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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-393
	)	
Claimant.	)	DPA Case No. [redacted]
	)	

FAIR HEARING DECISION

STATEMENT OF THE CASE

On October 5, 2010 Mr. [redacted] (Claimant) completed and signed an application for benefits under the State of Alaska's Heating Assistance Program (Exs. 1.0 – 1.4). The Claimant's application was received by the State of Alaska Division of Public Assistance (DPA or Division) on October 7, 2010 (Ex. 1).

On November 10, 2010 the Division mailed a notice to the Claimant advising that the Claimant's Heating Assistance Program (HAP) application had been denied on the grounds that the Claimant "did not pay for home heating" (Ex. 2). The Claimant requested a fair hearing with regard to the Division's denial of his Heating Assistance Program application on November 22, 2010 (Ex. 3).

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

The Claimant's hearing began as scheduled on December 23, 2010 before Hearing Examiner Jay Durych. The Claimant participated by telephone, 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 exhibits submitted were admitted into evidence. At the end of the hearing the record was closed and the case became ripe for decision.

ISSUE

Was the Division correct when, on November 10, 2010, it mailed a notice to the Claimant stating that the Claimant's Alaska Heating Assistance Program (HAP) application dated October 5, 2010 had been denied on the grounds that the Claimant did not pay for home heating at the time his application for Alaska Heating Assistance Program benefits was filed?

SUMMARY OF DECISION

The Division's denial notice dated November 10, 2010 did not comply with the minimum notice requirements of the applicable Fair Hearings regulation (7 AAC 49.070) because the notice did not reference the statute, regulation, or policy upon which the Division's denial of Alaska Heating Assistance Program benefits was based. Accordingly, the Division was not correct when on November 10, 2010 it mailed a notice to the Claimant advising that the Claimant's Alaskan Heating Assistance Program application dated October 5, 2010 had been denied on the grounds that the Claimant did not pay for home heating at the time his application for Alaska Heating Assistance Program benefits was filed. If the Division continues to believe that denial of the Claimant's Alaska Heating Assistance Program application is appropriate, it must provide a denial notice to the Claimant which complies with 7 AAC 49.070.

FINDINGS OF FACT

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

1. The Claimant has a Toyo oil-burning stove and a well insulated home (Ex. 3). He fills his 300 gallon fuel oil tank with heating oil once every two years (Ex. 3). If he purchases less than 200 gallons of heating oil at one time, the fuel vendor, Petro Marine, charges extra. (Ex. 3).

2. On October 5, 2010 the Claimant completed and signed an application for benefits under the State of Alaska's Heating Assistance Program (Exs. 1.0 – 1.4). The Claimant's application was received by the Division on October 7, 2010 (Ex. 1).

3. On November 10, 2010 the Division mailed a notice to the Claimant advising that the Claimant's Heating Assistance Program (HAP) application had been denied on the grounds that the Claimant did "not pay for home heating" (Ex. 2). The notice further stated that the Claimant had "no cost due to credit balance of $849.97 at Petro Marine" (Ex. 2). The Division's denial notice cited no state or federal statute, regulation, or policy manual provision in support of its determination (Ex. 2).

4. The Claimant requested a fair hearing with regard to the Division's denial of his Heating Assistance Program (HAP) application on November 22, 2010 (Ex. 3).

5. On or about December 16, 2010 Petro Marine's billing department confirmed that, as of that date, Mr. [redacted] had a credit balance of $849.97 on his account with Petro Marine (Ex. 9).

6. At the hearing of December 23, 2010 the Claimant credibly testified in relevant part that:

   a. He has a 300 gallon heating oil tank at his residence in [redacted], Alaska.

   b. Sometimes the winter driving conditions are so difficult that the fuel truck cannot make it up the hill to get to the Claimant's home.

   c. It costs more per gallon of fuel oil to have a delivery of less than 200 gallons of fuel oil than it does to have 200 gallons or more delivered at one time. Thus, his HAP benefits

go farther, and it ultimately costs the state less in HAP benefits, if he waits until his fuel oil tank is less than 1/3 full before re-filling it.

d. There is a question on the HAP application form which asks "If you pay both heat and electricity, should part of your grant be sent to your electric account?" The Claimant pays for both his heat and his electricity. In 2009 he forgot to check the box which would have allowed a portion of his 2009 - 2010 HAP benefits to go to his account at Homer Electric Association (HEA). He corrected this mistake in 2010 on his 2010 - 2011 HAP application (Ex. 1.3).

e. He does not need a new grant of HAP money for this winter (2010 – 2011). All he needs is to be able to transfer a portion of the credit balance on his Petro Marine account to pay the balance due on his account at Homer Electric Association (HEA).

