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**STATE OF ALASKA
DEPARTMENT OF HEALTH AND SOCIAL SERVICES
OFFICE OF HEARINGS AND APPEALS**

In the Matter of)
)
)
██████████,)
Claimant.)
)
_____)

OHA Case No. 08-FH-453
Division Case No. ██████████

FAIR HEARING DECISION

STATEMENT OF THE CASE

██████████ (Claimant) has received Food Stamps through the Division of Public Assistance (Division) since July 2006. (Ex. 2.1). On or about June 3, 2008 the Division discovered that the Claimant had been convicted of a felony involving illegal drugs and concluded that this permanently disqualified the Claimant from receiving further Food Stamp Benefits. (Ex. 2.1). The Division advised the Claimant of its determination via letter dated June 19, 2008. (Ex. 2.4). On June 24, 2008 the Claimant telephonically requested a fair hearing to contest the Division's termination of his Food Stamp Benefits. (Ex. 3). This office has jurisdiction of the Claimant's appeal pursuant to A.S. 47.27.080(a) and 7 AAC 49.010.

Pursuant to the Claimant's request, a hearing was held on July 31, 2008 before Hearing Officer Elizabeth Vazquez.¹ The Claimant attended the July 31, 2008 hearing telephonically from ██████████ and represented himself. ██████████, a Public Assistance Analyst representing the Division, attended the July 31, 2008 hearing in person. ██████████ of the Division testified telephonically from Juneau. The hearing was then continued to September 4, 2008.

On August 22, 2008 ██████████ of Alaska Legal Services Corporation entered an appearance as counsel for the Claimant. ██████████ and the Claimant attended the September 4, 2008 hearing telephonically. ██████████ attended the September 4, 2008 hearing in person to represent the Division.

¹ This case was reassigned to hearing officer Jay Durych following the initial hearing. Mr. Durych reviewed the tape of the first hearing, observed the second hearing, reviewed the file, and prepared this decision.

The parties agreed that there were no disputed issues of material fact. It was agreed that the sole issue for determination was the legal issue of whether the Claimant's prior felony conviction in the State of [REDACTED] came within the scope of the Federal regulations (7 CFR Sections 273.1(b)(7)(vii) and 273.11(m)) denying lifetime Food Stamp Benefits upon a person's conviction of certain drug felonies.

ISSUE

The Claimant's position, in a nutshell, is that because his [REDACTED] felony conviction was for attempted manufacture of a controlled substance (methamphetamine), rather than for "possession, use, or distribution" of a controlled substance, the conviction does not constitute a "drug felony" within the terms of the Federal regulations (7 CFR Sections 273.1(b)(7)(vii) and 273.11(m)) that deny benefits upon conviction of a drug felony. The Division's position was that, although the Claimant's conviction was for an attempt crime, the underlying facts of the case indicated that the Claimant had possession of equipment necessary to manufacture controlled substances, and his conviction therefore came within the ambit of the "drug felony" disqualification regulation. Therefore, the issue is:

Was the Division correct in terminating the Claimant's Food Stamp Benefits on the basis of his conviction of a felony in the state of [REDACTED] involving the attempted manufacture of a controlled substance (methamphetamine)?

FINDINGS OF FACT

1. The Claimant moved to Alaska and in July 2006 applied for Food Stamps.² (Ex. 2.1). As a result of this application, the Claimant received Food Stamp Benefits for the period from July 2006 through June 2008 (Ex. 2.1, Ex. 2.4). Upon filling out the Division's forms for recertification dated June 12, 2007, the Claimant checked the box stating that he had been convicted of a drug-related felony for an offense that occurred on or after August 22, 1996. (Ex. 2.1). The Claimant also admitted the conviction to Division personnel during a home visit on June 25, 2008. (Ex. 2.1). The Claimant again admitted his conviction in a subsequent Application for Services form dated December 8, 2007. (Ex. 2.5, 2.6). Thus, there is no indication that the Claimant ever misrepresented his conviction status to the Division.

2. As of the date of the last hearing (September 4, 2008), the Claimant was not employed. (Ex. 2.7). He receives approximately \$280.00 per month from the State's Adult Public Assistance program. (Ex. 2.8). He receives a housing subsidy from Alaska Housing Finance Corporation in the amount of \$900.00 per month. (Ex. 2.10).

