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

In the Matter of:)	
)	
██████████,)	OHA Case No. 10-FH-251
)	
Claimant.)	DPA Case No. ██████████
_____)	

FAIR HEARING DECISION

STATEMENT OF THE CASE

██████████ (Claimant) was a recipient of Food Stamp Program benefits (Ex. 1). On July 22, 2010 the State of Alaska Division of Public Assistance (DPA or Division) mailed to the Claimant a notice advising that the Claimant's Food Stamp case would be closed after July 31, 2010 based on excess household income (Ex. 3). On July 27, 2010 the Claimant signed and dated a hearing request form (Ex. 4.1). The Claimant's hearing request was received by the Division that same date (Ex. 5).

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

The Claimant's hearing began as scheduled on August 26, 2010. However, on that date the Claimant requested that the hearing on the merits of the case be postponed to allow her time to receive and review the Position Statement and Exhibits mailed to her on August 23, 2010 by the Division. The Division did not object to the Claimant's request for postponement. Accordingly, the Claimant's hearing was continued to September 28, 2010.

The hearing proceeded as scheduled on September 28, 2010 before Hearing Examiner Jay Durych. The Claimant participated by telephone, represented herself, and testified on her own behalf. ██████████, a Public Assistance Analyst with the Division, attended the hearing in person to represent and testify on behalf of the Division. The testimony of the parties was received and all exhibits submitted were admitted into evidence. At the end of the hearing the record was closed and the case was submitted for decision.

ISSUE

Was the Division correct when, on July 22, 2010, it mailed notice to the Claimant that it would terminate the Claimant's Food Stamp Program benefits after July 31, 2010, based on the assertion that the Claimant's household's monthly income exceeded the Food Stamp Program's applicable monthly income limit for a household of seven (7) persons?

SUMMARY OF DECISION

The substantive issue originally posed in this case is whether the Claimant's household's monthly income exceeded the Food Stamp Program's applicable monthly income limit. However, in preparing this decision, it became evident that the Division failed to provide the Claimant with the minimum ten (10) days' notice of adverse action required by the applicable federal and state regulations (7 CFR § 273.13 and 7 AAC § 49.060), and by court decisions.

Because the Division's notice was not legally sufficient, the Division was not correct when, on July 22, 2010, it notified the Claimant that it was terminating her Food Stamp benefits after July 31, 2010, on the basis that the Claimant's monthly household income exceeded the Food Stamp Program's applicable monthly income limit for a household of seven (7) persons.

FINDINGS OF FACT

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

1. The Claimant and her household were recipients of Food Stamp Program benefits (Ex. 1).
2. On July 21, 2010 a DPA Eligibility Technician was informed that the Claimant's husband had become employed by ██████████ Construction Company effective July 19, 2010 (Ex. 2). ██████████ informed DPA that the Claimant's husband's employment would probably last "until September." *Id.* ██████████ informed DPA that the Claimant's husband would be paid \$22.25 per hour; that he would work 10 hours per day, 6 days per week; that he would be paid bi-weekly; and that his first paycheck would be issued on Friday, August 6, 2010. *Id.*
3. The Alaska Food Stamp Program's income limits and standard deductions for a seven (7) person household, effective during the period October 1, 2009 through September 30, 2010, were as follows (Ex. 10):

165% of federal poverty level	\$5,722.00
Gross Income Limit	\$4,508.00
Net Income Limit	\$3,468.00
Standard Deduction	\$256.00

4. On July 22, 2010 the Division mailed to the Claimant a notice advising that the Claimant's Food Stamp case would be closed after July 31, 2010 (Ex. 3). The notice stated in relevant part as follows:

Your Food Stamp case is closed. You will not get Food Stamps *after July 2010* because your total income is over the Food Stamp Program limit. [Emphasis added].

\$3,468.00 is the Food Stamp income limit for your household. \$4,751.40 is the countable income amount we used to figure your eligibility.

You may reapply for Food Stamps at any time with a new application.

This action is based on Food Stamp Manual Section 603-2.

