

Office of Hearings and Appeals  
3601 C Street, Suite 1322  
P. O. Box 240249  
Anchorage, AK 99524-0249  
Telephone: (907) 334-2239  
Fax: (907) 334-2285

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

In the Matter of )  
 )  
 [REDACTED], )  
 ) OHA Case No. 10-FH-326  
 ) Division Case No. [REDACTED]  
\_\_\_\_\_  
Claimant. )

**FAIR HEARING DECISION**

**STATEMENT OF THE CASE**

Mr. [REDACTED] (Claimant) completed, signed and submitted an Application for Food Stamp benefits (Application) on September 23, 2010, which the Division received that same day. (Ex. 2.0-2.9) The Division of Public Assistance (Division) informed Claimant he was not eligible for the Food Stamp Program both during the eligibility interview conducted on September 23, 2010 and by written notice issued on September 27, 2010. (Exs. 3, 5)

Claimant requested a Fair Hearing on September 24, 2010. (Ex. 4) This Office of Hearings and Appeals has jurisdiction under authority of 7 AAC 49.010 *et. seq.* and 7 CFR § 273.15.

The Fair Hearing was first scheduled for October 21, 2010 and continued at Claimant's request and for his benefit on the following dates: November 4, 2010; November 18, 2010, and December 16, 2010. The continued hearings were for the purpose of allowing Claimant to obtain help in presenting his case. Claimant appeared telephonically at each of the scheduled hearings, represented himself and testified on his own behalf. Mr. [REDACTED], Public Assistance Analyst representing the Division of Public Assistance, appeared in person and testified for the Division at each of the scheduled hearings. All exhibits offered were admitted.

At the December 16, 2010 hearing, Claimant attempted to have an attorney, Mr. [REDACTED] with Alaska Legal Services, represent Claimant. Mr. [REDACTED] had met with Claimant earlier but had not accepted Claimant's case. During the December 16, 2010 hearing, the parties agreed to proceed with the hearing but leave the record open, should Claimant obtain legal representation, for Claimant's attorney to file an entry of appearance and/or documentation on Claimant's behalf. (Order Continuing Hearing, December 17, 2010) The hearing record remained open until January 12, 2011 for Claimant's attorney to submit documentation and until January 19, 2011 for the Division to submit its response to Claimant's submission, if any.

On January 12, 2011, Mr. [REDACTED] of Alaska Legal Services Corporation filed an Entry of Appearance and Claimant's Brief. On January 20, 2011, the Division of Public Assistance, through Ms. [REDACTED], Assistant Attorney General, filed an Entry of Appearance and State's Reply Closing Brief.

The hearing record closed on January 21, 2011 after the Division requested and received an extension of time.

### ISSUE

Was the Division correct to deny Claimant's September 23, 2010 Food Stamp application due to a felony drug conviction in 2003?

### FINDINGS OF FACT

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

1. Claimant completed, signed and submitted an Application for Food Stamp benefits (Application) on September 23, 2010. (Ex. 2.0-2.9) The Division received this application on September 23, 2010. (Ex. 2.0)
2. Claimant disclosed in his response to Application question 4 that he had been convicted of a drug-related felony for an offense that occurred on or after August 22, 1996. (Ex. 2.1) He wrote the year of the offense was 2003 and it occurred in Anchorage, AK. (Ex. 2.1)
3. Claimant participated in an eligibility interview on September 23, 2010. (Ex. 3) During the interview, his felony conviction for a drug-related offense in 2003 was discussed. (Ex. 3) The Eligibility Technician reviewed the court document recording his conviction and advised Claimant he was permanently not eligible for the Food Stamp Program because of his felony drug conviction according to food stamp rules. (Ex. 3)
4. On September 27, 2010, the Division gave<sup>1</sup> written notice to Claimant his September 23, 2010 Food Stamp Application had been denied because of his prior felony drug conviction. (Ex. 5)
5. Claimant requested a Fair Hearing on September 24, 2010. (Ex. 4)
6. Claimant was convicted in Alaska of Third Degree Misconduct Involving a Controlled Substance- 001 (AS 11.71.030(a)(1) for his conduct occurring on July 27, 2003, as shown on a certified copy of the Judgment, signed by a Superior Court Judge on August 12, 2005. (Ex. 6-6.3)

---

<sup>1</sup> The admitted exhibit notes the notice was "printed" on September 27, 2010. (Ex. 5) Such notices generally are sent by mailing, however, the mode of transmittal was not proved by the Division. Therefore, the finding is that Claimant was given notice, not sent notice.

