

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

In the Matter of:	)	Consolidated Cases:
	)	OAH No. 16-1316-MPC
VLADI & ASSOCIATES, LLC.	)	OAH No. 16-1490-MDA
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**DECISION**

**I. Introduction**

Vladi & Associates, LLC. (“Vladi”) was a Medicaid provider that provided personal care services (PCS) to Medicaid recipients. The Department of Health and Social Services, Division of Senior and Disabilities Services, Quality Assurance Unit (“Quality Assurance”), and another unit located in the Department of Health and Social Services, the Medicaid Program Integrity Unit (“Program Integrity”), notified Vladi that its Medicaid provider certification was terminated, and that it would be seeking repayment of sums allegedly improperly paid to Vladi. Shortly thereafter, Program Integrity notified Vladi that it was seeking repayment of \$71,843.77.<sup>1</sup>

Vladi requested hearings regarding both the termination action and the repayment demand. Because the two matters involve common factual and legal issues, the two cases were consolidated for all purposes. An evidentiary hearing was held over the course of three days, August 28 – 30, 2017. Assistant Attorney General Scott Friend represented the Department. Ron Offret represented Vladi.

Theresa Rosso, a former investigator with Quality Assurance; Caroline Hogan, also with Quality Assurance; Tracy Marshall, with the Department’s background check unit; and Douglas Jones, the manager of Program Integrity, testified on the Department’s behalf. Vladimir Vishnevetski, Vladi’s principal, testified on Vladi’s behalf.

The evidence in this case shows that Vladi allowed personal care assistants (PCA) to work for recipients without them first obtaining the proper background check clearance. Vladi billed, and was paid by, the Medicaid program for those services. Accordingly, Vladi is required to reimburse the Department for the improperly provided services. In addition, the severity of

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<sup>1</sup> For ease of reference, these two subdivisions within the Department of Health and Social Services will be referred to collectively as the “Department.”

Vladi's actions and its ongoing course of conduct, despite having been notified by the Department that its actions were improper, justify Vladi's permanent termination as a provider for the Alaska Medicaid program.

## II. Principles of Law<sup>2</sup>

### A. Background Check Requirements

Individuals and businesses that must be licensed or certified by the Department, or that will be paid by the Department to provide services to individuals served by the Department's programs, are required to undergo a background check. The background check requirement includes a criminal history check, which applies to owners of a business, its officers, directors, partners, members, and principals. The criminal history check requirement also applies to employees and independent contractors if those persons have regular contact with service recipients or their personal or financial records.<sup>3</sup> This criminal history check is mandatory.<sup>4</sup> Relatedly, this requirement applies to personal care assistants (PCAs).<sup>5</sup> A Medicaid-enrolled provider may not have a person who has been convicted of a barrier crime as an owner, officer, director, partner, member, principal, employee, or independent contractor of the business.<sup>6</sup>

A business entity that is subject to the background check requirement must request a criminal history background check for a prospective employee: "the criminal history check must be completed before hiring unless the department issues notice of a provisional valid criminal history check under 7 AAC 10.920."<sup>7</sup> If a provisional background check is issued and subsequently revoked, the employing "entity or provider must terminate association with the individual." The termination is ordinarily required to be immediate. However, the termination need not be immediate if the employing entity or provider intends to request a variance, **and** removes the revoked individual from any contact with a recipient or services and from the ability to access recipients' personal or financial records. If the revoked individual is either a court-appointed guardian or holds a power of attorney for the recipient, or is a relative of the recipient

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<sup>2</sup> All references to regulations are to those in effect at the time of the alleged acts that gave rise to this consolidated case.

<sup>3</sup> AS 47.05.300; 7 AAC 10.900(b).

<sup>4</sup> 7 AAC 10.910.

<sup>5</sup> AS 47.05.017(a) and (c).

<sup>6</sup> AS 47.05.310(a); 7 AAC 10.905.

<sup>7</sup> 7 AAC 10.910.

authorized to make the recipient’s financial decisions, the revoked individual may still handle the recipient’s financial affairs.<sup>8</sup>

If a previously-issued criminal history check is revoked, the revocation generally takes effect 30 days after the individual, or his/her employing entity or provider, receives notice of the revocation “unless a request for reconsideration is submitted.”<sup>9</sup> The Department has the discretion to immediately revoke the previously-issued criminal history check “if the department finds that the life, health, safety, or welfare of a recipient of services is threatened.”<sup>10</sup>

A criminal history check is valid for 6 years. However, if an individual with a valid criminal history check obtains a job with a new employer, within 100 days of leaving the previous employer, the new employer must have the Department verify that the criminal history check is still valid.<sup>11</sup> If an individual had a valid criminal history check with a prior employer, and it has been more than 100 days since he/she left that employment, the previous criminal history check is automatically revoked and the individual must apply for a new criminal history check.<sup>12</sup>

A PCA “must pass a criminal history check requested under (c) of this section unless the department grants a variance under 7 AAC 10.935.”<sup>13</sup> In addition:

The department will not pay for services provided by a personal care assistant

(1) for whom a criminal history check was not requested or required under 7 AAC 10.900 – 7 AAC 10.990; or

(2) who does not pass a criminal history check under 7 AAC 10.900 – 7 AAC 10.990.<sup>14</sup>

*B. Sanctions and Overpayment Claims*

The Department has the ability to impose sanctions against a provider for a large variety of reasons. Those include engaging in a course of conduct that is abusive of the Medicaid program, generally violating the applicable terms of the Medicaid statutes and regulations,<sup>15</sup> and “presenting or causing to be presented for payment any false or fraudulent claim for services or

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<sup>8</sup> 7 AAC 10.960.

