

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

In the Matter of:)	
)	
U J. J)	OAH Case No. 12-0611-SNA
)	Former OHA Case No.
)	DPA Case No.
_____)	

DECISION

I. Introduction

This case involves a decision by the State of Alaska Division of Public Assistance (Division) to recoup (recover) Supplemental Nutrition Assistance Program (SNAP or Food Stamp)¹ benefits previously issued to U J. J. The parties agree that, through no fault of her own, Ms. J was paid \$324 more in SNAP benefits than she should have been paid during the period July 2010 through December 2010. There is also no dispute that, pursuant to the applicable federal regulations, the Division must initially seek reimbursement from Ms. J for the overpaid SNAP benefits.

However, after the Division announces its decision to seek reimbursement, the beneficiary may request that the reimbursement amount be compromised. The parties disagree on the parameters of the Division's exercise of discretion in agreeing to compromise (reduce or waive) its SNAP overpayment claims. The parties have raised three specific issues regarding the Division's exercise of its discretion in this case. The first two issues are legal; the last is factual. The issues are:

1. Do the Division's internal guidelines or policies for compromising SNAP overpayment claims (Exhibit 18) constitute a regulation, and if so, are the policies invalid because they were not promulgated pursuant to Alaska's Administrative Procedure Act? This decision concludes that the policies are invalid because they were not properly promulgated.
2. If the Division's internal guidelines for compromising SNAP overpayment claims are invalid, should this case be remanded to the Division so that the Division can make a

¹ Congress amended the Food Stamp Act in 2008. The 2008 amendment changed the official name of the Food Stamp Program to the Supplemental Nutrition Assistance Program ("SNAP"). This decision uses the new ("SNAP") terminology.

redetermination using only the relevant federal regulation?² This decision concludes that it is not necessary to remand this case for redetermination.

3. If it is appropriate for this Office to consider the appropriate compromise amount itself, without remanding the matter to the Division, did the Division abuse its discretion under 7 CFR § 273.18(e)(7) in failing to compromise its SNAP overpayment claim to zero? This decision concludes that the Division's decision not to compromise this claim was appropriate.

II. Facts

A. Ms. J's Medical Condition.

Ms. J has dissociative identity disorder.³ This disorder has historically interfered with Ms. J's ability to maintain stable employment.⁴ Ms. J takes several prescription medications to treat this disorder; medications that she currently takes or has recently taken include cyclobenzaprine, endocet, morphine, oxcarbazepine, seroquel, and xanax.⁵

B. Ms. J's Financial Situation.

As indicated above, Ms. J's employment has been sporadic due to her dissociative identity disorder, and she currently has very little earned income.⁶ Ms. J receives \$751.33 per month in child support.⁷ She has little or no money in her checking and savings accounts.⁸ Between October 11, 2011 and January 4, 2012 Ms. J's bank account balance ranged from a high of about \$90.00 to a low of about negative \$100.00 (overdrawn).⁹ Ms. J's application for a 2011 Alaska Permanent

² See 7 CFR § 273.18(e)(7).

³ Ex. 4.1, J hearing testimony. Dissociative identity disorder (DID), formerly known as multiple personality disorder, is a disorder in which individuals exhibit two or more alternating identities or personalities. *Merck Manual of Diagnosis and Therapy* (18th Ed. 2006) at 1681. It reflects a failure or inability to integrate various aspects of identity, memory, and consciousness. American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders*, (Fourth Edition, Text Revision 2000) at 526. It is characterized by an inability to recall important personal information that is too extensive to be explained by ordinary forgetfulness. *Id.* Persons with DID experience frequent gaps in both short-term and long-term memory. *Id.* DID is typically associated with overwhelming childhood trauma. *Id.* at 527.

⁴ J hearing testimony.

⁵ Exs. E2 - E5; Ex. 19 p. 54.

⁶ J hearing testimony.

⁷ Ex. K1. At the time of the hearing there was testimony that the Child Support Services Division (CSSD) was or might be holding thousands of dollars of child support arrearages, pending resolution of a dispute between Ms. J and her son's father, which might be disbursed to Ms. J in the future (J testimony; see also Ex. K2). However, supplemental exhibits filed after the hearing, which included correspondence with CSSD, showed this was not the case (Ex. K1).

⁸ Exs. I1 - I15.

⁹ Exs. G1 - G4.

