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OFFICE OF THE PUBLIC AUDITOR

Fax

To: Thomas J. Fisher – Attorney for Appellant **From:** OPA Procurement Appeals
David J. Highsmith – Attorney for Appellee

Agency: Shimizu Canto & Fisher **Pages:** 8 (Including cover)
Office of the Attorney General - Guam

CC: Andrea Leitheiser, PhD – Acting Director Dept. of Mental Health and Substance Abuse **Date:** Tuesday – 12/09/08

Fax: 472-2886 / 472-2493 / 649-6948 **Phone:** 472-1131 / 475-3324 / 647-5330

Re: X (1) Decision and Order re Appellant's Motion to Strike Reply (2)
Scheduling Order re Formal Hearing and (3) Order Limiting Public
Disclosure of Portions of Record: OPA-PA-08-008

Urgent For Review Please Comment Please Reply Please Recycle

● **Comments:**

See Orders attached and please acknowledge receipt by re-sending this cover page along with the firm or agency stamp, date, and initials of receiver. Thank you.

Theresa Gumataotao – 475-0390 x 207 tgumataotao@guamopa.org

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OFFICE OF THE PUBLIC AUDITOR

PROCUREMENT APPEALS

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7 'IN THE APPEAL OF,
8 LATTE TREATMENT CENTER, INC,
9 Appellant

APPEAL NO: OPA-PA-08-008

DECISION AND ORDER RE
APPELLANT'S MOTION TO STRIKE
REPLY TO APPELLANT'S COMMENTS

10
11 To: **Attorney for Appellant: Latte Treatment Center, Inc.**
12 Thomas J. Fisher, Esq.
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17 **Attorney for Appellee: Department of Mental Health and Substance Abuse**
18 David J. Highsmith, Esq.
19 Assistant Attorney General, Civil Division
20 Office of the Attorney General
21 287 West O'Brien Drive
22 Hagatna, Guam, 96910

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23 **THIS MATTER** came before the Hearing Officer on December 5, 2008 for a hearing on
24 Appellant's (Hereafter Referred to as "LTC") September 11, 2008 Motion to Strike Appellee's
25 (Hereafter Referred to as "DMHSA") Reply to LTC's Comments. DMHSA did not file an
26 opposition to the Motion and at the hearing both parties submitted on the written motion and the
27 record in this matter. After reviewing the motion and record in this matter, the Hearing Officer
28 finds as follows:

Decision and Order Re Motion to Strike- 1

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1 1. **DMHSA's Reply was untimely.** Any rebuttal an agency may care to make to a
2 party's comments on an Agency report shall be filed with the Public Auditor within five (5)
3 working days after receipt by the Public Auditor of the comments to which the rebuttal is
4 directed. 2 G.A.R., Div. 4, Chap. 12, §12104(c)(4). Here, LTC filed its comments on Monday,
5 July 7, 2008 and DMHSA's deadline to file a rebuttal expired five (5) working days later on
6 Monday, July 14, 2008. There is no dispute that DMHSA filed its reply to LTC's comments on
7 August 1, 2008, eighteen (18) days after the July 14, 2008 deadline expired. Thus, DMHSA's
8 Reply is untimely.

9
10 2. **The ends of justice require excusing DMHSA's untimely filing of the reply.** The
11 Office of the Public Auditor (OPA) has the authority to exclude the untimely reply from being
12 considered in these proceedings. The Hearing Officer may impose the appropriate sanction
13 against any party or person, to include a purchasing agency such as DMHSA, for failing to obey
14 a procedural order and the sanction may include refusing to allow a disobedient party to support
15 or oppose designated claims or defenses and prohibiting that party from introducing designated
16 matters into evidence. 2 G.A.R., Div. 4, Chap. 12, §12109(h)(1). Here, the real issue is whether
17 exclusion of the untimely reply is the appropriate sanction for DMHSA's filing of said
18 documents eighteen (18) days late. The general rule is that administrative agencies have the
19 discretion to relax or modify their procedural rules adopted for the orderly transaction of
20 business when in a given case the ends of justice require it. *Neighborhood T.V. Co., Inc. v.*
21 *F.C.C.*, 742 F.2d 629, 636 (D.C. Cir., 1984). The Hearing Officer finds that DMHSA's failure to
22 file the reply was caused by simple neglect and not any willful defiance of the OPA's procedural
23 rules for procurement appeals. Although DMHSA's untimely filing caused, at best, a one (1)
24 month delay in these proceedings, the sanction of excluding the reply in this matter is not
25 appropriate because it is too heavy a sanction for the delay. Thus, the Hearing Officer finds that
26 the ends of justice require accepting DMHSA's reply filed on August 1, 2008.