<sup>9</sup> 7 AAC 10.945.

<sup>10</sup> 7 AAC 10.945(c).

<sup>11</sup> 7 AAC 10.910(c)(3) and (e).

<sup>12</sup> 7 AAC 10.915(g).

<sup>13</sup> 7 AAC 125.090(a)(4).

<sup>14</sup> 7 AAC 125.090(c).

<sup>15</sup> 7 AAC 105.400(6), (10), and (11).

supplies.”<sup>16</sup> The Department has a number of potential sanctions available to it. Among those is the discretion to terminate a provider “from participation in the Medicaid program.”<sup>17</sup> The factors for determining the appropriateness of the sanctions are:

- (1) seriousness of the offense;
- (2) extent of violations;
- (3) history of prior violations;
- (4) prior imposition of sanctions;
- (5) prior provision of provider education;
- (6) provider willingness to obey program rules;
- (7) whether a lesser sanction will be sufficient to remedy the problems; and
- (8) actions taken or recommended by peer-review groups or licensing boards.<sup>18</sup>

The Department also may require a provider to refund any payments it received that do not meet the Medicaid program’s requirements.<sup>19</sup>

### **III. Facts<sup>20</sup>**

Vladi is an enrolled Medicaid provider. Vladimir Vishnevetski is Vladi’s principal. Vladi provides personal care services (PCS) to eligible Medicaid recipients. Those services are provided by personal care assistants (PCAs) employed by Vladi.

In June 2014, the Division of Senior and Disabilities Services (Division) received a phone call from Jane Doe. Ms. Doe had not passed the background clearance required for PCAs, and had applied for a variance. She told the Division representative that she was working for Vladi as a PCA for her father. She wanted to know when her variance would be approved so that she could turn in her timesheets.<sup>21</sup>

The Division did a follow up investigation and determined that Vladi was allowing PCAs to work before they had passed a background check, or who had not passed the background check and did not obtain a variance. On July 16, 2014, Vladi was sent a “Notice to Correct” informing it that those practices were improper and needed to be stopped immediately.<sup>22</sup> That notice contained the following:

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<sup>16</sup> 7 AAC 105.400(1).

<sup>17</sup> 7 AAC 105.410(a)(1).

<sup>18</sup> 7 AAC 105.420(b).

<sup>19</sup> 7 AAC 105.220(f).

<sup>20</sup> The following facts were established by a preponderance of the evidence.

<sup>21</sup> AR 223.

<sup>22</sup> AR 199 – 203.

1. Comparison of the provider's background check database to the employee list with hired dates as well as timesheets demonstrates that it is common practice by the provider to allow PCA's to provide services without a provisional or approved background check status and while Barred with no variance in place.

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1. Any staff person who does not have a provisional or approved status or an approved variance must immediately stop providing services. They cannot resume providing services until they have at least a provisional clearance or an approved variance.<sup>23</sup>

On December 17, 2014, the Division sent Vladi a letter informing it that he had six employees, listed by name, who were not in its "background check account" and that those employees were not to work with clients or have access to the clients' protected health information until they had clearance. That employee list included Richard Baker.<sup>24</sup>

The Division met with Mr. Vishnevetski on January 6, 2015 and December 15, 2015. During each of these meetings, Mr. Vishnevetski's compliance with the background check process for his PCAs and his billing practices for the PCAs were discussed.<sup>25</sup>

The Division subsequently reviewed its records and determined that Vladi had violated the background check requirements for several persons; Vladi submitted billing claims, for which it had been paid, for PCAs who were not in compliance with the background check requirement when the services were rendered. In addition, the Division found an instance where Vladi submitted billings for PCA services that were furnished for a hospitalized recipient. The investigation resulted in Vladi being sanctioned by having its Medicaid provider certification terminated, and being required to repay \$71,843.77 to the Department.<sup>26</sup>

The underlying facts pertaining to each of the PCAs in question, and to the billing for a hospitalized recipient, are set out below.

1. John Smith - PCA

John Smith was a PCA who applied for a background check clearance on December 10, 2014 and was provisionally approved on December 10, 2014.<sup>27</sup> Smith had a prior approved background check clearance from a different business.<sup>28</sup> Mr. Vishnevetski spoke to Division

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<sup>23</sup> Ms. Rosso's testimony; AR 201.

<sup>24</sup> AR 458 – 461.

<sup>25</sup> Ms. Rosso's testimony.

<sup>26</sup> AR 6 – 9, 42 – 54.

<sup>27</sup> AR 232 – 233; Ms. Rosso's testimony.

<sup>28</sup> AR 232.

staff about this application and asked if he could hire Smith effective November 4, 2014 and was told that the hiring could not precede the date of Smith's background check approval. Mr. Vishnevetski, however, completed the computer application process and listed the date of hire as November 4, 2014. Sometime between December 10, 2014 and January 12, 2015, Mr. Vishnevetski changed the hire date to December 10, 2014.<sup>29</sup>

On January 9, 2015, Vladi submitted Medicaid billing claims for Smith's PCA services for November 4 through December 9, 2014. Those claims were denied. Vladi then resubmitted those same billing claims on April 13, 2015, and they were paid. The total amount paid was \$2,964.<sup>30</sup>

## 2. Mary Brown - PCA

Mary Brown was a PCA who received a background check clearance to work for Vladi on December 10, 2014. Vladi submitted Medicaid billing claims for Brown's PCA services for October 21 through December 9, 2014. Vladi was paid \$2,214.30 as a result. Brown had a background check clearance from 2013 while employed with a different PCS agency.<sup>31</sup>

## 3. James Johnson – PCA

James Johnson was a PCA who received a background check clearance to work for Vladi on December 10, 2014. Vladi submitted Medicaid billing claims for Johnson's PCA services for November 17 through December 9, 2014. Vladi was paid \$911.20 as a result. Johnson had a background check clearance from 2012 while employed with a different business.<sup>32</sup>

## 4. John Doe - PCA

John Doe was a PCA who applied for the background check clearance on July 22, 2014. He received a provisional background check clearance to work for Vladi on July 30, 2014, and a final background check approval on September 3, 2014. Vladi submitted Medicaid billing claims for John Doe's PCA services for July 14 – July 29, 2014 on August 21, 2014; they were denied. Vladi resubmitted those same claims on September 8, 2014, and they were paid. Vladi was paid \$1,464 as a result.<sup>33</sup>

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<sup>29</sup> AR 232 – 233; Ms. Rosso's testimony.

