

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

In the Matter of)	
)	
B G)	OAH No. 16-0894-PFE
_____)	Agency No.

DECISION AFTER REMAND

I. Introduction

The Division of Public Assistance notified B G that it would garnish her Permanent Fund Dividend (PFD) in order to pay Ms. G’s outstanding debt for overpaid child care assistance. Ms. G appealed and a hearing was held. Ms. G brought forward evidence that she timely requested a fair hearing in 2013 when the Division alleged that her child care assistance was overpaid. A proposed decision was issued finding that the Division had not proven that Ms. G had not requested a hearing in 2013. The Commissioner then remanded the case to take additional evidence about the Division’s intake procedures for overpayment claim appeals, and a supplemental hearing was held. The Division’s supplemental evidence established that it is more likely than not that Ms. G did not timely appeal the underlying overpayment determination. Therefore, the Division’s Notice of Garnishment is upheld.

II. Facts

B G is a self-employed hair stylist. She has a business license for her business. Because she was required to have child care in order to work, and she met the income requirements for child care assistance, she qualified for, and received, child care assistance benefits.¹

In 2013, however, Ms. G inadvertently let her business license temporarily lapse. She remained self-employed and continued to earn an income at her business. In July, she discovered the mistake when she received a call from the Division of Public Assistance. She immediately renewed her license.²

In the Division’s view, Ms. G was not eligible for child care assistance during the time that her license had lapsed. It sent Ms. G a notice that she must repay all child care assistance that she had received during the period January 1-July 31, 2013, which totaled \$2,825.³ The notice informed her that if she did not pay back the overpaid assistance, the Division would pursue legal

¹ G testimony.
² G testimony.
³ Division Exhibit 1.

remedies, including garnishment of her permanent fund dividend.⁴ Ms. G did not agree that she was legally required to pay back the child care assistance based on the clerical error of letting her business license lapse, so she requested an “administrative review” by filling out and returning the form on the back of the notice.⁵

On November 20, 2013, the administrative reviewer sent Ms. G a letter affirming the Division’s overpayment claim.⁶ Attached to this letter was a form called “7 AAC 49 Notice of Appeal and Request for Hearing.” Ms. G testified that she recalls that she filled out this form and mailed it back.⁷ The Division, however, could locate no record of having received this request or an oral request for a hearing (which would have been logged in a case note).⁸ Ms. G did not receive a hearing or other opportunity to further protest either the finding that she was overpaid child care assistance or the subsequent order requiring repayment. In the Division’s view, the finding and order became final because they were never appealed.

Over two and a half years later, in July 2016, the Division sent Ms. G a “Notice of Garnishment of Permanent Fund Dividend for Defaulted Overpayment.” Attached to this notice was a form called “Request for Hearing in the Office of Administrative Hearings.” Ms. G filled out this form and timely returned it to the Division. An in-person hearing on the garnishment was held on September 7, 2016. Ms. G represented herself, and Sally Dial represented the Division. Both Ms. G and Ms. Dial testified regarding the facts and their respective positions on the issues presented. A proposed decision was issued, finding that the Division had not proven that Ms. G had not requested a hearing in 2013, and therefore quashing the Division’s notice of garnishment.

The Commissioner of Health and Social Services then remanded the case to the administrative law judge to “take additional evidence about the Division’s intake procedures for appeals of child care assistance overpayment claims generally, and the Division’s efforts to locate documents specifically regarding appellant’s contention that she filed an appeal of the Division’s underlying overpayment claim.” A supplemental hearing was held for this purpose on January 11, 2017, and the record was closed.

⁴ *Id.*
⁵ Division Exhibit 2.
⁶ Division Exhibit 3.
⁷ G testimony.
⁸ Dial testimony.