Based on the report of new income from employment for [Claimant's husband], your household is now over-income for the Food Stamp Program. This is based on the report that [Claimant's husband] is receiving \$22.25 per hour, working 6 days per week, 10 hours per day, and paid bi-weekly

5. On July 27, 2010 the Claimant signed and dated a hearing request form (Ex. 4.1). The Claimant's hearing request was received by the Division that same date (Ex. 5).

6. At the hearing of September 28, 2010 the Claimant credibly testified in relevant part as follows:

a. Prior to his most recent (summer 2010) employment, her husband had not had a job in two years.

b. In her experience the Division has always estimated future income based on the last month's income. Her husband did not even receive a paycheck during the month of September 2010. Thus, in this case, the Division is attributing income to her family which they had not even received yet.

c. Her husband was laid-off from his employment on September 24, 2010. Thus, he is no longer earning the income that the Division estimated that he would earn back in July.

d. "Nobody knows what the future [holds] . . . not even the State of Alaska."

7. At the hearing of September 28, 2010 the Division's Hearing Representative credibly testified in relevant part as follows:

a. The Claimant's benefits were terminated in the middle of a recertification period.

b. When an individual is previously employed, the Division will average the person's last several months' income in prospectively estimating their future income. However, in this case, the Claimant's husband did not have any recent wages from recent employment. Accordingly, the only data that the Division had with which to estimate the

Claimant's husband's future income was the wage and hour information pertaining to his new job.

PRINCIPLES OF LAW

I. Burden of Proof and Standard of Proof.

This case involves the Division's termination of the Claimant's previously existing Food Stamp Benefits. Ordinarily, the party seeking a change in the status quo has the burden of proof.¹ Accordingly, because the Division is attempting to change the existing status quo by terminating benefits, the Division bears the burden of proof in these proceedings.

A party in an administrative proceeding can assume that "preponderance of the evidence" is the applicable standard of proof unless the governing statutes and/or regulations state otherwise.² The regulations applicable to this case do not specify any particular standard of proof. Accordingly, "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 facts sought to be proved are more probable than not or more likely than not.³

II. The Food Stamp Program – In General.

The Food Stamp program was established by the federal Food Stamp Act of 1977, codified at 7 USC Sections 2011 – 2029. The United States Department of Agriculture's Food and Nutrition Service has promulgated regulations to implement the Food Stamp Act. These regulations are codified primarily at 7 CFR Sections 271-274.

The Food Stamp Program has been delegated to the states for administration. 7 CFR Section 271.4. The Department of Health and Social Services administers the Food Stamp Program in Alaska, and has promulgated regulations which adopt the federal regulations (with certain minor variations as allowed by federal law). 7 CFR Section 272.7; 7 AAC 46.010 - 7 AAC 46.990.

III. The Food Stamp Program – Minimum Notice Requirements.

The Code of Federal Regulations (CFR) contains the federal rules stating what notice a State agency is required to provide a Food Stamp recipient before it reduces or terminates Food Stamp benefits. 7 CFR § 273.13, titled "Notice of Adverse Action," provides in relevant part as follows:

(a) *Use of notice.* Prior to any action to reduce or terminate a household's benefits within the certification period, the State agency shall . . . provide the household time and adequate advance notice before the adverse action is taken.

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).

(1) The notice of adverse action shall be considered timely if the advance notice period conforms to that period of time defined by the State agency as an adequate notice period for its public assistance caseload, provided that the period includes *at least 10 days from the date the notice is mailed to the date upon which the action becomes effective.* [Emphasis added].

The State of Alaska's Fair Hearing regulations are set forth in Title 7, Chapter 49 of the Alaska Administrative Code. State regulation 7 AAC 49.060 provides in relevant part that "the division shall give written notice to the client *at least 10 days* before the date the division intends to take action denying, suspending, reducing, or terminating assistance." [Emphasis added].

"The time in which an act provided by law is required to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded." AS 01.10.080. The term "law" includes regulations. *Perito v. Perito*, 756 P.2d 895, 898 (Alaska 1988).

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

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 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*

ANALYSIS

I. Introduction; Definition of Issues.

The substantive issue originally posed in this case is whether the Claimant's household's monthly income exceeded the Food Stamp Program's applicable monthly income limit. Neither party asserted that the notice of termination of benefits which the Division mailed to the Claimant was not legally sufficient.

