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

In the Matter of: )  
 )  
 [REDACTED], ) OHA Case No. 10-FH-81  
 )  
 Claimant. ) DPA Case No. [REDACTED]  
 \_\_\_\_\_ )

**FAIR HEARING DECISION**

**STATEMENT OF THE CASE**

[REDACTED] (Claimant) is a recipient of benefits under the Adult Public Assistance (APA) Program (Ex. 1, DPA Representative's testimony). On February 2, 2010 the State of Alaska Department of Health and Social Services, Division of Public Assistance (DPA or Division) determined that the Claimant had received more APA benefits than he was legally entitled to receive during the period from February 2009 through December 2009 (Ex. 4). On February 22, 2010 the Division mailed the Claimant a notice stating his APA benefits had been overpaid during the period from February 2009 through December 2009 (Ex. 5). The notice further advised the Claimant that the Division would be withholding a portion of his monthly APA benefits, beginning in April 2010, until it had recovered (recouped) the amount which had been overpaid. *Id.*

On March 19, 2010 the Claimant requested a hearing on the Division's recoupment action (Ex. 6.0).

This Office has jurisdiction to resolve this dispute pursuant to 7 AAC 49.010.

The Claimant's hearing was held as scheduled on April 13, 2010 before Hearing Examiner Patricia Huna.<sup>1</sup> The Claimant attended the hearing in person, represented himself, and testified on his own behalf. [REDACTED], a Public Assistance Analyst with the Division, attended the hearing in person and represented and testified on behalf of the Division. The parties' testimonies were received and all

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<sup>1</sup> Following the hearing this case was reassigned to Hearing Examiner Jay Durych. He reviewed this Office's hardcopy case file, and listened to the digital recording of the hearing held in this case, prior to preparing and issuing this decision.

exhibits offered were admitted into evidence. At the end of the hearing, the record was closed except for specific post-hearing filings to be made by the parties.

The Division's post-hearing filing was received on April 19, 2010 (Ex. 14.0). The Claimant's post-hearing filing was received on May 3, 2010 (Ex. 15.0). At that point the record was closed and the case was submitted for decision.

### **ISSUES**

1. Did the Division's notice of adverse action dated February 22, 2010 comply with applicable notice requirements?
2. Was the Division correct when, on February 22, 2010, it notified the Claimant that he had received \$770.00 more in APA benefits than he was legally entitled to receive during the period from February 2009 through December 2009?
3. Was the Division correct when, on February 22, 2010, it notified the Claimant that the overpayment was due to the Claimant's error rather than the Division's error?
4. Does the Claimant have any affirmative legal defense to the Division's claim for recoupment (repayment) of any overpayments?
5. Is it appropriate to consider the VA's reduction of the Claimant's monthly disability payment (from \$985.00 per month to \$877.00 per month effective November 1, 2009) in the context of this recoupment case?

### **FINDINGS OF FACT**

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

1. The Claimant was and is a recipient of benefits under the Adult Public Assistance (APA) Program (Ex. 1, DPA Representative's testimony).
2. The Claimant has been diagnosed as suffering from glaucoma, memory problems, posttraumatic stress disorder, and a personality disorder (Ex. 15.11; Claimant testimony). Medical records dated November 18, 2006 indicate that at that time the Claimant was assigned a Global Assessment of Functioning (GAF) score of 41 (Ex. 15.8).
3. On January 16, 2009 the Division mailed to the Claimant a notice advising him that he needed to complete and submit a review application for his APA benefits by February 5, 2009 (Ex. 2.0). The Claimant completed and signed an Eligibility Review Form on February 5, 2009 (Exs. 6.3–6.7). At page 3, item 8 of the form the Claimant indicated that his only source of income was a monthly payment from the Veterans Administration (VA) in the amount of \$935.00 (Ex. 6.5). The form was received by the Division on February 5, 2009 (Ex. 6.3).
4. The Division processed the Claimant's recertification application in February 2009 (DPA Hearing Representative's testimony). The Division determined the amount of the Claimant's monthly

