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

In the Matter of	)	OAH No. 12-0734-ADQ
	)	Agency No.
D A. S	)	Fraud Control Case No.
	)	Alaska Temporary Assistance Program

DECISION

I. Introduction

D A. S is a former Alaska Temporary Assistance recipient. On October 15, 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 first Intentional Program Violation (IPV) of the Temporary Assistance program by failing to disclose that she was a "fleeing felon."[1]

Ms. S's hearing took place on November 20, 2012. Ms. S was provided advance notice of the hearing by both certified mail and standard First Class mail.[2] Ms. S did not appear for the hearing and was not available at her telephone number of record, and the hearing went forward in her absence.[3]

Dean Rogers, an investigator employed by DPA's Fraud Control Unit, represented the division at the hearing. 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. The record closed at the conclusion of the hearing.

At the hearing, DPA was not able to prove, to the required "clear and convincing" level of certainty, that Ms. S committed an Intentional Program Violation of the Temporary Assistance program. Although Ms. S's Temporary Assistance application did contain an inaccurate answer to one question, several factors specific to this case leave considerable uncertainty as to whether she intended any deception.

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1 Ex. 3.

2 Ex. 1, p. 3; Ex. 3; Ex. 4.

3 Once proper notice has been given, the Temporary Assistance regulations allow a hearing to be held without the participation of the household member alleged to have committed the IPV. *See* 7 AAC 45.585(c). 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.

II. Facts

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

Ms. S applied for Alaska Temporary Assistance benefits on August 29, 2012.[4] As part of the application, Ms. S signed a statement certifying that the information contained in the application was correct.[5] The application contained a question asking "Is any adult in your household fleeing from prosecution, custody, confinement for a felony or Class A misdemeanor from any state?" Ms. S answered "no" to that question.[6]

In fact, however, Ms. S had pleaded guilty to, and been convicted of, fourth degree misconduct involving a controlled substance, a felony, in January of 2009.[7] She received a suspended imposition of sentence under which she would serve three years of probation.[8] In April of 2010, the state petitioned to revoke her probation on the basis of several alleged violations.[9] In accordance with normal practice, no copy of this petition appears to have been sent to Ms. S, and so she was presumably unaware that it had been filed. On April 21, 2010, the Superior Court made a finding that Ms. S was in violation of probation and issued a bench warrant.[10] This warrant had not been returned as of September 26, 2012, two and a half years after its issuance,[11] and thus apparently remained unserved as of the time of Ms. S's application a month previously.

Ms. S's primary probation violation—the one that apparently triggered the petition—was leaving the state without permission and thereafter failing to report monthly as required.[12] Before leaving the state, Ms. S called her probation officer and left a voice mail saying she would fax her travel itinerary. Four days later she did fax an itinerary, showing one-way travel to Seattle, departing the following day. The Department of Corrections apparently had an address for her in Seattle.[13]

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4 Ex. 7.
5 Ex. 7, p. 7.
6 Ex. 7, p. 2.
7 Ex. 11, p. 8.
8 *Id*. There was a short term of imprisonment imposed as a special condition of probation.
9 *Id.*, p. 2.
10 *Id.*, p. 1.
11 Ex. 1, p. 5; Rogers testimony.
12 *See* Ex. 11, pp. 5-6. There were prior alleged violations, but it appears that no petition had been filed after they occurred.
13 See *id.*, pp. 1, 5-6. The address is listed on page 1.

There are indications, discussed at more length in Part III below, that on August 29, 2012, two and a half years later, Ms. S was not attempting to conceal her status when she submitted her Temporary Assistance application. Chief among these is the fact that, just one question up from her "no" answer about fleeing felon status, she wrote down that she had been convicted of a drug-related felony and entered the particulars of her conviction.[14]

In the past, such a disclosure would have led DPA to inquire in the court system or Ingens databases regarding the applicant's current status with that conviction. Two years ago, however, DPA eligibility technicians were instructed not to do such research.[15] There is also no policy for eligibility technicians to inquire orally about these matters during the applicant's interview.[16]

Ms. S's Temporary Assistance application was approved, and she received Temporary Assistance benefits for August and September 2012 in the total amount of $850 as a result.[17]

III. Discussion

A person who is "determined to be fleeing to avoid prosecution, custody, or confinement after conviction . . . for a crime that is classified as a felony" is ineligible for participation in the Temporary Assistance program.[18] As noted above, clear and convincing evidence shows that, when she applied for assistance, Ms. S was subject to an unreturned bench warrant in connection with her felony probation. She was, therefore, someone who had been determined (by the court issuing the warrant) to be fleeing to avoid confinement after conviction. She was ineligible for Temporary Assistance.

