

Questionable Rule Denies Food Stamps to Self-Employed Workers

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I. Introduction

In many rural areas, a significant proportion of working poor households are self-employed in farming or other small enterprises. In rural Alaska and on some Native American reservations, subsistence hunting and fishing is crucial to many households' well-being. Even in urban areas, many low-income people seek to supplement their incomes by renting out rooms, doing odd repair work, or selling products of one kind or another. As the economy weakens, opportunities for low-income people to find traditional wage employment have become extremely scarce. This may lead even more legal services clients to turn to self-employment ventures to improve their situations.

Determining income is far more complicated for self-employed workers than for those in traditional wage employment. Not only is the money that they receive harder to account for, but an entirely separate analysis--the worker's cost of doing business--must be undertaken. Not surprisingly, the complexity of these cases--and many eligibility workers' lack of training and experience in handling them--causes disputes and errors that require the intervention of legal services advocates.

Quite apart from errors caused by these complexities, however, the regulations of the U.S. Department of Agriculture (USDA) deny self-employed households recognition of a large portion of their cost of doing business: capital costs. The Congressional Budget Office informally estimates that this regulation reduces food stamp benefits by approximately \$20 million a year nationally. Although legal services offices may see clients adversely affected by this regulation from time to time, the general complexity of the calculations necessary to determine the countable income of self-employed workers may obscure the remarkably clear-cut inconsistency between this regulation and the Food Stamp Act. This article analyzes this regulation and suggests possible remedies for legal services advocates.

II. Food Stamp Program and the Self-Employed Workers

A household may be eligible for food stamps if its monthly income is below the national gross and net income standards. /1/ The size of the household's monthly allotment is based on household size and net income. /2/ The Food Stamp Act broadly defines "income" to include "all income from whatever source," subject to several specific exclusions. /3/ The "cost of producing self-employed income" is one of these exclusions. /4/

Many costs of producing self-employment income are easy to account for and have been allowed as exclusions with relatively little trouble. These include wages to other workers, supplies, business taxes, /5/ and license fees. Capital expenses, however, have raised more difficult problems. The cost of an asset needed to produce self-employment income, such as a tractor or a fishing boat, may be accounted for in one of two ways: (1) as a direct expense when the asset is paid for, or (2) through depreciation, as the asset is consumed over time. If capital costs are treated as direct expenses, they may appear as a lump-sum payment to the supplier, as installment payments to the supplier, or as payments on a loan obtained to purchase the asset.

Although one could reasonably argue in support of either method of accounting for self-employed households' capital costs for the food stamp program, the current regulations permit neither. 7 C.F.R. Sec. 273.11(a)(4)(ii) states as follows:

"In determining net self-employment income, the following items shall not be allowable as costs of doing business: (A) Payments on the principal of the purchase price of income-producing real estate and capital assets, equipment, machinery, and other durable goods; . . . and (D) Depreciation."

Under this regulation, farmers, for example, can only exclude the part of their payments on tractors that represents interest. Money that self-employed workers paid out on the principal of capital assets is treated as income available to the household to spend on food. In self-employment enterprises, such as farming, fishing, and rental businesses, where property and equipment account for a large part of workers' expenses, this rule results in a dramatic overstatement of the income actually available to households. At a minimum, the rule drastically reduces households' allotments and for many households with very little money available for food, it denies them food stamps altogether.

III. Theories for Invalidating the Rule Against Excluding Capital Costs

A challenge to this regulation should prevail on the basis of the plain meaning of the statute itself. The Supreme Court has stated that the starting point in any inquiry into the statute's meaning is "the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." /6/ In this case, 7 U.S.C. Sec. 2014(d)(9) directs the USDA to exclude from consideration as household income "the cost of producing self-employed income" without limiting this exclusion to noncapital

costs. /7/ "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." /8/ It is difficult to find any ambiguity in the language of the statute.

