STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM

Petitioner: Jane Doe
MAHS Docket Number: XXXXXXXXX
Agency Number: XYZYZYZYZ
Administrative Law Judge: Ellen McLemore

PETITIONER'S BRIEF IN SUPPORT OF MAHS JURISDICTION

Introduction

Petitioner is entitled to a fair hearing before an administrative law judge (ALJ) to contest a Michigan Department of Health and Human Services ("Department") employee's denial of her request to compromise her claim. MAHS jurisdiction is proper because BAM 725 includes no criteria for determining when economic hardship is proven and provides for no limitations on Department employee discretion. In fact, Petitioner only recently (June 12, 2018) received Department's unpublished guidelines on compromising claims under a FOIA request. *See "Compromise Claim Policy," [new exhibit].* Department has not published these internal guidelines, which were unavailable to Petitioner and counsel and were only provided under a FOIA request. These guidelines are not included in BAM 725. BAM 600 also mandates fair hearings to ensure that Department decisions are made in accordance with policy. Denying MAHS jurisdiction to review Department decisions based on unpublished guidelines would defeat many of the goals of the Administrative Procedures Act, chief among them due process protection, decisional independence, and consistent, uniform rulemaking and adjudication. *See* Daniel F. Solomon, *Fundamental Fairness, Judicial Efficiency and Uniformity: Revisiting the Administrative Procedure Act*, 33 J. Nat'l Ass'n Admin. L. Judiciary Iss. 1, pp. 53—54 (2013).

Because Petitioner currently receives food assistance benefits (FAP), the Department's decision constitutes a reduction in Petitioner's benefits entitling her to an administrative hearing

per BAM 600. The Delegation of Authority[1] also gives MAHS broad jurisdiction to issue proposals for recommendation, providing that such jurisdiction is not limited to any particular cases. MAHS jurisdiction is also essential to ensuring that M.C.L. 400.43a is applied in a manner consistent with federal statutes and regulates, as mandated by the statutory language.

Procedural History

Petitioner had a hearing before ALJ Lynn Ferris on October 23, 2017. The ALJ ordered that 1) the restitution debt owed by Petitioner to Department was not discharged in bankruptcy and that the Department could continue to recoup the debt, 2) the Department failed to satisfy its burden of showing that it acted in accordance with Department policy regarding whether the FIP overissuance should be considered uncollectible and written-off, and was ordered to determine the applicability of write-off provisions in Department policy to Petitioner's FIP overissuance, and 3) Petitioner's claim that the Department is required to compromise her FAP overissuance was not ripe for review.

Petitioner appealed the ALJ decision on issues 2 and 3. As to issue 2, she argued that since the ALJ determined that the Department did not meet its burden in proving that it acted in accordance with Department policy, the Department should have been ordered to write-off the FIP debt. As to issue 3, Petitioner argued that the Department should be ordered to make a determination on her request for a FAP overissuance hardship waiver, or should be ordered to write-off the debt in whole or in part.

On February 18, 2018, the Circuit Court for the Third Judicial Circuit, Wayne County, considered oral argument. During argument, the Department advised the Court that it had

[1] The Delegation of Authority is Section 120 of the MAHS Administrative Hearing Pamphlet. It gives MAHS authority to make final decisions in certain cases and issue proposals for recommended decisions in all others. It may be accessed at:
https://www.michigan.gov/documents/mdch/ADMN_HEARING_PAMPHLET_MARCH_2008_227657_7.pdf

complied with the administrative hearing decision and, in a letter dated November 2, 2017, the Department addressed Petitioner's request to write-off the FIP debt and compromise the FAP debt. In that letter from DHHS, the request to compromise the FAP debt was denied.

On March 8, 2018, the Hon. Annette J. Berry of the Circuit Court issued an Order on Claim of Appeal. The Order affirmed the ALJ's hearing decision as to issue 1, holding that the Department had a continuing right to recoup FIP and FAP restitution debts because no discharge of the court-ordered restitution debt occurred in Petitioner's bankruptcy proceedings. The Circuit Court also affirmed the ALJ's hearing decision as to issues 2 and 3; additionally, the Circuit Court remanded the question of whether the FAP overissuance should be compromised to MAHS for a hearing with submission of additional evidence and the taking of testimony.