7. Claimant filed a post-hearing brief and supplied his Affidavit in support of it. In his Affidavit, he described himself as a ■ year old disabled person, receiving SSI and Adult Public Assistance, who needs food stamps to assist him to “put food on the table.” (Affidavit of ■ January 6, 2011). Claimant also avers he has “stayed clean” as well as attended “Narcotics Anonymous and Alcoholic Anonymous” meetings for the past seven years. (Affidavit of ■, January 6, 2011).

## PRINCIPLES OF LAW

### I. Burden of Proof

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).

### II. Standard of Proof

The regulations applicable to this case do not specify any particular standard of proof. A party in an administrative proceeding can assume that preponderance of the evidence is the standard of proof unless otherwise stated. *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, 493 (Alaska 2003).

### III. Applicable Law

The Food Stamp Program<sup>2</sup> is a federal program administered by the States. 7 C.F.R. § 271.4(a). The Code of Federal Regulations (C.F.R.) contains the rules for determining whether individuals qualify for Food Stamp benefits. *See*, 7 C.F.R. § 271 – 273.

The Alaska legislature has enacted statutes implementing a food stamp program at AS 47.25.975-AS 47.25.990. The Alaska “food stamp program” means the federal food stamp program authorized by 7 U.S.C. 2011-2036. AS 47.25.990(4). The duties of the Alaska Department of Health and Social Services, in regard to the food stamp program, include “comply[ing] with the requirements of 7 U.S.C. 2011-2036 (Food Stamp Program).” AS 47.25.980(a)(3).

---

<sup>2</sup> On October 1, 2008, the Food Stamp Program (FSP) was renamed the Supplemental Nutrition Assistance Program (SNAP). *See*, Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246 Section 4001, 122 Statutes at Large 1651, 1853. The SNAP program is still commonly called the Food Stamp Program and will be referred to as the Food Stamp Program in this decision.

Alaska Statutes pertaining to the food stamp program are found at AS 47.25.975, .980, .985 and .990. There is no Alaska statute limiting the lifetime ban on eligibility created by federal Food Stamp regulation 7 C.F.R. § 273.11(m) which applies to individuals who have been convicted of a drug-related felony arising from conduct occurring after August 22, 1996.

The regulations adopted by the Alaska Department of Health and Social Services concerning the Alaska food stamp program are found at 7 AAC 46.010 - .990. “The provisions of 7 AAC 46.021 – 7 AAC 46.990 address elements of the program which have been committed to the discretion of the division.” 7 AAC 46.010.

Alaska regulation 7 AAC 46.010, in part also provides: “Federal food stamp program regulations, including subsequent changes, at 7 C.F.R. 271-274 are adopted by reference.” “The division administers the [Alaska] food stamp program in accordance with the Food stamp Act of 1977, as amended (7 U.S.C. 2011 – 2029) and federal regulations promulgated under the Food Stamp Act of 1977, as amended....” 7 AAC 46.010.

No Alaska regulation limits the lifetime disqualification from eligibility for Food Stamps that is imposed by federal Food Stamp regulations on individuals convicted of drug related felonies for conduct occurring after August 22, 1996.

“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). Regulation 7 C.F.R. § 273.11(m) states, in relevant part:

*(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 conviction based on behavior which occurred after August 22, 1996.

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

AS 11.71.030(a)(1) “Misconduct Involved a Controlled Substance in the Third Degree” criminalizes the manufacture or delivery of any amount of a schedule IIA or IIIA controlled substance or possession of any amount of a schedule IIA or IIIA controlled substance with intent to manufacture or deliver it. “Misconduct involving a controlled substance in the third degree is a class B felony.” AS 11.71.030(c).

Fair Hearings arising from an action of the Department of Health and Social Services are authorized by Alaska regulations 7 AAC 49.010-.900. Regulation 7 AAC 49.170 “Limits of the hearing authority,” states:

Except as otherwise specified in applicable federal regulations and 7 AAC 49.160, the role of the hearing authority is limited to the ascertainment of whether the laws, regulations, and policies have been properly applied in the case and whether the computation of the benefits amount, if in dispute, is in accordance with them.

Alaska Regulation 7 AAC 49.160 describes the duties of the hearing authority as to hold a hearing, receive the evidence, and render a decision based on law and the evidentiary record.

There is no Alaska regulation or federal Food Stamp regulation which grants the Alaska Office of Hearings and Appeals hearing authority the right to address the validity of legislation or decide the Constitutional validity of statutes or regulations. “Administrative agencies do not have jurisdiction to decide issues of constitutional law.” *Alaska Public Interest Research Group v. State*, 167 P.3d 27, 36 (Alaska 2007).

