

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

In the Matter of)
)
 B C)
_____)

OAH No. 14-0841-MDS
Agency No.

ORDER OF DISMISSAL FOR UNTIMELINESS

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 hearing on the timeliness issue alone was held on August 6, 2014. Ms. C was present, represented by her attorney-in-fact, N M. C. Testimony was taken from N C, from K G of No Name Agency X, and from E D of No Name Agency Y. Agency Exhibits A-D and C Exhibit 1 were taken into the record.

The undisputed evidence in this case shows that the request for a hearing submitted on B C's behalf was not sent to the state until after the 30-day appeal period had expired. Ms. C does not meet the single basis for making an exception to the deadline. Her appeal must therefore be dismissed. Ms. C may still have options for seeking to restore the services she has lost, but they do not play any part in this decision on timeliness.

II. Facts

B C plainly requires a great deal of care.¹ Prior to the events at issue in this case, she had been authorized to receive 80.5 hours per week of PCA time. Following a reassessment, the Division of Senior and Disabilities Services (DSDS) issued a decision on December 30, 2013 that reduced her PCA time to 57.75 hours.²

N C received the December 30 decision in early January.³ She signed a written request for a fair hearing, and on January 8, 2014 she gave the request to Z D, who was then an employee of No Name Agency Y, one of B C's PCA agencies.⁴ Ms. D was quite insistent that it would be best for her to submit the hearing request. Regrettably, however, Ms. D did not send

¹ Observation at hearing.

² These events are undisputed in this case, and are reflected, among other places, at Exhibit C, page 2. The actual reduction decision is not in the record, however, and likewise absent from the record is the direct proof that it was mailed to the appropriate address. In a timeliness case, it would be greatly preferable if DSDS would routinely include these items in the record. The inadequacy of records supplied in cases of this kind has been noted previously. See *In re K.J.*, OAH No. 14-0221-MDS (Comm'r of Health & Soc. Serv. 2014) (<http://aws.state.ak.us/officeofadminhearings/Documents/MDS/THR/MDS140221.pdf>).

³ Testimony of N C.

⁴ *Id.*; Ex. C, p. 2. The actual hearing request is at Ex. 1, p. 4.

the hearing request to the designated fair hearing mailbox, nor to any other state address.⁵ She filled out a scan cover sheet indicating she was sending the request to “PCA Mail Box,” but it is virtually certain that she only circulated it to individuals connected with Ms. C’s PCA agencies.⁶ However, because of the cover sheet, it was not obvious to them that she had failed to submit the request to the state.⁷

It is common for No Name Agency Y to submit hearing requests on behalf of clients. Normally, if they hear nothing back after about 30 days, No Name Agency Y would check the status of the appeal with the Department of Health and Social Services, re-sending the original hearing request. In this case, however, there is no indication that any follow-up occurred.⁸

On April 22, 2014, it came to the attention of N C and the PCA agencies that the hearing request had never been submitted.⁹ On that date, they submitted the January hearing request to Xerox, the state contractor designated to receive such requests.¹⁰

On May 9, 2014, DSDS rejected the hearing request as untimely.¹¹ By handwritten letter faxed from No Name Agency Y, N C promptly appealed the untimeliness determination.¹²

For reasons outside the scope of this decision, care has been maintained at close to the pre-reduction levels up to this point. N C has testified that if PCA time is ultimately reduced in accordance with the December 30 decision, she will have to institutionalize B C. While no finding is made on this issue, the testimony is not implausible.

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.”¹³ Thus, there are two questions in an appeal such as this one: was the hearing request made 30 or fewer days after the date of the notice and, if not, were the

⁵ Testimony of K G and E D.

⁶ *Id.*; Ex. 1.

⁷ Testimony of K G.

⁸ Testimony of E D (whole paragraph).

⁹ Testimony of K G.

¹⁰ Remarkably, DSDS did not include the April 22 correspondence in the record. It would typically be essential in a timeliness case for DSDS to include in the record the very item DSDS alleges to have been submitted late. However, in this case these facts are not disputed and were established by testimony.

¹¹ Ex. D.

¹² Ex. C.

¹³ 7 AAC 49.030(a) (italics added).

circumstances such that the request could not have been made on time? When an appeal is untimely under 7 AAC 49.030 and does not meet the single exception, department regulations provide no discretion. The appeal must be dismissed.¹⁴

In the present case, the hearing request was clearly late. The notice of the agency's decision was properly sent out close to its date of December 30, 2013, because Ms. C had received it by January 8. The hearing request was not sent until April 22, 2014, more than two months after the 30-day period would have expired.

The exception to the time limit does not apply. B C's guardian chose to rely on her PCA agency to make the hearing request, thus delegating the task of getting the request to the department. This was a reasonable choice in the circumstances, bearing in mind that No Name Agency Y is a large and reputable PCA agency that routinely performs this function for its clients, almost always without incident. Thus, if the standard for relief from the strict requirements of the appeal deadline were "reasonable cause" or "excusable neglect," Ms. C might well prevail. However, the Department of Health and Social Services made a policy decision in 2013 to adopt a new regulation that places a much higher burden on anyone seeking relief from the deadline. Ms. C's guardian has not shown that she *could not* have appealed within the deadline. The error of a third party, on whom the Medicaid client chose to rely, has previously been found not to meet the "could not" threshold for relaxing the deadline.¹⁵

Because the appeal was beyond the 30-day window and the narrow exception to the deadline does not apply in these circumstances, dismissal is mandatory. Ms. C's request for a hearing on the December 30, 2013, reduction of her PCA hours must be dismissed.

IV. Commissioner Adoption or Non-Adoption

In general, authority to dismiss cases for untimeliness has been delegated by regulation to the administrative law judge. However, in this case the ALJ mistakenly told Ms. C's representatives that they would be given an opportunity to contest any adverse decision through a proposal for action. Accordingly, the ALJ will decline to exercise his delegated authority and will allow the proposal for action process to occur in this case. To become final, this decision will have to be adopted following that process.

DATED this 22nd day of August, 2014.

Signed
Christopher Kennedy
Administrative Law Judge

¹⁴ 7 AAC 49.100(5).

¹⁵ *In re R.J.*, OAH No. 14-0428-MDS (Comm'r of Health & Soc. Serv. 2014) (publication pending).

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 12th day of September, 2014.

By: Signed
Name: Jared C. Kosin, J.D., M.B.A.
Title: Executive Director
Agency: Office of Rate Review, DHSS

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