

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

In the Matter of)
)
C CARE SERVICES, LLC) OAH No. 14-2330-MPC
_____)

DECISION

I. Introduction

The Medicaid Program Integrity Unit of the Department of Health and Social Services (“Program Integrity”) issued a notice to C Care Services, LLC (“C Care”) on October 21, 2014. This notice informed C Care that “Medicaid payments for your services as a Medicaid provider have been suspended effective October 21, 2014.” C Care filed its Notice of Appeal, and the matter was referred to OAH for a hearing.

A hearing was held on January 20 and 21, 2015. C Care was represented by William F. Brattain II and Darryl L. Jones. Program Integrity was represented by Assistant Attorney General Scott D. Friend. Administrative Law Judge Kathleen A. Frederick orally granted two motions to dismiss. This decision formalizes those rulings and further explains the basis for those rulings.

II. Facts

C Care provided services to Medicaid recipients. It hired and provided personal care assistants to Medicaid recipients and provided additional services under the Medicaid Waiver Program. C Care was one of the larger providers; it served about 400 recipients and had annual billings of approximately \$10 million.¹

A notice was delivered to C Care on October 21, 2014.² The section titled “Notice of Sanction to be Imposed” stated that all payments for services were immediately suspended. The section titled “Notice of Grounds for Sanction” stated:

On October 21, 2014 the Medicaid Fraud Control Unit confirmed that Cecilia De Leon, owner of C Care LLC is under investigation of a credible allegation of fraud. Specifically, it is alleged that C Care and Cecilia De Leon violated the

¹ The background information about C Care’s business is taken from the testimony of Douglas Jones, the manager of the Program Integrity Unit.

² Referral to OAH, Attachment 1 (October 21 Notice).

provisions of AS 47.05.210(a)(1); AS 47.05.210(a)(2); AS 47.05.210(a)(5); AS 47.05.210(a)(7) and AS 11.46.600.^[3]

No other details about the nature of the allegation of fraud were included in this notice. While there was apparently an allegation that both C Care and Ms. De Leon had committed fraud, the notice says that only Ms. De Leon was under investigation for a *credible* allegation of fraud.⁴

C Care filed its Notice of Appeal on December 10, 2014.⁵ This appeal included a “Demand for Summary Dismissal” for failing to provide proper notice of the basis for the suspension of payments. C Care also included discovery requests with its appeal. A scheduling conference was held on December 29, 2014. Program Integrity was ordered to respond to C Care’s discovery requests by January 6, 2015. The hearing was set to begin on January 20, 2015.⁶

An eleven page agency record was transmitted to OAH and C Care on January 5, 2015. Pursuant to AS 44.64.060, this record should have been delivered by December 26, 2014, 15 days after the request for a hearing. On January 15, 2015, Program Integrity served and filed a CD containing the Agency Record from a different case, *In re C Care Services 2009 Audit*, OAH No. 14-1069-MDA. This CD contained 1,698 pages. Then, on January 16, 2015, Program Integrity served and filed a supplement to the Agency Record in this case, consisting of an additional 333 pages. January 16, 2015 was a Friday. Monday, January 19, 2015 was a state holiday.⁷

C Care filed two motions to dismiss on January 20, 2015.⁸ The first motion argued that the record in this case was largely hearsay and was insufficient to show a credible allegation of fraud. Further, according to C Care, since Program Integrity had not responded to discovery requests or otherwise informed C Care of the nature of the charges against it, additional evidence beyond the eleven page record should not be allowed.

C Care’s second motion filed on January 20 argued that Program Integrity’s case against it should be dismissed for failing to provide discovery or otherwise comply with OAH’s order to

³ October 21 Notice.

⁴ October 21 Notice.

⁵ Referral, Attachment 2.

⁶ Recording of Scheduling Conference; Scheduling Order dated January 8, 2015.

⁷ Official Notice is taken of the days of the week associated with these dates. 2 AAC 64.300(a). Either party may refute this information through the Proposal for Action process.

⁸ Since C Care had also made a motion to dismiss with its appeal, these were actually the second and third motions submitted in this matter.

respond to the discovery requests. Program Integrity filed a written opposition on January 21, 2015.