APA benefits based on the Claimant's written statement in the Eligibility Review Form that he received \$935.00 per month in VA benefits. *Id.*

5. The Claimant actually received \$985.00 per month from the VA from January 2009 through December 2009 (Claimant hearing testimony). When he completed the Eligibility Review Form on February 5, 2009 he understood that he was receiving \$985.00 per month from the VA. *Id.* He believes that he must have misread / miswritten the figure "\$985.00" as "\$935.00" on the Eligibility Review Form because of his glaucoma / vision problems. *Id.*

6. The Claimant provided the Division with a copy of a VA notice dated December 1, 2008, (which indicated that his monthly payment was \$935.00 effective December 1, 2008), in conjunction with his Eligibility Review Form submitted on February 5, 2009 (Ex. 12, Division Hearing Representative's testimony).

7. However, the Claimant also provided the Division with a printout of an online bank statement, showing a \$985.00 payment from the VA dated January 30, 2009, in conjunction with his Eligibility Review Form (Ex. B-1; Claimant testimony).

8. On February 25, 2009 the Division mailed to the Claimant a notice which stated in relevant part as follows (Ex. 3):

Your [APA] review application received on February 5, 2009 is approved. Your APA payment will change beginning March 2009. Your new benefit amount is \$121.00. The reason for this change is listed at the bottom of this notice.

\* \* \* \* \*

This action is supported by state regulations at 7 AAC 40.450 and APA Manual Section 480-1.

Reason(s) for the change: Your VA money increased to a gross amount of \$935.00 / month. This caused a decrease in your APA benefit from \$125.00 / month to \$121.00 / month.

9. The Claimant did not recall seeing / noticing the \$935.00 figure set forth in the Division's notice dated February 25, 2009 (Ex. 3) (Claimant testimony). Because he does not always open his mail on a timely basis, he may not have read the notice. *Id.*

10. On February 2, 2010 the Division conducted a case review and discovered that the Claimant's VA benefits had increased from \$935.00 per month to \$985.00 per month beginning in January 2009 (DPA Hearing Representative's testimony). The Division then re-calculated the amount of APA benefits that the Claimant should have received during the period from January 2009 through December 2009 based on monthly VA benefits of \$985.00. *Id.*

11. The Division determined that the Claimant had received \$770.00 more in APA benefits than he was legally entitled to receive during 2009 (Ex. 4). The Division calculated that the Claimant was

overpaid by \$74.00 in February 2009, and was overpaid by \$70.00 per month during the months of March 2009 through December 2009 (Ex. 4).

12. On February 9, 2010 the VA mailed a notice to the Claimant advising that it had lowered his monthly disability pension payment from \$985.00 per month to \$877.00 per month effective November 1, 2009 (i.e. retroactively) (Ex. B-2). The Claimant did not report this reduction in income to the Division until April 13, 2010 during his hearing (Division Hearing Representative's testimony).

13. During the period October 2009 through December 2009, the Claimant should have received \$877.00 per month from the VA instead of the \$985.00 per month which he actually received (Claimant testimony). Accordingly, the VA subsequently (in 2010) decreased his monthly payment in order to recoup the excess \$108.00 per month (\$324.00 total) in VA benefits that he received from October 2009 through December 2009.

14. On February 22, 2010 the Division mailed to the Claimant a notice which stated in relevant part as follows (Ex. 5):

You received \$770.00 too much [APA] money for the months of February 2009 through December 2009. You must repay this money. The reason(s) you were overpaid is explained below.

\* \* \* \* \*

This action is supported by APA Manual Section 482-2.

Reason(s) you were overpaid: You did not report your VA income change from \$935.00 to \$985.00.

15. On March 19, 2010 Claimant requested a hearing on the DPA's recoupment action (Ex. 6.0).

## PRINCIPLES OF LAW

### I. Burden of Proof and Standard of Proof.

The party seeking a change in the status quo normally has the burden of proof.<sup>2</sup> In this case the Division is attempting to change the status quo or existing state of affairs by seeking the recovery or recoupment of existing benefits. Accordingly, the Division bears the burden of proof in this case.

