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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. 11-FH-101
)
 Claimant.) DPA Case No. [REDACTED]
 _____)

FAIR HEARING DECISION

STATEMENT OF THE CASE

On February 15, 2011 [REDACTED] (Claimant) completed, signed, and submitted an application for Food Stamp benefits to the State of Alaska Division of Public Assistance (DPA or Division) (Exs. 2.0 – 2.9). On February 16, 2011 the Claimant participated in an eligibility interview with a DPA eligibility technician (Ex. 3). During this interview, the DPA Eligibility Technician advised the Claimant that he was not eligible for Food Stamp benefits because he had been convicted of a felony involving illegal drugs. *Id.*

On February 17, 2011 the Division mailed a notice to the Claimant stating that he was disqualified from receiving Food Stamp benefits as a result of his felony drug conviction, and that his application had therefore been denied (Ex. 4). On February 23, 2011 the Claimant requested a fair hearing to contest the Division's denial of his application for Food Stamp benefits (Exs. 5.0, 5.1).

This Office has jurisdiction to decide this case pursuant to 7 AAC 49.010.

The Claimant's hearing was held as scheduled on May 4, 2011 before Hearing Examiner Jay Durych. The Claimant attended the hearing in person, represented himself, and testified on his own behalf. [REDACTED], a Public Assistance Analyst employed by the Division, attended the hearing in person, represented the Division, and testified on its behalf. The parties' testimony was received and all exhibits that were submitted were admitted into evidence. At the end of the hearing the record was closed and the case became ripe for decision.

ISSUE

The Division asserts that the Claimant is disqualified from participation in the Food Stamp program because he has been convicted of a drug-related felony. The Claimant does not dispute

that he was convicted of a crime involving attempted *delivery* of a controlled substance. However, the Claimant notes that, under the applicable federal regulation, a person is disqualified from participation in the Food Stamp Program only if convicted of a crime which has, as an element, the *possession, use, or distribution* of a controlled substance. The Claimant asserts that the crime of attempted *delivery* of a controlled substance does not have, as an element, either the *possession, use, or distribution* of a controlled substance. Accordingly, the issue is:

Does the Claimant's felony conviction for attempted *delivery* of a controlled substance under AS § 11.71.010(a)(2) disqualify the Claimant from participation in the Food Stamp Program?

FINDINGS OF FACT

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

1. In 1998 a criminal case concerning Misconduct Involving a Controlled Substance in the First Degree was filed against the Claimant in Anchorage, Alaska (Case No. [REDACTED] Cr.) (Ex. 7). The charges were based on criminal conduct which allegedly occurred on [REDACTED], 1998. *Id.*
2. On or about September 7, 2001 the Claimant pled no contest to, and was found guilty of, a violation of Alaska Statute Sections 11.31.100 and 11.71.010(a)(2) (Attempted Misconduct Involving a Controlled Substance in the First Degree) in Case No. [REDACTED] Cr. (Exs. 7 – 7.4).
3. On February 15, 2011 the Claimant completed, signed, and submitted an application for Food Stamp benefits to the Division (Exs. 2.0 – 2.9). In response to the question “Have you or anyone in your household been convicted of a drug-related felony for an offense that occurred on or after August 22, 1996?” the Claimant truthfully answered “yes” (Ex. 2.1).
4. On February 16, 2011 the Division conducted an Eligibility Interview with the Claimant (Ex. 3). During this interview, the DPA Eligibility Technician checked a computer interface and confirmed that the Claimant had previously been convicted of a drug-related felony. *Id.*
5. On February 17, 2011 the Division mailed a notice to the Claimant stating that he was disqualified from receiving Food Stamp benefits as a result of his felony drug conviction, and that his application was therefore denied (Ex. 4).
6. On February 23, 2011 the Claimant requested a fair hearing to contest the Division's denial of his application for Food Stamp benefits (Exs. 5, 5.1).
7. On March 15, 2011 the Division mailed a second notice to the Claimant stating that he was disqualified from receiving Food Stamp benefits as a result of his felony drug conviction, and that his application was therefore denied (Ex. 6).

PRINCIPLES OF LAW

I. Burden of Proof and Standard of Proof.

The party seeking a change in the status quo normally bears the burden of proof.¹ In this case the Claimant is attempting to change the status quo or existing state of affairs by obtaining Food Stamp benefits. Accordingly, the Claimant bears the burden of proof in this case.

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.² 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.³

II. The Food Stamp Program – In General.

The Food Stamp Act of 1977 is a federal program. The statutes comprising the Act are codified at 7 U.S.C. §§ 2011 – 2029. The federal regulations implementing the program are promulgated by the United States Department of Agriculture and are found primarily in the Code of Federal Regulations at 7 C.F.R. §§ 271 – 274.

