

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

In the Matter of	)	
	)	
W G	)	OAH No. 13-1607-MDS
_____	)	Agency No.

**DECISION ON TIMELINESS**

**I. Introduction**

This matter came to the Office of Administrative Hearings as an appeal of a refusal to refer a prior appeal on the basis that the prior appeal was untimely. A telephonic hearing on the timeliness issue alone was held on December 3, 2013, with Ms. G representing herself.

The burden of proof to deny relief based on untimeliness falls on the party that asserts untimeliness. This is ordinarily not a difficult burden to meet. In this case, however, the Division made no attempt to meet its burden, and therefore it failed to establish that Ms. G's first appeal was untimely.

**II. Facts**

Following an assessment visit in April of 2013, the Division of Senior and Disabilities Services issued a decision by letter that reduced W G's PCA time from 34.5 hours per week to five hours per week.<sup>1</sup> The decision carried a date of August 12, 2013, but it was not mailed until August 14, 2013.<sup>2</sup> Ms. G received the letter soon thereafter.<sup>3</sup>

At some point, through a representative named C H, Ms. G apparently requested a fair hearing to contest the reduction. The Division asserts, with no supporting evidence, that it received the hearing request on September 26, 2013.

On October 4, 2013, the Division denied Ms. G's request for a hearing on the reduction on the basis that it was not made within the 30-day appeal window.<sup>4</sup> Ms. G requested a hearing on the timeliness decision,<sup>5</sup> and on November 13, 2013, the matter was referred to this office on the basis of the second hearing request.

At the hearing on the timeliness issue, the Division presented no evidence other than written exhibits it had circulated in advance of the hearing. Those exhibits did not include a

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<sup>1</sup> Ex. D, p. 3.  
<sup>2</sup> USPS tracking information, accessed on the record during the hearing.  
<sup>3</sup> Testimony of Ms. G.  
<sup>4</sup> Ex. D, p. 1.  
<sup>5</sup> Ex. C. The timeliness of the second hearing request has not been challenged.

copy of the original hearing request that the Division asserted to be untimely, nor any evidence of the date on which that request was received. Noting this gap in the record, the administrative law judge took the unusual step of reopening the record to permit the Division to submit a copy of the original hearing request, which presumably would carry a date stamp showing when it was received. The Division did not respond to the invitation to supplement the record.

### III. Analysis and Ruling

Under 7 AAC 49.030, a request for hearing in a public benefits case of this type must ordinarily be made “not later than 30 days after the date of the [required] notice.” The Department of Health and Social Services is authorized to entertain a hearing request made after the time limit “only if the administrative law judge finds . . . that the request for a hearing *could not* be filed within the time limit.”<sup>6</sup> This high standard would be difficult to meet in Ms. G’s case.<sup>7</sup> When an appeal is untimely under 7 AAC 49.030, Department of Health and Social Services regulations provide no discretion. The administrative law judge is required to dismiss the appeal.<sup>8</sup>

In this case, however, the Division has provided no evidence at all that the original hearing request was untimely. It has declined to supply a copy of the hearing request at issue, and it has provided no testimony or other documentation that might show the date on which the hearing request was received. As the party seeking to avoid a claim on the basis of untimeliness, the Division had the burden of proof to establish this very basic foundation for its defense.<sup>9</sup> If the defense had merit, there would be number of straightforward ways to establish this basic foundation, but none of them has been attempted here. The result is that the untimeliness defense is not established, and the case will go forward on the merits.

DATED this 10<sup>th</sup> day of December, 2013.

*Signed*

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Christopher Kennedy  
Administrative Law Judge

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

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<sup>6</sup> 7 AAC 49.030(a) (italics added).

<sup>7</sup> Ms. G seems to have been out of the hospital and largely in command of her own affairs for most of the 30 days following the original denial that she wished to challenge.

<sup>8</sup> 7 AAC 49.100(5). Dismissal authority in this situation is delegated by regulation to the administrative law judge; no proposed decision process under AS 44.64.060 is contemplated.

<sup>9</sup> See, e.g., *Ray v. Clements*, 700 F.3d 993, 1007-1008 (7<sup>th</sup> Cir. 2012).