

## ALJ CLE 2004

### **Section I: “Proof of Mailing” (One hour.)**

A. The Genesis of Concern: Meachem v. Wing, et.al., (USDC, SDNY, commenced June 25, 1999).

In 1999, Plaintiffs brought a class action for declaratory and injunctive relief, and attorney’s fees in the United States District Court for the Southern District of New York. Defendants are OTDA, the Department of Health and the Department of Labor. Plaintiffs assert that ALJs routinely and habitually accept HRA affidavits associated with the Agency practices in the mailing of notices, and continuing eligibility request correspondence as having established a presumption of mailing. Also assailed in the Amended Complaint is a pattern and practice, allegedly engaged in by NYC ALJs, of failing to provide a full and fair opportunity to Appellants to (a) testify and present a case without interruption; (b) cross-examine witnesses; (c) examine or rebut adverse testimony or witnesses; (d) subpoena documents or witnesses; (e) attain an understanding of the parties’ respective burdens of proof; (f) establish the credibility of their accounts; (g) receive DAFHs that contain necessary findings of fact. The primary issue in the DAFHs underlying the class action is whether an Appellant had good cause to fail to meet an eligibility requirement due to the non-receipt of an Agency-mailed piece of essential correspondence. It is from this set of issues that the general issue category entitled “proof of mailing” is derived.

In a decision dated December 9, 1999, the Court granted Defendant’s motion to dismiss, in part, insofar as Plaintiff’s claims arose under State law. The motion to dismiss was otherwise denied. Summary judgment motions are pending before the court. The parties have engaged in settlement discussions.

B. When do issues related to “proof of mailing” arise?

The question of whether or not an Agency mailed a significant piece of correspondence and the question of whether or not a hearing Appellant received a significant piece of correspondence cause “proof of mailing” issues to arise. These are not issues which are foreign to upstate hearings.

If the Appellant says, “I didn’t get the letter (or notice, or other form of essential mail which gives rise to a discontinuation or reduction in benefits)”, then, the issue as to receipt of mail has been presented.

C. How is “proof of mailing” established?

It is important to note at this point that a focus, exclusively on proving that a piece of correspondence has been mailed, may mislead an ALJ into believing that that is the only, or most essential issue. Actually, an Appellant's denial of receipt of an important piece of mail gives rise to a series of issues and concerns, which are outlined below.

1. The Agency has the burden of going forward. The Agency must establish that the piece of mail was mailed appropriately and to the correct address.
  - a. Affidavits – Should be current and applicable to the mailing.
  - b. Direct testimony – Agency representative testify to the process.
  - c. Client Notice System mailings.

2. Once the Agency has established the presumption of mailing to the ALJ's satisfaction, the burden of going forward shifts to the Appellant. It is recommended that an ALJ wait for the Agency to complete its presentation. If the Agency has failed to establish some aspect of mailing the essential correspondence, the ALJ should probe and question sufficiently to establish a record which would support a finding that the correspondence was or was not appropriately mailed and should have arrived at the Appellant's address of record.

Appellants should be afforded a full opportunity to address the alleged failure to receive the correspondence. If little information is provided, the following are a few, non-exclusive avenues of inquiry:

- a. Correct address and address of record (not always the same).
- b. Reliability of mail delivery.
- c. Expectation of the mailing.

#### D. Evaluating the evidence.

Initially, the ALJ must decide if the presumption of mailing has been established. If not, the Agency has not established a necessary element of its case. If so, then the ALJ must next evaluate the Appellant's explanation for failing to act upon the correspondence. Is the explanation plausible and believable? What are those facts established at the hearing which support a finding that the correspondence was not received? The rationale relied upon to find either in favor of receipt of mail or non-receipt of mail should be clearly articulated in the "Decision" section of the DAFH. The future need to engage in this exercise should be kept in mind by the ALJ as the hearing is being held. Thus, be certain that before closing the hearing, your record is as well developed as the circumstances permit.

#### E. Pitfalls to avoid.

- a. Affidavits should be complete, current and applicable.
- b. Adjournments should be provided to enable a party to provide any documentary evidence supporting oral testimony.

Examples: CMS affidavits of mailing, postal complaints.

#### F. Examples of actual "proof of mailing" cases and their resolution.

- a. The incomplete affidavit - Resolved by Stip., benefits restored.
- b. The 8-month old affidavit – Defended, Art. 78 Pet. dismissed.
- c. The 11-month old affidavit – Defended, settled on sep. basis.  
(Advisement on age of affidavit.)
- d. The arguably inapplicable affidavit: Carefully develop record.

G. Question and Answer/Discussion Session.