## ANALYSIS

### I. Burden of Proof

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). Because Claimant is applying for benefits, Claimant has the burden of proof in this case.

### II. Standard of Proof

A party in an administrative proceeding can assume that preponderance of the evidence is the standard of proof unless otherwise stated. *Amerada Hess Pipeline v. Alaska Public Utilities Comm’n*, 711 P.2d 1170, 1179 n. 14 (Alaska 1986). This standard is met when the evidence, taken as a whole, shows that the fact sought to be proved is probably true. Claimant must meet his burden of proof by a preponderance of the evidence.

### III. Issue

Was the Division correct to deny Claimant’s September 23, 2010 Food Stamp Application because he was convicted of a drug-related felony arising from conduct occurring after August 22, 1996?

### IV. Undisputed Facts

The parties do not dispute Claimant was convicted of a Class B felony involving an element of possession, use, or distribution of a controlled substance (drug) for conduct which occurred after August 22, 1996.

This case involves the question of whether or not the Division was correct to deny the Claimant's September 23, 2010 Application for Food Stamp benefits because of that conviction. There are no disputed facts in this case. The sole legal issue is whether the Division can deny a person Food Stamp benefits on the basis of a felony drug conviction arising from conduct that occurred after August 22, 1996.

On August 12, 2005, Claimant was convicted of the crime of Misconduct Involving a Controlled Substance in the third degree in violation of AS 11.71.030(a)(1). (Ex. 6-6.3) This crime is a Class B felony involving a controlled substance. AS 11.71.030(d). The criminal conduct for which Claimant was convicted occurred on July 27, 2003. (Ex. 6)

Federal Food Stamp regulations 7 C.F.R. § 273.1(b)(7)(vii) and § 273.11(m) address the ineligibility of applicants who have been convicted of drug-related felonies. Federal regulation 7 C.F.R. § 273.1(b)(7)(vii) provides that "[i]ndividuals who are ineligible under § 273.11(m) because of a drug-related felony conviction" may not receive Food Stamp benefits.

If an individual was convicted under Federal or State law of any offense which is classified as a drug-related felony by the law of the jurisdiction convicting that individual, that individual is not eligible to receive food stamps. 7 C.F.R. § 273.11(m) and 7 C.F.R. § 273.1(b)(7)(vii). This provision applies to all convictions resulting from conduct which occurred after August 22, 1996. 7 C.F.R. § 273.11(m).

However, 7 C.F.R. § 273.11(m), also provides an individual convicted of a drug-related felony for conduct occurring after August 22, 1996 may be eligible for food stamps if the "State legislature of the State where the individual is domiciled has enacted legislation exempting individuals domiciled in the State" from the disqualification. This regulation further specifically provides that if the State legislature has enacted legislation limiting the period of ineligibility, the individual will be ineligible for benefits for the duration of the (limited) period established by legislation. After the legislatively established period of ineligibility has elapsed, the individual then may be considered for eligibility.

The Alaska State legislature has not enacted legislation limiting the period of ineligibility for individuals convicted of a drug-related felony for conduct occurring after August 22, 1996.

#### V. Claimant's Brief, Division's Brief, Limited Hearing Authority

Claimant, through his attorney, filed a post-hearing brief on January 12, 2011. Claimant argues the Division's denial of his Application should be deemed erroneous because the "lifetime ban violates Claimant's constitutional right to rehabilitation and equal protection of the law."<sup>3</sup>

---

<sup>3</sup> Claimant "alternatively" "petitions" the Department to immediately issue regulation(s) that "consider an offender's rehabilitation." Claimant cites AS 44.62.220 in support of his petition. Claimant's Brief at 5. AS 44.62.220 applies to the Administrative Procedure Act and provides an "interested person may petition an agency for the adoption or repeal of a regulation...." Claimant's Brief at 5. This fair hearing case is an inappropriate forum to petition the Department for promulgation of a regulation. Moreover, 7 C.F.R. § 273.11(m) clearly requires state legislative action, not agency regulation, to alter the permanent ban on eligibility established by Subsection (m) 7 C.F.R. § 273.1(b)(7)(vii). Hence Claimant's petition will not be considered in this decision. Moreover, even if the

Claimant's Brief at 1. Claimant supports his argument by alleging deprivation of constitutionally protected rights. The constitutionally protected rights he asserts are: a) a right to rehabilitation; b) a right to expungement of criminal records; and c) a right to equal protection under law. Claimant's Brief. Claimant also supports his argument with his affidavit which asserts, among other things, that he is rehabilitated, i.e., "clean", and has been attending meetings to support and maintain his drug-free state for the past seven years. Claimant's Affidavit of January 6, 2011.

