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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-369
)
 Claimant.) DPA Case No. [REDACTED]
 _____)

FAIR HEARING DECISION

STATEMENT OF THE CASE

[REDACTED] (Claimant) completed and signed an application for Alaska Temporary Assistance Program (ATAP) benefits on November 1, 2010 (Exs. 2.0 – 2.9). His application was received by the State of Alaska Division of Public Assistance (DPA or Division) on November 1, 2010 (Ex. 3).

On November 5, 2010 the Division mailed a notice to the Claimant stating that his application for ATAP benefits had been denied on the basis that he was eligible for, and required to be served by, a native family assistance program (Ex. 5). The Claimant requested a fair hearing to contest the Division’s denial of his application for ATAP benefits on November 4, 2010 (Ex. 7).

This Office has jurisdiction to resolve this dispute pursuant to 7 AAC 49.010.

The Claimant’s hearing was held on January 26, 2011 before Hearing Examiner Jay Durych. The Claimant appeared in person, represented himself, and testified on his own behalf. [REDACTED], a Public Assistance Analyst with the Division, attended the hearing in person and represented and testified on behalf of the Division. The parties’ testimonies were received and all exhibits offered were admitted into evidence. At the end of the hearing the record was closed and the case became ripe for decision.

ISSUE

Was the Division correct to deny the Claimant’s application for Alaska Temporary Assistance Program benefits dated November 1, 2010, based on the assertion that, because the Claimant’s domestic partner is a native Alaskan, the applicable law requires that the Claimant instead apply to

and receive services from Cook Inlet Tribal Council's "Temporary Assistance for Needy Families" (TANF) program?

FINDINGS OF FACT

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

1. The Claimant completed and signed an application for Alaska Temporary Assistance Program (ATAP) benefits on November 1, 2010 (Exs. 2.0 – 2.9). The Claimant's application was received by the Division on November 1, 2010 (Ex. 3).
2. The Claimant's household consists of the Claimant, his domestic partner, and their three minor children (Exs. 1, 2.1). The Claimant identifies himself as being black or African-American (Ex. 2.1). The Claimant's domestic partner is an Alaskan native (Ex. A; Ex. 2.1; Claimant testimony).
3. The Claimant's domestic partner is a member of Cook Inlet Tribal Council (CITC) (Ex. A; Ex. 2.1; Claimant testimony). There is no evidence in the record that she has chosen to renounce her affiliation with CITC. She has previously applied for assistance for her household through CITC's Temporary Assistance for Needy Families (TANF) program, and her household has previously received services through CITC. *Id.*
4. The Claimant and his family live in Anchorage, Alaska (Ex. 2.0), which is within the geographic area served by CITC's Native family assistance program (Claimant testimony and undisputed fact).
5. Based on the facts found in Paragraphs 2-4, above, the Claimant is a member of the population eligible to be served by CITC's Native family assistance program.
6. The Claimant attended an eligibility interview with a DPA Eligibility Technician on November 4, 2010 (Ex. 3.0). At that time the Claimant explained that his domestic partner was an Alaska native, but that he did not want his family's ATAP case to be handled by CITC because he did not like CITC's program (Ex. 3.0).
7. On November 5, 2010 the Division mailed a notice to the Claimant advising that his application for Alaska Temporary Assistance Program benefits dated November 1, 2010 had been denied (Ex. 5). The notice stated in relevant part as follows:

Your application [for the Alaska Temporary Assistance Program] is denied because you are eligible to be served by a Native family assistance program

The federal government has authorized certain native organizations to operate native family assistance programs in Alaska

Call Cook Inlet Tribal Council . . . for information on their native family assistance program.

8. On his hearing request form dated November 4, 2010 (Ex. 4), the Claimant asserted that, because he had previously participated in the Alaska Temporary Assistance Program, he was not required to participate in CITC's Native family assistance program.

PRINCIPLES OF LAW

I. Burden of Proof and Standard of Proof.

This case involves the Division's denial of the Claimant's initial application for ATAP benefits. Ordinarily, the party seeking a change in the status quo bears the burden of proof. *State of Alaska Alcoholic Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985). The Claimant is attempting to change the existing status quo by obtaining ATAP benefits. Accordingly, the Claimant bears the burden of proof in this case.

