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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-307
)
 Claimant.) DPA Case No. [REDACTED]
)
 _____)

FAIR HEARING DECISION

STATEMENT OF THE CASE

On August 12, 2011 [REDACTED] (Claimant) submitted an application for Food Stamp Program¹ benefits to the State of Alaska Division of Public Assistance (DPA or Division) (Exs. 2.0 – 2.7). On August 12, 2011 the Division conducted a face-to-face eligibility interview with the Claimant (Ex. 3.0). During or shortly following this interview, a DPA Eligibility Technician checked a computer interface and discovered that the Claimant had previously been convicted of a felony involving illegal drugs. *Id.*

On August 16, 2011 the Division mailed a notice to the Claimant stating that his Food Stamp application received on August 12, 2011 had been denied as a result of his felony drug conviction (Ex. 4). On August 25, 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 September 22, 2011 before Hearing Examiner Jay Durych. The Claimant participated in the hearing by telephone, 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.

¹ In 2008 Congress amended the Food Stamp Act, renaming the Food Stamp Program as the Supplemental Nutrition Assistance Program ("SNAP"). *See* Food, Conservation, and Energy Act of 2008, Public Law No. 110-246 Section 4001, 122 Statutes at Large 1651, 1853. However, at this time the program is still commonly referred to as the "Food Stamp Program."

At the conclusion of the hearing it was agreed that the record would be held open for approximately thirty days (1) to allow the Claimant to submit any additional court records he wished to submit, and (2) to allow DPA to file a response and/or any additional court records DPA wished to submit. Additional court records, marked as Exhibits 6.0 – 6.5, were received from the Division on September 27, 2011. No additional records were received from the Claimant. On October 21, 2011 the record was closed and the case became ripe for decision.

ISSUE

Was the Division correct when on August 16, 2011 it notified the Claimant that his application for Food Stamp benefits, received on August 12, 2011, was denied based on the assertion that the Claimant was previously convicted of a drug-related felony?

FINDINGS OF FACT

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

1. On [REDACTED], 2005 a judgment of conviction was entered against the Claimant by the [REDACTED] Superior Court, [REDACTED] Judicial District, State of Alaska (Ex. 6.0). One of the charges of which the Claimant was convicted was the charge of Misconduct Involving a Controlled Substance in the Fourth Degree (A.S. 11.71.040(a)(3)(a)) (Ex. 6.0). The conviction was based on criminal conduct which occurred on August 13, 2004. *Id.*
2. On April 10, 2011 the Claimant completed and signed an application for Food Stamp benefits (Exs. 3.3 – 3.4). 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 answered “yes” (Ex. 3.4).
3. The Division received the Claimant’s application on April 19, 2011 (Ex. 3.3). the Division denied that application on or about April 20, 2011 on the basis of the Claimant’s drug-related felony conviction (Ex. 3.1; DPA Hearing Representative’s testimony).
4. On August 12, 2011 the Claimant completed, signed, and submitted another application for Food Stamp benefits (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 answered “no” (Ex. 2.1).
5. On August 15, 2011 the Division conducted a face-to-face eligibility interview with the Claimant (Ex. 3.0). During this interview the DPA Eligibility Technician checked a computer interface and discovered that the Claimant had previously been convicted of a drug-related felony. *Id.*
6. On August 16, 2011 the Division mailed a notice to the Claimant denying his August 12, 2011 application for Food Stamp benefits (Ex. 4). The notice stated that the Claimant’s application had been denied as a result of the Claimant’s drug-related felony conviction (Ex. 4).

7. On August 25, 2011 the Claimant requested a hearing to contest the Division’s denial of his August 12, 2011 application for Food Stamp benefits (Exs. 5, 5.1).

8. At the hearing of September 22, 2011 the Claimant testified in relevant part as follows:

a. He has a felony conviction. However, he did not have any illegal *drugs* in his possession. Rather, a woman who was a passenger in his vehicle at the time of the police stop had drug *paraphernalia* in her possession.

b. Accordingly, he believes that the conviction is not technically a drug-related felony for purposes of the Food Stamp Program.

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.² 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.³ 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.⁴

II. Relevant Alaska Criminal Law.

Alaska Statute (A.S.) § 11.71.040, titled “Misconduct Involving a Controlled Substance in the Fourth Degree,” provides in relevant part as follows:

- (a) Except as authorized in [inapplicable], a person commits the crime of misconduct involving a controlled substance in the fourth degree if the person . . .
- (3) possesses . . . (A) any amount of a Schedule IA or IIA controlled substance . . .

