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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. 11-FH-120  
)  
Claimant. ) DPA Case No. ██████████  
\_\_\_\_\_ )

**FAIR HEARING DECISION**

**STATEMENT OF THE CASE**

██████████ (Claimant) completed and signed an application for Alaska Temporary Assistance Program, Family Medicaid Program, and Food Stamp Program benefits on January 20, 2011 (Exs. 2.0 – 2.9). The State of Alaska Division of Public Assistance (DPA or Division) received the Claimant’s application on January 24, 2011 (Ex. 2.0). On March 3, 2011 the Division mailed notices to the Claimant stating that his application had been denied for failure to provide information requested by the Division (Exs. 9.1, 9.3). The Claimant requested a hearing to contest the Division’s denial of his application on March 15, 2011 (Exs. 9.2, 9.4).

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

The Claimant’s hearing was held on June 15, 2011 before Hearing Examiner Jay Durych. The Claimant attended the hearing in person, represented himself, and testified on his own behalf. The Claimant’s mother, ██████████; the Claimant’s fiancée, ██████████; and the Claimant’s minor son, ██████████; also attended the hearing and testified on the Claimant’s behalf. DPA Public Assistance Analyst ██████████ attended the hearing in person and represented and testified on behalf of the Division. All testimony and exhibits offered by the parties were received into evidence. At the end of the hearing the record was closed and the case became ripe for decision.

**ISSUE**

Was the Division correct to deny the Claimant’s January 20, 2011 application for Alaska Temporary Assistance Program, Family Medicaid Program, and Food Stamp Program benefits on March 3, 2011, based on the Claimant’s alleged failure to timely provide information and/or documentation requested by the Division for the purpose of determining program eligibility?

## SUMMARY OF DECISION

The substantive issue originally posed in this case was whether the Division was correct to deny the Claimant's application for Alaska Temporary Assistance Program, Family Medicaid Program, and Food Stamp Program benefits dated January 20, 2011 based on the Claimant's alleged failure to timely provide information and/or documentation requested by the Division for the purpose of determining program eligibility. 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 Alaska "Fair Hearings" regulation (7 AAC § 49.060, applicable to all three programs at issue in this case).

Because the Division's notices failed to provide the Claimant with 10 days' notice of adverse action, the Division was not correct when, on March 3, 2011, it notified the Claimant that his January 20, 2011 application for Alaska Temporary Assistance Program, Family Medicaid Program, and Food Stamp Program benefits had been denied.

## FINDINGS OF FACT

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

1. The Claimant completed and signed an application for Alaska Temporary Assistance Program, Family Medicaid Program, and Food Stamp Program benefits on January 20, 2011 (Exs. 2.0 – 2.9). The Claimant's application sought benefits for a household of four (4) persons, including the Claimant's minor son (Exs. 2.1, 2.6). The Claimant's application was received by the Division on January 24, 2011 (Ex. 2.0).
2. On January 24, 2011 a DPA Eligibility Technician held an intake interview with the Claimant (Ex. 3). The Claimant and his fiancée told the DPA representative that the Claimant's minor son stayed with them from Monday through Friday of every week, and stayed with his mother, ██████████, on the weekends (Ex. 3). A school verification form was given to the Claimant during the interview (Ex. 3). One of the Division's records states that the Claimant completed his portion of the form and returned it to DPA within an hour (Ex. 3); another record states that the Claimant returned the form on February 7, 2011 (Ex. 5.1).
3. On January 24, 2011 the DPA Eligibility Technician contacted ██████████ by phone to verify which parent had physical custody of the minor child the majority of the time (Ex. 3). Ms. ██████████ stated that she had the minor child the majority of the time (Ex. 3).
4. Later in the day on January 24, 2011 Ms. ██████████ appeared in person at the DPA's office and met with the DPA Eligibility Technician handling the case (Ex. 3). Ms. ██████████ again asserted that she had physical custody of the minor child the majority of the time (Ex. 3). A school verification form was given to Ms. ██████████ to be completed and returned (Ex. 3).
5. On February 7, 2011 the Claimant returned his completed school verification form to the Division, indicating that he had physical custody of his minor child (Ex. 5.1). Later in the day on February 7, 2011 Ms. ██████████ again appeared in person at the DPA's office and met with a DPA Eligibility Technician (Ex. 4). Ms. ██████████ again asserted that she had physical custody of the minor child the majority of the time (Ex. 4).

6. Ten days later, on February 17, 2011, Ms. [REDACTED] returned her completed school verification form to the Division, indicating that she had physical custody of her minor child (Ex. 5.2).

7. On *February 22, 2011* the Division mailed a notice to the Claimant listing certain additional information and/or documentation that the Claimant was required to provide to enable DPA to complete the processing of the Claimant's application (Exs. 6.0 – 6.4). The notice stated in relevant part as follows [original formatting condensed for brevity]:

Your application . . . received on January 24, 2011, is being held because I need more information. Please give me the items listed at the bottom of this notice by *February 28, 2011* or your application may be denied. [Emphasis added].