Fund Dividend was denied on August 5, 2011.¹⁰ As of September 13, 2011 Ms. J had exhausted her extended unemployment insurance benefits.¹¹

Ms. J is responsible for repayment of two student loans. As of November 21, 2010, the first loan had a remaining balance of \$2,336.80, and the second loan had a remaining balance of \$4,649.46.¹² In addition, as of December 19, 2011 Ms. J owed AA Spine and Pain Clinic, Inc. \$725.00.¹³

In addition to the above obligations, Ms. J has a son attending high school to support.¹⁴ Recently she has only been able to make her rent payments due to contributions from friends.¹⁵ She was not receiving SNAP benefits at the time of the Division's recoupment decision or at the time of the hearing.¹⁶ She sometimes goes without food so that her son has enough to eat.¹⁷

Ms. J testified at hearing that she had recently completed training in hair design to become a hairdresser or esthetician. She testified that, once she becomes certified and licensed, her income will probably increase. However, even if Ms. J is able to complete her training and obtain a higher-paying job, it is uncertain, due to her dissociative identity disorder, whether Ms. J will be able to *maintain* stable employment in the future.

C. *The Overpayments*

On July 7, 2010 Ms. J submitted an application for SNAP benefits.¹⁸ Ms. J sought benefits for a two person household consisting of herself and her minor son E.¹⁹ During her eligibility interview, Ms. J clearly advised the Division that she was *receiving* income from child support.²⁰

In March 2011, the Division reviewed its records and found that it had mis-coded child support payments being *received* by Ms. J as child support payments being *paid* by Ms. J.²¹ Based

¹⁰ Ex. B1.

¹¹ Ex. C1.

¹² Exs. D1 - D4.

¹³ Ex. H.

¹⁴ Ex. A3; J hearing testimony.

¹⁵ J hearing testimony.

¹⁶ Cole hearing testimony; J hearing testimony.

¹⁷ J hearing testimony.

¹⁸ Exs. 16.0 - 16.7. Prior to submitting this application Ms. J had received SNAP benefits fairly continuously since March 2008 (Ex. 19 at pp. 168 - 239).

¹⁹ Ex. 16.1. On September 16, 2010 Ms. J added her son's girlfriend to her household's SNAP case (Ex. 19 p. 152), creating a three person household for SNAP eligibility purposes.

²⁰ Ex. 2.1.

²¹ Exs. 2.0 and 2.4; Ex. 19 at p. 154.

on this mistake, the Division concluded that it had overpaid SNAP benefits to Ms. J during the months of July 2010 through December 2010.²²

On July 19, 2011, the Division mailed a recoupment (overpayment) notice to Ms. J.²³ That notice stated in relevant part as follows:

We have reviewed our records and it has come to our attention that you received more food stamps than you were entitled to receive. For the months of July 2010 through December 2010, you received \$2,543.00. We believe you should have received \$1,652.00 in food stamps for that period. This is because the agency coded your child support incorrectly. As such, based on our calculations you were overpaid by \$891.00.

On July 26, 2011, Ms. J requested that the Division compromise its overpayment claim.²⁴ In support of her request Ms. J wrote that she had multiple personality disorder, had not worked in eight months, and was receiving unemployment insurance.²⁵ Ms. J further stated that she was looking for work but had not yet been hired.²⁶

On July 28, 2011 the Division mailed a notice to Ms. J addressing her request to compromise the amount of the Division's claim.²⁷ That notice stated in relevant part:

On July 19, 2011, you were notified that you were overpaid Food Stamp benefits for the months of July 2010 through December 2010 because the agency coded your child support incorrectly. As a result of that finding, you were directed to repay the state \$891.00. You have requested that we compromise all or part of this overpayment due to hardship. Based upon the information you submitted, we are willing to compromise \$171.00 of the amount owed. As a result, the total amount you now owe is \$720.00.

The Division's notice (Ex. 5.0) did not state the legal authority on which it based its compromise determination.

At the hearing on January 4, 2012, it became apparent that, due to miscommunication, the Division should have added Ms. J's son's girlfriend to Ms. J's household during the period October 2012 through December 2012, but had not done so.²⁸ On January 18, 2012 the Division mailed a revised recoupment notice to Ms. J.²⁹ The Division's revised notice cited 7 CFR 273.18 and 7 AAC

²²

Id.

