

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

In the Matter of	)	
	)	
T L	)	OAH No. 21-1122-SAN
_____	)	

**DECISION**

**I. Introduction**

T L requested an appeal hearing on a substantiated finding of child maltreatment for purposes of the Child Protection Registry. The decision she is appealing included a 30-day deadline to appeal. Ms. L did not appeal for nine months. She then withdrew her appeal and filed a new one several months later. The Office of Children’s Services (“OCS”) denied her appeal request as untimely. It is that denial that is on appeal here.

Under the circumstances, denying the appeal request was not the appropriate procedure for OCS to raise the untimeliness of Ms. L’s appeal. But the correct procedure would have led to the same briefing on the same issues, so the error is harmless.

As for Ms. L’s underlying appeal, she concedes it is untimely but is effectively asking OCS to waive it. The reasons she offers for waiver, however, are not supported by evidence and OCS was well within its discretion not to waive its deadline. Accordingly, Ms. L’s appeal is dismissed.

**II. Facts**

OCS issued a notice to Ms. L of substantiated findings of child maltreatment on April 22, 2020 (“April 22, 2020 Decision”).<sup>1</sup> OCS addressed the notice to Ms. L at a post office box in No Name and included a paragraph explaining her appeal rights and setting a 30-day deadline to appeal.<sup>2</sup> Ms. L did not appeal within that deadline.

On November 23, 2020, the Department of Health and Social Services, Division of Health Care Services sent a letter to Ms. L — at the same post office box — advising her that it had completed a background check for a potential employer and noted that the April 22, 2020

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<sup>1</sup> Agency Record (“R.”) 000001-5.

<sup>2</sup> R. 000003, 000005.

Decision was a barrier.<sup>3</sup> The letter further stated that Ms. L could seek a variance within 90 days.<sup>4</sup>

Nearly two months later, on January 19, 2021, OCS received a request for appeal from Ms. L.<sup>5</sup> In that appeal, Ms. L stated that she “finally received the letter of my right to appeal January 2021.”<sup>6</sup> The return address for this appeal is the same post office box where OCS sent the April 22, 2020 Decision.

Within the next several days, OCS reached out to Ms. L by phone and email to explain the difference between an appealing a substantiated finding and seeking a variance of that finding.<sup>7</sup> After some follow up questions, Ms. L responded by email on February 3, 2021 stating “I’ll go ahead with the variance.”<sup>8</sup> OCS sent a follow up letter to Ms. L on February 4, 2021 stating that OCS “accepts the request to rescind the appeal request.”<sup>9</sup> OCS mailed this letter to the same post office box as the April 22, 2020 Decision.<sup>10</sup>

Ms. L emailed OCS on May 4, 2021 stating that a variance had been granted, but that she was unhappy with the conditions, and asked if she could appeal the variance or the April 22, 2020 Decision.<sup>11</sup> OCS exchanged several emails with Ms. L over the next couple of days, culminating in a response that Ms. L could appeal the variance decision.<sup>12</sup>

On May 19, 2021, OCS received an appeal request from Ms. L.<sup>13</sup> On May 26, 2021, an OCS representative emailed Ms. L’s counsel, Sandra Rolfe, referencing a phone conversation between them that day and asking for clarification on whether Ms. L was appealing the variance decision or the April 22, 2020 Decision. The OCS representative followed up with emails reiterating this request on June 1 and June 2.

OCS treated the appeal as a request for referral to OAH for hearing on the April 22, 2020 Decision and denied the referral as untimely in a June 4, 2021 decision.<sup>14</sup> This decision includes

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<sup>3</sup> R. 000106-08.

<sup>4</sup> R. 000107.

<sup>5</sup> R. 000381-82.

<sup>6</sup> R. 000381.

<sup>7</sup> R. 000015-17.

<sup>8</sup> R. 000014.

<sup>9</sup> R. 000026-27.

<sup>10</sup> *Id.*

<sup>11</sup> R. 000036.

<sup>12</sup> R. 000036-40.

<sup>13</sup> R. 000380.

