



STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
OFFICE OF INSPECTOR GENERAL
BOARD OF REVIEW
1900 Kanawha Boulevard East
Building 6, Room 817-B
Charleston, WV 25305

Bill J. Crouch
Cabinet Secretary

Jolynn Marra
Interim Inspector General

May 31, 2019



RE: [REDACTED] v. WVDHHR
ACTION NO.: 17-BOR-2176

Dear Ms. [REDACTED]

Enclosed is a copy of the decision resulting from the hearing held in the above-referenced matter.

In arriving at a decision, the Board of Review is governed by the Public Welfare Laws of West Virginia and the rules and regulations established by the Department of Health and Human Resources. These same laws and regulations are used in all cases to assure that all persons are treated alike.

You will find attached an explanation of possible actions that may be taken if you disagree with the decision reached in this matter.

Sincerely,

David A. Bishop
Administrative Law Judge
State Board of Review

Enclosure: Appellant's Recourse Form IG-BR-29
cc: Chaelyn Casteel, Assistant Attorney General

**WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES
BOARD OF REVIEW**

██████████,

Appellant,

v.

Action Number: 17-BOR-2176

**WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES,**

Respondent.

DECISION OF STATE HEARING OFFICER

INTRODUCTION

This is the decision of the State Hearing Officer resulting from an administrative hearing for ██████████. This proceeding was remanded to the Board of Review from the Circuit Court of ██████████ County by order entered August 14, 2018, in Civil Action Numbers 17-C-311 and 17-C-393. This hearing was held in accordance with the provisions found in Chapter 700 of the West Virginia Department of Health and Human Resources (DHHR) Common Chapters Manual and Federal Regulations at 7 CFR §273.16. The hearing was convened on February 13, 2019.

The remanded matter before the Board of review arises from the imposition of an administrative disqualification period and benefits repayment on the Appellant by the Respondent after the determination of a Supplemental Nutrition Assistance Program intentional program violation, as well as a challenge to the notice and waiver of the Appellant's right to an administrative hearing.

At hearing, the Respondent appeared by Assistant Attorney General Chaelyn Casteel and DHHR Investigations and Fraud Management Investigator Cassandra Burns. Appellant ██████████ appeared in person, and by her counsel, Attorney ██████████ and Attorney ██████████, Legal Aid of West Virginia. Witnesses for the Respondent were DHHR Investigations and Fraud Management Investigators Christina Saunders, Addison Hamilton, and Cassandra Burns. The Appellant testified on her own behalf.

Department's Exhibits:

- | | |
|-----|--|
| D-1 | Appointment Letter
Dated April 10, 2017 |
| D-2 | Statement of Advise and Consent
Dated: April 25, 2017 |

- D-3 Transaction History Records of the Appellant
May 16, 2016 to April 11, 2017
- D-4 EBT Transaction Summary for [REDACTED]
- D-5 Statement of [REDACTED]
Dated: April 25, 2017
- D-6 Advance Notice of Administrative Disqualification Hearing Waiver,
Hearing Procedures and Rights Notice, and Waiver of Administrative
Disqualification Hearing
- D-7 Repayment Agreement
Dated: April 25, 2017
- D-8 Overissuance Notice
Dated: May 8, 2017
- D-9 Disqualification Notice
Dated: July 14, 2017
- D-10 Household Eligibility Notice
Dated: July 14, 2017
- D-11 inRoads Benefits Application
Submission Date: April 1, 2016

Appellant's Exhibits:

- A-1 Interrogatory Responses
[REDACTED]
Case No. [REDACTED]
- A-2 Vendor Transaction List (Redacted)
- A-3 USDA Fraud Policy Memorandum
- A-4 Snap Trafficking Poster

After a review of the record, including testimony, exhibits, and stipulations admitted into evidence at the hearing, and after assessing the credibility of all witnesses and weighing the evidence in consideration of the same, the following Findings of Fact are set forth.

