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

In the Matter of)
)
 [REDACTED],) OHA Case No. 09-FH-322
)
 Claimant.) Division Case No. [REDACTED]
)
 _____)

FAIR HEARING DECISION

STATEMENT OF THE CASE

[REDACTED] (Claimant) applied for Food Stamp benefits on May 1, 2009. (Exs. 2.0 – 2.9) On May 8, 2009, the Division of Public Assistance (Division) sent the Claimant written notification his application for Food Stamp benefits was denied. (Ex. 6.0) Claimant requested a fair hearing on May 8, 2009. (Ex. 6.1) This office has jurisdiction pursuant to 7 AAC 49.010 and 7 CFR 273.15.

Pursuant to the Claimant's request, a hearing was held on August 12, 2009. The Claimant attended the hearing in person and testified on his own behalf. The Claimant was represented by [REDACTED], Esq., who appeared in person. [REDACTED], a Public Assistance Analyst with the Division, attended in person, testified on behalf of and represented the Division.

The record was left open after the hearing for post-hearing briefing, which the parties completed on September 14, 2009. The Claimant agreed to extend the time frame for issuing this decision until September 28, 2009.

STATEMENT OF ISSUES

The Division denied the Claimant's application for Food Stamp benefits because he had a prior felony drug conviction. The Claimant argued that the Division erred because the Claimant's conviction had been set aside. The Claimant also argued that the Division had waived any objection to the Claimant's receipt of Food Stamps because he had previously received Food Stamp benefits from the State of Alaska despite the Division knowing of his felony drug case. The Division's representative stated the Division had changed its policy on how it treated set aside convictions in Food Stamp cases.

The resulting issues are:

1. Was the Division correct to deny the Claimant's May 1, 2009 Food Stamp application due to a felony drug conviction when that conviction had been set aside?
2. Did the Division's approval of the Claimant's prior Food Stamp applications bar or waive its ability to deny the Claimant's Food Stamp application due to a prior felony conviction that had been set aside?

FINDINGS OF FACT

The following facts are proven by a preponderance of the evidence:

1. The Claimant was convicted of a Class C felony for violation of AS 11.71.040 in Alaska Superior Court case 3AN-03-00408 CR. (Ex. 3.2) He was given a suspended imposition of sentence in that criminal case. (Ex. 5.1)
2. The Claimant's conviction was set aside by the superior court in 2006. (Ex. 5.1)
3. The Claimant has had his civil rights restored. For instance, he has had his voting rights restored. (Ex. A)
4. The Claimant applied for Food Stamp benefits on May 1, 2009. (Exs. 2.0 – 2.9)
5. The Division denied the Claimant's May 1, 2009 Food Stamp application because he had a felony drug conviction. (Ex. 6.0)
6. The Claimant had previously received Food Stamp benefits from the State of Alaska in 2004, 2005, 2007, and 2008, despite the Division being aware of his previous felony drug case. (Ex. 13, pp. 1 – 4)

PRINCIPLES OF LAW

This case involves the question of whether or not the Division was correct to deny the Claimant's May 1, 2009 application for Food Stamp benefits. Because this case involves the denial of an application, the Claimant has the burden of proof¹ by a preponderance of the evidence.²

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

¹ "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)

² Preponderance of the evidence is the normal standard of proof in an administrative proceeding. *Amerada Hess Pipeline v. Alaska Public Utilities Comm'n*, 711 P.2d 1170, n. 14 at 1179 (Alaska 1986). Preponderance of the evidence is defined as "[e]vidence 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." Black's Law Dictionary 1064 (5th Ed. 1979)

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) details the specific Food Stamp rules relating to drug felons:

(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.

7 CFR 273.11(m) (emphasis in original).

AS 11.71.040 “Misconduct Involved a Controlled Substance in the Fourth Degree” criminalizes manufacture, possession, or delivery of specified controlled substances (drugs). “Misconduct involved a controlled substance in the fourth degree is a class C felony.” AS 11.71.040(d).

If a person is convicted of a crime and given a suspended imposition of sentence, and the person satisfies whatever “terms and conditions that the court determines” (including completing probation), the “court may set aside the conviction and issue to the person a certificate to that effect.” AS 12.55.085(a) and (e).

In *State v. Platt*, the Alaska Supreme Court ruled that a licensing board could use a set aside criminal 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 Supreme Court stated that the setting aside of a conviction “does not erase the fact of conviction.” *Platt* 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.” *Platt* at 600.

