



her right to a hearing to contest the charges. On the waiver form, however, the petitioner checked that she did not "admit that the facts are correct." See D.S.W. Exhibit III.

Based on the petitioner's waiver, the department determined that the petitioner would be disqualified from receiving food stamps for a six-month period. However, because the petitioner was not receiving food stamps at that time the disqualification was to take effect "whenever you apply and are eligible for food stamps again". (See Notice dated June 7, 1988, DSW Exhibit I).

Following the signing of the waiver the petitioner consulted with an attorney and decided she wished to contest the issue of whether she had intentionally violated a condition of the food stamp program. She alleges she signed the waiver only because she was "afraid of going to jail." She does not allege, however, that the department's investigator either coerced or threatened her into signing the waiver. She also does not allege that the investigator failed to fully inform her of her rights to a hearing. She claims only that she didn't know she was giving up her right to an administrative hearing by signing the waiver.

For purposes of the legal conclusion in this matter (see infra) it is unnecessary to determine whether the petitioner, in fact, fully understood the legal effects of signing a waiver. All that matters is the undisputed fact that the petitioner clearly gave notice to the department of

her desire to rescind her waiver before the department implemented any disqualification from food stamps that could have sprung from the waiver.

ORDER

The department's decision is reversed. The department shall, if it chooses, schedule an administrative disqualification hearing for the petitioner before it imposes any disqualification on the petitioner for this alleged "intentional program violation".

REASONS

Pursuant to federal regulation, states are required to establish a procedure to investigate and act upon all cases in which a recipient of food stamps is suspected of intentionally violating an eligibility provision of the program. See 7 C.F.R. § 273.16 et. seq. Vermont has adopted, essentially verbatim, the federal regulations regarding intentional program violation disqualifications. See Food Stamp Manual (F.S.M.) § 273.16 et. seq. Included in those provisions is the requirement that the department initiate and conduct a "food stamp disqualification (F.S.D.) hearing" against any individual accused of an intentional program violation. F.S.M. § 273.16(a). Under these regulations the decision of the department's hearing officer is administratively final. It can be appealed only to the Vermont Supreme Court. See F.S.M. § 273.16(e). By an agreement with the Human Services Board, the department has

designated the board's hearing officers as the "hearing authority" to conduct these F.S.D. hearings and to issue the final decisions of the department in these matters. The board, itself, is not involved.

At the outset, the instant case, which was brought by the petitioner pursuant to 3 V.S.A. § 3091 (the H.S.B. statute), raises the issue of the board's jurisdiction in matters "collateral" to the F.S.D. hearings. It should be noted and emphasized that at this point the hearing officer has heard no evidence relative to the underlying "merits" of the department's case (i.e., the petitioner's alleged "violation" of the Food Stamp program). The only question at this time is whether the board can, in effect, order the department to hold a F.S.D. hearing. The board concludes that it has this jurisdiction.

3 V.S.A. § 3091(a) provides, in pertinent part:

An applicant for or a recipient of assistance . . . from the . . . department of social welfare . . . may file a request for fair hearing with the human services board. An opportunity for a fair hearing will be granted to any individual requesting a hearing because his claim for assistance, benefits or services is denied, . . . or because he is aggrieved by any other agency action affecting his receipt of assistance, benefits or services . . .

Given the expansive language of the statute and the board's liberal interpretation of it in past cases (see Fair Hearings No. 7872, 7728, and 6549), it is concluded that the department's failure to provide the petitioner herein with a F.S.D. hearing constitutes an "action" by the department

"affecting (the petitioner's) receipt of benefits." The board findings nothing in the Human Services Board or the Food Stamp statutes and regulations that precludes it's consideration of issues "collateral" to the merits of F.S.D. hearings.<sup>1</sup>

F.S.M. § 273.16(f) sets forth procedures under which states may proceed to impose a disqualification for an intentional program violation based on the recipient's "waiver" of the right to a F.S.D. hearing. In this case, it appears that the department essentially complied with the due process requirements of the regulations in terms of notice to the petitioner and the explanation to her of her legal rights.<sup>2</sup> Id. F.S.M. § 273.16(f)(2) provides that once a waiver is obtained the affected household "shall be disqualified" in accordance with the duration requirements of the penalties section (see F.S.M. § 273.16(b)). However, paragraph (f)(2)(ii) of the waiver section provides: "No further administrative appeal procedure exists after an individual waives his/her right to an administrative disqualification hearing and a disqualification penalty has been imposed." (Emphasis added.) Paragraph (f)(2)(iii) of this section provides: "If the individual is not eligible for the program at the time the disqualification period is to begin, the period shall be postponed until the individual applies for and is determined eligible for benefits" (emphasis added).