<sup>14</sup> R. 000217-18.

a paragraph advising Ms. L that she can appeal the June 4, 2021 decision to OAH.<sup>15</sup> When OCS emailed that decision to Ms. L’s counsel, Ms. Rolfe responded that

[W]e were wanting to appeal only the [April 22, 2020] neglect finding. We would appeal the denial of the right to appeal as we did not receive notice as required. Ms. L never received a letter and knew nothing about the finding of Neglect until the background check for work was done. Based on the lack of notice alone she should be allowed to appeal these findings.<sup>16</sup>

OCS apparently accepted this email as an appeal of its non-referral decision and referred it to OAH.

The parties agreed for the timeliness and non-referral issues to be heard on briefs. Ms. L and OCS submitted opening briefs on August 13, 2021. OCS submitted a response on August 27, 2021. Ms. L did not submit a response brief.

### **III. Discussion**

The April 22, 2020 Decision has triggered numerous appeals and related decisions. And while they are all relevant, only one decision is on appeal: the June 4, 2021 OCS decision denying Ms. L’s request to appeal the April 22, 2020 Decision. And that June 4, 2021 decision addresses the timeliness of only Ms. L’s May 19, 2021 appeal of the April 22, 2020 Decision. As discussed below, the June 4, 2021 decision was procedurally incorrect, but substantively within OCS’s discretion.

#### **A. Did OCS Properly Deny Ms. L’s Request for an Appeal Hearing?**

A person appeals a substantiated finding for purposes of the Child Protection Registry by “mak[ing] a request to the department for review by the office of administrative hearings.”<sup>17</sup> OCS can either grant the request or deny it “for reasons provided by law” and give notice of a right to appeal that denial to superior court.<sup>18</sup>

OCS denied Ms. L’s May 19, 2021 appeal to OAH because it was submitted well outside the 30-day deadline set in the April 22, 2020 Decision.<sup>19</sup> This denial, however, has two flaws.

First, an appeal request can only be denied “for reasons provided by law,” and the timeliness of Ms. L’s appeal is a matter of agency adjudication, not law.<sup>20</sup> Administrative

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<sup>15</sup> R. 000218.

<sup>16</sup> R. 000007.

<sup>17</sup> 7 AAC 54.255.

<sup>18</sup> AS 44.64.060(b).

<sup>19</sup> R. 000217.

agencies have broad discretion to set administrative review procedures in accordance with due process.<sup>21</sup> OCS imposed several procedures for a potential appeal of its April 22, 2020 Decision: (1) that an appeal include the reasons OCS erred; (2) that the appeal include “any relevant documentation to support those reasons”; and (3) that the appeal hearing be requested within 30 days of the date the letter was mailed.<sup>22</sup> These types of procedures may be within an agency’s discretion, but in this instance they are not set forth in statute or regulation. Indeed, OCS’s regulation states only that a person “must make a request” for review by OAH.<sup>23</sup> Failure to comply with the 30-day deadline, therefore, is a failure to comply with an agency directive, not a statute or regulation. Accordingly, when OCS denied Ms. L’s untimely appeal request it was not for a reason “provided by law,” as required to deny an appeal hearing request.<sup>24</sup>

Second, when an agency denies a request for appeal to OAH, the venue for the requester to appeal that decision is superior court, unless otherwise provided by law.<sup>25</sup> OCS included a notice of the right to appeal in its June 4, 2021 denial, but stated that Ms. L could appeal the denial to OAH.<sup>26</sup>

If OCS made only the second error, dismissal so Ms. L can instead appeal to superior court would be appropriate. But the first error — denying a request for appeal for reasons not stated in statute or regulation — make the denial itself improper. What OCS should have done here is refer the appeal to OAH and then move for it to be dismissed as untimely. If OCS had done so, this matter would be exactly where it is now: with the parties asking OAH to resolve the timeliness issue on their briefs. Because the parties agreed to have this matter heard on the briefs, they have had the same opportunity to be heard and on the same issues as if OCS had instead granted the appeal request and raised the timeliness issue in the context of that appeal.

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<sup>20</sup> AS 44.64.060(b).

<sup>21</sup> See *City of Homer v. State, Dep’t of Nat. Res.*, 566 P.2d 1314, 1319 (Alaska 1977) (adopting *Mathews v. Eldridge* test for evaluating due process).

<sup>22</sup> R. 000003.

