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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. 11-FH-332
)	
Claimant.)	Division Case No. 
_____)	

FAIR HEARING DECISION

STATEMENT OF THE CASE

 (Claimant) is a former Food Stamp recipient. (Ex. 1) On September 6, 2011, the Division of Public Assistance (Division) sent the Claimant written notification that it was requesting repayment of \$2,628 in Food Stamp benefits that she had allegedly improperly received from July 2010 through June 2011. (Exs. 6.0 – 6.12) The Claimant requested a fair hearing on September 7, 2011. (Ex. 4)

This Office has jurisdiction pursuant to 7 AAC 49.010 and 7 C.F.R. § 273.15.

The Claimant's hearing was held on November 8, 2011. The Claimant appeared in person; she represented herself, and testified on her own behalf. , a Public Assistance Analyst with the Division, appeared in person; he represented the Division and testified on its behalf.

STATEMENT OF ISSUES

The Division required that the Claimant repay \$2,628 in Food Stamp benefit payments that were allegedly overpaid to the Claimant from July 2010 through June 2011. The Division argued that the Claimant should not have received Food Stamp benefits in any amount because she had a felony drug conviction which completely disqualified her from being eligible for Food Stamp benefits.

The Claimant raised two arguments. The first argument was that because her 1997 felony drug conviction had been set aside, it did not make her ineligible for Food Stamp benefits. This argument would pertain to the Food Stamp benefits received from July 2010 through December 2010. The second argument was that since she disclosed her August 2010 felony drug conviction on her January 18, 2011 Food Stamp application and the Division approved her application in

error, she should not be liable for repaying Food Stamp benefits issued due to the Division's error. This argument pertains to the Food Stamp benefits received from January 2011 through June 2011.

The resulting issues are:

- A. Is the Claimant liable for repayment of \$1,326 in Food Stamp benefits received during the period from July 2010 through December 2010, because she had a 2007 felony drug conviction, which was set aside?
- B. Is the Claimant liable to repay \$1,302 in Food Stamp benefits that she received during the period from January 2011 through June 2011, when those benefits were received because the Division approved her January 18, 2011 Food Stamp application in error?

FINDINGS OF FACT

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

1. The Claimant was convicted on August 20, 1997 of a Class C felony for violation of AS 11.71.040(a)(9) in Alaska Superior Court case [REDACTED] CR. (Exs. 15 – 15.3) The date of the offense was April 24, 1997. (Ex. 15) She was given a suspended imposition of sentence in that criminal case. *Id.*
2. The Claimant's 1997 conviction was set aside by the superior court in 2000. (Ex. 15.4)
3. The Claimant applied for Food Stamp benefits in July 2010. (Ex. 6.11) She answered "No" to the question on the Food Stamp application that asked whether she had been convicted of a drug-related felony. *Id.*
4. The Claimant was approved for and began receiving Food Stamp benefits beginning in July 2010. (Exs. 6.10 – 6.11) The Claimant received \$1,326 in Food Stamp benefits during the months of July 2010 through December 2010. (Ex. 6.10)
5. The Claimant was convicted on August 27, 2010 of a Class C felony for violation of AS 11.71.040(a)(3)(A) in Alaska Superior Court case [REDACTED] CR. (Exs. 16 – 16.4) The date of the offense was May 5, 2010. (Ex. 16)
6. The Claimant reapplied for Food Stamp benefits on January 18, 2011. (Ex. 3) She answered "Yes" to the question on the Food Stamp application that asked whether she had been convicted of a drug-related felony. *Id.*
7. The Claimant was reapproved for and began receiving Food Stamp benefits beginning in January 2011. (Exs. 6.10 – 6.11) The Claimant received \$1,302 in Food Stamp benefits during the months of January 2011 through June 2011. (Ex. 6.10)
8. On September 6, 2011, the Division sent the Claimant notice that she had been overpaid \$2,628 total in Food Stamp benefits during the time period from July 2010 through June 2011. (Exs. 6 – 6.10) The Division's notice explained that the overpayment was caused because the

Claimant was not eligible for Food Stamp benefits in any amount due to her drug felony conviction. (Ex. 6)

PRINCIPLES OF LAW

A party who is seeking a change in the status quo has the burden of proof by a preponderance of the evidence. *State, Alcoholic Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985); *Amerada Hess Pipeline v. Alaska Public Utilities Comm'n*, 711 P.2d 1170, n. 14 at 1179 (Alaska 1986). “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.” *Robinson v. Municipality of Anchorage*, 69 P.3d 489, 495 (Alaska 2003).