<sup>30</sup> AR 242 – 244; Ms. Rosso's testimony.

<sup>31</sup> AR 245 – 248.

<sup>32</sup> AR 84, 264.

<sup>33</sup> AR 269 – 271.

5. Mary Williams - PCA

Mary Williams was a PCA who applied for a background check clearance on July 30, 2014. Williams received a background check clearance on August 4, 2014. Vladi submitted Medicaid billing claims for Williams's PCA services for July 6 through August 3, 2014. Vladi was paid \$2,379 as a result. Williams had a background check clearance from 2013 while employed by a different business.<sup>34</sup>

6. Elizabeth Jones - PCA

Elizabeth Jones was a PCA who applied for a background check clearance on August 20, 2014. Jones received a background check clearance on August 26, 2014. Vladi submitted Medicaid billing claims for Jones's PCA services for August 17 through August 25, 2014. Vladi was paid \$957.70 as a result. Jones had a background check clearance from 2013 while employed by a different business.<sup>35</sup>

7. James Miller - PCA

James Miller was a PCA who applied for a background check clearance on September 27, 2014. Miller received a background check clearance on October 9, 2014. Vladi submitted Medicaid billing claims for Miller's PCA services for September 28 through October 8, 2017. Vladi was paid \$1,323.70 as a result.<sup>36</sup>

8. Elizabeth Davis - PCA

Elizabeth Davis was a PCA who received a background check clearance on October 23, 2014. Vladi submitted Medicaid billing claims for Davis's PCA services for October 19, 2014. Vladi was paid \$140.30 as a result. Davis had a background check clearance from 2011 while employed by a different business.<sup>37</sup>

9. Jane Doe - PCA

Jane Doe applied for a background check clearance on April 14, 2014. On May 1, 2014, Jane Doe received a provisional clearance.<sup>38</sup> The very next day, May 2, 2014, the background check unit sent Vladi written notice that Jane Doe had a barring condition, which caused Jane Doe to be barred from "association with an entity that is licensed or certified by, or that receives

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<sup>34</sup> AR 272 – 279.

<sup>35</sup> AR 102 – 104.

<sup>36</sup> AR 106 – 108.

<sup>37</sup> AR 109 – 112.

<sup>38</sup> AR 124.

funding from the Department of Health and Social Services.” That same notice informed Vladi that it could request a variance for Jane Doe, or that Jane Doe could request reconsideration.<sup>39</sup> Vladi received that notice on May 6, 2014.<sup>40</sup> Vladi requested a variance, which was denied on June 23, 2014. Vladi was sent a copy of that notice on June 24, 2014.<sup>41</sup> However, on June 30, 2014, Program Integrity sent Vladi a letter that said Jane Doe was suspended “effective 30 days from the date of this letter.” That same letter states that Vladi could not bill for services “rendered on or before May 2, 2014.” It then stated that Vladi could not bill for services rendered “after May 2, 2014.”<sup>42</sup>

Vladi submitted Medicaid billing claims for Jane Doe’s PCA services for April 13, 2014 through May 24, 2014. Those first claims were submitted on July 7, 2014, and Vladi continued to submit those claims as late as May 5, 2015. Vladi was paid a total of \$2,670.08.<sup>43</sup>

#### 10. Richard Roe - PCA

Richard Roe had a provisional background check clearance issued on May 31, 2011. In April 2013, the BCU notified Vladi that Mr. Roe’s background check application was incomplete and that he had 30 days to finish the application. On August 7, 2013, the BCU notified Vladi that the application was still incomplete and that the “applicants have been closed.”<sup>44</sup> The record does not reflect when Vladi received that notice. However, it had to have been received by August 21, 2013, because a new background check application was submitted that day. Mr. Roe did not receive either a provisional or final background check clearance. Instead, on October 25, 2013, both Vladi and Mr. Roe were notified that Mr. Roe had not passed the background check, and that Mr. Roe could either request reconsideration or Vladi could request a variance.<sup>45</sup> Mr. Roe received the notice on October 29, 2013. Vladi received the notice on November 8, 2013.<sup>46</sup>

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<sup>39</sup> AR 117 – 119.

<sup>40</sup> AR 124.

<sup>41</sup> AR 121 – 123.

<sup>42</sup> AR 28 – 29.

<sup>43</sup> AR 315 – 317.

<sup>44</sup> AR 126.

<sup>45</sup> AR 127 – 135.

<sup>46</sup> AR 131, 327 - 328.