The hearing began on January 20, 2015. Douglas Jones, manager of the Program Integrity Unit, testified on behalf of Program Integrity. During the remainder of that day and the next day, the parties addressed the motions to dismiss, focusing mainly on whether the notice was sufficient and, if not, whether that was cured by subsequent information provided by Program Integrity.

After hearing from the parties, the motions to dismiss were orally granted.⁹

III. Discussion

A. *Regulations for Withholding or Suspending Payments*

Medicaid is a federal program administered by the states. The state Medicaid agency is required to suspend all payments to a provider if it determines that:

there is a credible allegation of fraud for which an investigation is pending under the Medicaid program against an individual or entity unless the agency has good cause to not suspend the payments or to suspend the payment only in part.¹⁰

When payments are suspended under this provision, Program Integrity must send notice of the suspension within five days.¹¹ The notice must:

- (i) State that payments are being suspended in accordance with this provision.
- (ii) Set forth the general allegations as to the nature of the suspension action, but need not disclose any specific information concerning an ongoing investigation.
- (iii) State that the suspension is for a temporary period, as stated in paragraph (c) of this section, and cite the circumstances under which the suspension will be terminated.
- (iv) Specify, when applicable, to which type or types of Medicaid claims or business units of a provider suspension is effective.
- (v) Inform the provider of the right to submit written evidence for consideration by State Medicaid Agency; [and]
- (vi) Set forth the applicable State administrative appeals process and corresponding citations to State law.¹²

⁹ Because the motions were granted before Program Integrity finished presenting its evidence, the factual record is incomplete. No ruling can be made as to whether there was a credible allegation of fraud.

¹⁰ 42 C.F.R. §455.23(a)(1).

¹¹ 42 C.F.R. §455.23(b). There is an exception to this requirement if a law enforcement agency asks that the notice be temporarily delayed. That exception is not applicable here.

¹² 42 C.F.R. §455.23(b)(2). 42 C.F.R. §455.23(a)(3) allows for, but does not require, a state administrative review process.

Alaska law implements this federal requirement through its own regulation, 7 AAC 105.480. This regulation refers to withholding of payments instead of suspension, and states that payment may be withheld pursuant to 7 AAC 105.410 upon “receipt of reliable information that the circumstances giving rise to the need for the withholding involve medical assistance fraud as defined in AS 47.05.210.”¹³ The notice provision in this regulation is similar to the federal requirements except that notice must be given before payments are withheld.¹⁴ The notice must:

- (1) state that payments are being withheld in accordance with 42 C.F.R. 455.23 or an applicable provision of state law;
- (2) state that the withholding is for a temporary period;
- (3) specify, when appropriate, each type of medical assistance claim to which the withholding applies;
- (4) specify, when appropriate, general allegations that justify the withholding action;
- (5) cite the circumstances under which the withholding will be terminated; and
- (6) inform the provider of the right to submit written evidence for consideration by the department.^{15]}

Subsection (a) of 7 AAC 105.480 specifically states that the payments are withheld under 7 AAC 105.410.¹⁶

While 7 AAC 105.480 does not explicitly refer to an appeal process, the October 21 Notice said that it was imposing a sanction and that C Care could appeal under the provisions of 7 AAC 105.460. Section 460 provides the process available for appealing a sanction.

B. Credible Allegation of Fraud

A credible allegation of fraud may be an allegation which has been verified by the State, from any source, including but not limited to the following:

- (1) Fraud hotline complaints.
- (2) Claims data mining.
- (3) Patterns identified through provider audits, civil false claims cases, and law enforcement investigations. Allegations are considered to be credible when they have indicia of reliability and the State Medicaid agency has reviewed all

¹³ 7 AAC 105.480(a).

¹⁴ 7 AAC 105.480(b).

¹⁵ 7 AAC 105.480(b).

¹⁶ 7 AAC 105.410(3) allows for withholding of payments as a possible sanction.

allegations, facts, and evidence carefully and acts judiciously on a case-by-case basis.^[17]

The term “fraud” is defined as:

an intentional deception or misrepresentation made by a person with the knowledge that the deception could result in some unauthorized benefit to himself or some other person. It includes any act that constitutes fraud under applicable Federal or State law.^[18]

Mr. Jones testified that a search warrant was issued and served on October 21, 2014, the same day the suspension notice was delivered to C Care. He asserted that the issuance of a search warrant establishes that the allegations against C Care are credible. Under the limited record in this case, the mere existence of a search warrant does not establish the credibility of the fraud allegations against C Care.

