

The thirtieth calendar day from December 2, 2013 was January 1, 2014. However, January 1 was a state holiday. Mr. J requested a fair hearing by e-mail on January 2, 2014. The Division received the e-mail on that date.⁴

On January 9, 2014, a Division contractor denied Mr. J's request for a hearing on the basis that it was not made within the 30-day appeal window as calculated by the contractor.⁵ Five days later, Mr. J requested a hearing on the timeliness decision.⁶ On February 13, 2014 (20 days past the statutory deadline for doing so⁷), the Division referred the matter 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 copy of the original hearing request that the Division asserted to be untimely, an omission that has been fatal to the Division's case in at least one prior timeliness appeal.⁸ The exhibits also included no evidence of the mailing history of the Division's original denial notice other than the U.S. Postal Service tracking log. The Division offered to submit an affidavit at a later time that might attest that the denial notice was placed in the mail on November 29, 2013, but the administrative law judge declined to keep the record open for this purpose.⁹

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 date of notice is the date the Division puts the notice in the mail.¹⁰

The date of the notice terminating Mr. J from the Choice Waiver program was therefore December 2, 2013. The thirtieth calendar day from that date would be January 1, 2014. However, Alaska Statute 01.10.080 provides that whenever the last day of a period provided by law would fall on a holiday, the holiday is excluded from the count. This means that the end of

⁴ Oral stipulation at hearing.

⁵ Ex. D, p. 1.

⁶ Ex. C, p. 1. There is no issue as to the timeliness of the second hearing request.

⁷ See AS 44.64.060(a).

⁸ See *In re W.G.*, OAH No. 13-1607- MDS (Office of Administrative Hearings, Dec. 10, 2013) (published at <http://aws.state.ak.us/officeofadminhearings/Documents/MDS/THR/MDS131607.pdf>).

⁹ The reasons for this ruling were: (1) that timeliness hearings are supposed to be prompt, streamlined proceedings; (2) that if the Division intended to contradict its own exhibit D-10, it should have been prepared to do so at the hearing; and (3) that it was unlikely that an affidavit could successfully override the official USPS record of the mailing date, which showed mailing on December 2.

¹⁰ *In re K.Q.*, OAH No. 13-1238-MDS (Office of Administrative Hearings, Nov. 4, 2013), Decision and Order of Dismissal at 3 n.17 (<http://aws.state.ak.us/officeofadminhearings/Documents/MDS/THR/MDS131238.pdf>).

the thirty-day window for appeal was actually the 31st day after December 2. The 31st day after December 2 was January 2, 2014. Mr. J's notice of appeal was delivered to the Division on that date. Accordingly, it was timely. The result is that the Division's untimeliness defense is not established, and the case will go forward on the merits.¹¹

Mr. J mentioned at the hearing that he has an Alaska Legal Services attorney who will represent him in proceedings on the merits of his eligibility. As discussed at the hearing, the attorney will have until March 13, 2014 to enter an appearance; if no appearance is entered by that date, a hearing will be scheduled without considering the attorney's availability.

DATED this 6th day of March, 2014.

Signed _____
Christopher Kennedy
Administrative Law Judge

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

¹¹ Authority to rule on dismissal in this situation is delegated by regulation to the administrative law judge; no proposed decision process under AS 44.64.060 is contemplated. See 7 AAC 49.100(5). It is possible that the Division has an appeal right to the Superior Court under AS 44.64.030(c).