²³

Exs. 5.1 - 5.10.

²⁴

Ex. 4.1.

²⁵

Id.

²⁶

Id.

²⁷

Ex. 5.0.

²⁸

See the Division's Post-Hearing Brief dated January 25, 2012 at pages 1 -3.

²⁹

Ex. 20 pp. 1-13.

49 as the legal authority supporting the Division's action; the notice did not cite any Division policies or guidelines. The revised notice stated in relevant part as follows:

We have reviewed our records and it has come to our attention that you received more food stamps than you were entitled to receive. For the months of July 2010 through September 2010, you received \$1,229.00. We believe you should have received \$797.00 in food stamps for that period. This is because the agency coded your child support incorrectly. As such, based on our calculations you were overpaid by \$432.00. However, we owed you \$108.00 for October 2010 through December 2010 because the agency did not add a household member to your case. Therefore your outstanding balance is \$324.00. This notice replaces all previous notices sent to you

Thus, since the hearing, the Division has corrected a series of errors in its prior calculations to reach a new amount due. The Division's current overpayment claim is \$324.

D. Relevant Procedural History

Ms. J submitted her Fair Hearing Request to the Division on July 27, 2011,³⁰ and Ms. J's hearing was held on January 4, 2012. Ms. J and her attorney Ryan Fortson attended the hearing in person. Alex Hildebrand participated in the hearing by telephone and represented the Division. Trish Cole participated in the hearing by telephone and testified on behalf of the Division. Following the hearing, the parties submitted post-hearing briefs and additional exhibits.

III. Discussion

A. Introduction - Federal SNAP Recoupment Requirements.

The federal statute pertaining to the recoupment of overpaid SNAP benefits says the “state agency *shall* collect any over issuance of benefits issued to a household”³¹ The federal regulation implementing this statute says “the State agency *must* establish and collect any claim....”³² Pursuant to subsection (b)(3), collection action is required even where (as here) the “overpayment [is] caused by an action or failure to take action by the State agency.” Thus, it is clear that federal regulation 7 C.F.R. § 273.18 requires that the Division initially³³ attempt to recover overpaid SNAP benefits, even when the overpayment is the result of the Division’s error.

³⁰ Ex. 4.0.

³¹ 7 U.S.C. §2022(b)(1) (emphasis added).

³² The federal implementing regulation pertaining to the recoupment of SNAP benefits is 7 C.F.R. § 273.18. Subsection (a)(2) of that regulation provides in relevant part that “the State agency *must* establish and collect any claim . . . “. Subsection (e)(1) of that regulation also provides in relevant part that “state agencies *must* begin collection action on all claims unless [inapplicable].” Finally, pursuant to subsection (b)(3), collection action is required even where the “overpayment [is] caused by an action or failure to take action by the State agency.”

³³ 7 C.F.R. § 273.18(e)(6-7) contemplates that the amount of overpayment, if disputed by the recipient, will be determined at hearing, and only then will the issue of compromise be ripe for consideration by the agency. See *Waters-Haskins v. New Mexico Human Services Department, Income Support Division*, 210 P.3d 817, 822 (N.M. 2009) (7

Following the 1996 amendment of the Food Stamp statutes, virtually all courts have held that the applicable federal statute and regulations require recoupment of Food Stamp benefits regardless of fault.³⁴ The Alaska Supreme Court recently adopted this position in *Allen v. State of Alaska Department of Health & Social Services*, 203 P.3d 1155 (Alaska 2009).

The dollar threshold at which the federal SNAP regulations require that the Division attempt to collect SNAP overpayments is \$125 (collection efforts are required when the amount of the overpayment exceeds \$125).³⁵ If the household that received the overpayment is still receiving benefits, and the household does not want to repay the overpayment immediately in full, the household may opt to repay the overpayment through a reduction of its current SNAP benefits in the amount of \$10.00 per month or 10% of the household's monthly SNAP benefit, whichever is greater.³⁶ If the household that received the overpayment is no longer receiving benefits, the overpayment may be repaid through a lump-sum payment, installment payments, the performance of public service, or through involuntary collection efforts.³⁷

B. The Federal SNAP Regulation Governing the Compromise of Overpayment Claims.

The same federal regulation which requires that state agencies *initiate* the collection of overpaid SNAP benefits also gives state agencies the ability to *compromise* overpayment claims. Federal SNAP regulation 7 C.F.R. § 273.18(e)(7) states as follows:³⁸

(7) *Compromising claims.* (i) As a State agency, you may compromise a claim or any portion of a claim if it can be reasonably determined that a household's economic circumstances dictate that the claim will not be paid in three years.

