hearings

¹ The Division’s March 27, 2009 letter contains the language “[i]f you believe an error was made in the eligibility and benefit determination for your case, please advise me by April 27, 2009. . . If I do not hear from you by April 27, 2009, I will assume that your fair hearing request has been withdrawn.” (Ex. 5.1) This procedure is not authorized by either the Heating Assistance program regulations, 7 AAC 44.200 et. seq., or the Fair Hearing regulations, 7 AAC 49.010 et. seq. In order for a Claimant to withdraw a hearing request, the Claimant must do so in writing or on the record (a verbal withdrawal on the record before a hearing officer is the equivalent of a written withdrawal). 7 AAC 49.100(2).

² Pursuant to 7 AAC 49.180 “the hearing authority shall render a decision no later than 90 days after the date of receipt by the division of a request for a hearing.” The 90 day time period for issuing a decision expired on April 9, 2009. The Division’s April 27, 2009 scheduling notice was therefore sent out after the hearing decision was already overdue.

telephonically. He represented the Claimant and testified on her behalf. [REDACTED], Public Assistance Analyst with the Division, attended in person and represented the Division.

ISSUE

Was the Division correct to deny the Claimant's November 8, 2008 application for Heating Assistance?

FINDINGS OF FACT

The following facts are established by a preponderance of the evidence:

1. The Claimant lives in [REDACTED], Alaska. (Ex. 1.0) She resides in a 2 bedroom apartment in a building that has 4 or more units. (Ex. 1.2)
2. The Claimant lives with her minor child. (Ex. 1.0) Neither is under 6, over 60, or disabled. (Ex. 1.0) There are no other persons who reside with them. *Id.* Her household's monthly gross income is \$2,373.89. (Ex. 2; [REDACTED] testimony)
3. The Claimant's apartment is heated by natural gas. (Ex. 1.2; [REDACTED] testimony)
4. The natural gas supplied to the Claimant's apartment building comes from [REDACTED] Natural Gas, LLC. It does not come from a standard natural gas pipeline. Instead, liquefied natural gas is trucked to Fairbanks from the Cook Inlet area. The liquefied natural gas is then converted back into natural gas and piped directly to her building. (Exs. 12.0 – 12.1)
5. The Division determined the Claimant was not eligible for heating assistance because her "heating cost points" totaled 1.40. (Ex. 3) It first found she qualified for 5 "community fuel points" because she heated with natural gas, and multiplied those 5 "community fuel points" by .7 because she lived in a 4 unit building, and then multiplied that result (3.5) by .4 because her gross monthly household income (\$2,374) was between 151 to 175% of the Alaska poverty level. (Ex. 5.0) The final result (5 x .7 x .4) was 1.4. *Id.*

PRINCIPLES OF LAW

This case involves the denial of an application for benefits. When an application is denied, the applicant has the burden of proof³ by a preponderance of the evidence.⁴

³ "Ordinarily the party seeking a change in the status quo has the burden of proof." *State, Alcohol Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985)

⁴ Preponderance of the evidence is defined as follows:

Evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.

The Heating Assistance program provides financial assistance for heating bills to eligible households. 7 AAC 44.200. The Heating Assistance program determines a household's eligibility for assistance based upon the following factors:

household composition (size, age, and disability status of the household members);
household gross monthly income;
type of dwelling (house, apartment, etc.); and
household heat source (electric, propane, natural gas, oil, wood).

7 AAC 44.230; 7 AAC 44.340.

In order to be found eligible for Heating Assistance, the household's gross monthly income must not exceed the "maximum allowable poverty level" for the household size,⁵ and the household must have "heating cost points" of 2.0 or greater. 7 AAC 44.340(i) and (m).

The rules for calculating a household's "heating cost points" are set out in Alaska regulation 7 AAC 44.340 as follows:

7 AAC 44.340. Amount of assistance. (a) The department has assigned heating cost points to each community in the state, based upon the community's annual fuel cost and climatic conditions. These points are listed in Appendix A at the end of this chapter.