ALJ McLemore advised both parties by Order of Adjournment that the prehearing conference would be held to address whether the language in BAM 725 regarding FAP compromised claims precludes MAHS from having jurisdiction over the matter. On May 2, 2018, a telephone pre-hearing conference was held before ALJ McLemore. Both parties made arguments as to MAHS's authority under BAM 725 to decide the matter of whether Petitioner's FAP overissuance can be compromised. The Department raised an additional jurisdictional argument: that MAHS does not have authority to hear either issue on remand, as the Wayne County Circuit Court (in a separate criminal matter) had issued an order of restitution against Petitioner related to the FIP and FAP overissuances. *See Prehearing Decision*, p. 2.

Because Petitioner was not advised prior to the pre-hearing conference that additional jurisdictional arguments would be raised, Petitioner was not provided adequate opportunity to respond. *Id.* For this reason, all contested jurisdictional issues were rescheduled for argument at the fair hearing.

Argument

The Department's assertion of unfettered "final authorization" on compromising claims is inconsistent with express legislative goals in enacting the Administrative Procedures Act. Department ostensibly made the decision to deny Petitioner's request based on unpublished internal guidelines. *See Compromise Policy [new exhibit]*. These guidelines were only made available to Petitioner and counsel under a FOIA request. These guidelines are not published in the BAM 725. Due process is not ensured where Department makes final, non-reviewable decisions based on clandestine guidelines unavailable to public benefits claimants, their attorneys, and administrative law judges. Department's position contravenes BAM 600, which provides for fair hearings to ensure Departmental compliance with policy. MAHS jurisdiction is essential to protecting due process, preserving administrative records on appeal, and promoting uniformity in policymaking and procedures.

MAHS has jurisdiction over hearings pertaining to current FAP benefit levels, per BAM 600. The Department's decision to deny Petitioner's request for a compromised claim has a tangible impact on her benefit levels. That MAHS's jurisdiction is to be liberally applied is clear from the Delegation of Authority, which states that MAHS's authority to issue proposals for final decisions is "not limited" to cases arising under any particular statute. Furthermore, BAM 725 cannot be read to give final authorization to a Department employee because such an interpretation would be inconsistent with federal statutes and regulations.

I. MAHS has jurisdiction because BAM 600 provides that Department decisions must be reviewed for accordance with policy, and Department's internal, unpublished procedure on compromising claims frustrates the chief legislative goals in enacting the APA, such as due process protection, preservation of the administrative record, and uniformity in procedure and decision making

Department made its decision to reject Petitioner's request according to unpublished internal guidelines that were unavailable for Petitioner's case preparation, arguments in previous

hearings, and ALJ review. Petitioner's counsel just recently received a copy of Department's compromise claim policy pursuant to a FOIA request. Petitioner's case has been has been argued before an ALJ and in circuit court; nevertheless, it took years and a FOIA request to unearth Department's procedure for compromising claims. Since Department has a procedure for evaluating requests to compromise claims, that procedure—and Department decisions resulting therefrom—should be reviewable by an administrative law judge. This much is stated in BAM 600, which provides that "[t]he department provides an administrative hearing to review the decision and determine its appropriateness in accordance to policy. This item includes procedures to meet the minimum requirements for a fair hearing." *See BAM 600, page 1.* Department's assertion that MAHS lacks jurisdiction contravenes the language in BAM 600, which provides for fair administrative hearings to ensure that Department decisions are, at a minimum, made in accordance with Department policy. This cannot be ensured where Department keeps its policy hidden from public view, as is the case here.

Department's unpublished procedure is conducive to the sort of arbitrary decision making that the legislature intended to prevent in enacting the APA. Prior to the Administrative Procedures Act and the enactment of similar statutes across the States, hearing examiners were "in a dependent status with the agency employing them," and many complaints "were voiced against this system alleging that hearing examiners were "mere tools of the Agency."" *See* Hon. D. Randall Frye, *Statement of the Association of Administrative Law Judges*, 27 June 2012, pages 1—2. Before the APA, agency employees themselves were commonly empowered to hear and issue rulings in administrative hearings. Congress intended to change the administrative adjudication process in passing the APA in order "to ensure that the American people were protected from arbitrary decision making by government bureaucrats." Hon. D. Randall Frye,

Statement of the Association of Administrative Law Judges, 27 June 2012, pages 1—2. MAHS jurisdiction is necessary to prevent Department's arbitrary refusal to compromise claims.

Department's internal procedure and the lack of administrative oversight on its decisions warrant MAHS jurisdiction in light of the important purposes of the Administrative Procedures Act; namely, protecting due process by ensuring adequate notice, promoting uniformity in procedure, rulemaking, and adjudication, and preservation of a record at the administrative level in case of appeal. *See* Daniel F. Solomon, *Fundamental Fairness, Judicial Efficiency and Uniformity: Revisiting the Administrative Procedure Act*, 33 J. Nat'l Ass'n Admin. L. Judiciary Iss. 1, pp. 53—54 (2013); Hon. D. Randall Frye, *Statement of the Association of Administrative Law Judges*, 27 June 2012, pages 1—2.

