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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. 10-FH-11
)
 Claimant.) DPA Case No. [REDACTED]
 _____)

FAIR HEARING DECISION

STATEMENT OF THE CASE

[REDACTED] (Claimant) receives Alaska Temporary Assistance Program (ATAP), Food Stamp, and Family Medicaid benefits (Ex. 1). The State of Alaska Department of Health and Social Services, Division of Public Assistance (DPA or Division) received an Employment Statement from the Claimant on December 31, 2009 (Ex. 2). On January 20, 2010 the Division mailed to the Claimant a notice stating that the amount of her ATAP and Food Stamp benefits would be decreased, effective February 2010, based on the Claimant's receipt of estimated gross wages from employment in the amount of \$1,333.04 (Ex. 7). The Claimant submitted a Fair Hearing Request to the Division on January 20, 2010 (Ex. 7.1).

This Office has jurisdiction to resolve this dispute pursuant to 7 AAC 49.010.

On January 25, 2010 the Division notified the Claimant that the hearing concerning the decrease in the amount of her ATAP and Food Stamp benefits would be held on February 18, 2010 (Ex. 32). The hearing was held as scheduled on February 18, 2010 before Hearing Examiner Jay Durych. The Claimant participated in the hearing by telephone, represented herself, and testified on her own behalf. [REDACTED], a Public Assistance Analyst with the Division, attended the hearing in person and represented and testified on behalf of the Division.

The Claimant's Fair Hearing Request dated January 20, 2010 indicated that the Claimant wished to obtain a hearing with regard to the Alaska Temporary Assistance, Food Stamp, and Family Medicaid Programs (Ex. 7.1). However, at the hearing, both parties confirmed that there had been no adverse action as to the Claimant's Medicaid benefits, and that therefore no hearing was

necessary as to the Claimant's Medicaid benefits. The parties also confirmed that the only month of ATAP and Food Stamp benefits at issue in this case is February 2010.

The parties' testimonies were received and all exhibits submitted were admitted into evidence. At the end of the hearing the record was closed and the case was submitted for decision.

ISSUE

Was the Division correct when on January 20, 2010 it decreased the amount of the Claimant's Alaska Temporary Assistance Program (ATAP) and Food Stamp benefits, based on the Division's *estimate* of the Claimant's household's income for February 2010, instead of on the Claimant's *actual* income?

FINDINGS OF FACT

The following facts were established by a preponderance of the evidence:

1. The Claimant was, at all times relevant to this case, receiving Alaska Temporary Assistance Program (ATAP) and Food Stamp benefits (Ex. 1).
2. On December 31, 2009 the Claimant submitted an Employment Statement to the Division (Ex. 2). The Employment Statement indicated that the Claimant had become employed by a Burger King restaurant on December 23, 2009; that her pay rate was \$10.69 per hour; that she was paid bi-weekly; and that her first pay check would be issued on January 7, 2010 (Ex. 3).
3. On January 6, 2010 the Division mailed a Request for Information to the Claimant (Ex. 4). This request asked the Claimant to provide the Division with a "written statement from [her] employer" stating "how many scheduled hours on average" she would be "working per week." *Id.*
4. On January 14, 2010 the Claimant telephoned the Division and advised that she was working "on call" and that therefore her manager could not estimate the number of hours that the Claimant would be working each week (Ex. 5).
5. On January 19, 2010 the Division telephoned the Claimant's manager (Ex. 6). The manager stated that the Claimant's normal work schedule at that time was Monday 11:00 a.m. – 4:00 p.m. and Tuesday – Friday 11:00 a.m. – 5:00 p.m. for a total of 29 hours per week. *Id.* The manager stated that the Claimant had called-in and taken leave without pay 2-3 times during the current pay period, but had still (thus far) worked 23.5 hours during the current pay period. *Id.*
6. Based on that information, the Division calculated the Claimant's anticipated wages at 29 hours per week, multiplied by \$10.69 per hour, for a total of \$310.01 per week (Ex. 6). The Division then multiplied the Claimant's weekly rate of \$310.01 by a conversion factor of 4.3 and arrived at an estimated gross monthly wage of \$1,333.04. *Id.*
7. On January 20, 2010 the Division mailed to the Claimant a notice titled "Change in Benefits" (Ex. 7). The notice stated in relevant part as follows:

Your [ATAP] and Food Stamp benefits will change for February 2010. The reason for the change is listed below:

Your family's [ATAP] payment is \$405.00. The amount of income we used to figure this payment is \$824.64.

Your household's Food Stamp benefit is \$418.00. The amount of income we used to figure your Food Stamp benefit is \$1,262.44.

