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

In the Matter of	)	
	)	
C M	)	OAH No. 14-0257-MDS
	)	Agency No.

DECISION

I. Introduction

This is a case in which the Division of Senior and Disabilities Services (DSDS) set out to re-assess a client for Personal Care Assistant (PCA) services, but went about it in a highly unconventional way. When the assessment process did not go smoothly, it abruptly terminated PCA services, giving a variety of explanations for its action over the course of several months. The assessment efforts and the termination notices do not create a record that can support termination. The termination decision will have to be vacated, although the agency is certainly free to conduct an assessment or investigation in the future and make a new decision on continued eligibility.

The participant in the PCA program whose benefits are at issue in this case is C M, an 81-year-old Tagalog-speaker who has previously been found to have some problems with cognition and memory.[1] Mr. M's PCA is a family friend, P Q. Mr. M has given a power of attorney to N Q, the wife of P. N Q simultaneously serves as PCA to Mr. M's wife, R (who appears to be more impaired than Mr. M), for whom P holds a power of attorney. This arrangement has been in place for some time and appears to have been tolerated by DSDS;[2] it has not been part of any of the rationales for termination that DSDS has advanced so far in this case. The agency has determined that N Q is eligible to direct Mr. M's PCA services under the consumer-directed model.[3] Both PCAs are employed through No Name, LLC.

This case turns on procedural history rather than on the scoring of an assessment. The fact section below sets out that history.

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1 *See* Ex. E (2012 CAT).

2 *See, e.g.,* Ex. E; *see also* attachment to notice letter of May 9, 2014; direct testimony of Kichura (4/15/14 recording at 67:40ff.). Ms. Kichura is concerned about the arrangement, but it has not been advanced as a basis for termination.

3 Ex. E, p. 31

II. Facts

A. Assessment Efforts

The assessment process in this case began in an unremarkable way. C M, who had been receiving PCA services, was due for his annual reassessment. On December 23, 2013, DSDS scheduled the assessment for January 6, 2014. The agency simultaneously notified Mr. M's PCA agency, No Name, of the scheduled assessment.[4] The assessment was scheduled to coincide with an assessment of Mr. M's wife, R M.

On January 6, Agency nurse Denise Kichura came to the house, accompanied by a Tagalog interpreter. Mr. and Mrs. M and a representative from their PCA agency were present, as well as N Q.[5]

Ms. Kichura first assessed R M. Everyone in the home seems to have cooperated with this process, but the assessment "took some time to complete."[6] When Ms. Kichura was ready to turn her attention to C M, she found him lying on his back, apparently in distress and pain.[7] She suspected a hip fracture.[8] Others in the home expressed puzzlement at the situation, reporting that Mr. M had been walking that morning.[9] Ms. Kichura urged those present to get medical attention for Mr. M, and they promised to do so.[10] She terminated the assessment due to the apparent medical problem, stating that it would have to be rescheduled.[11]

The irregularities in this case begin with the rescheduling process. It may be that, while still at the house on January 6, Ms. Kichura discussed the possibility that the assessment would be rescheduled to the following Monday, January 13. In support of this, the agency has supplied an excerpt from a log of some kind (without providing a complete document) that suggests that Ms. Kichura mentioned she had an opening the next week, and that she contacted the SDS

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4 Ex. K; Ex. M, p. 2; direct testimony of K.

5 Testimony of Kichura and K.

DSDS acknowledged at the hearing that Mrs. Q holds a POA for Mr. M, but the agency has been inconsistent in whether it regards her as Mr. M's attorney-in-fact. It listed her as such in a 2012 assessment (Ex. E, pp. 2, 28), and accepted her signature on Mr. M's behalf on a 2013 rights and responsibilities form. Yet it failed to notify her when it first terminated Mr. M's PCA services (Ex. C, p. 2). A month later, in a replacement termination letter, it did notify her (Ex. F, p. 2), and yet when that notification was appealed to OAH, it failed to list her on the case referral notice. DSDS returned to treating Ms. Q as attorney-in-fact two months later, in its third notice of termination dated May 9, 2014.

6 Direct testimony of Kichura.

7 *Id*.

8 *Id.*

9 *Id*.; testimony of K on cross-examination.

10 *Id*.

