



COMMONWEALTH of VIRGINIA

Office of the Attorney General

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The Honorable Gerald E. Mabe, II
Commonwealth's Attorney
235 South Fourth Street, Suite 105
Wytheville, Virginia 24382

Dear Mr. Mabe:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You inquire whether the provision of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996¹ that renders persons convicted of certain drug offenses ineligible for food stamp assistance applies to convictions for manufacturing drugs and obtaining drugs by false pretenses. You further ask whether § 63.2-505.2 of the *Code of Virginia* in turn operates to exempt those offenses from such application.

Response

It is my opinion that the Personal Responsibility and Work Opportunity Reconciliation Act encompasses felony convictions for manufacturing controlled substances or for obtaining controlled substances by false pretenses. It is further my opinion that those persons with such convictions are disqualified from receiving food stamp benefits because § 63.2-505.2 does not exempt such convictions from the application of the federal law.

Applicable Law and Discussion

Pursuant to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, a person becomes ineligible to receive certain public assistance once convicted of "any offense which is classified as a felony . . . and which has as an element the possession, use, or distribution of a controlled substance."² States may opt out of this provision by enacting specific legislation to that end.³

In 2005, the General Assembly enacted § 63.2-505.2, which exempts certain food stamp applicants from the application of 21 U.S.C. § 862a. It expressly provides that a person "shall not be

¹ 21 U.S.C. § 862a.

² 21 U.S.C. § 862a(a).

³ 21 U.S.C. § 862a(d)

denied such assistance solely because he has been convicted of a felony offense of possession of a controlled substance in violation of § 18.2-250[.]”⁴ Thus, in exercising its discretion to exempt certain persons from the bar on benefits imposed by federal law, the General Assembly expressly chose only to exempt those who had been convicted under Virginia Code § 18.2-250.⁵

As a result, persons convicted under other provisions of the Code of Virginia may still fall within the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 bar to receiving benefits. The question becomes whether the conviction is an “offense which is classified as a felony . . . and which has as an element the possession, use, or distribution of a controlled substance.”⁶

You have specifically inquired regarding §§ 18.2-248 and 18.2-258.1. Section 18.2-248, among other related things, provides, “[e]xcept as authorized in the Drug Control Act . . . it shall be unlawful for any person to manufacture, sell, give, distribute, or possess with intent to manufacture, sell, give or distribute a controlled substance or an imitation controlled substance.” Pursuant to § 18.2-258, it is a Class 6 felony

for any person to obtain or attempt to obtain any drug or procure or attempt to procure the administration of any controlled substance, marijuana, or synthetic cannabinoids: (i) by fraud, deceit, misrepresentation, embezzlement, or subterfuge; or (ii) by the forgery or alteration of a prescription or of any written order; or (iii) by the concealment of a material fact; or (iv) by the use of a false name or the giving of a false address.⁷

As you note, absent state legislation to the contrary, the federal law denies benefits for those who have been convicted of felonies involving the possession, use, or distribution of controlled substances. You ask whether the crimes stated above constitute disqualifying offenses. Manufacturing a drug is a violation of § 18.2-248, a provision that by its terms includes possession among its elements.⁸ Further, to “obtain” a drug is “to gain possession of”⁹ it. As such, provided the specific violation of either section constitutes a felony,¹⁰ then a conviction under either subjects the offender to the disqualification provision of the federal law.

⁴ VA. CODE ANN. § 63.2-505.2 (2007). This section sets forth additional conditions for maintaining eligibility, but they are irrelevant to the instant inquiry.

⁵Section 18.2-250 makes it “unlawful for any person knowingly or intentionally to possess a controlled substance [,]” unless obtained pursuant to a valid prescription or as authorized by the Drug Control Act.

⁶ 21 U.S.C. § 862a(a).

⁷ For first time offenders, the violation may be reduced by the court to a Class 1 misdemeanor upon the defendant’s successful completion of the terms and conditions of probation. VA. CODE ANN. § 18.2-248(H) (2009).

⁸ See § 18.2-248(C)-(D), (E1)-(E3), (G)-(H2). See also, e.g., *Patterson v. Commonwealth*, 19 Va. App. 698, 702, 454 S.E.2d 367, 369 (1995) (“A person cannot manufacture marijuana without also possessing it; therefore, the elements of possession are ‘constituent parts’ of the greater offense of manufacturing. Thus, possession of marijuana is a lesser offense included in the offense of manufacturing marijuana.”) (citations omitted); *Spear v. Commonwealth*, 221 Va. 450, 457, 270 S.E.2d 737, 742 (1980) (intentional possession of controlled substance is lesser included offense of manufacturing).

⁹ THE WEBSTER ENCYCLOPEDIA OF THE ENGLISH LANGUAGE 576 (1967). THE AMERICAN HERITAGE DICTIONARY 859 (2d coll. ed. 1982) (defining “obtain” as “[t]o succeed in gaining possession of as the result of planning or endeavor”).

¹⁰ Not every offense established by § 18.2-248 is a felony. See § 18.2-248(E) and (F). In addition, convictions under § 18.2-248(J) relate to possession of certain substances with the intent to manufacture methamphetamine, methcathinone or amphetamine, which do not appear to be controlled substances. Because these offenses do not bar

Conclusion

Accordingly, it is my opinion that that the Personal Responsibility and Work Opportunity Reconciliation Act encompasses felony convictions for manufacturing controlled substances or for obtaining controlled substances by false pretenses. It is further my opinion that those persons with such convictions are disqualified from receiving food stamp benefits because § 63.2-505.2 does not exempt such convictions from the application of the federal law.

With kindest regards, I am

Very truly yours,



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a person from receiving public assistance, it is incumbent upon the local eligibility worker to determine the specific subsection or nature of the violation before deciding if the individual is ineligible.