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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-359
)
 Claimant.) Division Case No. [REDACTED]
)
 _____)

FAIR HEARING DECISION

STATEMENT OF THE CASE

Ms. [REDACTED], (Claimant) was a recipient of Food Stamps. (Ex. 1) On May 13, 2011, Claimant reported an anticipated change in her household composition to the Division of Public Assistance (Division). (Exs. 3-3.2) When processing this change, the Division discovered it had incorrectly issued more Food Stamps to Claimant's household because it had omitted the income of another household member when calculating the household's benefit amount. (Ex. 4.2; Division's Hearing Representative's testimony) The Division sought repayment of the alleged overpaid Food Stamps from Claimant. (Exs. 6.0-6.11)

On September 21, 2011, Claimant requested a Fair Hearing. (Exs. 7.0-7.1)

The Office of Hearings and Appeals (Office) has jurisdiction to decide this case by authority of 7 AAC 49.010 and 7 C.F.R. § 273.15.

PERTINENT PROCEDURAL FACTS

On September 21, 2011, Claimant requested a Fair Hearing concerning a) the delay in adding the household member; and b) the inclusion of another household member's income when determining household benefits. (Exs. 7.0-7.1) At the hearing, Claimant disputed being required to repay alleged overpaid Food Stamps benefits. (Claimant's testimony)

The Fair Hearing was held on October 27, 2011 and December 7, 2011. Claimant participated in person, represented herself and testified on her own behalf. Claimant was assisted by her husband, Mr. [REDACTED], who participated in person and testified on Claimant's behalf at the October 27, 2011

hearing. Ms. [REDACTED], Public Assistance Analyst represented the Division of Public Assistance and testified in person for the Division.

At the October 27, 2011 hearing, Claimant raised two issues. The first issue was that, on May 13, 2011, Claimant reported that in June 2011 her son would become a member of her household, but the Division delayed in adding him to the household composition until July, 2011. The second issue was that Claimant disputed the Division's inclusion of her 18 year old daughter's income, when the Division calculated the Food Stamp benefit for Claimant's household, which caused her household to receive excess Food Stamps that the Division wanted her to repay.

At the October 27, 2011 hearing, Claimant provided evidence in the form of a notice from the Division, dated April 12, 2011, informing Claimant her son would be added to her household beginning June 1, 2011 through August 2011. (Ex. A) This notice from the Division proved it had processed a copy of her court order on April 12, 2011. The Fair Hearing was continued for Claimant's benefit to enable the Division's Hearing Representative to confirm the notice and determine its effect on the remaining issue. The Hearing was continued to November 3, 2011, contingent on the Division's response.

On October 28, 2011, the Division's Hearing Representative gave written notice a) conceding the Division added Claimant's son to the household effective June 2011; b) conceding the Division would not seek repayment of the excess Food Stamp benefits issued as a result of omitting Claimant's daughter's income from the calculation of benefits; and c) issuing a supplementary Food Stamp benefit to the household. (Ex. 27) This written notice explained that the supplement offset ("voided") the alleged overpayment and implied that was why the Division was not persisting in its claim to recover the overpaid Food Stamp benefits.

The case was deemed resolved because, in order for the supplement to offset the repayment amount, the parties had to agree that the Division was correct to obtain repayment from Claimant. This necessarily meant the parties agreed that Claimant's daughter's income properly was included in the calculation of Food Stamp benefits. Otherwise stated, if the Division abandoned its claim for repayment of excess Food Stamps, there would be no offset and the Division would be required to pay additional Food Stamp benefits to the household. On November 1, 2011, this Office issued an order dismissing the case based on the Division's concession.

On November 22, 2011, Claimant expressed her concern about her underlying question of whether the Division was correct to include her employed daughter's income when calculating the Food Stamp benefit for the household. The Division wrote this Office stating that it intended its October 28, 2011 concession to resolve the repayment issue but not the underlying question concerning whether the Division properly could include Claimant's daughter's income when calculating Food Stamp benefits.

On November 29, 2011, the Hearing Authority re-opened this case and set a status hearing for December 7, 2011. Claimant appeared telephonically at the December 7, 2011 hearing as did the Division's Hearing Representative. The parties requested a decision to address whether the Division was correct to include Claimant's daughter's income when calculating Food Stamp benefits for the household.