11 *Id.*

scheduler to request that an assessment be set up.[12] On the other hand, E K of No Name testified credibly that he was only aware that the assessment was to be rescheduled, and did not know exactly when.[13] Moreover, Ms. Kichura herself testified to trying to reach the people at the M residence by phone, apparently on the 13th itself, and said that she made the call "because I wanted to see if I could see her at 10:30"[14]—testimony that confirms that any plan to return to the M home on that date was vague or tentative at best. It is clear is that no definitive notification of any subsequent assessment was sent to the PCA agency on January 6 or, indeed, on any date prior to January 13.[15]

On Monday, January 13, at 10:30 a.m., Nurse Kichura appeared at the M home for a follow-up assessment. On Monday, January 13, at 10:37 a.m.—seven minutes ***after***[16] the assessment was to start—the following notice was transmitted to No Name:

> An assessment has been scheduled for Monday, January 13, 2014, at 10:30 AM.
>
> You have been identified as someone that may have important information regarding this person's needs/abilities. Please plan on attending this appointment. The assessor will review any medical, functional and health related information from the past 12 months and/or the previous assessment, but can only do so if the records are provided.
>
> If you wish to send SDS copies of any medical, functional, or health related records, please fax them . . . .
>
> If the person being assessed requires that a language interpreter be present during the assessment, please notify SDS . . . .
>
> Also, please let SDS know if you cannot make the assessment or if the assessment needs to be rescheduled for another reason.
>
> Thank you for your assistance and cooperation!
>
> SDS Staff[17]

When Ms. Kichura appeared at the house at 10:30, Ms. N let her in but gave the appearance of being "surprised" and indicated that Mr. M had a doctor's appointment that morning.[18] Ms.

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[12] Ex. M, p. 1. This document cannot be given much weight because it is inconsistent with Ms. Kichura's own testimony. It indicates that Mr. M's medical problem on January 6 manifested itself "[u]pon arriving with interpreter." However, Ms. Kichura gave detailed testimony on April 15 indicating that the problem arose much later, not upon arrival. One is left with the impression that Exhibit M, page 1—which was not produced until May 14—is something other than a contemporaneously-prepared log.

[13] Testimony of K on cross-examination (5/13/14 recording at 30:45ff.).

[14] Direct testimony of Kichura (4/15/14 recording at 41:07ff).

[15] Ex. M, p. 2.

[16] At the second, May 13 hearing session, the agency asked for the record to be kept open so it could submit proof that No Name knew in advance about the second assessment. The agency clearly believed that it had given the advance notice, and that belief had played a role in its evaluation of this case. However, the documents DSDS submitted on May 14 proved the opposite of what the agency submitted them to prove.

[17] Ex. M, pp. 3-4.

Kichura told Mr. M that she "could come back later" and "that there must have been a misunderstanding."[19] Ms. Kichura indicated she would come back at "around three o'clock."[20] Notwithstanding the lack of prior notice and her statement that "there must have been a misunderstanding," Ms. Kichura told Mr. M and Mr. and Mrs. Q that if she came back, the PCA would have to pay the interpreter $150.[21] The PCA agreed to pay.[22]

Ms. Kichura then went and ate her lunch in her car, keeping the house under surveillance for part of the intervening period.[23] She returned for the assessment in the afternoon. There is no evidence that any notice of the afternoon assessment was given to No Name.

The afternoon assessment did not go well. Mr. M appeared to Ms. Kichura to be mentally impaired, and she considered calling 911. Mr. M, his POA, and his PCA wanted to go ahead with the assessment, but Ms. Kichura "didn't think it, it was appropriate," and she apparently said "I believe we have to reschedule this because it appears that he's mentally impaired."[24]

B. Termination and Notices

The agency did not reschedule the assessment. The next day, January 14, it issued a letter terminating PCA services, effective 30 days hence, on the ground that the agency "has been unable to schedule or conduct an assessment."[25] The agency did copy No Name with this notice (as well as with the subsequent letter, discussed below, that vacated and withdrew this notice[26]). The agency did not copy N Q with the January 14 notice, notwithstanding her approved status as the person holding a power of attorney and eligible to direct Mr. M's PCA services under the consumer-directed model.

The rationale advance in the January 14 notice was that "SDS has been unable to complete your assessment."[27] The notice cited appropriate regulations and invited the recipient

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18 Direct testimony of Kichura.