The Food Stamp Program is administered by the states. 7 CFR 271.4(a). The State of Alaska has adopted regulations to implement the Food Stamp Program. Those regulations are found at 7 AAC § 46.010 - 7 AAC § 46.990.

III. The Food Stamp Program – Disqualification of Convicted Felons.

In 1996 the Personal Responsibility and Work Opportunity Reconciliation Act, popularly known as the Welfare Reform Act, was enacted by Congress and signed into law. See Public Law No. 104-193, 110 Stat. 2105 (Aug. 22, 1996); *In re Cervantes*, 219 F.3d 955, 958, fn. 5 (9th Cir. 2000). The Welfare Reform Act disqualified persons convicted of certain drug-related felonies from receiving benefits under the federal Food Stamp program. 21 U.S.C.A. § 862a (a), (d)(2).)

21 U.S.C.A. § 862a (a)(1) provides in relevant part that “[a]n individual convicted (under Federal or State law) of any offense which is classified as a felony . . . and which has as an element the possession, use, or *distribution* of a controlled substance . . . shall not be eligible for-(1) assistance under any State program funded under Part A of title IV of the Social Security Act [42 U.S.C.A. § 601 et seq.]” [emphasis added]. This includes the Food Stamp Program.

¹ *State of Alaska Alcoholic Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985).

² A party in an administrative proceeding can assume that preponderance of the evidence is the applicable standard of proof unless otherwise stated. *Amerada Hess Pipeline Corp. v. Alaska Public Utilities Commission*, 711 P.2d 1170 (Alaska 1986).

³ *Black’s Law Dictionary* at 1064 (West Publishing, 5th Edition, 1979); *see also Robinson v. Municipality of Anchorage*, 69 P.3d 489, 495-496 (Alaska 2003) (“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”).

7 CFR § 273.11(b)(7)(vii) is the implementing regulation for 21 U.S.C.A. § 862a (a)(1). That regulation provides in relevant part that “individuals who are ineligible under § 273.11(m) because of a drug-related felony conviction” may not receive Food Stamp benefits. 7 CFR § 273.11(m) states the Food Stamp disqualification rules applicable to persons convicted of felony drug charges as follows:

(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 Ineligibility under this provision is only limited to convictions based on behavior which occurred after August 22, 1996 [Emphasis added].

Although the states have the discretion to exempt recipients from the drug felony disqualification rule pursuant to 21 U.S.C.A. § 862a(d)1) and 7 CFR § 273.11(m) (quoted above), the State of Alaska has not enacted legislation exempting Alaska state residents from the disqualification of 7 CFR § 273(1)(b)(7)(vii) or limiting the period of ineligibility. A.S. §§ 47.25.975 – 990; 7 AAC § 46.010 *et. seq.*

IV. Relevant Alaska Criminal Statutes.

Alaska Statute (“AS”) § 11.71.010, titled “Misconduct Involving a Controlled Substance in the First Degree,” provides in relevant part as follows:

- (a) Except as authorized in AS 17.30, a person commits the crime of misconduct involving a controlled substance in the first degree if the person
(2) delivers any amount of a schedule IIA or IIIA controlled substance to a person under 19 years of age who is at least three years younger than the person delivering the substance; or
- (c) Misconduct involving a controlled substance in the first degree is an unclassified felony and is punishable as provided in AS 12.55.

Alaska’s criminal statutes define “possess” as “having physical possession or the exercise of dominion or control over property.” AS § 11.81.900(48).

Alaska’s criminal statutes define “distribute” in relevant part as “*to deliver . . . a controlled substance*, whether or not there is any money or other item of value exchanged; it includes sale, gift, or exchange” [Emphasis added]. AS § 11.71.900(8).

Alaska’s criminal statutes define “delivery” as “the actual, constructive, or *attempted transfer* from one person to another of a controlled substance whether or not there is an agency relationship” [emphasis added]. AS § 11.71.900(6).

Alaska Statute (“AS”) § 11.31.100, titled “Attempt,” provides in relevant part as follows:

- (a) A person is guilty of an attempt to commit a crime if, with intent to commit a crime, the person engages in conduct which constitutes a substantial step toward the commission of that crime.

ANALYSIS

I. Introduction; Definition of Issue.

Initially, it should be noted that, at hearing, the parties agreed that there are no disputed issues of material fact to be decided by the hearing authority in this case. Thus, in this case it is not necessary for the hearing authority to determine the credibility of any witnesses or to weigh competing evidence.