* * * * *

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

³ 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).

⁴ *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”).

(d) Misconduct involving a controlled substance in the fourth degree is a Class C felony.

The portion of the statute quoted above, subsection (a)(3)(A), is the specific offense of which the Claimant was convicted (Ex. 6.0).

III. 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.

IV. The Food Stamp Program – Disqualification of Persons Convicted of Drug-Related Felonies.

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.].” This includes the Food Stamp Program.

7 CFR § 273.1(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....

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 either exempting Alaska state residents from the disqualification of 7 CFR § 273(1)(b)(7)(vii) or limiting the period of program ineligibility. *See* A.S. §§ 47.25.975 – 990; 7 AAC § 46.010 *et. seq.*

ANALYSIS

The Claimant does not dispute that he was convicted of a felony. He asserts, however, that in his particular case, the only items involved were drug *paraphernalia* and not illegal *drugs* per se. Accordingly, the Claimant asserts that his conviction is not a drug-related felony for purposes of the Food Stamp Program.

The Claimant's argument might have merit if the statute which he was convicted of violating, A.S. § 11.71.040(a)(3)(A), criminalized the possession of drug paraphernalia *instead of, or in addition to*, the possession of the drugs themselves. However, it does not. AS § 11.71.040(a) provides in relevant part that, “[e]xcept as authorized in [inapplicable], a person commits the crime of misconduct involving a controlled substance in the fourth degree if the person . . . (3) possesses . . . (A) any amount of a Schedule IA or IIA *controlled substance*” Thus, the statute (AS § 11.71.040(a)(3)(A)) criminalizes only certain controlled substances, *not* drug paraphernalia. Accordingly, the Claimant's conviction for violation of AS § 11.71.040(a)(3)(A) is necessarily *a conviction involving controlled substances*, not drug paraphernalia.

The crime which the Claimant was found guilty of, (i.e. a violation of Alaska Statute Section 11.71.040(a)(3)(A) - Misconduct Involving a Controlled Substance in the Fourth Degree) thus had, as an element, “the possession, use, or distribution of a controlled substance” within the meaning of 7 CFR § 273.11(m). *See* Principles of Law, above. The Claimant's conviction therefore constituted a “drug-related felony conviction” within the meaning of 21 U.S.C.A. § 862a(a)(1) and 7 CFR § 273.1(b)(7)(vii). Accordingly, the Division was correct to conclude that the Claimant's 2005 conviction was a felony drug conviction for purposes of the Food Stamp Program.

CONCLUSIONS OF LAW

1. The Claimant failed to carry his burden and did not prove, by a preponderance of the evidence, that the crime of which he was found guilty, (i.e. a violation of Alaska Statute Section 11.71.040(a)(3)(A) - Misconduct Involving a Controlled Substance in the Fourth Degree) did not have, as an element, “the possession, use, or distribution of a controlled substance” within the meaning of 7 CFR 273.11(m).
2. The Claimant's violation of Alaska Statute Section 11.71.040(a)(3)(A), (Misconduct Involving a Controlled Substance in the Fourth Degree), therefore constituted a “drug-related felony conviction” within the meaning of 21 U.S.C.A. § 862a(a)(1) and 7 CFR 273.1(b)(7)(vii).

DECISION

The Division was correct when, on August 16, 2011, it notified the Claimant that his application for Food Stamp benefits received on August 12, 2011 was denied because the Claimant had previously been convicted of a drug-related felony.

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. An appeal request must be sent within fifteen (15) days from the date of receipt of this decision. Filing an appeal with the Director could result in the reversal of this decision. To appeal, the Claimant must send a written request directly to:

Director of the Division of Public Assistance
Department of Health and Social Services
P.O. Box 110640
Juneau, Alaska 99811-0640

DATED this 17th day of November, 2011.

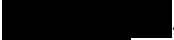
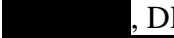
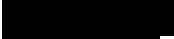
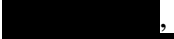

(signed)

Jay Durych
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on November 17, 2011 true and correct copies of the foregoing 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

, DPA Hearing Representative
, DPA Hearing Representative
, Policy & Program Development
, Staff Development & Training
, Administrative Assistant II

(signed)

By: _____
J. Albert Levitre, Jr.
Law Office Assistant I