ISSUE AND CONCLUSION

Claimant asserts the Division of Public Assistance was incorrect to include her eighteen year old daughter's income in the calculation of the household's Food Stamp benefit.

The Division's Hearing Representative asserted that Claimant's daughter must be included in its determination of the household's income and as a member of the household because the Food Stamp laws required her to be included.

After hearing, analysis, and review of the Division's action, the Division has been found to have correctly included Claimant's daughter's income to calculate the household's Food Stamp benefit.

FACTS ON WHICH THE DECISION IS BASED

This decision is supported by the following facts that have been proved by a preponderance of the evidence and were not disputed by the parties:

1. Claimant's daughter (daughter) became 18 years old on March 8, 2011. (Ex. 1) The daughter lives with Claimant as a member of Claimant's household. (Claimant's testimony) Claimant's daughter attends a post-secondary school (post-high school) full-time and works a minimum of 20 hours per week. (Claimant's testimony)
2. On March 25, 2011, Claimant's daughter began working at least 20 hours per week. (Ex. 2) The Division learned of her employment on May 2, 2011. (Ex. 2) By May 26, 2011, the daughter had graduated from high school. (Ex. 4.0)
3. On May 26, 2011, the Division was processing a change reported by Claimant and discovered Claimant's daughter's income had not been included in calculating the household's Food Stamp benefits. (Ex. 4.0) On June 24, 2011, the Division completed processing Claimant's reported change and also corrected its error of not including the daughter's income when calculating the household's Food Stamps. (Ex. 4.2)
4. On September 12, 2011, the Division wrote Claimant to inform her of its failure to include her daughter's income when calculating the household's Food Stamp amount for June 2011. (Exs. 6.0-6.11) The Division sought repayment of \$158 of overpaid Food Stamps for the month of June 2011 which had occurred because of its inadvertent error. (Exs. 6.5, 6.6, 6.10, 6.11)
5. The Division's September 12, 2011 notice was accompanied by supporting documents, in particular one titled: "Requirements for Eligibility". (Ex. 6.3) Under the paragraph "Income Test" is stated:

The Food Stamp Program does not count scholarships, grants and loans used for tuition and fees, reimbursements, Native dividends, heating assistance, earnings of children age 18 and younger who are in school, and loans.

Countable income includes wages, (Emphasis added.)

MAIN LEGAL AUTHORITY SUPPORTING THE DECISION

I. Food Stamp Program

The Food Stamp Program 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 if individuals qualify for Food Stamp benefits. *See*, 7 C.F.R. § 271 – 273.

A. Administration of The Food Stamp Program

Congress created the Food Stamp Program: “[t]o alleviate such hunger and malnutrition, a food stamp program is herein authorized which will permit low-income households to obtain a more nutritious diet....” 7 C.F.R. § 271.1(a) (quoting Section 2 of the Food Stamp Act of 1977 in part). The regulation establishing the purpose and scope of the Food Stamp Program, states in part, the Program is to “promote the general welfare and safeguard the health and well being of the nation’s population by raising the levels of nutrition among low-income households.” 7 C.F.R. § 271.1(a).

The administration of the Food Stamp Program (7 USC §§ 2011-2029) has been delegated by Congress to the states. 7 C.F.R. § 271.4. In Alaska, the Department of Health and Social Services administers the Food Stamp Program under regulations 7 AAC 46.010 - 7 AAC 46.990. These regulations incorporate and adopt the federal regulations in 7 C.F.R. § 271 – 274. 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).

B. Household Concept

A Household is composed of an individual living alone, an individual living with others but customarily purchasing food and preparing meals for home consumption separate and apart from others, or a group of individuals who live together and customarily purchase food and prepare meals together for home consumption. 7 C.F.R. § 273.1(a).

A person under 22 years of age who is living with his or her parents must be considered a member of the household and must be considered as customarily purchasing food and preparing meals with others even if they do not do so. 7 C.F.R. § 273.1(b)(1)(ii).

C. Calculation of Household Income

Food Stamp eligibility and benefits are based on the income available to the household. 7 C.F.R. § 273.9(a). Household income is “all income from whatever source....” 7 C.F.R. § 273.9(b). Earned income includes all wages and salaries. 7 C.F.R. § 273.9(b)(1)(i).