* * * * *

This action is based on [ATAP] Manual Section 775 and Food Stamp Manual Section 602-3A.

Reason for changes: Burger King average gross monthly wages of \$1,333.04.

8. The Claimant submitted a Fair Hearing Request on January 20, 2010 (Ex. 7.1).
9. On January 28, 2010 the Division received a telephone call from the Claimant's Case Manager (Exs. 8.1 – 8.2). He stated that all appointments and/or duties related to the Claimant's Family Self-Sufficiency Plan (FSSP) were scheduled during the evenings, and that therefore nothing related to the Claimant's FSSP required her to miss work during the day. *Id.*
10. On January 29, 2010 the Division telephoned a company which had been providing driving lessons to the Claimant (Ex. 9). That company's representative stated that all of the Claimant's driving lessons had been scheduled for 9:30 a.m. – 11:00 a.m. and that the Claimant had now completed all 12 lessons. *Id.*
11. The Claimant's pay statement for the period ending January 8, 2010 indicates that the Claimant worked 23.2 hours during that period, and took 56.8 hours of leave-without-pay during that period (Ex. 10.2).
12. The Claimant's pay statement for the period ending January 22, 2010 indicates that the Claimant worked 37.0 hours during that period, and took 43.0 hours of leave-without-pay during that period (Ex. 10.1).
13. A letter written and submitted by the Claimant to the Division on January 29, 2010 states that the Claimant took time off from work to take driving lessons on January 4, 6, 26, 27, 28, and 29, 2010; that the Claimant took time off from work to attend a meeting with her case worker on January 19, 2010; and that the Claimant also took time off from work to attend one or two meetings with Alaska Housing Finance Corporation (Ex. 10.3).
14. At the hearing of February 18, 2010 the Claimant testified in relevant part as follows:
 - a. She was hired on December 23, 2009 but was not placed on the work schedule until about 1.5 weeks later. When she was hired she was told that she might be working anywhere from zero to 33 hours per week.

- b. She was originally scheduled to work from 11:00 a.m. to 5:00 p.m. However, her actual work hours were from 11:00 a.m. to 4:00 p.m.
- c. She is currently scheduled to work 29-30 hours per week, but the week of the hearing she was given only about 20 hours of work. Her manager switches her work schedule “all the time.”
- d. She has a car, but is not currently licensed to drive. She needs to be able to drive her car in order to maintain her employment. Accordingly, she is taking driving lessons.
- e. The hours of operation of the company providing her driving lessons are 9:00 a.m. to 6:00 p.m. Monday through Friday. During the period in question she had to be absent from work to meet with her caseworker and to take driving lessons. Because of these absences she was unable to actually bring in the amount of income which the Division had prospectively estimated that she would earn in February 2010.
- f. She previously asked her manager if she could work late or work weekends to make up the time lost to her driving lessons, but her manager would not allow it. Now, her manager will allow it.

PRINCIPLES OF LAW

I. Burden of Proof and Standard of Proof.

The party seeking a change in the status quo normally bears the burden of proof.¹ In this case the Division is attempting to change the status quo or existing state of affairs by reducing the amount of the Claimant’s ATAP and Food Stamp benefits. Accordingly, the Division bears the burden of proof in this case.

The 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.² This standard is met when the evidence, taken as a whole, shows that the facts sought to be proved are more probable than not or more likely than not.³

¹ *State of Alaska Alcoholic Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985).

² A party in an administrative proceeding can assume that the “preponderance of the evidence” standard is the applicable standard of proof unless otherwise stated. *Amerada Hess Pipeline Corp. v. Alaska Public Utilities Commission*, 711 P.2d 1170 (Alaska 1986).

³ *Black’s Law Dictionary* at 1064 (West Publishing, 5th Edition, 1979).

II. The Alaska Temporary Assistance Program – in General.

The Alaska Temporary Assistance Program (“ATAP”) is a program created by the Alaska Statutes. See AS 47.05.010(1); AS 47.27.005 – AS 47.27.990. Because ATAP is a state program, its governing regulations are found in the Alaska Administrative Code. The Alaska Temporary Assistance Program’s regulations are set forth in 7 AAC 45.149 – 7 AAC 45.990.

III. The Alaska Temporary Assistance Program – Prospective Determination of Income.

7 AAC 45.350 provides in relevant part as follows:

The department will determine, on a monthly basis, eligibility for ATAP benefits and when income is considered available to the applicant or recipient. The department will consider all income that is received *or may be reasonably expected to be received* in a month to actually be available in that month. The department may adjust the initial eligibility determination or payment based upon the actual receipt of income. [Emphasis added].

