



FH
[REDACTED]

**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of

Milwaukee Enrollment Services, Petitioner

DECISION

v.

[REDACTED] Respondent

FOF/173341

PRELIMINARY RECITALS

Pursuant to a petition filed April 01, 2016, under Wis. Admin. Code §HA 3.03, and see, 7 C.F.R. § 273.16, to review a decision by the Milwaukee Enrollment Services to disqualify [REDACTED] from receiving FoodShare benefits (FS) for a period of one year, a hearing was held on May 16, 2016, at Milwaukee, Wisconsin.

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

NOTE: Judicial Notice has been taken of the criminal complaint, plea agreement and judgment of conviction in case [REDACTED] / [REDACTED] from the Federal District Court.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

Department of Health Services
Division of Health Care Access and Accountability
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: [REDACTED], Income Maintenance Specialist Advanced
Milwaukee Enrollment Services
1220 W. Vliet St., Room 106
Milwaukee, WI 53205

Respondent:

[REDACTED]
[REDACTED]
[REDACTED]

ADMINISTRATIVE LAW JUDGE:

Mayumi M. Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. The Respondent (CARES # [REDACTED]) received Foodshare benefits from January 2012 through June 2012. The Respondent received \$200 per month on the 9th of the month. (Exhibit 6)

2. On October 21, 2011, the Respondent completed a renewal for FoodShare. (Exhibit 3)
3. On October 24, 2011, the agency sent the Respondent an Eligibility and Benefits Booklet that warned the Respondent that he could be disqualified from the FoodShare program for selling his FoodShare benefits. (Exhibits 4 and 13)
4. Sometime between March 13, 2012 and September 18, 2012, the Respondent went to jail. During that time, the agency determined that someone had been using the Respondent's EBT card while he was in jail. (Exhibit 3)
5. On June 9, 2012, an EBT card ending in [REDACTED] was issued to the Respondent. It was not replaced until December 10, 2012, when the Respondent reapplied for benefits. (Exhibits 3 and 8)
6. On June 15, 2012, an EBT card ending in [REDACTED] was used at [REDACTED] to make a \$199 purchase, after a failed attempt to make a \$200 purchase. (Exhibit 7)
7. In August 2010, the owner of [REDACTED] became an authorized SNAP vendor, but he was no longer distributing seafood and meat. Instead, he was purchasing FoodShare benefits for cash, paying the benefit recipients only a percentage of the face value of the card. The recipients did not receive any food products. The owner engaged in this business until January 2013. (Exhibit 14)
8. On April 15, 2016, Milwaukee Enrollment Services (the agency) prepared an Administrative Disqualification Hearing notice, indicating that it believed the Respondent trafficked his FoodShare benefits with [REDACTED] on June 15, 2012. (Exhibit 2)

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 May 16, 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 an address in Minneapolis. [REDACTED] indicated that the notice was sent to the Respondent's last known address. [REDACTED] further indicated that the agency did not receive any 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 opposite is true.

The Merits of the Agency’s Case

In the case at hand, the agency asserts that the Respondent trafficked his benefits with [REDACTED] on June 15, 2012.

Exhibits 7 and 8 are a merchant summary and client summary showing that someone used an EBT card ending in [REDACTED], that was issued to the Petitioner, at [REDACTED] on June 15, 2012 to make a \$199 “purchase” after a failed attempt to make a \$200 purchase. This was during a time, when [REDACTED] was exclusively in the business of buying FoodShare benefits.

Although Exhibit 8, shows that the card ending in [REDACTED] was issued to Respondent on June 9, 2012, and not replaced until December 10, 2012, the case comments (Exhibit 3) indicate in an entry dated September 18, 2012, that the Respondent was in jail at that time, and that someone else was using his EBT card, while he was incarcerated.

It is unclear when the Respondent went into custody, but his last contact with the agency, before going into custody was March 13, 2012, when he completed a renewal. (Exhibit 3)

Because it is unclear when the Respondent went into custody, it is difficult to ascertain whether the Respondent was still in possession of the card ending in [REDACTED], when it was used at [REDACTED] on June 15, 2012. If Petitioner was in custody at that time, and someone else was using his

card, then the Respondent could not have been the individual trafficking benefits with [REDACTED] on June 15, 2012.

In the absence of reliable evidence establishing the Respondent's dates of custody, the agency has not met its burden to prove, by clear and convincing evidence, that the Respondent trafficked his benefits with [REDACTED] on June 15, 2012.

It is possible, that the Respondent is guilty of some other violation of the FoodShare program, such as selling his card to someone who, in turn, sold the benefits to [REDACTED], but that is an different allegation than what is alleged here. It is also possible that the Respondent allowed someone outside his household to use his benefits, but again, without documentation from the jail confirming the Respondent's dates of custody, and without information regarding his EBT card usage and information about whom he might have given his EBT card and pin number, there is not enough information in this record to determine what actually happened.

Based upon the foregoing, it is found that the agency has not met its burden to prove, by clear and convincing evidence, that the Respondent trafficked his benefits with [REDACTED] in June 2012.

I note for the record, that there was something that called into question the accuracy of the information contained in the client summary (Exhibit 8), because it indicated a card ending in [REDACTED] was issued to the Respondent on December 10, 2012 to replace the card ending in [REDACTED], but it also indicated that the card ending in [REDACTED] was replaced on that same day, with a card ending in [REDACTED], at 7:51 p.m., outside typical business hours.

CONCLUSIONS OF LAW

The agency has not met its burden to prove, by clear and convincing evidence, that the Respondent committed an IPV by trafficking his benefits with [REDACTED] on June 15, 2012.

THEREFORE, it is ORDERED

That IPV claim 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

If you disagree with this decision, you may appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 13th day of June, 2016.

\sMayumi M. Ishii
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin \DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on June 13, 2016.

Milwaukee Enrollment Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
[REDACTED]@dhs.wisconsin.gov