BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL BY THE COMMISSIONER OF HEALTH

In the Matter of	)	
	)	
E. M.	)	OAH No. 23-0431-HAP
	)	Agency No. 38264

DECISION

I. INTRODUCTION

E.M. is challenging a denial of Low Income Energy Assistance Program ("LIHEAP") benefits by the Division of Public Assistance ("DPA"). What Ms. M. takes issue with, however, is not how DPA applied state law to her application, but the validity of the agency's own regulation. Invalidating a regulation is not relief the Commissioner can provide in the context of an administrative appeal. Because Ms. M. does not dispute DPA's application of its regulation, and the Commissioner may not invalidate the regulation in this context, DPA decision is affirmed.

II. FACTS

DPA received a LIHEAP application from E.M. on May 3, 2023.[1]

LIHEAP is a federally funded assistance program that provides assistance with home energy costs. In Alaska, eligibility is determined by a point system based on an applicant's income and living situation. Total points of 2.0 or higher is needed to qualify for benefits.[2]

Ms. M. provided the following information and was awarded the following points accordingly:

Circumstances	Points Calculation
Lives in [Redacted City]; uses electric heat[3]	5 points[4]
One bedroom apartment[5]	multiply by 0.55[6]

1 Ex. 1.
2 7 AAC 44.080(m).
3 Ex. 1 at 1, 3.
4 7 AAC 44.080(f); 7 AAC 44.9001.
5 Ex. 1 at 2.
6 7 AAC 44.080(g)(5).

	5 * 0.55 = 2.75
Monthly income of $1296, which is 85% of the Alaska poverty guideline[7]	multiply by 0.70[8] 2.75 * 0.7 = 1.925
Disabled and over age 60[9]	add 1[10] 1.925 + 1 = 2.925
Lives in subsidized housing	multiply by 0.50[11] 2.925 * 0.50 = 1.4625
Total Points:	**1.4625**

Because DPA calculated Ms. M.'s points as less than two, it denied her application.[12]

Ms. M. timely appealed on June 13, 2023, which entitles her to a hearing, proposed decision, opportunity to submit a proposal for action on the proposed decision, and final Commissioner's office decision by September 11, 2023.[13] DPA delayed referring this matter to OAH by a full month.[14] OAH immediately noticed a hearing for July 27, 2023.[15]

For the hearing, DPA is required to provide a record consisting of a position statement summarizing its position, all documents DPA is relying on, and a copy of all laws DPA is relying on.[16] As of July 24, 2023, OAH had received no record. After OAH staff contacted the parties, DPA's counsel stated he would file the record the morning of July 25. Morning came and went with no record. OAH staff again contacted the parties. At 3:00 p.m. on July 25 — less than 48 hours before the hearing — DPA counsel finally filed the record. This record consisted of 478

---

7 Ex. 1 at 4; https://aspe.hhs.gov/topics/poverty-economic-mobility/poverty-guidelines.
8 7 AAC 44.080(i)(4).
9 Ex. 1 at 2.
10 7 AAC 44.080(k).
11 7 AAC 44.080(l).
12 Ex. 2.
13 7 AAC 49.180.
14 The Division is required by regulation to either refer a hearing request to OAH, or deny the hearing request, "[n]ot later than 10 days after the department receives a hearing request." 7 AAC 49.080. Ms. M. requested a hearing on June 13, 2023. Her hearing request was to have been referred to OAH no later than June 23, 2023. The Division did not refer the hearing request to OAH until July 13, 2023.
15 July 13, 2023 notice of hearing.
16 7 AAC 49.115.

pages, most of which were copies of laws the DPA was *not* relying on. Meanwhile, DPA failed to provide any of the factual record, including Ms. M.'s application, and failed to provide copies of several laws it relied on its position statement. Given the deficiency of the record, and the unreasonableness of expecting Ms. M. to review 478 pages and prepare for hearing in less than 48 hours, the hearing was postponed and DPA was ordered to file an amended record.[17]

DPA filed an amended record on July 28 and a hearing was held August 4.

III. DISCUSSION

Ms. M. does not dispute the facts DPA relied on to determine she is ineligible for LIHEAP benefits. Nor does she dispute DPA's points calculation based on these facts. Ms. M. takes issue with DPA applying a 50% reduction in points because Ms. M. lives in subsidized housing, arguing that this reduction violates federal law.

By regulation, the final step in calculating points for eligibility purposes is a 50% point reduction if the applicant lives in subsidized housing, pays some or all heating costs directly to a vendor, and receives a utility allowance as part of the applicant's housing cost calculation.[18] Ms. M. stated on her application that she lives in subsidized housing, identified the vendor that she pays for electricity, and attached documentation of the utility allowance she receives.[19] Ms. M. does not dispute these facts.

Ms. M. objection is to the legality of the 50% point reduction for subsidized housing applicants. Ms. M. cites language from the Alaska "Low Income Home Energy Assistance Program (LIHEAP) Model Plan," which states "[r]enters who live in subsidized housing, pay for their own heat, and receive a utility allowance will receive a benefit equal to 50% of what they would have received if they did not get the utility allowance."[20] Ms. M. pointed out that DPA is not reducing benefits by 50%, it is reducing points for eligibility by 50%.[21] This language is from an annual application that DPA submits to the United States Department of Health and Human Services ("HHS") to participate in the LIHEAP program for the year. DPA argues the language is merely "imprecise" and that it meant to refer to points, not benefits.[22] But whether

---

17 July 26, 2023 order.

18 7 AAC 44.080(l).