The use of the word “may” in 7 C.F.R. § 273.18(e)(7)(i) indicates that the decision whether to compromise a SNAP overpayment claim is subject to the Division's discretion.³⁹ Research

C.F.R. § 273.18 "requires that a state agency first establish a valid claim in the full amount of the overpayment, either by the notification letter or by a fair hearing, before the agency can decide whether to compromise the claim").

³⁴ See, for example, *Aktar v. Anderson*, 68 Cal.Rptr.2d 595 (Cal. App. 2nd Dist.1997) and *Vang v. Saenz*, 2002 WL 434733 (Cal. App. 3 Dist. 2002).

³⁵ 7 C.F.R. § 273.18(e).

³⁶ 7 C.F.R. § 273.18(g)(1).

³⁷ 7 C.F.R. § 273.18(g).

³⁸ Review of the Division's own (state option) SNAP regulations demonstrates that the Division has not adopted an official interpretation of 7 C.F.R. § 273.18(e)(7) by regulation. See 7 AAC 46.021 and Alaska Food Stamp Manual Sections 607-3 and 607-4. The Division's state option regulation is based on the 1985 version of the federal regulations (see 7 AAC 46.990(c)). Because the federal SNAP regulations have been revised several times since 1985, many of the Division's "state option" provisions no longer reference the correct federal SNAP regulation. For example, in 1985 the substance of what is now 7 C.F.R. § 273.18(e)(7)(i) was contained in 7 C.F.R. § 273.18(g)(2)(i).

³⁹ The use of the word ‘may’ rather than the directive ‘shall,’ indicates a discretionary power. *Frontier Saloon, Inc. v. Alcoholic Beverage Control Board*, 524 P.2d 657, 660 (Alaska 1974); see also *Gerber v. Juneau Bartlett Memorial Hospital*, 2 P.3d 74, 76 (Alaska 2000) (in contrast to the term “shall,” the term “may” generally denotes permissive or discretionary authority and not a mandatory duty).

indicates that the only appellate courts to address this issue to date have concluded that whether a state agency chooses to compromise a SNAP overpayment claim is discretionary.⁴⁰

C. *Standard of Review*

The Division initially argues that this Office should review the Division's findings under the reasonable basis test, and "merely seek to determine whether the agency's decision is supported by the facts and has a reasonable basis in law."⁴¹ However, the Division's position is contrary to the specific authority given a hearing authority by Alaska's Fair Hearing regulations, 7 AAC 49.010 *et. seq.* Pursuant to 7 AAC 49.160, the hearing authority is required to "hold [a] hearing and receive any testimony, evidence, and material introduced at the hearing," and then "render a decision based on the applicable laws, regulations, and policies." The Division's proposed standard of review would nullify these Fair Hearing regulations.⁴²

Further, the standard of review urged by the Division is not the standard which applies when (as here) an executive branch agency reviews a lower-level decision made within that agency. Rather, the standard asserted by the Division is the standard to be applied *after a final decision is made by the agency* and an appeal is made to the Superior Court.⁴³ At this stage the Department is still in the process of applying its expertise and reaching its final decision. During this internal review process, the administrative law judge and the Commissioner may independently weigh the evidence and reach a different conclusion than the Division staff, even if the original decision is factually supported and has a reasonable basis in the law. While the Commissioner may *choose* to give weight to the judgments and policy directions proposed by his staff, as the Department's

⁴⁰ See *Hill v. Indiana Board of Public Welfare*, 633 N.E.2d 352, 357 (Ind.App. 4th Dist. 1994) (holding based on a prior version of 7 C.F.R. § 273.18); *Waters-Haskins v. New Mexico Human Services Department, Income Support Division*, 210 P.3d 817, 822 (N.M. 2009) (stated as dicta).

⁴¹ See the Division's Post-Hearing Brief dated January 25, 2012 at pages 5-6 and 10-11, quoting *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Company*, 746 P.2d 896, 903 (Alaska 1987).

