

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

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|------------------|---|------------------------|
| In the Matter of |) | OAH No. 12-0716-ADQ |
| |) | Agency No. |
| N S. V-C |) | Fraud Control Case No. |
| _____ |) | Food Stamp Program |

DECISION

I. Introduction

N T V-C, who goes by the last name V, is a former Food Stamp¹ recipient. On October 8, 2012, the Department of Health and Social Services, Division of Public Assistance (DPA) initiated this Administrative Disqualification case against her, alleging she had committed a second Intentional Program Violation (IPV) of the Food Stamp Program.²

A hearing convened in this case on November 13, 2012, with Ms. V having been provided advance notice of the hearing by both certified mail and standard First Class mail.³ Initially, Ms. V was not available for the hearing, and the hearing went forward in her absence.⁴ Ms. V called in when the hearing was nearly completed. She reported that she has not recently checked her mail at 0000 U Drive, and therefore did not know about the hearing. Both parties agreed to a new hearing to be held Tuesday, November 27, 2012 at 9:00 a.m.

Ms. V's second hearing took place on November 27 as agreed. Ms. V did not appear for the hearing and was not available at her telephone number of record. Accordingly, the administrative law judge completed the taking of evidence from the first hearing and closed the record.

DPA was represented at both sessions by Dean Rogers, an investigator employed by DPA's Fraud Control Unit. Mr. Rogers and Amanda Holton, a DPA Eligibility Technician, testified on behalf of DPA. Exhibits 1-12 were admitted into evidence without objection and without restriction.

¹ Congress amended the Food Stamp Act in 2008 to change the official name of the Food Stamp Program to the Supplemental Nutrition Assistance Program ("SNAP"). The program is still commonly referred to as the Food Stamp Program.

² Ex. 3.

³ Ex. 1, p. 3; Ex. 3; Ex. 4.

⁴ Once proper notice has been given, the SNAP regulations allow a hearing to be held without the participation of the household member alleged to have committed the IPV. *See* 7 CFR § 273.16(e)(4). The same regulation sets out circumstances under which the recipient may seek to vacate this decision if there was good cause for the failure to appear.

At the hearings, DPA was not able to prove, to the required “clear and convincing” level of certainty, that Ms. V committed an Intentional Program Violation of the Food Stamp Program. Ms. V’s application did contain an inaccurate answer to one of the questions. However, factors specific to this case leave uncertainty as to whether she intended any deception, and the uncertainty is substantial enough that the case for an IPV has not been made out.

II. Facts

The following facts were established by clear and convincing evidence unless otherwise noted.

Ms. V participated in the Food Stamp Program in the 1990s. On March 2, 1994, she acknowledged that she had committed an IPV of the program by failing to report income of a household member. A six-month disqualification was imposed.⁵

Ms. V again applied for Food Stamp benefits on June 19, 2012.⁶ As part of the application, Ms. V signed a statement certifying that the information contained in the application was correct.⁷ Question 5 of the application asked “Is any adult in your household fleeing from prosecution, custody, confinement for a felony or Class A misdemeanor from any state?” Ms. V answered “no” to that question.⁸

In fact, however, in 2007 Ms. V had been convicted of Felony Driving While Intoxicated.⁹ She was sentenced to 24 months of imprisonment, with 20 months suspended on condition that she serve three years of probation beginning in June of 2007.¹⁰ In the first year and a half after her conviction, Ms. V violated her probation four times.¹¹ Each time, her probation was revoked in part and additional jail or substance-abuse treatment time was imposed.¹² From these four experiences, Ms. V must have learned that violation of probation results in liability for additional confinement.

On August 17, 2009, Ms. V again violated her probation by leaving her region of residence without permission and moving to another part of Alaska.¹³ She had requested a travel

⁵ Ex. 12, p. 1.

⁶ Ex. 7.

⁷ Ex. 7, p. 7.

⁸ Ex. 7, p. 2.

⁹ Ex. 10, p. 3.

¹⁰ *Id.*

¹¹ *Id.*, pp. 3-4.

¹² *Id.*

¹³ *Id.*, pp. 4-5.

permit, and supplied specific and accurate information about where she was going, but she did not wait to actually receive the permit.¹⁴ She thereafter failed to report to her probation officer, despite a court-ordered obligation to do so and a supplemental notice, sent to her new address, requiring her to do so.¹⁵ In the absence of contrary evidence, these circumstances represent clear and convincing evidence that she must have known that she was in violation of her probation and was a fugitive from confinement for her felony after she stopped complying with probation in August of 2009.

In October of 2009, the state petitioned to revoke her probation on the basis of the new alleged violations.¹⁶ In accordance with normal practice, no copy of this petition appears to have been sent to Ms. V, and so she was presumably unaware that it had been filed. On December 8, 2009, the Superior Court made a finding that Ms. V was in violation of probation and issued a bench warrant.¹⁷ This warrant had not been returned as of September 13, 2012, nearly three years after its issuance,¹⁸ and thus apparently remained unserved as of the time of Ms. V's application three months previously.

From before this probation violation until some time afterward (from July through November of 2009), Ms. V was receiving Food Stamps.¹⁹ The agency has not supplied any records from that period, and so it is impossible to tell whether her Food Stamps were terminated as a result of her probation violation or whether she was otherwise made specifically aware of the inconsistency between being in violation of her felony probation and receiving Food Stamps.

