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

In the Matter of	)	
	)	
K Q	)	OAH No. 14-1152-SNA
	)	Agency No.

DECISION

I. Introduction

In processing K Q's July 2014 food stamp recertification, the Division calculated the Q's household income by including payments made by a third party to an escrow account. The payments were for a home that the Qs had sold to the party. The Qs still owed money on the home, however, and 100 percent of the escrow payment went to the original seller, not the Qs. Under federal law, the payment is not income to the Qs because it is not otherwise payable to them.

The department had issued a final administrative decision on this same issue in 2013, which found that the money was income. Although Ms. Q would normally be bound by this decision, here, the department elects to not estop Ms. Q because she did not have the information she needed to appeal the department's earlier decision. Therefore, the Division's decision is overturned, and the Division should calculate Ms. Q's income without including the payment made to the escrow account.

II. Facts

In 2012, the Qs purchased a home in the No Name Area from the C family. The Cs financed the sale, and the Qs made monthly payments to the Cs to pay off the cost of the home. Later, the Qs sold the home to the Ps. The Qs financed the sale, and the Ps made monthly payments of $727 to an escrow account to pay off the cost of the home. The Qs did not receive any of the money paid by the Ps to the escrow account. Instead, the escrow agent, First National Bank, paid that money directly to the C family. Eventually, when Q's note to the Cs is paid off, the Qs will receive the remaining payments.

In 2013, the Division of Public Assistance determined that the money paid by the Ps to the escrow account was income to the Qs for food stamps purposes.[1] Including this money as income reduced K Q's food stamps benefit for 2013. Ms. Q appealed the division's inclusion of

[1] *Id*. at 4.

the escrow payment as income to a fair hearing, and the Division's decision was affirmed by the department.[2] Ms. Q did not appeal the department's decision to superior court.

During the eligibility period following the decision, the Division at first paid the Q's food stamps at the lower rate dictated by the 2013 decision. At one point in 2014, for unexplained reasons, the Division paid the food stamp benefit at the higher rate—apparently at the rate that she would receive if the $727 was not included as income.[3]

On June 4, 2014, Ms. Q applied to the division to recertify her household's food stamp benefits for the period beginning July 1, 2014. On July 1, 2014, the division approved the recertfication, but continued to include the escrow payment made by the Ps as income to the Qs. On July 2, 2014, Ms. Q requested a fair hearing regarding the amount of her 2014 food stamp benefit.[4] A hearing was held on July 29, 2014 at which Jeff Miller represented the division, and Ms. Q represented herself. The administrative law judge subsequently sent the parties a complete copy of 7 C.F.R. § 273.9(c)(1)(vii), the federal regulation that governs whether the Ps's escrow payment is included as income for the Qs. A status conference was held on August 7, 2014, and the record held open until August 18, 2014, for the parties to submit argument regarding the federal regulation. On August 18, 2014, Assistant Attorney General Alex Hildebrand entered an appearance and submitted a post-hearing brief in this case.

III. Discussion

This case presents two issues. First, even if the escrow payment should not be included as income under federal law, are the Qs bound by the 2013 final administrative decision holding that the payment is income? Second, under federal food stamp regulations, is the Ps's payment to the escrow account properly treated as income to the Qs?

A. What effect does the Qs failure to appeal the 2013 decision against them have on this fair hearing?

The Division asks that the department affirm its decision without regard to whether the decision was right or wrong.[5] The Division cites to the legal doctrine known as "collateral estoppel." Under this doctrine, parties are bound by the final decisions entered in their cases.

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2 *In re K Q*, OAH No. 13-0180-CMB (Health and Social Services 2013) (Division Exhibit 16).

3 At the hearing, the Division indicated that it may bring an action to recoup the overpayment.

4 Division Exhibit 6.1.

5 Division's Post-Hearing Issue Brief at 4.

Even if a new case arises, if the parties are the same, and an issue is the same, the parties cannot challenge the previous decision on the issue that was already decided.[6]

At the supplemental status conference, Ms. Q agreed that the issue of whether the Ps's payment was income was decided in a final decision that she did not appeal. Further, she agreed with the principle of finality: people should be bound by legal decisions that they did not appeal. She argued, however, that collateral estoppel should not be applied here because neither the Division nor the department ever gave her the information she needed to appeal the decision against her.