PRINCIPLES OF LAW

I. Burden of Proof and Standard of Proof.

The party seeking a change in the status quo ordinarily bears the burden of proof. [1] This case involves the denial of the Claimant's application for Heating Assistance Program benefits. Pursuant to applicable law, the Claimant is held to be attempting to change the existing status quo by obtaining benefits. The Claimant therefore bears the burden of proof in these proceedings.

A party in an administrative proceeding can assume that the "preponderance of the evidence" standard is the appropriate standard of proof unless applicable statutes and/or regulations state otherwise. [2] The statutes and regulations applicable to this case do not specify any particular standard of proof. Therefore, "preponderance of the evidence" is the standard of proof applicable to this case. This standard is met when the evidence, taken as a whole, shows that the fact sought to be proved is more probable than not or more likely than not. [3]

II. The Alaska Heating Assistance Program – In General.

The Alaska Heating Assistance Program was established by Alaska Statute (AS) 47.25.621 to provide expanded eligibility for Alaska residents for home heating assistance, to the extent funds are appropriated by the legislature for that purpose.

The Alaska Heating Assistance Program regulations are set forth in the Alaska Administrative Code at 7 AAC 44.200 - 7 AAC 44.360. Pursuant to 7 AAC 44.200, "[t]he purpose of the heating assistance program is to provide assistance under the Alaska heating assistance program to low income households to offset the cost of home heating."

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

2 *Amerada Hess Pipeline Corp. v. Alaska Public Utilities Commission*, 711 P.2d 1170 (Alaska 1986).

3 *Black's Law Dictionary* at page 1064 (West Publishing, Fifth Edition, 1979).

III. The Alaska Heating Assistance Program – Notice Requirements.

The State of Alaska Department of Health and Social Services' "Fair Hearings" regulations apply to the Alaska Heating Assistance Program. *See* 7 AAC 49.010(a). Alaska "Fair Hearings" regulation 7 AAC 49.070 provides in relevant part that, "[u]nless otherwise specified in applicable federal regulations, 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*." [Emphasis added].

In *Allen v. State of Alaska Department of Health and Social Services, Division of Public Assistance*, 203 P.3d 1155 (Alaska 2009), the Alaska Supreme Court reconfirmed that public assistance benefit recipients are entitled to adequate notice "detailing the reasons" for agency action (*Allen* at 1167). In its decision the *Allen* court stated (203 P. 3d at 1168):

> If a major purpose served by benefit change or denial notices is protecting recipients from agency mistakes, then it stands to reason that such notices should provide sufficient information to allow recipients to detect and challenge mistakes.

In the *Allen* decision, the Alaska Supreme Court did not automatically find in favor of the claimant because of the defective notice. Instead, the court allowed the Division to correct its defective notice by completely reissuing it (*Allen* at 1169).

IV. *Sua Sponte* Determination of Notice Issues.

A matter considered or determined "*sua sponte"* is a matter considered or determined on a court's (or other judicial or quasi-judicial entity's) "own will or motion . . . without prompting or suggestion" by either party. *Black's Law Dictionary* at 1277 (West, 5th Edition, 1979).

An issue may be determined *sua sponte* when the issue is a "threshold" matter to another question properly before the adjudicative body. [4] "[A] court may consider an issue 'antecedent to ... and ultimately dispositive of' the dispute before it, even an issue the parties fail to identify and brief." [5] There are numerous cases in which courts reviewing administrative decisions have upheld the authority of a hearing officer or ALJ to raise various issues *sua sponte*. [6]

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[4] *Thomas v. Crosby*, 371 F.3d 782 (11th Cir. 2004), *cert. denied* 543 U.S. 1063, 125 S.Ct. 888, 160 L.Ed.2d 793 (2005).