Mr. Roe applied for a background check clearance again on February 5, 2014, which was denied on February 13, 2014.<sup>47</sup> Vladi and Mr. Roe received notice of the denial on February 19, 2014.<sup>48</sup>

Vladi submitted Medicaid billing claims for Mr. Roe's PCA services for May 16 through May 30, 2011, before Mr. Roe received his provisional background check clearance on May 31, 2011, and also submitted Medicaid billing claims for Mr. Roe's PCA services for August 7, 2013 through November 23, 2013. Vladi was paid a total of \$19,650.33 as a result.<sup>49</sup>

11. Jane Roe - PCA

Ms. Roe had a provisional background check clearance issued on July 7, 2010. On April 8, 2011, Vladi was sent notice that her background check clearance was revoked and that there was a 30-day deadline to request a variance or reconsideration.<sup>50</sup> Vladi sent the Division a letter on April 12, 2011, stating that there had been a case of mistaken identity and asking the Division to "[p]lease check her case and cancel your revocation letter so she can start working again."<sup>51</sup> Vladi submitted Medicaid billing claims for Ms. Roe's PCA services provided for May 9, 2011 through March 30, 2013. Vladi was paid a total of \$84,414.55 as a result.<sup>52</sup>

12. Maria Lee - PCA

Maria Lee requested a background check clearance on January 21, 2014. A provisional background check clearance was issued on February 5, 2014. On April 25, 2014, Vladi was sent notice that Maria Lee's background check clearance was denied.<sup>53</sup> Vladi received that notice on April 30, 2014.<sup>54</sup> A variance request was made, which was denied on August 25, 2014.<sup>55</sup> Vladi requested reconsideration of the variance denial, which was denied on September 25, 2014.<sup>56</sup>

Vladi submitted Medicaid billing claims for Maria Lee's PCA services for January 8 through February 4, 2014 and May 11 through June 7, 2014. Vladi was paid a total of \$2,622.40 as a result.<sup>57</sup>

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<sup>47</sup> AR 341 – 349.

<sup>48</sup> AR 329 – 330.

<sup>49</sup> AR 353 – 375.

<sup>50</sup> AR 180 – 181.

<sup>51</sup> AR 22.

<sup>52</sup> AR 383 – 402.

<sup>53</sup> AR 187 – 190.

<sup>54</sup> AR 197.

<sup>55</sup> AR 191 – 192.

<sup>56</sup> AR 194 – 196.

<sup>57</sup> AR 419 – 421.

13. Richard Baker - PCA

Richard Baker had a background check clearance that expired on September 2, 2014. Vladi was notified that it would expire on August 8, 2014. The Division notified Vladi on December 17, 2014 that Baker did not have a valid background check clearance. Baker did not reapply for a background check clearance until March 31, 2016. He received clearance on April 25, 2016.<sup>58</sup> However, as demonstrated by Vladi's billings for October 11, 2015 through January 30, 2016, Baker worked as a PCA for Vladi prior to the background check having been issued.<sup>59</sup>

14. Billings for a hospitalized recipient.

Nancy Lewis was the PCA for a recipient who became hospitalized on August 22, 2015. The recipient did not leave the hospital and died several days later.<sup>60</sup> However, Vladi submitted Medicaid billing claims for Nancy Lewis's PCA services, furnished while the recipient was hospitalized.<sup>61</sup> A critical incident report was submitted to the Division, dated September 8, 2015. It states that the recipient went to the hospital and died on August 22, 2015. That critical incident report had a pre-typed name on it, stating that Mr. Vishnevetski was the reporter. However, the rest of the form is handwritten and is clearly written by a witness to the recipient's falling suddenly very ill at the recipient's home and having to be hospitalized.<sup>62</sup> Mr. Vishnevetski testified that he did not know the recipient was hospitalized until he received the Department's October 16, 2016 report, and that the PCA had lied to him when he received her timesheets.

The Department presented no evidence showing that Mr. Vishnevetski actually knew about the hospitalization, other than the report. Because that report is clearly handwritten (printed, not cursive) by an eyewitness, and because the handwriting on the report closely resembles the handwriting on Ms. Lewis's application for employment,<sup>63</sup> it is more likely true than not true that the PCA, Ms. Lewis, completed the critical incident report. The Department did not show that Mr. Vishnevetski was the person who filed the report. Consequently, the Department has not shown by a preponderance of the evidence that Mr. Vishnevetski was aware of the hospitalization at the time he submitted the PCA billings for this recipient. The

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<sup>58</sup> AR 296, 493.

<sup>59</sup> AR 293 – 295.

<sup>60</sup> AR 47; Ms. Rosso's testimony.

<sup>61</sup> Ms. Rosso's testimony.

<sup>62</sup> AR 33 – 35.

<sup>63</sup> *See* Vladi Ex. 7f.

Department requested repayment of this billed amount on February 3, 2017. Vladi reimbursed the Department in full in March 2017.<sup>64</sup>

#### **IV. Discussion**

In order for a business to receive payment from the Medicaid system for services provided to Medicaid recipients, that business must be enrolled as a Medicaid provider with the Department.<sup>65</sup> A Medicaid provider is required to comply with all applicable federal and state requirements.<sup>66</sup> In this case, because the Department is seeking affirmative relief against Vladi, consisting of repayment and licensing sanctions, it has the burden of proof by a preponderance of the evidence to establish the requisite non-compliance.

Both the Department and Vladi consistently use the term “background check” instead of “criminal history check.” This discussion will also follow that convention.

##### *A. Background Check Requirements*

A review of Vladi’s PCAs show that they fall into one or more categories: those whom Vladi allowed to work before either a provisional or final background check clearance was received, and those whom Vladi allowed to work after the background check clearance had been denied or revoked. Vladi billed Medicaid for, and was paid for, these services.