Specifically, at the supplemental status conference, Ms. Q noted that neither in 2013 nor 2014 did the Division provide her with the *examples* that accompany the specific federal regulation, 7 C.F.R. § 273.9(c)(1)(vii), that governs third-party payments.[7] She cited to the 2014 materials that the Division had sent her, and noted that although the Division had included the text of 7 C.F.R. § 273.9(c)(1)(vii), the Division had excised the examples from the text.

Following the supplemental status conference, the Division entered the entire record of the 2013 proceedings into the record of this proceeding. Review of the 2013 materials reveals that although the Division provided her with multiple pages of regulations and policies, it did not include 7 C.F.R. § 273.9(c)(1)(vii).[8] The written decision provided to Ms. Q at the conclusion of her 2013 fair hearing did quote from a portion of 7 C.F.R. § 273.9(c)(1)(vii), but it, too, did not include or mention the examples.

Ms. Q argued that without the examples, the regulation, 7 C.F.R. § 273.9(c)(1)(vii), is not clear. Therefore, when she read the 2013 decision, she was led to conclude that she should not appeal. She said that because the Division did not give her in 2013 the information she needed to appeal, the department should not in 2014 apply the doctrine of collateral estoppel against her.

The doctrine of collateral estoppel applies to administrative adjudications.[9] Therefore, this decision could simply invoke the doctrine, and affirm the Division's decision. Unlike a situation where two parties are bound by a (right or wrong) decision made by a court, however, here, the department has the discretion to either estop Ms. Q or allow Ms. Q to argue the merits

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6 *See, e.g., Miller v. State, Dept. of Public Safety, Div. of Motor Vehicles*, 761 P.2d 117, 118 (Alaska,1988) (holding that elements of collateral estoppel are "(1) the issue decided in a prior adjudication was precisely the same as that presented in the action in question; (2) the prior litigation must have resulted in a final judgment on the merits; and (3) there must be "mutuality" of parties, *i.e.*, collateral estoppel may be invoked only by those who were parties or privies to the action in which the judgment was rendered.").

7 Q testimony (supplemental status conference).

8 Division Supplemental Exhibit.

9 *Harrod v. State, Dept. of Revenue,* 255 P.3d 991, 999 -1000 (Alaska 2011)

of her case.[10] Therefore, further inquiry is necessary before determining whether to affirm on the basis of collateral estoppel.

Without question, the doctrine of finality is important in administrative adjudications. Litigants should not be able to request multiple fair hearings on the same issue. Therefore, in most administrative cases, and certainly in any case where the applicant was merely forum shopping or trying again, the doctrine of collateral estoppel should be invoked so that final decisions are, in fact, final. This is true even when the first decision was wrongly decided.

The reason Ms. Q requested a fair hearing here, however, was because the Division itself, with no explanation, had earlier begun to pay her food stamp benefits at the higher amount.[11] Then, in the July 2014 recertification, the Division reverted to its earlier position, and paid the lower amount. Ms. Q requested a fair hearing in order to receive an explanation.[12] Ms. Q, therefore, was not forum shopping. After Ms. Q became aware of the full text of the federal regulation, and the examples, she concluded that the previous decision was wrong. Because the examples had not been provided to her earlier, Ms. Q believed she should be allowed to appeal the 2014 recertification.

No cases directly address whether the department should estop Ms. Q from appealing in this situation. The cases, do, however, instruct that state laws and policies implementing the federal food stamp program must be consistent with the governing federal law.[13] For example, the Alaska Supreme Court has held that state law on equitable estoppel must give way to federal requirements when the two conflict.[14]

The requirement of consistency with federal law, however, does not necessarily mean that the doctrine of collateral estoppel could not apply here. Simply put, the fact that an adjudicatory decision was wrong in one particular case does not mean that the state food stamp system is not consistent with federal law.

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[10] The department is the final decision maker for the agency. Therefore, if there are weighty reasons for revisiting a prior decision, the department is not bound to award the Division the benefit of the doctrine of collateral estoppel.

[11] The Division explained that the change in amount was an administrative error.

[12] Q testimony.

[13] *Cf., e.g., Allen v. State, Dept. of Health & Social Services, Div. of Public Assistance* 203 P.3d 1155, 1161 - 1162 (Alaska 2009) ("There is a role for state law in the administration of the food stamp program, as long as it does not conflict with federal law."); *Harrington v. Blum*, 483 F.Supp. 1015, 1019 (D.C.N.Y., 1979) ("It is clear that States must use the federal eligibility standards in determining eligibility for food stamps. 7 U.S.C. §§ 2014(b), 2019(e); *see Knebel v. Hein*, 429 U.S. 288, 97 S.Ct. 549, 50 L.Ed.2d 485 (1977). State or local policies or practice inconsistent with federal statutes or regulations are invalid. ").

