



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

██████████ Respondent

DECISION

Case #: FOF - 174531

Pursuant to petition filed May 20, 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 for ten years, a hearing was held on Thursday, July 7, 2016, by telephone.

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

NOTE: The record was held open until the end of the day on July 7, 2016, to give OIG an opportunity to submit the original e-mail in which Exhibits 8, 9 and 10 were attached to establish the agency from which they came.

On July 7, 2016, ██████████ submitted, via e-mail, an unsigned letter from a ██████████ (██████████) dated July 7, 2016. The purpose of the hold open was not to allow OIG to do further investigation and obtain additional evidence to shore up its case. The record was held open to give OIG an opportunity to provide the evidence that it should have already had. Consequently, the document cannot be accepted into the record, at this time.

On July 11, 2016, ██████████ submitted another e-mail with 56 pages in attachments. The submission was made after the close of the record, which was at the end of the day on July 7, 2016, and there is no indication the documentation was shared with the Respondent. Consequently, the submission cannot be accepted into the record at this time.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

Office of the Inspector General
Department of Health Services - OIG
PO Box 309
Madison, WI 53701

By: ██████████, PARIS Agent

Respondent:

██████████
██████████

██████████
ADMINISTRATIVE LAW JUDGE:
Mayumi M. Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. The Respondent (CARES # ██████████) received FoodShare benefits on August 20, 2014. She received another disbursement on September 18, 2014. (Exhibit 5)
2. On August 18, 2014, the Respondent completed an on-line ACCESS application in which she reported living in Wisconsin. The application contained a penalty warning, advising the Respondent of the consequences for providing false information, including disqualification from the FoodShare program. The Respondent electronically signed the application, indicating that she understood the penalties for providing false information or breaking the rules. (Exhibit 3)
3. The Respondent received a foodstamp disbursement from another state on August 19, 2014, and on September 19, 2014. (Exhibit 10)
4. On June 1, 2016, the Office of Inspector General prepared an Administrative Disqualification Hearing Notice alleging that the Respondent provided false information between August 18, 2014 and September 30, 2014, to receive FoodShare benefits to which she was not entitled. (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 July 7, 2016. The Respondent was advised of the date and time of the hearing, in an Administrative Disqualification Hearing Notice that was sent to her at an address in Indiana.

According to [REDACTED], the Charge and Summary of Evidence was mailed to Respondent in May 2016 and returned to OIG on May 9, 2016. Even though OIG knew the address was no good, it sent the hearing notice to that same address. Unsurprisingly, the notice was returned to the agency on June 10, 2016. [REDACTED] indicated that OIG made no attempt to obtain an alternate mailing address for the Respondent.

Unsurprisingly, the Respondent did not call in with a phone number where she could be reached for the hearing, because she never got the notice telling her to do so. An attempt was made to contact the Respondent at (219) [REDACTED], but an individual identifying herself as [REDACTED] answered the phone, instead. So, the hearing proceeded in the Respondent's absence.

What is an Intentional Program Violation?

7 C.F.R. §273.16(c) states that Intentional Program Violations “shall consist of having intentionally: 1) Made a false or misleading statement or misrepresented facts; or 2) Committed an 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 card or any other reusable documents used as part of an automated delivery system (access device).”

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 OIG's burden of Proof?

In order for the agency to establish that a FoodShare 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"(a.k.a. "more likely than not") 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 be a reasonable doubt that the elements have been shown.

The Merits of OIG's Case

In the case at hand, the Office of the Inspector General (OIG) asserts that the Respondent violated the rules of the FoodShare Program between August 18, 2014, and September 30, 2014, by lying about being a Wisconsin resident in order to receive duplicate benefits from Indiana.

"A household shall live in the State in which it files an application for participation" in the food stamp program. 7 *CFR* §273.3(a) "No individual may participate as a member of more than one household or in more than one project area, in any month..." Id. See also 7 *CFR* §272.4(3) Thus, duplicate benefits are not allowed.

