

Office of Hearings and Appeals
3601 C Street, Suite 1322
P. O. Box 240249
Anchorage, AK 99524-0249
Phone: (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-336
)
 Claimant.) D.P.A. Case No. [REDACTED]
)
 _____)

FAIR HEARING DECISION

STATEMENT OF THE CASE

Ms. [REDACTED] (Claimant) applied for Food Stamp¹ benefits on or about September 16, 2010. (Exs. 2.0 - 2.5) On October 5, 2010, the State of Alaska Division of Public Assistance (Division) notified Claimant she was eligible to receive Nineteen Dollars (\$19.00) per month in Food Stamp benefits. (Ex. 6.0) On October 5, 2010, Claimant requested a fair hearing. (Ex. 6.1)

This office has jurisdiction pursuant to regulation 7 AAC 49.010.

A hearing was held on October 28, 2010. Claimant appeared in person, represented herself, and testified on her own behalf. [REDACTED], a Public Assistance Analyst representing the Division, attended in person and testified on behalf of the Division (Division's Hearing Representative).

ISSUE

The Division argued it properly calculated Claimant's income anticipated during the certification period based on her average gross monthly income earned during the 21 day period of August 28, 2010 to September 18, 2010. Claimant argued that because the number of hours she works part-time varies, and had been elevated due to a temporary situation at work, the Division should have averaged over a longer period of time. Claimant argued the Division should have averaged her gross income from the start of her employment on April 16, 2010 to September 18, 2010, to determine her average gross monthly income. The issue is whether the Division was correct to

¹ 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 continues to be commonly called the Food Stamp Program.

calculate Claimant's Food Stamp benefit based on her monthly gross income earned between August 28, 2010 and September 18, 2010.

FINDINGS OF FACT

The following facts have been established by a preponderance of the evidence:

1. On September 16, 2010, the Division received Claimant's completed application for recertification of her eligibility for Food Stamp benefits. (Exs. 2.0 - 2.5) Claimant applied as a household of one person, herself. (Ex. 2.0) On the application, Claimant wrote she worked part-time, flexible hours which "are never the same," and "I can add hours if they are open." (Ex. 2.1) Claimant placed a question mark ("?") in the box disclosing hours worked as part of her response to question 7. (Ex. 2.1)

2. On September 29, 2010, the Division sent Claimant a notice requesting, in part, that she provide proof of her income, if she worked full time or part time, how often she was paid, how much she was paid per hour, how many hours per day she was scheduled to work, when the pay periods ended, what dates she was paid, and what was her gross income. The notice stated she "may also submit your most current 2-3 pay stubs to satisfy this request." (Ex. 4) The Division sent an employment verification form in a separate envelope. (Ex. 4)

3. Claimant's part-time earned income fluctuates from pay period to pay period, as does the number of hours she works. This finding is based on the following facts:

a. On October 4, 2010, the Eligibility Technician received copies of three of Claimant's pay stubs, spanning the period of August 28, 2010 through September 18, 2010. (Exs. 5.0; 5.3) The Eligibility Technician calculated Claimant's gross monthly income based on the 21 day period, averaging 34.9 hours per week, represented by these pay stubs as follows (Exs. 5.0, 5.3):

Weekly Pay Period	Hours Worked	Gross Income 3 Pay Periods	Year to Date Total Hours	Year to Date Gross Income
Aug. 28-Sept. 4	37.21	\$ 334.89	587.06	\$ 5,284.58
Sept. 5 – Sept. 11	35.59	346.05	622.67	5,630.63
Sept.12 –Sept. 18	31.94	287.46	654.61	5,918.09
Totals	104.74	968.40	654.61	5,918.09