3. On June 18, 2008 the Division determined that it had previously erred in issuing Food Stamp Benefits to the Claimant because he was a convicted drug felon. (Ex. 2.0). On June 19, 2008 the Division sent the Claimant a notice advising him that his Food Stamp Benefits were being terminated effective June 30, 2008; that he was no longer eligible to participate in

² The Claimant's earliest application forms for Food Stamp Benefits are not before the hearing officer.

the Food Stamp Program because he is a drug felon, and that he was permanently ineligible for the Food Stamp Program. (Ex. 2.4).

4. On June 24, 2008 the Claimant requested a Fair Hearing to contest the Division's termination of his Food Stamp Benefits (Division Fair Hearing Position Statement at p.2; Ex. 3). The Claimant's Food Stamp Benefits were restored on June 24, 2008 pending the outcome of the hearing. (Division's Fair Hearing Position Statement at p.2; Ex. 4.0; Ex. 4.1).

5. On March 31, 2000 an Amended Criminal Complaint was filed against the Claimant in the [REDACTED] Circuit Court of the State of [REDACTED]. (Ex. A-4). The Claimant was initially charged with two separate counts. The first (felony) count alleged attempted manufacture of methamphetamine (a controlled substance) in violation of [REDACTED] Statutes Annotated ("WSA") Sections 939.32, 961.41(1)(e)(1), 961.50, and 961.49. (Ex. A-4). The second (misdemeanor) count alleged possession of drug paraphernalia with the primary intent for use in manufacturing, compounding, converting, producing, processing, or preparing a controlled substance or controlled substance analog in violation of [REDACTED] Sections [REDACTED] (Ex. A-4).

6. On April 5, 2000 an Amended Information was filed with the [REDACTED] court which superseded the above described Amended Criminal Complaint previously filed. This Information retained Count I of the former charging document (alleging attempted manufacture), but deleted Count II (alleging possession of drug paraphernalia with the primary intent for use in manufacturing, compounding, converting, producing, processing, or preparing a controlled substance or controlled substance analog) (Ex. A-3). Thus, the count which specifically alleged possession was dropped from the charging documents.

7. Documentation obtained by the Division from the [REDACTED] Circuit Court indicates that Count II (alleging possession) was dismissed on April 7, 2000 on motion of the prosecutor. Thus, the only count which specifically alleged possession was not only dropped from the charging documents, but was formally dismissed.

8. On April 7, 2000 the Claimant pled either guilty or no contest to Count I, which alleged attempted manufacture of methamphetamine (Ex. C). On June 5, 2000 the Claimant was convicted of Attempted Manufacture of an Amphetamine in violation of [REDACTED] Sections [REDACTED] (Ex. B, C). This was a felony conviction under [REDACTED] law. (Ex. B, C). Neither the fact of the conviction nor the date of the conviction were challenged by either party.

9. Based on both the probable cause statement and the charges (counts) filed, there is no indication from the [REDACTED] Amended Criminal Complaint that there was any actual possession, use, or distribution of methamphetamine or any other controlled substance.

PRINCIPLES OF LAW

“Ordinarily, the party seeking a change in the status quo has the burden of proof.” State of Alaska Alcoholic Beverage Control Board v. Decker, 700 P.2d 483, 485 (Alaska 1985). This case involves the termination of Food Stamp Benefits by the Division. Accordingly, the Division has the burden of proof here because its termination of benefits constitutes a change in the status quo.

Alaska’s Administrative Procedures Act calls for a default standard of proof by a preponderance of the evidence in cases where another standard of proof is not set by applicable law.³ The state and federal regulations applicable to this case do not specify any particular standard of proof. Therefore, the “preponderance of the evidence” standard is the standard of proof applicable to this case.⁴

An individual convicted of certain drug-related felonies on or after August 22, 1996 is disqualified from receiving benefits under the Federal Food Stamp Program. 21 U.S.C.A. § 862a (a), (d)(2).⁵

21 U.S.C.A. Section 862a (a)(1) provides in relevant part: “An individual convicted (under Federal or State law) of any offense which is classified as a felony ... and which has as an element the possession, use, or distribution of a controlled substance ... shall not be eligible for-[(¶)] (1) assistance under any State program funded under Part A of Title IV of the Social Security Act [42 U.S.C.A. § 601 et seq.]” [emphasis supplied].

