



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General

vs.

██████████, Respondent

DECISION

Case #: FOF - 172301

Pursuant to petition filed February 26, 2016, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Office of the Inspector General to disqualify ██████████ from receiving FoodShare benefits (FS) one year, a hearing was held on Tuesday, April 12, 2016 at 09:00 AM at ██████████, Wisconsin.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

Department of Health Services, Office of the Inspector General, by
██████████, Trafficking Agent
Office of the Inspector General
PO Box 309
Madison, WI 53701

Respondent:

██████████
██████████
██████████

ADMINISTRATIVE LAW JUDGE:

Mayumi Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. The Respondent (CARES # ██████████) is a resident of Milwaukee County who received FS benefits from August 2, 2014 through December 31, 2014. (Exhibit 7)
2. On April 25, 2016, the Office of Inspector General (OIG) prepared an Administrative Disqualification Hearing Notice alleging that on an unspecified date, at an unspecified location, the Respondent allowed

an unspecified amount of FoodShare benefits to be used to purchase unspecified items not intended for the Respondent's household. (Exhibit 1)

DISCUSSION

Respondent's Non-appearance

The Respondent did not appear for this hearing. This circumstance is governed by the regulation in 7 C.F.R. §273.16(e)(4), which states in part:

If the household member or its representative cannot be located or fails to appear at a hearing initiated by the State agency without good cause, the hearing shall be conducted without the household member being represented. *Even though the household member is not represented, the hearing official is required to carefully consider the evidence and determine if intentional Program violation was committed based on clear and convincing evidence.* If the household member is found to have committed an intentional program violation but a hearing official later determines that the household member or representative had good cause for not appearing, the previous decision shall no longer remain valid and the State agency shall conduct a new hearing. The hearing official who originally ruled on the case may conduct a new hearing. In instances where the good cause for failure to appear is based upon a showing of nonreceipt of the hearing notice, the household member has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. In all other instances, *the household member has 10 days from the date of the scheduled hearing to present reasons indicating a good cause for failure to appear. A hearing official must enter the good cause decision into the record.*

Emphasis added

The hearing in this case took place on April 12, 2016. The Respondent was advised of the date and time of the hearing, in an Administrative Disqualification Hearing Notice that was sent to him at post office box used by homeless individuals, that allows the individuals to pick up their mail at the [REDACTED] [REDACTED]. Mr. [REDACTED] indicated that this was the Respondent's last known address and that there has been no returned mail.

The Respondent did not appear at the hearing and the Respondent did not contact the Division of Hearings and Appeals within 10 days to explain his failure to appear. As such, it is found that the Respondent did not have good cause for his non-appearance.

What is an IPV?

An IPV is defined at 7 C.F.R. §273.16(c) as intentionally: making a false or misleading statement or misrepresenting; concealing or withholding facts; or committing any act that constitutes a violation of the Food Stamp Act, federal regulations or any Wisconsin statute relating to the use, presentation, transfer, acquisition, receipt or possession of food stamp coupons or an authorization to participate (ATP) card.

The Department's written policy restates federal law, below:

3.14.1 IPV Disqualification

7 CFR 273.16

A person commits an Intentional Program Violation (IPV) when s/he intentionally:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts; or

2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

An IPV may be determined by the following means:

1. Federal, state, or local court order,
2. Administrative Disqualification Hearing (ADH) decision,
3. Pre-charge or pretrial diversion agreement initiated by a local district attorney and signed by the FoodShare recipient in accordance with federal requirements, or
4. Waiver of the right to an ADH signed by the FoodShare recipient in accordance with federal requirements.

FoodShare Wisconsin Handbook, §3.14.1.

The agency may disqualify only the individual who either has been found to have committed the IPV or has signed a waiver or consent agreement, and not the entire household. If disqualified, an individual will be ineligible to participate in the FS program for one year for the first violation, two years for the second violation, and permanently for the third violation. However, any remaining household members must agree to make restitution within 30 days of the date of mailing a written demand letter, or their monthly allotment will be reduced. 7 C.F.R. §273.16(b).

What is the Burden of Proof?

In order for the agency to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit an intentional program violation per 7 C.F.R. §273.16(e)(6).

"Clear and convincing evidence" is an intermediate standard of proof which is more than the "preponderance of the evidence" used in most civil cases and less than the "beyond a reasonable doubt" standard used in criminal cases.

In Kuehn v. Kuehn, 11 Wis.2d 15, 26 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. In criminal cases, while not normally stated in terms of preponderance, the necessary certitude is universally stated as being beyond a reasonable doubt.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that "yes" should be the answer because of its greater weight and clear convincing power. "Reasonable certainty" means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the "middle burden." The evidence required to meet this

burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4th ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence, a firm conviction as to the existence of each of the two elements even though there may exist a reasonable doubt that the Respondent committed an IPV.