The regulations applicable to this case do not specify any particular standard of proof. Therefore, the "preponderance of the evidence" standard is the standard of proof applicable to this case.<sup>3</sup> This

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<sup>2</sup> *State of Alaska Alcoholic Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985).

<sup>3</sup> A party in an administrative proceeding can assume that preponderance of the evidence is the applicable standard of proof unless otherwise stated. *Amerada Hess Pipeline Corp. v. Alaska Public Utilities Commission*, 711 P.2d 1170 (Alaska 1986).

standard is met when the evidence, taken as a whole, shows that the facts sought to be proved are more probable than not or more likely than not.<sup>4</sup>

## II. The Adult Public Assistance Program – In General.

The Adult Public Assistance (APA) Program is a cash benefit program established to furnish financial assistance to needy aged, blind, and disabled persons and to help them attain self-support or self-care. See AS 47.25.430, AS 47.25.590(b), and the DPA website at <http://health.hss.state.ak.us/dpa/programs/apa/> (date accessed July 31, 2009). People who receive APA financial assistance are over 65 years old or have severe and long term disabilities that impose mental and/or physical limitations on their day-to-day functioning. *Id.*

## III. The Adult Public Assistance Program – Regulations Pertinent to This Case.

Eligibility for the APA Program is based in part on financial need. 7 AAC 40.090. Financial need is, in turn, based in part on the amount of the applicant or recipient's income. 7 AAC 40.230.

7 AAC 40.440, titled "Report of Change," provides in relevant part as follows:

(a) From the date of application until an applicant is determined to be ineligible for assistance, the applicant or the person acting on his behalf . . . must report any change in circumstances which may affect his eligibility or assistance payment within 10 days of the change. The report may be made in person, by telephone, or by mail to the nearest office of the division.

(b) Changes which must be reported under (a) of this section include any . . . . (3) change in amount [or] source of income in the household . . . .

7 AAC 40.450, titled "Redeterminations," provides in relevant part as follows:

(a) Upon receipt of information from any source that indicates that a change in circumstances affecting an applicant's eligibility or amount of assistance may have occurred, the division shall investigate and, if necessary, adjust the amount of assistance or suspend or terminate assistance . . . .

(b) At least annually, or more frequently as circumstances warrant, the division will re-determine each recipient's eligibility. The division may require a recipient . . . to complete a review application and furnish documentation to support it.

(c) For non-SSI recipients, the division shall require each recipient . . . to complete a review application and furnish documentation to support it at least annually.

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<sup>4</sup> *Black's Law Dictionary* at 1064 (West Publishing, 5<sup>th</sup> Edition, 1979).

7 AAC 40.480, titled "Repayment of Overpayments," provides in relevant part as follows:

(a) The division may pursue repayment under this section from a current or former recipient of assistance under this chapter who received an overpayment.

\* \* \* \* \*

(c) If an overpayment occurred solely as the result of an administrative error or oversight by the division, the division may *request* repayment. [Emphasis added].

(d) If an overpayment occurred because the recipient . . . failed to comply with [applicable program requirements], the division may *require* repayment. [Emphasis added].

(e) To request or require repayment under (c) or (d) of this section, the division shall send an overpayment notice to the current or former recipient . . . . The overpayment notice must (1) identify the overpayment amount; (2) give the reason for the overpayment; and (3) specify whether repayment is being requested or required; if repayment is required, the division shall specify what further actions will be taken by the division if repayment is not made.

\* \* \* \* \*

(g) Within 30 days of the date printed on the overpayment notice, a current recipient who is required to repay an overpayment under (d) of this section shall repay the entire amount of the overpayment to the division. If the repayment is not timely made, the division shall reduce the recipient's future assistance payments by using the formula set out in (f) of this section.

(h) The division may suspend withholding under (f) or (g) of this section for up to three months upon receipt of evidence that the loss of assistance to a current recipient would result in extreme economic hardship to the recipient.