If a court does find it necessary to look beyond the plain language of the statute, the legislative history of the Food Stamp Act of 1977, which contained the exclusion for the costs of producing self-employment income, supports an exclusion for capital costs. The House Agriculture Committee objected to USDA regulations (similar to those now in force) and expressed the intention that the legislation that it was writing would lead to the allowance of these expenses:

"[T]he Department has stated that costs of producing income from self-employment are all costs except: (1) Payments on the principal of the purchase cost of income producing real estate. Any payments of principal, interest and taxes on the home shall be subject to paragraph (c)(1)(iii)(h) of this section; (2) Payments on the principal of the purchase cost of capital assets, equipment, machinery, and other goods; (3) Depreciation; and (4) A net loss sustained in any previous period.

While there is no reason to permit for food stamp purposes the accelerated forms of depreciation afforded under the Internal Revenue Code, and some factor for wear and tear of machinery and buildings, obsolescence and accrued replacement costs should be inherent in doing business. The full amount of self-employment income would be recognized as income, but then there would be an exclusion for the cost of producing that income.

Thus, the Department would be expected to revise its regulations in this regard to allow some form of depreciation in arriving at "net" business income." /9/

In implementing the 1977 Act, the USDA duly revised its regulations the next year so that "depreciation [is] allowed as a cost of producing self-employment income for equipment, machinery or other capital investments necessary to the self-employment enterprise." /10/ The Department stated that "a provision allowing depreciation as a cost of doing business for self-employed households [was included] in compliance with the legislative history [accompanying the Food Stamp Act of 1977] H.R. Rep. No. 95-464." /11/

In 1981, however, the USDA reversed its position /12/ and denied households an exclusion for depreciation in calculating their costs of doing business. /13/ The USDA based this change on the recommendations of the conference report on the Food Stamp Act Amendments of 1980. /14/ Although the 1980 conference report did urge "that the Secretary no longer permit depreciation to be subtracted in determining net self-employment income," /15/ this recommendation has very little legal significance and should not bar a challenge to this regulation.

No amendment to section 2014(d)(9) was included in the 1980 legislation; indeed, none was included in either house's version of the legislation. Absent any relevant provision in any legislation enacted into law, or even in the House or the Senate bills under consideration in the conference committee, this statement's only possible legal significance would be as "post-

enactment legislative history" seeking to reveal the intent of an earlier Congress that passed section 2014(d)(9) as part of the Food Stamp Act of 1977.

The general rule is that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." /16/ In *Waterman S.S. Corporation v. United States*, for example, the Court ruled that without new legislation the views of a "subsequent Congress would not supplant the contemporaneous intent of the Congress which enacted the Act." /17/ In *Consumer Product Safety Commission v. GTE Sylvania*, the Court distinguished between subsequent legislation enacted into law, which is entitled to "great weight" in interpreting earlier legislation, and mere "post-enactment legislative history" recorded by a member or committee within Congress:

"With respect to subsequent legislation, however, Congress has proceeded formally through the legislative process. A mere statement in the conference report as to what the Committee believes an earlier statute meant is obviously less weighty.

The less formal types of subsequent legislative history provide an extremely hazardous basis for inferring the meaning of a congressional enactment. . . . Such history does not bear strong indicia of reliability, however, because as time passes memories fade and a person's perception of his earlier intention may change. Thus, even when it would otherwise be useful, subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment." /18/

Accordingly, the 1980 conference report's statement deserves little, if any, deference. The regulation, therefore, should be judged by how closely it conforms with the language of the statute and contemporaneous legislative history.

Indeed, the court can readily order a remedy that reconciles the statute's command to exclude all costs of producing self-employment income and the 1980 conference committee's recommendation that depreciation no longer be allowed. The 1980 conference committee's desire can be accommodated consistently with the statute by permitting the exclusion from income of payments on the principal of the purchase cost of capital assets, equipment, machinery, and other goods as a cost of producing income. /19/

The USDA's 1981 rule also has been criticized in a subsequent Congress. In its report to accompany the Hunger Prevention Act of 1988, the Senate Committee on Agriculture, Nutrition, and Forestry denounced the rule and urged litigation to return to the pre-1981 rule. The Committee stated that "the Committee by no means claims that this bill eliminates all of the barriers to participation in the food stamp program by farmers and other self-employed individuals." /20/ The Committee reiterated that the intent of the Food Stamp Act is to allow all work-related expenses of self-employed workers to be excluded in determining net income for eligibility purposes, stating that under its bill