4. The Eligibility Technician determined Claimant was eligible for Nineteen Dollars (\$19.00) per month of Food Stamp benefits based on prospective extension of her August 28, 2010 through September 18, 2010 period of monthly gross income. (Ex. 5.4, 5.5; Ex. 5.10) This finding is based on the following facts:

a. The Eligibility Technician calculated the 21 day gross income of \$968.40 yielded an average gross income of \$322.80 per week. (Ex. 5.0)

b. The Technician then multiplied this \$322.80 weekly gross average by 4.3, to account for the months in a year which have more than four weeks. (Ex. 5.0)

c. This calculation resulted in an attributed monthly gross income of \$1,388.04. (Ex. 5.0; Ex. 5.4)

d. The gross monthly income of \$1,388.04 and an earned income deduction of \$277.61 were applied on the Food Stamp Budget Work Sheet, which resulted in a determination that Claimant's net monthly income was \$1,110.43. (Ex. 5.4)

e. Claimant's shelter costs of \$385.00 were considered, and found not to warrant further adjustment, and then her net monthly income was adjusted to find the adjusted Food Stamp income of \$333.13. (Ex. 5.5) This resulted in a monthly benefit amount of Nineteen Dollars (\$19.00). (Ex. 5.5)

5. On October 5, 2010, the Division notified Claimant it had approved her application for recertification of Food Stamp benefits for the period September 16, 2010 through March 2011. (Ex. 6.0) Claimant was informed she would receive Nineteen Dollars (\$19.00) of Food Stamps monthly, based on "countable income" of \$867.44. (Ex. 6.0; *See also*, Exs. 5.5, 5.10)

6. Claimant's earned income is certain but the monthly amount fluctuates every month. This finding is based on the following facts:

a. Claimant's employer wrote that Claimant had been employed part-time since April 16, 2010 and her scheduled hours averaged 20-25 hours per week, which included additional hours she was able to work due to a temporary remodeling situation. (Ex. 7.1)

b. Claimant's employer stated to the Eligibility Technician on October 11, 2010, that Claimant's "elevated hours" were expected to end in mid-November with the completion of the remodeling. (Ex. 7.0) Claimant worked part-time and also supplemented her hours whenever she was able to fill in for an absent co-worker. (Ex. 2.1; Claimant's testimony)

7. The Eligibility Technician decided not to change the calculation of Claimant's gross income as established by the period August 28, 2010 to September 18, 2010 because Claimant's wages were not expected to decrease until mid-November 2010. (Ex. 7.0) The Eligibility Technician understood that after mid-November 2010, Claimant's gross income would change due to the loss of "elevated hours." (Ex. 7.0)

PRINCIPLES OF LAW

I. Burden of Proof and Standard of Proof.

Each recertification application involves a new and independent eligibility determination. *See, Banks v. Block*, 700 F. 2d 292, 296 – 297 (6th Cir. 1983). Ordinarily, the party seeking a change in the status quo has the burden of proof. *State of Alaska Alcoholic Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985).

The regulations applicable to this case do not specify any particular standard of proof. A preponderance of the evidence is the normal standard of proof in an administrative proceeding. *Amerada Hess Pipeline v. Alaska Public Utilities Comm'n*, 711 P.2d 1170, n. 14 at 1179 (Alaska 1986). Therefore, the standard of proof is the preponderance of the evidence.

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).

II. The Food Stamp Program.

Administration of the federal Food Stamp Program has been delegated to the states.² Federal Regulation 7 Code of Federal Regulations Section 271.4. The Department of Health and Social Services administers the Food Stamp program in Alaska, and has promulgated regulations which adopt the federal regulations (with certain minor variations as allowed by federal law). 7 C.F.R. Section 272.7; 7 AAC 46.010 - 7 AAC 46.990.

Regulation 7 C.F.R. § 273.9(a) requires, in part, the use of net and gross income eligibility standards as provided in 42 U.S.C. 9902(2) and based on the Federal income poverty levels. These standards have been adopted by Alaska and are set out in the Alaska Food Stamp Manual, Addendum 4 (version effective October 1, 2009 through September 30, 2010) implements 7 C.F.R. § 273.9(a). The standard Food Stamp Program gross income limits effective in April 2010 for a household of one (1) is \$1,466. (*See*, Ex. 10.0)

A household's eligibility is determined for the month of application by considering the household's circumstances for the entire month of application. 7 C.F.R. § 273.10(a)(1)(i). This applies to applications for recertification. 7 C.F.R. § 273.10(a)(2).

