

petitioner's waiver and filed a request for hearing in the petitioner's behalf with the Human Services Board. On October 26, 1990, the board notified the parties that the matter was scheduled for hearing on November 7, 1990. On November 1, 1990, the Department implemented its decision terminating the petitioner's food stamps. On the day of the hearing (November 7, 1990) the Department moved to dismiss the petitioner's appeal before the board for lack of subject matter jurisdiction.

ORDER

The Department's decision terminating the petitioner's food stamps is reversed. The petitioner's benefits shall be reinstated until the petitioner, after a hearing, is determined to have committed an intentional violation of the Food Stamp program.

REASONS

The circumstances surrounding this appeal are similar (but, as discussed below, not identical) to Fair Hearing No. 8656, decided by the Board on January 13, 1989. In that case the Board described the Department's Food Stamp Disqualification (FSD) hearing process, noting that it was separate from the Human Services Board appeals process. Id. pp. 3-4. However, in that case the Board held that it has general jurisdiction under 3 V.S.A. § 3091(a) to consider issues "collateral" to F.S.D. hearings, and that the food stamp regulations and "fundamental fairness" did

not preclude the petitioner in that case "from simply changing her mind and rescinding a waiver she previously signed." Id. at pp. 5-6.⁴

The instant matter is different in at least one respect from Fair Hearing No. 8656. In Fair Hearing No. 8656, the petitioner, prior to the time she signed her waiver, had been terminated from food stamps for reasons unrelated to the alleged intentional program violation. Thus, the Department in that case had informed the petitioner on the waiver form that she would be disqualified "whenever" she reapplied and was found otherwise eligible for food stamps. Id. pp. 2 and 6. As of the date of the Board hearing in Fair Hearing No. 8656, the petitioner had not reapplied for food stamps.

The petitioner in the instant matter did not "rescind" his waiver until after the Department had notified him it was implementing the disqualification. It is clear, however, that the petitioner herein rescinded his waiver (and notified the Department of same) before the effective date the Department was to implement its decision, see supra. It is concluded, therefore, that the "disqualification penalty" had not yet been "imposed" when the petitioner rescinded his waiver. See F.S.M. § 273.16 (f) (2) (ii) and Fair Hearing No. 8656, pp. 5-6. Thus, the Board's holding in Fair Hearing No. 8656 is deemed applicable and controlling.⁵

For the above reasons, the petitioner's rescision of his waiver of a hearing must be considered valid and binding on the Department. Unless and until the Department holds a Food Stamp Disqualification Hearing for the Petitioner--and the Petitioner loses that hearing--the Department cannot impose any disqualification on the petitioner based on the alleged intentional program violation.⁶

FOOTNOTES

¹The Department alleges that the petitioner misrepresented the amount of rent he paid from November 1, 1989 to May 31, 1990.

²It is not known why the Department took more than three months to follow up on the petitioner's waiver.

³The petitioner resides in a food stamp "household" of two persons. The Department's notice informed the petitioner that he was ineligible to receive food stamps for six months and that the household was to have \$10.00 a month deducted from its remaining food stamps to "repay the overpayment" of food stamps caused by the petitioner's actions. Since the household, after the petitioner's disqualification, was only eligible for \$10.00 a month in food stamps, the recoupment effectively terminated the household's benefits entirely as of November 1, 1990.

⁴The Department has appealed the Board's decision in Fair Hearing No. 8650, and the case is now pending before the Vermont Supreme Court.

⁵It should also be noted that the "waiver form" used by the Department in the instant case appears somewhat different than the form used in Fair Hearing No. 8650. See id., footnote 2, p. 7. The petitioner in this case, unlike in Fair Hearing No. 8650, also alleges that the Department's oral representations made to him at the time he signed the waiver were flawed and misleading. See id., pp. 1-2. However, given the basis of the Board's holding

in Fair Hearing No. 8650 and the conclusion herein that the instant case is indistinguishable from that holding, it is unnecessary (as it was in Fair Hearing No. 8650) for the Board to consider any other issue surrounding the legal sufficiency of the Department's F.S.D. process. Other than admitting a copy the waiver itself, the hearing officer has neither heard nor considered any evidence concerning the circumstances surrounding the petitioner's signing of the waiver. Also, as was (and still is) the case in Fair Hearing No. 8650, the hearing officer has not heard any evidence or considered any of the allegations concerning the "merits" of the petitioner's alleged intentional program violation.

⁶As noted above (see footnote 3), the Department's actions in this case concern not only the six-month "disqualification" of the petitioner, but also the recoupment of benefits allegedly "overpaid" to the petitioner's household. The petitioner denies he should be liable for any overpayment. The standard for determining liability for mandatory recoupment is less stringent than for imposing a penalty of disqualification. ("Inadvertent error" on the part of the household, as established by a preponderance of evidence, is sufficient to establish overpayment liability [see F.S.M. § 273.18], whereas clear and convincing evidence of intentional misconduct is required to impose a disqualification.) Thus, even if the Department does not ultimately establish an intentional program violation, it may still be entitled to recoup benefits overpaid due to household error. Hearings to contest a Department determination of "inadvertent household error" are held before the Human Services Board pursuant to 3 V.S.A. § 3091(a) and F.S.M. § 273.15. (If, however, it is ultimately determined that an intentional program violation did occur, the petitioner would automatically be liable to repay any resulting overpayment of benefits. See F.S.M. § 273.18(d)(2).) Also, the Department has the option of pursuing recoupment--as an "inadvertent household error" claim during the pendency of an intentional program violation proceeding. See F.S.M. § 273.18(a)(3). However, since no hearing has yet been held by anyone on the "merits" of any aspect of the Department's determination, all adverse actions by the Department against the petitioner, including recoupment and placing the household on "monthly reporting" status, should be stayed during the pendency of this and any resultant appeal hearings. F.S.M. § 273.15(k).

#