



SUBJECT: Fraud Policy: 7 CFR 273.16
TO: Regional Food Stamp Program Directors
All Regions

Background

This memorandum is to reiterate and clarify current policy governing intentional Program violations (IPV) as set forth at 7 CFR 273.16 of the Food Stamp Program (FSP) regulations. As a result of recent Food and Nutrition Service (FNS) reviews, we noted some procedures that are not consistent with the letter or intent of 7 CFR 273.16. For example, we found that administrative disqualification hearing (ADH) waivers are sometimes offered to clients suspected of an IPV prior to the State agency's completion of its investigation and of its determination to hold an ADH. We also found that some State agencies combine administrative and judicial procedures rather than pursuing one or the other. Given these findings, a clarification of the fraud provisions would be both helpful and appropriate at this time.

In addition, both State agency staff and legal aid advocates have offered suggestions that we think merit consideration. We are passing along these practices for consideration by other State agencies in the operation of their fraud prevention and detection efforts.

Use of ADH Waiver

Section 7 CFR 273.16 (f)(1)(i) reads; "Prior to providing this written notification [that the individual can waive his/her right to an ADH] 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." This provision requires the State agency to make a determination that there is sufficient evidence to hold an ADH and it intends to do so prior to offering the individual an opportunity to sign an ADH waiver. Waivers should not be offered when there is a suspicion of guilt but the evidence is not convincing. If a State agency determines that it has sufficient evidence to hold a hearing and has offered the individual an opportunity to waive the hearing, the State agency should then go ahead and schedule a hearing if the individual does not sign the waiver. For example, an investigator having reviewed an individual's electronic benefits transfer transactions in a store previously disqualified for trafficking, might believe based on these transactions, that the individual has committed an IPV. However, unless the investigator is willing to take this evidence before a hearing official, an ADH waiver should not be offered.

Administrative Hearings Versus Court Referrals

Section 6 (b)(2) of the Food Stamp Act of 1977, as amended reads; "Each State agency shall proceed against an individual alleged to have engaged in such activity (intentional Program violation) either by way of administrative hearings, after notice and an opportunity for a hearing at the State level, or by referring such matters to appropriate authorities for civil or criminal action in a court of law." (Emphasis added.) The FSP regulations at 7 CFR 273.16 (a)(1) reiterate the substance of this language and add that "The State agency shall not initiate an administrative disqualification hearing against an accused individual whose case is currently being referred for prosecution. Finally, sections 7 CFR 273.16 (e) concerning ADHs and 7 CFR 273.16 (g) concerning court referrals describe two separate and distinct procedures.

Thus stated, these provisions require the State agency to make a determination as to which procedure, administrative or judicial, it believes appropriate for a given case and to pursue that procedure to its conclusion. The State agency must not offer an ADH waiver if it intends to refer the case for prosecution nor suggest prosecution if the waiver is not signed. If an ADH waiver is offered, it should be because the State agency has already determined that an administrative hearing is appropriate in this case and is offering an individual the opportunity to opt out by signing the waiver. For individuals to make an informed decision with respect to waiving the right to a hearing, they must be fully informed of due process rights, hearing procedures, and consequences they face if determined guilty of an IPV at the hearing. Offering an ADH waiver accompanied by the required notices appropriate to the administrative proceeding does not properly inform the individual of the consequences of not signing the waiver if he or she is to be referred for prosecution. Individuals, based on the penalty specified in the ADH waiver notice for example, may decide to go ahead with the ADH only to find themselves facing prosecution and a far more significant penalty. Thus, whenever State agencies have sufficient evidence to hold a hearing and have offered an ADH waiver to the individual, an ADH and not a referral for prosecution is the appropriate course of action.

Similarly, suggesting to the client that his/her case may be referred for prosecution if he/she does not sign an ADH waiver is confusing or misleading and again makes it difficult for the individual to make an informed decision. Additionally, the

consequences of losing a judicial proceeding are potentially so severe when contrasted with “merely” losing one’s benefits for 12 months, that it is conceivable that innocent clients will sign ADH waivers rather than risk the alternative.