\* \* \* \* \*

(n) A current or former recipient, or a responsible person acting on the recipient's behalf, who wishes to dispute an action taken by the division under this section may request a hearing under 7 AAC 49.

(o) In this section "overpayment" means the amount of assistance given under this chapter to which a recipient was not entitled; "overpayment" includes the amount of assistance paid to a recipient under 7 AAC 49.190 pending a fair hearing, if the hearing authority renders a decision requiring that the assistance be repaid.

7 AAC 40.490, titled “Correction of Underpayments,” provides in relevant part as follows:

(b) If the division finds it has underpaid an applicant in an amount of \$25 or more during the previous months, it will issue a corrective payment. A corrective payment will not be made if the underpayment resulted from the applicant's failure, without good cause, to report, or to accurately report, a change in circumstances under 7 AAC 40.450.

Adult Public Assistance Manual Section 482, cited by the Division in its recoupment notice, essentially restates 7 AAC 40.480, set forth above.

#### IV. Relevant Case Law.

An affirmative defense can generally be defined as a new matter which, even assuming the initial claim, charge, or complaint to be true, is a defense to it. *Bowman v. Blair*, 889 P.2d 1069, 1071 footnote 2 (Alaska 1995) (quoting *Rollins v. Leibold*, 512 P.2d 937, 940 (Alaska 1973)). The burden of proof of an affirmative defense is on the party raising the defense. *See Stormont v. Astoria Ltd.*, 889 P.2d 1059, 1063 (Alaska 1995); *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279, 294 (Alaska 1976).

“Administrative agencies do not have jurisdiction to decide issues of constitutional law.” *Alaska Public Interest Research Group v. State*, 167 P.3d 27, 36 (Alaska 2007).

A party invoking equitable estoppel against the government must show four elements: (1) the government asserted a position by conduct or words; (2) the party acted in reasonable reliance on the government's assertion; (3) the party suffered resulting prejudice; and (4) estopping the government from acting against the party's interests serves the interest of justice so as to limit public injury. *Hidden Heights Assisted Living, Inc. v. State of Alaska Department of Health and Social Services, Division of Health Care Services*, 222 P.3d 258, 268 (Alaska 2009).

In *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 104 S.Ct. 2218, 81 L.Ed.2d 42 (1984), the United States Supreme Court found that no detrimental change in position had occurred, that the appellant had not lost any legal right, and that the appellant had not suffered any adverse change in its status, where the only harm suffered was the inability to retain money which should have never been received in the first place. 467 U.S. at 61, 104 S.Ct. at 2224.

Laches is usually invoked to bar a claim because the plaintiff has unreasonably delayed seeking relief or protecting a known right. *See* Dan B. Dobbs, *Law of Remedies* § 2.4(4), at 103 (Second Edition 1993) (“In its most orthodox form, laches is unreasonable delay by the plaintiff in prosecuting a claim or protecting a right of which the plaintiff knew or should have known, and under circumstances causing prejudice to the defendant.”).

The doctrine of laches “creates an equitable defense when a party delays asserting a claim for an unconscionable period.” *Concerned Citizens of South Kenai Peninsula v. Kenai Peninsula Borough*, 527 P.2d 447, 457 (Alaska 1974). To bar a claim under laches, “[a] court must find both an unreasonable delay in seeking relief and resulting prejudice to the defendant.” *Id.* Because laches is an affirmative defense, the party asserting it bears the burden of proof. *Winn v. Mannhalter*, 708 P.2d 444 (Alaska 1985).

## ANALYSIS

### Introduction; Definition of Issues; Burden of Proof.

The ultimate issues in this case are:<sup>5</sup>

1. Whether the Division's notice of adverse action dated February 22, 2010 complied with applicable notice requirements;
2. Whether the Claimant received \$770.00 more in APA benefits than he was legally entitled to receive during the period February 2009 through December 2009;
3. Whether any overpayment was due to the Claimant's error or the Division's error;
4. Whether the Claimant has any affirmative legal defense to the Division's claim for recoupment (repayment) of any overpayments; and
5. Whether it is appropriate to consider the VA's reduction of the Claimant's monthly disability payment (from \$985.00 per month to \$877.00 per month effective November 1, 2009) in the context of this recoupment case.

