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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. 11-FH-129
)
 Claimant.) DPA Case No. [REDACTED]
)
 _____)

FAIR HEARING DECISION

STATEMENT OF THE CASE

[REDACTED] (Claimant) applied for Interim Assistance benefits on February 3, 2011 (Ex. 3). The State of Alaska Division of Public Assistance (DPA or Division) denied his application on March 16, 2011 (Ex. 3). The Claimant requested a hearing to contest the Division's denial of his application on March 18, 2011 (Ex. 4.1).

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

Hearings were held on April 27, 2011 and June 1, 2011 before Hearing Officer Jay Durych. The Claimant participated by telephone in each hearing, represented himself, and testified on his own behalf. Public Assistance Analyst [REDACTED] appeared in person at each hearing to represent and testify on behalf of the Division. [REDACTED], the Division's Interim Assistance Medical Reviewer, participated and testified at each hearing by telephone. All testimony and exhibits submitted by the parties were admitted into evidence. At the end of the second hearing the record was closed and the case became ripe for decision.

ISSUES

The original issue in this case was whether or not the Division was correct when, on March 16, 2011, it denied the Claimant's February 3, 2011 application for Interim Assistance benefits. However, during the preparation of this decision the Hearing Examiner noted an issue as to the legal sufficiency of the Division's benefit denial notice (Ex. 3). Accordingly, the issues to be determined are:

1. Was the Division's eligibility denial / benefit denial notice dated March 16, 2011 (Ex. 3) legally sufficient (i.e. did it satisfy the notice requirements of the applicable Fair Hearings regulation and the applicable decisions of the Alaska Supreme Court)?
2. If not, was the insufficiency of the Division's eligibility denial / benefit denial notice cured by subsequent notices or events?
3. If so, was the Division correct to deny the Claimant's February 3, 2011 application for Interim Assistance benefits based on the assertion that the Claimant failed to prove that he is disabled based on the applicable Social Security Administration criteria?

SUMMARY OF DECISION

The Division's eligibility denial / benefit denial notice dated March 16, 2011 did not satisfy the minimum notice requirements of Alaska Fair Hearings regulation 7 AAC 49.070, or applicable decisions of the Alaska Supreme Court, (including *Allen v. State*), which apply to any denial of Interim Assistance benefits by the Division.

Pursuant to the Alaska Supreme Court's decision in *Allen v. State*, these notice deficiencies can be cured by re-noticing the Claimant. However, the Claimant has not yet been adequately re-noticed in this case. Accordingly, the Division was not correct when, on March 16, 2011, it notified the Claimant that his application for Interim Assistance benefits dated February 3, 2011 had been denied.

FINDINGS OF FACT

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

1. The Claimant's application for Interim Assistance benefits was received by the Division on February 3, 2011 (Ex. 1).
2. On March 16, 2011 the Division mailed an eligibility denial / benefit denial notice to the Claimant (Ex. 3) which stated in relevant part as follows (original formatting condensed for brevity):

APA DENIED – OTHER REASONS

Your application for Adult Public Assistance (APA) and Medicaid received on February 03, 2011 is denied because of reason number(s) 5, below (5) You do not meet the disability requirements for APA and Medicaid. This action is based on APA Manual Section 424 and 425.

Nowhere in the notice is the Interim Assistance Program mentioned. Nowhere in the notice is 7 AAC 40.180, the Interim Assistance Program's sole substantive regulation, mentioned. Nowhere in the notice is APA Manual Section 426, the Interim Assistance Program's sole substantive policy manual section, mentioned.

3. On March 18, 2011 the Claimant requested a hearing with regard to the Division's denial of his February 3, 2011 application for Interim Assistance (Ex. 4.1).

PRINCIPLES OF LAW

I. Burden of Proof; Standard of Proof.

This case involves an application for Interim Assistance benefits. When an application is denied, the applicant has the burden of proof¹ by a preponderance of the evidence.²

II. Notice Requirements Applicable to the Interim Assistance Program.

The State of Alaska Department of Health and Social Services' "Fair Hearings" regulations apply to the Interim 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 *Baker v. State, Dept. of Health & Social Services*, 191 P.3d 1005, 1009 (Alaska 2008), the Alaska Supreme Court held that a Medicaid Personal Care Assistant (PCA) services reduction notice was defective because it failed to provide the recipients with adequate notice: "due process demands that recipients facing a reduction of their public assistance benefits be provided a meaningful opportunity to understand, review, and where appropriate, challenge the department's action." *Id.* at 1011. In *Baker*, the Department was required to include the assessment form (PCAT) with its benefit reduction notices. *Id.* at 1012.