##### 1. PCA billings before a background check clearance was received.<sup>67</sup>

These PCAs were John Smith, Mary Brown, James Johnson, John Doe, Mary Williams, Elizabeth Jones, James Miller, Elizabeth Davis, Jane Doe, and Maria Lee. Six of these, Smith, Brown, Johnson, Williams, Jones, and Davis, had a prior background check clearance that had been obtained by a previous employer. For five of these, John Doe, Williams, Jones, Jane Doe, and Lee, Vladi’s submitted billings included services provided before a background check clearance was even requested.

Vladi did not dispute the basic facts. However, he argued that his billings were valid for a number of reasons. Each of those reasons is not persuasive, as discussed further below.

Vladi maintained that he hired the PCAs retroactively. However, the regulations do not allow for retroactivity. They are clear that a PCA “must pass a criminal history check . . . unless

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<sup>64</sup> Vladi Exs. 7d – 7e.

<sup>65</sup> 7 AAC 105.210(a).

<sup>66</sup> See 7 AAC 105.220.

<sup>67</sup> The Department’s exhibits also reference Linda Thomas. However, neither Quality Assurance’s October 6, 2016 Report of Investigation nor Program Integrity’s November 2 and 16 repayment demand letters mention Thomas. As a result, this decision will not discuss Thomas’s involvement further.

the department grants a variance.”<sup>68</sup> The regulations further provide that in order for Medicaid to pay for a PCAs services, that PCA must first obtain either a provisional or a final background check clearance:

The department will not pay for services provided by a personal care assistant

(1) for whom a criminal history check was not requested or required under 7 AAC 10.900 – 7 AAC 10.990; or

(2) who does not pass a criminal history check under 7 AAC 10.900 – 7 AAC 10.990.<sup>69</sup>

Vladi then argued that requesting a criminal history check was sufficient to allow billing for services. However, this argument is not persuasive. The regulation, when read as a whole, states that if a PCA does not apply for a background check, or is not approved, the PCA cannot be employed, and the provider cannot bill for the PCA’s services. So, a PCA must apply **and** be approved in order to be employed, and for the provider to be paid for the PCAs services. Given the underlying purpose behind the background check requirement – to protect recipients from unsafe care providers – allowing a PCA to work for a recipient before his or her background check is completed defeats that purpose.

There is, however, one other issue that must be resolved. What happens to the PCAs who have a prior valid background check from a different employer? The regulations answer that question – the background check must be verified, and in some cases must be completely reapplied for.<sup>70</sup> In other words, the background check does not automatically transfer with the PCA.

The net result is that PCAs cannot perform services for Medicaid recipients until they obtain either a provisional or final background check, or in the case of PCAs with a prior valid background check who are transferring to a new provider, until the background check is verified. And the provider cannot bill for those services. Vladi’s practice of allowing PCAs to work and submitting Medicaid claims for such PCAs prior to the date of their approval was a violation of the PCA and Medicaid program requirements.

Vladi raised an additional argument, that he was required to pay the PCAs prior to their approval under Department of Labor requirements because they began working before the date

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<sup>68</sup> 7 AAC 125.090(a).

<sup>69</sup> 7 AAC 125.090(c).

<sup>70</sup> 7 AAC 10.910(c)(3) and (e); 7 AAC 10.915(g).

of approval. That argument is devoid of merit and would require ignoring the PCA and Medicaid program requirements. Vladi's option was to **not** hire a PCA prior to the date the background clearance was received.

2. PCAs whose background check clearance was either not obtained or was revoked.

This category contains Richard Roe, Jane Roe, Jane Doe, and Maria Lee.

Richard Roe has a complicated history. He received a provisional clearance in 2011. On April 26, 2013, he was given 30 days to complete his application. On August 7, 2013, he was notified that his application was closed. However, the closing letter did not explicitly inform him that his provisional background check was revoked. In addition, while the Department has the legal ability to automatically revoke a provisional background check for failure to complete an application under 7 AAC 10.920(b), 7 AAC 10.950(a) allows an applicant the right to request reconsideration "of a department decision under 7 AAC 10.900 – 7 AAC 10.990." The closure letter of August 7, 2013 did not cite to any underlying regulation or statute. It failed to explicitly advise Vladi or Mr. Roe that the provisional background clearance has been cancelled, and that he had not received a valid final background check. It failed to advise Mr. Roe or Vladi of appeal rights, reconsideration rights, or variance rights. These defects render the notice ineffective. This means that the provisional approval from 2011 was still in effect.<sup>71</sup>

Mr. Roe then reapplied for a background check clearance, which was denied on October 25, 2013. Vladi received the denial notice on November 8, 2013. Vladi, however, submitted billings for November 9 through November 23, 2013. Vladi maintains this was proper for two separate reasons: first, because a variance was requested, and second, because Mr. Roe was providing services for a relative. Neither of these arguments are persuasive. The regulations are clear that a provider is required to terminate association with a person whose clearance is denied. The regulation does not provide for ongoing PCA approval while the variance request is pending. Nor does it provide for an exception in the case of relatives of the recipient.<sup>72</sup> In fact, the provider must make sure there is no ongoing contact with the recipient by the PCA, except that a person who is an authorized legal or financial representative can continue to have access to

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<sup>71</sup> See 7 AAC 10.950 for reconsideration and variance request requirements. Also see *Smart v. State*, 237 P.3d 1010, 1016 - 1016 (Alaska, 2010), for a discussion of general notice requirements, including the right to seek an administrative review.

<sup>72</sup> 7 AAC 10.960(f).

financial information or make financial decisions for the recipient while the variance request is pending.<sup>73</sup> Accordingly, effective November 8, 2013 – the date Vladi received notice that Mr. Roe’s background check had not been passed – Vladi could no longer employ Mr. Roe as a PCA, because that requires direct contact with a recipient.