(b) If the household uses natural gas and another fuel type for heat, the department will use the community heating cost points for natural gas in Appendix A.

(c) If the household uses self-harvested wood or coal for heat, the department will use the community heating cost points for oil in Appendix A multiplied by 0.5.

(d) If the household uses purchased wood or coal for heat, the department will use the community heating cost points for oil in Appendix A multiplied by 0.8.

(e) The department will multiply the community heating cost points determined under (a) - (d) of this section by the first one of the following factors that describes the household's dwelling. If more than one factor applies, the department will use the factor listed first:

(1) the factor of 1.4 if the household resides in a mobile home with heated living space of 980 square feet or more;

Black's Law Dictionary 1064 (5th Ed. 1979)

⁵ Household gross monthly income may not "exceed 225 percent of the level set in the federal poverty guidelines for Alaska." 7 AAC 44.230(a)(4).

(2) the factor of 0.4 if the household resides in a travel trailer or mobile home less than 35 feet in length, or in a recreational vehicle, tent, or pickup camper;

(3) the factor of 0.15 if the household resides in a one-room dwelling such as a studio apartment, hotel, or boarding home;

(4) the factor of 0.35 if the household resides on a boat;

(5) the factor of 0.55 if the household resides in a one-bedroom dwelling, or a one-room house or cabin without bedrooms;

(6) the factor of 1.3 if the household resides in a three-or-more bedroom single family, duplex, or triplex home;

(7) the factor of 0.7 if the household resides in a two-bedroom unit in an apartment building of four or more attached units.

(f) If the household resides in a single residence with one or more other households, the heating cost points determined under (a) - (e) of this section are reduced to the household's proportionate share of the home heating expenses.

(g) The department will assign each household the following percentage of heating cost points determined under (a) - (f) of this section, based on the household's gross monthly income and family size, expressed as a percentage of the Alaska poverty level:

(1) 40 percent of points if the household's gross monthly income is more than 150 percent of the Alaska poverty level but no more than 175 percent of the Alaska poverty level;

(2) 30 percent of points if the household's gross monthly income is more than 175 percent but no more than 200 percent of the Alaska poverty level;

(3) 20 percent of points if the household's gross monthly income is more than 200 percent but no more than the maximum allowable Alaska poverty level under this chapter.

(h) The department will add one point to the heating cost points determined under (a) - (f) of this section if the household includes one or more members 60 years of age or older, legally disabled, or under six years of age.

(i) Households with heating cost points determined under (a) - (f) of this section to be less than 2.0 are not eligible.

(j) The department will round the total heating cost points computed in (a) - (h) of this section to the nearest whole number and multiply by the benefit rate to determine the

amount of the household heating assistance. The department will establish the benefit rate annually . . .

The “community heating cost points” referred to in 7 AAC 44.340 above are contained in 7 AAC 44.9001 “**Appendix A to 7 AAC 44 COMMUNITY HEATING COST POINTS.**” (Emphasis in original)

The community of Fairbanks receives 10 “community heating cost points” for homes heated by oil, electricity, or propane. 7 AAC 44.9001(89). The community of Fairbanks has “N/A” listed for “community heating cost points” for homes heated by natural gas. 7 AAC 44.9001(89). “N/A” is listed when “natural gas utility service is not available in the community as of August, 1999. If natural gas utility service becomes available in additional communities, the division will use the natural gas points from the geographically closest community with natural gas listed in Appendix A [7 AAC 44.9001].” 7 AAC 44.9001. Big Lake is the geographically closest community to Fairbanks that is listed as having natural gas service. 7 AAC 44.9001(29). It has 5 natural gas “community heating cost points.” *Id.*

ANALYSIS

The issue in this case is whether Division was correct to deny the Claimant’s November 8, 2008 application for Heating Assistance. Because this case involves an application for Heating Assistance, the Claimant has the burden of proof by a preponderance of the evidence.