A search warrant may be issued if the judicial officer reasonably believes the property involved in the warrant was stolen or embezzled, used as a means to commit a crime, is in the possession of someone who intends to use it to commit a crime, is evidence of a crime, or evidence that a particular person committed a crime.¹⁹ The fact that files were taken from C Care’s offices pursuant to a search warrant simply means there is credible evidence to believe the files are evidence of a crime or evidence that a particular person committed a crime. Without more information about the warrant and the affidavits supporting it, it is unknown whether the crime at issue was fraud or whether the alleged perpetrator of the crime was C Care or some other individual employed by or connected with C Care.²⁰ For example, the documents might help show that personal care assistants were conspiring with recipients to obtain payment for services not performed. This could potentially be accomplished without C Care’s knowledge or approval.

Showing the existence of a credible allegation, therefore, requires more than just showing an investigation is being conducted or that a search warrant was issued. Instead, when a provider appeals a suspension, Program Integrity must show what the allegation is and why there is reason to believe the allegation is true.

¹⁷ 42 C.F.R. §455.2.

¹⁸ 42 C.F.R. §455.2.

¹⁹ AS 12.35.020. Significantly, once a search warrant is served, the person from whom property was taken must be given a copy of the warrant and any supporting affidavits for that warrant. AS 12.35.025; Rule of Crim. Proc. 37(b).

²⁰ As noted above, according to the October 21 Notice, C Care was not being investigated.

C. Motion to Dismiss for Inadequate Notice

1. Due Process Requirements

A party's due process rights are implicated any time the government seeks to take a person's life, liberty, or property. The right to due process is violated if the deprived party is not given an opportunity to be heard at a meaningful time and in a meaningful manner.²¹

Determining what process is due is made on a case-by-case basis depending on the interest deprived, and the competing governmental interests involved.²² The notice of the deprivation and the type of hearing provided must be appropriate to the type of case involved.²³ Normally, due process requires a hearing before any deprivation of property.²⁴ At a minimum, due process requires being informed of the evidence that supports the deprivation and an opportunity to respond so that there is "an initial check against a mistaken decision[.]"²⁵

In this case, there was no notice or opportunity to be heard prior to the suspension of payments. On the other hand, federal law explicitly required a suspension without prior notice as soon as Program Integrity determined a credible allegation of fraud existed. Federal laws supersede state requirements.²⁶ Accordingly, C Care was not entitled to any notice prior to the suspension.²⁷ However, the notice regulations are interpreted to otherwise comply with the requirement that C Care have a meaningful opportunity to contest Program Integrity's decision. In doing so, C Care's interest in a continued income stream so that it can stay in business is weighed against the state's interest in not continuing to reimburse for services when there is a reason to believe that at least some of the reimbursement is being obtained fraudulently.

2. Minimum Notice Requirements

Under the federal regulation, Program Integrity was required to provide notice of the general allegations of the suspension action, but did not have to disclose any specific information about the ongoing investigation.²⁸ Similarly, under state law the notice must "specify, when appropriate, general allegations that justify the withholding action."

²¹ *Blaufuss v. Ball*, 305 P.3d 281, 286 (Alaska 2013).

²² *Blaufuss v. Ball*, 305 P.3d 281, 286 (Alaska 2013).

²³ *Patrick v. Municipality of Anchorage*, 305 P.3d 292, 299 (Alaska 2013).

²⁴ *Storrs v. Municipality of Anchorage*, 721 P.2d 1146, 1149 (Alaska 1986).

²⁵ *Storrs v. Municipality of Anchorage*, 721 P. 2d 1146, 1149 (Alaska 1986).

²⁶ U.S. Constitution, art. VI, § 2.

²⁷ This assumes that the federal regulation does not violate federal due process requirements.

²⁸ 42 C.F.R. 455(b)(2)(ii).

This case is not about whether an actual instance of fraud can be proven. Instead, the question is whether there was a *credible allegation* of fraud. Two general allegations were raised in this hearing:

1. that C Care improperly billed for services provided by personal care assistants before they had been approved through the required background check process; and
2. that C Care improperly altered documents to support billing for services.