As noted above, the petitioner herein was not eligible for and was not receiving food stamps when and after she signed the waiver. No penalty has yet been "imposed" on her. The department's notice to her, dated June 7, 1988, states only that the penalty will be a six-month disqualification. It further states that the petitioner will "subject" to the above disqualification "whenever" she applies and is found eligible for food stamps again (see supra).

The board finds nothing either in the regulations or as a matter of fundamental fairness that precludes an individual in the petitioner's circumstances from simply changing her mind and rescinding a waiver she previously signed.<sup>3</sup> For these reasons, it must be concluded that the regulations themselves fully allow an individual in the petitioner's situation to rescind a waiver and elect to proceed to hearing--assuming the department then elects to follow through with its regulatory remedies. Therefore, the department's decision is reversed and the matter remanded to the department for any further administrative proceedings the department deems appropriate.

FOOTNOTES

<sup>1</sup> Fortunately, the board need not at this time consider the issue of the validity of the entire F.S.D. hearing process vis-a-vis 3 V.S.A. § 3091. Clearly, however, the underlying "merits" of F.S.D. hearings also entail the department's denial of a "claim for benefits". There is no provision whatsoever under state law for the department to,

in effect, bypass the board's consideration of these cases.

<sup>2</sup>The board also need not consider whether the regulations themselves comply with general administrative due process requirements. The hearing officer feels compelled to comment, however, that he doubts that any person, especially one unschooled in the vagaries of the food stamp regulations and the fundamentals of due process, could ever fully comprehend the legal ramifications of this type of waiver. The biggest problem (one specifically raised by the petitioner in this case) is the distinction between the criminal and civil processes. The notices do not make clear that the F.S.D. hearing is a civil remedy the department must pursue. In fact, recipients are specifically advised to seek the legal services of the public defender, who only handles criminal matters. Moreover, these investigations are almost always fraught with accusations of "fraud" and innuendos of "jail". It is reasonable to assume that any unrepresented individual facing the department's investigative machinery will be under at least some degree of "duress".

It should be noted that F.S.M. § 273.16(f) specifically allows states the "option" of implementing the waiver provisions of that section. The hearing officer suspects that the department's decision to adopt this section will, in the long run, prove to be more trouble to the department than it is worth in terms of administrative "convenience" (i.e., the avoidance of holding hearings in every F.S.D. case). The department was, or should have been, aware of the legal "risks" (from a due process standpoint) that are involved in obtaining waivers from individuals accused of intentional program violations.

<sup>3</sup>The department does operate under time constraints in F.S.D. hearings that are imposed by the regulations. However, the regulations provide only that a final decision be rendered within 90 days after a household is notified that a hearing "has been scheduled." F.S.M. § 273.16(e)(2)(iv). Thus, unless and until an individual not receiving benefits rescinds her waiver the department is under no obligation to schedule a hearing and begin the 90-day period.

The department might argue, however, that a person not receiving benefits could rescind a waiver months or even years after the occurrence of the alleged violation if that is when she reapplies for food stamps. At that time, the department could well be handicapped in its ability to present its case at a F.S.D. hearing. This is not the case, herein, however. The petitioner in this case notified the department of her rescission within three weeks of receiving the department's June 7, 1988, notice. The department would not have been prejudiced at all by holding a F.S.D. hearing

when the petitioner rescinded her waiver. Thus, the board in this matter need not consider whether, and under what circumstances, a time limit should apply within which an individual can rescind a previously-given waiver. To the extent, however, that the board's ruling in this matter might ultimately compel the conclusion that the department is required to hold a F.S.D. hearing whenever an individual who has not received benefits rescinds a waiver, it cannot at this time be concluded that this would be an unreasonable "risk" for the department to assume for exercising its "option" to obtain the waiver in the first place (see Footnote 2, supra).

# # #