In *Allen v. State, Dept. of Health & Social Services*, 203 P.2d 1155, 1168 – 1170 (Alaska 2009), the Alaska Supreme Court held that before the Division could require repayment of allegedly overpaid Food Stamp benefits from a recipient, the Division was required to send the recipient notice containing its detailed calculations and the reasons for the repayment. 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

¹ "Ordinarily the party seeking a change in the status quo has the burden of proof." *State of Alaska Alcohol Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985).

² Preponderance of the evidence is defined as "[e]vidence 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." *Black's Law Dictionary* at page 1064 (West Publishing, 5th Edition, 1979).

provide sufficient information to allow recipients to detect and challenge mistakes.³

III. Regulations and Policy Manual Provisions Cited in the Division's Denial Notice.

Adult Public Assistance Manual Section 424 states the *age requirements* applicable to applicants for the Adult Public Assistance Program. It does not apply to the Interim Assistance Program.

Adult Public Assistance Manual Section 425 states the blindness and disability requirements applicable to applicants for the *Adult Public Assistance Program*. It does not apply to the Interim Assistance Program.

IV. The Interim Assistance Program's Substantive Regulations and Policy Manual Provisions.

The Interim Assistance Program's sole substantive regulation (i.e. regulation which defines the disability criteria) is 7 AAC 40.180, titled "Initial Determination of Disability." That regulation provides as follows:

(a) An applicant whose disability is being determined by the department under 7 AAC 40.170(b) must be examined by a psychiatrist or other physician who has entered into a current provider agreement under 7 AAC 43.065. The results of the examination must be provided on a form approved by the department.

(b) The department will make a determination of whether the applicant is disabled based on

(1) a medical review by the department as to whether the applicant is likely to be found disabled by the Social Security Administration, including whether the applicant's impairment meets (A) The SSI program's presumptive disability criteria under 20 C.F.R. 416.934, as revised as of April 1, 2005, and adopted by reference; or (B) Social Security Administration disability criteria for the listings of impairments described in 20 C.F.R. 404, subpart P, appendix 1, as revised as of April 1, 2005, and adopted by reference;

(2) medical evidence provided by the applicant or obtained by the department;

³ One of the cases cited by the Alaska Supreme Court in *Allen* was *Ortiz v. Eichler*, 616 F.Supp. 1046, 1061-1062 (D. Del. 1985), *reargued Ortiz v. Eichler*, 616 F.Supp. 1066 (D. Del. 1985), *affirmed Ortiz v. Eichler*, 794 F.2d 889 (3rd Cir.1986). In *Ortiz* the court stated that, "at a minimum, due process requires the agency to explain, *in terms comprehensible to the claimant*, exactly what the agency proposes to do and why the agency is taking this action" (emphasis added). The court explained that "this detailed information is needed to enable claimants to understand what the agency has decided, so that they may assess the correctness of the agency's decision, make an informed decision as to whether to appeal, and be prepared for the issues to be addressed at the hearing." *Id.*

- (3) other evidence provided by the applicant under 7 AAC 40.050, if applicable; and
 - (4) a review of the written results of the psychiatrist's or other physician's examination under (a) of this section.
- (c) In determining whether an applicant's disability meets the criteria set out in (b)(1)(B) of this section, the department will consider whether the
- (1) the applicant's condition is listed as an impairment category described in (b)(1)(B) of this section;
 - (2) medical information obtained under (b) of this section documents the applicant's impairment;
 - (3) impairment affects the applicant's activities of daily living;
 - (4) the applicant can perform any other work, including sedentary work; and
 - (5) the applicant's impairment has lasted or is expected to last for a continuous period of not less than 12 months.

The Interim Assistance Program's sole substantive policy manual section, (i.e. the policy manual section which states the Interim Assistance Program's disability criteria), is APA Manual Section 426, titled "Interim Assistance." Section 426-2C provides in relevant part as follows:

426-2 C. INTERIM BLINDNESS OR DISABILITY DETERMINATION

The APA program uses the same definitions of disability and blindness as SSI. The Division will obtain and use medical and other information to determine whether an applicant is likely to meet the SSI disability/blindness criteria, and is eligible for Interim Assistance.

ANALYSIS

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

The Division asserts that it was correct to deny the Claimant's application for Interim Assistance benefits based on the Claimant's alleged failure to satisfy the applicable disability criteria (Exs. 2.1 and 2.2, DPA Hearing Representative's testimony, DPA Medical Reviewer's testimony).

However, prior to reaching the merits of the case, it is first necessary to determine whether the Division's eligibility denial / benefit denial notice dated March 16, 2011 (Ex. 3) was legally sufficient to deny the Claimant's application for Interim Assistance Program benefits. There are no factual issues to be resolved with regard to the Division's notice: the notice speaks for itself.

Accordingly, the adequacy of the Division's notice can be resolved as a purely legal matter based on the applicable regulations and judicial decisions.