[5] *United States National Bank v. Independent Insurance Agents of America, Inc.*, 508 U.S. 439, 447, 113 S.Ct. 2173, 2178, 124 L.Ed.2d 402 (1993), *quoting Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77, 111 S.Ct. 415, 112 L.Ed.2d 374 (1990), *rehearing denied* 498 U.S. 1075, 111 S.Ct. 804, 112 L.Ed.2d 865 (1991).

[6] For example, in *Young v. Governing Board*, 115 Cal. Rptr. 456 (Cal. App. 1974) the reviewing court found that a hearing officer had the power to order continuances on his own motion. In *Cornell University v. Velez*, 856 F.2d 402, 405 (1st Cir. 1988) the reviewing court upheld an ALJ's *sua sponte* consideration of an untimely special fund application. In *Hanshew v. Royal Coal Co.*, 872 F.2d 417, 1989 WL 27470 (4th Cir. 1989) the reviewing court found that the administrative law judge's *sua sponte* initiation of summary proceedings, and requirement that the parties exchange and submit evidence at least forty days before the hearing, was at most harmless error. Again, in *Wheatley v. Bryant Auto Service*, 860 S.W.2d 767 (Kentucky 1993), the Court determined that an ALJ was authorized to reopen a final award *sua sponte* in order to correct a legal error therein. In *Freeman United Coal Mining Company v. Director, Office of Workers' Compensation Programs*, 94 F.3d 384 (7th Cir. 1996) the reviewing court found that an ALJ did not err by addressing the viability of a legal issue *sua sponte*, stating "[w]e believe . . . that the ALJ was well within his

ANALYSIS

There are no disputed factual issues in this case. However, it is not necessary to reach the merits of this case because the Division's denial of the Claimant's application for Alaska Heating Assistance Program benefits was incorrect as a matter of law.

The State of Alaska Department of Health and Social Services' "Fair Hearings" regulations apply to the administration of the Alaska Heating Assistance Program. *See* 7 AAC 49.010(a). Alaska "Fair Hearings" regulation 7 AAC 49.070 provides in relevant part that, "unless otherwise specified in applicable federal regulations, 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*." [Emphasis added]. In this case, there is no applicable federal regulation. Accordingly, the requirements of 7 AAC 49.070 apply.

On November 10, 2010 the Division mailed a notice to the Claimant advising that the Claimant's Heating Assistance Program application had been denied on the grounds that the Claimant did "not pay for home heating" (Ex. 2). The notice further stated that the Claimant had "no cost due to credit balance of $849.97 at Petro Marine" (Ex. 2). However, *the Division's denial notice cited no state or federal statute, regulation, or policy manual provision in support of its determination* (Ex. 2).

In *Allen v. State of Alaska Department of Health and Social Services, Division of Public Assistance*, 203 P.3d 1155 (Alaska 2009), the Alaska Supreme Court reconfirmed that public assistance benefit recipients are entitled to adequate notice "detailing the reasons" for agency action (*Allen* at 1167). In its decision the *Allen* court stated (203 P. 3d at 1168):

> If a major purpose served by benefit change or denial notices is protecting recipients from agency mistakes, then it stands to reason that such notices should provide sufficient information to allow recipients to detect and challenge mistakes.

The denial notice issued by the Division in this case failed to specify the "state or federal statute, regulation, or policy manual provision" on which it was based. It was therefore inadequate under 7 AAC 49.070 and the *Allen* decision. Accordingly, the Division was not correct when on November 10, 2010 it mailed a notice to the Claimant advising that the Claimant's Alaskan Heating Assistance Program application dated October 5, 2010 had been denied on the grounds that the Claimant did