Jane Roe’s situation is not as complicated as Mr. Roe’s situation. Ms. Roe had a provisional background check clearance. On April 8, 2011, Vladi was notified that it was revoked. That notice was not defective; it referred to applicable regulations, and notified the parties of the deadlines to request reconsideration or request a variance. The notice, however, referred to 7 AAC 10.945, which does not provide for immediate revocation. Instead, that regulation states that revocation is effective within thirty days “unless a request for reconsideration is submitted.” Vladi sent the Division a letter on April 12, 2011, claiming that there had been a mistake, and asking the Division to rescind the cancellation. This was a request for reconsideration. There, however, is no indication in the record that the request for reconsideration was ever acted upon. Accordingly, because there was no action on the request for reconsideration, Ms. Roe’s background check clearance remained valid. Given that, Vladi’s continued employment of Ms. Roe was not improper.<sup>74</sup>

Jane Doe had billings for time periods before a background check was obtained. Jane Doe, however had a provisional background check clearance issued on May 1, 2014. On May 2, 2014, Vladi and Jane Doe were sent notice that the final background check had been denied. Vladi received a copy of the notice on May 6, 2014. A variance was requested, which was denied on June 24, 2014. As discussed above, the request for a variance does not provide authorization for services to be continued pending action on the variance. This would normally mean that Vladi could have billed for Jane Doe’s services for at most six days – May 1, the date of provisional approval, through May 6, 2014, the date Vladi received notice that the background clearance was denied. However, on June 30, 2014, confusing correspondence issued by Program Integrity said Jane Doe was suspended “effective 30 days from the date of this letter;” however, that same letter states that Vladi cannot bill for services “rendered on or before May 2, 2014,”

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<sup>73</sup> 7 AAC 10.960(f).

<sup>74</sup> While the evidence at hearing strongly suggested that Ms. Roe misrepresented the facts to Vladi by informing him that there were criminal charges against her son “Sam” when there in fact were charges against her, this does not change the fact that reconsideration was requested and not acted upon. *See* AR 22, and Vladi Ex. 30.

and then states that Vladi cannot bill for services rendered “after May 2, 2014.”<sup>75</sup> This incredibly confusing correspondence does not help the Division’s case. On the other hand, Vladi was not authorized to bill for services either before or after May 2, 2014. But the facts of this case show that Jane Doe had several days where the provisional background check was issued, and that Vladi did not receive notice of the denial until May 6, 2014. It was therefore not improper for Vladi to bill for May 1 through May 6, 2016. However, once Vladi received notice that Jane Doe’s background clearance was denied, Jane Doe could no longer work as a PCA and Vladi could not bill for those services.

Maria Lee received a provisional background check clearance on February 5, 2014. Vladi received notice on April 30, 2014 that the final background check clearance was denied.<sup>76</sup> However, Vladi allowed Lee to work as a PCA before the provisional clearance was obtained – January 8 through February 4, 2014 – and after the final background check clearance was denied – May 11 through June 7, 2014.

Richard Baker received a background check clearance on April 25, 2016.<sup>77</sup> However, Baker worked as a PCA for Vladi prior to a background check having been issued, as demonstrated by Vladi’s billings for October 11, 2015 through January 30, 2016.<sup>78</sup> It is important to note that on December 17, 2014, the Division sent Vladi a letter specifically informing him that Richard Baker did not have a valid background check clearance.<sup>79</sup>

To summarize, Vladi allowed John Smith, Mary Brown, James Johnson, John Doe, Mary Williams, Elizabeth Jones, James Miller, Elizabeth Davis, Jane Doe, Maria Lee, and Richard Baker to work as PCAs before receiving either a provisional or final background check clearance for them. Vladi also allowed Richard Roe, Jane Doe, and Maria Lee to work as PCAs after he was notified that their final background check clearance had had been revoked or denied.

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<sup>75</sup> AR 28 – 29.

<sup>76</sup> AR 197.

<sup>77</sup> AR 296.

<sup>78</sup> AR 293 – 295.

<sup>79</sup> AR 458 – 461.

*B. Overpayment*

Program Integrity sent Vladi notice on November 2 and November 16, 2016 that it was requiring repayment for the following:

<u>PCA</u>	<u>Dates of Service</u>	<u>Amount</u>	<u>Reason</u>
Maria Lee	1/7/14 – 2/1/14	\$ 2,068.12	No background check
Maria Lee	1/10/14 – 1/31/14	\$ 333.76	No background check
Jane Doe	4/27/14 – 5/24/14	\$ 2,670.08	No background check
John Doe	7/14/14 – 7/29/14	\$ 1,464.00	No background check
Mary Williams	7/20/14 – 8/2/14	\$ 793.00	No background check
Mary Williams	7/20/14 – 8/2/14	\$ 719.80	No background check
Mary Brown	10/23/14 – 12/9/14	\$ 2,122.80	No background check
Richard Roe	8/6/13 – 11/23/13	\$ 4,688.44	No background check
Richard Roe	8/6/13 – 11/23/13	\$10,018.76	No background check
Richard Roe	8/6/13 – 11/23/13	\$ 2,878.34	No background check
Jane Roe	4/19/11 – 12/31/11	\$23,386.57	No background check
Jane Roe	1/1/13 – 3/30/13	\$13,117.50	No background check
James Miller	9/28/14 – 10/8/14	\$ 298.90	No background check
James Miller	9/28/14 – 10/8/14	\$ 1,024.80	No background check
James Johnson	11/17/14 – 12/9/14	\$ 911.20	No background check
Nancy Lewis	8/23/15 – 8/28/14	\$ 347.70	Recipient in hospital

Vladi has raised a general objection to some of these claims, arguing that the overpayment claim is barred by the general three-year statute of limitations pertaining to contract claims, AS 09.10.053. However, Vladi has cited to the wrong statute of limitations. AS 09.10.120 applies to this case. It provides for a six-year statute of limitations on actions brought “in the name of or for the benefit of the state.” All the claims in this case arose less than six years prior to November 2016, when this action was initiated. As a result, Vladi’s argument on this point is not persuasive.