<sup>23</sup> 7 AAC 54.255. A previous regulation did include an appeal deadline. Ms. L has not challenged the validity of OCS requiring an appeal within 30 days absent a current regulation providing that deadline. What is at issue in this matter is a deadline stated in an OCS decision.

<sup>24</sup> AS 44.64.060(b).

<sup>25</sup> AS 44.64.060(b).

<sup>26</sup> R. 000218.

Accordingly, the procedural error here is harmless and this matter will proceed as if on appeal with briefing on the timeliness issue.<sup>27</sup>

### **B. Is Ms. L's May 19, 2021 Appeal Untimely?**

Ms. L does not challenge the validity of the 30-day appeal deadline. Nor does she dispute that she filed her May 19, 2021 appeal outside the 30-day appeal deadline OCS set in its April 22, 2020 Decision.<sup>28</sup> She also does not dispute that she withdrew her initial January 2021 appeal to instead apply for a variance.<sup>29</sup> Ms. L argues that her May 19, 2021 appeal should be heard because (1) she filed her January 2021 appeal “as soon as she learned about” the April 22, 2020 Decision; and (2) she misunderstood the variance process.<sup>30</sup> Effectively, Ms. L is seeking waiver of the appeal deadline. But the evidence does not support her reasons for waiver.

Ms. L's counsel asserts in her brief — without citation to any evidence, such as an affidavit from her client — that Ms. L did not receive the April 22, 2020 Decision.<sup>31</sup> The decision was addressed to Ms. L at the same post office box where she received other OCS decisions and correspondence included in the record. Ms. L responded to the other documents sent to this post office box, indicating she received them without incident. There is no evidence she did not timely receive the April 22, 2020 Decision as well.

But even assuming she did not receive the April 22, 2020 Decision, the evidence shows she did not diligently respond to it. Agencies have general administrative authority to determine policies and procedures in administrative adjudications.<sup>32</sup> Here, OCS stated an appeal deadline in its decision. But even in the absence of an express deadline, courts have held there is a general rule of diligence.<sup>33</sup> Ms. L contends that she learned of the decision when OCS completed a background check for a potential employer.<sup>34</sup> OCS sent that background check

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<sup>27</sup> Cf. *Yost v. State, Div. of Corps., Bus. And Pro. Licensing*, 234 P.3d 1264, 1273 (Alaska 2010) (court did not err in converting civil action to administrative appeal and deciding issues as an appeal).

<sup>28</sup> Briefing on Timeliness of TL's Request for Administrative Review (“L Br.”) at 2.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 1-3.

<sup>31</sup> *Id.* at 2.

<sup>32</sup> See *Amerada Hess Pipeline Corp. v. Alaska Pub. Utilities Comm'n*, 711 P.2d 1170, 1178 (Alaska 1986) (“As a general rule, absent statutory restrictions and due process limitations, administrative agencies have the discretion to set policy by adjudication instead of rulemaking.”).

<sup>33</sup> See, e.g., *JCW Investment, Inc. v. Novelty, Inc.*, 509 F.3d 339, 342 (7th Cir. 2007) (“In the absence of a statutory or rule-based deadline [for motion], we think that a general rule of diligence should govern.”)

<sup>34</sup> *Id.* at 1.

notice to Ms. L on November 23, 2020 and specifically referenced the April 22, 2020 Decision.<sup>35</sup> Yet Ms. L did not attempt to appeal the April 22, 2020 Decision until January 19, 2021, almost two months later.<sup>36</sup> Thus Ms. L not only failed to meet a 30-day deadline set forth in the decision, but failed to act with diligence to appeal

Even if the January 19, 2021 was somehow timely, that appeal is not at issue here because Ms. L chose to withdraw that appeal. She did so after OCS explained to her the difference between an appeal and a variance application for purposes of addressing a substantiated finding.<sup>37</sup> Ms. L then chose to pursue a variance instead of an appeal, as confirmed by OCS in a follow up letter.<sup>38</sup> Nowhere in the record did OCS suggest Ms. L would be preserving appeal rights by filing a variance, nor did Mr. L ask about preserving any appeal rights.