II. Was The Division's Benefit Denial Notice Legally Sufficient?

The eligibility denial / benefit denial notice which the Division mailed to the Claimant on March 16, 2011 (Ex. 3) stated in relevant part as follows (original formatting condensed for brevity):

APA DENIED – OTHER REASONS

Your application for *Adult Public Assistance (APA) and Medicaid* received on February 03, 2011 is denied because of reason number(s) 5, below . . . (5) *You do not meet the disability requirements for APA and Medicaid.* This action is based on APA Manual Section 424 and 425. [Emphasis added].

Alaska "Fair Hearings" regulation 7 AAC 49.070 applies to notices pertaining to the Interim Assistance Program. See 7 AAC 49.010. 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 addition, judicial decisions make clear that additional information may be required, in a notice of adverse action, in order to satisfy state and federal Constitutional due process requirements. In *Allen v. State of Alaska Department of Health & Social Services*, 203 P.2d 1155, 1168 (Alaska 2009), the court noted that agencies sometimes make mistakes, and that, "[i]f 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." Such notice "is necessary to protect claimants against proposed agency action 'resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases.'" See *Ortiz v. Eichler*, 794 F.2d 889, 893 (3rd Cir. 1986), quoted by the Alaska Supreme Court in *Allen*, 203 P.2d 1155 at 1168.

Based on the foregoing standards, the Division's notice in this case is legally defective for at least three reasons. First, the notice references the wrong programs - the Adult Public Assistance (APA) and Medicaid Programs. Nowhere in the notice is the Interim Assistance Program mentioned. Due process requires that benefits not be denied or terminated without a written notice invoking, at least once, the name by which the benefit program is commonly known.

Second, the notice does not state what disability requirement(s) the Claimant failed to meet. A Claimant in an Interim Assistance case cannot know whether or how to challenge a denial of eligibility / benefits unless the Division notifies the Claimant as to which of the several Interim Assistance criteria the Claimant has allegedly failed to satisfy.

Finally, the notice does not include "the statute, regulation, or policy upon which [the Division's] action is based" as specifically required by 7 AAC 49.010. The notice references Adult Public Assistance Manual Section 424 and 425. However, neither of those policy manual provisions

applies to the Interim Assistance Program. The Interim Assistance Program's sole substantive policy manual section, (i.e. the policy manual section which states the Interim Assistance Program's disability criteria), is APA Manual Section 426, titled "Interim Assistance." Because the notice failed to cite either the Interim Assistance Program's sole substantive regulation (7 AAC 40.180), or the Interim Assistance Program's sole substantive policy manual section, (APA Manual Section 426), the notice does not satisfy the requirements of Alaska "Fair Hearings" regulation 7 AAC 49.070.

In summary, the notice issued by the Division in this case did not comply with the requirements of regulation 7 AAC 49.070, *Baker v. State*, and/or *Allen v. State*, (discussed above and in the Principles of Law at page 3, above). The Division's notice dated March 16, 2011 was therefore not legally sufficient to deny the Claimant's February 3, 2011 application for Interim Assistance.

III. What is the Effect of the Division's Legally Insufficient Notice?

Under the Alaska Supreme Court's 2009 decision in *Allen*, defective notice cannot be cured by simply having a claimant go through the hearing process and thereby obtain the information that the initial notice should have contained. *See Allen*, footnote 68 at 1169. Accordingly, in this case the deficiencies with the Division's notice dated March 16, 2011 were not cured by the Claimant's participation in the hearing process.

In *Allen*, 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 legally sufficient eligibility denial / benefit denial notice to the Claimant.

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

CONCLUSIONS OF LAW

1. The Division's eligibility denial / benefit denial notice dated March 16, 2011 did not satisfy the minimum notice requirements of Alaska Fair Hearings regulation 7 AAC 49.070, or applicable Alaska Supreme Court decisions, with regard to the notice's purported denial of the Claimant's February 3, 2011 application for Interim Assistance benefits.
2. The deficiencies in the Division's eligibility denial / benefit denial notice dated March 16, 2011 have not been cured.
3. Accordingly, the Division was not correct when, on March 16, 2011, it notified the Claimant that it had denied his February 3, 2011 application for Interim Assistance benefits.

DECISION

The Division was not correct when, on March 16, 2011, it denied the Claimant's February 3, 2011 application for Interim Assistance 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. *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. To appeal, 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

DATED this 15th day of July, 2011.

(signed)

Jay Durych
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on July 15, 2011 true and correct copies of this document were sent to the Claimant via USPS mail, and to the remainder of the service list by secure / encrypted e-mail, as follows:

Claimant – Certified Mail, Return Receipt Requested

██████████, DPA Hearing Representative

██████████, DPA Hearing Representative

██████████, Policy & Program Development

██████████, Staff Development & Training

██████████, Administrative Assistant II

██████████, Eligibility Technician I

(signed)

By: _____

J. Albert Levitre, Jr.
Law Office Assistant I