

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL  
BY THE COMMISSIONER OF HEALTH AND SOCIAL SERVICES**

In the Matter of	)	
	)	
T J	)	OAH No. 16-1120-MDS
	)	Agency No.

**DECISION UPON SUMMARY ADJUDICATION**

**I. Introduction**

The Division of Senior and Disabilities Services (Division) issued T J a notice that it intended to terminate her Medicaid Waiver benefits. Ms. J appealed. Because, as a matter of law, the Division did not provide Ms. J with adequate notice, the Division’s termination decision is REVERSED.

**II. Procedural History**

This is the third case concerning the Division’s January 12, 2016 assessment of Ms. J. The first case was 16-0537-MDS. In that case, the Division sought to terminate Ms. J’s Medicaid Waiver benefits. The Division, however, failed to conduct the statutorily-required comparative analysis before termination, and summary adjudication was entered in Ms. J’s favor. The second case was 16-0885-MDS. In that case, the Division sought to terminate Ms. J’s PCA services; after a hearing, Ms. J partially prevailed on the merits and some services were restored. This third case results from the Division renoticing Ms. J that it was going to terminate her Medicaid Waiver benefits.

Both sides moved for summary adjudication. The Division’s motion argued that the decision issued in the prior PCA services case conclusively established that Ms. J no longer qualifies for Medicaid Waiver benefits. That motion was denied.

Ms. J sought summary adjudication on the ground that the Division failed to comply with the requirements enunciated in the *Krone*<sup>1</sup> class action case, specifically (1) that it did not conduct the statutorily required comparative analysis prior to termination, and (2) that it failed to provide a detailed explanation to Ms. J of how it came to its conclusion that she no longer qualified for Medicaid Waiver benefits. Ms. J’s motion was denied as to the comparative analysis requirement. This left the issue of whether the termination notice was defective because

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<sup>1</sup> *Krone, et. al., v. State, Dept of Health and Social Services*, Superior Court Case No. 3AN-05-10283 CI (October 1, 2014 Order, pp. 6 - 7).

it did allegedly did not provide a clear explanation of how the Division determined that Ms. J no longer qualified for Medicaid Waiver benefits. This issue is addressed below.

### III. Facts

Ms. J is 58 years old. She has serious health problems. She applied for Medicaid Waiver benefits in 2014. The Division assessed her to determine her eligibility. It denied her application based upon its assessment that her level of care need was not sufficiently acute to qualify her for Medicaid Waiver benefits.<sup>2</sup> However, Ms. J requested a hearing, and the parties resolved the case during the hearing process. In that resolution, the Division found that Ms. J was eligible for Medicaid Waiver benefits. The central fact in that eligibility finding was that Ms. J was participating in cardiac rehabilitation. This circumstance, when combined with adjustment of the scoring for Ms. J's activities of daily living (ADLs), made her eligible. The adjusted ADL scores were: "3/2 for transfers, 2/2 for locomotion, and 3/2 for toilet use."<sup>3</sup>

The Division reassessed Ms. J on January 12, 2016 to determine whether she continued to be eligible for Medicaid Waiver benefits. The assessment result, as reflected on her 2016 Consumer Assessment Tool (CAT), was that she was not eligible.<sup>4</sup> As discussed above, the Division's sent an initial termination notice, which led to a reversal in Case No. 16-0537-MDS. On September 9, 2016, the Division sent Ms. J a second notice that her Medicaid Waiver benefits would be terminated.<sup>5</sup>

The September 9, 2016 notice consists of a letter along with over 300 pages of attachments, some of which are duplicates.<sup>6</sup> The letter informed Ms. J that the Division

has determined that you have materially improved since you last qualified for the waiver program on **05/06/2015**. This means that you no longer meet nursing facility level of care or qualify for Medicaid waiver services.<sup>7</sup>

The letter then recites the process that the Division used and the documents it reviewed in making its determination. However, the letter does not explain the reasons why it concluded that Ms. J was no longer Waiver eligible. Instead, it refers to the *Material Improvement Reporting Form*, which is included as part of the attachments to the termination letter. The *Material Improvement Reporting Form* consists of multiple pages. The first three pages contain check

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<sup>2</sup> See Ex. F, pp. 13 - 41.

<sup>3</sup> Ex. F, p. 277.

<sup>4</sup> Ex. E, p. 29.

<sup>5</sup> Ex. D.

<sup>6</sup> Exs. D, E, and F.

<sup>7</sup> Ex. D, p. 1 (emphasis in original).

lists of various medical conditions/treatments over time (as shown on the 2014 CAT, in the parties' resolution of the fair hearing on the 2014 CAT, and the January 12, 2016 CAT).<sup>8</sup> The next page contains a chart showing the scoring for Ms. J's scored activities of daily living over that same period.<sup>9</sup> That chart contains four columns. The first column covers the unmodified 2014 CAT. The second column appears to cover the 2014 CAT, as it was modified by the resolution of the parties' dispute in the 2015 fair hearing case. The third column covers the January 2016 CAT. The fourth column contains comments. However, the second column, which deals with the 2014 CAT as modified by settlement, contains clear errors. For instance, the scoring for the activities of daily living (ADLs) contains the unmodified scoring for those ADLs.<sup>10</sup>