19 Ex. 1 at 2, 3, 14.

20 Ex. 7 (the entire "model plan" is available online at https://aws.state.ak.us/OnlinePublicNotices/Notices/Attachment.aspx?id=135923. *See also* July 21, 2023 email from Ms. M..

21 July 21, 2023 email from Ms. M.

22 Position Statement at 4-5; Mr. Nelson hearing testimony.

living in subsidized housing impacts an applicants' eligibility for benefits or merely the amount of benefits are two very different things with vastly different impacts on the lives of applicants. But any discrepancy between Alaska's "Model Plan" and its regulations is a matter between DPA and the federal HHS. DPA's application to HHS is not law and does not supersede state regulation. State regulation states that a 50% reduction in points will be applied to subsidized housing applicants.[23]

Ms. M. also argues that the 50% reduction violates uncodified federal law which specifies that subsidized housing applicants "shall be treated identically with other households eligible for or receiving energy assistance, including in the determination of the home energy costs for which they are individually responsible and in the determination of their incomes for any program in which eligibility or benefits are based on need, except as provided in subsection (d)."[24] Ms. M. argues that she, as a subsidized housing applicant, is not being treated the same as other applicants. DPA agreed, but pointed out the exception in this language for subsection (d). Subsection (d) provides a "special rule" for LIHEAP that allows a state to consider a subsidized housing applicant's utility allowance when determining benefit levels so long as the reduction in benefits is "reasonably related to the amount of the heating or cooling component of the utility allowance received" and ensures the greatest benefits go to those with the greatest need.[25] Because this matter involves LIHEAP, it is the special rule in subsection (d) that applies, not the language Ms. M. relies on that calls for identical treatment.

Ms. M. also contends the 50% reduction violates the LIHEAP special rule. Ms. M. submitted copies of an email from a DPA program coordinator who agreed that the 50% reduction, as currently applied, is an "error" and that DPA "need[s] to make a change to fix the problem and comply with the federal law."[26] DPA counsel downplayed this person's authority to speak for the Division, but also revealed that the Division is currently working on amending its regulations.[27]

The 50% reduction here is a matter of regulation. **"**Administrative agencies are bound by their regulations just as the public is bound by them."[28] Even if the agency employees agree that

---

23 7 AAC 44.080(l).
24 Ex. 6 at 9.
25 *Id*. at 9-10.
26 July 21, 2023 email from Ms. M.
27 Mr. Nelson hearing testimony.
28 *Burke v. Houston NANA, L.L.C.*, 222 P.3d 851, 868-69 (Alaska 2010).

the regulation at issue, 7 AAC 44.080(l), does not comport with federal law, DPA remains obligated to comply with its regulation when reviewing Ms. M.'s application. The validity of the regulation is not an issue that can be resolved in an administrative appeal of Ms. M.'s application denial, nor can the Commissioner unilaterally change the regulation in response to Ms. M.'s appeal. Regulations must be amended through the Administrative Procedures Act process.[29] And challenging the validity of a regulation or similar rule should be done in a original action in superior court, not in an administrative appeal to a Commissioner or appeal to superior court of a Commissioner's decision.[30]

An administrative appeal is for challenging how an agency has applied its laws to a particular application. It is not the correct forum for seeking to invalidate a regulation.[31] Because Ms. M.'s challenge is to the regulation itself, and not to how DPA applied its regulation to deny her application, and the record supports the decision, DPA's decision is affirmed.

IV. CONCLUSION

The record and existing regulation support DPA's decision. Accordingly, the decision is affirmed.

Dated: August 10, 2023

[image redacted]

Rebecca Kruse
Administrative Law Judge

---

[29] AS 44.62.180, *et seq.*

[30] *See*, *e.g.*, *State, Department of Transportation &Public Facilities v. Fairbanks North Star Borough*, 936 P.2d 1259, 1262 (Alaska 1997) (claim that borough ordinances are invalid because they exceed the borough's statutory authority, where a court needed only to consider the relevant statutes and regulations, was properly an original action and the remedy of invalidating ordinances is a judicial, not administrative, relief); *Haynes v. State, Commercial Fisheries Entry Commission*, 746 P.2d 892, 865 (Alaska 1987) (claim to invalidate regulation would appropriately be an original action, not an administrative appeal, but finding the plaintiff lacked standing); *see also Owsichek v. State, Guide Licensing and Control Bd.*, 627 P.2d 616, 619 (Alaska 1981) (action for declaratory judgment declaring statute unconstitutional was appropriately an independent action, not an administrative appeal).

[31] A challenge to the validity of a regulation is appropriately addressed with the superior court in an original action, not in an administrative appeal to an agency. Also, if DPA moves forward with amending this regulation, it is required to provide opportunities for public input.

Adoption

The undersigned, by delegation from the Commissioner of Health, 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 18th day of September, 2023.

By: [redacted]
Name: Daniel Phelps
Title: Project Coordinator

Certificate of Service: The undersigned certifies that this is a true and correct copy of the original and that on this date an exact copy of the foregoing was provided to the following individuals: E.M. (by mail and email); Justin D. Nelson (by email); Sally Dial, DPA (by email); Dept. of Law Central Email (by email).

Signature: [redacted] Date: 09/18/2023

[OAH note: Decision has redacted for publication.]