[14] *Allen*, 203 P.3d at 1164.

Yet, courts have shown a willingness to require administrative agencies to take extra measures in certain benefit cases. In *Allen v. State, Dept. of Health & Social Services, Div. of Public Assistance*, for example, the Alaska Supreme Court identified food stamps as meeting a "brutal need" for the needy individuals who qualify for the benefit.[15] *Allen* warned that when a brutal need is at issue, "courts have traditionally required that agencies go to greater lengths—incurring higher costs and accepting inconveniences—to reduce the risk of error."[16] This warning could influence the department here. To the extent that there are other weighty reasons for not applying collateral estoppel, the agency may determine to exercise its discretion and allow the applicant to appeal the issue that was decided by the former decision.

Taking all of these issues into consideration, this case comes down to the fact that in 2013, the Division represented to Ms. Q that it was providing her with "the basis of the agency's action," which, in the Division's view, was "the Food Stamp Manual and Code of Federal Regulation[s]." The Division attached these materials to its Position Statement as Exhibit 3-22.[17] Based on this representation, Ms. Q did not expect to have to further research the law. Yet, the materials attached in 2013 did not include 7 C.F.R. § 273.9(c)(1)(vii) or the examples that are attached to the regulation. Therefore, the Division did not give Ms. Q the information she would have needed to determine whether to appeal the decision against her.

The department's decision did contain some of the information needed: it quoted from a portion of 7 C.F.R. § 273.9(c)(1)(vii). It did not, however, include the examples.[18] Although Ms. Q could have looked up the law herself, the 2013 decision contained a typographical error that gave an incorrect cite for the regulation.[19] Had Ms. Q attempted to look up the law based on this cite, she may well have been stymied. Finally, in the 2014 Position Statement, the Division did include the text of the regulation, but it cut the regulation off mid-page, again leaving out the

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15 203 P.3d at 1167.

16 *Id*. In *Allen*, the court held the agency to a very high standard for notice. *Allen* did not address collateral estoppel, and it is not being cited here as direct precedent. Two concepts, however, can be taken from *Allen.* First, courts may sometimes hold agencies to an unusually high standard of perfection in benefits cases. Although that does not compel an outcome, it should be considered here, where the Qs are not receiving a benefit to which they normally would be entitled under federal law. Second, the court was recognizing a real need, and that need can be taken into account here in the agency's determination of whether to exercise its discretion.

17 DPA's Position Statement (Feb. 26, 2013) at 3 ¶3.

18 OAH No. 13-0180-CMB at 4; Division Exhibit 16.3.

19 *Id.*

examples.[20] Therefore, heading into her 2014 fair hearing, Ms. Q still did not have complete information.

Ms. Q argues that based on what she was given, she had no reason to appeal the 2013 decision. That argument is reasonable. Without reference to the examples (which, as discussed in the next section of this decision, explain the obscure term "otherwise payable"), the text of 7 C.F.R. § 273.9(c)(1)(vii) could reasonably be read to require inclusion of the Ps's payment as income (which was how the department read it). Only with careful scrutiny of the examples does the regulation begin to make sense.

Under these circumstances, the most reasonable action for the department here is to decline to affirm the Division on the procedural ground of collateral estoppel. Instead, the department will reach the merits of Ms. Q's 2014 fair hearing, and rule on her benefit level for July 2014 forward.

This decision is limited to its facts. Here, the Division and department both made several errors. In 2013, the Division represented that it was giving Ms. Q the regulatory basis for the decision, but it did not provide the governing regulation or examples to Ms. Q.[21] In 2014, the Division increased the Q's benefit (to the level she would receive if the payment was not income) with no explanation, apparently in error. In the 2014 Position Statement, the Division gave Ms. Q the relevant federal regulation but cut off the pertinent examples. Then, in issuing the 2013 decision, the ALJ made a typographical error in the cite to the federal regulation in the 2013 decision. Given these errors, and given the fact that Ms. Q's appeal was based on a legitimate concern that had nothing to do with forum shopping, the appropriate step for the department to take at this juncture is to consider the merits of Ms. Q's argument that the Ps's payment is not income for food stamps purposes.