A party in an administrative proceeding can assume that preponderance of the evidence is the applicable standard of proof unless pertinent statutes or regulations state otherwise. *Amerada Hess Pipeline Corp. v. Alaska Public Utilities Commission*, 711 P.2d 1170 (Alaska 1986). 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. 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. *Black's Law Dictionary* 1064 (5th Edition 1979).

II. The Alaska Temporary Assistance Program – In General.

The Temporary Aid to Needy Families (TANF) program was created by Congress when it passed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) (Public Law No. 104-193, 110 Stat. 2105 (Aug. 22, 1996); 42 U.S.C. § 601 et seq. The Alaska Temporary Assistance Program (ATAP) is a state program created to implement the federal TANF program in the state of Alaska. See A.S.47.05.010(1); A.S.47.27.005 – A.S.47.27.990. The Alaska Temporary Assistance Program's governing regulations are found in the Alaska Administrative Code at 7 AAC 45.149 – 7 AAC 45.990.

Alaska Statute Section 47.27.025, which establishes the ATAP cash assistance program, provides in relevant part that "(a) The department shall provide cash assistance to families that establish eligibility based on a determination of need"

III. Native Family Assistance Programs.

Under PRWORA, (discussed above), federally recognized Indian tribes are eligible to create and administer their own TANF programs. See 42 U.S.C. 612. If a tribal plan is approved by the United States Department of Health and Human Services, the tribe receives federal funds out of the state's federal TANF block grant allocation. 42 U.S.C. 612(a)(1)(A). Like states, tribes may use their TANF funding in any manner reasonably calculated to accomplish the purposes of TANF, but tribal TANF programs have more flexibility than do state programs. See 42 U.S.C. 612(a)(3)(C)(ii).

Pursuant to Alaska Statute Section 47.27.070, Cook Inlet Tribal Council is one of the Alaska Native organizations with whom the State of Alaska Department of Health and Social Services is required to coordinate in the development of Alaska native organizations' family assistance programs.

Regulation 7 AAC 45.276, titled "Native Family Assistance Program," etc, provides as follows:

(a) Except as provided in (c) of this section, a person who lives within the service area of a tribal or Native family assistance program operated under 42 U.S.C. 612 or AS 47.27 and is a member of the service population eligible to be served by that program, *is not eligible to receive assistance under ATAP*. If that person applies for or is receiving assistance from ATAP, the department will take one of the following actions: (1) the department will not accept an application for ATAP from the person; (2) *the department will deny any pending application for ATAP for the person*; (3) the department will terminate the person from participation in ATAP. [Emphasis added].

(b) If the department takes action under (a) of this section, the department will immediately refer the person to the appropriate tribal or Native family assistance program to apply for and pursue benefits under that program.

(c) A family that lives within the service area of a tribal or Native family assistance program operated under 42 U.S.C. 612 or AS 47.27 and is a member of the service population eligible to be served by that program, qualifies for ATAP assistance under the special circumstances provision in AS 47.27.200(k) *if the caretaker relative has chosen not to claim tribal affiliation, and has not previously received tribal services*. [Emphasis added].

(d) Special circumstances do not exist if the family is ineligible for assistance or will receive a reduced benefit under a tribal or Native family assistance program because the eligibility requirements of that program differ from ATAP eligibility requirements.

Alaska Temporary Assistance Program Manual Section 710-4, pertaining to Native Family Assistance Programs, essentially re-states the provisions of 7 AAC 45.276, set forth above.

IV. Constitutional and Statutory Authorities Relied on by the Claimant.

Article XIV of (the 14th Amendment to) the United States Constitution states in relevant part that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, Section I of the Constitution of the State of Alaska provides in relevant part that "all persons are equal and entitled to equal rights, opportunities, and protection under the law"

Article I, Section 3 of the Constitution of the State of Alaska provides in relevant part that "[n]o person is to be denied the enjoyment of any civil or political right because of race, color, creed, sex, or national origin."

42 U.S.C.A. § 2000d provides in relevant part that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

V. Administrative Agencies do not Have the Authority to Decide Constitutional Issues.

“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).

VI. The Office of Hearings and Appeals Does not Have the Authority to Invalidate Regulations Promulgated by the State of Alaska Department of Health and Social Services.