The parties agree that the sole issue for determination in this case is the purely legal issue of whether the Claimant’s conviction for *attempted delivery* of a controlled substance under AS § 11.71.010(a)(2) is within the type of drug-related felonies, defined in 7 CFR § 273.11(m), for which a person is disqualified from the Food Stamp Program. More particularly, the precise issue for determination is whether the felony crime of *attempted delivery* of a controlled substance under AS § 11.71.010(a)(2) is equivalent to “the possession, use, or distribution of a controlled substance” within the meaning of federal Food Stamp regulation 7 CFR § 273.11(m).

II. Does the “Attempted Delivery” of a Controlled Substance Have, as an Element, the “Possession,” “Use,” or “Distribution” of a Controlled Substance?

The Claimant was convicted of *attempted delivery* of a controlled substance under AS § 11.71.010(a)(2). Does attempted delivery equate to either possession, use, or distribution?

Research indicates that neither the federal Food Stamp statutes, nor the federal Food Stamp regulations, define the terms “possession,” “use,” or “distribution” for purposes of 7 CFR § 273.11(m). Accordingly, in order to determine whether “attempted delivery” has either “possession,” “use,” or “distribution” as an element, it is appropriate to examine Alaska’s criminal statutes to determine whether those terms are defined under state law.

The Alaska criminal statutes do not define the term “use.” Although the Alaska criminal statutes do define the term “possess,” that definition does not assist in resolving the issue in this case.⁴

Alaska criminal statute AS § 11.71.900(8) defines “distribute” in relevant part as “to *deliver* . . . a controlled substance, whether or not there is any money or other item of value exchanged; it includes sale, gift, or exchange” Thus, under the Alaska criminal statutes, the *distribution* of a controlled substance is equivalent to the *delivery* of a controlled substance. Accordingly, as a matter of logic, the converse is also true: the *delivery* of a controlled substance is equivalent to the *distribution* of a controlled substance.

⁴ AS § 11.81.900(48) defines “possess” as “having physical possession or the exercise of dominion or control over property.”

Similarly, Alaska criminal statute AS § 11.71.900(6) defines “delivery” as including “the actual, constructive, or *attempted transfer*” of a controlled substance from one person to another. The Alaska criminal statutes do not define the term “transfer.” However, Roget’s II New Thesaurus (3rd Edition 2003) defines “transfer” at page 1035 as “the act of delivering or the condition of being delivered: delivery”

In summary, based on the foregoing, the “transfer,” “delivery,” and “distribution” of a controlled substance are essentially the same. Accordingly, under Alaska law, the crime of which the Claimant was convicted – (attempted *delivery* of a controlled substance under AS § 11.71.010(a)(2)) - has as an element, or is essentially the same as, the *distribution* of a controlled substance under 7 CFR § 273.11(m).

Because the crime of which the Claimant was convicted – (attempted *delivery* of a controlled substance under AS § 11.71.010(a)(2)) - has as an element the *distribution* of a controlled substance within the meaning of 7 CFR § 273.11(m), the Claimant is disqualified from participation in the Food Stamp program pursuant to 21 U.S.C.A. § 862a (a)(1) and 7 CFR § 273.(1)(b)(7)(vii).

The Division was therefore correct when, on February 17, 2011, it mailed a notice to the Claimant stating that he was disqualified from receiving Food Stamp benefits as a result of his felony drug conviction, and that his application had been denied.

CONCLUSIONS OF LAW

1. Pursuant to Alaska criminal law statute AS § 11.71.900(8), the “*distribution*” of a controlled substance is defined in relevant part as the “*delivery* of a controlled substance. Consequently, under Alaska law, the attempted *delivery* of a controlled substance under AS § 11.71.010(a)(2) necessarily has as an element, or is essentially the same as, the *distribution* of a controlled substance under 7 CFR § 273.11(m).

2. Because the Claimant was convicted of an offense which is classified as a felony, and which has as an element the distribution of a controlled substance, the Claimant is disqualified from, and not eligible for participation in, the Food Stamp Program, pursuant to 21 U.S.C.A. § 862a (a)(1) and 7 CFR § 273.(1)(b)(7)(vii).

3. Accordingly, the Division was correct when, on February 17, 2011, it mailed a notice to the Claimant stating that he was disqualified from receiving Food Stamp benefits as a result of his felony drug conviction, and that his application for Food Stamp benefits dated February 15, 2011 had therefore been denied.

DECISION

The Division was correct when, on February 17, 2011, it denied the Claimant’s application for Food Stamp benefits dated February 15, 2011.