Ms. V's Food Stamp application in June of 2012 was approved and she received Food Stamp benefits for June through September 2012 in the total amount of \$812 as a result.²⁰ Her benefits were then terminated in connection with the fraud investigation leading to this case.²¹

III. Discussion

Federal Food Stamp law provides that a period of disqualification must be imposed on any individual proven to have "intentionally . . . made a false or misleading statement, or

¹⁴ *Id.*, p. 4.

¹⁵ *Id.*, p. 5.

¹⁶ *Id.*, p. 2.

¹⁷ *Id.*, p. 1.

¹⁸ Ex. 1, p. 5; Rogers testimony.

¹⁹ Ex. 9.

²⁰ Ex. 9; Ex. 11.

²¹ Hearing testimony of Rogers.

misrepresented, concealed or withheld facts” in connection with the program.²² Except in special circumstances that do not apply here, the period of disqualification for a person’s second IPV is 24 months.²³ DPA must prove the elements of the IPV by clear and convincing evidence.²⁴

A person who is “fleeing to avoid . . . custody for a [felony] crime” or who is “violating a condition of probation . . . under . . . State law” is ineligible for participation in the Food Stamp Program.²⁵ As noted above, clear and convincing evidence shows that Ms. V was in both of these categories when she applied for Food Stamps in June of 2012, and her “no” answer to Question 5 was inconsistent with this status. Further, the indications are quite strong that she must have known that she was subject to confinement for a felony at the time she moved away and stopped complying with her probation requirements. It is a closer question, however, whether she knew she was *still* a person fleeing confinement for a felony in the summer of 2012.

To establish an IPV, the agency must show by clear and convincing evidence that Ms. V *intended* to misrepresent, conceal, or withhold. Clear and convincing evidence is stronger than a preponderance of evidence but weaker than evidence beyond a reasonable doubt. “If clear and convincing proof is required, there must be induced a belief that the truth of the asserted facts is highly probable.”²⁶ Therefore, DPA must show that it is not merely possible, nor even merely likely, that Ms. V intended to deceive; it must show such a deceptive intent to be “highly probable.”

In this case, there is certainly reason to suspect a deceptive intent, but the factual circumstances do not quite rise to the level of “clear and convincing” on that issue. Two circumstances leave significant room for doubt.

The first is the passage of time. In June of 2012, when she applied for Food Stamps, Ms. V was two years beyond the expiration of her sentence as it had been set by the court. She might well have imagined that whatever consequences she risked by not complying with her probation had simply not come to pass. This is not a person who covertly absconded and evaded capture; instead, it is someone who gave specific and accurate information about where she was going,

²² 7 C.F.R. §§ 273.16(b)(1); 273.16(c)(1).

²³ 7 C.F.R. §§ 273.16(b)(1)(ii).

²⁴ 7 C.F.R. § 273.16(e)(6).

²⁵ 7 C.F.R. § 273.11(n).

²⁶ *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). See also *Buster v. Gale*, 866 P.2d 837, 844 (Alaska 1994) (to be clear and convincing, evidence has to yield a “firm belief or conviction”).

and then actually did go there. A person who provided this information and never heard anything further might well suppose, albeit mistakenly, that she was not considered to be fleeing. This is particularly so where, as was the case with Ms. V, the lack of followup continued as additional years went by and the original duration of her sentence expired.

Further, the question on the application— “Is any adult in your household fleeing from prosecution, custody, confinement for a felony or a class A misdemeanor from any state?”—is not particularly well designed to bring out answers about long ago probation violations. Applicants could suppose that the question is directed to people who are evading prosecution or who have escaped from jail or prison. Even an applicant like Ms. V, who had enough experience with the criminal system to know that probation violations often lead to further confinement for the underlying crime, might not make the connection between this question and a probation violation during a sentence that was supposed to have expired by now.²⁷

Because of these surrounding circumstances, DPA has not shown it to be “highly probable” that Ms. V intended to misrepresent when she checked the “no” box for Question 5. To put it another way, it is more than remotely possible that she checked the “no” box without specifically realizing she was giving the wrong answer. Accordingly, the division has failed to meet its elevated burden of proof to establish an Intentional Program Violation.

Although DPA has failed to establish an IPV, the evidence received in this proceeding indicates that Ms. V received benefits to which she was not entitled. DPA may seek to recover those benefits under 7 AAC 45.570. Recovery under that provision does not require a showing of intentional fraud, nor does it require a heightened standard of proof.

IV. Conclusion and Order

The Division of Public Assistance did not meet its burden of proving by clear and convincing evidence that an Intentional Program Violation occurred.

Dated this 28th day of November, 2012.

Signed

Christopher Kennedy
Administrative Law Judge

²⁷ Recognizing this to be a fair concern, the DPA representative asked, in another proceeding, that the hearing authority suggest better phrasing for the question. Clearer language might be achieved by adapting portions of the Food Stamp regulation, 7 C.F.R. § 273.11(n). For example, a question could be added asking, “Have you violated a condition of probation or parole under federal or state law?”

Adoption

The undersigned, by delegation from 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 12th day of December, 2012.

By: Signed
Name: Christopher M. Kennedy
Title: Administrative Law Judge

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