7 AAC 45.355 provides in relevant part as follows:

(a) The department will determine the *prospective eligibility* of an assistance unit by *estimating what income, resources, and other circumstances are likely to exist for the assistance unit during the month for which eligibility is being determined*

(b) In determining prospective eligibility under (a) of this section, *the department will make its best estimate of the income that an assistance unit receives or is expected to receive during the month for which eligibility is being determined as provided in 7 AAC 45.425.* [Emphasis added].

7 AAC 45.425 provides in relevant part as follows:

(a) For the purposes of determining the eligibility of an assistance unit for ATAP benefits and calculating the ATAP payment amount, *the department will make a best estimate of the anticipated income for an assistance unit by using the actual income received or expected to be received in the month for which the determination is being made.* [Emphasis added].

(b) If income from a source cannot reasonably be anticipated to be received in a month for which a determination is being made, the department will not include income from that source in the estimate of income.

(c) *If income from a source can reasonably be anticipated to be received in a month for which a determination is being made but the monthly amount is uncertain, the department will include in the estimate of income only that amount that can be anticipated with reasonable certainty.* In determining the amount of income anticipated to be received with reasonable certainty, the department may average the monthly income received from the source in previous months. [Emphasis added].

(d) If income from a source is received on a weekly or biweekly basis, the department will estimate the anticipated monthly income by multiplying weekly amounts by 4.3 and biweekly amounts by 2.15.

IV. The Food Stamp Program – In General.

The Food Stamp Act of 1977 is a federal program. The statutes comprising the Act are codified at 7 USC 2011 – 2029. The federal regulations implementing the program are promulgated by the United States Department of Agriculture and are found primarily in the Code of Federal Regulations (CFRs) at 7 CFR 271 – 274.

The Food Stamp Program is administered by the states. 7 CFR 271.4(a). The State of Alaska has adopted regulations to implement the Food Stamp Program. Those regulations are found in the Alaska Administrative Code (AAC) at 7 AAC 46.010 – 7 AAC 46.990.

V. The Food Stamp Program – Prospective Determination of Income.

7 CFR 273.10(c)(1) provides in relevant part as follows:

(1) Anticipating income.

(i) For the purpose of determining the household's eligibility and level of benefits, the State agency shall take into account the income already received by the household during the certification period *and any anticipated income the household and the State agency are reasonably certain will be received during the remainder of the certification period.* If the amount of income that will be received, or when it will be received, is uncertain, that portion of the household's income that is uncertain shall not be counted by the State agency *If the exact amount of the income is not known, that portion of it which can be anticipated with reasonable certainty shall be considered as income* [Emphasis added].

* * * * *

ANALYSIS

Introduction: Definition of Issue.

It should initially be noted that the Claimant does not dispute the Division's arithmetic with regard to its calculation of her benefits (Claimant hearing testimony). Likewise, the Claimant does not dispute that the amount of her benefits should be reduced because she is now working and receiving income from her employment. *Id.* Finally, there is no dispute that the number of work hours estimated by her store manager for January 2010 (29 hours per week per Ex. 6) were significantly higher than the number of hours actually worked by the Claimant in January 2010 according to her pay statements (Exs. 10.1 – 10.2). Those pay statements show a total of 60.2 hours worked during the four week period ending on January 28, 2010. *Id.* Thus, while the Claimant's manager estimated the Claimant's hours at 29 hours per week, the Claimant's average number of hours

worked during this period was really only 15.1 hours per week. In short, during January 2010 the Claimant only worked about half (50%) of the hours estimated by the Claimant's manager.

The Claimant asserts that, because her *actual* number of hours worked (and thus her monthly gross income) for January 2010 was far less than the *estimate* of her January 2010 income (used by the Division to estimate her income for February 2010), the Division should have used the actual, lower number of hours worked when estimating her future income. This is a purely legal issue.

I. Was The Division Correct To Use Claimant's Estimated Income, Instead of Her Actual Income, in Determining The Amount of ATAP Benefits?

The issue raised by the Claimant in this case is completely logical and understandable: why did the Division use her *estimated income*, instead of her *actual income*, as a basis for calculating her future benefits? The answer to this question is simple: timing.

In order for the Division to base benefit payments on *actual income* instead of *estimated income*, the Division would necessarily be required to administer the ATAP and Food Stamp programs *retroactively*. In a retroactive benefit payment system, it would not be possible for the Division to make a benefit payment *until after the end of the applicable earnings period* because the recipient's actual income cannot be determined until the end of that period. Under such a system, a recipient's January benefits could not be paid until February, and so on; all benefit payments would necessarily have to be made after-the-fact or in arrears.