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[20] Division Exhibit 12.4. Because the regulation was cut-off at mid-page just as the examples were starting, Ms. Q asserted that the Division may have been deliberately trying to deceive her regarding the law. Mr. Miller explained, however, that he was not trying to withhold important information. In his view, the examples were not relevant.

[21] This decision is not addressing the issues of promissory estoppel or the Division's duty or lack of duty to provide an accurate or complete copy of the relevant law. These issues have not been briefed or argued in this appeal. This decision is merely noting that when the Division tells an applicant that it is providing the relevant law, and then leaves out an important part of the law, it provides an adequate basis for the department to recognize that the applicant had reason for not appealing a prior decision. The department's interest in enforcing the doctrine of finality is lessened because Ms. Q's failure to appeal was based at least in part on an error made by the Division.

B. Is the Ps's payment to the escrow account income to the Qs?

Federal food stamp regulations address the situation where a payment that would otherwise be paid to the household is paid instead to a third party. In some circumstances that payment to the third party is income to the household. In others, it is not.

The governing regulation states that "moneys legally obligated and otherwise payable to the household which are diverted by the provider of the payment to a third party for a household expense shall be counted as income."[22] The regulation provides examples of how this standard applies. Example C explains that if a payment is not "otherwise payable" to the household, the money is *not* income to the household.[23] Most significant for this case, if the money is diverted to the third party under a legally binding agreement, the money is not income: "payments

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[22] 7 C.F.R. § 273.9(c)(1)(vii). The text of the entire regulation (with examples) is as follows:

> (c)(1)((vii) Other third-party payments. Other third-party payments shall be handled as follows: moneys legally obligated and otherwise payable to the household which are diverted by the provider of the payment to a third party for a household expense shall be counted as income and not excluded. If a person or organization makes a payment to a third party on behalf of a household using funds that are not owed to the household, the payment shall be excluded from income. This distinction is illustrated by the following examples:
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> (A) A friend or relative uses his or her own money to pay the household's rent directly to the landlord. This vendor payment shall be excluded.
>
> (B) A household member earns wages. However, the wages are garnished or diverted by the employer and paid to a third party for a household expense, such as rent. This vendor payment is counted as income. However, if the employer pays a household's rent directly to the landlord in addition to paying the household its regular wages, the rent payment shall be excluded from income. Similarly, if the employer provides housing to an employee in addition to wages, the value of the housing shall not be counted as income.
>
> (C) A household receives court-ordered monthly support payments in the amount of $400. Later, $200 is diverted by the provider and paid directly to a creditor for a household expense. The payment is counted as income. Money deducted or diverted from a court-ordered support or alimony payment (or other binding written support or alimony agreement) to a third party for a household's expense shall be included as income because the payment is taken from money that is owed to the household. However, payments specified by a court order or other legally binding agreement to go directly to a third party rather than the household are excluded from income because they are not otherwise payable to the household. For example, a court awards support payments in the amount of $400 a month and in addition orders $200 to be paid directly to a bank for repayment of a loan. The $400 payment is counted as income and the $200 payment is excluded from income. Support payments not required by a court order or other legally binding agreement (including payments in excess of the amount specified in a court order or written agreement) which are paid to a third party on the household's behalf shall be excluded from income.

[23] *Id*. at (C) ("For example, a court awards support payments in the amount of $400 a month and in addition orders $200 to be paid directly to a bank for repayment of a loan. The $400 payment is counted as income and the $200 payment is excluded from income.").

specified by a . . . legally binding agreement to go directly to a third party rather than the household are excluded from income because they are not otherwise payable to the household."[24]

Here, the Qs have entered into a legally binding agreement. Under that agreement, the escrow agent, First National Bank, is required to apply 100 percent of the payments made by the Ps to the debt owed to the Cs.[25] Accordingly, under the applicable federal regulation, the payment by the Ps is not income to the Qs.

The Division argues that the "key distinction" in the regulation is whether the money is owed to the household.[26] In the Division's view, if the money diverted to a third party is owed to the household, the payment is income to the household. When the money paid to a third party is a gift, the money is not income. For example, in Example A, a friend pays the household's rent. This money is not income.[27]

Example C in the regulation, however, makes clear that legal obligation for the payment is important only when the money is otherwise payable to the household. Example C gives two scenarios. In the first one, a court order requires a support payment of $400 to the household. Later, $200 of the $400 is paid directly to a creditor for money owed by the household. The $200 is income because it is owed to the household *and* otherwise payable to the household.[28]

In the second scenario, the court orders a $400 support payment paid to the household *and* a second $200 payment to "be paid directly to a bank for repayment of a loan."[29] In that scenario, the $200 payment would *not* be income to household, without regard to whether the household is legally obligated to pay back the loan or whether the person making the payment owes the money to the household.[30] Under this example, the key distinction is not whether the money used to pay the household's loan is owed to the household. The key distinction is that it is not *otherwise payable* to the household because of a court order or a legally binding agreement.

