

# STATE OF ALASKA

DEPT. OF HEALTH AND SOCIAL SERVICES  
DIVISION OF PUBLIC ASSISTANCE

SARAH PALIN, GOVERNOR

P.O. BOX 110640  
JUNEAU, ALASKA 99811-0640  
PHONE: (907) 465-3347  
FAX: (907) 465-5154

February 16, 2009

[REDACTED]

Re: OHA Case #08-FH-705  
Program Type: Food Stamps  
Agency Case # [REDACTED]

Dear [REDACTED]:

This is in response to your request for a Director's review of your December 18, 2008 fair hearing decision, in which the Hearing Authority upheld the denial of your participation in the Food Stamp Program. I received your request on January 6, 2009.

At issue is whether you are eligible for the federal Food Stamp Program because of your drug-related felony conviction.

The federal food stamp regulations in 7 CFR 273.1(b)(7)(vii) and 7 CFR 273.11(m) specify that individuals are permanently disqualified from receiving Food Stamp benefits if they are convicted of a "drug-related" felony for behavior that occurred after August 22, 1996.

As stated in the Fair Hearing decision, the fact that your conviction was set aside does not erase the conviction. *State*, 169 P.3d at 600.

I am upholding the Hearing Authority's decision that our agency was correct to exclude you from participating in the Food Stamp Program effective September 30, 2008. This decision has been reached based upon a

[REDACTED]  
February 16, 2009

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review of the hearing record, fair hearing exhibits, the Hearing Authority's decision, and applicable laws and regulations.

If for any reason you are not satisfied with this decision, you may appeal to the Superior Court within 30 days.

Sincerely,

Ellie Fitzjarrald  
Director

cc: Patricia Huna-Jines, Hearing Authority  
[REDACTED], Policy & Program Development  
[REDACTED], Staff Development & Training  
[REDACTED], Fair Hearing Representative  
Case File

Office of Hearings and Appeals  
3601 C Street, Suite 1322  
P. O. Box 240249  
Anchorage, AK 99524-0249  
Ph: (907)-334-2239  
Fax: (907)-334-2285

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

In the Matter of	)	
	)	
██████████,	)	OHA Case No. 08-FH-705
	)	
Claimant.	)	Division Case No. ██████████
_____	)	

**FAIR HEARING DECISION**

**STATEMENT OF THE CASE**

██████████ (Claimant) was receiving Food Stamp and Family Medicaid. (Ex. 1) On September 8, 2008, the Division of Public Assistance (Division) sent the Claimant written notification her household's benefits would terminate effective September 30, 2008 because of excess resources. (Ex. 4) Claimant tried to rectify her status, upon which the Division re-determined eligibility for benefits. On October 9, 2008, the Division sent Claimant notice her household would receive Food Stamp benefits, however, she would be excluded from receiving the benefit because she was convicted of a drug-related felony, however, the household could continue receiving Food Stamp benefits. The Division did not reverse its determination that the Claimant's household was not eligible for Family Medicaid because of excess resources.

On October 8, 2008, the Claimant requested a fair hearing. Pursuant to the Claimant's request, a hearing was held on November 5, 2008. The Claimant attended the hearing telephonically and represented herself ██████████, a Public Assistance Analyst with the Division, attended in person and represented the Division.

**ISSUE**

1. Was the Division correct to exclude Claimant as an eligible household member for Food Stamp benefits because she was a convicted of a drug-related felony?
  
2. Was the Division correct to terminate Claimant and her household from Family Medicaid benefits because of excess resources?