The creators of the current version of the Alaska Temporary Assistance Program, however, elected to base the amount of a recipient's payments on a *prospective estimate of income* instead of on the recipient's actual income as determined after-the-fact. See 7 AAC 45.350, 7 AAC 45.355, and 7 AAC 45.425 (set forth in the Principles of Law at pages 5-6, above). The obvious advantage of this system is that it allows the Division to get benefits to a recipient almost immediately, instead of requiring the Division to wait a month to allow a recipient to establish an actual earnings history. The one disadvantage of the system is that a recipient's estimated income can be higher or lower than the recipient's actual income.

In this case, the Division's estimate of the Claimant's income for February 2010 was based on the Claimant's manager's statement that the Claimant's normal work schedule at the time was Monday 11:00 a.m. – 4:00 p.m. and Tuesday through Friday 11:00 a.m. – 5:00 p.m. for a total of 29 hours per week (Ex. 6). Based on this information, the Division calculated the Claimant's anticipated wages at 29 hours per week, multiplied by \$10.69 per hour, for a total of \$310.01 per week (Ex. 6). The Division then multiplied the Claimant's weekly rate of \$310.01 by a conversion factor of 4.3 (as required by 7 AAC 45.425(d), set forth in the Principles of Law, above), and arrived at an estimated gross monthly wage of \$1,333.04. *Id.*

In summary, the information on which the Division's estimate was based was obtained from a reliable source (the Claimant's employer), on whose information the Division reasonably relied. The Division had the discretion, pursuant to 7 AAC 45.350, 7 AAC 45.355, and 7 AAC 45.425, to use that information to estimate the Claimant's anticipated future earnings. The Division was therefore correct when on January 20, 2010 it decreased the amount of the Claimant's Alaska

Temporary Assistance Program (ATAP) benefits based on the Division's estimate of the Claimant's household's income for February 2010.

II. Was The Division Correct To Use Claimant's Estimated Income, Instead of Her Actual Income, in Determining The Amount of Food Stamp Benefits?

The creators of the current version of the Food Stamp Program also elected to base the amount of a recipient's payments on a *prospective estimate of income* instead of on the recipient's actual income as determined after-the-fact. *See* 7 CFR 273.10(c)(1) (set forth in the Principles of Law at pages 6-7, above). Accordingly, the same analysis applicable to the Claimant's ATAP benefits, (set forth in Section I, above), also applies to the Claimant's Food Stamp benefits. The information on which the Division's estimate was based was obtained from a reliable source (the Claimant's employer), on whose information the Division reasonably relied. The Division had the discretion, pursuant to 7 CFR 273.10(c)(1), to use that information to estimate the Claimant's anticipated future earnings. The Division was therefore correct when on January 20, 2010 it decreased the amount of the Claimant's Food Stamp Program benefits based on the Division's estimate of the Claimant's household's income for February 2010.

CONCLUSIONS OF LAW

1. The Division has the discretion, pursuant to 7 AAC 45.350, 7 AAC 45.355, and 7 AAC 45.425, to use an applicant or recipient's prior employment and earnings information to estimate the applicant or recipient's anticipated future earnings for purposes of the Alaska Temporary Assistance Program.
2. The Division has the discretion, pursuant to 7 CFR Section 273.10(c)(1), to use an applicant or recipient's prior employment and earnings information to estimate the applicant or recipient's anticipated future earnings for purposes of the Food Stamp Program.
3. The Division proved, by a preponderance of the evidence, that it prospectively estimated the Claimant's income for February 2010 based on reliable information provided by the Claimant's employer concerning the Claimant's January 2010 employment and earnings.
4. The Division was therefore correct when on January 20, 2010 it decreased the amount of the Claimant's Alaska Temporary Assistance Program (ATAP) and Food Stamp Program benefits, based on the Division's estimate of the Claimant's household's income for February 2010, instead of on the Claimant's actual income.

DECISION

The Division was correct when on January 20, 2010 it decreased the amount of the Claimant's Alaska Temporary Assistance Program (ATAP) and Food Stamp Program benefits, based on the Division's estimate of the Claimant's household's income for February 2010, instead of on the Claimant's actual income.

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, 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

If the Claimant appeals, the 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 14th day of April, 2010.

Jay Durych
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on this 14th day of April 2010 true and correct copies of the foregoing document were sent to the Claimant via U.S.P.S. mail, and to the remainder of the service list by e-mail, as follows:

Claimant – Certified Mail, Return Receipt Requested
[REDACTED], DPA Hearing Representative

[REDACTED], Director, Division of Public Assistance
[REDACTED], Policy & Program Development
[REDACTED], Staff Development & Training
[REDACTED], Chief of Field Services
[REDACTED], Administrative Assistant II
[REDACTED], Eligibility Technician I

J. Albert Levitre, Jr.
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