The earned income of any household member who is under 18 years old and who is a student of an elementary school or secondary school is excluded. 7 C.F.R. § 273.9(c)(7). The State of Alaska Division of Public Assistance has interpreted this Food Stamp regulation. (*See*

<http://dpaweb.hss.state.ak.us/manuals/fs/fsp.htm>, accessed December 20, 2011.) The Division of Public Assistance Food Stamp Manual (Manual) Section 602-3 D § 17 (Ex. 11) provides:

17. Earnings of Elementary and Secondary Students Under Age 18

Earned income of a student is exempt when an individual:

- Is under age 18; and,
- Lives with his or her parents or is under parental control of an adult household member; and,
- Is currently enrolled at least half-time in elementary or secondary school.
This exclusion continues during semester breaks and summer vacation.

This income becomes countable effective the month following the month the student becomes 18 years of age or is no longer enrolled in elementary or secondary school and does not plan to resume enrollment, whichever occurs first.

The Division of Public Assistance Food Stamp Manual (Manual) Section 600-2 Definitions provides:

Institution of Higher Education: Any institution of post-secondary education that normally requires a high school diploma or equivalency certificate for enrollment, including but not limited to colleges, universities, and vocational or technical schools. Normally requires can mean that a person is required to have a diploma or equivalency certificate, but persons not having either may be enrolled by passing an entrance examination.

In some Alaska community colleges, trade schools, and vocational-technical schools, many of the various curricula do not require a diploma or the equivalent for enrollment. For example, secretarial schools will offer courses in typing, stenography, etc. and other schools will train workers to obtain licenses as beauty technicians, bartenders, auto mechanics, etc. Those enrolled in curricula not requiring a high school diploma would not be considered enrolled in an institution of higher education.

However, certain curricula offered by these schools may require a diploma or equivalent for enrollment. These can include curricula such as licensed practical nursing and aircraft mechanics. Where the curriculum in such schools requires a diploma or equivalent, the students enrolled for completion of the required courses in that curriculum would be considered as enrolled in an institution of higher education.

Therefore, for schools offering varied curricula, the determination of whether it is an institution of higher education should be made based on the normal enrollment requirements of each curriculum.

Institution of Post-secondary Education: Any public or private educational institution which normally:

1. Requires a high school diploma, or equivalency, for enrollment; or,
2. Provides an educational program beyond secondary education and is so recognized by the Department of Education Post-Secondary Education Commission; or,
3. Provides a program of training to prepare students for gainful employment.

D. Student Eligibility for Food Stamps

Food Stamp regulation 7 C.F.R. § 273.5(a) provides that an individual who is enrolled at least one-half time in an institution of higher education is a student not eligible to participate in the Food Stamp Program, unless that person qualifies for one of the exemptions in subparagraph (b) of the regulation.

Subparagraph (b) of Food Stamp regulation 7 C.F.R. § 273.5 sets out several exemptions by which such an individual may receive benefits. To be eligible for Food Stamps, a student must meet at least one of the criteria constituting an exemption from non-eligibility. The exemption applicable to this case is:

- (5) Be employed for a minimum of 20 hours per week and be paid for such employment....

ANALYSIS OF THE ISSUE

I. Burden of Proof

“Ordinarily, the party seeking a change in the status quo has the burden of proof.” *State, Alcoholic Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985). Because the parties have no dispute concerning any facts relevant to the issue, resolution of the issue in dispute is purely a matter of law. There being no disputed applicable fact, neither party has the burden of proving facts.

II. Undisputed facts

The parties agreed that Claimant’s daughter became 18 years old on March 9, 2011, graduated from high school, is attending post-secondary school full time, and earns income from working more than 20 hours per week while living with Claimant.

III. Discussion of the Issues

1. Was the Division correct to include Claimant’s 18 year old daughter as a member of the household?

It is undisputed that Claimant’s daughter is under 22 years of age and living in her mother’s household. The Food Stamp regulations clearly require a child under the age of 22 years who is living with a parent to be included in the household. 7 C.F.R. § 273.1(b)(1)(ii). Therefore, the Division was correct to include Claimant’s daughter as a member of Claimant’s household.

2. Was the Division correct to include Claimant's daughter's earned income as part of the household's income?

Claimant's daughter is over 18 years of age and earning income by working more than 20 hours per week. The daughter has graduated from high school and is attending a post-secondary school.

