

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

In the Matter of:)
)
K E. Q) OAH Case No. 12-0852-SNA
) DPA Case No.
)
_____)

DECISION

I. Introduction

The case addresses the question of whether K Q or her husband E Q are ineligible to participate in the Supplemental Nutrition Assistance Program (SNAP or Food Stamp program)¹ due to prior convictions in Alaska and Louisiana. Because each of the convictions constitutes a “drug-related felony” for purposes of the Food Stamp program, neither Mr. Q nor Ms. Q are eligible to receive these benefits.

II. Facts

A. The Convictions at Issue

E Q was convicted in Louisiana for Possession of a Hallucinogenic Substance with Intent to Distribute.² This was a felony conviction under Louisiana law.³ On October 16, 2005 Mr. Q received an automatic first-time offender pardon of his Louisiana conviction from the Louisiana Department of Public Safety and Corrections.⁴

Mr. and Ms. Q were both subsequently convicted in Alaska of Misconduct Involving a Controlled Substance in the Second Degree. The convictions were for criminal conduct involving

¹ Congress amended the Food Stamp Act in 2008. *See* Food, Conservation, and Energy Act of 2008, Public Law No. 110-246 Section 4001, 122 Statutes at Large 1651, 1853. The 2008 amendment changed the official name of the Food Stamp Program to the Supplemental Nutrition Assistance Program (“SNAP”). However, the former program name (“Food Stamp program”) is still commonly used. Accordingly, this decision utilizes the old (“Food Stamp”) terminology.

² Ex. 2.22.

³ In Louisiana, marijuana is classified as a Schedule I non-narcotic controlled dangerous substance. *See* La. R.S. 40:964, Schedule I, C(19) and 966 B(1). The penalty for distribution of a Schedule I substance such as marijuana is a term of imprisonment at hard labor for not less than five nor more than thirty years, and a fine of not more than fifty thousand dollars. *See* La. R.S. 40:966. Pursuant to La. R.S. 14:2 A(4), a felony is “any crime for which an offender may be sentenced to death or imprisonment at hard labor.” Accordingly, Mr. Q’s conviction was a felony conviction under Louisiana law. *See also State ex rel. D.R.*, 51 So.3d 121 (La. App. 4th Cir. 2010).

⁴ Ex. 2.22.

possession of precursors of methamphetamine.⁵ These were Class A felony convictions under Alaska law.⁶

B. Relevant Procedural History

On July 30, 2012 Ms. Q completed and signed an application for Food Stamp benefits.⁷ In response to question number 4 of the application, which asks whether anyone in the applicant's household has been convicted of a drug-related felony, Ms. Q truthfully answered yes.⁸

The Division received Ms. Q's application on August 3, 2012,⁹ and an eligibility interview was conducted on August 7, 2012.¹⁰ The DPA eligibility technician's notes from the eligibility interview indicate that he somehow overlooked the felony drug convictions disclosed by Ms. Q on her application form.¹¹ Ms. Q's application was approved on September 4, 2012, retroactive to the date of application.¹²

On October 13, 2012 the Division became aware of the Qs' (previously disclosed) drug-related felony convictions.¹³ On October 15, 2012 the Division mailed a notice to Ms. Q stating that the Qs' Food Stamp benefits would terminate on October 31, 2012.¹⁴ The notice stated that Ms. Q's Food Stamp benefits were being terminated because (1) her household's monthly countable income exceeded the applicable Food Stamp program maximum monthly income limit;¹⁵ and (2) because of Mr. and Ms. Q's felony drug convictions.¹⁶ On November 16, 2012 the Division mailed an amended or supplemental notice to Ms. Q, which set forth the regulations on which the Division's termination of benefits was based.¹⁷

⁵ Ex. 2.14.

⁶ A.S. 11.71.020(d).

⁷ Exs. 2.0 - 2.9.

⁸ Ex. 2.1.

⁹ Ex. 2.0.

¹⁰ Ex. 2.10.

¹¹ Exs. 2.10, 2.11.

¹² Ex. 2.12.

¹³ Ex. 2.13.

¹⁴ Ex. 2.23.

¹⁵ Ex. 2.23. At hearing, Ms. Q stated that the over-income question has been resolved and is not at issue in this case.

¹⁶ Ex. 2.23. However, the Division's notice dated October 15, 2012 did not "detail the reasons for the proposed adverse action, including the statute, regulation, or policy upon which that action is based," as required by Alaska "Fair Hearing" regulation 7 AAC 49.070. Accordingly, it was necessary for the Division to issue an amended / supplemental notice, as indicated below.

