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

In the Matter of:)
)
██████████,) OHA Case No. 10-FH-178
)
Claimant.) DPA Case No. ██████████
_____)

FAIR HEARING DECISION

STATEMENT OF THE CASE

██████████ (Claimant) has been a recipient of Food Stamp benefits since February 2009 (Ex. 1). On July 15, 2009 the Claimant completed, signed, and submitted an Eligibility Review Form (Recertification Application) for Food Stamp benefits to the State of Alaska Division of Public Assistance (DPA or Division) (Exs. 2.0 – 2.5). On August 26, 2009 the Division conducted an Eligibility Interview with the Claimant (Ex. 3.0). During this interview, the DPA Eligibility Technician checked a computer interface and discovered that the Claimant had previously been convicted of a felony involving illegal drugs. *Id.*

On December 28, 2009 the Division mailed to the Claimant a notice stating that she was permanently disqualified from receiving further Food Stamp benefits as a result of her felony drug conviction, and that she was required to re-pay to the Division the value of the Food Stamp benefits that she had improperly received (Exs. 4.0 – 4.14). On May 12, 2010 the Division mailed to the Claimant a notice advising that the Division would submit its Food Stamp repayment claim against her to a federal collection program if she did not resolve the debt with the Division within 60 days (Exs. 5.1 – 5.3). On May 27, 2010 the Claimant telephonically requested a fair hearing to contest her liability for the overpaid Food Stamp benefits (Ex. 6.1).

This Office has jurisdiction to decide this case pursuant to 7 AAC 49.010.

A hearing was held as scheduled on June 23, 2010 before Hearing Examiner Patricia A. Huna.¹ The Claimant attended the hearing in person, represented herself, and testified on her own behalf. ██████████, a Public Assistance Analyst employed by the Division, attended the June 23, 2010 hearing in person, represented the Division, and testified on its behalf. The parties' testimony was received and

¹ Following the hearing this case was reassigned to Hearing Examiner Jay Durych. He reviewed this Office's case file, and listened to the digital recording of the June 23, 2010 hearing, prior to his issuance of this decision.

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

ISSUES

At the hearing, the Division's representative made clear that the Division is not accusing the Claimant of doing anything wrong, and that the Claimant was overpaid Food Stamps due to the Division's error and not as a result of any fraud or misrepresentation by the Claimant. The Division asserted, however, that:

- a. The Claimant has a felony drug conviction which disqualifies her from receiving Food Stamp benefits, even though the Claimant's conviction was later set-aside; and
- b. That the Division is required by federal regulations to seek repayment of all overpaid Food Stamp benefits, even those overpayments resulting from the Division's own errors.

In response, the Claimant asserted:

- a. She should not have any felonies on her record because all of them were either dismissed, or ended with a suspended imposition of sentence (SIS).
- b. She lives or has lived in housing funded by the Alaska Housing Finance Corporation (AHFC), and could not legally reside in AHFC housing if she were really a felon.
- c. She legally owns a gun, which she would not be able to do legally if she were a felon.
- d. She spoke on the phone with someone from DPA who berated her and accused her of committing fraud. However, she never lied or committed fraud with regard to her Food Stamp benefits.

Based on the parties' assertions, the resulting issues are:

1. Does the Claimant's 1999 conviction count as a felony drug conviction for purposes of the Food Stamp Program, even though the Claimant was granted a Suspended Imposition of Sentence (SIS) with regard to that conviction?
2. Is the Division entitled to seek recoupment (repayment) of any over-paid Food Stamp benefits, even though any overpayments were made due to a mistake by the Division and were not the fault of the Claimant?

SUMMARY OF DECISION

Federal regulations disqualify certain persons who have been convicted of "drug-related felonies" from participating in the Food Stamp Program. Prior to her receipt of the Food Stamp benefits at issue, the Claimant had pled no contest to, and was found guilty of, Misconduct Involving a Controlled Substance in the Fourth Degree. That crime involved the possession, use, or distribution of a controlled substance. Accordingly, the Claimant's crime constituted a "drug-related felony conviction" within the meaning of the applicable regulation, presumptively disqualifying the Claimant from the Food Stamp Program.