The Food Stamp regulations require that once a child is 18 or older and has earned income, the income must be included in the total income attributed to the household, if the child is living in the household and working at least 20 hours per week while attending an institution of higher education at least half-time. 7 C.F.R. § 273.9(b)(1)(i), (c)(7) and 7 C.F.R. § 273.5(b)(5). The Division of Public Assistance Manual Section 600-2 defines "institution of higher education" to include (generally) any learning facility which is post-secondary school or post-high school.

As of March 2011, Claimant's daughter became 18 years old and hence her income was no longer exempt from being included from the Food Stamp Program. 7 C.F.R. § 273.9(c)(7) This is true even though Claimant's daughter did not graduate from high school until later, by May 26, 2011, because the exemption applies only to persons less than 18 years old and who are still in high school. The fact that Claimant's daughter is attending post-secondary school full time does not make her income exempt from inclusion in the calculation of household Food Stamp benefits. Therefore, the law requires the Division to include Claimant's daughter's income when determining Food Stamp eligibility and benefits for Claimant's household. The Division was correct to include the daughter's income.

During the hearing, Claimant argued that the Division's September 12, 2011 notice included a page titled "Requirements for Eligibility," which included a section subtitled "Income Test" that meant her daughter's income should not be counted.¹ (Ex. 6.3) Claimant asserted this notification meant her daughter's income should not be counted because it specifically states²:

The Food Stamp Program does not count scholarships, grants and loans used for tuition and fees, reimbursements, Native dividends, heating assistance, earnings of children age 18 and younger who are in school, and loans. (Emphasis added.)

The wording of this sentence incorrectly states the Food Stamp regulations. To any reader, the plain meaning of the underlined words is that the income of children who are 18 and younger and who are in any school, is not counted for purposes of eligibility for Food stamps. This wording includes the group of persons who are 18 years old, but not yet 19 years old. This is incorrect. Also, the use of the word school is overbroad so as to be misleadingly vague and therefore incorrect.

The Food Stamp regulations state the earned income of any household member who is under 18 years old and who is a student of an elementary school or secondary school is excluded. 7 C.F.R. § 273.9(c)(7). The Division of Public Assistance Manual clearly states that the income of persons under

¹ Claimant understandably questioned the application of this wording to her daughter's circumstances. However, Claimant did not allege reliance on the incorrect wording of the notice nor could she, because the Division provided the wording as part of a repayment request. Therefore, estoppel is not at issue in this case.

² Finding of Fact 5.

the age of 18 who live with a parent and attend elementary or secondary school is exempt. Section 602-3 D Section 17. The sentence on the page "Requirements for Eligibility" (Ex. 6.3) incorrectly states the Food Stamp law.

The federal Food Stamp regulations are clear. Neither the Division nor the Office of Hearings and Appeals may choose not to follow the federal regulations. "Administrative agencies are bound by their regulations, just as the public is bound by them." *Burke v. Houston NANA, L.L.C.*, 222 P.3d 851,868-869 (Alaska 2010). The regulations cannot be changed by incorrect wording on an attachment to a packet of information notifying persons that the Division is seeking recovery of an alleged excess of Food Stamp benefits. Claimant cannot rely on this incorrect wording to prevent inclusion of her daughter's income when calculating the household's Food Stamp benefit.

CONCLUSIONS OF LAW

1. Claimant's daughter is under 22 years old and living at home with her parent. Therefore, the Division of Public Assistance properly included Claimant's daughter as a member of the household. 7 C.F.R. 273.1(b)(ii).
2. Claimant's daughter is over 18 years old, living at the home of her parent while a full time student enrolled at a post-secondary school and employed more than 20 hours per week. Therefore, Claimant's daughter's income must be included as household income for purposes of determining eligibility for Food Stamps and the monthly benefit amount. 7 C.F.R. § 273.9(b)(1)(i), (c)(7).

DECISION

The Division was correct to include Claimant's daughter's income for purposes of determining eligibility for Food Stamps and of calculating the household's benefit amount.

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. 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. To appeal, 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

Dated this December 21, 2011.

Claire Steffens
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on December 21, 2011 true and correct copies of the foregoing were sent to:
Claimant, Certified Mail, Return Receipt Requested.

and to other listed persons (via secure, encrypted e-mail):

[REDACTED], Hearing Representative
[REDACTED], Hearing Representative
[REDACTED], Chief, Policy & Program Dev.
[REDACTED], Administrative Assistant II
[REDACTED], Staff Development & Training

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