The Qs are in the same situation as given by the example—under a binding agreement, the Ps's payments are made directly to a bank for the purpose of paying down a loan. As in the

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24 *Id*.

25 Division Exhibit 15.

26 Division's Post-Hearing Issue Brief at 3. The department reached a similar conclusion in its 2013 decision. OAH No. 13-0180-CMB at 4.

27 7 C.F.R. § 273.9(c)(1)(vii)(A).

28 7 C.F.R. § 273.9(c)(1)(vii)(C).

29 *Id.*

30 *Id.* Although the example does not state the reason for the court order, it appears to be contemplating something of the nature of child support, which would be *owed* to the household.

example, the Qs never receive any of the money. The money is not otherwise payable to the Qs. Therefore, the Ps's payments are not income to the Qs for purposes of food stamps.

The Division argues that "there is no legal obligation on the part of the Ps to pay the Qs's lender directly."[31] That is true—the Ps do not pay the Cs directly. The Ps pay the bank. That does not matter for purposes of the analysis, however, because the payment to the escrow agent is a payment to a third party. The Division does not dispute that a binding agreement requires that the escrow agent apply all of the Ps's payment to pay down a loan. The *Escrow Instructions*, which are in the record, state that "An *agreement* between payer and payee *requires* disbursement to a prior mortgagee."[32] This binding contract satisfies the requirement of a legally binding agreement.[33] Therefore, under food stamp regulations, the $727 monthly payment would not be income to the Qs.

C. Is the payment income to the Qs because they receive a benefit from the payment?

At the hearing, the Division asserted that the money is income to the Qs because the Qs receive a benefit from the Ps's payment.[34] Under the examples, however, benefit to the household is not a criterion for including the payment in income. Under the examples, payments that go to the household's rent or paying down the household's loan may or may not be income, depending on whether the money is owed and otherwise payable to the household.[35]

Moreover, as Ms. Q argued at the hearing, the Qs do not receive a current actual benefit from the payment. The Qs do not see any of this money and it is not available to them to spend on food or other commodities. The money does not pay their rent or make house payments on a house they own—the Ps are the owners of the home. Thus, the beneficiaries of this money transfer are the Ps, for whom the payment means they remain in possession of the home, and the Cs, who get the money. The Qs receive a future springing benefit from the payment in that they retain the right to receive money in the future. In addition, they avoid being ensnared in a three-way legal action that might follow should the Ps default.

In this circumstance, whether this payment goes to a "household expense" is questionable—it is a household expense only in the sense that it technically pays down a debt. In

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31 Division's Post-Hearing Issue Brief at 2.

32 Division Exhibit 15.2 (emphasis added).

33 For a discussion of the elements of a binding contract, see *Chambers v. Scofield*, 247 P.3d 982, 987 (Alaska 2011) (an "agreement forms a binding contract when the agreement satisfies the four elements of contract formation: an offer encompassing all essential terms, unequivocal acceptance by the offeree, consideration, and an intent to be bound").

34 The Division did not make this argument in its Post-Hearing Brief.

35 7 C.F.R. § 273.9(c)(1)(vii).

a common sense point of view, however, the Qs believe they do not owe the debt—the Ps owe the debt. Yet, because whether federal law would characterize the payment as paying a household expense is not clear, this decision relies solely on the fact that the payment is not otherwise payable to the Qs to conclude that the payment is not income.

IV. Conclusion

Because the $727 monthly payment made by the Ps to the escrow agent is not otherwise payable to the Qs, it is not income for purposes of food stamps. In the unusual circumstances of this case, the department will not estop Ms. Q from challenging the Division's decision on this issue. Therefore, Ms. Q's household's food stamp benefit beginning July 1, 2014, should be recalculated with the $727 removed from income.

DATED this 8th of September, 2014.

By: *Signed*
Stephen C. Slotnick
Administrative Law Judge

Adoption

Under a delegation from the Commissioner of Health and Social Services, I adopt this Decision as the final administrative determination in this matter, under the authority of AS 44.64.060(e)(1).

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 10th day of October, 2014.

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

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