Providing fair administrative hearings is essential to due process, particularly when the termination or restriction of benefits is involved and the claimant is indigent. *See Goldberg v. Kelly*, 397 U.S. 254 (Sup.Ct. 1970). Due process protection requires compliance with the above mentioned language in BAM 600; otherwise, Department need not ever prove that its own decisions were made in accordance with its policy on compromising claims. Due process also requires that a hearing officer be unbiased; "[t]he hearing officer should not be under the supervision of a person who is responsible for prosecuting or developing the Department's case." In this case, the same agency officials responsible for collecting the debt are alleged to have final authority over compromising these debts. Department also asserts the legitimacy of an internal, secret procedure for evaluating compromise claim requests. Granting final authorization on compromise claim requests to an agency employee without any oversight or tribunal jurisdiction to review the determination violates due process principles. This is especially problematic in the

case at bar, where Department denied Petitioner's request based on unpublished, unavailable procedural guidelines.

Due process also requires adequate notice, which is itself integral to the right to a fair hearing. *Bliek v. Palmer*, 102 F.3d 1472, 1475 (8th Cir. 1997). Adequate notice is that which is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* Without MAHS jurisdiction, Department is free to send Petitioner inadequate notice—or even no notice—of an agency employee's determination not to compromise the claim. Petitioner neither had notice of nor access to Department's procedural guidelines for compromising claims.

Department may have sent Petitioner inadequate notice for the same reasons observed in *Bliek.* In *Bliek*, plaintiffs sought injunctive and declaratory relief pursuant to 42 U.S.C. § 1983, contending that defendants violated plaintiffs' due process rights by failing to notify them of the state's discretionary authority to settle, adjust, compromise, or deny claims arising out of overissuances of food stamps due solely to agency error. *Id.* at 1473. Because the letter "[gave] the impression to the plaintiffs who have no discretionary funds (which, given the low-income status of the class members, is likely a common situation) that they have no alternative but to agree to reduce their future allotment of food stamps," the court agreed that defendant's Repayment Agreement demand letter provided plaintiffs inadequate notice in violation of their constitutional right to due process. *Id.* at 1476.

Just as in *Bliek*, Petitioner was never informed of the state's discretionary authority to compromise or terminate claims. Petitioner was also never informed of Department's internal guidelines for evaluating compromise claim requests prior to a recent FOIA request. Instead, Petitioner was given an Intentional Program Violation Repayment Agreement and pressured to

sign it. *See IPV Repayment Agreement, Hearing Packet p. 20.* No notice of the Department's discretionary authority to compromise the claim was provided to Petitioner prior to signing the agreement. Just like the inadequate notice given in *Bliek*, the Department's notice to Petitioner was not reasonably calculated to afford Petitioner an opportunity to state her objections to the state's proposed actions. *Id.*

MAHS jurisdiction is also necessary to promote uniformity in procedure, rulemaking, and adjudication. Uniform application of procedure and consistent adjudication are impossible where Department can keep its own procedures shielded from Petitioner and the public. MAHS jurisdiction ensures that the correct agency employees vested with appropriate authority make reasonable, fair, and legal decisions based on statutes, regulations, and procedure. Since BAM 725 provides no criteria for assessing economic hardship and does not include Department's internal procedure, MAHS jurisdiction is necessary to ensure uniform application of Department procedure on compromising claims. Neither Michigan law nor the BAM says that clients are not entitled to a fair hearing regarding denials of requests to compromise claims. If the Michigan legislature intended to preclude fair hearings in these cases, they could and would have said so in MCL 400.43a or in the administrative regulations. MAHS jurisdiction is essential to maintaining the consistency of Department procedures and checking for abuse of discretion.

Furthermore, MAHS jurisdiction ensures that a reasonably complete administrative record will be available in case of appeal, which protects due process rights. Administrative agency decisions may be overturned by a court of law if it was "in violation of the constitution or a statute" or "if it was affected by other substantial material error of law." MSA § 3.560(208), MCL § 24.306; *THM, LTD v. Commissioner of Insurance,* 176 Mich.App. 772, 777 (1989). The norm is for judicial review based solely on the record before the agency. *See* Daniel F. Solomon,

Fundamental Fairness, Judicial Efficiency and Uniformity: Revisiting the Administrative Procedure Act, 33 J. Nat'l Ass'n Admin. L. Judiciary Iss. 1, p. 117, FN 215 (2013). In order to uphold the administrative decision, the court must find "evidence that a reasonable mind would find sufficient to support the decision." *Quality Clinical Laboratories, Inc. v. Dept. of Social Services,* 141 Mich.App. 597, 599 (1985).

