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

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| In the Matter of | ) | |
| | ) | |
| D O | ) | OAH No. 17-0945-CCA |
| | ) | Agency No. |

# DECISION

## I. Introduction

D O requested a hearing regarding the denial of her eligibility to participate in the Child Care Assistance program as a child care provider. On the date set for the hearing, October 2, 2017, the Division of Public Assistance (Division) conceded Ms. O's eligibility as a provider. The record showed, however, that her daughter L O had signed the same appeal form as D and had apparently used the form to appeal the termination of her family's eligibility as recipients of child care assistance benefits, but the Division had not seen or recognized L's attempt to appeal. Over the objection of the Division, the administrative law judge determined that L's appeal would be heard in this case rather than requiring her to submit a new appeal request form.

The hearing on L's appeal was heard over the course of three additional days: December 5 and December 18, 2017, and January 9, 2018. The Division was represented by Jeff Miller. L O represented herself and testified on her own behalf. Based on a careful review of the evidence and arguments presented, this Decision finds that L's appeal should have been accepted and processed by the Division, and that her appeal was timely; but she did not establish that the Division's termination of her family's eligibility was incorrect. The termination, therefore, is affirmed.

## II. Procedural Background and Facts

D O (hereinafter referred to as D) is a child care provider under the Child Care Assistance program. She provides child care to the children of her daughter, L O (hereinafter referred to as L). D's application to renew her eligibility as a provider was denied by the Division on July 20, 2017.[1] She appealed the denial on August 17, 2017,[2] and a hearing was scheduled for October 2, 2017. Prior to the hearing, the Division reviewed additional documents provided by D and conceded the issue of her eligibility. The Division's representative, Jeff Miller, informed D of that concession prior to the hearing and requested that she withdraw her appeal. At the time set for hearing, however, D appeared and explained that she did not want to withdraw her appeal,

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1 Exh. 12.

2 Exh. 16.

because she had been told by the Division that she would still not be paid for child care services that she had provided to L's children during the summer of 2017. Mr. Miller explained on the record that this was because L's family's eligibility to receive child care assistance benefits had been terminated as of July 1, 2017.

L did not appear at the first day of the hearing on October 2, 2017, but D stated on the record her belief that L wished to contest this termination. While the parties and the administrative law judge (ALJ) were discussing these issues, they examined the request for hearing form submitted by D and saw that L had also signed the form along with her mother. The form can be used by both families and child care providers to appeal the Division 's eligibility decisions; in this instance, D and L had checked the boxes for both "family" and "child care provider."[3]

Telephonic status conferences were held on October 10 and 11, 2017, attended by Mr. Miller, D, and L. L explained that her intent in signing the request for hearing form was to address both her mother's eligibility as a child care provider and her family's eligibility to receive child care benefits. The ALJ then determined that rather than require L to submit a new request for hearing form, L's claim would be heard within this case, which had been initiated by the Division in response to the form submitted by her and her mother.[4] The continued hearing was scheduled for November 7, 2017.[5] On that date, however, L had not yet received a packet of documents that Mr. Miller had filed with the ALJ, so the hearing was rescheduled to December 5, 2017.

On December 5, 2017 L testified under oath about her efforts to both maintain her family's eligibility and assist her mother with her provider eligibility appeal. The hearing was not completed within the allotted time, so an additional hearing day was scheduled for Monday, December 11, 2017. On that date, however, the hearing again had to be rescheduled; over the previous weekend Mr. Miller had submitted a new position statement, in which the Division argued, among other things, that L's appeal should not be heard as part of this case. L had not received a copy of Mr. Miller's filings in time to be able to review them prior to the hearing on that date, so the hearing was rescheduled to December 18, 2017.

On December 18, 2017 the hearing was convened again, additional testimony was taken, and the ALJ ruled on the record on that date that L's appeal was properly heard in this case. But

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3 *Id.*

4 *See* October 11, 2017 Scheduling Order.

5 *Id.*

because additional time was needed, one more day of hearing was scheduled for January 9, 2018. On that date, the testimony was finally completed, the record was closed, and the case became ripe for decision.

Throughout the four days of hearing in this matter, testimony was given by D O, L O, Child Care Assistance Program (CCAP) manager Colleen Vague, and CCAP employees Ambra Mavis, Billy Macon, and Misty Anderson. The evidence submitted by the parties in this matter is summarized as follows.

L explained in her testimony that in May 2016, the Division had notified her that certain of its mailings had been returned by the postal service as unclaimed, so she had gone to the CCAP office to pick up the returned mailings. She testified credibly that when she visited the office for that purpose on or about May 16, 2017, she filled out a recertification application while she was there and submitted it over the counter to CCAP staff. Regarding her pursuit of this appeal, as already mentioned, L testified that when she signed the request for hearing form along with her mother and checked the box for "family," her intention was to pursue an appeal of the termination of her family's eligibility for child care assistance benefits.