The next two pages of the *Material Improvement Reporting* form consist of written comments. Those two pages recite Ms. J's history and the 2014 and 2016 assessments in a fair amount of detail.<sup>11</sup> In the comments, the Division concludes that Ms. J "as indicated above no longer meets the criteria for Nursing Facility Level of Care" and that she does not qualify for Waiver benefits. However, no underlying reasoning for that conclusion is provided. Instead, there is a recitation of facts without a discussion of their import nor an explanation of how those facts lead to the Division's conclusion.<sup>12</sup>

#### **IV. Discussion**

Ms. J filed a motion for summary adjudication in her favor. Summary adjudication in an administrative proceeding is the equivalent of summary judgment in a court proceeding.<sup>13</sup> It is a means of resolving disputes without a hearing when the central underlying facts are not in contention, but only the legal implications of those facts. Under these circumstances, the evidentiary hearing is not required.<sup>14</sup>

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<sup>8</sup> Ex. F, pp. 273 – 275.

<sup>9</sup> Ex. F, p. 276.

<sup>10</sup> Ex. F, p. 276.

<sup>11</sup> Ex. F, pp. 277 – 278.

<sup>12</sup> Ex. F, p. 278.

<sup>13</sup> See, e.g., *Schikora v. State, Dept. of Revenue*, 7 P.3d 938, 940-41, 946 (Alaska 2000).

<sup>14</sup> See *Smith v. State of Alaska*, 790 P.2d 1352, 1353 (Alaska 1990); 2 Pierce, *Administrative Law Treatise* § 9.5 at 813 (5th ed. 2010).

Ms. J's motion argued that the Division's termination letter fails to comply with the *Krone* order which requires that the "State must provide a detailed explanation of why it came to" the conclusion that a recipient "is no longer eligible for the Waiver program."<sup>15</sup>

A review of the Division's September 9, 2016 termination notice and attached *Material Improvement Reporting* form does not reveal anything that could be described as either a coherent or detailed explanation of why the Division concluded that Ms. J was no longer Waiver eligible. Instead, there are voluminous attachments, and a detailed recitation of various facts. While a sophisticated party familiar with the nuances of the Medicaid Waiver program's eligibility requirements could infer from those the Division's reasoning as to why Ms. J no longer qualified, it is the Division's responsibility under *Krone* to explicitly supply that reasoning. On its face, the Division has failed to comply with the *Krone* order.

The previously-issued partial summary adjudication order stated that this was not a procedural due process issue. After reviewing the applicable case law, this previous holding is rejected. In *Baker v. State*, a case involving procedural due process notice requirement for termination or reduction of PCA services, the Alaska Supreme Court held that before the Division terminated or reduced benefits, it must first provide adequate notice to recipients:

We agree that decisional law strongly supports the position that "due process requires an explanation of the *specific* reasons for reducing . . . benefits." . . . to the extent feasible, the department should be required to show how and why it determined that a reduction in PCA services was in order.<sup>16</sup>

The *Baker* Court further stated "due process demands that recipients facing a reduction in their public assistance benefits be provided a meaningful opportunity to understand, review, and where appropriate, challenge the department's action."<sup>17</sup> Importantly, the context in which *Baker* was decided makes it clear that this requirement attached at the point of the initial agency decision, **before** administrative appeal. The *Krone* requirement that the Division provide a detailed explanation is therefore a rephrasing of the Division's initial notice requirements elucidated by the Alaska Supreme Court. Accordingly, because the Division's termination notice does not contain a detailed explanation of how Ms. J's condition has improved, since her previous finding of eligibility, such that she no longer qualifies for Medicaid Waiver benefits, it

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<sup>15</sup> *Krone*, pp. 6 – 7.

<sup>16</sup> *Baker v. State, Dept. of Health and Social Services*, 191 P.3d 1005, 1011 (Alaska 2008) (citations omitted, emphasis in original).

<sup>17</sup> *Id.*

fails to comply with minimum procedural due process notice requirements. Consequently, the Division may not seek to terminate Ms. J's Medicaid Waiver benefits until it provides adequate notice.<sup>18</sup>

In Ms. J's case, a proper notice would have explained why the loss of the cardiac rehabilitation component of her care caused her overall score to fall below a qualifying level. This could be done, not by attaching hundreds of pages of raw paperwork, but by writing a few sentences of plain English.

## V. Conclusion

The Division's termination of Ms. J's Waiver benefits is REVERSED.

DATED this 30<sup>th</sup> day of December, 2016.

*Signed* \_\_\_\_\_

Lawrence A. Pederson  
Administrative Law Judge

## Adoption

The undersigned, by delegation from the Commissioner of Health and Social Services, adopts this Decision, under the authority of AS 44.64.060(e)(1), as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 18<sup>th</sup> day of January, 2017.

By: *Signed* \_\_\_\_\_

Name: Lawrence A. Pederson  
Title: Administrative Law Judge

[This document has been modified to conform to the technical standards for publication.]

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<sup>18</sup> The Division may pursue this termination action, if it renotices Ms. J. See *Allen v. State, Dept. of Health and Social Services*, 203 P.2d 1155, 1169 (Alaska 2009).