Per 7 C.F.R. §273.16(b)(5), “an individual found to have made a fraudulent statement or representation with respect to the identity or place of residence of the individual in order to receive multiple food stamp benefits simultaneously shall be ineligible to participate in the Program for a period of 10 years.” *See also FoodShare Wisconsin Handbook, § 3.14.12*

OIG relies primarily on Exhibits 8, 9 and 10. There are problems with those exhibits. First, other than ██████'s hand written notes, there is nothing on the reports themselves, identifying them as documents from Indiana. Second, according to OIG, the EBT usage in Exhibit 10, shows that the Respondent was, in fact, in Wisconsin at the time she made her August 2014 application. As such, there is no evidence that the Respondent lied to Wisconsin about her residence.

OIG has not provided any applications, six month report forms or case comments from Indiana, so there is no way to know what the Respondent reported to Indiana. As such, OIG cannot prove that the Respondent lied to Indiana about her residence. Indeed, merely receiving benefits is not proof of deceit, which is why Federal Regulations and the FoodShare manuals have an overpayment category that is referred to as non-client / agency error.

Based upon the foregoing, it is found that OIG has failed to prove the Respondent intentionally lied about her residence to get duplicate benefits. As such, the agency cannot impose a 10 year disqualification.

Some consideration was given to whether a one-year disqualification should be imposed, if the Respondent lied in her August 2014 application, when she answered “no” to the question, “Are you getting FoodShare or SNAP(Supplemental Nutrition Assistance Program) this month?”

However, the question posed did not ask if the Respondent was receiving benefits in another state. So the agency cannot prove she lied in that regard. Further, it is unclear whether the Respondent knew she would continue receiving benefits from another state at the time she completed her August 18, 2014 application in Wisconsin.

Finally, consideration was given to whether a one-year disqualification should be imposed, because the Respondent received duplicate benefits, which is, in and of itself, against the rules. As discussed above, “No individual may participate as a member of more than one household or in more than one project area, in any month...” 7 CFR §273.3(a); *See also 7 CFR §272.4(3) and FoodShare Wisconsin Handbook §3.4.1*

Although Exhibit 10 does not contain any information identifying the state from which it came, it is clear that it is not the same as the Wisconsin usage report in Exhibit 6. As such, it is reasonable to conclude that Exhibit 10 is a food stamp usage report from another state.

Exhibit 10 indicates that the Respondent received a deposit of benefits on August 19, 2014. The Respondent must have known that she had the benefits, because she used them on August 19, 2014, and continued to use them throughout the month. The Respondent also received a deposit of benefits on September 19, 2014, from the other jurisdiction and she had to have known she had those benefits, because she used them.

The Wisconsin Food Stamp Issuance History Disbursement print out shows that the Respondent received deposits of benefits from Wisconsin on August 20, 2014, and September 18, 2014. The Respondent had to have known that she at least had the September benefits because she used them. (See Exhibit 6)

As such, it is found that the Respondent violated the rules of the Foodshare program by receiving duplicate benefits.

Intention is a subjective state of mind to be determined upon all the facts, Lecus v. American Mut. Ins. Co. of Boston, 81 Wis.2d 183 (1977), but there is a general rule that a person is presumed to know and intend the

probable and natural consequences of his or her own voluntary words or acts. See John F. Jelke Co. v. Beck, 208 Wis. 650 (1932); 31A C.J.S. Evidence §131.

There is no evidence in the record to rebut the presumption that the Respondent intentionally received duplicate benefits. On the contrary, it is difficult to believe the Respondent accidentally received and spent food stamp benefits from Wisconsin and another jurisdiction over the course multiple transactions over two months.

CONCLUSIONS OF LAW

1. The Respondent violated, and intended to violate, the FS program rule prohibiting the receipt of duplicate benefits.
2. The violation specified in Conclusion of Law No. 1 is the first such violation committed by the Respondent.

NOW, THEREFORE, it is ORDERED

That OIG determination that the Respondent committed an IPV is sustained, and that the Respondent may make a finding that the respondent committed a first IPV of the FoodShare program and disqualify the respondent from the program **for one year**, effective the first month following the date of receipt of this decision.

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 22nd day of July, 2016

\sMayumi M. 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
[REDACTED] - email



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on July 22, 2016.

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