The Claimant's felony conviction was later set-aside. However, applicable case law requires that the Claimant's conviction be considered a felony drug conviction *even though* the Claimant's conviction was later set-aside. The Claimant was therefore not eligible to receive Food Stamp benefits following her felony conviction.

The Division provided Food Stamp benefits to the Claimant after she had been disqualified from the program by her felony conviction. These benefit payments were due to Division error. However, the applicable legal authorities require that the Division seek recoupment of Food Stamp overpayments even in cases in which the recipient was not at fault. The Division was therefore correct when on December 28, 2009 and May 12, 2010 it notified the Claimant that she was required to repay to the Division \$994.00 in overpaid Food Stamp benefits that she previously received for the months of February 2009 through July 2009.

FINDINGS OF FACT

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

1. In 1998 a criminal case concerning misconduct involving a controlled substance was filed against the Claimant in Anchorage, Alaska (Case No. 3AN-S98-██████ Cr.) (Ex. 3.4). The charges were based on criminal conduct which occurred on May 1, 1998. *Id.*
2. On or about January 5, 1999 the Claimant pled no contest to, and was found guilty of, a violation of Alaska Statute Section 11.71.040(a)(3)(A) (Misconduct Involving a Controlled Substance in the Fourth Degree) in Case No. 3AN-S98-██████ Cr. (Ex. 3.4). However, Superior Court Judge ██████ suspended the imposition of sentence, and instead imposed a three year term of probation (Exs. 3.4 – 3.7).
3. On February 12, 2002 Judge ██████ signed an *Order of Discharge After Suspended Imposition of Sentence* (Ex. 3.1). That order stated in relevant part that the Claimant's "judgment of conviction is hereby set aside," "the case is closed," and "the [Claimant] is discharged by the court without imposition of sentence." *Id.*
4. On July 15, 2009 the Claimant completed, signed, and submitted to the Division an Eligibility Review Form (Recertification Application) for Food Stamp benefits (Exs. 2.0 – 2.5). In response to the question "Has anyone [in your household] been convicted of a drug-related felony for an offense that occurred on or after August 22, 1996?" the Claimant answered "no" (Ex. 2.0).
5. On August 26, 2009 the Division conducted an Eligibility Interview with the Claimant (Ex. 3.0). During this interview, the DPA Eligibility Technician checked a computer interface and discovered that the Claimant had previously been convicted of a felony involving illegal drugs. *Id.*
6. On December 28, 2009 the Division mailed to the Claimant a notice stating that she was permanently disqualified from receiving further Food Stamp benefits as a result of her felony drug conviction, and that she was required to re-pay to the Division the value of the Food Stamp benefits that she had improperly received (Exs. 4.0 – 4.14). The Division calculated the amount of the Food Stamp overpayment as \$994.00. *Id.*

7. On May 12, 2010 the Division mailed to the Claimant a notice advising that the Division would submit its \$994.00 Food Stamp repayment claim against her to a federal collection program if she did not resolve the debt with the Division within 60 days (Exs. 5.1 – 5.3).

8. On May 24, 2010 the Claimant submitted a letter to the Division contesting its recoupment claim (Ex. 6.2). The Claimant asserted that, as a result of receiving a Suspended Imposition of Sentence in Case No. 3AN-S98-██████ Cr., she had not actually been convicted of any felony. *Id.*

9. On May 27, 2010 the Claimant telephonically requested a fair hearing to contest the Division's attempt to collect the allegedly overpaid Food Stamp benefits (Ex. 6.1).

10. At the hearing of June 23, 2010 the Claimant testified that she had been receiving Food Stamps since 1999, but is now working and is no longer receiving them; that she does not have the money to repay the Food Stamp benefits at issue; that she is currently working two jobs to support herself and her son; and that the only way she could repay the Food Stamp benefits at issue would be to pay \$10.00 per month.