The Division's witnesses, on the other hand, testified credibly that they never received a recertification application from L. CCAP employees described their procedures for receiving and processing recertification forms submitted by benefits recipients, and they testified about their efforts to search for and locate any application that L may have submitted in May, June or July 2017.[6] They also testified that the Division's records contain no record of L visiting or contacting CCAP offices in mid-May 2017. Their conclusion was that L never submitted the recertification application. Because the Division had no record of her having submitted the application, her family's CCAP case was closed on June 30, 2017, terminating their eligibility to receive benefits.

## III. Discussion

As discussed above, this case initially concerned only D's provider eligibility. That issue was resolved prior to the hearing when the Division conceded her eligibility, but L's claim was then incorporated into this case. As a result, there are three issues to be decided here:

(1) Was it appropriate to include L's claim in this hearing?

(2) Assuming an affirmative answer to issue no. 1, was L's appeal timely filed?

[6] The Division's witnesses also described significant turnover in CCAP staffing during spring and summer of 2017, resulting in three different "eligibility technicians" being assigned to L's case during that timeframe.

(3) Did L demonstrate that the Division's termination of her family's eligibility for benefits was incorrect?

*A. Inclusion of L's claim was appropriate*

L signed the request for hearing form on August 17, 2017, along with her mother, and they checked both the box for "family" and the box for "child care provider" on the form.[7] Mr. Miller confirmed during the October 10, 2017 status conference that Division staff had overlooked that fact when processing the form, and that upon receiving it, they should have contacted L and asked her whether she was appealing the termination of her family's eligibility. Later, however, the Division argued in its December 11 position statement that L had really been focusing only on helping her mother with her appeal regarding her provider status. In support of this argument, the Division cited the fact that L's interactions with CCAP staff during July 2017, and the documents she and her mother provided to the CCAP, were all focused on establishing her mother's provider eligibility. The Division concludes that "[t]here is no evidence that L was addressing her own child care assistance case."[8]

The Division's argument, however, ignores the fact that the August 17, 2017 request for appeal form itself is evidence of L's intent. The simple fact is that L signed the request for hearing form and that the box for "family" was checked on the form – there would be no need for her to sign the form or to check that box if it was intended only to initiate an appeal regarding her mother's provider eligibility. In addition, Mr. Miller acknowledged, on the record, that if Division staff had noticed L's signature on the form and the check in the "family" box, they would have contacted L to ask her what her intentions were. Undoubtedly, if the Division had made such an inquiry at the time, L would have stated that she intended to appeal her family's eligibility termination. Her testimony on this point was clear and credible; and in any event, it would defy common sense for a person in her position to not have any intention of appealing the termination of her family's eligibility, while at the same time being heavily involved in assisting her mother to reestablish her provider eligibility.[9]

The Division erred in not noticing that L had signed the request for hearing form and had checked the "family" box on the form, and in not following up with her to determine whether she

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7 Exh. 16.

8 Division's December 11, 2017 position statement, p. 14.

9 As was demonstrated on the first day of the hearing, ensuring her mother's eligibility as a provider is a pointless exercise if L's family has been determined to be ineligible as recipients of CCAP benefits.

intended to appeal her family's eligibility termination. It was appropriate, therefore, to allow L's claim to be heard in this case.[10]

*B. L's appeal was timely*

The Division argued that even if one were to assume that L intended to appeal her family's CCAP eligibility when she signed the request for hearing form on August 17, 2017, her appeal was untimely. This is because Division regulations require that appeals of eligibility determinations must be filed no more than 30 days after the determination is made.[11] The Division's representative, Mr. Miller, explained that CCAP recipients are given advance notice that they must file a recertification application and are given a deadline on which their case will be closed and their eligibility will terminate if they have not filed the application. Mr. Miller also stated that the Division is not required to send a separate notice of the case closure and termination when it occurs. Here, L was informed by a written notice on May 15, 2017 that her eligibility would end on June 30, 2017 unless she filed a recertification application.[12] The Division then closed the family's case on June 30, 2017; thus, the Division's position is that the last day for L to file her appeal was July 30, 2017. The request for hearing form was dated and submitted 17 days later, on August 17, 2017.[13]

The flaw in the Division's argument is that CCAP staff sent L another notice on September 19, 2017, stating as follows:

> Your Child Care Assistance case was closed on 06/30/17 because:
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> X You did not submit a Child Care Assistance Application to continue participation prior to 06/30/17.
>
> ….
>
> If you disagree with this determination you may request a hearing within thirty (30) days of the date of this notice by completing and submitting the *Request for Hearing* on the back of this notice.[14]

Given the Division's position that it is not required to send notices of case closures brought about by a failure to submit a recertification application, it is unclear why this notice was sent to L.

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10 Alternatively, L could have been required to (a) file her own appeal in October 2017, and (b) argue that it should be deemed to have been effectively filed on August 17, 2017. This approach, however, would have been far more inefficient, and in any event, the Division never argued that it should have been followed.

11 *See* 7 AAC 49.030(a).

12 Exhs. 7, 7.1.

13 The regulation that sets the 30-day filing requirement for appeals also states that "[a] hearing request may be accepted after the time limit … only if the administrative law judge finds, based on the evidence submitted, that the request for a hearing could not be filed within the time limit." 7 AAC 49.030(a).