19 *Id*. (4/15/14 recording at 45:00).

20 *Id*. (4/15/14 recording at 46:20).

21 *Id*. (4/15/14 recording at 60:00).

22 *Id*. (4/15/14 recording at 61:00). The ALJ encourages DSDS to seek legal advice about whether it is permissible for Ms. Kichura to ask for a payment of this kind, and whether it is permissible for the interpreter to receive it. In this particular case, the record is unclear as to whether the payment was actually made, but it was certainly demanded.

23 Ms. Kichura was surreptitiously watching goings-on in the house through the front window. The observations she made using that methodology have not been relied on in this decision.

24 Direct testimony of Kichura (4/15/14 recording at 53:00 – 60:00).

25 Ex. C, p. 2.

26 Ex. 4, p. 3.

27 Ex. C, p. 2.

to contact DSDS to reschedule. To anticipate the legal issues to some degree, one can say that apart from the failure to send it to the legally responsible party, there may have been nothing fundamentally wrong with the January 14 notice. However, that notice is a dead letter because, on February 13, 2014, DSDS replaced it with a corrected notice.[28] Rodney George, the acting manager of the PCA unit, has testified unequivocally that the intent was to withdraw the January 14 notice "retracting" and replacing it completely.[29]

The February 13 notice terminated PCA services on the single ground that "you appear to have misrepresented your level of need."[30] It cited no legal authority for terminating on this basis. The notice was addressed to the correct parties (including Mrs. Q), and gave notice of appeal rights. It had an effective date ten days from the date of the notice, or February 23, 2014.

On February 20, 2014, C M appealed the decision set out in the February 13 notice.[31] DSDS referred the case to the Office of Administrative Hearings (OAH), omitting to list Mrs. Q on the notice of referral. OAH convened a hearing on April 15, 2014. At the conclusion of the April 15 session, the ALJ noted a concern about whether it would legally be possible for the agency to prevail, given its subsequent February 13 letter withdrawing its January 14 decision and replacing it with a new one that relied on no identifiable legal authority. The agency moved for a 30-day continuance of the hearing to allow it to "review the notices." Over objection from Mr. M, and after explaining that a review might cause the termination case to go away, the ALJ granted the motion. A second hearing session was scheduled for May 13, 2014.

Two business days before the second session, DSDS used certified mail to send a third notice of termination, addressing it to both Mr. M and Mrs. Q.[32] The third notice is quite ambiguous in some respects, but—reading it in the light most generous to the division—it terminates PCA services for two independent reasons: (1) that Mr. M failed to cooperate in the division's efforts to reassess the client on three separate occasions, despite DSDS attempts to accommodate "your requests for rescheduling";[33] and (2) that Mr. M has had a "material change

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[28] Ex. F, p. 2.

[29] Testimony of George in response to ALJ, Ybarra, and Q questions (4/15/14 recording at 1:45:30 – 1:48:30, 1:50:20).

[30] Ex. F, p. 2.

[31] Ex. F, p. 1.

[32] The two recipients have different mailing addresses, and yet the notice letter lists only one certified mail number. This suggests that the notice was not actually mailed to both individuals. However, this issue was not explored at the hearing.

[33] Notice letter of May 9, 2014, p. 2. The way the letter is written, it is not clear that DSDS is actually terminating on this basis, or simply saying that it would be justified to do so. The discussion of noncooperation is followed by a sentence beginning with the word "However," going on from there to terminate on the basis that Mr.

of condition" and no longer has a medical/functional need for PCA services.[34] The discussion of the first ground appropriately cites as its legal basis the regulations in 7 AAC 125 that require annual assessments. The discussion of the second ground cites 7 AAC 126.026 as its legal basis. This is a typographical error, because there is no such regulation (Title 7 of the Alaska Administrative Code has no chapter 126).

The third notice specifies no effective date for the agency action it announces. The introductory language in the notice implies that it is an amplification of the February 13 notice, and thus one could surmise that the February 23 effective date of that notice was carried over to the new notice.

The third notice is more detailed than the second in setting out the particular physical observations made by the nurse-assessor that led the agency to believe that his support needs no longer justify PCA services. Mr. M received the third notice on May 12, 2014.[35] The final hearing session was May 13, 2014. At this point in the case, nurse Kichura had already completed her testimony. She attended the second hearing session, and presumably Mr. M's lay representative could have recalled her to the stand for further examination, if he knew enough about procedure to ask to do so. This issue was not discussed, and Ms. Kichura was not returned to the stand.