11. At the hearing of June 23, 2010 the Division's Hearing Representative testified in relevant part that, under appropriate circumstances the Division can accept repayment plans of as little as \$5.00 per month so as to avoid undue hardship to a former benefit recipient.

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.² In this case the Division is attempting to change the status quo or existing state of affairs by seeking repayment of Food Stamp benefits that it alleges were not properly issued. 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.³ 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.⁴

II. Relevant Alaska Criminal Law.

AS 11.71.040, titled “Misconduct Involving a Controlled Substance in the Fourth Degree,” provides in relevant part as follows:

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

³ A party in an administrative proceeding can assume that preponderance of the evidence is the applicable standard of proof unless otherwise stated. *Amerada Hess Pipeline Corp. v. Alaska Public Utilities Commission*, 711 P.2d 1170 (Alaska 1986).

⁴ *Black's Law Dictionary* at 1064 (West Publishing, 5th Edition, 1979); *see also Robinson v. Municipality of Anchorage*, 69 P.3d 489, 495-496 (Alaska 2003) (“Where one has the burden of proving asserted facts by a preponderance of the evidence, he must induce a belief in the minds of the triers of fact that the asserted facts are probably true”).

(a) Except as authorized in [inapplicable], a person commits the crime of misconduct involving a controlled substance in the fourth degree if the person . . . (3) possesses . . . (A) any amount of a Schedule IA or IIA controlled substance . . .

* * * * *

(d) Misconduct involving a controlled substance in the fourth degree is a Class C felony.

Pursuant to AS 12.55.085 (e), “[u]pon discharge by the court without imposition of sentence, the court may set-aside the conviction and issue to the [defendant] a certificate to that effect.”

“In Alaska a conviction that has been set aside loses much of its legal importance in future legal proceedings.” *State of Alaska Division of Corporations, Business and Professional Licensing, Alaska Board of Nursing v. Platt*, 169 P.3d 595, 599 (Alaska 2007). However, “[a]lthough setting aside a conviction limits the consequences of the conviction itself, it does not change the fact that an individual was previously found guilty of committing a crime.” *Id.*

“Setting aside a conviction does not expunge the conviction from the individual's criminal record, which means that . . . the conviction and the judgment setting it aside consequently remain in the public record.” *Id.* “Thus, although the set- aside indicates that the defendant has made a ‘substantial showing of rehabilitation’, it does not erase the fact of conviction.” *Id.* “[T]he fact of conviction may lead to certain ‘lingering consequences’” *Id.* at 600.

“The only instance in which Alaska law provides that an adult may have a conviction removed from his or her criminal record is where he or she is able to show that ‘beyond a reasonable doubt, [the conviction] resulted from mistaken identity or false accusation.’” *Id.* at 600, citing AS 12.62.180(b).

III. 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 U.S.C. 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 at 7 C.F.R. 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 at 7 AAC 46.010 - 7 AAC 46.990.

IV. The Food Stamp Program – Disqualification of Convicted Felons.

In 1996 the Personal Responsibility and Work Opportunity Reconciliation Act, popularly known as the Welfare Reform Act, was enacted by Congress and signed into law. See Public Law No. 104-193, 110 Stat. 2105 (Aug. 22, 1996); *In re Cervantes*, 219 F.3d 955, 958, fn. 5 (9th Cir. 2000). The Welfare Reform Act disqualified persons convicted of certain drug-related felonies from receiving benefits under the federal Food Stamp program. 21 U.S.C.A. § 862a (a), (d)(2).

21 U.S.C.A. Section 862a (a)(1) provides in relevant part that “[a]n 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.].” This includes the Food Stamp Program.