FINDINGS OF FACT

- 1) The Appellant was a recipient of benefits from the Supplemental Nutrition Assistance Program (SNAP).
- 2) The Appellant received SNAP benefits during the period of May 2016 to April 2017. (Exhibit D-3)
- 3) On April 1, 2017, the Appellant acknowledged by electronic signature upon completing the benefits application her rights and responsibilities for the ensuing benefits period. (Exhibit D-11)
- 4) The Appellant acknowledged that she read, understood, and agreed to the responsibilities as set out in the application. (Exhibit D-11)
- 5) The first statement within the SNAP Rights and Responsibilities section of the Appellant's April 2016 application form, set forth the requirement that the Appellant was not to use EBT SNAP benefits to purchase food on credit. (Exhibit D-11)
- 6) Between July 6, 2016 and February 6, 2017, the Appellant on four occasions used SNAP benefits to purchase food from SNAP-authorized mobile meat vendors who delivered meat to her home. (Exhibit D-4)
- 7) Three vendors that provided food delivery to the Appellant during this period were [REDACTED], [REDACTED], and [REDACTED] meat trucks. (Exhibit D-4)
- 8) The Appellant purchased meat by the case from the meat truck vendors. The Appellant testified that the meat received from the meat truck vendors was a better quality than what was available at her local grocery store.
- 9) For each transaction, the Appellant presented her SNAP EBT card to the vendor. The vendor made a carbon copy of the Appellant's SNAP EBT card.
- 10) For each transaction, the Appellant also provided to the meat truck vendor her personal identification number assigned to her SNAP EBT card and the date on which new benefits would be placed in her SNAP EBT benefits account.
- 11) Using the Appellant's SNAP EBT card information, the vendors processed payment the month after food delivery when the Appellant received a deposit of new benefits in her SNAP EBT account.
- 12) Prior to purchasing food from the meat truck vendors, the Appellant asked a DHHR employee and her residential complex manager to make sure the meat trucks were legitimate and authorized SNAP EBT vendors from whom she could purchase food.

- 13) In 2017, the Respondent Investigations and Fraud Management unit (IFM) conducted an investigation into SNAP EBT transactions involving meat trucks after receiving a referral from the USDA Food and Nutrition Service.
- 14) The IFM investigation included [REDACTED] and [REDACTED] meat trucks.
- 15) A task force of IFM investigators was assembled for the meat truck investigation. IFM Investigator Cassandra Burns was assigned as the lead investigator for the task force.
- 16) As part of the investigation, SNAP benefit recipients who purchased food from [REDACTED] meat truck were identified by IFM investigators.
- 17) The Appellant was identified by IFM investigators as a SNAP benefit recipient who purchased food from [REDACTED] meat truck.
- 18) IFM Investigator Christina Saunders prepared and mailed an appointment letter to the Appellant. (Exhibit D-1)
- 19) The April 10, 2017 letter notified the Appellant that a referral had been received regarding the Appellant's benefit case and that an interview appointment with the Appellant was scheduled for April 25, 2017. (Exhibit D-1)
- 20) The appointment letter indicates that IFM staff, "developed evidence which indicates you received benefits to which you were not entitled." (Exhibit D-1)
- 21) On April 21, 2017, four days prior to the interview with the Appellant, IFM Investigator Saunders prepared an *Advance Notice of Administrative Disqualification Hearing Waiver* form (waiver notice) and a *Waiver of Administrative Disqualification Hearing* form (waiver). (Exhibit D-6)
- 22) The pre-prepared waiver notice indicates that an "investigation has been completed relative to your Supplemental Nutrition Assistance Program (SNAP) case record." (Exhibit D-6)
- 23) The waiver notice indicates the Appellant "intentionally violated the SNAP by: **SNAP trafficking.**" (Exhibit D-6)
- 24) The waiver notice indicates "evidence to prove this allegation consists of **EBT Transactions.**" (Exhibit D-6)
- 25) The waiver concludes the Appellant intentionally violated a SNAP rule and that an administrative disqualification hearing would be requested. (Exhibit D-6)
- 26) The waiver indicates that "SNAP Trafficking/Misuse" and "Fraudulent use of an access device" were the allegations to be presented at the administrative disqualification hearing. (Exhibit D-6)