III. Discussion

When a person defaults on public assistance overpayments owed to the Department of Health and Social Services, the Department may garnish the person's PFD in order to satisfy the debt.⁹ In order to execute the garnishment, the Division of Public Assistance must follow a prescribed set of rules, including giving a right of appeal to the original claim and giving notice that future dividends will be taken to satisfy the debt.¹⁰ Under AS 43.23.068(a)(3)(C) and (D), the Division must ensure that either the overpayment claim is not contested, or, if contested, that the issue was resolved (through the administrative or judicial dispute resolution process) by upholding the overpayment claim.¹¹

A hearing on a garnishment appeal will generally address only whether the Division has complied with the rules for proper execution of a garnishment. Therefore, this hearing was not about whether the Division's original decision in 2013 was proper. This hearing was about only one issue: whether Ms. G timely requested an appeal of the Division's November 20, 2013 administrative review upholding the conclusion that child care assistance had been overpaid. If Ms. G had appealed that review, and the Division did not provide her a fair hearing, then, under AS 43.23.068(a)(3), the Division would not be allowed to garnish her PFD. On the other hand, if Ms. G failed to timely request an appeal of the administrative review, then the administrative review decision is final, and the Division may garnish her PFD.¹²

In this case, the Division has the burden of proving that Ms. G did not appeal the November 20, 2013 administrative review decision upholding the overpayment claims.¹³ As evidence in support of its contention, Sally Dial, the Division's hearing representative, testified that she searched, and had other Division staff search, both Division files and case notes. The Division has no record of Ms. G having filed an appeal of the administrative review decision. Because the Division has an established practice of keeping and tracking records of requests for appeal, Ms. Dial concluded that Ms. G did not request an appeal of the November 2013

⁹ AS 43.23.068.

¹⁰ *Id.*

¹¹ The pertinent section of AS 43.23.068(a)(3)(D) requires the Division to certify to the Department of Revenue that "if the overpayment claim has been contested and resolved in favor of the Department of Health and Social Services, no appeal is pending, the time limit for filing an appeal has expired, or the appeal has been resolved in favor of the Department..."

¹² Ms. G's appeal would have been due 30 days after she received the November 20, 2013 administrative review decision - in late December, 2013.

¹³ Permanent Fund execution appeals are governed by the Administrative Procedure Act, AS 44.62.330 – 44.62.630, which places the burden of proof on the Division to show by a preponderance of the evidence that it is entitled to the garnishment in question. AS 43.23.068(c).

administrative review decision. Ms. Dial is a credible witness, with experience in searching Division files and presenting cases on behalf of the Division.

Ms. Dial's testimony on this issue was corroborated by testimony at the supplemental hearing from Yvonne Algabre, an employee of the Division's claims unit. Ms. Algabre explained the Division's system for processing and tracking appeal paperwork submitted on overpayment claims; she testified that a search was conducted for Ms. G's 2013 appeal papers and none were found. Ms. Algabre testified that she was very confident that the Division did not lose Ms. G's 2013 appeal paperwork, and that if the paperwork had been received, the Division would have initiated the fair hearing process for Ms. G.¹⁴

Similar testimony was provided at the supplemental hearing by Ronda Buckingham with the Division's Child Care Program Office. She explained the manner in which her office processes fair hearing requests, and she described the search process that she undertook to attempt to locate Ms. G's 2013 paperwork. Paperwork from Ms. G requesting a fair hearing regarding the Division's overpayment claim was not found. Ms. Buckingham also testified regarding a "Debar Warning" issued to Ms. G in February 2014; this document warned Ms. G that if she did not agree to a repayment arrangement and start repaying the overpayment claim, she would be "debarred" from receiving future child care assistance benefits. Ms. G's family was actually debarred on or about March 18, 2014, effective as of April 1, 2014.¹⁵ Ms. G confirmed that she has not received any child care assistance benefits since early 2014, apparently as a result of being debarred. Ms. Dial and Ms. Buckingham confirmed that the Division would not have mailed out the February 2014 debar warning document if Ms. G's fair hearing request had been received.

At the supplemental hearing, Ms. G reiterated that she sent in the fair hearing paperwork. In her view, she simply never got her "day in court" due to what she perceives as the Division's error in losing her appeal papers.

Ms. Dial closed the Division's case at the supplemental hearing by stating that if Ms. G had properly mailed in or dropped off a fair hearing request, the request would have been notated somewhere within the Division, either within the claims unit or the Child Care Program Office. She added that the Division has gone to extreme lengths to try to locate Ms. G's paperwork, and that it has demonstrated that no fair hearing request was ever received from Ms. G in 2013.