An administrative agency does not have the authority to adjudicate the constitutionality of its own regulations, and consequently a hearing officer who derives his authority from an agency does not have the authority to determine that an agency regulation is unconstitutional *or otherwise invalid*. *Howard v. Federal Aviation Administration*, 17 F.3d 1213, 1218 (9th Cir. 1994); *Gilbert v. National Transportation Safety Board*, 80 F.3d 364, 366-367 (9th Cir. 1996).

Alaska “Fair Hearings” regulation 7 AAC 49.170, titled “Limits of the Hearing Authority,” provides that, “except as otherwise specified in applicable federal regulations and 7 AAC 49.160 the role of the hearing authority [i.e. the Office of Hearings and Appeals] 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 benefit amount, if in dispute, is in accordance with them.”

ANALYSIS

Introduction; Definition of Issues.

There are no disputed factual issues to be resolved in this case. The only issue raised in this case is whether state ATAP regulation 7 AAC 45.276 prohibits the Claimant from participating in the state’s Temporary Assistance Program, and requires that he instead participate in Cook Inlet Tribal Council’s “Temporary Assistance for Needy Families” (TANF) program, due to the fact that the Claimant’s domestic partner is an Alaska native. This is a purely legal issue which must be decided by applying the relevant regulations.

At hearing, the Claimant initially questioned whether 7 AAC 45.276, on its face, requires that he be excluded from participation in ATAP. However, the Claimant’s primary argument is that 7 AAC 45.276 is not valid and is not enforceable because it violates his state and federal Constitutional rights, and his federal statutory right, to enjoy the equal protection of the laws and to be free of racial discrimination. Accordingly, the over-all issue (previously stated above) is actually comprised of the following *two sub-issues*:

1. Whether state ATAP regulation 7 AAC 45.276 prohibits the Claimant from participating in the state’s Temporary Assistance Program due to the fact that the Claimant’s domestic partner is an Alaska native.

2. Whether state ATAP regulation 7 AAC 45.276 violates the Claimant's state and/or federal Constitutional rights, or certain federal civil rights statutes.

I. Does 7 AAC 45.276 Prohibit the Claimant From Participating in the State's Temporary Assistance Program Based on the Undisputed Facts of This Case?

State ATAP Regulation 7 AAC 45.276 basically provides that any person who lives within the service area of a tribal or Native family assistance program, and who is a member of the service population eligible to be served by that program, *is not eligible to receive assistance under ATAP*. The only exception to this rule is *if the caretaker relative has chosen not to claim tribal affiliation, and has not previously received tribal services*.

In this case it is not disputed that the Claimant lives within the service area of CITC's Native family assistance program; that his wife is an Alaska native; and that she has not disclaimed her affiliation with CITC. *See* Findings of Fact at Paragraphs 2 – 5. Thus, the Claimant's wife is a member of the population eligible to be served by CITC's program.¹ In addition, the Claimant and his domestic partner have previously received services through CITC. *Id.* Accordingly, based on the plain language of the regulation, 7 AAC 45.276 prohibits the Claimant's *family* from participating in the state's Temporary Assistance Program, and instead requires that he participate in Cook Inlet Tribal Council's "Temporary Assistance for Needy Families" (TANF) program.

This result is in large part due to the fact that the primary purpose of ATAP is to provide cash assistance *to benefit a household's minor children; ATAP eligibility does not exist for an adult independent of his or her children (see 7 AAC 45.195)*. Thus, pursuant to 7 AAC 45.276, the Claimant's *own eligibility* for ATAP, and/or for CITC's Native family assistance program, is *entirely dependent* on the eligibility status of his domestic partner and children. Pursuant to 7 AAC 45.276, the prior participation of the Claimant's *household* in CITC's Native family assistance program, and the fact that the Claimant's domestic partner has not disclaimed affiliation with CITC, in effect binds or ties the Claimant to CITC's program.² The regulation does not give the Division (or this Office) any discretion in the matter whatsoever; 7 AAC 45.276(a)(2) expressly requires that the Claimant's ATAP application be denied under the circumstances of this case.³

The Claimant asserts, however, that state ATAP Regulation 7 AAC 45.276 is never-the-less not valid and not enforceable because it conflicts with state and federal Constitutional prohibitions against racial discrimination, and because it conflicts with federal civil rights legislation. That argument is addressed below.