- 27) On April 25, 2017, IFM Investigator Saunders and IFM Investigator Addison Hamilton conducted an interview with the Appellant regarding her meat truck transactions.
- 28) During the interview with the Appellant, IFM Investigator Hamilton stood while the Appellant was seated. The door to the interview room was closed.
- 29) Prior to questioning, IFM Investigators Saunders and Hamilton reviewed the *Statement of Advise and Consent* form (advise and consent) with the Appellant. (Exhibit D-2)
- 30) Each numbered section of the advise and consent was read to the Appellant and she was given a copy to allow her to read along.
- 31) The final statement above the signature line in the advise and consent states, "I have not been promised anything, threatened, pressured, or coerced. I am not in custody, under arrest, or in any way restrained in freedom of movement. I know that I am free to leave at any time." (Exhibit D-2)
- 32) The Appellant placed her initials next to the number or placed a checkmark next to her chosen responses on the advise and consent form. (Exhibit D-2)
- 33) On the advise and consent form, the Appellant initialed next to the statement that, "I waive my right to have a lawyer with me and choose to be interviewed." (Exhibit D-2)
- 34) The Appellant signed the advise and consent form at 4:32 p.m. on April 25, 2017. (Exhibit D-2)
- 35) The Appellant reported during the interview that she received food from meat truck vendors where she could "buy now and pay later." (Exhibit D-5)
- 36) The Appellant reported that during the meat truck transactions a carbon copy of her card was made by the vendor, and she provided her PIN number, ID, address, and the date she would receive new benefits. (Exhibit D-5)
- 37) IFM Investigator Saunders contemporaneously prepared the written statement of the Appellant from the answers given by the Appellant during her interview.
- 38) The Appellant reviewed, read, and signed the written interview statement. (Exhibit D-5)
- 39) IFM Investigator Saunders determined that the Appellant committed an intentional program violation from misuse of her EBT SNAP benefits by purchasing food from the meat truck vendors on credit.
- 40) There was no determination made that the Appellant committed a violation of trafficking SNAP benefits.

- 41) IFM Saunders presented the Appellant with the previously prepared waiver notice, waiver, and *Rights and Hearing Procedures* form. (Exhibit D-6)
- 42) The Appellant was then afforded an opportunity to read and review the forms. The Investigators left the interview room.
- 43) The Appellant testified that she took approximately 10 minutes to review the waiver because she does not “sign anything before reading it.”
- 44) The Appellant signed the waiver. (Exhibit D-6)
- 45) The Appellant checked the box on the waiver which states, “I admit to the facts as presented and understand that a disqualification penalty will be imposed if I sign this waiver.” (Exhibit D-6)
- 46) The Appellant entered into a *Repayment Agreement* prepared by IFM Investigator Saunders. (Exhibit D-7)
- 47) The Appellant agreed to repay “\$910 received in benefits to which I was not entitled, received during the period of 7/16 through 12/16.” (Exhibit D-7)
- 48) The *Repayment Agreement* erroneously sets forth that the “overpayment is due to failing to report earned income.” (Exhibit D-7)
- 49) The agreement states that it serves, “as notice of an over-issuance of benefits.” (Exhibit D-7)
- 50) On May 8, 2017, a notification of over-issuance of benefits was sent to the Appellant. (Exhibit D-8)
- 51) The notice erroneously states that the Appellant received more benefits than she was eligible to receive because of “TRAFFICKING.” (Exhibit D-8)
- 52) The Appellant was disqualified from SNAP benefits for a 12-month period. (Exhibit D-9)
- 53) Civil Action Numbers [REDACTED] and [REDACTED] were filed in the [REDACTED] by the Appellant.
- 54) The actions were consolidated and remanded to the Board of Review for a full evidentiary hearing on the merits by order entered August 14, 2018.
- 55) The Appellant and Respondent agreed to rescind the Appellant’s *Waiver of Administrative Disqualification Hearing* to allow for remand of the matter for factual development and hearing before the Board of Review.

APPLICABLE AUTHORITY

Code of Federal Regulations

7 C.F.R. §273.16 – Disqualification for Intentional Program Violation.

...

(c) Definition of intentional Program violation. Intentional Program violations shall consist of having intentionally:

- (1) Made a false or misleading statement, or misrepresented, concealed or withheld facts; or
- (2) Committed any act that constitutes a violation of SNAP, SNAP regulations, or any State statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of SNAP benefits or EBT cards.

...

(e) Disqualification hearings. The State agency shall conduct administrative disqualification hearings for individuals accused of intentional Program violation in accordance with the requirements outlined in this section.

...

(3) Advance notice of hearing.

(i) The State agency shall provide written notice to the individual suspected of committing an intentional Program violation at least 30 days in advance of the date a disqualification hearing initiated by the State agency has been scheduled. If mailed, the notice shall be sent either first class mail or certified mail-return receipt requested. The notice may also be provided by any other reliable method. If the notice is sent using first class mail and is returned as undeliverable, the hearing may still be held.

