

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

In the Matter of )  
)  
L R. M ) OAH No. 14-0580-ADQ  
\_\_\_\_\_) Agency No.

**DECISION**

**I. Introduction**

L M applied for and received Food Stamps benefits. She did not disclose a prior drug related felony conviction on her application. The Division of Public Assistance (division) alleged that this constituted an Intentional Program Violation (IPV).

A hearing was held on May 23, 2014. Ms. M had been sent a notice of the hearing, but did not appear at the scheduled time.<sup>1</sup> She also did not provide a telephone number at which she could be called for the hearing. At the time set, the telephone number listed in the OAH record was called, but she could not be contacted. The hearing was held in Ms. M’ absence pursuant to 7 AAC 45.585(b). The evidence presented by the division was insufficient to establish an IPV by clear and convincing evidence.

**II. Facts**

Ms. M applied for Food Stamps on July 15, 2013.<sup>2</sup> Question 4 of the application asked whether anyone in the household had been convicted of a drug related felony. Ms. M answered “no.”<sup>3</sup> She applied for Food Stamps again on February 5, 2014.<sup>4</sup> This application also asserts that no member of the household had been convicted of a drug related felony.<sup>5</sup>

Based on the information provided by Ms. M, her February application was approved, and she received Food Stamps for February through April of 2014.<sup>6</sup> For those three months, she received a total of \$108 in benefits.<sup>7</sup>

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<sup>1</sup> Ms. M had returned a form dated May 8, 2014, indicating that she wished to have her hearing by telephone. Exhibit 6, page 5.

<sup>2</sup> Exhibit 7, page 1.

<sup>3</sup> Exhibit 7, page 2.

<sup>4</sup> Exhibit 7, page 13.

<sup>5</sup> Exhibit 7, page 22.

<sup>6</sup> Exhibit 11.

<sup>7</sup> *Id.*

Ms. M had in fact been convicted for a drug related felony on July 1, 2013.<sup>8</sup> She pleaded guilty to a violation of AS 11.71.040(a)(3)(A), possession of a controlled substance. This constitutes a class C felony under Alaska law.<sup>9</sup>

### III. Discussion

For Food Stamp recipients, an IPV is defined to include having intentionally made “a false or misleading statement, or misrepresented, concealed or withheld facts[.]”<sup>10</sup> In order to prevail, the division must prove this violation by clear and convincing evidence.<sup>11</sup> A person who is found to have committed an IPV is disqualified from receiving Food Stamps for 12 months for a first time violation, 24 months for a second violation, and permanently for a third IPV.<sup>12</sup> In addition, the household must repay any benefits wrongfully received.<sup>13</sup>

In calculating the household’s benefits, individuals who have been convicted of a state or federal drug-related felony for conduct occurring after August 22, 1996 may not be included as a household member.<sup>14</sup> Convictions that count towards this exclusion are those for which an element of the offense is possession, use, or distribution of a controlled substance as defined by the Controlled Substance Act, 21 U.S.C. 802(6).<sup>15</sup>

Proof of facts by clear and convincing evidence means the party with the burden of proof has shown that the facts asserted are highly probable.<sup>16</sup> This is a higher standard of proof than the preponderance of the evidence standard, but less than the beyond a reasonable doubt standard used in criminal cases.

When Ms. M was convicted, the court suspended imposition of her sentence pursuant to AS 12.55.085. When she successfully completes her probation, she may ask the court to set aside her conviction.<sup>17</sup>

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<sup>8</sup> Exhibit 10.

<sup>9</sup> AS 11.71.040(d).

<sup>10</sup> 7 C.F.R. § 273.16(c)(1).

<sup>11</sup> 7 C.F.R. § 273.16(e)(6).

<sup>12</sup> 7 C.F.R. § 273.16(b)(1).

<sup>13</sup> 7 C.F.R. § 273.16(b)(12).

<sup>14</sup> 7 C.F.R. § 273.11(m). There are exceptions to this rule if the state legislature has enacted legislation that exempts them from this exclusion.

<sup>15</sup> *Id.*

<sup>16</sup> *DeNuptiis v. Unocal Corporation*, 63 P.3d 272, 275 n. 3 (Alaska 2003).

<sup>17</sup> AS 12.55.085(e).