Neither of these allegations is listed in the October 21 Notice. Mr. Jones acknowledged that C Care would not be able to discern the nature of the allegations from this notice. Instead, he said C Care would need to ask someone what the allegations were.²⁹

Program Integrity argued that it was not required to provide any information about the nature of the allegations because it was not required to disclose information concerning an ongoing investigation. However, 42 C.F.R §455.23 does not prohibit disclosing information, and specifically contemplates that state law may provide for a hearing. Program Integrity did provide for a hearing. Under both the state and federal regulations, the provider has the right to submit written evidence for consideration. The right to submit evidence and the right to contest a decision at a hearing are both meaningless unless the provider is given some information about the nature of the allegations.

Program Integrity is correct that the regulatory scheme related to withholding payments is protective of any ongoing investigation, and is correct that it does not need to provide significant detail about the allegations. Here, however, it provided no information about the allegations or why it believed them to be credible. At a minimum, the notice should have said that:

1. C Care was accused of fraudulently billing for personal care assistants who did not have completed background checks;
2. C Care was accused of fraudulently altering documents used to support its billing; and
3. Specified the reasons why Program Integrity found those allegations to be credible.

This information could easily have been provided without jeopardizing any ongoing investigation. Without this information, C Care did not know what written evidence to submit for consideration, or how to prepare for its hearing to contest Program Integrity's claim that there

²⁹ Jones testimony. As pointed out during the hearing, C Care did ask for this information by way of discovery requests, but the requests were not answered.

was a credible allegation of fraud.³⁰ Because this information was not included in the October 21 Notice, the notice was deficient.

C Care also argued that the more detailed notice requirements of 7 AAC 105.440 applied in this case. The October 21 Notice says it was issued pursuant to 7 AAC 105.480, which provides for withholding of payments under 7 AAC 105.410. Withholding of payments is listed as a possible sanction in that regulation.³¹ When payments are withheld under section 410, a section 440 notice is issued. In addition, the October 21 Notice specifically said that the appeal process was the process described in 7 AAC 105.460, that is the process used to appeal a notice issued under 7 AAC 105.440. However, it is not necessary to decide here whether Program Integrity must comply with the 7 AAC 105.440 notice requirements because, as discussed above, the October 21 Notice was deficient under the less stringent requirements of section 480.

State agencies sometimes make mistakes. The purpose of a hearing is to allow an opportunity to correct those mistakes. For that opportunity to be meaningful, the notice must provide sufficient information to detect and challenge a mistake.³² Without knowing what the allegations were and why Program Integrity believed them to be credible, C Care could not meaningfully challenge Program Integrity's action.

D. Providing Additional Information During the Hearing Process Does Not Cure the Notice Deficiency

Program Integrity did provide more information prior to the start of the hearing. It provided the agency record on January 5, 2015, the agency record from a different administrative hearing involving C Care on January 15, and a supplement to the agency record on January 16th. It also provided a prehearing brief and four exhibits on January 16.

Program Integrity transmitted its agency record on January 5, 2015. The agency record consists of "the record relied on to support the decision."³³ The record consisted of eleven pages describing an investigation into allegations that C Care was billing for services provided by personal care assistants before they had completed the background check process. While the original allegation only involved one individual on contract with C Care, the investigation found

³⁰ It is unnecessary to decide in this case whether Program Integrity would also need to provide more information since it did not meet even this minimal standard.

³¹ 7 AAC 105.410(a)(3).

³² See *Allen v. State, Dept. of Health and Social Services*, 203 P.3d 1155, 1168 (Alaska 2009).

³³ AS 44.64.060. Since Program Integrity did not say it was withholding any documents, C Care and the administrative law judge could reasonably believe that only these eleven pages were considered in deciding to issue the October 21 Notice.

evidence that there were many employees who were allowed to work without a background check.³⁴ Had this document been included with the October 21 Notice, the notice would have met the minimal requirements described above for the allegation concerning background checks. This document describes what C Care is alleged to have done that is fraudulent and explains why that allegation is credible.³⁵

3. *Submission of Second Agency Record and Prehearing Brief*

On January 16, 2015, Program Integrity submitted the agency record from a Medicaid Audit case. It also submitted its prehearing brief which included four pages from the audit that, according to the prehearing brief, were evidence of fraud. The pages purportedly show that notes used to support billing for one day of services were later altered to bill for multiple days. Nothing in the prehearing brief explains why this change to these records would be fraudulent. However, when the prehearing brief is read in conjunction with the audit report from the other OAH case, C Care would reasonably understand that the four pages attached to the brief were examples of billing records that Program Integrity believed were altered, but would not know why Program Integrity believed the alterations were not accurate, non-fraudulent corrections made to show the actual dates services were provided.