(ii) If no proof of receipt is obtained, a timely (as defined in paragraph (e)(4) of this section) showing of nonreceipt by the individual due to circumstances specified by the State agency shall be considered good cause for not appearing at the hearing. Each State agency shall establish the circumstances in which non-receipt constitutes good cause for failure to appear. Such circumstances shall be consistent throughout the State agency.

(iii) The notice shall contain at a minimum:

- (A) The date, time, and place of the hearing;
- (B) The charge(s) against the individual;
- (C) A summary of the evidence, and how and where the evidence can be examined;
- (D) A warning that the decision will be based solely on information provided by the State agency if the individual fails to appear at the hearing;

(E) A statement that the individual or representative will, upon receipt of the notice, have 10 days from the date of the scheduled hearing to present good cause for failure to appear in order to receive a new hearing;

(F) A warning that a determination of intentional Program violation will result in disqualification periods as determined by paragraph (b) of this section, and a statement of which penalty the State agency believes is applicable to the case scheduled for a hearing;

(G) A listing of the individual's rights as contained in § 273.15(p);

(H) A statement that the hearing does not preclude the State or Federal Government from prosecuting the individual for the intentional Program violation in a civil or criminal court action, or from collecting any overissuance(s); and

(I) If there is an individual or organization available that provides free legal representation, the notice shall advise the affected individual of the availability of the service.

...

(f) Waived hearings. Each State agency shall have the option of establishing procedures to allow accused individuals to waive their rights to an administrative disqualification hearing. For State agencies which choose the option of allowing individuals to waive their rights to an administrative disqualification hearing, the procedures shall conform with the requirements outlined in this section.

(1) Advance notification.

(i) The State agency shall provide written notification to the household member suspected of intentional Program violation that the member can waive his/her right to an administrative disqualification hearing. Prior to providing this written notification to the household member, the State agency shall ensure that the evidence against the household member is reviewed by someone other than the eligibility worker assigned to the accused individual's household and a decision is obtained that such evidence warrants scheduling a disqualification hearing.

(ii) The written notification provided to the household member which informs him/her of the possibility of waiving the administrative disqualification hearing shall include, at a minimum:

(A) The date that the signed waiver must be received by the State agency to avoid the holding of a hearing and a signature block for the accused individual, along with a statement that the head of household must also sign the waiver if the accused individual is not the head of household, with an appropriately designated signature block;

(B) A statement of the accused individual's right to remain silent concerning the charge(s), and that anything said or signed by the individual concerning the charge(s) can be used against him/her in a court of law;

(C) The fact that a waiver of the disqualification hearing will result in disqualification and a reduction in benefits for the period of disqualification, even if the accused individual does not admit to the facts as presented by the State agency;

(D) An opportunity for the accused individual to specify whether or not he/she admits to the facts as presented by the State agency. This opportunity shall consist of the following statements, or statements developed by the State agency which have the same effect, and a method for the individual to designate his/her choice:

(1) I admit to the facts as presented, and understand that a disqualification penalty will be imposed if I sign this waiver; and

(2) I do not admit that the facts as presented are correct. However, I have chosen to sign this waiver and understand that a disqualification penalty will result;

(E) The telephone number and, if possible, the name of the person to contact for additional information; and

(F) The fact that the remaining household members, if any, will be held responsible for repayment of the resulting claim.

(iii) The State agency shall develop a waiver of right to an administrative disqualification hearing form which contains the information required by this section as well as the information described in paragraph (e)(3) of this section for advance notice of a hearing. However, if the household member is notified of the possibility of waiving his/her right to an administrative disqualification hearing before the State agency has scheduled a hearing, the State agency is not required to notify the household member of the date, time and place of the hearing at that point as required by paragraph (e)(3)(i)(A) of this section.

...

7 C.F.R. §274.7 Benefit redemption by eligible households.

...

(b) Prior payment prohibition. Program benefits shall not be used to pay for any eligible food purchased prior to the time at which an EBT card is presented to authorized retailers or meal services. Neither shall benefits be used to pay for any eligible food in advance of the receipt of food, except when prior payment is for food purchased from a nonprofit cooperative food purchasing venture.

...

Common Chapters Manual

740 Subpart D – Administrative Disqualification Hearings

... 740.11 Definitions.