"farm households with regular incomes but irregular expenses [would] have their incomes and expenses averaged over the year just as would be done if their gross income itself was variable. In so doing, the Committee does not intend to dictate what

accounting methods the Department will use to count farm (or other) households' expenses as long as households receive credit for all expenses legitimately related to their work." /21/

The Committee did not act to amend the statute, presumably because the statute is already clear. /22/

Therefore, even if the court were inclined to give credence to postenactment legislative history, it now exists for both sides of the debate. No persuasive reason exists for honoring the 1980 legislative history criticizing depreciation while ignoring the 1988 legislative history objecting to the denial of an exclusion for capital costs, particularly when the two can be reconciled by allowing capital costs to be excluded as paid rather than through a depreciation allowance. /23/ More importantly, the only legislative history contemporaneous with the enactment of the statutory provision at issue clearly requires that households' capital costs be taken into account.

IV. Conclusion

The USDA's regulation denying self-employed people an exclusion for capital expenses is wholly inconsistent with the Food Stamp Act. Although the USDA may have discretion under the statute to specify the method by which self-employed workers' costs are excluded in determining their net incomes, it does not have authority to inflate their incomes artificially by ignoring their capital costs. The USDA's 1981 rulemaking should be entitled to little deference, /24/ particularly because it represents a reversal of an earlier rule adopted contemporaneously with the statute. /25/

One court of appeals has questioned the propriety of this regulation *sua sponte*, /26/ but no court has yet ruled on it directly. The paucity of affirmative litigation is not entirely surprising in light of the factual complexity of these cases. Few self-employed households affected by this regulation have the legal sophistication to understand the calculations that the food stamp office makes to determine their eligibility; many may have had doubts about their eligibility before they applied, and most probably assume that the food stamp office knows what it is doing when it denies their applications or provides only minimal benefits.

As long as this regulation remains in force, it will continue to undermine the intent of Congress to encourage self-sufficiency for food stamp recipients. /27/ In litigating on behalf of eligible clients adversely affected by this regulation, advocates should be able to present self-employed workers in an extremely sympathetic light, whether they are marginal farmers, hunters or fishers, or low-income people in a metropolitan area who earn money as vendors or landlords, or through other ventures. A successful challenge to the regulation would help these workers feed their families and allow them to continue in ventures that may lead to long-term self-sufficiency.

footnotes

1. 7 C.F.R. Secs. 273.9(a)(2), 273.10(e)(1)(i)(A), and 273.10(e)(2)(i)(A).

2. See 7 U.S.C. Sec. 2017(a); 7 C.F.R. Sec. 273.10(e)(2)(ii)(A).

3. 7 U.S.C. Sec. 2014(d); see also 7 C.F.R. Sec. 273.9(b) and (c).

4. 7 U.S.C. Sec. 2014(d)(9) states as follows:

"Household income for purposes of the Food Stamp Program shall include all income from whatever source excluding . . . the cost of producing self-employed income, but household income that otherwise is included under this subsection shall be reduced by the extent that the cost of producing self-employment income exceeds the income derived from self-employment as a farmer."

5. Personal income taxes "and other work-related personal expenses" are not allowed as exclusions because "these expenses are accounted for by the 20-percent earned income deduction specified in [7 C.F.R.] Sec. 273.9(d)(2)." 7 C.F.R. Sec. 273.11(a)(4)(ii)(C).

6. *Consumer Prod. Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108 (1980); see, e.g., *Securities Indus. Ass'n v. Federal Reserve Bd.*, 468 U.S. 137, 142-43 (1984); *Bureau of Alcohol, Tobacco & Firearms v. Federal Labor Relations Auth.*, 464 U.S. 89, 98 n.8, (1983). The USDA's rules must be consistent with the Food Stamp Act. 7 U.S.C. Sec. 2013(c); see, e.g., *West v. Bowen*, 879 F.2d 1122 (3d Cir. 1989) (Clearinghouse No. 44,143); *Jordan v. Lyng*, 659 F. Supp. 1402, 1411 (E.D. Va. 1987) (Clearinghouse No. 42,443); *Harley v. Lyng*, 653 F. Supp. 260, 276 (E.D. Pa. 1986).