These issues will be addressed separately in the order stated above. Because the Division is the party attempting to change the status quo by recouping overpaid benefits, the Division bears the burden of proof on these issues (see Principles of Law at pages 4-5, above).

### I. Did The Division's Notice Of Action Comply With Applicable Notice Requirements?

The Claimant did not voice any concern about the Division's notice either before or during the hearing. However, in the Claimant's post-hearing brief dated April 28, 2010 the Claimant asserted that the Division's notice of adverse action dated February 22, 2010 was legally defective because it did not comply with the requirements of 7 CFR 273.18(e)(3)(iv)(E) (Claimant's brief at page 6).

The Division's notice does not appear to contain all of the information required by 7 CFR 273.18(e)(3)(iv)(E). However, it was not required to. Regulation 7 CFR 273.18 is a *Food Stamp*

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<sup>5</sup> The Claimant asserted three (3) affirmative defenses in his post-hearing brief:

1. The recoupment regulation (7 AAC 40.480) violates the Due Process Clause (Article I Section 7) of the Constitution of the State of Alaska and/or the Due Process Clause (Fifth Amendment) of the Constitution of the United States (Claimant's brief at pages 5-6).
2. The Division's recoupment action is barred by the doctrine of estoppel (Claimant's brief at 7).
3. The Division's recoupment action is barred by the doctrine of laches (Claimant's brief at 7).

Analytically, these defenses all fall within the broader issue (No. 4, above) of whether the Claimant has any affirmative legal defense to the Division's claim for recoupment (repayment) of any overpayments. These defenses are addressed individually at pages 11-12, below.



*Program* regulation. It applies only to Food Stamp cases. This case involves only APA benefits and *does not* involve Food Stamp benefits. Accordingly, 7 CFR 273.18 is inapplicable here.

The adequacy of notice in this case is governed by state regulation 7 AAC 49.070, which provides in relevant part that “written notice to the client must detail the reasons for the proposed adverse action, including the statute, regulation, or policy upon which that action is based.” The Division’s notice dated February 22, 2010 (Ex. 5 – quoted in Findings of Fact at Paragraph 14, above) stated that it was “supported by APA Manual Section 482-2.” Adult Public Assistance Manual Section 482 essentially restates 7 AAC 40.480, which specifically deals with the recoupment of overpayments. Thus, the Division’s notice of adverse action complied with 7 AAC 49.070 and was therefore legally sufficient.

## II. Did The Claimant Receive \$770.00 More In APA Benefits Than He Was Legally Entitled To Receive During The Period February 2009 Through December 2009?

The Division determined that the Claimant had received \$770.00 more in APA benefits than he was legally entitled to receive during 2009 (Ex. 4). The Division calculated that the Claimant was overpaid by \$74.00 in February 2009, and was overpaid by \$70.00 per month during the months of March 2009 through December 2009 (Ex. 4).

The Claimant did not dispute the Division’s calculations and overpayment figures. The Claimant did assert that the VA’s reduction of his monthly disability payment from \$985.00 per month to \$877.00 per month effective November 1, 2009 may have changed the overpayment calculations for November and December 2009. However, that specific sub-issue is analyzed separately in Analysis Section V, below. Accordingly, (aside from any deduction to which the Claimant may be entitled for those two months), the Division has established, by a preponderance of the evidence, that the Claimant received \$770.00 more in APA benefits than he was legally entitled to receive during the period February 2009 through December 2009.

## III. Was The Overpayment Due to a Claimant Error or a Division Error?

The next issue is whether the overpayment (established above) was due to an error by the *Claimant* or solely to an error by the *Division*. 7 AAC 40.480(c-d), titled “Repayment of Overpayments,” provides in relevant part as follows:

- (c) If an overpayment occurred solely as the result of an administrative error or oversight by the division, the division may *request* repayment. [Emphasis added].
- (d) If an overpayment occurred because the recipient . . . failed to comply with [applicable program requirements], the division may *require* repayment. [Emphasis added].