14 Exh. 17.23. Apparently, the delay in sending out this notice was due to the previously mentioned turnover within the CCAP staff. Exh. 17.22.

Nonetheless, by sending the notice to her, the Division effectively extended the deadline for her to file an appeal of the termination of her family's eligibility for benefits. She had already submitted her appeal via the August 17, 2017 request for hearing discussed above. Therefore, her appeal was timely.[15]

*C. L did not establish that the eligibility termination was incorrect*

Having established that L appealed the termination of her family's eligibility, and that her appeal was timely, the critical remaining question is: was the Division correct in closing her family's case and terminating their eligibility? On this question, L bears the burden of proof to establish, by a preponderance of the evidence, that the Division's decision was incorrect.[16] "Preponderance of the evidence" means that a fact is shown to be more likely true than not true.[17]

L testified emphatically that she submitted her recertification application over the counter at the CCPO on or about May 16, 2017. Her testimony was clear and internally consistent and appeared to be credible. If L's testimony is accurate, it would mean the Division somehow lost or misplaced her application, and therefore it would be appropriate to allow her to submit it again and to require the Division to process it as if it had been submitted prior to June 30, 2017.

L's testimony, however, was contradicted by the equally credible testimony of the Division's witnesses, which in turn was corroborated by the documentary record maintained by CCAP staff. They testified that they diligently searched their files and could find no record of a recertification application submitted by L at any time in May or June 2017. They also testified that the program has established office policies and practices that require them to log every contact with a recipient or other member of the public, whether it be a telephone or in-person contact. Beyond having no record of an application from L, the Division was unable to locate any record of a visit by L to the CCAP office in May, or even a phone contact by her during the mid-May timeframe.

In addition, Mr. Miller responded to L's testimony by pointing out that she testified that she had spoken with her former caseworker, Olive Timoteo, in May 2017, and that Ms. Timoteo had told her at that time that she was going to be gone for two weeks and that L needed to submit

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15 Under these circumstances, it would be absurd to find that L's August 17, 2017 appeal filing was untimely, given that a month after she submitted it, the Division told her she had another 30 days to appeal.

16 7 AAC 49.135, applicable here, places the burden of proof on a party pursuing a claim for "new or additional benefits," and places the burden on the Division where it is seeking to reduce or terminate benefits. Here, L's claim more closely resembles a claim for new benefits, because in order for her family's eligibility to continue she had to submit the equivalent of a new application.

17 2 AAC 64.290(e).

documents for renewal of her family's eligibility. The Division, however, presented evidence that Ms. Timoteo actually took her two weeks of leave in the first half of April 2017, and that her employment with the CCAP ended shortly after that, on April 21, 2017. The Division presented evidence that prior to Ms. Timoteo leaving the CCAP, she had several interactions with L in March and April regarding the effect of changes in L's income on her CCAP benefits, and that L submitted documents to the CCAP regarding those changes in April. Mr. Miller highlighted these facts and argued that L must have confused in her mind those documented April interactions with interactions in May that could not have taken place, because by then Ms. Timoteo wasn't even employed by the CCAP.

The ultimate issue in this case is whether or not L submitted a recertification application at any time in May or June 2017. This is a purely factual issue as to which the evidence in this case is basically equivocal. On one hand, L has emphatically stated that she submitted the application at the No Name office on May 16, 2017. On the other hand, the Division cannot locate the application, it has no record of her visiting or contacting the CCAP office in mid-May 2017, the Division's witnesses gave credible testimony as to procedures which ensure the accuracy of the CCAP's records, and there is no indication or suggestion that the Division has lost or destroyed the application. In addition, the Division was able to show that details of L's testimony regarding her contacts with her former caseworker Ms. Timoteo could not be accurate, because in the timeframe when L said they had spoken about recertification, Ms. Timoteo no longer worked for the CCAP.

I find that L did not meet her burden of proof on the ultimate issue presented here. In cases (like this one) in which the evidence for both sides is equivocal, the party bearing the burden of proof must present evidence *better* than that of the Division. L did not present evidence that carried more weight than the Division's evidence on the question of whether she submitted a recertification application prior to June 30, 2017.[18]

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[18] The result here would be the same even if the Division were to bear the burden of proof; I would find that the entirety of the Division's evidence sufficiently outweighs L's testimony as to result in the Division's closing of L's case being affirmed.

## IV. Conclusion

Although this case was initiated by D O, L O's appeal was properly included in the case, and L's appeal was timely filed. However, L did not present sufficient evidence to establish that she submitted her recertification application by June 30, 2017; therefore, the Division's closure of her family's CCAP case and termination of their benefits is affirmed.

Dated: February 8, 2018

*Signed*
Andrew M. Lebo
Administrative Law Judge

# Adoption

The undersigned, by delegation from 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 22nd day of February, 2018.

By: *Signed*
Name: Andrew M. Lebo
Title: Administrative Law Judge/OAH

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