7 CFR 273.11(b)(7)(vii) is the implementing Federal regulation for 21 U.S.C.A. Section 862a (a)(1). That regulation provides in relevant part that “individuals who are ineligible under 273.11(m) because of a drug-related felony conviction” may not receive Food Stamp Benefits. 7 CFR 273.11(m) states the Food Stamp disqualification rules applicable to persons convicted of felony drug charges as follows:

(m) Individuals convicted of drug-related felonies. An individual convicted (under federal or State law) of any offense which is classified as a felony by the law of the jurisdiction involved and which has as an element the possession, use, or distribution of a controlled substance . . . shall not be considered an eligible household member unless the State legislature of the State where the individual is domiciled has enacted

³ “Unless a different standard of proof is stated in applicable law the (1) petitioner has the burden of proof by a preponderance of the evidence. . . “AS 44.62.460(e)(1).

⁴ See also Amerada Hess Pipeline Corp. v. Alaska Public Utilities Commission, 711 P.2d 1170 (Alaska 1986) (a party in an administrative proceeding can assume that preponderance of the evidence is the standard of proof unless otherwise stated). This standard is met when the evidence, taken as a whole, shows that the fact sought to be proved is more probable than not. Amerada Hess, supra, 711 P.2d 1170, 1179 n.14 (Alaska 1986).

⁵ The Personal Responsibility and Work Opportunity Reconciliation Act, popularly known as the Welfare Reform Act (Act), Public Law No. 104-193, 110 Stat. 2105 (Aug. 22, 1996) .

legislation exempting individuals domiciled in the State from the above exclusion. If the State legislature has enacted legislation limiting the period of disqualification, the period of ineligibility shall be equal to the length of the period provided under such legislation. [Emphasis supplied].

Methamphetamine is a controlled substance under Federal law (21 U.S.C.A Section 812) and under [REDACTED] law ([REDACTED]).

[REDACTED] (“[REDACTED]”) Section [REDACTED] makes the attempted commission of various crimes a crime in itself. [REDACTED] prohibits the manufacture, distribution, or delivery of certain controlled substances including methamphetamines. A conviction under these statutes constitutes a felony conviction under [REDACTED] law (Ex. B, C).

ANALYSIS

The parties agree that there are no disputed issues of fact to be decided by the Hearing Officer in this case. There is no dispute the Claimant was convicted on April 7, 2000 of Attempted Manufacture of an Amphetamine in violation of [REDACTED] (Criminal Code) Sections [REDACTED] and [REDACTED] and that this was a felony conviction. (Ex. B, C). Likewise, there is no dispute that the Claimant properly disclosed, on his Application for Services dated December 18, 2007 and during a home visit on June 25, 2008, the fact that he had been convicted of a drug-related felony for an offense that occurred on or after August 22, 1996. (Ex. 2.6). Thus, in this case it is not necessary to determine the credibility of any witnesses or to weigh competing evidence.

Federal regulation 7 CFR 273.11(m) provides that individuals are permanently disqualified from receiving Food Stamp Benefits if they are convicted of a “drug-related felony” on or after August 22, 1996. Federal regulation 7 CFR 273.11(m) defines a “drug-related felony” conviction as a felony conviction which contains as an element “the possession, use, or distribution of a controlled substance.” It is clear that Methamphetamine is a controlled substance under Federal law (21 U.S.C.A Section 812) and under [REDACTED] law ([REDACTED]). Accordingly, the sole issue for determination here is whether the Claimant’s Wisconsin conviction constitutes a “drug-related” felony as defined in 7 CFR 273.11(m). Thus, the more specific issue to be decided is whether the Claimant’s felony conviction of Attempted Manufacture of an Amphetamine under WSA Sections 939.32 and 961.41(1)(e)(1) has as an element “the possession, use, or distribution of a controlled substance” within the meaning of Federal regulation 7 CFR 273.11(m).

I. The [REDACTED] Statute

The Claimant was convicted of attempted manufacture of a controlled substance in violation of Wisconsin law. Accordingly, it is appropriate to examine the language of the [REDACTED] statute to determine whether possession, use, or distribution are required elements of the crime of manufacture of a controlled substance under [REDACTED] law.