Thus, if an overpayment is caused by recipient’s failure to comply with applicable program requirements, the division may *require* the Claimant to repay the overpayment (7 AAC 40.480(d)), whereas if an overpayment occurred solely as the result of an administrative error or oversight by the

division, the division may not require the Claimant to repay the overpayment, but rather may only *request* repayment (7 AAC 40.480(c)).<sup>6</sup>

The issue of who was responsible for the overpayment was hotly contested by the parties. At the hearing of April 13, 2010 the Claimant asserted:

1. He may have mistakenly / inadvertently mis-reported the amount of his VA benefits to the Division. He did have an obligation to provide accurate information to the Division. However, the Division also had an obligation to notice discrepancies. Because he had signed informational releases, the Division should have ascertained the VA income discrepancy by itself / on its own.

At the hearing of April 13, 2010 the Division's Hearing Representative asserted in response that:

1. The Claimant began receiving his increased VA benefits in January 2009. He submitted his recertification application in February 2009. He should have disclosed his increased VA benefits within 10 days of his receipt of same, or (at latest) in his February 2009 recertification application.

2. The Claimant *may* have submitted documentation to the Division, in the context of his recertification application, which indicated both that he was receiving \$935.00 per month in VA benefits, *and* that he was receiving \$985.00 per month in VA benefits. However, the Division's notice to the Claimant dated February 25, 2009 (Ex. 3) clearly stated the Division's understanding that the Claimant was receiving \$935.00 per month in VA benefits instead of \$985.00 per month. This notice put the Claimant on notice that the Division was basing the amount of his APA benefits on the Claimant's receipt of \$935.00 per month in VA benefits.

It is true that the Claimant provided the Division with a printout of an online bank statement, showing a \$985.00 payment from the VA dated January 30, 2009, in conjunction with his Eligibility Review Form on February 5, 2009 (Ex. B-1; Claimant testimony). At the same time, however, he also provided the Division with a copy of a VA notice dated December 1, 2008 which indicated that his monthly payment was \$935.00 effective December 1, 2008 (Ex. 12, Division Hearing Representative's testimony). Most importantly, at page 3, item 8 of the Eligibility Review Form itself the Claimant indicated that his monthly VA benefit was \$935.00 (Ex. 6.5).

Ideally, the Division would have noticed the discrepancy in the Claimant's Northrim Bank statement (Ex. B-1) and inquired further. However, 7 AAC 40.440, titled "Report of Change," places the primary responsibility for timely and correctly reporting changes, (including changes in income) squarely on the shoulders of the recipient (see Principles of Law at pages 5-6, above).

In addition, the recoupment regulation, 7 AAC 40.480, makes repayment optional *only* when an overpayment results "*solely* as the result of an administrative error or oversight by the division." *See*

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<sup>6</sup> The APA Program's regulation stands in stark contrast to the Food Stamp Program's regulation in this regard. Under the Food Stamp Program, the Division is *required* to recoup overpaid benefits *even if the benefits were overpaid due to no fault of the recipient*. See 7 USCA § 2022; 7 CFR § 273.18; and *Allen v. State of Alaska Department of Health & Social Services, Division of Public Assistance*, 203 P.3d 1155 (Alaska 2009).

7 AAC 40.480(c). In this case, even construing all factual issues in favor of the Claimant, it is clear that the Claimant was at least partially at fault for the misunderstanding which resulted in the overpayment. Thus, it simply cannot be said that the overpayment at issue was *solely* “the result of an administrative error or oversight by the division.”

In summary, the Division has carried its burden and proved, by a preponderance of the evidence, that the overpayments at issue were primarily the result of Claimant error. Accordingly, unless some legal defense applies, the Division is entitled to recoup the overpayments. The three legal defenses asserted by the Claimant are discussed in Analysis Section IV, below.