¹⁷ Ex. 2.24. Because the Division did not provide legally sufficient notice of adverse action to the Qs until November 16, 2012, the Division was obligated to continue paying benefits through November 30, 2012. See 7 CFR § 273.13, 7 AAC 49.060.

On November 1, 2012, Ms. Q requested a hearing with regard to the Division's termination of the Food Stamp benefits of her and her husband.¹⁸ A hearing was held on November 27, 2012. Ms. Q participated in the hearing by telephone, represented herself, and testified on her own behalf. Public Assistance Analyst Terri Gagne participated in the hearing by telephone, represented the Division, and testified on its behalf.

III. Discussion

A. Overview: *Disqualification of Persons Convicted of Drug-Related Felonies*

The Food Stamp program is a federal program administered by the states.¹⁹ In 1996 the Personal Responsibility and Work Opportunity Reconciliation Act, popularly known as the Welfare Reform Act, was enacted by Congress.²⁰ This act made persons convicted of certain drug-related felonies ineligible to receive benefits under the Food Stamp Program.²¹

Federal Food Stamp regulation 7 C.F.R. § 273.11(m) is the implementing regulation for the legislation referenced above (21 U.S.C. § 862a(a)(1)). Regulation 7 C.F.R. § 273.11(m) states the Food Stamp eligibility 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 (as defined in . . . 21 U.S.C. 802(6)) 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

The states have the discretion to exempt recipients from the drug felony eligibility rule pursuant to 21 U.S.C.A. § 862a(d)(1) and 7 C.F.R. § 273.11(m) (quoted above). The State of Alaska has not enacted legislation either exempting Alaska state residents from ineligibility under 7 C.F.R. § 273(1)(b)(7)(vii) or limiting the period of program ineligibility.²² The State of Louisiana has limited its Food Stamp disqualification period for felony drug convictions to a period of one

¹⁸ Exs. 2.26, 2.27. The children in the household are still receiving benefits.

¹⁹ 7 C.F.R. § 271.4(a).

²⁰ 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).

²¹ 21 U.S.C.A. § 862a (a)(1), (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 or SNAP.

²² See A.S. §§ 47.25.975 – 990; 7 A.A.C. § 46.010 *et. seq.*

year following the date of conviction or release from incarceration, whichever is later.²³ However, this limitation of the disqualification period applies only to participants in *Louisiana's* Food Stamp program; it does not modify the Food Stamp program rules of other states.

B. Are any of the Convictions at Issue Here "Drug-Related Felonies"?

The parties agreed at hearing that there are no disputed factual issues to be decided in this case. Thus, in this case it is not necessary to determine the credibility of any witnesses or to weigh competing evidence. Rather, the issue for determination in this case is whether Mr. Q's Louisiana conviction, Mr. Q's Alaska conviction, and/or Ms. Q's Alaska conviction, constitute drug-related felonies as defined in the relevant federal statute and regulation. Ms. Q asserts that, because her husband's Louisiana conviction was pardoned, and because both the Alaska convictions involved drug precursors rather than completed drugs, none of the three convictions falls within the disqualification provisions of 21 U.S.C.A. § 862a(a)(1) and/or 7 C.F.R. § 273.11(m). Each of the three convictions is separately analyzed below.

1. Mr. Q's Louisiana Conviction

Ms. Q asserts that, because her husband received an automatic first offender pardon as to his Louisiana conviction, it does not count for purposes of the Food Stamp Program disqualification rule. The pardon on which Ms. Q relies appears to be unique to Louisiana law. Louisiana's Constitution (Article 1 § 20) provides that full rights of citizenship shall be restored upon termination of state and federal supervision following conviction for any offense. The automatic first offender pardon letter at issue here is authorized by Louisiana Constitution Article 4 § 5(E)(1) and is implemented by LSA-R.S. 15:572(B), which provide that a first offender never previously convicted of a felony shall be pardoned automatically upon completion of his sentence, without recommendation of the Board of Pardons and without action by the governor.