The Division, through its attorney, filed a post-hearing reply brief on January 20, 2011. The Division argues its denial of Claimant's Application should be deemed correct because federal and state laws, and regulations, require the Division to deny eligibility to an individual who has been convicted of a drug-related felony for conduct occurring after August 1996, and Claimant is such an individual. The Division further argues that Claimant's legal arguments are beyond the scope of the Fair Hearing and beyond the authority of the Office of Hearing and Appeals to consider. The Division's Brief further states Claimant's arguments regarding constitutional issues are "preserved for appeal of this decision, if any, to the superior court." Division's Brief, at 4.

Alaska regulation 7 AAC 49.170 limits the role of a hearing authority. 7 AAC 49.170. The role of the hearing authority is to ascertain whether the laws, regulations and policies have been properly applied in the case and to determine if the benefit amount has been correctly computed in accordance with them. 7 AAC 49.170. The duties of the hearing authority is to hold hearings, receive evidence, apply it to law, regulation and policy and render a decision, which is disseminated to the parties. 7 AAC 49.160. These Alaska regulations do not authorize the hearing authority in this case to consider constitutional issues, including whether federal Food Stamp or Alaska food stamp laws or regulations give effect to constitutionally protected rights or are adequate under the federal or state Constitutions. More specifically, the hearing authority is not granted the authority to address Claimant's assertions in regard to his constitutionally granted "right to rehabilitation or right to equal protection."

"Administrative agencies do not have jurisdiction to decide issues of constitutional law." *Alaska Public Interest Research Group v. State*, 167 P.3d 27, 36 (Alaska 2007). Therefore, the issues, raised in Claimant's Brief and in the Division's Reply Closing Brief, which pertain to whether the Alaska laws and regulations are Constitutionally adequate, cannot be considered by the hearing authority.

## VI. Conclusion

The Division was correct when it applied the Food Stamp regulations, 7 CFR 273.1(b)(7)(vii) and 7 CFR 273.11(m), and denied Claimant's September 23, 2010 application for Food Stamp benefits.

---

Alaska legislature enacted a limiting statute in response to Claimant's action in this case, the change would not affect this case, although it might apply to Claimant's future application, if any.

## CONCLUSIONS OF LAW

1. Claimant did not meet his burden of proving by a preponderance of the evidence that he is eligible for Food Stamp benefits notwithstanding his conviction in Alaska for the drug-related felony on August 12, 2005 of misconduct involving a controlled substance in the third degree, for conduct occurring after August 22, 1996.
2. Federal regulations 7 CFR § 273.11(m) and 7 CFR § 273.1(b)(7)(vii) were correctly applied by the Division of Public Assistance when it denied Claimant's September 23, 2010 application.
3. The Department of Health and Social Services, Office of Hearings and Appeals is not authorized to determine whether laws or regulations are Constitutional. Therefore, Claimant's assertions pertaining to Constitutional issues are not addressed in this decision.

Therefore, the Division did not err in denying Claimant's September 23, 2010 application for Food Stamp benefits.

## DECISION

The Division was correct to deny Claimant's September 23, 2010 Food Stamp application because he was not eligible for the Food Stamp Program as a result of having been convicted in Alaska on August 12, 2005 of a class B felony, that is, misconduct involving a controlled substance in the third degree, for conduct occurring on July 27, 2003.

## 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  
P.O. 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 February 2<sup>nd</sup>, 2011.

\_\_\_\_\_  
*/signed/*  
Claire Steffens  
Hearing Authority



CERTIFICATE OF SERVICE

I certify that on this 2<sup>nd</sup> day of February 2011 true and correct copies of the foregoing were sent to:

[REDACTED], ALSC, for Claimant, Certified Mail, Return Receipt Requested.  
and to other listed persons (via e-mail), as follows:

[REDACTED], Asst. Atty. Gen., for Division – via Fax  
[REDACTED], Hearing Representative  
[REDACTED], Hearing Representative  
[REDACTED], Chief, Policy & Program Dev.  
[REDACTED], Administrative Assistant II  
[REDACTED], Eligibility Technician I  
[REDACTED], Staff Development & Training

---

J. Albert Levitre, Jr., Law Office Assistant I