⁴² Inherent aspects of rendering a decision based on the applicable laws and regulations include the determination of which laws and regulations apply, and interpreting those laws and regulations. The Division's argument that questions of law may not be addressed in an administrative hearing is rejected.

⁴³ See, for example, *Simpson v. State, Commercial Fisheries Entry Commission*, 101 P.3d 605, 609 (Alaska 2004), in which the Alaska Supreme Court stated:

In reviewing administrative decisions, we have recognized at least four principal standards of review. "These are the 'substantial evidence test' for questions of fact; the 'reasonable basis test' for questions of law involving agency expertise; the 'substitution of judgment test' for questions of law where no expertise is involved; and the 'reasonable and not arbitrary test' for review of administrative regulations." [Footnotes omitted].

chief executive he is never *obliged* to do so.⁴⁴ Accordingly, the deferential standard of review proposed by the Division is simply not appropriate in the context of internal agency review.

Finally, new and different evidence has been collected during the hearing process that was not available to the Division at the time it made its initial determination. This necessitates a fresh look at the merits of the case.⁴⁵ Accordingly, no deference will be given to factual determinations made by the Division prior to hearing.

D. The Division's Guidelines for Compromising SNAP Overpayment Claims Are Invalid Because They Were not Promulgated Pursuant to Alaska's Administrative Procedures Act.

One of the main arguments between the parties in this case concerns whether the Division's internal guidelines for compromising SNAP repayment claims⁴⁶ are valid since they were not promulgated using the procedures required by Alaska's Administrative Procedure Act (APA).⁴⁷ Significantly, the APA requires that state agencies publish public notice of, and allow public comment on, all proposed regulations prior to their adoption.⁴⁸

Ms. J asserts that the Division's guidelines fall within the general rule⁴⁹ that an agency interpretation of a regulation that supplements, revises, or makes a regulation more specific is itself a regulation and must be adopted pursuant to the Administrative Procedure Act. The Division counters that the guidelines at issue here fall within an exception to the general rule,

⁴⁴ See, e.g., *In re Alaska Medical Development – Fairbanks, LLC*, OAH No. 06-0744-DHS, Decision & Order at 5-6 & n.70 (issued April 18, 2007; adopted by Commissioner of Health & Social Services in relevant part, Decision After Remand, Oct. 9, 2007) (<http://aws.state.ak.us/officeofadminhearings/Documents/DHS/DHS060744.pdf>); *In re Rockstad*, OAH No. 08-0282-DEC, Decision & Order at 5 (Commissioner of Environmental Conservation, adopted Nov. 17, 2008) (<http://aws.state.ak.us/officeofadminhearings/Documents/DEC/DEC080282.pdf>). *Tesoro*, cited by the Division, is not applicable because it discusses only the standard of review when the judicial branch is reviewing decisions made by the executive branch.

⁴⁵ In the seminal case concerning the rights of applicants and recipients in public assistance cases, *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970), the United States Supreme Court stated that the hearing officer or ALJ must render a decision based solely on the applicable legal rules *and on the evidence adduced at the hearing*. Simply put, there would be no point to an evidentiary hearing if the new evidence from that hearing could not be used along with the previously considered evidence to re-evaluate the Division's findings and conclusions. See *In re Parker*, 969 A.2d 322 (N.H. 2009) and *Albert S. v. Department of Health and Mental Hygiene*, 891 A.2d 402, 416 (Md. Ct. Spec. App. 2006).

⁴⁶ These policies or guidelines, comprising two pages, are included in the hearing record as Exhibit 18.

⁴⁷ Alaska's Administrative Procedures Act is codified at A.S. 44.62.010 - A.S.44.62.950.

⁴⁸ See AS44.62.190 (requiring public notice of the proposed agency action); AS 44.62.200 (specifying the content of the public notice); AS 44.62.210 (requiring a public hearing); AS 44.62.215 (requiring the keeping of a record of all public comments received).

