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

In the Matter of	)	
	)	
D C	)	OAH No. 17-0271-ATP
	)	Agency No.

DECISION ON TIMELINESS
and
NOTICE OF HEARING ON THE MERITS

I. Introduction

During the early part of 2016, D C of No Name was eligible for Alaska Temporary Assistance (ATAP) benefits, which enabled her to receive PASS I child care assistance. On August 15, 2016, the Division of Public Assistance determined that she was no longer eligible for ATAP, a determination that seems to have related to her income.

On September 27, 2016, Ms. C sent a pair of emails to DPA mentioning that she had requested a fair hearing. DPA does not dispute that these emails were, themselves, requests for a fair hearing. DPA eventually processed them as such, concluded that they were untimely, and informed Ms. C that her hearing request was denied. This matter came to the Office of Administrative Hearings as an appeal of the second decision, that is, the decision refusing to refer the prior appeal on the basis of untimeliness.

A telephonic hearing on the timeliness issue alone was held on April 18, 2017. Although this case is assigned to a different administrative law judge, the undersigned conducted the timeliness hearing because the assigned judge was unexpectedly unavailable. Ms. C represented herself, while the agency was represented (on different issues) by lay representative Sally Dial and Assistant Attorney General Alex Hildebrand. After the hearing, the record was kept open until Friday, April 21 for additional written submissions. This decision is issued the following Monday.

The burden of proof to deny relief based on untimeliness falls on the party that asserts untimeliness. In this case, the history of the handling of Ms. C's case is so irregular that DPA has not been able to show that Ms. C was late in seeking an appeal. This makes the appeal timely. The case will proceed to a hearing on the merits.

II. Background

In early August of 2016, Ms. C seems to have had one ATAP application pending that was submitted on two occasions. The record contains a GEN 72 recertification application dated June 24, 2016 but bearing a July 28, 2016 received stamp from DPA.[1] Ms. C contends that she had submitted it in June and then resubmitted it July 28 at her caseworker's request, since the earlier copy could not be found.[2]

In the first half of August, Ms. C was in active communication with DPA about this application, supplying a number of additional documents that DPA requested relating to her income and housing expenses. During the same period, she noticed that her benefits had ended, and she contends that on August 8 she indicated a desire for a fair hearing on that termination in a written letter that she hand-delivered. However, she does not have a date-stamped copy of this letter, and so it is hard to verify that whether it was actually given to DPA. DPA does not currently have a record of receiving the August 8 letter, but as the other anomalies discussed below demonstrate, the absence of this record is hardly proof that the event did not occur.

On August 15, 2017, DPA generated a notice entitled "PASS II CHILD CARE REFERRAL."[3] It was accompanied by a notice entitled "ATAP DENIED – OVER INCOME,"[4] which denies an ATAP application received on July 28 on the basis of supposed earnings of $12 per hour, 29 hours per week, plus child support of $945.30 per month. Testimony from DPA established that the August 15 denial would have had an appeal rights statement on the back of it (now in the record as Ex. 6), and that it would have been mailed to Ms. C's address on August 16. Ms. C does not recall receiving it. However, Ms. C agrees that she was very much aware that her benefits had not been recertified.

Ms. C may have submitted another fair hearing request on September 2, 2016. She has a copy of a note beginning "I requested a fair hearing regarding my ATAP case and still have not gotten a response . . .", but it is again difficult to verify whether this was actually delivered or transmitted to the agency.[5] Ms. C says that it was.

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[1] Ex. 7.2 – 7.6.

[2] Ms. C thinks an email sent to her in October by Eligibility Technician U L, containing a scan of one page of a June 24 application, is proof that the earlier submission has been found. However, that scan seems to come from the same document, in Ex. 7.2 – 7.6, that bears the July 28 received stamp. It proves nothing about what happened in June.

[3] Ex. 2.2 (supplied after the hearing).

[4] Ex. 2.1.

[5] The request is in the electronic record as 59695.jpg.

On September 27, 2016, there is a third written request for hearing. It is an email with the subject line "I never received a fair hearing" and, in addition to other information, saying: "No one ever responded to my request for a fair hearing either. Someone please call me asap."[6] She sent a second email to the same effect later the same day.[7] There is no dispute that DPA received this pair of emails prior to close of business on September 27. If this was the only request for a fair hearing regarding the notice mailed on August 16, it would be 42 days after that notice was issued. Since the time limit for appeal is 30 days,[8] that would be 12 days late.

When DPA receives a request for a fair hearing, it is required by law to take action on that request within ten days.[9] The action must be either to deny the request for a reason provided by law (such as untimeliness), or to refer the case to the Office of Administrative Hearings.[10] In this case, DPA's field office did nothing with the September 27 request until February 17, 2017, 143 days later. On that date, it forwarded the request to DPA's fair hearing unit. Then, notwithstanding that the ten-day time limit had already been exceeded fourteen-fold, the hearing unit took another twelve days to act on the request. On March 1, 2017, 145 days after the expiration of its own deadline, the hearing unit denied the September 27 request because the latter was twelve days late.[11] Ms. C immediately appealed the untimeliness ruling.

