

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

In the Matter of the)	
)	
SUSAN REED)	OAH No. 13-0937-MDR
d/b/a CARE CORE)	
_____)	

DECISION ON SUMMARY ADJUDICATION

I. Introduction

Susan Reed, who does business under the name Care Core, provides Medicaid care coordination services. She is paid for those services by the Medicaid program. On May 10, 2013, the Office of Rate Review (ORR) notified her that her payment rate would decrease by 20 percent. Ms. Reed requested a hearing.

Prior to the hearing, ORR moved for summary adjudication. Ms. Reed did not oppose ORR’s motion for summary adjudication.¹ The undisputed facts show that Ms. Reed was notified of the requirement that she file an annual provider report, as required by 7 AAC 145.531(e), and of the financial consequences if she did not file that report. Ms. Reed, however, did not file any part of her report. Alaska regulation 7 AAC 145.520(l)(1) mandates that a provider who does not file any part of the required report “will” have the Medicaid payment rate reduced by a total of 20 percent. Because Ms. Reed did not file any part of her report, and because she does not have any legal defenses to the filing requirement, ORR’s motion for summary adjudication is granted; its decision reducing her payment rate by 20 percent is upheld.

II. Facts

Ms. Reed is a Medicaid care coordinator who received \$58,682 in Medicaid payments in calendar year 2011.² On February 1, 2013, ORR send her a letter, by certified mail, that she would be required to provide ORR with an annual report, to include an audited financial statement, a working trial balance, and cost survey. The letter also told her that if she did not indicate otherwise, her fiscal year would be considered to be the calendar year, and that she

¹ ORR filed its motion for summary adjudication on July 19, 2013. Ms. Reed’s opposition was due by August 14, 2013. On August 16, 2013, she requested an extension of time to file her opposition. She was granted an extension, until August 27, 2013, to file that opposition. She did not request a further extension and did not file an opposition.

² Kim Hyung Affidavit, para. 2; Agency Record, p. 1.

would be informed of the deadlines to submit that information.³ The February 1 letter was delivered on February 5, 2013.⁴ On April 1, 2013, ORR sent Ms. Reed a second certified letter, stating that her fiscal year was considered to be the calendar year and that she had 30 days from the date of the letter to provide the required audited financial statement, working trial balance, and cost survey for the 2011 calendar year.⁵ Ms. Reed received the second letter on April 2.⁶ After the reporting window expired, ORR sent Ms. Reed a third certified letter, mailed May 10 and delivered May 11, 2013, advising her that her payment rate would be decreased by a total of 20 percent because she had not submitted any part of her annual report.⁷

Ms. Reed then wrote ORR two letters. The first, dated May 22, 2013, acknowledged receipt of the April 1, 2013 letter. It stated that she had been quoted a fee of \$4,000 for an audit, and stated that she would provide her records to a person of ORR's "choosing," or that if ORR would pay for the audit, she would provide her records to the accountant.⁸ The second, dated June 10, 2013, again acknowledged receipt of the April 1 letter but denied having received any subsequent correspondence (*i.e.*, the May 10, 2013 letter), requested a hearing, and claimed that other care coordinators had not had their payment rates reduced.⁹

III. Discussion

ORR has moved for summary adjudication. Summary adjudication in an administrative proceeding is the equivalent of summary judgment in a court proceeding.¹⁰ It is a means of resolving disputes without a hearing when the central underlying facts are not in contention, but only the legal implications of those facts. Under these circumstances, the evidentiary hearing is not required.¹¹ Summary adjudication, however, is not automatically granted when one party does not file an opposition to a motion for summary adjudication. In order to grant summary adjudication, even when an opposition is not filed, there must still be a determination that there is no genuine issue of material fact and that the moving party is legally entitled to judgment.¹²

³ Kim Hyung Affidavit, para. 3; Ex. A.

⁴ Kim Hyung Affidavit, para. 5; Ex. C.

⁵ Kim Hyung Affidavit, para. 6; Ex. D.

⁶ Kim Hyung Affidavit, para. 7; Ex. E.