It is undisputed that the Claimant resides in [REDACTED], in a household of two persons, in a two bedroom apartment located within a multiple unit (4 units or larger) apartment building, that she heats with natural gas, that no one in her household is under 6, over 65, or disabled, and that the only occupants of her apartment are her and her minor child, i.e. she does not share her home with another household.

The Division allowed the Claimant 5 “community fuel points” because her home is heated with natural gas. Although the applicable regulation does not provide Fairbanks with a point listing for natural gas, the regulation directs the Division to use “the natural gas points from the geographically closest community with natural gas listed in [7 AAC 44.9001].” 7 AAC 44.9001. The Division used 5 points, which is the natural gas points allotted for Big Lake,⁶ which is the closest community to Fairbanks with a natural gas listing contained in the application regulation. This is consistent with the applicable regulations. *See* 7 AAC 44.340(a) and 7 AAC 44.9001(29) and (89).

The Division then multiplied the Claimant’s 5 “community fuel points” by .7 because she lived in a two bedroom apartment located in a multiple unit (4 units or larger) building. This is also consistent with the applicable regulation. *See* 7 AAC 44.340(e)(7). The net result was 3.5 “heating costs points.”

The Division then multiplied the Claimant’s 3.5 “heating cost points” by .4 because her monthly gross income was \$2,374. *See* 7 AAC 44.340(g). That result was 1.4 “adjusted heating cost points.” It then denied the Claimant’s Heating Assistance application because her final “heating cost points” were less than 2.0.

⁶ Anchorage and Palmer also are provided with 5 natural gas points. 7 AAC 44.9001(14) and (207).

The Claimant did not disagree with the Division's calculations. Instead, she argued that her natural gas heat should not have been assigned 5 points at the beginning of the calculation process, but that she should instead have received 10 points for her heating fuel source. Her argument was based on the fact that her natural gas did not come directly from the natural gas source by pipeline, but rather was natural gas that was liquefied and trucked to Fairbanks and then reconverted to natural gas before being piped into her home. In essence, she was arguing that her natural gas, due to transportation and conversion costs, was more like propane or heating oil and should have received the same number of points as those.

The Claimant alternatively argued that the Division should have increased the natural gas points for Fairbanks. She argued that because Fairbanks received 10 points for oil when Anchorage received 8 points for oil heat, then Fairbanks should have received 7 points for natural gas instead of 5.

Acceptance of the Claimant's arguments would require that this Office rewrite the applicable regulation (7 AAC 44.9001) to either 1) make a distinction whereby liquefied natural gas would be treated like propane or oil rather than natural gas, a distinction not provided for in the regulation, or 2) revise the fuel point listings containing in the regulation. This Office is required to adhere to applicable regulations. It does not have the discretion to ignore or redraft regulations. A regulation is "binding on the agency that issues it." Pierce, *Administrative Law Treatise*, § 6.6 (4th Ed. 2002). The Claimant's arguments are noted for the record, but they fail. The Division was correct to provide the Claimant with 5 points for natural gas heat.

However, a review of the Division's methodology used in denying the Claimant's application reveals the Division misapplied the eligibility determination process set out in the Heating Assistance regulation 7 AAC 44.340. The Division denied the Claimant's application because her heating cost points were 1.4, which is less than the 2.0 minimum heating cost points required by 7 AAC 44.340(i). The Division arrived at the figure of 1.4 heating cost points by going through the following steps:

1. It provided the Claimant with 5 points because she heated with natural gas. This was an application of 7 AAC 44.340(a) – (d).
2. It multiplied the 5 points by .7 because she lives in an apartment that is located in a 4 unit or larger apartment building. This was an application of 7 AAC 44.340(e). This resulted in a figure of 3.5 heating cost points.
3. It multiplied the 3.5 heating costs points by .4 because the Claimant's household's monthly gross income is between 150 percent and 175 percent of the Alaska federal poverty guidelines. This was an application of 7 AAC 44.340(g)(1). The final result was 1.4 heating cost points.

