

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

In the Matter of:)
)
 M S) OAH No. 12-0828-ATP
) DPA Case No.

DECISION

I. Introduction

There are two issues in this case, each of which is independently dispositive. The first issue is whether M S requested a hearing, with regard to her Alaska Temporary Assistance Program¹ (ATAP) benefits, within the time period provided by regulation. The second issue is whether Ms. S has demonstrated good cause for missing the hearing scheduled at her request. With regard to the first issue, this decision concludes that Ms. S's hearing request was not timely filed, and that Ms. S has not demonstrated good cause to relax the applicable filing deadline. With regard to the second issue, this decision concludes that Ms. S has not demonstrated good cause for missing her hearing. Accordingly, this case is dismissed on those procedural grounds without reaching the merits of the case.

II. Facts

Ms. S receives ATAP benefits.² On August 20, 2012 the Division of Public Assistance (DPA or Division) notified Ms. S that a thirty day "first time job quit penalty" was being assessed in her ATAP case because (the Division asserted) Ms. S had voluntarily ceased employment without good cause.³ Imposition of this penalty would result in closure of Ms. S's ATAP case for the month of September 2012.⁴ Ms. S was advised that she could re-apply for ATAP benefits on or after October 1, 2012.⁵ The Division's notice also advised Ms. S that she had the right to show good cause for her termination of employment.⁶

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. ATAP is designed to help financially eligible families with minor children. AS 47.27.010.

² Ex. 2.

³ Ex. 2.

⁴ Ex. 2.

⁵ Ex. 2.

⁶ Ex. 2.

Ms. S requested a hearing with regard to her ATAP penalty on November 2, 2012.⁷ This was approximately 74 days after the mailing of the Division's notice.

On November 5, 2012 the Division referred Ms. S's hearing request to this Office. On that date this Office mailed a Notice of Hearing to the parties which scheduled Ms. S's hearing for November 26, 2012. Also on that date DPA filed a motion to dismiss Ms. S's hearing request on the basis that "Ms. S is past the 30 day time frame to request a hearing."⁸

Ms. S's hearing began as scheduled on November 26, 2012 at 11:00 a.m. Ms. S contacted this Office approximately 15-20 minutes prior to her scheduled hearing time and advised that she wished to attend her hearing in-person, but that she was running 15 minutes late. The Division did not object to postponing the hearing by 15 minutes. The Administrative Law Judge and the Division's hearing representative waited until 11:45 a.m. for Ms. S to arrive. However, Ms. S never arrived, and she could not be reached by phone. Accordingly, later that day an order was issued advising Ms. S that, unless she provided evidence by December 6, 2012 demonstrating good cause for her failure to participate in her hearing, her case might be dismissed.⁹ The order also stated that Ms. S's opposition to the Division's motion to dismiss the case based on an untimely hearing request was also to be filed by December 6, 2012.

On December 3, 2012 this Office received an e-mail from Ms. S responding to the order of November 26, 2012. Ms. S did not address the issue of the timeliness of her hearing request. With regard to good cause for missing her hearing, Ms. S acknowledged that she had received "a short notice of a hearing date and time," but that she did not appear for her hearing "because [she] did not want to show for a hearing with no proof of validation."¹⁰

III. Discussion

A. The Timeliness of Ms. S's Hearing Request

Ms. S's Fair Hearing Request with regard to the Alaska Temporary Assistance Program is governed by the Department of Health & Social Services' hearing regulations. Those regulations are located in the Alaska Administrative Code at 7 AAC 49.010 – 7 AAC 49.900.

⁷ Ex. 3.

⁸ See DPA's Petition to Deny Fair Hearing Request dated November 5, 2012.

⁹ See 7 AAC 49.100(4) (the hearing authority may dismiss a case if "the client fails, without good cause as determined by the hearing authority, to appear . . . at the scheduled hearing"); 2 AAC 64.320(a) ("If a party who filed a notice of appeal or request for hearing fails to participate in a proceeding, the administrative law judge may order or propose the dismissal of the case or the affirmation of the decision contested.").

¹⁰ Ex. 4.

The regulation that governs the timeliness of hearing requests under ATAP 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." Case law from other jurisdictions indicates that a hearing request deadline like that of 7 AAC 49.040 may be extended, but only upon a showing of good cause.¹¹

The Division's records indicate that its penalty notice was mailed to Ms. S on August 20, 2012. Ms. S has not asserted that she did not receive the Division's notice, or that her receipt of the notice was delayed by the mail. However, there is no evidence in the record as to the precise date on which Ms. S received the Division's penalty notice.

In cases where the date of delivery is disputed or unknown, many courts have applied a rebuttable presumption that a mailing was delivered / received three to seven days after the date it was mailed.¹² It is appropriate to apply that presumption in this case.