¹ It is important to remember that, pursuant to 7 AAC 45.276, the Claimant's household's eligibility for CITC's Native family assistance program exists *because of the Claimant's domestic partner's status as an Alaska native*, not because of any status held by the Claimant himself.

² ATAP regulation 7 AAC 45.276(c) allows participation in the ATAP program, notwithstanding eligibility for the Native family assistance program, only when "the caretaker relative has chosen not to claim tribal affiliation, and has not previously received tribal services."

³ ATAP regulation 7 AAC 45.276(a)(2) expressly states that, if an individual is eligible for a Native family assistance program, "the department *will deny any pending application for ATAP for the person.*" [Emphasis added].

II. Does the Office of Hearings and Appeals Have Jurisdiction to Decide the Constitutional and Federal Statutory Civil Rights Arguments Raised By The Claimant?

The Claimant's Constitutional and statutory arguments are, in essence, that by being required to participate in a Native family assistance program based solely on the racial heritage of his wife, he is deprived of the equal protection of the laws and is treated differently based on race.

The Office of Hearings and Appeals, although created as an independent office, is within the State of Alaska Department of Health and Social Services. "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). Accordingly, regardless of how plausible or how implausible the Claimant's arguments might be, it is clear that this Office (the Office of Hearings and Appeals) does not have jurisdiction (i.e. does not have the authority) to decide the Constitutional issues raised by the Claimant. Accordingly, the Claimant's Constitutional arguments are noted for the record, but they cannot be addressed in this decision.

The Claimant's only other argument is that 7 AAC 45.276 violates federal civil rights statute 42 U.S.C.A. § 2000d. However, determination of this argument would require that this Office invalidate a regulation promulgated by the Department (i.e. Health and Social Services) of which it is a part. A hearing officer who derives his authority from an agency does not have the authority to determine that an agency regulation is invalid. *Howard v. Federal Aviation Administration*, 17 F.3d 1213, 1218 (9th Cir. 1994); *Gilbert v. National Transportation Safety Board*, 80 F.3d 364, 366-367 (9th Cir. 1996).

Similarly, state Fair Hearings regulation 7 AAC 49.170, titled "Limits of the Hearing Authority," confines the role of the Office of Hearings and Appeals "to the ascertainment of whether the laws, regulations, and policies [of the State of Alaska Department of Health and Social Services] have been properly applied," and "whether the computation of [any] benefit amount, if in dispute, is in accordance with them." Accordingly, the Claimant's federal statutory civil right argument is noted for the record, but it cannot be addressed in this decision.

CONCLUSIONS OF LAW

1. State regulation 7 AAC 45.276 prohibits the Claimant and his household from participating in the state's Temporary Assistance Program, and instead requires that he participate in Cook Inlet Tribal Council's "Temporary Assistance for Needy Families" (TANF) program.
2. The Office of Hearings and Appeals does not have jurisdiction to decide the federal and state Constitutional issues raised by the Claimant.
3. The Office of Hearings and Appeals does not have jurisdiction to decide the federal statutory civil rights issue raised by the Claimant.
4. Accordingly, the Division was correct when on November 5, 2010 it denied the Claimant's application for Alaska Temporary Assistance Program benefits dated November 1, 2010, because State regulation 7 AAC 45.276 requires that the Claimant instead apply to and receive services from

Cook Inlet Tribal Council's "Temporary Assistance for Needy Families" (TANF) program, due to the fact that the Claimant's domestic partner is a native Alaskan.

DECISION

The Division was correct when on November 5, 2010 it denied the Claimant's application for Alaska Temporary Assistance Program benefits dated November 1, 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 24th day of March, 2011.

(signed)

Jay Durych
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on this 24th day of March 2011 true and correct copies of this document were sent to the Claimant via USPS mail, and to the remainder of the service list by secure / encrypted e-mail, as follows:

Claimant – Certified Mail, Return Receipt Requested
[REDACTED], DPA Hearing Representative
[REDACTED], DPA Hearing Representative
[REDACTED], Policy & Program Development
[REDACTED], Staff Development & Training
[REDACTED], Administrative Assistant II
[REDACTED], Eligibility Technician I

(signed)

By: _____

J. Albert Levitre, Jr.
Law Office Assistant I