... D. Intentional Program Violation –

1. Intentionally making a false or misleading statement, or misrepresenting, concealing or withholding facts; or
2. Committing any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any state statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of coupons, authorization cards or reusable documents used as part of an automated benefit delivery system access device.

DISCUSSION

Intentional Program Violation

The central issue to be determined in this matter is whether the Appellant committed an intentional program violation subjecting her to program disqualification and repayment. The Appellant argues that the alleged misuse conduct was not intentional, nor did it constitute a program violation.

The Respondent is required to show in this matter that the Appellant committed an act that constitutes a violation of SNAP regulations for the purpose of using or presenting SNAP benefits or EBT card. 7 C.F.R. §273.16 (c)(2). Specifically, the Respondent determined that the Appellant purchased food on credit with SNAP benefits in violation of 7 C.F.R. §274.7(b), which provides that “program benefits cannot be used to pay for any food purchased prior to the time at which an EBT card is presented to authorized retailers or meal services.” The standard of proof to be applied is clear and convincing evidence.

On four separate occasions, the Appellant purchased food from meat truck vendors that came to her home. The Appellant presented her EBT card to each meat truck vendor for every transaction. The Appellant was aware that the vendor would not present her EBT card information for full SNAP payment processing at the time she received her food, but instead knew subsequent processing would occur after a SNAP benefit deposit was placed into her account.

The Appellant first argues that she was unaware of the prohibition of buying food on credit and that she acted out of ignorance, mistake or accident, and was without intent to misuse her benefits. The Appellant testified at hearing that she did not know the transaction procedures used by the meat truck vendors was prohibited. The Appellant however in completing her *Rights and Responsibilities* form acknowledged the program prohibition of buying food on credit.

The Appellant discussed with several people, including a department worker, whether the meat truck vendors were authorized and legitimate SNAP vendors. After those discussions, the

Appellant correctly believed that the meat trucks were SNAP authorized vendors. The Appellant however did not inquire whether the “buy now/pay later” was an authorized practice. The Appellant testified that the only person that told her that “buy now/pay later” was an authorized practice was “[REDACTED]” the meat truck salesman. The Appellant knowingly engaged in purchasing food on credit during the period in which she acknowledged the prohibition of purchasing food on credit and agreeing to be held accountable for the prohibition.

The Appellant also argues that she is not in violation of the federal regulation that prohibits purchasing food on credit. The applicable regulation, 7 C.F.R. §274.7(b), provides that “program benefits cannot be used to pay for any food purchased prior to the time at which an EBT card is presented to authorized retailers or meal services.” The Appellant argues that she received her food at the same time she presented her EBT card to the meat truck vendors and therefore is not in violation of the regulation. While a technically compelling argument, it is not ultimately persuasive as the Appellant’s EBT card was not presented for immediate transactional processing from current SNAP benefits, but instead knowingly presented to the vendor for future processing, after receiving new benefits the following month.

“Where a statute is of doubtful meaning, the contemporaneous construct placed thereon by the officers of government charged with its execution is entitled to great weight, and will not be disregarded or overthrown unless it is clear that such construction is erroneous.” United Services Automobile Association v. Lucas, 233 W. Va. 68, 754 S.E.2d 754 (2014). The West Virginia Supreme Court has also provided, “[W]e are mindful that our review of an agency’s construction of the statute it administers as reflected in a rule promulgated by that agency is limited and this Court does not have free reign to substitute its preferred construction of the statute for that of the agency. Syl. Pt. 4, Appalachian Power Co. v. State Tax Dept., 195 W.Va. at 579, 466 S.E.2d at 430. In cases where an agency’s governing statute is silent or ambiguous with respect to a specific issue, this Court shows substantial deference to the agency’s construction as reflected in a rule or regulation, or application thereof, unless the agency has exceeded its constitutional or statutory authority or has acted arbitrarily or capriciously.” Verizon W. Va., Inc. v. W. Va. Bureau of Employment Programs, Workers; Comp. Div., 214 W. Va. 95, 110 S.E.2d 170, 185 (2003).

The Respondent IFM unit, responsible for SNAP violation enforcement, interprets 7 C.F.R. §274.7(b) to prohibit purchasing food on credit by program recipients. This interpretation of buying food on credit includes transactions where an EBT card is presented to the vendor for subsequent processing from future benefits. The Respondent’s interpretation is not clearly erroneous, nor does it create arbitrary and capricious results. To adopt a literal reading would create unjust and potentially skewed outcomes during enforcement. Violations of buying food on credit could be avoided by simply handing a vendor an EBT card, regardless of the knowledge or intent of the recipient.