4. *Providing Information After An Appeal Does Not Cure A Defective Notice*

Even if Program Integrity had subsequently provided adequate information concerning both allegations, that information cannot be used to cure a defective notice. C Care only received that information because it appealed the decision. No one should have to litigate to obtain information that should have been provided initially. Had the proper information been provided, C Care might very well have decided not to contest whether these were credible allegations. Instead, it might have conserved its resources to contest those allegations at a later time – when the state attempts to convict C Care of fraud or attempts to terminate its participation in the Medicaid program.

In addition, the controlling federal regulation explicitly requires the notice to include the general allegations supporting the withholding of payments. The October 21 Notice does not contain any information about the allegations. In addition, Program Integrity

³⁴ Record at 4.

³⁵ The additional documents supplied in the Supplement to Agency Record provide back up support for the allegations described in the first 11 pages of the record. Neither the original record nor the supplement address the allegation that documents were altered.

has provided no authority for [an] assertion that failure to comply with an explicit federal regulation notice requirement can be cured if a [party], through [its] own initiative, challenges an Agency action and eventually obtains the information that the federal regulation specifically requires the Agency's initial notice to contain.^[36]

E. Motion to Dismiss for Discovery Violation

C Care also asked that this matter be dismissed because Program Integrity failed to comply with a discovery order. As discussed above, C Care submitted discovery requests with its appeal, and Program Integrity was informed during the scheduling conference that it would have to respond to those requests. That oral order was later confirmed in the written Scheduling Order.

There was some ambiguity as to what sort of response Program Integrity would provide. Counsel noted during the scheduling conference that he would need to check with his client before he could say what documents would be provided. However, there should have been no question that a response of some sort was required. C Care's discovery consisted of three requests for admission, eight interrogatories, and four requests for production. Given the protections given to ongoing investigations by the federal and state regulations, Program Integrity may have had valid objections to some or all of these requests. But a valid objection must be affirmatively asserted. It is never proper to ignore a discovery request simply because a valid objection exists.

While administrative hearings are typically less formal than judicial hearings, the parties must still comply with the rules and orders. Failure to do so has consequences. Many times, the remedy for failing to timely comply with a discovery order would be a continuance to allow a second opportunity to respond to the discovery requests, and to give the requesting party time to prepare its case after receiving those documents. That is not an appropriate remedy in this case. Because C Care's entire existence was jeopardized by the withholding of payments, a prompt hearing was essential.³⁷ A continuance would only cause C Care further harm if it turned out that there was no credible allegation of fraud. Another possible remedy would be to exclude any evidence offered by Program Integrity related to the discovery requests. As a practical matter, this remedy would have the same effect as a dismissal since Program Integrity didn't answer any

³⁶ *Allen*, 203 P.3d at 1169.

³⁷ The need for a prompt resolution is one reason why an oral ruling was issued. Unfortunately, there was a delay in issuing this written proposed decision. That delay does not change the analysis for rejecting a continuance as a possible remedy.

of the requests. Instead, the appropriate remedy here is to dismiss Program Integrity's credible allegation of fraud claim.³⁸

IV. Conclusion

C Care's motion to dismiss Program Integrity's claim that there is a legal basis for withholding payments is GRANTED. In addition, its motion to dismiss for failure to comply with a discovery order is GRANTED. Program Integrity's decision to withhold payments is REVERSED, and no payments may be withheld unless a new notice is issued that complies with due process requirements, and the provisions of 42 CFR 455.23 and 7 AAC 105.480.

Dated this 30th day of October, 2015.

Signed

Kathleen A. Frederick
Administrative Law Judge

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 December, 2015.

By: *Signed*

Name: Jared C. Kosin, J.D., M.B.A.
Title: Executive Director
Agency: Office of Rate Review, DHSS

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

³⁸ 2 AAC 64.360(a).