The Merits of OIG’s Case

Wis. Stats. §49.795 describes various food stamp/Food Share offenses and under subsection 3 states that, “no person may knowingly issue food coupons to a person who is not an eligible person...”

7 CFR §271.5(b)(1) states that individuals who knowingly transfer coupons, authorization cards, or access devices, between \$100 and \$5000 in value, in any manner contrary to the Food and Nutrition Act of 2008, is guilty of a felony.

In the case at hand, the Office of Inspector General intended to allege that the Respondent intentionally violated the rules of the FoodShare program by attempting to allow an unauthorized individual to use his EBT card at [REDACTED] on September 27, 2014, to purchase \$120.12 worth of soft drinks that were not intended for the Respondent’s household. OIG’s theory of the case goes on to speculate that the Respondent gave his EBT card to a store owner, to purchase soda for resale at his store.

In order to prove its case, OIG relied upon Exhibit 3, which contained:

- 1) a photocopy of a voided transaction for \$120.12 worth of soda
- 2) a photo copy of the Respondent’s EBT card
- 3) surveillance photos of a young man and two women at “registers 12-13”,
- 4) three surveillance photos of a van,
- 5) a surveillance photo of a young man walking in the store,
- 6) A Wisconsin Department of Transportation Abstract, and
- 7) A print out of a screen shot from the FNS website

OIG also provided Exhibit 5, a photocopy of the Respondent’s Wisconsin ID, showing that the Respondent was 37 years old at the time in question, and probably older than the man in the photo of registers 12-13.

OIG’s case has several holes:

- 1) The voided receipt does not show that the Respondent’s EBT card was used for that attempted transaction.
- 2) There is nothing in the record to explain why the transaction was voided. As such, it is entirely possible that the individual who was using the card did not have the pin number. If the individual making the purchase did not have the pin number, one has to wonder whether the Respondent voluntarily gave his EBT card to that individual.
- 3) There is nothing in the surveillance photos of the registers 12-13 to indicate that the Respondent’s EBT card was being used at those registers, nor do those photos show what was being purchased.
- 4) The photo copy of the receipt does not reflect that it came from registers 12-13.

- 5) The surveillance photos are not clear enough to say that the individual wandering through the store is the same individual at registers 12-13.
- 6) While OIG was able to connect the van in the surveillance photos to a disqualified SNAP vendor through the license plates, the photos are not good enough to show that the individual who made a purchase at registers 12-13 got into the van.
- 7) It is unclear how the individual driving off in the van is connected to store owner. OIG has provided no hard evidence to explain the connection.
- 8) The store / vendor was permanently disqualified from the SNAP program in January 1996 and there is no evidence that store is still in business. So, there is insufficient evidence to prove the unusually large soda purchase made in September 2014 was for a store.

Mr. [REDACTED] testified that the loss prevention officer from [REDACTED] took a copy of the EBT card from the individual in the photos and provided Exhibit 3 to OIG. So, to connect the dots, OIG is relying on the verbal hearsay / double hearsay statements of an unidentified loss prevention officer and potentially the triple hearsay statements of the individuals working the registers. This is not reliable evidence.

In the absence of testimony from the loss prevention officer, and / or the cashier who was ringing up the transaction, there is insufficient evidence to prove that the Respondent's EBT card was used for the voided soda purchase. Further, in the absence of evidence clearly identifying the individual making the purchase and tying that individual to the disqualified store, there is sufficient evidence that the Respondent allowed an agent of a disqualified store owner to purchase soda for his store.

It should be noted that the notice issued by OIG is defective. 7 CFR 273.16(e)(3)(iii)(B) states that the notice shall contain, "the charges against the individual". Consequently, the Administrative Disqualification Hearing Notice needs to at least state, what the person did, where they did it and when, i.e. "Sold his EBT card at the [REDACTED] on or about July 6, 2015." It is unreasonable to expect an individual to defend himself against IPV charges, when the individual isn't told, specifically, of what he is accused.

Based upon the record before me, I find that OIG has not met its burden to prove, by clear and convincing evidence, that the Respondent intentionally violated the rules of the FoodShare program.

CONCLUSIONS OF LAW

OIG has not met its burden to prove, by clear and convincing evidence, that the Respondent intentionally violated the rules of the FoodShare program.

NOW, THEREFORE, it is ORDERED

That IPV case number [REDACTED] is hereby reversed.

REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as "PARTIES IN

INTEREST” **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,
Wisconsin, this 26th day of April, 2016

\sMayumi Ishii
Administrative Law Judge
Division of Hearings and Appeals

- c: Office of the Inspector General - email
- Public Assistance Collection Unit - email
- Division of Health Care Access and Accountability - email
- ██████████ - email



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The preceding decision was sent to the following parties on April 26, 2016.

Office of the Inspector General
Public Assistance Collection Unit
Division of Health Care Access and Accountability
[REDACTED]@dhs.wisconsin.gov