The Appellant presented her EBT card to the meat truck vendors at the time she received her food knowing the transaction was “buy now/pay later,” and would not be fully presented by the vendor for processing until new benefits were deposited in the Appellant’s SNAP benefits account the following month. The Appellant committed an intentional program violation by purchasing food on credit, subjecting her to program disqualification and repayment.

Notice

The second issue to be reviewed in this matter is whether adequate notice was provided to the Appellant prior to her execution of a waiver of the right to an administrative disqualification hearing. The Appellant asserts that the notice provided fails to meet due process and federal authority requirements. The Respondent contends that any notice inadequacy is a technical violation and not prejudicial to the Appellant.

There are several areas of controlling authority applicable to this issue. In Hudson v. Bowling, 232 W.Va. 282, 752 S.E.2d 313 (2013), the West Virginia Supreme Court set forth a requirement in SNAP overpayment cases that notices, at a minimum, must contain, “(1) an explanation of the proposed action and the reason therefore, in simplified form and easily understandable language; and (2) a reference to all applicable sections of the *DHHR Common Chapters Manual*.” Several federal regulations are applicable to this issue, including 7 C.F.R. §273.16(f), which sets out the notice requirements prior to a waiver of an administrative disqualification hearing, as well as the notice requirements for the waiver form itself. The waiver form must contain the same information as an advance notice of hearing, which specifically requires a notice of the charges against the individual and a summary of the evidence. 7 C.F.R. §273.16(f)(1)(iii), 7 C.F.R. §273.16(e)(3)(iii).

The Appellant contends that the appointment letter, the waiver notice, and waiver are all subject to, and in violation of, federal regulation and Hudson notice requirements. While the authorities unquestionably cover the waiver notice and waiver, the assertion that the appointment letter is subject to the same notice requirements is not accurate.

The Appellant avers that the April 10, 2017 appointment letter sent by the Respondent to the Appellant must contain the same notice elements required for administrative hearings and waivers. The authority regarding notice of intentional program violations, administrative disqualification hearings and hearing waivers however simply do not apply to appointment letters. The appointment letter is intended to inform a recipient of an interview appointment as part of an ongoing investigation. Department investigators then gather information during the interview as part of the investigation. Prior to the conclusion of an investigation, or alternatively a decision of adverse action, the appointment letter could not accurately contain the charges against the recipient or a complete evidence summary. The appointment letter sent to the Appellant is not subject to the notice requirements of Hudson or 7 C.F.R. §273.16(f) and therefore, is not in violation of those notice requirements.

The waiver notice and the waiver however are certainly subject to the requirements necessitating a notice of charges, an evidence summary, a simple and understandable reason for disqualification, and a citation to the applicable authority. In the case at hand, the notice provided by the Respondent in the waiver notice and waiver failed to satisfy these requirements.

A task force of IFM investigators was assembled to investigate possible SNAP violations surrounding mobile meat truck vendors. The Appellant was interviewed as part of that meat truck investigation. Several days prior to the interview with the Appellant, IFM Investigator Christina Saunders prepared a waiver notice and waiver for possible use by the Appellant. These forms were created prior to the completion of the investigation or a charging decision being reached.

In the waiver notice, “**SNAP Trafficking**” was inserted as the intentional program violation. The summary of evidence was listed as “**EBT Transactions**”. In the waiver, “Snap Trafficking/Misuse” and “Fraudulent use of an access device” was inserted as the charge against the Appellant. The waiver did not contain citations to applicable authority, a summary of the evidence, any fact specific to the Appellant’s conduct, or even notice of the actual alleged violation against the Appellant, which was buying food on credit.

While not improper to plan ahead for different possibilities and to pre-populate forms based on possible outcomes during a large investigation, the specific notice requirements that protect the rights of recipients cannot be relegated to vague generalizations to cover all possible variations of misconduct. The Appellant was never notified in writing prior to waiving her right to an administrative hearing that the disqualification being pursued against her was based on the misuse of benefits from buying food on credit, which is prohibited by the DHHR rights and responsibilities form and federal regulation. Trafficking, although listed multiple times in the documents produced by the Respondent, was never alleged against the Appellant. The vague catch-all misconduct allegations placed in the Appellant’s forms, along with a lack of meaningful evidence summary and lack of citations to the provisions being violated did not provide adequate notification to the Appellant to allow for a knowing and intelligent waiver of her hearing rights. The Respondent did not provide adequate notice to the Appellant, as required by federal regulation and by the West Virginia Supreme Court in Hudson, prior to the execution of a waiver of her right to an administrative disqualification hearing.