¹⁴ Ms. Algabre did acknowledge that the claims unit office made an error that resulted in Ms. G's PFD being garnished while this appeal was pending (the PFD was later returned to Ms. G). Ms. Algabre explained that this was a different type of error than the document-handling error alleged by Ms. G regarding her 2013 appeal paperwork.

¹⁵ Buckingham testimony.

I accept the testimony of the Division's witnesses that the Division has no record of Ms. G's request for an appeal. I agree that, based on the Division's practices, this testimony supports an inference that Ms. G did not file an appeal. Unless Ms. G could provide substantial evidence to the contrary, the Division's evidence would be sufficient to carry its burden.

The main evidence offered by Ms. G to support her contention that she timely filed an appeal is her sworn testimony. In most cases, even with a credible witness, this testimony about an event that occurred three years ago would likely not be sufficient to overcome the Division's evidence. Even though a witness may be credible, and may currently believe that she took an action three years earlier, given that memories fade and events can become mixed, testimony, standing alone, is usually not sufficiently persuasive to overcome the Division's evidence of its business practice.¹⁶

In this case, Ms. G's testimony was not sufficiently persuasive to overcome the Division's evidence that the 2013 appeal papers were never received. On the one hand, her testimony revealed a strong desire to tell her side of the story to a decision-maker who would be able to evaluate the legal merits of her argument. She explained that she had wanted a fair hearing and that she had asked for one by filling out the form and mailing it to the Division. She believes that the only explanation for this situation is that the Division must have misfiled or lost her appeal papers.

On the other hand, the Division has no record of ever receiving her request. It is possible (although unlikely) that Ms. G's memory of events is inaccurate, or that she misaddressed the envelope containing the appeal request, or that the postal service failed to deliver the appeal request to the Division. If that were the case, or if for some other reason the request was not delivered to the Division, the bottom line is that the Division never received her appeal request. Thus, there was never a "pending appeal" that meets the criteria of AS 43.23.068(a)(3).

Ms. G testified that when this garnishment hearing was scheduled, she thought that she was finally being given the fair hearing that she remembered having requested in late 2013. During the supplemental hearing, however, she provided no explanation as to why she did not inquire with the Division about the status of her appeal when she received the Division's debar warning in February 2014. The debar warning letter should have put her on notice that her appeal

¹⁶ See, e.g., *In re GC*, OAH No. 13-0783-CCA at 4 (Dep't Health & Soc. Servs. 2014) (holding that possibility that Division may have lost document does not outweigh evidence that Division has process in place for preserving documents).

request had not been received, or at least had not been processed. Making an inquiry about the status of her appeal at that time, approximately two months after the deadline for her to submit her appeal request, would have been consistent with Ms. G's determination to have a fair hearing on the overpayment claim. It also would have been close enough to the deadline that there is a good chance that she would have been allowed to pursue a late-filed appeal. However, Ms. G's action in waiting until nearly three years after the deadline to attempt to continue her pursuit of the appeal undermined the strength of her argument.

After the initial proposed decision was issued in this matter and the Commissioner remanded the case for the taking of additional evidence, the Division had the burden to bring forward evidence that was responsive to the remand order. The Division met its burden by introducing evidence regarding its established practice of keeping and tracking records of requests for appeal, and regarding its additional communication with Ms. G between November 2013 and July 2016. The Division brought forward sufficient evidence to show that its view of the facts was more likely than not accurate, and that it is entitled to the proposed garnishment.

IV. Conclusion

The Division's Notice of Garnishment of Permanent Fund Dividend for Defaulted Overpayment is upheld.

DATED this 7th of March, 2017.

By: Signed _____
Andrew M. Lebo
Administrative Law Judge

Adoption

Under a delegation from the Commissioner of Health and Social Services and under the authority of AS 44.64.060(e)(1), I adopt this decision 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 9th day of March, 2017.

By: Signed _____
Name: Douglas Jones
Title: Medicaid Program Integrity Manager

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