⁷ Kim Hyung Affidavit, para. 8-9; Exs. F, G, H.

⁸ Agency Record, p. 10.

⁹ Agency Record, p. 3.

¹⁰ *See, e.g., Schikora v. State, Dept. of Revenue*, 7 P.3d 938, 940-41, 946 (Alaska 2000).

¹¹ *See Smith v. State of Alaska*, 790 P.2d 1352, 1353 (Alaska 1990); 2 Pierce, *Administrative Law Treatise* § 9.5 at 813 (5th ed. 2010).

¹² *See, e.g., Martinez v. Ha*, 12 P.3d 1159, 1162 (Alaska 2000).

A Medicaid home and community-based waiver services provider is required to submit an annual report, no later than nine months after the close of its fiscal year. That annual report must include a cover letter signed by the provider's chief executive officer certifying the completeness and accuracy of the report, an audited financial statement, a post-audit working trial balance tied to the audited financial statement, a completed statistic worksheet, and a complete cost survey (when requested by the department).¹³ If a small service provider, *i.e.*, one who receives \$200,000 or less in yearly Medicaid payments, does not provide the audited financial statement, the service provider's payment rate is reduced by 10 percent.¹⁴ If that service provider also does not submit the other required documents, the payment rate is reduced by an additional 10 percent.¹⁵ The payment reductions remain in effect until a complete annual report is submitted.¹⁶

There are no genuine issues of material fact in this case. ORR has furnished copies of the letters it sent to Ms. Reed, and proof that they were delivered. Ms. Reed was therefore on notice that ORR required her to file an annual report for 2011 and the deadline for filing it.¹⁷ Indeed, Ms. Reed acknowledges that she received ORR's April 1, 2013 letter that provided her with a deadline for filing her report, and she did not file it. Ms. Reed is therefore subject to a 20 percent combined reduction in her Medicaid payment rate because she did not file any part of her annual report: a 10 percent reduction for not filing the audited financial statement and an additional 10 percent reduction for not filing the remainder of the report.

While Ms. Reed did not file an opposition to ORR's motion for summary adjudication, she alluded to two legal defenses in her May 22, 2013 letter and her June 10, 2013 hearing request letter. Those defenses are (1) that the reduction in her payment was an unconstitutional taking of property without due process, (2) that she has been singled out for a reduction, *i.e.*, the regulation is being selectively enforced.

¹³ 7 AAC 145.531(e).

¹⁴ 7 AAC 145.520(l)(1)(B).

¹⁵ 7 AAC 145.520(l)(1)(C).

¹⁶ 7 AAC 145.520(l)(B) and (C).

¹⁷ It should be noted that under a strict application of the underlying regulation, 7 AAC 145.531(e), Ms. Reed's annual report was already overdue at the time the Division sent out its February 1, 2013 letter notifying Ms. Reed about the obligation to file an annual report. This is because her 2011 annual report was technically due 9 months after close of her fiscal year; since her fiscal year ended on December 31, the 2011 annual report would have been due by October 1, 2012.

A. *Unconstitutional Taking*

If Ms. Reed is making the argument that the underlying regulations are invalid, be it either on constitutional or other grounds, that issue is reserved for the courts, not the administrative hearing process for two reasons. First, an administrative agency is “bound by [its] regulations unless and until it repeals or amends the regulation using the proper procedure. Administrative agencies are bound by their regulations just as the public is bound by them.”¹⁸ Second, invalidation of a regulation is a judicial function. The Alaska Administrative Procedure Act specifically provides that “[a]n interested person may get a judicial declaration on the validity of a regulation by bringing an action for declaratory relief in the superior court.”¹⁹ An administrative agency, even acting in a quasi-judicial status, does not have judicial powers.²⁰ This decision will therefore not address the issue further.