It is important to note that the Department's policy for compromising claims was only revealed after a FOIA request. Therefore, it is only now that the procedure used by Department is included in the administrative record. The administrative record cannot be complete where Department is free to hide its procedure for making final, non-reviewable determinations. Without MAHS jurisdiction, the Department is free to make decisions on compromising claims without developing any administrative record at all. Under the APA: "[I]t is the role of the agency to resolve factual issues to arrive at a decision ***that is supported by the administrative record***, whereas the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Sierra Club v. Jackson*, 833 F.Supp.2d 11, 18 (D.D.C. 2012). Without a fair hearing, the administrative record cannot be developed sufficiently for circuit or district courts to determine whether the administrative record permitted the agency decision. Without MAHS jurisdiction, Department need not develop any administrative record at all, which is problematic at both administrative and judicial tribunals.

II. MAHS has jurisdiction because BAM 600 otherwise provides for a fair hearing in Petitioner's case

As discussed in part I of the argument, BAM 600 mandates administrative hearings to review Department decisions and ensure their accordance with Department policy, making MAHS jurisdiction especially necessary where Department's policy has so far been unavailable

to Petitioner and MAHS. *See BAM 600*. In addition, BAM 600 gives all clients the right to contest a department decision affecting eligibility or benefit levels. *See* BAM 600, April 1, 2018, p.1. The same manual provides that MAHS may grant hearings about a claimant's current level of FAP benefits and reductions in the amount of program benefits. *See* BAM 600, April 1, 2018, p. 5. Restrictions under which benefits or services are offered also warrant a hearing before an administrative law judge. *Id.*

Petitioner is currently receiving food assistance benefits from Department, which, as of July 31, 2017, is seeking to recoup $8380.00 from her for FAP overpayments. *See Bridges Claims, Hearing Packet, p. 30.* Department is recouping 20% of Petitioner's monthly FAP benefits (totaling about $70.00 per month). This amounts to a reduction in benefit levels; Petitioner is not entitled to retain and spend her issued FAP benefits because of her recoupment obligations. The recoupment schedule may also be considered a "restriction" under which current FAP benefits are issued to Petitioner. The restrictive nature of the restitution obligations is clear given that, when the debt was originally assigned to Petitioner, she was disqualified from benefits for one year. *See Disqualification Consent Agreement, Hearing Packet, p.22.*

For these reasons, BAM 725 is not the only relevant authority, and it is not controlling in the case at bar. As BAM 600 indicates, MAHS has the authority to grant a hearing where a food assistance claimant contests her benefit levels or restrictions under which benefits are offered; this is at the heart of Petitioner's request for a compromised claim, as she urgently needs these benefits to take care of her disabled daughter.

III. MAHS has jurisdiction because it has been delegated unlimited authority to issue proposals for final decisions

Besides BAM 600, MAHS jurisdiction is supported by Section 120 ("Delegation of Authority") of the Administrative Hearing Pamphlet, because this section indicates that MAHS's

authority to issue proposals for final decisions is not limited to specific contested cases. This section provides that:

"The delegation of final decision authority applies to, contested cases held under MCL 330.1236, 330.1238, 330.1407, 330.1536 MCL 400.9, MCL 400.112g MCL 500.287, MCL 333.12613, MCL 400.112g, 7 CFR 246.1 et seq., 42 CFR 431.200 et seq., and Michigan Administrative Code 330.2052. The delegation to issue proposals for final decisions applies to, but is not limited to, contested case held under MCL 400.111c (1) (b)."

See Administrative Hearing Pamphlet, Section 120 (2015), p. 1.

The drafters of the Administrative Hearing Pamphlet could have limited MAHS's authority to issue proposals for final decisions if they intended to do so. This is clear based on the express limitation of final decision authority to contested cases arising under specific statutes and regulations. Since MAHS's authority to issue proposals for final decisions "is not limited to" particular cases brought under specific statutes, MAHS at least has jurisdiction to issue a proposal for a recommended decision to Department on Petitioner's request to compromise her claim.