## FINDINGS OF FACT

1. Claimant resided with her two children in [REDACTED] and was receiving Food Stamps and Family Medicaid. She was living in a house she owned. (Ex. 1).
2. In mid-August 2008, Claimant moved to [REDACTED] and began living with her domestic partner. She had one son with her, the other son was living with his father. She reported her house in [REDACTED] as vacant. (Ex. 2).
3. On September 8, 2008, the Division sent Claimant notice her Food Stamps and Family Medicaid would be terminated effective September 30, 2008. The Division determined because her home was not for rent or sale, she exceeded the resource limit. (Ex. 4).
4. On September 30, 2008, Claimant provided the Division with verification her house in [REDACTED] was rented, with a lease signed September 11, 2008 which had an effective date of September 15, 2008. (Ex. 5 and 5.1).
5. Upon a review of Claimant's case, the Division found Claimant was convicted on January 14, 2003 of the crime of Misconduct Involving a Controlled Substance IV, a violation of Alaska Statute 11.71.040(a)(3)(A). The crime occurred in [REDACTED]. (Ex. 8.3) She was granted a suspended imposition of sentence. (Ex. 8.6).
6. On October 9, 2008, the Division sent Claimant notice it had removed Claimant from Food Stamp eligibility because of a "felony drug conviction." However, the child in her household was still eligible. (Ex. 10).
7. The parties agree Claimant's equity in the [REDACTED] house is over \$2,000.00.
8. Claimant's [REDACTED] house has never been for sale.

## PRINCIPLES OF LAW

This case involves the termination of Food Stamp benefits and Family Medicaid. When benefits are terminated, the Division has the burden of proof<sup>1</sup> by a preponderance of the evidence.<sup>2</sup>

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<sup>1</sup> "Ordinarily the party seeking a change in the status quo has the burden of proof." *State, Alcohol Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985)

<sup>2</sup> Preponderance of the evidence is defined as follows:

Evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.

Food Stamps is a federal program administered by the State. 7 CFR 271.4(a). The Code of Federal Regulations (CFR) contains the rules for determining whether individuals qualify for Food Stamp benefits. “Individuals who are ineligible under §273.11(m) because of a drug-related felony conviction” may not receive Food Stamp benefits. 7 CFR 273.1(b)(7)(vii). 7 CFR 273.11(m) defines what constitutes a drug-related felony:

(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 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. In eligibility under this provision is only limited to convictions based on behavior which occurred after August 22, 1996.

7 CFR 273.11(m) (underlining is added to emphasize the required elements).

An individual commits the crime of misconduct involving a controlled substance in the fourth degree under AS 11.71.040 if he or she possess any amount of a schedule IA or IIA controlled substance. This is a class C felony. AS 11.71.040(d).

The Alaska Supreme Court recently dealt with the effect of a set aside conviction in a civil setting, where it ruled that a licensing board could use the set aside conviction to justify denial of a professional license. *State, Division of Corporations, Business and Professional Licensing, Alaska Board of Nursing v. Platt*, 169 P.3d 595 (Alaska 2007). The Alaska Court stated that the setting aside of a conviction “does not erase the fact of conviction.” *State* at 599. It further stated that regardless of the setting aside of the conviction, the applicant was a “person who ‘has been convicted’ of a criminal offense.” *State* at 600.

The Food Stamp program counts the income of an excluded person who is part of the physical household, but does not count her as part of the household to determine whether the household meets the gross and net for income eligibility criteria. 7 CFR 273.11(c)(1). For example, if there are three people who reside, purchase and prepare meals together, it would normally be a three person household. If one of them is excluded because of a drug related felony conviction, the Food Stamp program will count her income as being part of the household income yet use the gross and net income eligibility limits for a two person household.

Alaska Regulation 7 AAC 100.136(a) states in pertinent part: “A household is not eligible for Family Medicaid if the household has nonexempt resources, as determined under 7 AAC [100.138](#) and 7 AAC [100.140](#), with a total value, as determined under 7 AAC [100.144](#), in excess of \$2,000...”

7 AAC 100.138 provides a list of resources exempt from the restrictions of 7 AAC 100.136(a). A physical structure that serves as the recipient’s residence is a resource considered exempt from the \$2000.00 limit. 7 AAC 100.138(b). Accordingly, if a recipient is not living in the physical structure, then it is not an exempt resource, and is subject to the \$2,000 limit. Real property, if the recipient is making a good faith effort to sell the property, is also an exempt resource. 7 AAC 100.138(j).