#### IV. Does the Claimant Have any Affirmative Legal Defense to the Division’s Recoupment Claim?

The Claimant has asserted three affirmative defenses to the Division’s recoupment claim (see discussion at page 8, above). Each of these defenses is discussed in turn below. Because the Claimant is the party asserting these defenses, he bears the burden of proving them by a preponderance of the evidence (see discussion in Principles of law, above).

##### A. The Claimant’s Due Process Defense.

At pages 5-6 of his post-hearing brief the Claimant asserts that the Division’s recoupment regulation (7 AAC 40.480) violates the Due Process Clause (Article I Section 7) of the Constitution of the State of Alaska, and/or the Due Process Clause (Fifth Amendment) of the Constitution of the United States. However, the Office of Hearings and Appeals is a subdivision of the Department of Health and Social Services, which is an administrative agency. Administrative agencies do not have jurisdiction to decide issues of constitutional law. *Alaska Public Interest Research Group v. State*, 167 P.3d 27, 36 (Alaska 2007). Accordingly, the Claimant’s Due Process argument cannot be addressed in this decision. The Claimant’s Due Process argument is noted for the record in the event of an appeal.

##### B. The Claimant’s Estoppel Defense.

At page 7 of his post-hearing brief the Claimant asserts that the Division’s recoupment action is barred by the doctrine of estoppel. A party invoking equitable estoppel against the government must show four elements: (1) the government asserted a position by conduct or words; (2) the party acted in reasonable reliance on the government’s assertion; (3) the party suffered resulting prejudice; and (4) estopping the government from acting against the party’s interests serves the interest of justice so as to limit public injury. *Hidden Heights Assisted Living, Inc. v. State of Alaska Department of Health and Social Services, Division of Health Care Services*, 222 P.3d 258, 268 (Alaska 2009).

The Claimant cannot prevail on his estoppel defense on the facts of this case. In *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 104 S.Ct. 2218, 81 L.Ed.2d 42 (1984), the United States Supreme Court found that no detrimental change in position had occurred, that the appellant had not lost any legal right, and that the appellant had not suffered any adverse change in its status, *where (as here) the only harm suffered was the inability to retain money which should have never been received in the first place.* 467 U.S. at 61, 104 S.Ct. at 2224. Accordingly, even assuming for the sake of argument that the Claimant could establish the first, second, and fourth elements of an estoppel claim, he cannot, as a matter of law, demonstrate the third element (prejudice) on the facts of this case.

### C. The Claimant's Laches Defense.

At page 7 of his post-hearing brief the Claimant asserts that the Division's recoupment action is barred by the doctrine of laches. The doctrine of laches "creates an equitable defense when a party delays asserting a claim for an unconscionable period." *Concerned Citizens of South Kenai Peninsula v. Kenai Peninsula Borough*, 527 P.2d 447, 457 (Alaska 1974). To bar a claim under laches, "[a] court must find both an unreasonable delay in seeking relief and resulting prejudice to the defendant." *Id.*

The Claimant cannot prevail on his laches defense on the facts of this case. First, the Division did not unreasonably delay the assertion of its recoupment claim. The Division first discovered on February 2, 2010 that the VA's payment to the Claimant had increased from \$935.00 per month to \$985.00 per month beginning in January 2009 (DPA Hearing Representative's testimony). The Division mailed its recoupment notice to the Claimant on February 22, 2010, less than three weeks later (Ex. 5). This hardly constitutes an unreasonable delay in seeking relief.

Second, as noted above, the courts have held that a party has not lost any legal right or suffered any adverse change *where (as here) the only harm suffered was the inability to retain money which should have never been received in the first place* (see *Heckler v. Community Health Services of Crawford County, Inc.*, discussed above). Accordingly, the Claimant cannot, as a matter of law, demonstrate prejudice on the facts of this case.