The Division mailed its penalty notice on August 20, 2012. Based on the rebuttable presumption discussed in the preceding paragraph, the Division's evidence raises a rebuttable presumption that the penalty notice was received by Ms. S no later than seven days after the date it was mailed (*i.e.* by August 27, 2012). Because Ms. S did not provide any evidence as to the actual date of receipt of the penalty notice, the legally presumed date of receipt (*i.e.* no later than August 27, 2012) remains un-rebutted and should therefore be adopted.

Based on the presumed receipt date of August 27, 2012, the 30 day response period specified by 7 AAC 49.040 ended on September 26, 2012. The Division received Ms. S's hearing request on November 2, 2012. This was approximately 37 days after the expiration of the 30 day deadline specified by 7 AAC 49.040.

In summary, Ms. S's request for a hearing with regard to her ATAP benefits was not filed within the 30 day period specified by 7 AAC 49.040. In addition, Ms. S neither argued nor proved

¹¹ See *Dumas v. Medicaid / MassHealth*, 2007 WL 4099344 (Mass. Super. Ct. 2007).

¹² See *Ocasio v. Fashion Inst. of Tech.*, 9 Fed. Appx. 66, 68 (2nd Cir. 2001) (applying the "usual presumption that the letter was received within three days after mailing"); *Seitzinger v. Reading Hosp. & Med. Ctr.*, 165 F.3d 236, 239 (3rd Cir. 1999) (same). In the absence of a known date of delivery, the Fifth U.S. Circuit Court of Appeals applies a presumption that a notice was received within three to seven days after mailing. See *Morgan v. Potter*, 489 F.3d 195, 196 (5th Cir. 2007) (citing *Bowers v. Potter*, 113 F. App'x 610, 612-13 (5th Cir. 2004); *Martin v. Alamo Cmty. Coll. Dist.*, 353 F.3d 409, 411 (5th Cir. 2003)). In *Coen v. Riverside Hosp.*, 2 Fed. Appx. 449, 450-51 (6th Cir. 2001), the Sixth U.S. Circuit Court of Appeals applied a presumption that a notice was received within five days following mailing. See also *Loyd v. Sullivan*, 882 F.2d 218, 218 (7th Cir. 1989) (stating, in a social security case, that "receipt date [of notice] is presumed to be five days from the mailing date"); *Lozano v. Ashcroft*, 258 F.3d 1160, 1167 (10th Cir. 2001) (presuming receipt no more than five days after mailing date); *Legille v. Tegtmeyer*, 382 F.Supp. 166, 169 (D.D.C. 1974) (presuming mail was received within five days).

any good-cause exception to enforcement of the 30 day hearing request deadline. Accordingly, the DPA's motion to dismiss is granted, and this case is dismissed as not timely filed.

B. Ms. S's Failure to Appear for her Hearing

The telephone call that Ms. S made to this Office just prior to her hearing, and Ms. S's e-mail of December 3, 2012, both confirm that she was aware of the date and time of her hearing. The only remaining question is whether she had good cause not to attend her hearing.

The Department's hearing regulations do not define good cause for failure to attend a hearing. Accordingly, it is appropriate to look to judicial decisions defining "good cause" in similar circumstances for guidance. The Anchorage Superior Court addressed the issue of "good cause" in *Arreola v. State of Alaska Department of Health and Social Services*, Case No. 3AN-02-8767 Civil (September 24, 2003). That case also involved a claimant's failure to attend an administrative hearing involving Alaska Temporary Assistance Program benefits. The Department's hearing officer had ruled that the claimant had abandoned her case by failure to appear for the hearing. On appeal, the Superior Court judge held that, because 7 AAC 49.100 does not define "good cause" for failing to appear, it is appropriate to look to another ATAP regulation (7 AAC 45.261) to define "good cause." Under 7 AAC 45.261, examples of "good cause" for failure to appear for a hearing are: (1) a sudden and temporary situation beyond the control of the recipient, affecting one's health or ability to attend, including family illness or death or tragedies of nature; (2) if the recipient must appear in court or serve on a jury; (3) if the recipient is in detention or is incarcerated; (4) if the recipient's transportation breaks down or otherwise becomes unavailable and the recipient has no reasonable form of alternative transportation available; or (5) if weather conditions prohibit travel.

Ms. S neither argued nor proved any of the good-cause exceptions listed above. Accordingly, Ms. S has not demonstrated good cause for failure to attend her hearing.

IV. Conclusion

This case is dismissed because (1) Ms. S's hearing request was untimely under 7 AAC 49.040; and (2) Ms. S failed to demonstrate good cause for missing her hearing. Accordingly, the Division's imposition of its penalty as to Ms. S's ATAP benefits remains in effect. This decision does not, however, affect Ms. S's right to cure her ATAP noncompliance penalty at any time.

DATED this 5th day of December, 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 26th day of December, 2012.

By: Signed _____
Name: Ree Sailors
Title: Deputy Commissioner, DHSS

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