We must return to the aftermath of Ms. C's September 27 emails regarding a fair hearing for additional background. On October 4, 2016, Eligibility Technician U L emailed Ms. C as follows:

> This is your redetermination you requested, your recert is processed your allotment for 9/16 supplement of 150.00 and forward 377.00. you may submit verification of any changes you feel you need to report. Otherwise your next recert is due 1/2017. [sic]

The email is puzzling because it suggests the June/July recertification application had just been processed, which might suggest that any determination made in August was not final. Ms. C replied with a query as to whether her ATAP case was "still open." She apparently received no response.

The records from Ms. C's interactions with DPA from August through October suggest a difficult relationship. Ms. C is quick to accuse others of incompetence (not always fairly), and it

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[6] Ex. 3A.
[7] Ex. 3.1.
[8] 7 AAC 49.030(a). The appeal rights statement on the back of DPA notices correctly states this time limit.
[9] AS 44.64.060(b); 7 AAC 49.080.
[10] *Id.*
[11] Ex. 4. OAH appreciates that AAG Hildebrand was willing to acknowledge the irony of this ruling.

seems likely that she is not an easy client to work with. This, of course, is not a reason to treat her application any differently than it would otherwise be handled, and there is no direct evidence that DPA did so.

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.[12] In the present case, the date of the notice is August 16, 2016, and the thirtieth day thereafter is September 15, 2016. There are exceptions to the appeal deadline, but they are not applicable here.

In this case, several preliminary issues were considered at the hearing. One could argue that when an agency fails to reject a hearing request as untimely within its time limit for doing so, an agency waives its right to reject the hearing request. One could argue that when an agency raises a client's untimeliness but is itself more untimely than the client, it is barred from raising untimeliness by the equitable doctrine of unclean hands. Finally, one could argue that an agency might be estopped to reject a hearing request if, by delaying action on the hearing request, the agency has prejudiced the appealing party's ability to protect his or her interests by other means. There is no need to delve into the complexities of these issues, because this case is more easily resolved on purely factual grounds.

A contention that another party was untimely in asserting its rights is an affirmative defense.[13] The party relying on untimeliness must raise the issue and must prove it factually.

To prevail on timeliness, DPA must prove that Ms. C did not appeal the termination of her ATAP benefits prior to September 15, 2016. Ms. C has supplied copies of two appeal requests dated prior to that time. Her September 27 communications, moreover, are consistent with the existence of prior requests—they were written as requests for a phone call since she had never had a response after asking for a hearing.

The only evidence that the prior requests were <u>not</u> submitted is the testimony of Sally Dial, DPA's hearing representative, who testified that there was no record of prior requests in the electronic record of Ms. C's case. She testified that the office receiving a hearing request is

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[12] *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).

[13] *E.g., In re M.H.,* OAH No. 12-0525-MDS (Comm'r of Health & Soc. Serv. 2012) (published at http://aws.state.ak.us/officeofadminhearings/Documents/MDS/MNPA/MDS120525.pdf?_ga=1.125510026.1007090623.1398363649).

required to case-note it and forward it to the hearing unit, which must log it in. Thus, DPA effectively seeks an inference that since there is no case note or log entry for the August 8 and September 2 hearing requests, they must not have been submitted. It simply is not possible to make such an inference on the present record, however. The receiving office did not case-note the pair of hearing requests that indisputably were received: there is a case note for September 28, 2016, but it says nothing about a request for a hearing.[14] And the receiving office did not forward the September 27 request to the hearing unit until the following February. There is no reason to suppose that requests for a hearing were being processed in this case in a systematic manner.

There is no conclusive evidence that Ms. C delivered the August 8 and September 2 documents to DPA, but she has given plausible testimony that she did so. The agency's inferential evidence to the contrary is too weak to conclude that, more likely than not, the prior requests were never delivered. Hence, DPA has not met its burden of showing that no timely hearing request was submitted.

The result is that the Division's untimeliness defense is not established, and the case will go forward on the merits.[15] DPA's hearing unit has indicated that it has not yet evaluated whether Ms. C has a persuasive case on the merits, and accordingly, some time will be set aside for that evaluation. If the case is not resolved informally beforehand, the telephonic hearing on the merits will be held before Chief Administrative Law Judge Kathleen Frederick on **May 00, 2017 at 00:00 p.m.**

DATED this 24th day of April, 2017.

Signed
Christopher Kennedy
Administrative Law Judge

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

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14 Ex. 9 (submitted after the hearing at ALJ's request).

15 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).