

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON
REFERRAL BY THE COMMISSIONER OF HEALTH AND SOCIAL SERVICES**

In the Matter of)	
)	OAH No. 12-0460-ADQ
S F. G)	Agency No.
_____)	FCU No.

DECISION AND ORDER

I. Introduction

S G applied for Food Stamps benefits, and his application was approved. The Division of Public Assistance (division) subsequently determined that, in its view, he had provided a false answer to one of the questions on his application. The division sought to have Mr. G disqualified from the program based on this alleged intentional program violation.

A hearing was held on October 30, 2012. Mr. G did not appear for that hearing. An Order to Show Cause was issued. Mr. G responded to that order, but as discussed below, he did not establish good cause for having missed the hearing. Based on the evidence in the record, Mr. G did commit an intentional program violation.

II. Facts

On June 25, 2012, Mr. G applied to receive food stamps and other public assistance benefits.¹ One question on the application was

5. Is any adult in your household fleeing from prosecution, custody, confinement for a felony or class A misdemeanor from any state?

Mr. G answered that question “no.”²

In fact, a bench warrant had been issued for Mr. G’s arrest on April 23, 2012.³ He was subject to arrest because he was in violation of his probation and a petition to revoke that probation had been filed.⁴ Mr. G was on probation for the offense of Assault 3.⁵ At the

¹ Exhibit 7.
² Exhibit 7, page 2
³ Exhibit 11, page 1.
⁴ *Id.*
⁵ Assault in the third degree is a class C felony. AS 11.41.220(e).

time the petition to revoke was filed, Mr. G was in violation of several conditions of his probation.⁶

This was the second time Mr. G was in violation of his probation. On July 9, 2011, he was found to be in violation and was required to serve 60 days of his previously suspended incarceration time.⁷

III. Discussion

A. Order to Show Cause for Missed Hearing

Mr. G did not attend the hearing scheduled for October 30, 2012. An order to show cause was issued that gave him ten days to contact the Office of Administrative Hearings (OAH) to explain “in writing why he was not available for the hearing.” He was given OAH’s phone number to contact if he needed more information about how to provide this explanation. The following letter was received in response to the order:

To Whom it May Concern, On behalf of S F. G. He didn’t make that appointment because he is in jail and his mail comes through my address so he via a phone call ask me H D to let you know via U.S. Mail where he is.^[8]

The division raises several objections to re-opening the hearing. First, the division states that the letter does not actually request a new hearing. The order to show cause, however, specifically said that if good cause was shown, a new hearing would be held. Thus, there was no need to specifically request a hearing.

Next, the division notes that Ms. D had not been appointed as Mr. G’s representative.

Until such time that appointment of a representative is made, confidentiality rules prohibit disclosure of any information related to G’s public assistance case to any third party.^[9]

The confidentiality provisions exist for the protection of the recipient, and if Mr. G wishes to disclose information about this case to others, he has the right to do so. While the confidentiality rules would constrain how the division could respond to this information, they do not prevent the division or OAH from receiving the letter. Having someone else contact OAH on his behalf may not be the best way to establish good cause for not appearing at the hearing, but it is an acceptable method.

⁶ Exhibit 11, pages 3 – 5. The affidavit filed with the petition to revoke probation is hearsay, but is admissible pursuant to 2 AAC 64.290(a)(1) (admissible evidence includes evidence that a reasonable person would rely on in the conduct of serious affairs).

⁷ Exhibit 11, page 3.

⁸ Letter received by OAH on November 9, 2012.

⁹ Opposition to Finding of Good Cause.

Although he has properly responded to the order to show cause, Mr. G did not establish good cause. Being in jail provides part of the explanation, but Mr. G has not explained why he didn't call to reschedule the hearing or request that he participate by telephone from jail.¹⁰ Nor has he explained why neither of these was possible. He was able to call Ms. D, so he most likely could have called OAH. Mr. G had the burden to establish good cause for not appearing at his hearing, and he has not met that burden.

B. Intentional Program Violation

The division has alleged that Mr. G has committed an intentional program violation. In order to prevail, the division must prove this violation by clear and convincing evidence.¹¹ For Food Stamp recipients, an intentional program violation is defined to include having intentionally made “a false or misleading statement, or misrepresented, concealed or withheld facts[.]”¹² A person who is found to have committed an intentional program violation is disqualified from receiving food stamps for 12 months for a first time violation,¹³ and must repay any benefits wrongfully received.¹⁴

The division argued that Mr. G has misrepresented, concealed, or withheld facts when he answered “no” to question 5.¹⁵

C. Fleeing Custody or Confinement for a Felony

In determining whether Mr. G has committed an intentional program violation, the first question is whether someone fleeing or avoiding a probation revocation hearing is fleeing prosecution, custody, or confinement for a felony or class A misdemeanor. Probation revocation hearings are not criminal matters, so Mr. G was not fleeing or avoiding prosecution for a felony or misdemeanor. Probation revocation hearings can, however, result in custody or confinement. The custody or confinement is for all or a portion of the original sentence for which probation was granted. In this case, the original sentence was for a class C felony. To the extent Mr. G was attempting to avoid his probation revocation hearing, he can be said to have been fleeing from custody or confinement.