Prejudice

The Appellant contends that prejudice from inadequate notice resulted in denial and delay of her administrative hearing as well as improper sanctions and reductions. The Appellant requests dismissal of the intentional program violation and sanctions as the remedy. The Respondent argues that even if the Appellant was prejudiced from improper notice, the waiver was rescinded, and dismissal is too severe of a remedy to be imposed.

In Hudson, the West Virginia Supreme Court ruled that where the notice does not comply with the minimum requirements, the burden is on the Department to establish, by a preponderance of the evidence, that the Appellant was not prejudiced in his or her ability to contest the overpayment. *Id.* at 323. The Court also noted however that, “dismissal in all circumstances is too draconian a remedy for this Court to impose on an agency tasked with maximizing scarce resources to serve tens of thousands of individuals in need of assistance.” *Id.* at 292, 323.

The Appellant is correct in that there is little doubt she has been prejudiced by the inadequate notice of the waiver notice and waiver. Because of the notice inadequacies, the Appellant was not afforded an opportunity to knowingly and intelligently waive her right to an administrative disqualification hearing. The Appellant’s access to the administrative hearing process required intervention by the [REDACTED], and therefore was necessarily delayed.

The Appellant however is incorrect in asserting the existence of coercion by IFM Investigators in the Appellant’s execution of the waiver. The evidence presented indicates that the Appellant was not subject to improper actions, pressure, or direction by IFM staff before or during the execution

of the waiver of hearing. The Appellant testified that she was claustrophobic, panicked, scared and did not feel free to leave during the interview. She also testified that IFM Investigator Hamilton was “towering” over her, “coming at me”, and went “street thug.” The Appellant’s statements regarding the conditions of the interview are not credible when compared with the entirety of the reliable evidence presented. The reliable evidence indicates that the Appellant was free to leave the interview and was not subject to misconduct by IFM Investigator Hamilton. While the Appellant was not given all the information necessary to make a knowing and intelligent waiver of her hearing rights, the evidence presented indicates that the Appellant was able to fully review the advise and consent form and to act freely and voluntarily, without coercion or undue influence, in giving a statement and waiving her right to an administrative hearing.

The evidence presented indicates that DHHR IFM staff conducted an extensive investigation into SNAP meat truck vendors that involved numerous investigators, recipients, vendors and witnesses. The investigators, attempting to be efficient, pre-populated notice and waiver forms with vague and curt catchall language that failed to provide violation citations or recipient specific facts and evidence. By prepopulating the notice and waiver forms with nonspecific brief generalizations, the investigators were able to present them to the Appellant immediately after the interview and determination of violation, no matter what the specific facts or type of misconduct alleged. There was no evidence presented however that indicates an intent to subvert the notice requirements on the part of investigators. In fact, IFM Investigator Cassandra Burns testified that IFM staff currently believe the forms as presented to the Appellant satisfy all notice requirements, as a federal SNAP oversight review indicated the waiver documents used by IFM are satisfactory.

The Appellant’s waiver of administrative hearing was rescinded by the parties to allow for the remand and full hearing in this matter. While the Appellant’s right to an administrative hearing was delayed, she was placed back in the position she was in prior to the waiver, and then afforded an opportunity to an administrative hearing on the merits. Absent coercion, undue influence, or an intent to subvert notice requirements, combined with a finding that the Appellant did in fact commit an intentional program violation that correctly subjected her to disqualification, repayment and sanctions, the Respondent is correct that dismissal of this action is too severe of a remedy for the insufficient notice given to the Appellant regarding the now rescinded waiver of hearing.

CONCLUSIONS OF LAW

- 1) The Respondent proved by clear and convincing evidence that Appellant committed an intentional program violation subjecting her to program disqualification and repayment.
- 2) The Appellant committed a SNAP program violation of 7 C.F.R. §274.7(b), by using her EBT card and benefits to purchase food on credit.
- 3) On four occasions, the Appellant provided her EBT card to meat truck vendors at the time they delivered food to her home, knowing that presentment for payment by the vendors would not occur until new benefits were deposited in the Appellant’s SNAP benefits account the following month.