However, during the Hearing Authority's preparation of this decision, it became evident that the formal written notice of benefit termination which the Division mailed to the Claimant might not be legally sufficient.⁷ This Office will not generally address an issue not raised by the parties. However, it is clear that the sufficiency of notice of adverse administrative action is an important "threshold" issue because it implicates Constitutional due process concerns.⁸ Accordingly, it is appropriate that the Hearing Authority address the legal sufficiency of the Division's notice, "sua sponte" or on its own initiative, even though the issue was not raised by the parties.⁹

The proper determination of this case thus requires the consideration of two sub-issues. These sub-issues are:

1. Was the Division's termination of benefits *procedurally correct* - i.e. did the Division follow the legally required procedures and give legally sufficient notice in terminating the Claimant's household's Food Stamp benefits?
2. Was the Division's termination of benefits *substantively correct* - i.e. did the Claimant's household's income really exceed the applicable Food Stamp Program maximum income limit?

If the answer to the first sub-issue (whether the Division followed the correct procedures / gave legally adequate notice in terminating the Claimant's benefits) is "no," it is not necessary to proceed to the second sub-issue (whether the Division's termination of benefits was

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.

⁷ This Office routinely examines the sufficiency of the formal notice of adverse action in all cases in which it renders a decision. However, in the vast majority of cases in which the Division's notices are legally sufficient, there is no need to explicitly discuss the issue, unless the sufficiency of notice has been contested by the Claimant.

⁸ See, for example, *Allen v. State of Alaska Department of Health & Social Services, Division of Public Assistance*, 203 P.3d 1155 (Alaska 2009) and the state and federal cases cited therein.

⁹ See discussion regarding the raising of issues by an adjudicative body on its own initiative in the Principles of Law at page 5, above.

substantively correct). Accordingly, the issue of whether the Division's termination of benefits was *procedurally correct* (whether notice was legally sufficient) must be considered first.

II. Did the Division Satisfy Minimum Notice Requirements in Terminating the Claimant's Food Stamp Benefits?

The facts pertaining to whether the Division provided legally adequate notice in this case are not in dispute. *On July 22, 2010* the Division mailed to the Claimant a notice advising that the Claimant's Food Stamp case would be closed *after July 2010* (Ex. 3). The notice stated in relevant part that "your Food Stamp case is closed [and] [y]ou will not get Food Stamps *after July 2010* because your total income is over the Food Stamp Program limit." *Id.* [Emphasis added].

The applicable federal and state regulations (7 CFR § 273.13 and 7 AAC § 49.060, respectively) each required the Division to provide the Claimant with the minimum of ten (10) days' notice of adverse action prior to terminating the Claimant's Food Stamp benefits. *However, the days counted as the first day of the ten day period, and the last day of the ten day period, differ between the two regulations*, as explained below.

A. Notice Requirements of the Federal Food Stamp Regulation.

The applicable federal Food Stamp regulation, 7 CFR § 273.13(a)(1), requires that the notice period "conform to that period of time defined by the State agency as an adequate notice period for its public assistance caseload, *provided that the period includes at least 10 days from the date the notice is mailed to the date upon which the action becomes effective*" [Emphasis added]. In other words, pursuant to 7 CFR § 273.13(a)(1), the notice period must be "at least 10 days from the date the notice is mailed to the date upon which the action becomes effective," *or* the "period of time defined by the State agency as an adequate notice period," *whichever is longer*. Pursuant to 7 CFR § 273.13(a)(1), the 10 days would start running on the date the notice was mailed and end on July 31, 2010.

In this case, the notice was mailed on July 22, 2010. The Division's notice stated that the Claimant's household would "not get Food Stamps *after July 2010*" (Ex. 3). Thus, the first day that the Claimant's household would not receive Food Stamp benefits would be August 1, 2010; this would be the effective date of the termination. There are ten (10) days from the date the notice was mailed (July 22) to the date upon which the termination became effective (August 1). Accordingly, *absent an applicable state regulation providing a longer notice period*, the Division's notice complied with the minimum ten day notice requirement of the applicable *federal* Food Stamp regulation, 7 CFR § 273.13(a)(1).