In addition, Vladi argued that this action is barred by equitable estoppel. In order to successfully invoke estoppel against a governmental agency, four elements must be established:

1. the assertion of a governmental position by either conduct or words;
2. an act which reasonably relied upon the governmental position;
3. resulting prejudice; and
4. “estoppel serves the interest of justice so as to limit public injury.”<sup>80</sup>

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<sup>80</sup> *Wassink v. Hawkins*, 763 P.3d 971, 975 (Alaska 1988).



Vladi relies upon 7 AAC 125.190 in support of its argument. 7 AAC 125.190 requires the Department to conduct compliance audits of PCA agencies “on a biennial basis.” Vladi argues that if an audit had been done before July of 2014, he would have been appraised by the Department of any procedural errors and could have rectified them. If such an audit had been performed, and Vladi had been given a clean bill of health, then this argument would have some merit. However, the failure of a governmental agency to conduct a compliance audit cannot be said to amount to an assertion of a governmental position. Accordingly, Vladi has not satisfied the first element of the equitable estoppel test and this argument is not persuasive. It is not necessary to address the other three elements.

There are two claims pertaining to Maria Lee. Both claims are for services rendered prior to February 5, 2014, the date Lee received provisional clearance. As discussed above, the regulations do not allow the Medicaid program to pay for a PCA’s service prior to the date of either a provisional or final background check clearance. The Department may recover both claims in their entirety.

There is one claim pertaining to Jane Doe. That claim is for services rendered from April 27 through May 24, 2014. However, Jane Doe received a provisional clearance on May 1. While that clearance was revoked on May 2, Vladi did not receive notice of the revocation until May 6. Vladi could therefore legitimately bill for Jane Doe’s services for May 1 through May 6, 2014. The Department’s recovery is limited to April 27 through April 30, and May 7 through May 24, 2014.

The Department has one claim pertaining to John Doe. That claim is for services rendered from July 14 to July 29, 2014. The claim is upheld in its entirety. John Doe was not issued a provisional background clearance until July 30. It should be noted that the background clearance was not applied for until July 22, and Vladi billed for services predating the application.

The Department has two claims pertaining to Mary Williams. Those claims involve payment for services rendered from July 20 through August 2, 2014. Those services predated August 4, 2014, the date Williams received a background check clearance. Accordingly, both claims are upheld in their entirety.

The Department has one claim pertaining to Mary Brown. That claim involves payment for services rendered from October 23 through December 9, 2014. However, Brown did not

receive a background check clearance until December 10, 2014. Accordingly, the claim is upheld in its entirety.

The Department has three claims pertaining to Richard Roe. Those claims involve payments for services rendered from August 6 through November 23, 2013. As discussed above, due to notice defects, Mr. Roe had a provisional background clearance from 2011, and he was not properly notified that he was not approved for a final background check clearance. As a result, he did not lose his provisional clearance until November 8, 2013, the date Vladi received notice that Mr. Roe's background clearance application was denied. As a result, the billings for services through November 8, 2013 were valid. However, the billings for November 9 through November 23, 2013 were not valid, and that portion of the claims is upheld.

The Department has two claims pertaining to Jane Roe, for April 19, 2011 through December 31, 2011, and for January 1, 2013 through March 30, 2013. However, as discussed above, Ms. Roe was notified that her background check clearance was revoked, and reconsideration was timely requested. When a clearance is revoked, which is distinct from it being denied, a request for reconsideration keeps the clearance active while the request is pending. Program Integrity has not demonstrated that the reconsideration was ever denied. In the analogous case of *Paxton v. Gavlak*, the Alaska Supreme Court held that CSED's failure to send a party a closure letter complying with the Appellate Rules' procedural requirements resulted in the review file being kept open.<sup>81</sup> Because the applicable regulation, 7 AAC 10.950, clearly provides that the Department was required to explicitly notify Ms. Roe that her reconsideration request was denied and of appeal rights, and failed to do so, that reconsideration request is still pending, and Ms. Roe's background clearance was valid during the time of these claims. As a result, The Department may not recover these two claims.

The Department has two claims pertaining to James Miller. Those claims involve payment for services rendered from September 28 through October 8, 2014. Miller did not obtain a background check clearance until October 9, 2014. Accordingly, those claims are upheld in full.

The Department has one claim pertaining to James Johnson. That claim involves payment for services rendered from November 17 through December 9, 2014. Johnson did not

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<sup>81</sup> *Paxton v. Gavlak*, 100 P.3d 7, 12 (Alaska, 2004).

obtain a background check clearance until December 10, 2014. Accordingly, that claim is upheld in full.

The Department has one claim pertaining to Nancy Lewis. This claim involves payment for services rendered from August 23 through August 28, 2014. However, this claim was already paid in full in March of 2017. Accordingly, the Department may not pursue it further.

In summary, the Department's claims regarding Maria Lee, John Doe, Mary Williams, Mary Brown, James Miller, and James Johnson are upheld in their entirety. The claims regarding Jane Doe and Richard Roe are upheld in part. The claims regarding Jane Roe and Nancy Lewis, as discussed above, are disallowed. The Department is required to recalculate the claim amounts consistent with this decision.