. . . .

Items you need to send in: because another parent is claiming child is in their home we need to verify who has majority of custody for child in the months [for which] you are requesting assistance. Please complete a detailed custody calendar for the month of application and 2 months after [January – March, 2011] showing the date and times the child is in your home and date and times he is with his mother. We also ask that mother reviews and signs the custody calendars we are mailing to you.

8. The Claimant ultimately provided the documentation requested by the Division (Claimant's Exs. D - F; hearing testimony of Claimant, [REDACTED], and [REDACTED]). However, this information was not provided to the Division until sometime during March 2011, after the February 28, 2011 deadline stated in the DPA's notice. *Id.*

9. In 2011, the month of February contains 28 days.

10. On *March 3, 2011, nine (9) days after the date of the Division's request for additional information / documentation*, the Division mailed a notice to the Claimant stating that his application for Alaska Temporary Assistance Program benefits had been denied for failure to provide the information previously requested (Exs. 8.1, 9.1).

11. On *March 3, 2011, nine (9) days after the date of the Division's request for additional information / documentation*, the Division mailed a second notice to the Claimant stating that his application for Family Medicaid Program and Food Stamp Program benefits had been denied for failure to provide the information previously requested (Exs. 8.0, 9.3).

## PRINCIPLES OF LAW

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

This case involves an application for Alaska Temporary Assistance Program, Family Medicaid Program, and Food Stamp Program benefits. When an initial application is denied, the claimant / applicant bears the burden of proof <sup>1</sup> by a preponderance of the evidence. <sup>2</sup>

## II. The Alaska Temporary Assistance Program – in General.

The Alaska Temporary Assistance Program (“ATAP”) is a program created by the Alaska Statutes. See AS 47.05.010(1); AS 47.27.005 – AS 47.27.990. Because ATAP is a state program, its governing regulations are found in the Alaska Administrative Code. The Alaska Temporary Assistance Program’s regulations are set forth in 7 AAC 45.149 – 7 AAC 45.990.

## III. The Medicaid Program - In General.

Medicaid was established in 1965 by Title XIX of the Social Security Act to provide medical assistance to certain needy individuals and families. 42 USC § 1396 et. seq. On the federal level, the U.S. Department of Health and Human Services (“HHS”) administers the program through the Centers for Medicare and Medicaid Services (“CMS”). In Alaska, the State Department of Health and Social Services (“DHSS”) administers the Medicaid program at the state level.

Because Medicaid is a federal program, many of its requirements are contained in the Code of Federal Regulations (CFRs) at Title 42, Part 435 and Title 45, Part 233. The Medicaid Program’s general eligibility requirements are set forth at 42 CFR Sections 435.2 – 435.1102.

The State of Alaska’s statutes implementing the federal Medicaid Program are set forth at AS 47.07.010 – AS 47.07.900. The State of Alaska’s regulations implementing the Medicaid program are set forth in the Alaska Administrative Code at Title 7, Chapter 43 and Chapter 100 et. seq.

## IV. 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.

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<sup>1</sup> This case involves an application for renewal of Food Stamp benefits for a new certification period. Because of the manner in which the Food Stamp Program is administered, each recertification application involves a new and independent eligibility determination. See *Banks v. Block*, 700 F.2d 292, 296 – 297 (6<sup>th</sup> Cir. 1983). The Claimant therefore bears the burden of proof in this case.

<sup>2</sup> Preponderance of the evidence is the standard of proof generally applicable in administrative proceedings. *Amerada Hess Pipeline Corp. v. Alaska Public Utilities Commission*, 711 P.2d 1170 (Alaska 1986). The regulations applicable to this case do not specify any particular standard of proof. Accordingly, the “preponderance of the evidence” standard is the standard of proof applicable to this case. 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 1064 (West Publishing, 5<sup>th</sup> Edition, 1979).

## V. Minimum Notice Requirements.

State of Alaska “Fair Hearing” Regulation 7 AAC § 49.060 applies to the Alaska Temporary Assistance Program, the Family Medicaid Program, and the Food Stamp Program. See 7 AAC § 49.010(a). Regulation 7 AAC § 49.060 states in relevant part that “[t]he 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.”

“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” also includes regulations. *Perito v. Perito*, 756 P.2d 895, 898 (Alaska 1988).

“Administrative agencies are bound by their regulations just as the public is bound by them.” *Burke v. Houston NANA, L.L.C.*, 222 P.3d 851, 868 – 869 (Alaska 2010).

## VI. 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.<sup>3</sup> “[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.”<sup>4</sup> 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*.<sup>5</sup>

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

<sup>4</sup> *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).