WSA Section 961.01 (13) defines "manufacture" for purposes of [REDACTED] controlled substances laws as:

[T]he production, preparation, propagation, compounding, conversion or processing of, or to produce, prepare, propagate, compound, convert or process, a controlled substance or controlled substance analog, directly or indirectly, by extraction from substances of natural origin, chemical synthesis or a combination of extraction and chemical synthesis, including to package or repackage or the packaging or repackaging of the substance, or to label or to relabel or the labeling or relabeling of its container. "Manufacture" does not mean to prepare, compound, package, repackage, label or relabel or the preparation, compounding, packaging, repackaging, labeling or relabeling of a controlled substance . . .

Thus, the above [REDACTED] statutory definition of "manufacture" does not, by its terms or on its face, include "the possession, use, or distribution of a controlled substance" as defined in 7 CFR 273.11(m). Accordingly, the Claimant's felony drug conviction, as defined by the [REDACTED] statutes, does not automatically come within the scope of the federal regulation (7 CFR 273.11(m)) disqualifying persons convicted of certain drug felonies from participating in the Food Stamp Program. However, to "leave no stone unturned" it is necessary to examine the pertinent case law to determine if judicial decisions have reached the same conclusion.

II. Possession.⁵

A. Court Decisions.

Federal regulation 7 CFR Section 273(m) requires a felony conviction which has as an element "the possession, use, or distribution of a controlled substance". This section will discuss the "possession" element which, if present, would place the Claimant's [REDACTED] conviction within the scope of 7 CFR 273.11(m).

It is important to note that the portion of the criminal complaint which specifically charged the Claimant with the crime of possession was formally dismissed. See statement of facts, above. Thus, the narrow issue here is whether the statutory crime of attempted manufacture of a controlled substance involves possession of a controlled substance based on applicable [REDACTED] decisional law.⁶

The Claimant has cited [REDACTED], [REDACTED]) for the proposition that possession is not an element of the offense of manufacturing a controlled substance. The Claimant's assertion is correct as to the statute

⁵ Black's Law Dictionary (West 1979) defines "possession" in relevant part as "the detention and control, or the manual or ideal custody, of anything which may be the subject of property"

⁶ In subparts I-III of this Analysis section, references to "manufacture" or "manufacturing" may include attempted manufacture. While the distinction between the two can be important in other circumstances, the distinction is not significant under the circumstances in this case.

at issue in those court decisions (██████████ Statutes Section ██████████). However, these decisions were issued in 1978 and 1988, prior to a repeal and reenactment of the ██████████ criminal code. Accordingly, the statutes construed in these two decisions may not be identical to the statutes under which the Claimant was convicted in 2000. The cases are thus persuasive, but not mandatory, authority as to whether possession is an element of the Claimant's crime. Accordingly, it is appropriate to proceed with a review of court decisions from other jurisdictions in order to determine the issue.

A review of the relevant court decisions disclosed seven (7) cases from four (4) jurisdictions holding that possession of a controlled substance is an element of the manufacture of a controlled substance. State v. Metz, 43 S.W.3d 374 (Mo. App. W.D. 2001), Patton v. People, 35 P.3d 124 (Colo. 2001), State v. Farris, 125 S.W.3d 382 (Mo. App. W.D. 2004), State v. Snover, 88 P.3d 807 (Kansas App. 2004), U.S. v. Beltz, 385 F.3d 1158 (8th Cir. 2004), State v. Mickle, 164 S.W.3d 33 (Mo. App. W.D. 2005), and State v. Fanning, 135 P.3d 1067 (Kansas 2006).

On the other hand, nine (9) cases from four (4) jurisdictions have held that possession of a controlled substance is not an element of the manufacture of a controlled substance. U.S. v. Berry, 914 F.2d 263 (9th Cir. 1990), People v. Coria, 985 P.2d 970 (Cal. 1999), State v. Todd, 70 S.W.3d 509 (Mo. App. W.D., 2002), State v. Campbell, 78 P.3d 1178 (Kansas App. 2003), State v. Patten, 122 P.3d 350 (Kansas 2005), State v. Miles, 130 P.3d 1198 (Kansas App. 2005), State v. Randolph, 130 P.3d 593 (Kansas App. 2006), Tilley v. State, 202 S.W.3d 726 (Mo. App. S.D. 2006), and State v. Schutte, 157 P.3d 1129 (Kansas App. 2007). Accordingly, no majority rule has yet been established on the possession issue.