7. 7 U.S.C. Sec. 2014(d)(9).

8. *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43, (1984).

9. H.R. REP. NO. 464, 95th Cong., 1st Sess. 1 (June 24, 1977), reprinted in 1977 U.S. CODE CONG. & ADMIN. NEWS 1978, 2001-2002.

10. 43 Fed. Reg. 47912 (Oct. 17, 1978).

11. *Id.*

12. 46 Fed. Reg. 4646 (Jan. 16, 1981).

13. 7 C.F.R. Sec. 273.11(a)(4)(ii).

14. "[T]he Conference Committee Report accompanying the 1980 Amendments suggests that the Secretary delete depreciation" as an allowable cost of doing business for self-employed households. 46 Fed. Reg. 4646 (Jan. 16, 1981).

15. H. R. CONF. REP. NO. 957, 96th Cong., 2d Sess. 17 (May 14, 1980), reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 1057, 1069-1070. This recommendation apparently grew out of state food stamp administrators' complaints that calculating depreciation was excessively difficult for eligibility workers.

16. *United States v. Price*, 361 U.S. 304 (1960); *Waterman S.S. Corp. v. United States*, 381 U.S. 252 (1965), *Consumer Prod. Safety Comm'n*, 447 U.S. at 102; *Firestone Tire & Rubber Co. v. Bruch*, 109 S. Ct. 948 (1989); *Bobsee Corp. v. United States*, 411 F.2d 231, 237 (5th Cir. 1969); *Malloy v. Eichler*, 860 F.2d 1179, 1187 (3d Cir. 1988) (Clearinghouse No. 40,089); *Home Group, Inc. v. C.I.R.*, 875 F.2d 377, 381 (2d Cir. 1989); *Denny v. Westfield State College*, 880 F.2d 1465, 1470 (1st Cir. 1989), adding "what a later Congress says cannot be allowed to 'override the unmistakable intent of the enacting one.'"

17. *Waterman S.S. Corp.*, 381 U.S. at 269.

18. *Consumer Prod. Safety Comm'n*, 447 U.S. at 118, n.13 (1980).

19. Allowing an exclusion for expenses as they are paid would be the simplest method and probably would be the most accurate reflection of households' actual resources currently available to purchase food. It would therefore be most consistent with the Food Stamp Act's stated purposes. See 7 U.S.C. Secs. 2011 and 2014(a). "The goal is to smooth the way for participation by the needy, not to place obstacles in their path by making them out to be less needy than they in fact are." H.R. REP. NO. 464, *supra* note 9, at 2055.

20. S. REP. NO. 397, 100th Cong., 2d Sess. 15 (June 23, 1988) reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS 2253.

21. *Id.* at 1988 U.S. CODE CONG. & ADMIN. NEWS 2254. Senator Daschle also specifically attacked this regulation in the floor proceedings on the Hunger Prevention Act:

"Under current regulations, farmers and other self-employed individuals cannot apply depreciation expenses against their income for eligibility purposes. Neither can they deduct payments of principal for a loan used to buy tools or equipment. That they are not permitted to do so is clearly unfair and, in my view, almost certainly illegal. And it is undermining one of the principal purposes of this bill; to encourage employment and self-sufficiency The cost (of including the reform) is so high that we could not enact the reforms without taking money from other pressing nutrition needs As a result, I came to the conclusion that this issue is a matter for litigation, not legislation I soon will be requesting that the committee look into this matter."