### V. Is it Appropriate To Consider the VA's Reduction of the Claimant's Monthly Disability Payment (from \$985.00 per Month to \$877.00 per Month Effective November 1, 2009) in the Context of This Recoupment Case?

The last issue to be resolved is whether it would be appropriate to consider the VA's reduction of the Claimant's monthly disability payment (from \$985.00 per month to \$877.00 per month effective November 1, 2009) in the context of this case. This reduction in VA benefits is significant because, if considered within this case, it would decrease the amount of the DPA overpayments made to the Claimant for the months of November and December 2009, thus decreasing the total amount of the Division's recoupment claim.

The Division is in general required to adjust the amount of a recipient's APA benefits based on changes in a recipient's financial circumstances. See 7 AAC 40.450, set forth in the Principles of Law, above. However, pursuant to 7 AAC 40.490(b), a corrective payment *will not* be made to a recipient "if the underpayment resulted from the [recipient's] failure, without good cause, to report, or to accurately report, a change in circumstances under 7 AAC 40.450."

In summary, had the Claimant timely reported the VA's reduction of his VA benefits effective November 2009, the Claimant would be entitled to have that reduction in VA benefits considered in the context of a redetermination of the amount of his APA benefits and/or this recoupment claim. However, because the VA notified the Claimant of the retroactive reduction of his VA benefits on February 9, 2010 (Ex. B-2), but the Claimant did not report the VA's reduction of his VA benefits to DPA until April 13, 2010 (Ex. 14.0), the Division is not required to, in essence, retroactively credit the Claimant's APA account.

Accordingly, pursuant to 7 AAC 40.490(b), it would not be appropriate to consider the VA's reduction of the Claimant's monthly disability payments for November and December 2009 in the context of this case.

### **CONCLUSIONS OF LAW**

1. The Division carried its burden and proved, by a preponderance of the evidence, that:
  - a. The Division's notice of adverse action dated February 22, 2010 complied with applicable notice requirements;
  - b. The Division was correct when, on February 22, 2010, it notified the Claimant that he had received \$770.00 more in Adult Public Assistance benefits than he was legally entitled to receive during the period February 2009 through December 2009;
  - c. The Division was correct when, on February 22, 2010, it notified the Claimant that the \$770.00 overpayment was due to the Claimant's error and was not solely due to Division's error; and
  - d. The Division was not required to consider the VA's reduction of the Claimant's monthly disability payment (from \$985.00 per month to \$877.00 per month effective November 1, 2009) within the context of this recoupment case.
2. The Claimant failed to carry his burden and did not prove, by a preponderance of the evidence, that he possessed any affirmative defense that would bar the Division's claim for recoupment.
3. The Division was therefore correct when, on February 22, 2010, it notified the Claimant that he had received \$770.00 more in Adult Public Assistance benefits than he was legally entitled to receive during the period February 2009 through December 2009, and that the Division was entitled to recoup those overpaid benefits.

### **DECISION**

The Division was correct when, on February 22, 2010, it notified the Claimant that he had received \$770.00 more in Adult Public Assistance benefits than he was legally entitled to receive during the period February 2009 through December 2009, and that the Division was entitled to recoup those overpaid benefits.

### **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

If the Claimant appeals, the request must be sent within 15 days from the date of receipt of this Decision. Filing an appeal with the Director could result in the reversal of this Decision.

DATED this 28th day of June, 2010.

(signed)

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Jay Durych  
Hearing Authority

#### CERTIFICATE OF SERVICE

I certify that on this 28th day of June 2010 true and correct copies of the foregoing document were sent to the Claimant via U.S.P.S. mail, and to the remainder of the service list by e-mail, as follows:

Claimant – Certified Mail, Return Receipt Requested  
[REDACTED], DPA Hearing Representative

[REDACTED], Director, Division of Public Assistance  
[REDACTED], Policy & Program Development  
[REDACTED], Staff Development & Training  
[REDACTED], Chief of Field Services  
[REDACTED], Administrative Assistant II  
[REDACTED], Eligibility Technician I

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J. Albert Levitre, Jr.  
Law Office Assistant I