If Ms. Reed is arguing that her payment is being reduced without being supplied proper procedural due process, that argument fails. ORR has provided her with the same procedural due process through the administrative hearing process as public benefit recipients, which she availed herself of through her request for an administrative hearing to challenge her payment rate reduction.²¹

B. *Selective Enforcement*

Ms. Reed asks, in her June 10, 2013 hearing request: “I have been in contact with other Care Coordinator who have not provided any part of an annual report and have not have their rated reduced. Is there a reason I have been singled out for this heavy handed treatment?”²² This suggests a claim that the Medicaid provider rate reduction penalty has been selectively applied. If so, this part of Ms. Reed’s argument is not a contention that the regulation is invalid, but rather a contention that staff within the Department Health and Social Services applied the regulation in an unconstitutional manner by singling out Ms. Reed for disproportionate, selective enforcement.

¹⁸ *Burke v. Houston NANA, L.L.C.*, 222 P.3d 851, 868 - 869 (Alaska 2010).

¹⁹ AS 44.62.300.

²⁰ *Alaska Public Interest Research Group v. State*, 167 P.3d 27, 35 - 37 (Alaska 2007).

²¹ “Procedural due process ‘requires that benefit recipients be given timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend before their benefits are reduced or terminated, in order to afford them protection from agency error and arbitrariness.’” *Pfeifer v. State, Dept. of Health & Social Services*, 260 P.3d 1072, 1084 (Alaska 2011) (citations omitted).

²² Agency Record, p. 3.

Such “as applied” equal protection defenses can be evaluated in a proceeding such as this one.²³ However, in order to prevail on such a defense, Ms. Reed has “the burden of demonstrating that [ORR’s] ‘selective enforcement’ of the [rate reduction] ‘is part of a deliberate and intentional plan to discriminate based on an arbitrary or unjustifiable classification.’”²⁴ Ms. Reed, however, did not state a factual basis for her claim. “An agency need not – indeed, often cannot – apply a statute simultaneously to all similarly situated parties to avoid violating the equal protection clause so long as it is not intentionally discriminating against any party.”²⁵ Given the complete lack of any evidence regarding a selective enforcement defense, and the lack of any articulated claim based on an arbitrary or unjustifiable classification, Ms. Reed has not presented a factual or legal issue that would preclude granting summary adjudication in ORR’s favor.²⁶

IV. Conclusion

There are no genuine issues of material fact and ORR is entitled to summary adjudication in its favor as a matter of law. Ms. Reed was given notice of the regulatory requirement for submitting an annual report, and of the financial penalties that would ensue if she did not file that report. She has not filed her report. Consequently, ORR’s reduction of her Medicaid provider payment rate by 20 percent is upheld.

DATED this 11th day of September, 2013.

By: Signed
Lawrence A. Pederson
Administrative Law Judge

²³ See, e.g., *In re Holiday Alaska, Inc.*, OAH No. 08-0245-TOB (Comm’r of Commerce, Community & Econ. Dev. 2008) (<http://aws.state.ak.us/officeofadminhearings/Documents/TOB/TOB080245.pdf>), at 7-13.

²⁴ *State, Dept. of Natural Resources v. Alaska Riverways, Inc.*, 232 P.3d 1203, 1220 (Alaska 2010).

²⁵ *Id.*

²⁶ To properly oppose a summary adjudication motion on the basis that the rate payment reduction had been selectively and improperly enforced against her, Ms. Reed would need to have filed an affidavit explaining how the regulation had been selectively enforced against her “based on an arbitrary or unjustifiable classification.” 2 AAC 64.250(b). However, Ms. Reed is representing herself. “Adequate knowledge of both the right to file and the necessity of filing counter-affidavits to oppose summary judgment is critical to the pro se litigant’s access to a just disposition of the merits of his claim,” *Maydun, supra*, 657 F.2d at 877. The requirements of 2 AAC 64.250(b) must be administered in that spirit. Regardless, even given the latitude afforded pro se litigants, Ms. Reed did not file an opposition and did not make any averments in her correspondence that can be interpreted to create a colorable claim of selective enforcement.

Adoption

The undersigned 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 15th day of October, 2013.

By: Signed _____
William Streur, Commissioner
Department of Health and Social Services