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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-317
)
 Claimant.) Division Case No. [REDACTED]
)
 _____)

FAIR HEARING DECISION

STATEMENT OF THE CASE

[REDACTED] (Claimant) was receiving Food Stamp benefits in August 2010. (Ex. 1) The Division received her recertification application (Form Gen 72) for Food Stamp benefits on August 31, 2010. (Exs. 2.0 – 2.5) On September 7, 2010, the Division of Public Assistance (Division) sent the Claimant written notification her August 31, 2010 recertification application for Food Stamp benefits was denied. (Ex. 5) The Claimant requested a fair hearing on September 21, 2010. (Ex. 9 – 9.1)

This Office has jurisdiction pursuant to 7 AAC 49.010 and 7 CFR 273.15.

The Claimant's hearing was held on October 26, 2010 and November 30, 2010. The Claimant represented herself and testified on her own behalf. She attended in person on October 26, 2010 and telephonically on November 30, 2010. [REDACTED], a Public Assistance Analyst with the Division, attended the hearing in person; he testified on behalf of and represented the Division.

STATEMENT OF ISSUES

The Division argued it was required to deny the Claimant's August 31, 2010 recertification application for Food Stamp benefits because she had a prior felony drug conviction. The Claimant argued that the Division erred because her conviction had been set aside.

The resulting issue is:

Was the Division correct to deny the Claimant's August 31, 2010 Food Stamp recertification application, on September 7, 2010, due to a felony drug conviction when that conviction had been set aside?

FINDINGS OF FACT

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

1. The Claimant was convicted on June 27, 1997 of a Class C felony for a violation of AS 11.71.040(a)(3)(F) in Alaska Superior Court case [REDACTED] CR. (Exs. 10- 10.3) The date of the offense was January 9, 1997. (Ex. 10.2) She was sentenced on June 27, 1997 and given a suspended imposition of sentence in that criminal case. (Exs. 10.2 – 10.3)
2. The Claimant's conviction was set aside by the superior court in 1999. (Ex. 10.1) An amended order setting aside the conviction was entered on December 12, 2001. (Ex. 10)
3. The Claimant applied for Food Stamp benefits on August 31, 2010. (Exs. 2.0 – 2.5)
4. The Division denied the Claimant's August 31, 2010 Food Stamp application, on September 7, 2010, because she had a felony drug conviction. (Ex. 5)

PRINCIPLES OF LAW

A party to an administrative hearing, who is seeking a change in the status quo, has the burden of proof by a preponderance of the evidence. *State, Alcohol 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 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) 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 CFR 273.11(m) (emphasis in original).

The Alaska State regulations that contain state optional elements of the federal Food Stamp program are contained in 7 AAC 46.010 *et. seq.* The Alaska State regulations, as contained in 7 AAC 46.010 *et. seq.*, do not exempt applicants from the federal Food Stamp felony exclusion. Nor do they limit the length of time during which an applicant can be excluded from receiving Food Stamp benefits due to a felony drug conviction.

AS 11.71.040 “Misconduct Involved a Controlled Substance in the Fourth Degree” criminalizes manufacture, possession, or delivery of specified controlled substances (drugs). AS 11.71.040(a)(3)(F), as it read prior to 2006, prohibited the possession of a pound or more of a schedule VIA controlled substance (Marijuana).¹ AS 11.71.040(a)(3)(F); AS 11.71.190(b). “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.

ANALYSIS

There are no disputed facts in this case. There is one legal issue in this case, 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 Claimant was charged with a violation of AS 11.71.040(a)(3)(F), possession of a pound or more of Marijuana, and subsequently convicted of that offense on June 27, 1997. A violation of AS 11.71.040(a)(3)(F) is a Class C felony. AS 11.71.040(d). The date of the Claimant’s offense was January 9, 1997.

If the Claimant was convicted of a drug felony for an offense, involving the use, possession, or distribution of a controlled substance, that occurred after August 22, 1996, she is permanently ineligible to receive Food Stamp benefits. 7 CFR 273.1(b)(7)(vii); 7 CFR 273.11(m). The Claimant was convicted of a drug felony for an offense, involving the possession of a controlled substance (AS 11.71.040(a)(3)(F)), that occurred on January 9, 1997, i.e. after August 22, 1996. The Division denied the Claimant’s Food Stamp application due to her prior drug felony conviction.

¹ In 1996, the Alaska legislature amended AS 11.71.040(a)(3)(F) to criminalize possession of 4 ounces or more of Marijuana. (Sec. 7, ch. 53, SLA 2006).

The Claimant was given a suspended imposition of sentence in her drug felony case, and her conviction was subsequently set aside. She therefore argues that because her conviction was set aside, she 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.

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 August 31, 2010 Food Stamp application because she had been convicted of a drug related felony, regardless of the fact the felony conviction had been set aside.

CONCLUSIONS OF LAW

1. The Claimant was convicted on June 27, 1997 of a Class C felony for violation of AS 11.71.040(a)(3)(F), for an offense that was committed on January 9, 1997, in Alaska Superior Court case ██████████ CR. That conviction counted as a felony drug conviction for the purposes of the Food Stamp program regardless of the fact the Claimant was given a suspended imposition of sentence in that criminal case, and regardless of the fact her conviction was set aside by the Superior Court in 1999.
2. The Division was therefore correct to deny the Claimant’s August 31, 2010 Food Stamp application, on September 7, 2010, due to a felony drug conviction despite the fact her conviction had been set aside.