III. Analysis

This is a termination case. The burden of proof to demonstrate that Mr. M's services should terminate falls on DSDS.[36]

A. Notice Issues

Apart from exceptional circumstances that do not apply here,[37] department regulation 7 AAC 49.070 requires the department to give a recipient written notice before it reduces or terminates benefits.[38] The notice must "state the reasons for the proposed action, including the

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M's functional condition does not justify PCA services. One could read this passage as saying that the agency would be justified to terminate for a procedural reason (noncooperation), but elects instead to terminate on the basis of substantive ineligibility (functional improvement).

[34] *Id*., p. 3.

[35] Statement on the record of P Q (5/13/14 recording at 2:55:30). Fortunately for the division, the certified letter took only one business day to go through the mail and Mr. M's PCA picked it up for him immediately.

[36] 7 AAC 49.135.

[37] The exceptional circumstances are found in 7 AAC 49.060(1) – (8). No one has contended that any of them apply in this case.

[38] The Department of Health and Social Services' "Fair Hearings" regulations in 7 AAC 49 apply to the Medicaid Program. *See* 7 AAC 49.010(a).

statute, regulation, or policy upon which that action is based."[39] The notice must be given "not later than 10 days before the date the department intends to take the action."[40]

In this case, the first notice is a dead letter because it was withdrawn (it was also probably defective on account of the failure to send it to Mrs. Q, whom the agency had recognized as the legally responsible party). The second notice was plainly defective because, although it alluded to some background regulations such as the one making the Consumer Assessment Tool applicable to PCA assessments, it cited no "statute, regulation, or policy" upon which a termination for "misrepresentation" could be based.[41] DSDS did not contest the inadequacy of the second notice at the hearing.

What DSDS has chosen to do about the defective second notice is to attempt to cure it through a third notice issued just before the end of the hearing. There were other courses that might have been followed after notice problems came to light during the first hearing session, but they were not chosen. The chosen course is problematic for four reasons.

First, it is not at all clear that a defective notice of this kind can be cured by sending supplemental notices that provide the missing information. In *Allen v. State, Department of Health and Social Services,*[42] the Alaska Supreme Court addressed a very similar situation, in which the agency had issued a notice of a decision to recoup Food Stamp overpayments, but had neglected to include information about how the claim was calculated and about rights that the recipient had under law, both of which were required by the regulation governing notices.[43] Although the missing information had arguably been supplied in later notices and the recipient was actually aware of her rights, the court nonetheless held that the notice defects "were not cured" because "giving notice that complies with the regulations is prerequisite" to the regulatory action.[44] The court required the agency to start over.[45]

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39 7 AAC 49.070.

40 7 AAC 49.060.

41 This decision should not be read to imply that deliberate misrepresentation could not be a program violation or a basis for exclusion from the program. The sentence in the text is merely intended to note that the agency cited no legal or policy authority in its notice. Notices are supposed to include such authority.

42 203 P.3d 1155 (Alaska 2009).

43 *Id*. at 1166-68.

44 *Id*. at 1169.

45 *Id.* ("if the Agency wishes to pursue its recoupment claims . . ., it must issue . . . notices that comply with the . . . regulation").

In *Baker v. State, Department of Health and Social Services,* the Supreme Court held the department to strict compliance with the applicable notice regulations in the context of a reduction of PCA services. 191 P.3d 1005 (Alaska 2008). That case did not involve the issue of after-the-fact curative notices, but it gives little encouragement to the view that the rigorousness applied to the Food Stamp program in *Allen* would be relaxed if the Supreme Court were to encounter a similar issue in the PCA program.

Second, and somewhat relatedly, the Department of Health and Social Services has already held that corrective notices sent under 7 AAC 49 cannot be made retroactive—that is, they must take effect prospectively, ten days or more after the correct notice was given.[46] The May 9 notice did not expressly state an effective date (which may be a notice defect in itself), but it implied that it was an amplification of the February 13 notice, which expressly set an effective date of February 23, 2014. Thus, the May 9 notice, even if it was legally sufficient in the information it provided, was nonetheless defective because it was not provided "10 days before the date the department intends to take the action."[47]

Third, with respect to the second of the two grounds it gave for termination (material change of condition), the May 9 notice was defective because it cited a nonexistent regulation as its authority.