The Division went one step too far when it determined the Claimant was not eligible for Heating Assistance because she only had 1.4 heating cost points instead of the minimum required amount of 2.0 heating cost points. 7 AAC 44.340(i) provides that "[h]ouseholds with heating cost points determined under (a) - (f) of this section to be less than 2.0 are not eligible." Steps 1 through 2, above,

applied sections (a) – (e) of the regulation, 7 AAC 44.340, which resulted in the Claimant receiving 3.5 heating cost points.⁷ Step 3, above, was an application of section (g) of the regulation. However, point eligibility for assistance is determined only by applying sections (a) – (f). In other words, the Division should have stopped at Step 2 above, which resulted in the Claimant receiving 3.5 heating cost points, which is greater than the minimum eligibility standard of 2.0 heating required by the regulation 7 AAC 44.340(i).

In summary, the Division erred when it calculated the Claimant had a total of 1.4 heating cost points. Instead, she had a total of 3.5 heating cost points as calculated according to 7 AAC 44.340(a) – (f). She was therefore eligible to receive Heating Assistance benefits. Consequently, the Division was not correct when it denied the Claimant’s November 8, 2008 Heating Assistance application.

This Decision does not address the amount of Heating Assistance benefit amount the Claimant should have received. This case is remanded to the Division to calculate the Claimant’s Heating Assistance benefit amount based upon her November 8, 2008 Heating Assistance application.

CONCLUSIONS OF LAW

1. The Division was correct to award the Claimant with 5 “community fuel points” because she heats with natural gas, albeit liquefied natural gas.
2. The Division, however, did not properly apply the procedure set out in the applicable regulation 7 AAC 44.340, when it determined the Claimant was not eligible for Heating Assistance benefits because it incorrectly calculated her heating cost points as being 1.4. The correct application of the regulation, 7 AAC 44.340, results in the Claimant being eligible for Heating Assistance benefits because her heating cost points totaled 3.5.
3. The Division was therefore not correct when it denied the Claimant’s November 8, 2008 application for Heating Assistance benefits.

DECISION

The Division was not correct when it denied the Claimant’s November 8, 2008 application for Heating Assistance benefits. This matter is remanded to the Division for its determination of the amount of the Heating Assistance benefit amount the Claimant is entitled to receive as a result of her November 8, 2008 Heating Assistance application. *See* 7 AAC 49.210 (“[T]he division shall provide assistance retroactive to the effective date of the erroneous denial.”)

If the Claimant disagrees with the Division’s determination of her Heating Assistance benefit amount, the Claimant may request a new Fair Hearing to contest the amount.

⁷ It was not necessary to apply section (f) of the regulation because the Claimant does not share her home with another household, i.e. splitting the cost was not applicable.

APPEAL RIGHTS

If for any reason the Claimant is not satisfied with this Decision, the Claimant has the right to appeal by requesting a review by the Director. To do this, send a written request directly to:

Director of the Division of Public Assistance
Department of Health and Social Services
PO Box 110640
Juneau, AK 99811-0640

An appeal request must be filed within 15 calendar days from the date of receipt of this Decision. Filing an appeal with the Director could result in the reversal of the Hearing Authority's decision.

DATED this 23rd day of July 2009.


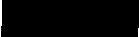
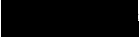
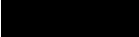
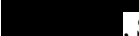

Larry Pederson
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on this 23rd day of July 2009, true and correct copies of the foregoing were sent:

By First Class Mail, Certified, Return Receipt Request to the Claimant's Representative;

and to the following by electronic mail:

, Division Hearing Representative
, Director
, Director's Office
, Policy & Program Development
, Policy & Program Development
, Staff Development & Training

J. Albert Levitre, Jr., Law Office Assistant I