7 CFR 273.1(b)(7)(vii) is the implementing 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 legislation exempting individuals domiciled in the State from the above exclusion

Although the states have the discretion to exempt recipients from the drug felony disqualification rule pursuant to 21 U.S.C.A. § 862a(d)1) and 7 CFR 273.11(m) (quoted above), the State of Alaska has not enacted legislation exempting Alaska state residents from the disqualification of 7 CFR 273(1)(b)(7)(vii) or limiting the period of ineligibility. A.S. 47.25.975 – 990; 7 AAC 46.010 et. seq.

V. Statutes, Regulations, and Court Decisions Regarding Recoupment (Repayment) of Overpaid Food Stamp Benefits.

The Food Stamp statute at issue in this case is 7 U.S.C.A. § 2022, titled ”Disposition of Claims.” That statute provides in relevant part as follows:

(b) Collection of overissuances . . . (1) In general. Except as otherwise provided in this subsection, *a State agency shall collect any overissuance of benefits issued to a household* [Emphasis added].

The Food Stamp regulation at issue in this case is 7 C.F.R. § 273.18, titled “Claims against Households.” That regulation provides in relevant part as follows:

- (a)(1) A recipient claim is an amount owed because of: (i) Benefits that are overpaid or . . . [inapplicable].
- (a)(2) This claim is a Federal debt subject to this and other regulations governing Federal debts. *The State agency must establish and collect any claim* by following these regulations. [Emphasis added].

7 CFR 271.4, titled “Delegations to State Agencies for Administration,” provides as follows:

(b) Claims delegation. FNS delegates to the State agency, *subject to the standards in Section 273.18*, [set forth above] the authority to determine the amount of, and settle, adjust, compromise or deny all or part of any claim which results from fraudulent or nonfraudulent overissuances to participating households. [Emphasis added].

In *Allen v. State of Alaska Department of Health & Social Services*, 203 P.3d 1155 (Alaska 2009), the Alaska Supreme Court discussed “agency error” Food Stamp recoupment cases. In this decision the court ultimately held, based on the controlling federal Food Stamp statutes and regulations (discussed above), that Food Stamp Program overpayments made due to state agency error *must* be recouped *even from innocent recipients*.

ANALYSIS

This case does not involve any disputed issues of material fact. The sole issues for determination are purely legal issues. These are:

1. Whether the Claimant's 1999 conviction counts as a felony drug conviction for purposes of the Food Stamp Program even though the Claimant was granted a Suspended Imposition of Sentence (SIS).
2. Whether the Division is entitled to seek recoupment (repayment) of any over-paid Food Stamp benefits even though any overpayments were made due to a mistake by the Division and were not the fault of the Claimant.

These two issues will be addressed in the order stated above.

I. Is the Claimant’s 1999 Conviction, Although Set-Aside, Still Technically a Conviction?

The Claimant’s 1999 conviction was a felony conviction involving the possession of controlled substances (drugs). See AS 11.71.040 and Findings of Fact at Paragraph 2. Accordingly, there is no question that the Claimant’s conviction would disqualify her from the Food Stamp Program, pursuant to 21 U.S.C.A. § 862a(d)1) and 7 CFR 273.11(m), had the Claimant’s conviction *not* been set-aside. The issue here is whether the Claimant’s 1999 conviction still counts as a felony drug conviction under 21 U.S.C.A. § 862a(d)1) and 7 CFR 273.11(m) *even though the Claimant’s conviction was set-aside*.

The Alaska Supreme Court addressed the affect of the set-aside of a criminal conviction (i.e. a Suspended Imposition of Sentence) in *State of Alaska Division of Corporations, Business and Professional Licensing, Alaska Board of Nursing v. Platt*, 169 P.3d 595, 599 (Alaska 2007). In *Platt*, the court explained that “[a]lthough setting aside a conviction limits the consequences of the conviction itself, it does not change the fact that an individual was previously found guilty of committing a crime.” *Id.* The court further stated that “[s]etting aside a conviction does not expunge the conviction from the individual's criminal record,” and that, “although the set- aside indicates that the defendant has made a ‘substantial showing of rehabilitation’, it does not erase the fact of conviction.” *Id.*

In summary, pursuant to the Alaska Supreme Court’s decision in *Platt*, a conviction is still a conviction even when it has been set-aside. The *Platt* decision is mandatory authority in Alaska, which the Division was bound to follow. Accordingly, the Division was correct to conclude that the Claimant's 1999 conviction counts as a felony drug conviction for purposes of the Food Stamp Program *even though* the Claimant was granted a Suspended Imposition of Sentence (SIS).