⁴⁹ See *Matanuska-Susitna Borough v. Hammond*, 726 P.2d 166 (Alaska 1986); *Reichmann v. State, Dept. of Natural Resources*, 917 P.2d 1197 (Alaska 1996); *Jerrel v. State, Department of Natural Resources*, 999 P.2d 138, 144 (Alaska 2000) (rehearing denied); *Alyeska Pipeline Serv. Co. v. State, Department of Environmental Conservation*, 145 P.3d 561, 573 (Alaska 2006); *Squires v. Alaska Bd. of Architects, Engineers & Land Surveyors*, 205 P.3d 326, 335 (Alaska 2009).

which dispenses with the need for formal promulgation of a regulation where the policy or guideline at issue is merely the Division's interpretation of an existing regulation.⁵⁰

Ms. J's position is more persuasive. When the federal regulation is juxtaposed against the Division's guidelines, it is clear that the Division's guidelines go far beyond the broad terms of the federal regulation. 7 C.F.R. § 273.18(e)(7)(i) states only that, "[a]s a State agency, you may compromise a claim or any portion of a claim if it can be reasonably determined that a household's economic circumstances dictate that the claim will not be paid in three years." In contrast, the Division's internal guidelines⁵¹ allow compromise of a claim only where "the household meets one or more of the following" criteria:

- a. Household is currently receiving a means-tested government benefit
- b. Household contains a SPECAT individual
- c. Household income is limited to [unemployment insurance benefits - "UIB"], or UIB has expired and the household member remains unemployed.
- d. Household includes a military spouse.
- e. Household is currently repaying another government agency for an agency-caused overpayment.
- f. The household is no longer receiving the income that was responsible for causing the overpayment
- g. The household experienced an unanticipated circumstance that has negatively impacted the household's income after the overpayment was determined

The Division's guidelines do not explain or interpret 7 C.F.R. § 273.18(e)(7)(i). Instead, the guidelines establish new criteria that are not necessarily correlated with the only federal guideline, which is whether the claim will be repaid in three years.⁵² Accordingly, they constitute a *de facto* regulation that should have been promulgated in accordance with the APA. Because the guidelines were not, they cannot be used to support the Division's compromise determination in this case.

⁵⁰ See *State v. Northern Bus Company*, 693 P.2d 319 (Alaska 1984); *Usibelli Coal Mine, Inc. v. State*, 921 P.2d 1134, 1148-1149 (Alaska 1996); *Alaska Center for the Environment v. State*, 80 P.3d 231, 244 (Alaska 2003); *Smart v. State*, 237 P.3d 1010, 1011 (Alaska 2010); *Friends of Willow Lake, Inc. v. State, Dept. of Transp. & Public Facilities, Div. of Aviation & Airports*, 280 P.3d 542 (Alaska 2012).

⁵¹ Exhibit 18, page 2.

⁵² For example, having a military spouse does not appear to make one less likely to be able to repay the overpayment within three years.

E. In Addition, the Division's SNAP Compromise Guidelines Were not Cited in the Division's Notices and Therefore Cannot Serve as a Basis for the Division's Determination.

The Department of Health and Social Services' "Fair Hearings" regulations apply to the Food Stamp Program. *See* 7 AAC 49.010(a). Alaska "Fair Hearings" regulation 7 AAC 49.070 provides in relevant part that, "[u]nless otherwise specified in applicable federal regulations, written notice to the client must detail the reasons for the proposed adverse action, *including the statute, regulation, or policy upon which that action is based.*" [Emphasis added].

Neither the Division's July 28, 2011 nor the January 18, 2012 compromise notices referenced the Division's compromise guidelines. Accordingly, under 7 AAC 49.070,⁵³ the Division's compromise guidelines cannot be used as a basis for the Division's action in this case.⁵⁴

F. It is not Necessary to Remand This Case to the Division for Redetermination.

The Division asserts that, if its SNAP compromise guidelines are found to be invalid, the case should be remanded back to the agency for a new determination based solely on 7 C.F.R. § 273.18(e)(7)(i). Certainly the Commissioner has the authority to remand the matter to the Division.⁵⁵ However, as Ms. J points out, there are a number of reasons why the case should not be remanded to the Division.

First, there is no new evidence available to the Division that is not already contained in the record.

Second, it is possible that, if this matter were remanded to the Division, it would again be appealed. Making a decision at this point saves time and avoids wasting resources.

Finally, there is at least one reported Fair Hearings case indicating that it is an error for an administrative law judge to remand a case for redetermination by the agency when the ALJ possesses the evidence necessary to decide the issue. In *Albert S. v. Department of Health and Mental Hygiene*, 891 A.2d 402, 416 (Md. Court of Special Appeals 2006) the Maryland court

⁵³ *See also Baker v. State, Dept. of Health & Social Services*, 191 P.3d 1005, 1009 (Alaska 2008); *Allen v. State, Dept. of Health & Social Services*, 203 P.2d 1155, 1168 – 1170 (Alaska 2009).