<sup>5</sup> 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 (1<sup>st</sup> 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 (4<sup>th</sup> 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 (7<sup>th</sup> 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 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

## ANALYSIS

### I. Introduction; Definition of Issues.

The substantive issue originally posed in this case is whether the Division was correct to deny the Claimant's application for Alaska Temporary Assistance Program, Family Medicaid Program, and Food Stamp Program benefits dated January 20, 2011 based on the Claimant's alleged failure to timely provide information and/or documentation requested by the Division for the purpose of determining program eligibility.

However, during the Hearing Authority's preparation of this decision, it became evident that the eligibility denial notices which the Division mailed to the Claimant might not be legally sufficient.<sup>6</sup> 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 procedural due process concerns.<sup>7</sup> Accordingly, it is appropriate that the Hearing Authority address the legal sufficiency of the Division's notices, "sua sponte" or on its own initiative, even though the issue was not raised by the parties.<sup>8</sup>

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

1. Was the Division's denial of the Claimant's application for benefits *procedurally correct* - i.e. did the Division follow the legally required procedures and give legally sufficient notice in denying the Claimant's application for Alaska Temporary Assistance Program, Family Medicaid Program, and Food Stamp Program benefits?
2. Was the Division's denial of the Claimant's application for benefits *substantively correct* - i.e. did the Claimant fail to timely provide information and/or documentation requested by the Division for the purpose of determining program eligibility?

If the answer to the first sub-issue (whether the Division followed the correct procedures / gave legally adequate notice in denying the Claimant's application for benefits) is "no," it is not necessary to proceed to the second sub-issue (whether the Division's denial of eligibility / benefits was substantively correct). Accordingly, the issue of whether the Division's eligibility denial notice was *procedurally correct* - (whether notice was legally sufficient) - must be considered first.

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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.

<sup>6</sup> 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.

<sup>7</sup> 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.

<sup>8</sup> See discussion regarding the raising of issues by an adjudicative body on its own initiative in the Principles of Law at page 5, above.

## II. Did the Division's Notices Satisfy the Requirements of the Applicable Regulations?

The facts pertaining to whether the Division provided legally adequate notice in this case are not in dispute. On *February 22, 2011* the Division mailed a notice to the Claimant listing certain additional information and/or documentation that the Claimant was required to provide to enable DPA to complete the processing of the Claimant's application (Exs. 6.0 – 6.4). The notice stated in relevant part: “[p]lease give me the items listed at the bottom of this notice by February 28, 2011 or your application may be denied.” The Claimant failed to provide the Division with the requested information / documentation by the date specified (see Findings of Fact at Paragraph 8, above).

*On March 3, 2011, nine (9) days after the date of the Division's request for additional information / documentation*, the Division mailed two notices to the Claimant stating that his application for Alaska Temporary Assistance Program benefits, Family Medicaid Program benefits, and Food Stamp Program benefits, had been denied for failure to provide the information previously requested (Exs. 8.0, 8.1, 9.1, and 9.3). Thus, the Division denied the Claimant's application, as to all three programs, nine (9) days after the date the Division mailed its notice requesting additional information and/or documentation. Was this notice legally sufficient?

Alaska Fair Hearings regulation 7 AAC § 49.060 requires that the Division provide an applicant with at least ten (10) days' written notice prior to any denial of Alaska Temporary Assistance Program benefits, Food Stamp Program benefits, and/or Medicaid Program benefits. The Division's benefit denial notice dated February 22, 2011 was not legally sufficient under any of the three programs at issue because it gave the Claimant only nine (9) days to provide the information and/or documentation requested prior to denial of his application.

In summary, the notice of adverse action provided by the Division was one (1) day less than the notice period required by the applicable regulation (7 AAC § 49.060). Accordingly, the Division was not correct when on March 3, 2011 it denied the Claimant's application for Alaska Temporary Assistance Program, Family Medicaid Program, and Food Stamp Program benefits dated January 20, 2011.

### **CONCLUSIONS OF LAW**

1. The Division failed to provide ten (10) days' notice of adverse action, as required by Alaska Fair Hearings regulation 7 AAC § 49.060, prior to denying the Claimant's January 20, 2011 application for Alaska Temporary Assistance Program, Food Stamp Program, and Medicaid Program benefits.
2. Accordingly, the Division was not correct when, on March 3, 2011, it denied the Claimant's January 20, 2011 application for Alaska Temporary Assistance Program, Family Medicaid Program, and Food Stamp Program benefits.

### **DECISION**

The Division was not correct when, on March 3, 2011, it denied the Claimant's January 20, 2011 application for Alaska Temporary Assistance Program, Family Medicaid Program, and Food Stamp Program 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 1st day of August, 2011.

(signed)

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Jay Durych  
Hearing Authority

## CERTIFICATE OF SERVICE

I certify that on August 1, 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