- 4) The Appellant's argument that she acted out of ignorance, mistake or accident is not credible or persuasive as the Appellant when completing her *Rights and Responsibilities* form acknowledged the program prohibition of buying food on credit.
- 5) The Appellant's position that a violation did not occur because she received her food at the time she presented her EBT card to the meat truck vendors is a technically compelling argument. The argument however is not ultimately persuasive as the Appellant's EBT card was not presented for processing from current SNAP benefits, but instead knowingly presented by the Appellant for "buy now/pay later" meat, which constituted future processing of payment by the vendor after the receipt of new benefits in the account of the Appellant.
- 6) The Respondent IFM unit, responsible for SNAP violation enforcement, interprets the federal regulation prohibiting purchasing food on credit, 7 C.F.R. §274.7(b), to include transactions where an EBT card is presented to the vendor for processing at a later date after receipt of additional benefits.
- 7) In Verizon W. Va., Inc. v. W. Va. Bureau of Employment Programs, 214 W. Va. 95, 110 S.E.2d 170, 185 (2003), The West Virginia Supreme Court set forth that substantial deference be given to an agency's application of a rule, "unless the agency has exceeded its constitutional or statutory authority or has acted arbitrarily or capriciously." The Respondent's interpretation of 7 C.F.R. §274.7(b) is not clearly erroneous, nor does it create arbitrary and capricious results.
- 8) The appointment letter sent to the Appellant for purposes of conducting an interview into suspected program violations, prior to a charging determination and prior to the conclusion of the investigation, is not subject to the notice requirements of Hudson v. Bowling, 232 W.Va. 282, 752 S.E.2d 313 (2013), or 7 C.F.R. 273.16(f), and therefore is not in violation of those notice requirements.
- 9) The *Advance Notice of Administrative Disqualification Hearing Waiver* form and the *Waiver of Administrative Disqualification Hearing* form prepared and presented to the Appellant are subject to the requirements of Hudson and 7 C.F.R. 273.16(f), necessitating a notice of charges, an evidence summary, a simple and understandable reason for disqualification, and a cite to the applicable authority.
- 10) The vague catch-all misconduct allegations placed in the Appellant's *Advance Notice of Administrative Disqualification Hearing Waiver* and the *Waiver of Administrative Disqualification Hearing* forms, along with a lack of meaningful evidence summary and cites to the provisions being violated, did not provide adequate notification to the Appellant to allow for a knowing and intelligent waiver of her administrative hearing rights.
- 11) The evidence presented indicates that the Appellant was not subject to improper actions or coercion by IFM Investigators before or during the execution of the waiver of hearing. While not given all the information necessary to make a knowing and intelligent waiver

of her hearing rights, the Appellant was able to act freely and voluntarily in giving her statement and waiving her right to an administrative hearing.

- 12) Because of the notice inadequacies, the Appellant was not afforded an opportunity to knowingly and intelligently waive her right to an administrative disqualification hearing, which resulted in delay of access to the administrative hearing process, requiring intervention by the [REDACTED].
- 13) The evidence presented indicates the notice deficiencies are a result of prepopulating the waiver forms with vague catchall language to cover multiple violation scenarios, but does not indicate an intent by the investigators to subvert the notice requirements.
- 14) IFM Investigator Casandra Burns avers that IFM waiver forms as presented satisfy all notice requirements, citing a federal SNAP oversight review which determined that the documents satisfy federal notice requirements.
- 15) In Hudson, the Court states that, "dismissal in all circumstances is too draconian a remedy for this Court to impose on an agency tasked with maximizing scarce resources to serve tens of thousands of individuals in need of assistance." *Hudson v. Bowling*, 232 W.Va. 282, 752 S.E.2d 313 (2013).
- 16) The Appellant's waiver of administrative hearing was rescinded by the parties to allow for the remand and full hearing in this matter. The determination that the Appellant did in fact commit an intentional program violation, correctly subjecting her to disqualification, repayment, and sanctions, makes dismissal of this action for inadequate notice for the rescinded waiver too severe of a remedy, especially in the absence of coercion, undue influence, or an intent to subvert notice requirements.

DECISION

It is the finding of the State Hearing Officer that the Defendant committed an intentional program violation, correctly subjecting her to disqualification and repayment.

ENTERED this 31st day of May 2019.

David A. Bishop
Administrative Law Judge
Board of Review