The issue here is whether the automatic first offender pardon effectively erases Mr. Q's Louisiana conviction. Case law from the State of Louisiana indicates that it does not. In *State v. Adams*, 355 So.2d 917, 922 (La. 1978), the Louisiana Supreme Court distinguished between a true governor's pardon and the automatic first offender pardon. The court concluded that the automatic pardon provision does not restore "the status of innocence to the convict who has merely served out his sentence." In *State v. Wiggins*, 432 So.2d 234 (La. 1983), the Louisiana Supreme Court stated that the automatic first offender pardon "did not erase [the defendant's] status as a convicted felon." In *State v. Daniel*, 903 So.2d 644 (La. App. 2nd Cir. 2005), the Louisiana Court of Appeals

²³ See Title 67 Louisiana Administrative Code §1988(B).

indicated that the automatic first offender pardon is not the same as expungement of the conviction.²⁴ Most recently, in *State v. Lemoine*, 919 So.2d 727, 729 (La. App. 5th Cir. 2005), the same court concluded that "the law of this state has never recognized the automatic first offender pardon as being a full pardon and restoring the pardoned individual to the status of innocence."

In summary, the automatic first offender pardon does not erase Mr. Q's Louisiana conviction according to the applicable state law. Accordingly, Mr. Q's Louisiana conviction disqualifies him from participation in the Food Stamp program within the State of Alaska.

2. Mr. and Mrs. Q's Alaska Convictions

Mr. and Ms. Q's Alaska convictions were both for "Misconduct Involving a Controlled Substance in the Second Degree" under A.S. § 11.71.020. Specifically, they were convicted of possessing "an immediate precursor of methamphetamine, or the salts, isomers, or salts of isomers of the immediate precursor of methamphetamine, with the intent to manufacture any material, compound, mixture, or preparation that contains methamphetamine, or its salts, isomers, or salts of isomers."²⁵ Ms. Q asserts that these convictions do not count for purposes of Food Stamp eligibility because the Alaska statute criminalizes the possession of *drug precursors*, while the applicable Food Stamp statute and regulation do not (she asserts) disqualify a person from participation in the Food Stamp program based on the possession of a mere precursor chemical.

The answer to the issue raised by Ms. Q lies in the federal statutes and regulations defining the term "controlled substance." The Food Stamp drug felony provisions, 21 U.S.C. § 862a(a)(1) and 7 C.F.R. § 273.11(m), incorporate the definition of "controlled substance" used in the Controlled Substance Act, and specifically at 21 U.S.C. § 802(6). That provision defines "controlled substance" as "a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter."

The schedules referenced in 21 U.S.C. § 802(6) are found in 21 U.S.C. § 812. Methamphetamines and related drugs are categorized by that statute as Schedule I substances. Subsection (c) of Schedule I includes the "salts, isomers, and salts of isomers" of methamphetamines and related drugs as within the definition of "controlled substance."

In addition, 21 U.S.C. § 811(e) allows the United States Attorney General to add "immediate precursors" to the federal schedules of controlled substances. This was done by regulation at 21 C.F.R. § 1308.12, which provides in relevant part:

²⁴ See also *Carranza-De Salinas v. Holder*, 2012 WL 5392829 (5th Cir. 2012), in which the procedural history of the case demonstrates that an automatic first offender pardon is not the same as expungement of the conviction.

²⁵ A.S. § 11.71.020.

(f) Immediate precursors. Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances: (1) Immediate precursor to amphetamine and methamphetamine

In summary, the precursors, salts, isomers, and salts of isomers of methamphetamines have all been included within the federal definition of a "controlled substance." Accordingly, Mr. and Ms. Q's 2008 Alaska convictions, for the possession of methamphetamine precursors with the intent to manufacture, constitute "drug-related felonies" for purposes of the federal Food Stamp statutes and regulations (21 U.S.C.A. § 862a(a)(1) and 7 C.F.R. § 273.11(m)).

IV. Conclusion

The Qs' three convictions all have, as an element, "the possession, use, or distribution of a controlled substance" within the meaning of 21 U.S.C.A. § 862a(a)(1) and 7 C.F.R. § 273.11(m). The Qs' convictions therefore constitute "drug-related felonies" under 21 U.S.C.A. § 862a(a)(1) and 7 C.F.R. § 273.11(m). Accordingly, the Division was correct to find that Mr. and Ms. Q are not eligible to participate in the Food Stamp Program in Alaska. The Division's decision is therefore affirmed.

Dated this 30th day of November, 2012.

Signed _____
Jay Durych
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 11th day of December, 2012.

By: *Signed* _____
Name: Jay D. Durych
Title: Administrative Law Judge

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