Fourth, again with respect to the second ground, the May 9 notice raises due process concerns. By shifting the ground for termination from misrepresentation to need, it put the details of Mr. M's actual physical condition directly at issue, but it did so after the nurse-assessor—on whose observations it was based—had already completed her testimony and cross-examination. Had the ALJ fully appreciated this at the time, he would have made sure Mr. M's representative knew he could reopen the questioning of the nurse. However, the ALJ did not do so, and DSDS did not ask the ALJ to do so.

B. Alleged Failure to Cooperate with Assessment

The division's final notice letter correctly notes that the agency cannot approve continued PCA services without the required assessment, and hence there is an implied duty for a recipient desiring continued services to cooperate in making him or herself available for the assessment. The agency informs recipients of this responsibility, and N Q acknowledged the responsibility when she signed a renewal application for Mr. M in late 2013.[48] The division did not, however, demonstrate a failure to cooperate in this case.

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[46] *In re Q.S.*, OAH No. 13-1460-CMB (Comm'r of Health & Soc. Serv., adopted by delegation Dec. 2, 2013) (http://aws.state.ak.us/officeofadminhearings/Documents/CMB/CMB131460.pdf); *In re R.B.*, OAH No. 12-0371-CMB (Comm'r of Health & Soc. Serv., adopted by delegation Oct. 11, 2012) (http://aws.state.ak.us/officeofadminhearings/Documents/CMB/CMB120371.pdf).

[47] 7 AAC 49.060.

[48] Recipient Rights and Responsibilities (attached to May 9, 2014 notice letter), at 1 ("I am responsible for . . . cooperating with SDS in the scheduling and completion of my eligibility assessment").

On January 6, the Qs and Ms did cooperate in the assessment of R M, but nurse Kichura concluded that C M was having a medical emergency—she suspected a hip fracture—and she took the initiative to call off the assessment. A medical emergency is not a failure to cooperate.

On January 13, the morning assessment attempt must be disregarded because nurse Kichura may have shown up without prior arrangement. The notice to the PCA agency was sent after she arrived, not before, and there is no clear evidence that the household was otherwise informed of her intentions a reasonable amount of time in advance. Ms. Kichura herself stated there must have been a misunderstanding. So far as we know, Mr. M had an appointment that morning; again, having a conflicting appointment when the assessor shows up unannounced is not noncooperation. Indeed, Mr. M's PCA was sufficiently anxious to cooperate that he acceded to Nurse Kichura's astonishing demand for $150 to induce her to come back.

Finally, the evidence is uncontroverted that the third assessment attempt was terminated solely at Ms. Kichura's initiative. Mr. M and the Qs all wanted to proceed. Nurse Kichura thought Mr. M was too impaired to participate properly, but she could have gone forward, simply recording on the Consumer Assessment Tool (CAT) any failures to attempt to perform the required tests or answer the required questions, and scoring it accordingly. She called off the assessment saying she would have to reschedule, and then did not reschedule. This does not establish a failure to cooperate by the recipient.

C. Alleged Material Improvement

The division's final notice makes findings about C M's cognitive abilities, ability to transfer unaided, and ability to locomote.[49] Based on these, it concludes that he does not have a functional/medical need for PCA services. However, the method prescribed by regulation for the division to determine a patient's need for PCA services is systematic evaluation of a large number of activities of daily living, instrumental activities of daily living, and other factors using the CAT.[50] There is no regulatory basis to determine eligibility based on an informal evaluation of just three items, wholly discarding the structure provided by the CAT.

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[49] May 9, 2014 notice letter at 3.

[50] *See*, *e.g.*, 7 AAC 125.020(a), (b).

IV. Conclusion

Because of improper notice, and also because of failure to establish a valid basis for termination, the decision of the Division of Senior and Disabilities Services to terminate the PCA services of C M must be reversed. This decision does not preclude a subsequent decision to terminate.

DATED this 6th day of September, 2014.

Signed
Christopher Kennedy
Administrative Law Judge

Adoption

The undersigned, by delegation from of 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 11th day of September, 2014.

By: *Signed*
Name: Lawrence A. Pederson
Title: Administrative Law Judge

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