

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

In the Matter of:)	
)	
N N)	OAH No. 12-0731-ATP
_____)	DPA Case No.

DECISION

I. Introduction

The issue in this case is whether N N requested a hearing, with regard to her Alaska Temporary Assistance Program¹ (ATAP) benefits, within the time period allowed by regulation. This decision concludes that Ms. N's hearing request was filed later than allowed, and that Ms. N has not demonstrated good cause to relax the applicable filing deadline. Accordingly, this case is dismissed, on procedural grounds, without reaching the merits of her case.

II. Facts

Ms. N applied for ATAP benefits on April 13, 2012.² On May 22, 2012, the Division of Public Assistance (DPA or Division) notified Ms. N that her application for ATAP benefits had been approved, retroactive to April 2012, but that a penalty had been imposed which decreased the amount of her ATAP benefits.³ The Division imposed the penalty based on its position that Ms. N had "failed to complete and submit a child support information form to the Public Assistance office."⁴ The Division's notice also advised Ms. N, however, that she had the right to show good cause for her failure to provide the form.⁵

The notice of May 22, 2012 was placed by the Division in the United States Mail on May 22, 2012, using Ms. N's last known address, in the normal course of the Division's business.⁶ The notice was not returned to the Division as unclaimed, undeliverable, etc. by the United States Postal Service.⁷ Ms. N acknowledged that she received the Division's notice sometime in June.⁸

¹ The Alaska Temporary Assistance Program (ATAP) is a program created by the Alaska Statutes to implement the federal program for Temporary Aid to Needy Families, or TANF. *See* AS 47.05.010(1); AS 47.27.005 – AS 47.27.990; 42 U.S.C. § 601 *et. seq.* ATAP's governing regulations are found in the Alaska Administrative Code at 7 AAC 45.149 – 7 AAC 45.990. AS 47.27.010.

² Ex. 2.

³ Ex. 2.

⁴ Ex. 2.

⁵ Ex. 2.

⁶ Jeff Miller hearing testimony.

⁷ Jeff Miller hearing testimony.

⁸ N N hearing testimony.

Ms. N testified that she contacted the Division by phone once or twice each month, beginning in June 2012, and that she requested a hearing as to the ATAP penalty during one or more of these calls.⁹ However, the Division has no record of any contact with Ms. N from the date the notice at issue was mailed on May 22, 2012 until September 28, 2012, when the Division received a phone call from Ms. N.¹⁰ The Division's records indicate that the phone call of September 28, 2012 involved Ms. N's Food Stamp benefits rather than her ATAP benefits.¹¹ The Division's records indicate that Ms. N did not request a hearing with regard to her ATAP penalty until October 5, 2012.¹²

On October 15, 2012 the Division referred Ms. N's hearing request to this Office. The Division simultaneously filed a motion to dismiss Ms. N's hearing request on the basis that "Ms. N is past the 30 day time frame to request a hearing."¹³

A limited hearing was held on October 29, 2012 to address Division's motion to dismiss Ms. N's case. The hearing began as scheduled. Testimony was received from both parties under oath. Ms. N indicated that her phone records would show that she had contact with the Division (and thus could have requested a hearing) during the thirty days following her receipt of the Division's notice. Based on Ms. N's statements, the parties were given until November 2, 2012 to provide documentary evidence showing contact between Ms. N and the Division from May 22, 2012 through October 5, 2012, prior to the motion to dismiss being ruled upon. The next day (October 30, 2012) the Division submitted its records, which showed no contact with Ms. N between the dates of May 23, 2012 until September 28, 2012. No records were received from Ms. N.

Ms. N's hearing reconvened on November 5, 2012. Ms. N stated that she had as yet been unable to obtain her telephone records, and requested additional time to obtain these records. The Division did not object to Ms. N's request. Accordingly, Ms. N's hearing was continued to November 19, 2012, giving Ms. N two more weeks to obtain the records at issue.

This Office attempted to contact the parties on November 19, 2012 at the scheduled hearing time. Ms. N was not available in person or by telephone. This Office waited for ten minutes or more after the hearing's scheduled start time for Ms. N to arrive or call-in. However, Ms. N did not do so. Accordingly, the hearing was adjourned and the record was closed.

⁹ N N hearing testimony.

¹⁰ Exs. 6, 7; Jeff Miller hearing testimony.

¹¹ Ex. 10; Jeff Miller hearing testimony.

¹² Exs. 5, 7; Jeff Miller hearing testimony.

¹³ See DPA's Petition to Deny Fair Hearing Request dated October 15, 2012.

III. Discussion

Ms. N's Fair Hearing Request with regard to the ATAP Program is governed by the Department of Health and Social Services' Fair Hearing regulations. These regulations are located in the Alaska Administrative Code at 7 AAC 49.010 – 7 AAC 49.900.

The regulation that governs the timeliness of hearing requests under the ATAP Program is 7 AAC 49.040. That regulation states that "[a] hearing is available upon request *only for those clients who make or mail an oral or written request within 30 days after receipt of notice* of the division action by which they are aggrieved" (emphasis added).

In this case, Ms. N neither argued nor proved a good-cause exception to enforcement of the thirty day hearing request deadline. Rather, she asserted that she had in fact notified the Division that she was requesting a hearing, by phone, within thirty days of her receipt of the Division's penalty notice. Ms. N was given the opportunity to provide telephone records to substantiate her assertion, but she failed to do so.

On the other hand, the Division presented records, kept in the normal course of business, showing no contact with Ms. N during the period in question. It is a well-established and long-accepted evidentiary rule that the absence of a communication constitutes proof that it was never received. *See* Alaska Rule of Evidence 803(7) (providing that "evidence that a matter is not included in [regularly kept business] records" is admissible "to prove the nonoccurrence or nonexistence of the matter."

Traditional factors in assessing a witness's credibility, include (1) the quality of the witness's knowledge, understanding, and memory; (2) whether the witness has an interest in the outcome of the case or any motive, bias, or prejudice; (3) inconsistencies, patent omissions and discrepancies in the witness's testimony; (4) the inherent probability or improbability of the witness's testimony; and (5) whether the witness's testimony was consistent or inconsistent with other evidence in the case (i.e. the presence or absence of corroborating evidence). Because Ms. N could not pin down the dates of her asserted phone calls to the Division with any accuracy, and because the Division has no record of these phone calls, and because Ms. N did not provide any documents corroborating her assertions despite having been given the opportunity, it is more probable than not that Ms. N did not request a hearing until the earliest date after May 22, 2012 on which the Division has a record of contact. That date is September 28, 2012.

Pursuant to 7 AAC 49.040, the deadline for requesting a hearing with regard to ATAP benefits is 30 days after receipt of the Division's written notice. Ms. N thought that she received

the Division's penalty notice in June 2012. Assuming for purposes of this decision that she did not receive the Division's notice of May 22, 2012 until the last day of June (June 30), Ms. N's hearing request would have been due no later than Monday, July 30, 2012. The preponderance of the evidence shows that Ms. N did not request a hearing by that date.

IV. Conclusion

Ms. N's hearing request was made approximately two (2) months after expiration of the 30 day deadline to request a hearing. The Division's motion to dismiss is granted. The Division's imposition of its penalty as to Ms. N's ATAP benefits remains in effect, subject to her right to cure her ATAP noncompliance penalty.

DATED this 30th day of November, 2012.

Signed _____

Jay Durych

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 December, 2012.

By: *Signed* _____

Name: Jay D. Durych

Title: Administrative Law Judge

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