The State of Alaska does not have a procedure whereby a criminal record can be expunged. *Journey v. State*, 895 P.2d 955 (Alaska 1995). A set aside criminal conviction does not expunge a person’s criminal record. *Id.*

A party may assert estoppel against a governmental agency. The requirements for establishing estoppel against the government are as follows:

1. The assertion of a governmental position by either conduct or words;
2. An act which reasonably relied upon the governmental position;
3. Resulting prejudice; and
4. “estoppel serves the interest of justice so as to limit public injury.”

Wassink v. Hawkins, 763 P.3d 971, 975 (Alaska 1988).

In *Amarillo Prod. Credit Association v. Farm Credit Administration*, 887 F.2d 507, 512-13 (5th Cir.1989), it was held that the Farm Credit Administration could not “be estopped from acting in accordance with the law” and “in light of reconsideration of the relevant facts and its mandate ... may alter its past interpretation.”

ANALYSIS

There are no disputed facts in this case. There are two legal issues in this case. The first is whether the Division can deny a person Food Stamp benefits on the basis of a felony drug conviction, when that conviction has been set aside. The second issue is whether the State’s prior issuance of Food Stamp benefits, despite its knowledge of the set aside felony drug conviction, requires the Division to approve this new application.

A. Was the Division correct to deny the Claimant’s May 1, 2009 Food Stamp application due to a felony drug conviction when that conviction had been set aside?

The Claimant was charged with a violation of AS 11.71.040. This statute criminalizes drug possession, delivery, or manufacture. It is a Class C felony. AS 11.71.040(d). If the Claimant has been convicted of a drug felony, he is permanently ineligible to receive Food Stamp benefits. 7 CFR 273.1(b)(7)(vii); 7 CFR 273.11(m). The Division denied the Claimant’s Food Stamp application due to his prior drug felony conviction.

The Claimant was given a suspended imposition of sentence in his prior drug felony case, and his conviction was subsequently set aside. He therefore argues that because his conviction was set aside, he has never been “convicted” of a drug felony, and is consequently eligible for Food Stamp benefits.

The issue of whether a set aside criminal conviction is still a “conviction” for civil purposes was resolved by the Alaska Supreme Court in *State, Division of Corporations, Business and Professional Licensing, Alaska Board of Nursing v. Platt*, 169 P.3d 595 (Alaska 2007). In *Platt*, the Alaska Supreme Court ruled that a licensing board could use a set aside criminal conviction to justify denial of a professional license. The Alaska Supreme Court stated that the setting aside of a conviction “does not erase the fact of conviction.” *Id.* 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.” *Id.* at 600.

The Claimant’s reliance on *Journey v. State*, 895 P.2d 955 (Alaska 1995) is misplaced. *Journey* is not on point. It stands for the proposition that a set aside criminal conviction does not expunge³ a person’s criminal record. The Claimant also cites to *Doe v. Dep’t of Public Safety*, 92 P.3d 398 (Alaska 2004) in support of his position. *Doe* is distinguishable. It dealt with whether a person who had his sex offender conviction set aside was required to register as a “convicted”

³ The term “expungement” refers to the elimination of a criminal conviction. *Journey*, fn. 6 at 957. (citations omitted).

sex offender.⁴ It does not deal with civil collateral consequences of a conviction when the conviction has been set aside.

Under the *Platt* analysis, a set aside conviction is still a conviction for civil purposes. It therefore follows that the Claimant's set aside felony drug conviction is a felony drug conviction for the purposes of the Food Stamp program.

A review of the pertinent Food Stamp regulation, 7 CFR 273.11(m), shows only two possible ways of not counting the felony drug conviction: if there is Alaska legislation exempting the State from counting the felony drug conviction, or that limits the length of time the conviction may be used against an applicant. The Alaska Food Stamp regulations, 7 AAC 46.010 *et. seq.*, do not contain either of these exceptions. Nor do the Alaska Statutes. The State of Alaska has therefore chosen to preclude an individual convicted of a drug related felony from receiving Food Stamp benefits.

The Division was therefore correct when it applied the Food Stamp regulations, 7 CFR 273.1(b)(7)(vii) and 7 CFR 273.11(m), to deny the Claimant's May 1, 2009 Food Stamp application because he had been convicted of a drug related felony, regardless of the fact the felony conviction had been set aside.