For purposes of determining eligibility and level of benefits, the income already received by the household during the certification period and any anticipated income the household and the Division "are reasonably certain will be received during the remainder of the certification period" is taken into account. 7 C.F.R. § 273.10(c)(1)(i).

Income which is uncertain to be received during the remainder of the certification period is given special consideration. "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...." 7 C.F.R. § 273.10(c)(1)(i). "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. In cases where the receipt of income is reasonably certain but the monthly amount may fluctuate, the household may elect to income average. 7 C.F.R. § 273.10(c)(1)(i) [Emphasis added.]

² The Food Stamp program was established by the federal Food Stamp Act of 1977, codified at 7 USC Sections 2011 – 2029. The United States Department of Agriculture's Food and Nutrition Service has promulgated regulations to implement the Food Stamp Act. These regulations are codified primarily at 7 C.F.R. Sections 271-274.

When change in income is anticipated, the State may not use past income as an indicator of the income anticipated for the certification period: "...the State agency shall not use past income as an indicator of income anticipated for the certification period if changes in income have occurred or can be anticipated. If income fluctuates to the extent that a 30-day period alone cannot provide an accurate indication of anticipated income, the State agency and the *household may use a longer period of past time if it will provide a more accurate indication of anticipated fluctuations in future income.*" 7 C.F.R. § 273.10(c)(1)(ii)[Emphasis supplied.]

Income is defined broadly as "all income from whatever sources, excluding only items specified...." 7 C.F.R. § 273.9(b). Certain expenses are deducted from income. 7 C.F.R. § 273.9(d). The monthly expense of shelter in excess of 50 percent of the household's income, after all other deductions are allowed, is deducted from income. 7 C.F.R. § 273.9(d)(6)(ii).

ANALYSIS

The issue in this case is whether the Division used the correct averaging time period: that is, was it correct to determine the amount of Food Stamp benefits for which Claimant was eligible by calculating Claimant's income based on her gross income earned between August 28, 2010 and September 18, 2010, a 21 day period.

I. Burden of Proof and Standard of Proof.

Claimant applied for recertification of her Food Stamp benefits on September 16, 2010. Because Claimant is challenging the determination of benefits for which she is eligible under that application, she is attempting to change the status quo. Claimant must prove, by a preponderance of the evidence, that the Division's decision was incorrect.

II. The Undisputed Facts.

Claimant's household consists of one person: herself. Claimant began employment on April 16, 2010, regularly works part-time about 20-25 hours per week. Claimant adds to her part-time work such additional hours as may be available to work due to the absence of co-workers and her employer's temporary remodeling situation. These additional hours are unpredictable in quantity and unpredictable as to when they become available. Consequently, Claimant's gross monthly income fluctuates but is certain.

The Division calculated Claimant's income based on the number of hours worked and the income earned during the period August 28, 2010 through September 18, 2010, a span of 21 days (or 3 weeks) with an average of 34.9 hours per week. (Exs. 5.3-5.5) The Division calculated Claimant's gross monthly earned income to be \$1,388.04. From this amount, the Division subtracted the earned income deduction to get a net monthly income of \$1,110.43. The Technician then determined Claimant's shelter costs of \$385.00 did not warrant further reduction of her monthly net income.

The parties do not dispute Claimant's net income (as calculated by the Eligibility Technician) of \$1,110.43 is less than the maximum Food Stamp net monthly income limit of \$1,128.00.

Also, it is not disputed that Claimant's year-to-date totals are: 654.61 hours worked from April 16, 2010 to September 18, 2010 yielding \$5,918.09 gross earned income during that period. Claimant does not dispute the Division's calculations, including the earned income deduction of \$277.61 and shelter expense of \$385.00.

