

3. On February 28, 2015, the Respondent completed an ACCESS Six Month Report Form (SMRF) confirming the Wausaukee address. The Respondent electronically signed the SMRF, certifying under penalty of perjury that that the information he provided was correct and complete. (Exhibit 5)
4. On June 30, 2016, Marinette County prepared an Administrative Disqualification Hearing Notice alleging that the Respondent lied about his residence in his November 2014 application and his February 2015 SMRF, claiming to be in a private residence, when, in fact, he was in a nursing home. (Exhibit 11)

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 August 4, 2016. The Respondent was advised of the date, time and location of the hearing, in an Administrative Disqualification Hearing Notice that was sent to him at an address in Wausaukee, although according to the agency summary, the Respondent had asked for his mail to go to an address in Amberg. [REDACTED] testified that there is no record of any returned mail.

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 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 the Agency'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 exist a reasonable doubt that the Respondent committed an IPV.

The Merits of OIG’s Case

In the case at hand, Marinette County asserts that the Respondent violated the rules of the FoodShare Program by lying about his residence Between December 1, 2014 and April 30, 2015. It is alleged that the Respondent reported being at home, when in fact, he was living at a nursing home.

Per *FoodShare Wisconsin Handbook* §3.2.1.4, residents of institutions, meaning a place that provides meals in addition to care and/or services beyond the meals and lodging, are not eligible for FoodShare benefits. See 7 C.F.R. §273.1(b)(7)

In order to prove this IPV the agency must show:

- 1) That the Respondent reported being at his home address (via SMRF, Applications, Case Comments, etc.)
- 2) What the nursing home address was (via nursing home letter head; testimony of nursing home staff; website print out, etc.)
- 3) That the Respondent was actually living at the nursing home (via regularly kept record of nursing home; testimony of nursing home staff; etc.)

Marinette County’s case fails for the following reasons:

First, the agency has not provided any documentation showing what the nursing home address was, nor has it provided evidence that the address provided by the Respondent was not that of a nursing home. As such, there is no way to prove the address provided in the application and renewal was not accurate.

Second, the only evidence of the Respondent being in a nursing home is the hearsay statement of Meghan Rutherford contained in an e-mail. While hearsay is admissible, it needs to be reliable. There is nothing about that e-mail that lends the hearsay an indicia of reliability. Indeed, it is unclear what [REDACTED]’s basis of knowledge is and the information may very well be double or triple hearsay, if [REDACTED] was not involved in the Petitioner’s alleged admission into the nursing home. Furthermore, the e-mail is not a regularly kept business record of the nursing home, nor is it any kind of medical record. Consequently, Marinette County has not established, by clear and convincing evidence, that the Respondent was in a nursing home during the time in question.

Third, there is some question of whether the agency would be able to establish intent, even if it could prove the Respondent was in a nursing home, since there is no evidence that the Respondent was advised that it was against the rules of the FoodShare program for nursing home residents to receive FoodShare benefits. One cannot purposefully break a rule that one is not aware of.

Based upon all of the foregoing, it is found that Marinette County has not met its burden to prove, by clear and convincing evidence, that the Respondent violated the rules of the FoodShare program.

CONCLUSIONS OF LAW

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

NOW, 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

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 August, 2016

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

- c: Bay Lake Consortium - email
- Public Assistance Collection Unit - email
- Division of Health Care Access and Accountability - email
- [REDACTED] - email



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

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Division of Health Care Access and Accountability
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