Ms. L now argues that her May 19, 2021 appeal — filed more than a year after the decision it challenges — should be accepted because she did not get the result she wanted from her variance application. Ms. L’s counsel states — again, without an affidavit from Ms. L or other supporting evidence — that Ms. L did not understand the variance process, including that the substantiated finding would remain intact and that the variance could be granted with conditions.<sup>39</sup> But the record includes an email exchange in which Ms. L asked how long the substantiated finding would remain in place if not appealed, and OCS explained that it is a ten-year barring condition.<sup>40</sup> And by regulation, OCS may grant variances limited to only part of the of the background check requirements.<sup>41</sup> Ms. L thus had reason to know the variance might not provide the relief she was hoping for and that by dropping her appeal, the substantiated finding would stand.

“As a general rule, an applicant . . . who is aware of and yet misses a reasonable administrative deadline is not entitled to relief.”<sup>42</sup> It is a matter of agency discretion.<sup>43</sup> The

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<sup>35</sup> R. 000106-08.

<sup>36</sup> R. 000381-82.

<sup>37</sup> R. 000014-17.

<sup>38</sup> R. 000014, 000026.

<sup>39</sup> L Br. at 2-3.

<sup>40</sup> R. 000014-15.

<sup>41</sup> 7 AAC 10.930(f).

<sup>42</sup> *Forquer v. State, Com. Fisheries Entry Comm'n*, 677 P.2d 1236, 1243 (Alaska 1984) (agency had discretion not to waive deadline to submit evidence).

<sup>43</sup> *Id.* (“[I]t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice

evidence shows the April 22, 2020 Decision, with its 30-day appeal deadline, was mailed to Ms. L at the same address where she has been receiving mail from OCS without incident. There is no evidence that she did not receive this decision as well. Furthermore, Ms. L did not appeal for almost two months after receiving the background check notice in November 2020. She then withdrew that appeal and was advised that the April 22, 2020 Decision would continue to be a barring condition. It was only after receiving an unsatisfactory decision on her variance request that Ms. L filed a second appeal of the April 22, 2020, more than a year after that decision was issued. These facts strongly support an exercise of discretion not to waive the appeal deadline in this case.

#### **IV. Conclusion**

Based on the record, Ms. L had an opportunity to appeal the April 22, 2020 Decision, but did not act timely to do so. It thus falls within the Department's discretion whether to waive the deadline. Procedurally, OCS should have initiated this process by referring Ms. L's appeal and then moving to dismiss it as untimely. But the timeliness issue, and the parties' opportunity to brief it, was the same regardless of any procedural defects. That briefing and the record demonstrate that Ms. L's appeal was untimely. The record also fails to support an exercise of discretion to waive the appeal deadline. Accordingly, Ms. L's May 19, 2021 appeal is dismissed.

Dated: September 27, 2021

Signed

Rebecca Kruse

Administrative Law Judge

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require it.”); *cf. Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153-54 (2013) (deadlines to appeal administrative decisions are not jurisdictional unless a statute specifies that the deadline is jurisdictional); *McCarrey v. Comm'r of Nat. Res.*, 526 P.2d 1353, 1355 (Alaska 1974) (“failure to file an appeal [of a final agency decision to court] within strict time limitations does not create a jurisdictional defect.”).

## 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:

The ALJ ultimately finds after full briefing from the parties that Ms. L's appeal was untimely and her failure to file in a timely manner was not excused. The undersigned agrees with the ALJ's factual analysis but modifies the ALJ's legal conclusions

to provide greater clarity on the validity of the 30-day deadline set by OCS to appeal the substantiation finding. The ALJ

concludes that such a deadline may be imposed by OCS as a matter of agency discretion. The undersigned agrees that the

specific deadline does not need to expressly appear in the regulation and that OCS has authority, as an agency, to set deadlines

for appeals. By stating a deadline in a decision, OCS is not rulemaking; OCS is providing a process for appealing a specific decision, in keeping with OCS's obligation to provide due process.

The 30- day notice is a reasonable and common sense interpretation by OCS of the right provided in regulation for review of OCS's substantiation finding. The deadline is identical to that provided in Alaska Rule of Appellate Procedure 602(a)(2) and follows the Alaska Supreme Court's guidance provided to agencies concerning final agency decisions.

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 November, 2021.

By: Signed  
Name: Christine R. Marasigan  
Title: Program Coordinator II

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