To establish an Intentional Program Violation of the Temporary Assistance program, DPA must prove that Ms. S intentionally misrepresented, concealed or withheld a material fact on her August 29, 2012 application "for the purpose of establishing or maintaining a family's eligibility for Temporary Assistance benefits."[19] DPA must prove the elements of the IPV by clear and convincing evidence.[20] When broken down, there are four elements:

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14 Ex. 7, p. 2.
15 Holton testimony.
16 *Id.* (whether followup inquiry is made depends on the technician). There is no record of such an inquiry in this case. *See* Ex. 8.
17 Ex. 10; Ex. 12; Holton testimony.
18 AS 47.27.015(a)(2).
19 7 AAC 45.580(n).
20 7 AAC 45.585(e).

1. There must be a misrepresentation, concealment, or withholding of information.
2. The information must be material.
3. The misrepresentation, concealment, or withholding must be intentional.
4. The misrepresentation, concealment, or withholding must be for the purpose of establishing or maintaining eligibility.

Ms. S's "no" answer to the question whether she had been "fleeing from . . . custody . . . for a felony" was inaccurate, at least in the sense that she had stopped reporting for probation as required. Further, because her eligibility turned on the answer to this question, the fact Ms. S misstated was material. The first two elements are therefore met.

To establish an IPV, however, the agency must also show by clear and convincing evidence that Ms. S *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."[21] Therefore, DPA must show that it is not merely possible, nor even merely likely, that Ms. S intended to deceive; it must show such a deceptive intent to be "highly probable." The facts surrounding this case do not support such a finding.

First, there is limited evidence from which one may infer that Ms. S knew she had been determined to be fleeing. The bench warrant, which is the formal reflection of that determination, had apparently never been served. Perhaps Ms. S could have surmised that a bench warrant would issue when she failed to complete the terms of her probation, but there is no evidence to indicate she had prior experience with probation revocations that would have shown her how this process works.

Moreover, Ms. S 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 surreptitiously absconded and evaded capture; instead, it is someone who left a voice mail promising she was going to fax her travel itinerary, and then actually did fax her travel itinerary to her probation officer, showing exactly where she was going. Someone who provided this information and never heard anything further might well suppose, albeit mistakenly, that she was

[21] *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

not considered to be fleeing. This is particularly so where, as was the case with Ms. S, 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 probation violations. Readers could suppose that the question is directed to people who are evading prosecution or who have escaped from jail or prison; it would be fairly easy for people with limited experience in the criminal system, at least in some circumstances, not to make the connection to probation.[22]

Most fundamentally, the information Ms. S did put onto her Temporary Assistance application is inconsistent with an intent to deceive. Ms. S expressly disclosed her felony and identified where the conviction occurred. She had no way of knowing of DPA's recent internal decision not to follow up on such disclosures by checking the online databases. A person setting out to deceive the agency regarding her "fleeing felon" status surely would not identify, right on her application, the very felony from which she was supposedly fleeing.

Because of these surrounding circumstances, DPA has not shown it to be "highly probable" that Ms. S intended to misrepresent when she checked the "no" box for Question 5. Accordingly, the division has failed to meet its 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. S 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.

[22] Recognizing this to be a fair concern, the DPA representative at the hearing asked, if this decision did not support an IPV in this instance, that the hearing authority suggest better phrasing for the question. Since this application is used for both Temporary Assistance and Food Stamps, clearer language might be achieved by adapting portions of the related 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?"

IV. Conclusion

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 21st day of November, 2012.

Signed
Christopher Kennedy
Administrative Law Judge

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 7th 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.]