### ANALYSIS

Because this case is a termination of existing benefits, the State has the burden of proof by a preponderance of the evidence.

#### 1. Food Stamp Benefits

The issue is whether the Division was correct to exclude Claimant as an eligible household member for Food Stamp benefits because she was convicted of a drug-related felony. There are no disputed facts with regard to this issue. On January 14, 2003, the Claimant was convicted of the crime of Misconduct Involving a Controlled Substance in the fourth degree in violation of AS 11.71.040(a)(3)(A). The crime occurred on [REDACTED]. This crime is a felony involving possession of a controlled substance. AS 11.71.040(d).

Federal regulation 7 CFR 273.1(b)(7)(vii) and 7 CFR 273.11(m) provide that individual are permanently disqualified from receiving Food Stamp benefits if they are convicted of a “drug-related felony” for behavior that occurred after August 22, 1996.

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.” The Claimant’s conviction falls within this definition. She was convicted of a felony consisting of possession of any amount of schedule IA or IIA controlled substance and she committed this crime after August 22, 1996. Therefore, because the Claimant was convicted of a drug-related felony as defined in 7 CFR 273.11(m) she is not eligible for Food Stamp benefits. The fact Claimant’s conviction was set aside does not erase the conviction. *State*, 169 P.3d at 600.

The Division was therefore correct when it applied the Food Stamp regulation, 7 CFR 273.11(c)(1), to exclude the Claimant from being counted as part of the Claimant’s Food Stamp household.

#### 2. Excess Resources.

The issue is whether the Division was correct to terminate Claimant's Family Medicaid benefits because of excess resources.

Pursuant to Alaska Regulation 7 AAC 100.136(a) a household is not eligible for Family Medicaid if the household has nonexempt resources with a total value in excess of \$2000. A physical structure that services as the recipient's residence is a resource considered exempt. 7 AAC 100.138(b). In addition, if a recipient is attempting to sell a property in good faith, that property would be an exempt resource. 7 AAC 100.138(j). Accordingly, if a recipient is not living in the physical structure, then it is not an exempt resource and is subject to the \$2000 limit. Furthermore, if the recipient is not trying to sell the property in good faith, then it is not an exempt resource and is subject to the \$2000 limit.

It is undisputed that at the time of the Division's review, in the beginning of September, 2008, the Claimant owned a house in [REDACTED] which she was not occupying and which had more than \$2000 in equity. It is also not disputed the property was never for sale. Therefore, the house was a resource in excess of \$2000.00 and disqualified the Claimant's household from the Family Medicaid program pursuant to 7 AAC 100.36 if the resource was not exempt pursuant to 7 AAC 100.138. The Division was therefore correct when it applied 7 AAC 100.136 and determined Claimant had excess resources which made her ineligible for Family Medicaid benefits.

### **CONCLUSIONS OF LAW**

1. The Division met its burden of proof by a preponderance of the evidence and was correct when it determined it was required to exclude the Claimant from her Food Stamp household effective September 30, 2008, because she had been convicted of a drug related felony.
2. The Division met its burden of proof by a preponderance of the evidence and was correct when it terminated the Claimant's household Family Medicaid benefits effective September 30, 2008, because the Claimant had excess resources that exceeded the \$2000 limit for the program.

### **DECISION**

1. The Division was correct to exclude the Claimant from her Food Stamp household effective September 30, 2008.
2. The Division was correct to terminate Family Medicaid benefits for the Claimant's household effective September 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  
PO Box 110640  
Juneau, AK 99811-0640

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


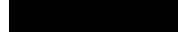
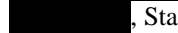
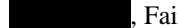
DATED this \_\_\_ day of December, 2008.

Patricia Huna-Jines  
Hearing Authority

### CERTIFICATE OF SERVICE

I certify that on this \_\_\_th day of  
December 2008, true and correct  
copies of the foregoing were sent to:

Claimant – Certified Mail, Return Receipt Requested.

 Director  
 Policy & Program Development  
 Staff Development & Training  
 Fair Hearing Representative

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Al Levitre  
Law Office Assistant I