⁵⁴ This issue is admittedly raised *sua sponte*. However, an issue may properly be determined *sua sponte* when the issue is a "threshold" matter to another question properly before the adjudicative body. *See Thomas v. Crosby*, 371 F.3d 782 (11th Cir. 2004), *cert. denied* 543 U.S. 1063, 125 S.Ct. 888, 160 L.Ed.2d 793 (2005). Notice is always a threshold matter in any judicial or quasi-judicial proceeding. In addition, both parties have the opportunity to address this issue through the proposal for action process before a final decision is issued.

⁵⁵ *See* 2 AAC 64.340(d).

held that it was an error for an ALJ to remand a Medicaid disability case to the agency to reevaluate disability based on new medical evidence received at the administrative hearing:

[T]he ALJ erred at the fair hearing review by remanding to the SRT, because sufficient medical evidence was presented to the ALJ with respect to the alleged disability. Given the sufficiency of the medical evidence, it was the ALJ's obligation to render a decision on the merits of appellant's application for Medicaid based on a disability.

Accordingly, this decision will determine whether the Division's compromise of its claim against Ms. J was appropriate without remanding the matter to the Division.

G. Is it Appropriate to Write-Off the Overpayment at This Time?

The federal SNAP regulation (7 C.F.R. § 273.18(e)(7)) allows an overpayment claim to be written-down, or completely written-off, *if it can reasonably be determined that the household's economic circumstances dictate that the claim will not be paid within three years.*⁵⁶ Thus, applying the regulation to this case, the precise issue is whether Ms. J has proven by a preponderance of the evidence that her financial circumstances will not improve sufficiently to allow collection of the \$324 at issue within the next three years.⁵⁷

It is clear from the evidence received at hearing that Ms. J's current financial condition is very poor. Were it reasonably certain that Ms. J's financial condition at the end of the 36-month period will be the same as her financial condition at hearing, it would be appropriate to completely write-off the Division's overpayment claim.

However, although it is clearly *possible* that Ms. J's financial circumstances will not improve over the next three years, it is also possible that they *will* improve. Ms. J testified at hearing that she anticipates higher wages in the future based on her recent training as a hair stylist. In addition, as long as Ms. J remains in Alaska, she would presumably be eligible for the annual Alaska Permanent Fund dividend distribution. Since 1982 these dividends have ranged from a low of \$331.29 to a high of \$2,069.00.⁵⁸ Thus, it is likely that receipt of a single dividend check would allow repayment or collection of the \$324 at issue.

⁵⁶ 7 CFR 273.18(e)(7).

⁵⁷ 2 AAC 64.290(e).

⁵⁸ See Alaska Permanent Fund Division website at [http://pfd.alaska.gov/DivisionInfo/SummaryApplications Payments](http://pfd.alaska.gov/DivisionInfo/SummaryApplicationsPayments) (date accessed September 21, 2012).

Based on the foregoing, the undersigned concludes that Ms. J has not, at this time,⁵⁹ proven by a preponderance of the evidence that her financial circumstances will not improve sufficiently to allow collection of the \$324.00 at issue within the next three years. Accordingly, the Division is not required to compromise the \$324.00 overpayment claim at this time.

IV. Conclusion

The Division's decision to seek recovery of \$324.00 in SNAP benefits which were overpaid to Ms. J during the period July 2010 through December 2010 is AFFIRMED.

Dated this 24th day of September, 2012.

Signed _____
Jay Durych
Administrative Law Judge

Non-Adoption Options

D. The undersigned, by delegation from the Commissioner of Health and Social Services and in accordance with AS 44.64.060(e)(5), rejects, modifies or amends the interpretation or application of a statute or regulation in the decision as follows and for these reasons:

Per request of Division articulated in Proposal for Action by the Division of Public Assistance.

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 29th day of October, 2012.

By: *Signed* _____
Name: Ree Sailors
Title: Deputy Commissioner, DHSS

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

⁵⁹ Nothing in 7 CFR § 273.18 limits a recipient or former recipient to a single compromise request. Accordingly, an individual may submit a new compromise request whenever his or her circumstances change or relevant new information becomes available.