II. Do The Applicable Statutes and Regulations Require Recoupment of Overpaid Food Stamp Benefits Even When a Claimant is Not at Fault?

The federal statute pertaining to recoupment of Food Stamp benefits is 7 U.S.C.A. § 2022. Subsection (b)(1) of that statute provides in relevant part that the “state agency *shall* collect any overissuance of benefits issued to a household” [Emphasis added]. This statute requires, on its face, that the DPA attempt to recover overpaid benefits.

The federal implementing regulation pertaining to recoupment of Food Stamp benefits is 7 C.F.R. § 273.18. That regulation has three subsections that are pertinent to this case. Subsection (a)(2) of that regulation provides in relevant part that “the State agency *must* establish and collect any claim . . . “. Subsection (e)(1) of that regulation also provides in relevant part that “state agencies *must* begin collection action *on all claims* unless [inapplicable].” Finally, pursuant to subsection (b)(3), collection action is required even where (as here) the “overpayment [is] caused by an action or failure to take action by the State agency.” Thus, it is clear that federal regulation 7 C.F.R. § 273.18 requires on its face that the DPA attempt to recover overpaid benefits, *even when the overpayment is the result of the DPA’s own error*.

In conclusion, federal law clearly *requires* that state agencies like DPA seek to recover Food Stamp Program overpayments. This is true even where the overpayments were caused by agency error and the benefit recipient was innocent of any wrongdoing. The Alaska Supreme Court recently confirmed this in the case of *Allen v. State of Alaska Department of Health & Social Services*, 203 P.3d 1155 (Alaska 2009) (discussed in the Principles of Law, above). That decision is binding on this Office.

CONCLUSIONS OF LAW

1. The Division carried its burden and proved, by a preponderance of the evidence, that:
 - a. The crime which the Claimant pled no contest to, and was found guilty of, (i.e. a violation of Alaska Statute Section 11.71.040(a)(3)(A) - Misconduct Involving a Controlled Substance in the Fourth Degree) had, as an element, “the possession, use, or distribution of a controlled substance” within the meaning of 7 CFR 273.11(m) and therefore constituted a “drug-related felony conviction” within the meaning of 7 CFR 273.(1)(b)(7)(vii).
 - b. Pursuant to the Alaska Supreme Court’s decision in *State of Alaska Division of Corporations, Business and Professional Licensing, Alaska Board of Nursing v. Platt*, 169 P.3d 595, 599 (Alaska 2007), the Claimant’s 1999 conviction is considered a felony drug conviction for purposes of 21 U.S.C.A. § 862a(d)1) and 7 CFR 273.11(m) even though the Claimant’s conviction was set-aside.
 - c. The applicable federal statute and regulation (7 U.S.C.A. § 2022 and 7 C.F.R. § 273.18) require the Division to seek recoupment of Food Stamp overpayments even in cases involving agency error in which the recipient was not at fault.
2. The Division was therefore correct when on December 28, 2009 and May 12, 2010 it notified the Claimant that she was required to repay to the Division \$994.00 in overpaid Food Stamp benefits that she previously received for the months of February 2009 through July 2009.

DECISION

The Division was correct when on December 28, 2009 and May 12, 2010 it notified the Claimant that she was required to repay to the Division \$994.00 in overpaid Food Stamp benefits that she previously received for the months of February 2009 through July 2009.

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 22nd day of July, 2010.

(signed)

Jay Durych
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on this 22nd day of July 2010 true and correct copies of the foregoing document were sent to the Claimant via USPS 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

(signed)

J. Albert Levitre, Jr.
Law Office Assistant I