What is disputed is whether the Division correctly used the monthly gross income earned from a 21 day period, i.e., August 28, 2010 through September 18, 2010, to determine Claimant's Food Stamp benefit amount for the certification period of September 2010 through March 2011.

Claimant asserts the August to September 2010 period is not representative of her income because it included extra hours she was able to add to her work schedule only because they were temporarily available: They would become unavailable after mid-November 2010. Claimant asserted the income she earned over the year, i.e., starting April 16, 2010, would be more representative of her prospective income for the recertification period.

The first step is to determine if using the period Claimant wants (April 16, 2010 – September 18, 2010) as contrasted with the period the Division averaged (August 28, 2010 - September 18, 2010) would result in a different benefit amount. If no difference would result, the issue is moot.

III. Would Using a Yearly Average Gross or Net Income Result in A Different Food Stamp Benefit Level?

Claimant asserts the Division should have averaged her income over the year (i.e., since April 16, 2010 when she became employed) instead of relying on the past three pay periods (August 28, 2010 to September 18, 2010). She asserts this is more representative of her anticipated income because her income results, in part, from her ability to work extra hours due to the employers' temporary remodeling situation and her ability to work extra hours when co-workers are absent. The temporary remodeling situation is anticipated to end in mid-November 2010. The certification period spans from September 2010 to March 2011. Thus, the three pay period (21 day) average gross income could be representative of the period September 2010 to October 2010, but not the subsequent five (5) months.

Comparing Claimant's average monthly gross income based on the 3 week span to the 22 week span shows:

Time Span Averaged	Hours Worked	Average Hours Worked/Week
April 16 - Sept. 18, 2010 22 weeks	654.61	29.75
August 28 - Sept. 18, 2010 3 weeks	104.74	34.91

Time Span Averaged	Gross Income Divided by # of weeks	Multiplied by 4.3 = Average Monthly Gross Income	Difference in Average Monthly Gross Income
April 16 - Sept. 18, 2010, 22 weeks	\$ 5,918.09 ÷ 22 = \$ 269.00	\$ 1,156.70 monthly	

Thus, if Claimant's income is averaged over the longer period, a substantial difference results. Inputting the April 16 through September 18, 2010 average monthly gross income amount of \$1,156.70 for calculation in the Food Stamp Budget Work Sheet appears to result in a determination that Claimant would receive a different monthly Food Stamp benefit.

IV. Was the Eligibility Technician Correct to Calculate Food Stamp Benefits Based on Income from the Period August 28, 2010 through September 18, 2010?

Claimant likely would receive additional benefits if the Division had considered her income over the period of her employment in year 2010, i.e., April 16, 2010 to September 18, 2010. The question next is whether Claimant's request for averaging of her income was appropriate, given the fluctuations in her work hours and hence, income.

A. The Division determined Claimant's income would fluctuate during the certification period.

The Division's Eligibility Technician determined that because Claimant would continue to be able to work extra hours until mid-November 2010, her wages could be anticipated not to decrease until then. (See, Ex. 7.0) Based on this reasoning, the Eligibility Technician calculated Claimant's benefits according to her income from her three most recent weekly pay amounts, a 21 day period averaging 34.9 hours per week. However, the Eligibility Technician's determination acknowledges Claimant's argument - that although her income was certain, it would fluctuate. Additionally, Claimant's income would fluctuate unpredictably after mid-November 2010. Therefore, the Eligibility Technician should have applied 7 C.F.R. § 273.10(c)(1)(i) and averaged Claimant's income over a longer period of time than 21 days.