Decisions from the courts of Kansas and Missouri have come down on both sides of the issue. Some of the cases comment that while the presence or possession of drugs or drug paraphernalia is a factual prerequisite to the manufacture of methamphetamine, it is not a legal prerequisite, and thus not a required element of the crime. State v. Miles, 120 P.3d 808 (Kansas App. 2005), State v. Cooper, 145 P.3d 945 (Kansas App. 2006).

In summary, a review of the pertinent court decisions shows that no majority rule has been established as to whether "possession" is an element of the crime of manufacture or attempted manufacture of a controlled substance. Accordingly, the existing case law is not determinative of the issue and a statutory analysis must be performed.

B. Statutory Definition of "Possession".

Although (as indicated above) the court decisions are somewhat in disarray, the statutory definition of "controlled substance" set forth in Federal statute 21 USCA Section 802(6) is clear. This statute states that the term "controlled substance" means "a drug or other substance, or immediate precursor, included in [21 USCA Section 812]." Neither 21 USCA Sections 802(6) or 812 include the paraphernalia associated with drug manufacturing within the definition of "controlled substance". The ██████████ charging documents (criminal complaint and information) indicate that the Claimant possessed drug paraphernalia, but not the drugs themselves. Accordingly, based on the Federal statutory definition of the term

“controlled substance”, the Claimant’s felony drug conviction for attempted manufacture of a controlled substance does not automatically come within the scope of the federal regulation (7 CFR 273.11(m)) disqualifying certain drug felons from participating in the Food Stamp Program.

Similarly, [REDACTED] statute [REDACTED], which defines “controlled substance”, does not include the paraphernalia associated with drug manufacturing within the definition of “controlled substance”. One can easily envision a situation where the drug manufacturing process has begun but where no drug, controlled substance, or immediate precursor chemical has yet been produced. Accordingly, based on the statutory definitions provided in the Federal and [REDACTED] statutes (21 USCA Sections 802(6) and 812 and [REDACTED] Sections [REDACTED]), respectively), the possession of a controlled substance, (as “controlled substance” is defined by either [REDACTED] or Federal law), is not a required element of the crime of manufacture or attempted manufacture of a controlled substance under [REDACTED] law.

III. Use.⁷

A. Court Decisions.

As previously stated, federal regulation 7 CFR 273.11(m) requires a felony conviction which has as an element “the possession, use, or distribution of a controlled substance.” This section will discuss the “use” element that could trigger the applicability of the federal regulation to the Claimant’s [REDACTED] conviction. In other words, this section will discuss the “use” element which, if present, would place the Claimant’s [REDACTED] conviction within the scope of Federal regulation 7CFR 273.11(m).

Research indicates that no [REDACTED] court decision has addressed the issue of whether use of a controlled substance is an element of the Claimant’s crime. Research has disclosed only two (2) cases from two (2) jurisdictions holding that use of a controlled substance is an element of the manufacture of a controlled substance. State v. Snover, 88 P.3d 807 (Kansas App. 2004); Hester v. State, 208 S.W.3d 747 (Ark. 2005). On the other hand, there are only four (4) cases, all from the same jurisdiction, indicating that use of a controlled substance is not an element of the manufacture of a controlled substance. State v. Gunn, 26 P.3d 710 (Kansas App. 2001), State v. Miles, 130 P.3d 1198 Kansas App. 2005), State v. Cooper, 179 P.3d 439 (Kansas 2008), and State v. DeJulio, 189 P.3d 580 (Kansas App. 2008).

In summary, a review of the pertinent court decisions shows that no majority rule has been established as to whether “use” is an element of the crime of manufacture or attempted manufacture of a controlled substance. Accordingly, the existing case law is not determinative of the issue and a statutory analysis must be conducted.

⁷ Black’s Law Dictionary (West 1979) defines “use” in relevant part as “to put or bring into action or service; to employ for or apply to a given purpose . . . to avail oneself of; to employ; to utilize; to carry out a purpose or action by means of; to put into action or service, especially to attain an end.”