Food Stamps is a federal program administered by the State. 7 C.F.R. § 271.4(a). The Code of Federal Regulations (C.F.R.) contains the rules for determining whether a Food Stamp household is eligible to receive 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 C.F.R. § 273.1(b)(7)(vii). 7 C.F.R. § 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. Ineligibility under this provision is only limited to convictions based on behavior which occurred after August 22, 1996.

7 C.F.R. § 273.11(m) (emphasis in original).

Alaska Statute 11.71.040 “Misconduct Involving a Controlled Substance in the Fourth Degree” criminalizes manufacture, possession, or delivery of specified controlled substances (drugs). Both subsection (a)(3) and (a)(9) criminalize possession of specific controlled substances (drugs). AS 11.71.040(a)(3) and (9). “Misconduct involving 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.¹ *Journey v. State*, 895 P.2d 955 (Alaska 1995). A set aside criminal conviction does not expunge a person’s criminal record. *Id.*

An agency “must establish and collect any claim” including a claim for overpaid Food Stamp benefits issued due to agency error. 7 C.F.R. § 273.18(a)(1)(i); 7 C.F.R. § 273.18(a)(2); 7 C.F.R. § 273.18(b)(3). *Also see Allen v. State, DHSS* 203 P.3d 1155, 1164 - 1166 (Alaska, 2009) (The Division is allowed to seek restitution of overpaid Food Stamp payments, even when the overpayment is due to the Division’s error) Adult members of the Food Stamp recipient’s household are the persons responsible for repaying overpaid Food Stamp benefits. 7 C.F.R. § 273.18(a)(4)(i).

ANALYSIS

There are two issues in this case, both of which will be addressed below. Both of the issues involve the Division seeking to change the status quo by requiring the Claimant to repay Food Stamp benefits she had previously received. The Division therefore has the burden of proof by a preponderance of the evidence.

- A. Is the Claimant liable for repayment of \$1,326 in Food Stamp benefits received during the period from July 2010 through December 2010, because she had a 2007 felony drug conviction, which was set aside?

If the Claimant has been convicted of a drug felony that occurred after August 22, 1996, she is permanently ineligible to receive Food Stamp benefits. 7 C.F.R. § 273.1(b)(7)(vii); 7 C.F.R. § 273.11(m). The facts of this case show that the Claimant was convicted on August 20, 1997 of a Class C felony for violation of AS 11.71.040(a)(9) in Alaska Superior Court case [REDACTED] CR. (Exs. 15 – 15.3) This was a felony conviction for drug possession. *See* AS 11.71.040(a)(9). The date of the offense was April 24, 1997. (Ex. 15) She was given a suspended imposition of sentence in that criminal case. *Id.* The Claimant’s conviction was set aside by the superior court in 2000. (Ex. 15.4)

The Division argued that the Claimant should not have received any Food Stamp benefits because of her 2007 felony drug conviction. The Claimant argued that because her conviction was set aside, she has never been “convicted” of a drug felony, and was therefore eligible for Food Stamp benefits.

¹ An expungement of a conviction, as contrasted to the setting aside of a conviction, erases the conviction in its entirety: Black's Law Dictionary 621 (8th ed.2004) defines “expunge” as “[t]o erase or destroy.” It further defines “expungement of record” as “[t]he removal of a conviction (esp. for a first offense) from a person's criminal record.” *Id.*

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.

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 C.F.R. § 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 final result is that the Claimant’s set aside 2007 felony drug conviction barred her from receiving Food Stamp benefits. She therefore should not have received Food Stamp benefits. An agency “must establish and collect any claim” for overpaid Food Stamp benefits. 7 C.F.R. § 273.18(a)(1)(i); 7 C.F.R. § 273.18(a)(2); 7 C.F.R. § 273.18(b)(3). The Division was therefore correct when it required that the Claimant repay the Food Stamp benefits she had been issued in the period from July 2010 through December 2010, regardless of the fact her 2007 felony drug conviction had been set aside. The amount of those benefits was \$1,326.