The prohibition against conducting both administrative and judicial procedures simultaneously, or in combination, does not preclude the State agency from prosecuting an individual upon completion of the administrative process. In fact, 7 CFR 273.16 (e)(3)(iii)(H) requires a statement informing the individual that having a hearing does not preclude the State or Federal Government from subsequently prosecuting the individual. Similarly, cases referred for prosecution that are declined by the prosecutor, or in which no action has been taken against the individual by the prosecutor or court, may be pursued administratively. Finally, FNS recognizes that circumstances sometimes change or that new evidence may be introduced that causes the State agency to reconsider its original decision to hold an ADH and instead refer the case for prosecution. This may be appropriate on a case-by-case basis, but not as a matter of practice.

ADH Waiver Forms

Section 7 CFR 273.16(f)(1)(iii) states; “The State agency shall develop a waiver of [the] right to 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 hearing.” Paragraph (e)(3) further requires, among other things, that a list of the individual’s rights as contained in 7 CFR 273.15 (p) be included. In other words, the ADH waiver form provided to individuals must include the information contained in each of three separate sections of the Program regulations: 273.16 (f)(1)(ii), 273.16 (e)(3)(iii), and 273.15 (p). For reference, a summary of these rights and procedures is attached. However, readers should consult the regulations for the exact regulatory text when necessary.

We have included these requirements because our reviews showed that important information was sometimes omitted or was presented in such a way as to be confusing to the client. Omission of due process rights and other information from the waiver form not only fails to provide the individual information necessary to make a decision about signing the waiver; it may also jeopardize the State agency’s case.

In general, all forms used by the State agency to advise individuals about the investigation due process rights and hearing procedures, should be simply stated and in a manner that is clear and understandable to clients.

Suggested Practices

These suggestions have come from both State agencies and legal aid advocates. We believe adoption of these practices would serve the interests of both investigators and clients by increasing clarity and reducing the appearance of intimidation.

The first suggestion is to include a statement on the ADH waiver form that would allow the individual to assert that they do not wish to waive their right to an administrative hearing. For example, such a statement might read, “I have read this notice and wish to exercise my right to have an administrative hearing.” Current regulations at 7 CFR 273.16(f)(1)(ii)(D) require that the individual be permitted to indicate on the waiver form whether they agree or disagree with the facts of the case as presented. Some clients might wrongly conclude that they should sign the waiver to disagree with the facts as presented and exercise their right to have a hearing. We believe the inclusion of this additional statement will allow the individual to sign the waiver form while affirmatively asserting his or her desire to have a hearing.

Second, clients unfamiliar with administrative hearings may confuse the ADH with a court proceeding and may wrongly believe that the consequence of a hearing is essentially the same as that of a conviction in court. Thus, individuals may believe the waiver is a way of avoiding a more serious penalty they might be subject to were they to go ahead with the hearing. Adding a statement to the waiver form indicating that the penalty remains the same whether the individual chooses to have a hearing and is determined guilty, or whether the individual waives the hearing, might permit a more objective consideration of the merits of agreeing to the waiver versus having an administrative hearing.

Third, we are passing along for your consideration procedures adopted by a couple of State agencies that permit individuals that agree to meet with investigators the same opportunity for reflecting on their decision to sign an ADH waiver as those individuals that receive their ADH waivers by mail. In one instance, rather than having individuals sign the waiver during the interview, individuals are asked to take the waiver form home and return it signed by a specified date if they want to waive their right to an ADH. Alternatively, one State agency permits individuals that sign waivers during the interview to contact the investigator and ask instead to withdraw the waiver and to have an ADH. Adopting such procedures may not greatly increase the burden on investigators and may help to ensure that individuals do not impetuously waive their right to a hearing, particularly those that might be innocent.

The last suggested practice concerns cases in which the person suspected of committing an IPV has a documented mental disability (e.g., noted in the case record or discovered during the investigation). Because some mentally disabled individuals may lack the ability to form the intent necessary for establishing an IPV, and may not fully understand the consequences of signing an ADH waiver, the State agency may schedule an administrative hearing without offering a waiver. This ensures that the procedures of the State agency fully protect the rights of the individual to seek legal counsel or assistance without raising the issue that the waiver was questionable.

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Attachment -- Administrative Rights List