Michigan court decisions support this interpretation, confirming that "is not limited to" confers broad discretion on an agency to use authority. For instance, in *Estate of Bacon by Bacon v. DHHS*, 2017 WL 2390673 (Mich.App. 2017), the court considered the amount of discretion given to DHHS based on the language in M.C.L. 112(3)(e), which states that "[t]he department of community health shall develop a definition of hardship according to section 1917(b)(3) of title XIX that includes, but is not limited to, the following..." *See* M.C.L. 112(3)(e). The court determined that "the Legislature also provided express language ("includes, but not limited to, the following") granting the [the Department] discretion to include other requirements for the hardship exemption." *Id.* at 3.

Like the DHHS in *Bacon*, MAHS has authority to issue final proposals for decisions that "applies to, but is not limited to," certain contested cases. *See* Administrative Hearing Pamphlet,

Section 120 (2015), p. 1. This shows that MAHS's ability to issue proposals for decisions and hear contested cases has no significant express or implied limitations.

IV. MAHS has jurisdiction because Department recoupment procedures must be consistent with federal laws and regulations, which provide for fair administrative hearings

The Department's claim to have final authorization precluding MAHS jurisdiction on recoupment procedures is inconsistent with federal law and regulations, which provide for fair hearings when the state takes action that impacts benefit levels. The statutory basis for the Department's recoupment efforts is M.C.L. 400.43a, which provides that "[p]rocedures for the recovery of overpayments made under federally assisted programs shall be consistent with federal law and regulations." *See* M.C.L. 400.43a. MAHS jurisdiction is proper because denying Petitioner a fair hearing would be inconsistent with federal regulations. For instance, 7 CFR § 273.15(a) states that, except as indicated in § 271.7(f), "each State agency shall provide a fair hearing to any household aggrieved by any action of the State agency which affects the participation of the household in the Program." See 7 CFR § 273.15(a). Petitioner's request for an ALJ hearing does not fall under any of the exceptions listed under § 271.7(f), which states that: "Any household that has its allotment reduced, suspended or cancelled as a result of an order issued by FNS in accordance with these rules may request a fair hearing if it disagrees with the action, subject to the following conditions. State agencies shall not be required to hold fair hearings unless the request for a fair hearing is based on a household's belief that its benefit level was computed incorrectly under these rules or that the rules were misapplied or misinterpreted. State agencies shall be allowed to deny fair hearings to those households who are merely disputing the fact that a reduction, suspension or cancellation was ordered."
See 7 CFR § 271.7(f). Petitioner believes that the law on compromising claims was misapplied and misinterpreted in her case due to economic hardship and is entitled to a fair hearing. *Id.*

Petitioner began paying recoupment on February 28, 2009. She has paid approximately $6461.00 towards her FAP overissuance balance and had an outstanding balance of $8380.00 as of July 31, 2017. Her benefits continue to be recouped at a rate of about $72 per month. It is reasonable to infer that Petitioner is unable to pay back the entire overissuance balance within three years, since it has taken her more than eight years to pay a fraction of the balance.

Further, Petitioner is not merely contesting that a reduction, suspension, or cancellation of benefits was ordered. She is currently receiving FAP. The Department's claim against her concerns the previous overissuance of these FAP benefits. Therefore, the Department's efforts to recoup these payments constitutes a tangible reduction in her FAP benefits, entitling her to a fair hearing under 7 CFR §§ 273.15(a), 271.7(f). Department is recouping 20% of Petitioner's monthly payments in order to satisfy Petitioner's repayment obligation. The federal regulations should determine whether Petitioner is entitled to a fair hearing before a MAHS ALJ, because M.C.L. 400.43a indicates that the state's recoupment efforts shall be consistent with such regulations.

Federal statutes also show that MAHS jurisdiction over Department recoupment decisions is proper. For instance, 7 U.S.C. 2022(iv) states that "[a]dministrative and judicial review, as provided in section 2023 of this title, shall apply to the final determinations by the Secretary under clause (ii)." *See* 7 U.S.C. 2002(iv). The statute confirms Congress's intent to provide claimants with a fair administrative hearing, even after a final determination on overissuance is made by the Secretary and the state agency.

As an "agency" under the Administrative Procedures Act, *see* M.C.L. § 24.203(2), the Department has no inherent power and derives its authority from the Legislature, statutes, or Constitution. *Deleeuw v. State Bd. of Canvassers*, 688 N.W.2d 847, 850 (Mich.App. 2004).

M.C.L. 400.43a reiterates this principle by requiring consistency with federal statutes and regulations with respect to recoupment procedures. BAM 725 must be interpreted in a manner consistent with the statute and the federal regulations mentioned above; this makes MAHS jurisdiction necessary in Petitioner's case.

Conclusion

For the reasons stated above, we ask that MAHS find it has jurisdiction to review Department's decision not to compromise Petitioner's overpayment claim.