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discretion in considering this issue, despite the parties' failure to raise it, as its resolution was necessary to accurately determine which regulations applied to [the claimant's] claim for benefits." In *Saleeby v. Safir*, 734 N.Y.S.2d 139 (N.Y.A.D., 1st Dept., 2001) the reviewing court upheld a hearing officer's *sua sponte* reopening of a hearing. Similarly, in *Wahlgren v. Department of Transportation, Driver & Motor Vehicles Services Branch*, 102 P.3d 761 (Or. App. 2004) the reviewing court found that the Hearing Officer did not err in raising a right-to-counsel issue *sua sponte*. In *Halvonik v. Dudas*, 398 F.Supp.2d 115 (D. D.C. 2005), *affirmed* 192 Fed.Appx. 964 (Fed. Cir. 2006), *certiorari denied* 549 U.S. 1305, 127 S.Ct. 1889, 167 L.Ed.2d 365 (2007), the reviewing court found that an ALJ did not err by *sua sponte* amending a complaint in an administrative case. Finally, in *Styles v. Elkhorn Truck Parts & Service*, 2009 WL 2217743 (Ky. App. 2009) the reviewing court upheld an ALJ's *sua sponte* award of increased interest to the prevailing party.

not pay for home heating at the time his application for Alaska Heating Assistance Program benefits was filed. [7]

In the *Allen* decision, the Alaska Supreme Court did not automatically find in favor of the claimant because of the defective notice. Instead, the court allowed the Division to correct its defective notice by completely reissuing it (*Allen* at 1169). Accordingly, in this case the Division must likewise be given the option of issuing a proper / corrected denial notice to the Claimant.

If the Division, following receipt of this decision, again denies the Claimant's Heating Assistance Program application, and if, after receipt of the new denial notice, the Claimant still disagrees with the Division's action, the Claimant may then request a new hearing within 30 days of receipt of the Division's notice of adverse action (7 AAC 49.040). In that event, the Claimant would be entitled to a new hearing.

CONCLUSIONS OF LAW

1. The State of Alaska Department of Health and Social Services' "Fair Hearings" regulations apply to the administration of the Alaska Heating Assistance Program pursuant to 7 AAC 49.010(a).

2. Alaska "Fair Hearings" regulation 7 AAC 49.070 requires that written notices to clients detail the reasons for any proposed adverse action, including the statute, regulation, or policy upon which that action is based.

3. The denial notice issued by the Division in this case failed to specify the "state or federal statute, regulation, or policy manual provision" on which it was based.

4. Accordingly, the Division was not correct when on November 10, 2010 it mailed a notice to the Claimant advising that the Claimant's Alaskan Heating Assistance Program application dated October 5, 2010 had been denied on the grounds that the Claimant did not pay for home heating at the time his application for Alaska Heating Assistance Program benefits was filed.

5. If the Division, following receipt of this decision, again denies the Claimant's Heating Assistance Program application, and if, after receipt of the new denial notice, the Claimant still disagrees with the Division's action, the Claimant may then request a new hearing within 30 days of receipt of the Division's notice of adverse action (7 AAC 49.040). In that event, the Claimant would be entitled to a new hearing.

DECISION

The Division erred when on November 10, 2010 it mailed a notice to the Claimant advising that the Claimant's Alaskan Heating Assistance Program application dated October 5, 2010 had been denied on the grounds that the Claimant did not pay for home heating at the time his application for Alaska Heating Assistance Program benefits was filed.

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[7] Because of the importance of adequate notice under the applicable regulations and case law, it is appropriate for this Office to address this issue even though the issue of adequate notice was not raised by the parties. *See*, Principles of Law at pages 4-5 and footnotes 4 – 6, above.

If the Division, following receipt of this decision, again denies the Claimant's Heating Assistance Program application, and if, after receipt of the new denial notice, the Claimant still disagrees with the Division's action, the Claimant may then request a new hearing within 30 days of receipt of the Division's notice of adverse action (7 AAC 49.040). In that event, the Claimant would be entitled to a new hearing.

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 22nd day of February, 2011.

(signed)

Jay Durych
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on this 22nd day of February 2011 true and correct copies of the foregoing decision were sent to the Claimant via USPS Mail, and to the rest of the service list via e-mail, as follows:

Claimant – Certified Mail, Return Receipt Requested

[redacted], DPA Fair Hearing Representative
[redacted], DPA Fair Hearing Representative

[redacted], Policy & Program Development
[redacted], Staff Development & Training
[redacted], Administrative Assistant II
[redacted], Eligibility Technician I

(signed)

J. Albert Levitre, Jr.
Law Office Assistant I