B. Notice Requirements of the State Regulation.

The federal regulation, 7 CFR § 273.13(a)(1), defers to the state regulation in situations where the state regulation provides for more notice than does the federal regulation (7 CFR § 273.13(a)(1)). See discussion in Analysis Section II(A), above. Thus, the federal regulation - 7 CFR § 273.13(a)(1) - merely provides a "floor" below which a state's notice requirements

cannot fall. If a state regulation provides for *more notice* than otherwise required by the federal regulation, then 7 CFR § 273.13(a)(1) requires that a state agency satisfy the more stringent state requirements.

The Division uses state regulation 7 AAC 49.060, (which is one of the State of Alaska's Fair Hearing regulations set forth in Title 7, Chapter 49 of the Alaska Administrative Code), to define the "adequate notice period for its public assistance caseload." 7 AAC 49.060 provides in relevant part that "the division shall give written notice to the client at least 10 days *before the date the division intends to take action* denying, suspending, reducing, or terminating assistance." [Emphasis added].

In calculating the ten day period under 7 AAC49.060, the first day (July 22 - the date the notice was mailed) - *is not counted* as part of the 10 day period. is excluded. See AS 01.10.080 and *Perito v. Perito*, 756 P.2d 895, 898 (Alaska 1988). Accordingly, the first day counted is July 23; it is "Day 1." There are 31 days in July. Accordingly, the tenth day is August 1, 2010. However, while 7 CFR § 273.13(a)(1) allows the termination to become effective on the tenth day, 7 AAC49.060 requires that ten days elapse "*before the date the division intends to take action.*" Thus, had the Division sought to terminate benefits on August 2, 2010, the Division's notice of July 22, 2010 would have been adequate under 7 AAC 49.060. However, because the Division sought to terminate benefits on August 1, 2010, the Division's notice of July 22, 2010 was one day "short" of adequate under 7 AAC 49.060.

Finally, because the Division's notice was not adequate under 7 AAC 49.060, and because 7 CFR § 273.13(a)(1) incorporates the notice period of 7 AAC 49.060 by reference (see discussion above), the Division's notice was also not adequate under 7 CFR § 273.13(a)(1). Accordingly, the Division was not correct when, on July 22, 2010, it notified the Claimant that it was terminating her Food Stamp benefits after July 31, 2010, on the basis that the Claimant's monthly household income exceeded the Food Stamp Program's applicable monthly income limit for a household of seven (7) persons.¹⁰

CONCLUSIONS OF LAW

1. The Division failed to provide the Claimant with the minimum ten (10) days' notice of adverse action required by the applicable federal and state regulations (7 CFR § 273.13 and 7 AAC § 49.060).
2. Accordingly, the Division was not correct when, on July 22, 2010, it notified the Claimant that it was terminating her Food Stamp benefits after July 31, 2010, on the basis that the Claimant's monthly household income exceeded the Food Stamp Program's applicable monthly income limit for a household of seven (7) persons.

¹⁰ Because the Division did not follow the correct procedures in terminating the Claimant's benefits, it is not necessary to proceed to the issue of whether the Division's termination of benefits was substantively correct.

DECISION

The Division was not correct when, on July 22, 2010, it notified the Claimant that it was terminating her Food Stamp benefits after July 31, 2010, on the basis that the Claimant's monthly household income exceeded the Food Stamp Program's applicable monthly income limit for a household of seven (7) persons.

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 October, 2010.

(signed)

Jay Durych
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on this 28th day of October 2010 true and correct copies of the foregoing decision were sent to the Claimant via U.S.P.S. mail, and to the remainder of the service list via e-mail on 10-29, as follows:

Claimant – Certified Mail, Return Receipt Requested
██████████, DPA Fair Hearing Representative

██████████, Director
██████████, Chief of Field Services
██████████, Policy & Program Development
██████████, Staff Development & Training
██████████, Administrative Assistant II
██████████, Eligibility Technician I

(signed)

J. Albert Levitre, Jr.
Law Office Assistant I