### *C. Sanctions*

The Department has requested that Vladi be permanently terminated from participation as a provider in the Alaska Medicaid program. Vladi raised equitable estoppel as a defense to the imposition of sanctions. The reasoning for its argument consists of the fact that the Department had not conducted a biennial compliance audit under 7 AAC 125.190. As discussed above, this argument is not persuasive.

Termination of a Medicaid provider's certification is the ultimate sanction. The evidence in this case shows that Vladi blatantly and consistently disregarded the background check clearance requirements. Vladi consistently and admittedly allowed PCAs to work before the background check was completed. In some cases, it allowed the PCA to work before the background check had even been applied for: John Smith, John Doe, Mary Williams, Elizabeth Jones, and Maria Lee. It allowed Richard Roe to work as a PCA when Mr. Roe's clearance was denied.<sup>82</sup> It allowed Richard Baker to work as a PCA when there was not even an application for a background check clearance. It billed for services rendered as a PCA prior to the background check being approved, and billed for services rendered when the PCA had the background check denied.

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<sup>82</sup> While Vladi allowed Jane Doe to work as a PCA after being notified that the provisional background clearance was no longer valid, the confusing and conflicting correspondence from the Department, discussed above, belies using Jane Doe as a factor in determining sanctions.

The background check clearance regulations went into effect in 2007.<sup>83</sup> If Vladi's practices had occurred in 2007 or 2008, it might be understandable. However, each of the instances recited above occurred in 2014. Some of these instances occurred after July 16, 2014, when Vladi was sent a "Notice to Correct" about its PCA hiring of: John Smith, Mary Brown, James Johnson, John Doe, Mary Williams, Elizabeth Jones, James Miller, Elizabeth Davis, and Richard Baker.

This consistent disregard of the background check clearance requirement is a serious offense. The Department raised Vladi's compliance as an issue in July 2014. That had no effect, as shown by the fact that there were numerous violations through the end of 2014. Indeed, the Division provided billings showing that Vladi was billing for Richard Baker's PCA services in late 2015 and early 2016, despite Baker not obtaining his background check clearance until April 2016, and Vladi being explicitly notified in December of 2014 that Baker did not have a valid background check clearance. The Division's meetings with Mr. Vishnevetski in January and December of 2015 obviously did not cause Mr. Vishnevetski to come into compliance.

These facts demonstrate that Vladi has consistently and repeatedly committed a serious offense against the Medicaid program requirements,<sup>84</sup> despite being counseled and educated by the Department.<sup>85</sup> Vladi is clearly unwilling to obey program rules.<sup>86</sup> Under these circumstances, it is more likely than not that a lesser sanction would be insufficient to remedy the issue.<sup>87</sup>

In the *Loving Care* case, where a Medicaid provider knowingly allowed persons who did not pass the criminal background check, or who did not apply for a background check, to participate in the provider's business, the provider was permanently terminated from

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<sup>83</sup> 7 AAC 10.900 – 990 (Register 181 effective February 9, 2007). They remained unchanged until they were recently amended effective July 26, 2017, Register 222.

<sup>84</sup> 7 AAC 105.420(b)(1) and (2).

<sup>85</sup> 7 AAC 105.420(b)(3) and (5).

<sup>86</sup> 7 AAC 105.420(b)(6).

<sup>87</sup> 7 AAC 105.420(b)(7).

participation in the Medicaid program.<sup>88</sup> That administrative decision was appealed to the Superior Court, where it was upheld.<sup>89</sup>

Due to the ongoing, severe nature of Vladi's refusal to comply with the background check clearance requirements for PCAs, and consistent with the *Loving Care* decision, the Department has met its burden of proof and demonstrated that Vladi should be permanently terminated as a provider for the Alaska Medicaid program.<sup>90</sup>

## V. Conclusion

The Department had the burden of proof by a preponderance of the evidence. It met its burden and demonstrated that Vladi should be permanently terminated from participation as a provider in the Alaska Medicaid program. In addition, it has also demonstrated that Vladi allowed PCAs to work while they were ineligible, and then billed for those services. Vladi must reimburse the Department for the payments he received from those billings. However, the Department did not meet its burden on all the asserted overpayment claims. The Department is therefore required to recalculate the overpayment amount, based upon this decision. If Vladi disagrees with the recalculated overpayment amount, it may request a new hearing confined to that limited issue.

DATED this 29<sup>th</sup> day of December, 2017.

By: Signed \_\_\_\_\_  
Lawrence A. Pederson  
Administrative Law Judge

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<sup>88</sup> *In the Matter of A Loving Care PCA*, OAH Case No. 15-0454-MPC (Commissioner of Health and Social Services, 2016). That decision is available online at OAH's website:

<http://aws.state.ak.us/officeofadminhearings/Documents/MPC/MPC150454.pdf>

<sup>89</sup> *Loving Care PCA v. State, DHSS*, Superior Court Case No. 3AN-16-04613CI (Decision issued April 25, 2017). A copy of the Superior Court decision is available online at OAH's website:

<http://aws.state.ak.us/officeofadminhearings/Documents/MPC/MPC150454%20Superior%20Court%20Decision.pdf>

<sup>90</sup> Although the Department did not raise this in its arguments, it should be noted that there is a specific provision in the PCA regulations providing for disenrollment or decertification of a PCA provider for failure to comply with the background check clearance requirements: "The department may . . . disenroll or decertify, a personal care agency . . . (4) if a personal care assistant does not pass a criminal history check . . . and the personal care agency does not terminate association with the individual . . . unless the department grants a variance under 7 AAC 10.935." 7 AAC 125.080(c).

## 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 25 day of January, 2018.

By: Signed \_\_\_\_\_  
Erin Shine  
Special Assistant to the Commissioner  
Department of Health and Social Services

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]