134 CONG. REC. S9858 (daily ed. July 26, 1988).

22. Simply because Congress has not amended the statute in response to a regulation that is already contrary to the statutory language cannot be read to mean that Congress agrees with the USDA. In *Firestone Tire & Rubber Co. v. Bruch*, 109 S. Ct. at 948, the Court ruled that *de novo* review was an appropriate standard for reviewing an employer's denial of benefits under ERISA despite the fact that Congress had failed to act upon a bill that would provide *de novo*

review under these circumstances. Similarly, in *United States v. Price*, 361 U.S. at 304, the Court ruled that Sec. 272(d) of the Internal Revenue Code allowed a taxpayer to waive the right to be issued a notice of deficiency prior to conducting a proceeding for the collection of a tax. Congress considered revisions in the statute contrary to this decision, but the revisions were never adopted. The Court stated that "from the failure to act, respondent would have us infer an acceptance by Congress of the Ninth's Circuit position (one disallowing the waiver). Such non-action by Congress affords the most dubious foundation for drawing positive inferences." *United States v. Price*, 361 U.S. at 310-311.

23. See note 19 and accompanying text, *supra*.

24. The USDA's position here is entitled to less weight because it was not issued contemporaneously with the passage of the statute at issue. *Blackfeet Tribe v. Montana*, 729 F.2d 1192, 1202-3 (9th Cir. 1982) (en banc); *Alaska Pub. Easement Defense Fund v. Andrus*, 435 F. Supp. 664, 670 (D. Alaska 1977); *Drew v. Larrimore*, 257 F. Supp. 659, 669-70 (D.S.C. 1966), rev'd on other grounds, 380 F.2d 479 (4th Cir. 1967), cert. denied, 389 U.S. 974 (1968). See *Center for Auto Safety v. Ruckelshaus*, 747 F.2d 1, 5 (D.C. Cir. 1984).

25. Far less than the usual amount of deference is due to an administrative interpretation that has been inconsistent over time. See, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *NAACP, Jefferson County Branch v. Donovan*, 765 F.2d 1178, 1183-84 (D.C. Cir. 1985) (Clearinghouse No. 33,367); *Natural Resources Defense Council v. United States EPA*, 683 F.2d 752, 760-61 (3d Cir. 1982).

26. In *Meyer v. Lyng*, 859 F.2d 62 (8th Cir. 1988), a check was made jointly payable to a self-employed farmer and the Farmers Home Administration (FmHA). FmHA retained the entire proceeds of the check to pay back a loan pursuant to its crop security interest. The court ruled that the plaintiff could not exclude the check under 7 U.S.C. Sec. 2014(d)(1)'s exclusion for gains not in the form of money payable directly to the household. The court suggested, however, that the result might well have been different in a challenge under 7 U.S.C. Sec. 2014(d)(9). *Id.* at 65. The court mentioned twice that "To the extent his FmHA loan . . . represents actual farm expense, they should be excluded from his household income in calculating the household's eligibility for food stamps." *Id.* at 66.

27. The courts have held themselves "constrained by our obligation 'to honor the clear meaning of a statute, as revealed by its language, purpose and history,'" even if that necessitates rejecting the interpretation of an agency. *Bethlehem Steel v. United States EPA*, 651 F.2d 861, 868 (3d Cir. 1981); *Cleary v. United States Lines, Inc.*, 728 F.2d 607 (3d Cir. 1984); *National Indus. Sand Ass'n v. Marshall*, 601 F.2d 689, 698-99, n.32 (3d Cir. 1979); *United States ex rel. Dancy v. Arnold*, 572 F.2d 107, 113 (3d Cir. 1978). If benefits under a remedial statute are at issue, ambiguities will be resolved in favor of the intended beneficiaries, without regard to an adverse agency interpretation. *Alaska Pub. Easement Defense Fund*, 435 F. Supp. at 671. See also *Peyton v. Rowe*, 391 U.S. 54, 65 (1968) ("remedial statutes should be liberally construed"); *A.H. Phillips v. Walling*, 324 U.S. 490, 493, (1945); *Brennan v. Keyser*, 507 F.2d 472, 477 (9th Cir. 1974), cert. denied, 420 U.S. 1004 (1975); *Szlosek v. Secretary of HHS*, 674 F. Supp. 944, 948 (D. Mass. 1987) (Clearinghouse No. 39,996).