B. Did the Division's approval of the Claimant's prior Food Stamp applications bar or waive its ability to deny the Claimant's Food Stamp application due to a prior felony conviction that had been set aside?

The Claimant's felony drug case was filed in 2003. *See* Finding of Fact 2 above. Despite the fact he had a felony drug case, he received Food Stamp benefits in 2004, 2005, 2007 and 2008. *See* Finding of Fact 7 above. The Division was aware of his felony drug case when it approved his previous receipt of Food Stamp benefits. *Id.*

The Claimant therefore argues that the Division's approval of his prior applications requires it to approve the May 1, 2009 application. The Division's response was that the Division had changed its policy on how it treated set aside convictions.

The Claimant's argument is essentially an estoppel argument. In order to establish estoppel, the Claimant must prove each of the following four elements:

1. The assertion of a governmental position by either conduct or words;
2. An act which reasonably relied upon the governmental position;
3. Resulting prejudice; and
4. "estoppel serves the interest of justice so as to limit public injury."

Wassink v. Hawkins, 763 P.3d 971, 975 (Alaska 1988).

⁴ *Doe* held that a person who was convicted of a sex offense and had the conviction set aside, prior to the enactment of the sex offender registration act which required registration regardless of whether the conviction was set aside, was not required to register as a sex offender. *See* AS 12.63.100(3).

It should first be noted that the Claimant was applying for Food Stamp benefits. He has not argued or demonstrated that the Division told him his application would be approved despite his set aside felony drug conviction. Instead, the Claimant relies on the Division's prior history of approval.

On a strict estoppel analysis, the Claimant fails. First, the Division did not make any assertion that the Claimant's new application would be approved. Second, because there was no assertion his new application would be approved, the Claimant could not have reasonably relied upon the non-existent assertion. Third, the Claimant has not been prejudiced. He was not receiving Food Stamp benefits immediately before his application, so he did not lose anything as a result of his application.

The Claimant must satisfy all four elements of the estoppel test. Because he does not satisfy any of the first three elements, it is not necessary to address the fourth element ("estoppel serves the interest of justice so as to limit public injury."), and he is not entitled to relief against the Division.

However, an alternative premise underlying Claimant's estoppel argument is that a governmental agency may not change its policies. This is incorrect. Government agencies may change their policies. They do so all the time. *See e.g. Amarillo Prod. Credit Association v. Farm Credit Administration*, 887 F.2d 507, 512-13 (5th Cir.1989) (The Farm Credit Administration could not "be estopped from acting in accordance with the law" and "in light of reconsideration of the relevant facts and its mandate ... may alter its past interpretation.")

The Division is therefore able to change its policies "in accordance with the law." The 2007 *Platt* case with its holding that a set aside conviction could justify denial of a professional license supported the Division's change of policy with regard to set aside criminal convictions.

The Claimant's argument of estoppel based on the Claimant's prior history of Food Stamp approval therefore fails.

CONCLUSIONS OF LAW

1. The Division was correct to deny the Claimant's May 1, 2009 Food Stamp application due to a felony drug conviction when that conviction had been set aside.
2. The Division's approval of the Claimant's prior Food Stamp applications did not bar or waive its ability to deny the Claimant's May 1, 2009 Food Stamp application due to a prior felony conviction that had been set aside.

DECISION

The Division was correct to deny the Claimant's May 1, 2009 Food Stamp application.

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

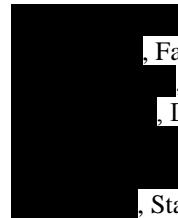
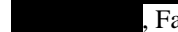
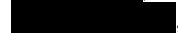
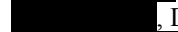
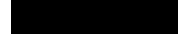
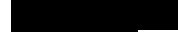
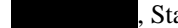
An appeal request must be sent within 15 days from the date of receipt of this decision. Filing an appeal with the Director could result in the reversal of this decision.

DATED this 28th day of September, 2009.

/Signed/
Larry Pederson
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on this 28th day of September 2009, true and correct copies of the foregoing were sent to:

, Esq. for Claimant – Certified Mail, Return Receipt Requested.
, Fair Hearing Representative - email
, Director - email
, Director's Office - email
, Policy & Program Development - email
, Policy & Program Development - email
, Staff Development & Training - email

J. Albert Levitre, Jr.
Law Office Assistant I