Although she did not appear at the hearing, Ms. M did send in a written statement. In response to a form question asking whether she wanted to waive her right to a hearing, Ms. M stated

I'm not quite sure what one [admission or non-admission of the facts alleged] I should choose cuz technically I'm not convicted cuz I got an S.I.S. (sentence in suspension). When I complete my probation my charge is drop[ped]. But I'll do whatever is necessary to handle this correctly.<sup>[18]</sup>

The division argued that Ms. M' understanding of the effect of an SIS is wrong, and that defendants are routinely informed that they are in fact convicted at the time the guilty plea is accepted. However, there is no evidence in this case that Ms. M was actually given this type of warning. Nor was there adequate evidence to establish what defendants are generally told about the legal effect of an SIS. In addition, at least in the past, defendants were routinely given *inaccurate information* by the court about the effect of an SIS conviction.<sup>19</sup>

Under Alaska law, the court is not required to set aside Ms. M' conviction once she completes her probation.<sup>20</sup> Even after a conviction is set aside, the record is not expunged.<sup>21</sup> In other words, anyone searching the court records would see that the conviction had occurred. In addition, Ms. M has not yet completed her probation. Even if it is likely that her conviction will be set aside at a future date, it has not yet been set aside.

A set aside conviction cannot be used as a basis for increasing the sentence after a subsequent conviction, can be an affirmative defense to some repeat offender prosecutions, and creates an expectation that the conviction won't be used to impose new affirmative burdens on the defendant.<sup>22</sup> However, these limits do not change the fact that the individual had been convicted, or that the crime had been committed.<sup>23</sup> The fact of the conviction may be used for some purposes even after the conviction has been set aside.<sup>24</sup>

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<sup>18</sup> Exhibit 6, page 4.

<sup>19</sup> See *Journey v. State*, 895 P.2d 955, 957 (Alaska 1995) (quoting trial court's comments about judges often informing defendants that a set aside conviction means the defendant can honestly say they have not been convicted).

<sup>20</sup> AS 12.55.085(e) ("the court may set aside the conviction and issue to the person a certificate to that effect").

<sup>21</sup> *Journey*, 895 P.2d at 961.

<sup>22</sup> *State, Div. of Corporations, Business and Professional Licensing v. Platt*, 169 P.3d 595, 599 (Alaska 2007).

<sup>23</sup> *Id.*

<sup>24</sup> *State v. Platt*, 169 P.3d at 600 (use by Board of Nursing in denying license).

Ms. M has been convicted of a drug related felony, and her answer on the application was incorrect. For purposes of an IPV, however, it is not enough to show that Ms. M's answer on her application was incorrect. The division must also show that she intentionally provided an incorrect answer. In addition, it must prove this intent by clear and convincing evidence. Intent may be proven through circumstantial evidence, and frequently the fact of a prior conviction will be sufficient to prove an intentional misrepresentation.<sup>25</sup> That will not always be the case, however. It took several Alaska Supreme Court decisions to develop the law concerning suspended imposition of sentences, and someone not familiar with those decisions could readily misunderstand the effect of a conviction occurring simultaneously with an SIS. At least in the past, even judges provided inaccurate advice as to the effect of an SIS. Without some information about what Ms. M was actually told during her court appearance when she pleaded guilty, there is a substantial possibility that Ms. M did not understand that her guilty plea resulted in an actual conviction.<sup>26</sup> Accordingly, the division has not met its burden of proving that it was highly likely that her answer on the Food Stamps application was an intentional misrepresentation or an intentional false statement.

#### **IV. Conclusion and Order**

The division has not proven that Ms. M committed an Intentional Program Violation. It has proven that she has a drug related felony conviction. Under current law, this creates a life-long bar to receiving Food Stamps in Alaska.<sup>27</sup> That conviction also disqualified her from receiving the benefits Ms. M received in February, March, and April of 2014.

The division may seek to require Ms. M to make restitution of incorrectly issued

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<sup>25</sup> See *In re D B*, OAH No. 14-0202-ADQ (Commissioner of Health and Social Services 2014), page 3; *In re K J*, OAH No. 14-0164-ADQ (Commissioner of Health and Social Services 2014), page 3. Published OAH decisions may be found on line at <http://aws.state.ak.us/officeofadminhearings/categoryList.aspx>.

<sup>26</sup> See Exhibit 6, page 4 (“technically I’m not convicted”).

<sup>27</sup> As noted above, federal law permits each state to modify the life-time impact of a prior drug conviction. Alaska has not done so.

benefits.<sup>28</sup> If she disagrees with the division's restitution demand, she may request a separate hearing on that issue.<sup>29</sup>

Dated this 5<sup>th</sup> day of June, 2014.

*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 7<sup>th</sup> day of July, 2014.

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

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

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<sup>28</sup> 7 CFR § 273.18(a). *See In re J.K. Q.*, OAH No. 13-1661-ADQ (Commissioner of Health and Social Services 2014), page 4.

<sup>29</sup> 7 CFR § 273.15.