¹⁰ OAH regularly holds hearings where one participant appears by telephone from a jail or prison.

¹¹ 7 C.F.R. § 273.16(e)(6).

¹² 7 C.F.R. 273.16(c)(1).

¹³ 7 C.F.R. 273.16(b)(1).

¹⁴ 7 C.F.R. 273.16(b)(12).

¹⁵ In its post hearing brief, the division also argued that Mr. G was not eligible to receive food stamps because he was in violation of his probation. For purposes of this hearing, however, the question is whether he made a false or misleading statement. The application did not ask whether he was complying with the conditions of his probation, so he did not commit an intentional program violation by failing to disclose that information.

Whether Mr. G was attempting to avoid his revocation hearing depends in part on whether he was aware of the arrest warrant or petition to revoke probation. Mr. G only made a false or misleading statement, or misrepresented facts in his answer to question 5, if he knew of the warrant or petition. In the context of “intentional misrepresentation” law, a person can be held to have known a statement was false or misleading if

1. the defendant knew or believed the matter was not as [he][she] represented;
2. the defendant did not have the confidence in the accuracy of the statement that [he][she] stated or implied; or
3. the defendant knew [he][she] did not have the basis for the statement that [he][she] stated or implied.^{16]}

There is no evidence in this matter to suggest that Mr. G had actual knowledge of the petition or arrest warrant. He did, however, know that he was not complying with his conditions of probation, and had been out of compliance for an extended period of time.¹⁷ He also knew that when he had violated probation in the past, his probation was revoked and he had to serve additional time in prison. The division has shown that it is highly probable that Mr. G could not state with any degree of confidence that he was not fleeing from custody or confinement for his probation violations.¹⁸ His statement was misleading and a misrepresentation, and constitutes an intentional program violation.

IV. Conclusion and Order

Mr. G has committed a first time Intentional Program Violation of the Food Stamp program. He is therefore disqualified from receiving Food Stamp benefits for a 12 month period, and required to reimburse the division for benefits that were overpaid as a result of the intentional program violation.¹⁹ The Food Stamp disqualification period shall begin February 1, 2013.²⁰ This disqualification applies only to Mr. G, and not to any other individuals who may be

¹⁶ Alaska Civil Pattern Jury Instruction 17.02.

¹⁷ He knew that he was not meeting with his probation officer, and he knew he had not enrolled in the required substance abuse class. *See* Exhibit 11, pages 4 and 5 (petition to revoke probation).

¹⁸ Had he testified, Mr. G might have shown that he had a different understanding of the question, or might have explained why he did not believe he was avoiding custody or confinement. In the absence of that testimony, however, there is nothing to rebut the division’s clear and convincing evidence.

¹⁹ 7 C.F.R. § 273.16(b)(1); 7 C.F.R. § 273.16(b)(12); 7 C.F.R. § 273.16(e)(8)(iii).

²⁰ *See* 7 C.F.R. § 273.16(b)(13) and (e)(8)(i); *Garcia v. Concannon*, 67 F.3d 256, 259 (9th Cir. 1995). Insofar as 7 C.F.R. § 273.16(e)(9)(ii) is inconsistent with this result, it must be disregarded as contrary to statute, as discussed in *Garcia* and in *Devi v. Senior and Disabled Serv. Div.*, 905 P.2d 846 (Or. App. 1995).

included in his household.²¹ For the duration of the disqualification period, Mr. G's needs will not be considered when determining Food Stamp eligibility and benefit amounts for his household. However, he must report his income and resources as they may be used in these determinations.²²

The division shall provide written notice to Mr. G and any remaining household members of the benefits they will receive during the period of disqualification, or that they must reapply because the certification period has expired.²³

If over-issued Food Stamp benefits have not been repaid, Mr. G or any remaining household members are now required to make restitution.²⁴ If Mr. G disagrees with the division's calculation of the amount of overissuance to be repaid, he may request a separate hearing on that limited issue.²⁵

Dated this 26th day of November, 2012.

Signed
Jeffrey A. Friedman
Administrative Law Judge

Adoption

The undersigned, by delegation from of the Commissioner of Health and Social Services, adopts this Decision, under the authority of AS 44.64.060(e)(1), as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 20th day of December, 2012.

By: Signed
Name: Ree Sailors
Title: Deputy Commissioner, DHSS

[This document has been modified to conform to the technical standards for publication.]

²¹ 7 C.F.R. § 273.16(b)(11).
²² 7 C.F.R. § 273.11(c)(1).
²³ 7 C.F.R. § 273.16(e)(9)(ii).
²⁴ 7 C.F.R. § 273.16(b)(12); 7 C.F.R. § 273.16(e)(8)(iii).
²⁵ 7 C.F.R. § 273.15.