B. Claimant's change in income was anticipated.

As stated above, the Eligibility Technician acknowledged Claimant's income was expected to change after mid-November. When change in income is anticipated, the State may not use past income as an indicator of the income anticipated for the certification period. The Code of Federal Regulations states, in relevant part:

...the State agency shall not use past income as an indicator of income anticipated for the certification period if changes in income have occurred or can be anticipated. If income fluctuates to the extent that a 30-day period alone cannot provide an accurate indication of anticipated income, the State agency and the household may use a longer period of past time if it will provide a more accurate indication of anticipated fluctuations in future income.

7 C.F.R. § 273.10(c)(1)(ii)[Emphasis supplied.]

This regulation requires analysis of whether Claimant's income might fluctuate "to the extent that a 30-day period alone cannot provide an accurate indication of anticipated income..." 7 C.F.R. § 273.10(c)(1)(ii). Although the Eligibility Technician apparently determined a 21 day period of August 28, 2010 to September 18, 2010 would provide an accurate indication of

anticipated income, she also acknowledged Claimant's anticipated income after mid-November could not be accurately indicated. Simply put, after mid-November, Claimant could not work the extra hours she had previously because the temporary re-modeling situation would be completed. The number of hours she could work, in addition to her part-time hours, were unknowable. The 21 day period used by the Eligibility Technician alone could not accurately predict Claimant's anticipated income.

C. Claimant requested averaging over a longer period of time and meets the criteria to have her income averaged.

Claimant requested averaging of her income over the period of the year. Food Stamp regulation 7 C.F.R. § 273.10(c)(1)(i) provides, in relevant part:

[i]n cases where the receipt of income is reasonably certain but the monthly amount may fluctuate, the household may elect to income average.

Claimant falls within that class of applicants contemplated by 7 C.F.R. § 273.10(c)(1)(i) who are entitled to request averaging because of the fluctuating amount of monthly income they anticipate receiving. Claimant's income is reasonably certain because she is a part-time employee. However, Claimant's monthly income amount fluctuates because she has supplemented her part-time hours with additional hours, as they are available, until mid-November 2010. The number of supplemental hours she will be able to work is unknown. What is known is that after mid-November, she will be unable to supplement her hours based on work available due to the remodeling. Hence, her ability to supplement her hours will change: Claimant will be left with only the hours made available by a co-worker's absence. To obtain a representative average monthly income, the Division should have averaged her income over the longer period of April 16, 2010 through September 18, 2010.

Consequently, the Division did not apply the correct prospective calculation methodology to determine the amount of Food Stamp benefits for which Claimant was eligible: the Division should have averaged Claimant's income over the longer period of April 16, 2010 through September 18, 2010.

CONCLUSIONS OF LAW

1. Claimant proved by a preponderance of the evidence that the 21 day period of August 28, 2010 through September 18, 2010 was not an appropriate period of time on which to average her monthly income to establish her Food Stamp benefits for the certification period of September 2010 through March 2011.

2. Claimant proved her income was certain but its amount would fluctuate sufficiently during the certification period of September 2010 to March 2011 that the provisions of Food Stamp regulation 7 C.F.R. § 273.10(c)(1)(ii) applied to her and she was entitled to request averaging of her income over a longer period than a 21 day period.

3. The Division erred in calculating Claimant's Food Stamp benefits by attributing her past income from August 28, 2010 through September 18, 2010 prospectively and should have used

the average of Claimant's income since April 16, 2010 through September 18, 2010 to make its determination.

DECISION

The Division was not correct to base calculation of Claimant's Food Stamp benefits for the certification period of September 2010 to March 2011 on Claimant's income earned during the 21 days between August 28, 2010 and September 18, 2010.

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 December 6, 2010.

/signed/
Claire Steffens
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on this 6th day of December 2010, true and correct copies of the foregoing were sent to the Claimant via U.S.P.S. mail, and to the remainder of the service list via e-mail, as follows:

Claimant – Certified Mail, Return Receipt Requested

_____, Fair Hearing Representative
_____, Director
_____, Policy & Program Development
_____, Staff Development & Training
_____, Administrative Assistant II
_____, Eligibility Technician I
_____, Chief of Field Services

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