B. Is the Claimant liable to repay \$1,302 in Food Stamp benefits that she received during the period from January 2011 through June 2011, when those benefits were received because the Division approved her January 18, 2011 Food Stamp application in error?

This issue is slightly different from the preceding issue. The Claimant had a new felony drug conviction in August 2010: she was convicted on August 27, 2010 of a Class C felony for violation of AS 11.71.040(a)(3)(A) in Alaska Superior Court case [REDACTED] CR. (Exs. 16 – 16.4) The date of the offense was May 5, 2010. (Ex. 16) This was a felony conviction for drug possession. *See* AS 11.71.040(a)(3). The Claimant reapplied for Food Stamp benefits on January 18, 2011. (Ex. 3) She answered “Yes” to the question on the Food Stamp application that asked whether she had been convicted of a drug-related felony. *Id.*

The Division should have denied the Claimant’s January 18, 2011 Food Stamp application because she informed the Division about her felony drug conviction. *See* 7 C.F.R. § 273.1(b)(7)(vii); 7 C.F.R. § 273.11(m). However, the Division mistakenly approved her application and the Claimant ended up receiving a total of \$1,302 in Food Stamp benefits in the period from January 2011 through June 2011.

The Claimant did not assert or argue that her 2010 felony drug conviction had been set aside. Instead she argued that she should not be liable to repay her Food Stamp benefits when her receipt of those benefits was caused by the Division's error, not hers. However, the regulations are clear that the adults in the Food Stamp household are the parties responsible for repaying the Food Stamp benefits, even if the overpayment was caused by the Division's mistake. 7 C.F.R. § 273.18(a)(2); 7 C.F.R. § 273.18(a)(4)(i); 7 C.F.R. § 273.18(b)(3). *Also see Allen v. State, DHSS 203 P.3d 1155, 1164 - 1166 (Alaska, 2009)*. This means that even though the Division made the mistake that resulted in the Claimant receiving benefits she was not entitled to, the Claimant is responsible for repaying those benefits.

The Division was therefore correct when it required that the Claimant repay the Food Stamp benefits she had been issued in the period from January 2011 through June 2011, regardless of the fact the Division's error caused the Claimant to receive those benefits. The amount of those benefits was \$1,306.

CONCLUSIONS OF LAW

1. The Claimant was not eligible to receive Food Stamp benefits in the period from June 2010 through December 2010 due to her 2007 felony drug conviction, regardless of the fact that her conviction had been set aside. As a result, the Division was correct to require that the Claimant repay the Division the \$1,326 in Food Stamp benefits she received during that time period.
2. The Claimant was not eligible to receive Food Stamp benefits in the period from January 2011 through June 2011 due to her 2007 and 2010 felony drug convictions. The Division is legally required to recover the overpaid Food Stamp benefits, even when the overpayment was caused by the Division's mistake. As a result, the Division was correct to require that the Claimant repay the Division \$1,302 in Food Stamp benefits she received during the time period from January 2011 through June 2011.

DECISION

The Division was correct to require the Claimant to repay a total of \$2,628 in Food Stamp benefit payments that were overpaid to the Claimant during the months of July 2010 through June 2011.²

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. 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. To appeal, send a written request directly to:

² \$1,326 was paid during the time period from July 2010 through December 2010. \$1,302 was paid during the time period from January 2011 through June 2011. These two amounts total \$2,628.

Director of the Division of Public Assistance
Department of Health and Social Services
PO Box 110640
Juneau, AK 99811-0640

DATED this 9th day of December, 2011.

/Signed/
Larry Pederson
Hearing Authority

Certificate of Service

I certify that on this 9th day of December, 2011, true and correct copies of the foregoing were sent to:

Claimant by U.S.P.S First Class Certified Mail, Return Receipt Requested and to the following by secure e-mail:

[REDACTED], Public Assistance Analyst
[REDACTED], Public Assistance Analyst
[REDACTED], Policy & Program Development
[REDACTED], Staff Development & Training
[REDACTED], Administrative Assistant II

J. Albert Levitre, Jr.
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