B. Statutory Definition of “Use”.

As previously stated, the definition of “manufacture” contained in [REDACTED] statute [REDACTED] does not, by its terms, include the use of a controlled substance. Neither 21 USCA Section 802 nor [REDACTED] Section [REDACTED] (the relevant federal and state definitional sections) define “use”. However, as indicated in footnote 7, above, Black’s Law Dictionary (5th Edition 1979) defines “use” in relevant part as “to put or bring into action or service; to employ for or apply to a given purpose . . . to avail oneself of; to employ; to utilize; to carry out a purpose or action by means of; to put into action or service, especially to attain an end.” Accordingly, based on the statutory definition of “manufacture” contained in the [REDACTED] statute (Section [REDACTED]) and the commonly accepted meaning of the term “use”, a controlled substance could necessarily only be “used” after completion of manufacture. The use of a controlled substance, (as “controlled substance” is defined by either [REDACTED] or Federal law), is therefore not a required element of the crime of manufacture or attempted manufacture of a controlled substance under [REDACTED] law.

IV. Distribution.⁸

A. Court Decisions.

Research indicates that no [REDACTED] court decision has addressed the issue of whether distribution of a controlled substance is an element of the Claimant’s crime. There is only one court decision on the issue of whether distribution of a controlled substance is an element of the crime of manufacture of a controlled substance. The North Carolina Supreme Court has stated that intent to distribute is generally not required as an element of the offense of manufacturing a controlled substance. State v. Brown, 313 S.E.2d 585 (N.C. 1984); State v. Muncy, 339 S.E.2d 466 (N.C. App. 1986). Based on the lack of relevant case law, it is again appropriate to perform a statutory analysis.

B. Statutory Definition of “Distribution”.

As previously stated, the definition of “manufacture” contained in [REDACTED] statute [REDACTED] does not, by its terms, include the distribution of a controlled substance. [REDACTED] defines “distribute” as “to deliver other than by administering or dispensing a controlled substance or controlled substance analog.” [REDACTED] Section [REDACTED] defines “deliver” or “delivery” as “the actual, constructive or attempted transfer from one person to another of a controlled substance or controlled substance analog, whether or not there is any agency relationship”. Similarly, 21 USCA Section 802(11) defines “distribute” in relevant part as “to deliver (other than by administering or dispensing) a controlled substance . . .”. Thus, based on the plain meaning of the statutory language, “distribution” of a controlled substance would necessarily occur only after completion of manufacture. Accordingly, the distribution of a controlled substance, (as “controlled substance” is defined

⁸ Black’s Law Dictionary (West 1979) defines “distribution” as “the giving out or division among a number; sharing or parceling out; allotting; dispensing; apportioning.”

by either [REDACTED] or federal law), is not a required element of the crime of manufacture or attempted manufacture of a controlled substance under [REDACTED] law.

V. Attempt.⁹

It is significant that the Claimant's conviction was for attempted manufacture of a controlled substance rather than for the completed crime. [REDACTED] Section [REDACTED] provides as follows:

An attempt to commit a crime requires that the actor have an intent to perform acts and attain a result which, if accomplished, would constitute such crime and that the actor does acts toward the commission of the crime which demonstrate unequivocally, under all the circumstances, that the actor formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.

In this case, the [REDACTED] charging documents indicate that the Claimant had assembled the equipment and ingredients necessary to manufacture methamphetamine. Based on the presence of the drug paraphernalia, it was apparent that the Claimant had the intent to manufacture methamphetamine, and that he had performed preliminary acts that were prerequisite to the manufacture of methamphetamine. However, he had not yet actually begun to manufacture the drug.

As discussed above, the completed crime of manufacture of a controlled substance does not require possession, use, or distribution of a controlled substance under Wisconsin law. It necessarily follows that the crime of attempted manufacture of a controlled substance, which requires only intent and an overt act toward commission of the crime, would not require possession, use, or distribution based on the language of [REDACTED] Section [REDACTED]

VI. Summary.

Federal regulation 7 CFR 273.11(m) provides that individuals are permanently disqualified from receiving Food Stamp Benefits if they are convicted after August 22, 1996, of a "drug-related felony." 7 CFR 273.11(m) requires the felony conviction to have as an element "the possession, use, or distribution of a controlled substance."

There is no dispute that the Claimant was convicted in [REDACTED] after August 22, 1996, of the felony crime of Attempted Manufacture of Methamphetamine under [REDACTED] Sections [REDACTED]. It is also clear that Methamphetamine is a controlled substance under Federal law (21 U.S.C.A Section 812) and under [REDACTED] law ([REDACTED]).

⁹ In the context of criminal law, Black's Law Dictionary (West 1979) defines "attempt" in relevant part as follows:

An effort or endeavor to accomplish a crime, amounting to more than mere preparation or planning for it, which, if not prevented, would have resulted in the full consummation of the act attempted but which, in fact, does not bring to pass the party's ultimate design. The requisite elements of an attempt to commit a crime are (1) an intent to commit it; (2) an overt act toward its commission; (3) failure of consummation; and (4) the apparent possibility of commission.

Accordingly, the sole issue for determination in this case is whether the Claimant's conviction constitutes a "drug-related felony" as defined in 7 CFR 273.11(m). More specifically, whether the Claimant's felony conviction of Attempted Manufacture of Methamphetamine under [REDACTED] Sections [REDACTED] and [REDACTED] contains as an element "the possession, use, or distribution of a controlled substance" within the meaning of Federal regulation 7 CFR 273.11(m).

The [REDACTED] statutes that define the crime that the Claimant was convicted of do not, on their face, include or require proof of "the possession, use, or distribution of a controlled substance" as defined in 7 CFR 273.11(m). Two [REDACTED] court decisions hold that possession is not a required element of the crime of manufacture of a controlled substance. There were no court decisions found which were determinative on the issue of whether use or distribution are required elements of the crimes of manufacture or attempted manufacture of a controlled substance. Statutes must be interpreted based on their plain meaning in the absence of court decisions requiring a different result. Accordingly, under [REDACTED] law, the completed crime of Manufacture of Methamphetamine does not require either possession, use, or distribution of methamphetamine as constituent elements. Further, because the crime of Attempted Manufacture of Methamphetamine requires only the intent to manufacture plus one overt act in furtherance of that intent, that crime likewise does not require the possession, use, or distribution of Methamphetamine as constituent elements.

Thus, the Claimant's felony drug conviction, as defined by the [REDACTED] statutes, does not have as an element "the possession, use, or distribution of a controlled substance", and therefore does not come within the scope of Federal regulation 7 CFR 273.11(m). The Claimant's conviction for Attempted Manufacture of Amphetamine under [REDACTED] Sections [REDACTED] and [REDACTED] thus does not constitute a "drug-related felony conviction" within the meaning of 7 CFR 273.11(m). Accordingly, the Claimant is not disqualified by 21 U.S.C.A. § 862a (a), (d)(2) or by 7 CFR 273.11(m) from receiving benefits under the Federal Food Stamp Program.

CONCLUSIONS OF LAW

1. Methamphetamine is a controlled substance under Federal law (21 U.S.C.A Section 812) and under [REDACTED] law ([REDACTED]).
2. The crime of Attempted Manufacture of Methamphetamine under [REDACTED] Sections [REDACTED] and [REDACTED] is a felony.
3. The Claimant's conviction on April 7, 2000 for Attempted Manufacture of an Methamphetamine under [REDACTED] Statutes Annotated ([REDACTED].) Sections [REDACTED] and [REDACTED] did not have as an element, "the possession, use, or distribution of a controlled substance" within the meaning of 7 CFR 273.11(m).
4. The Division erred when it determined that the Claimant's conviction for Attempted Manufacture of an Amphetamine under [REDACTED] Statutes Annotated ([REDACTED].) Sections

██████ and ██████████ constituted a “drug-related felony conviction” within the meaning of 7 CFR 273.(1)(b)(7)(vii).

DECISION

The Division incorrectly terminated the Claimant’s Food Stamp Benefits effective June 30, 2008.

APPEAL RIGHTS

If for any reason the Claimant is not satisfied with this decision, the Claimant has the right to appeal by requesting a review by the Director. To do this, the Claimant must send a written request directly to:

Director of the Division of Public Assistance
Department of Health and Social Services
P.O. Box 110640
Juneau, Alaska 99811-0640

An appeal request must be sent within fifteen (15) days from the date of receipt of this decision. Filing an appeal with the Director could result in the reversal of this decision.

DATED this _____ day of October, 2008.

Jay Durych
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on this ____ day of October 2008,
true and correct copies of the foregoing were sent to :

██
(attorney for Claimant) – Certified Mail, Return Receipt Requested
██████████, Director
██████████, Policy and Program Development
██████████, Staff Development and Training
██████████, Fair Hearing Representative

By: _____
Al Levitre
Law Office Assistant I