



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Public Assistance Collection Unit, Petitioner

vs.

PROPOSED DECISION

[REDACTED]

Case #: FOF - 151091

Pursuant to petition filed July 30, 2013, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Public Assistance Collection Unit to disqualify Alicia Jones from receiving FoodShare benefits (FS) one year, a hearing was held on Wednesday, October 2, 2013, at 9:00 AM, at Milwaukee, Wisconsin.

NOTE: The record was held open at Petitioner's request to supplement the record with a copy of case comments. They have been marked as Exhibit 14 and entered into the record.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV) by trafficking her FoodShare benefits.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

Public Assistance Collection Unit

P.O. Box 8938

Madison, WI 53708-8938

By: Nadine Stankey, Card Trafficker Auditor

Department of Health Services

Office of the Inspector General

1 West Wilson Street

Madison, WI 53703

Respondent:

[REDACTED]

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ADMINISTRATIVE LAW JUDGE:

Mayumi Ishii

Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent is a resident of Milwaukee County who received FoodShare benefits from May 1, 2012 through October 31, 2012 (Exhibit 8 and Exhibit 12)
2. On November 10, 2012, an unidentified person from FNS/The Department of Agriculture (USDA), conducted an Audit of [REDACTED] (Exhibits 3 and 4)
3. On December 12, 2012, the USDA sent [REDACTED] a notice indicating that it was charging the store with violating the Supplemental Nutrition Assistance Program (SNAP) regulations by trafficking benefits. (Exhibit 2)
4. On January 22, 2013, the USDA sent [REDACTED] a letter indicating that it found that the store did, in fact, violate the SNAP regulations. The notice further indicated that the finding would be final, unless the store owner submitted a written request for review within ten days of receipt of the letter. (Exhibit 5)
5. On August 9, 2013, the Department of Health Services, Office of the Inspector General (OIG) prepared an Administrative Disqualification Hearing Notice alleging that Petitioner committed an intentional program violation by trafficking her FoodShare benefits. (Exhibits 12 and 13)

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 non-receipt 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

A hearing in this case took place on September 16, 2013. The Respondent did not contact the administrative law judge with a phone number where she could be reached. The OIG provided a phone number for the Respondent from its records, which was called twice; once at approximately 11:00 and again at approximately 11:15 a.m. Each time, a voice-mail message was left for Respondent. After the second call, the hearing proceeded without the Respondent.

Immediately after the hearing ended, Respondent called and the OIG was brought back on record. Respondent indicated that she did not receive the hearing notice from the OIG, because she had moved and she requested an opportunity to receive and review the OIG's documentation. Consequently, the hearing was adjourned and rescheduled to October 2, 2013 at 9:00 a.m. On September 17, 2013, the hearing notice was initially sent to Respondent at the

incorrect address, but was re-sent to Respondent on September 23, 2013, at the address she provided on September 16, 2013.

Respondent, again, did not call in with a phone number. On October 2, 2013, two attempts were made to contact Respondent at her last known phone number, once at approximately 9:00 a.m. and again at approximately 9:15 a.m. Voice messages were left both times, telling Respondent to call if she had good cause for her failure to be available for the hearing. The hearing proceeded in her absence. The Respondent did not contact the administrative law judge and she did not submit anything within 10 days of the hearing date. As such, it is found that the Respondent did not have good cause for her non-appearance.

The Merits of OIG's Claim

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 state statute relating to the use, presentation, transfer, acquisition, receipt or possession of food stamp coupons or an authorization to participate (ATP) card.

The Department of Health Service'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.

In order for the OIG 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" used in most civil cases and less than the "beyond a reasonable doubt" standard used in criminal cases. It is used in civil cases where a higher standard is required because the outcome could result in serious social consequences for, or harsh effects on an individual. See 32A C.J.S., Evidence §1023. While the terminology for this intermediate standard of proof varies from state to state, it is clear that it is what is required by the FoodShare regulations. See Jackson v. State, 546 So.2d 745 (Fla. App. 2 Dist. 1989).

In Slomowitz v. Walker, 429 So.2d 797, 800 (Fla. 4th. DCA 1983), the court held that, "...Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established."

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."

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 Department of Health Services, the OIG initially stated that it believed that the Respondent intentionally violated SNAP regulations by trafficking her FoodShare benefits. 7 CFR §271.2 defines "trafficking" as, "the buying or selling of coupons, ATP cards or other benefits instruments for cash or consideration other than eligible food; or the exchange of firearms, ammunition, explosives, or controlled substances, as defined in section 802 of title 21, United States Code for coupons."

When asked for a specific theory of the case, the OIG indicated on the first hearing date that it believed the respondent was purchasing non-eligible items, such as cigarettes, tissue and cleaning supplies, with her FoodShare benefits. However, the OIG produced no testimony from anyone who saw the Respondent do this, nor did the OIG produce any receipt or other documentation showing that the Respondent's EBT card was used to purchase these non-eligible items.

In order to prove its case, the OIG relied upon an investigation of [REDACTED] conducted by an unidentified person employed by the FNS/USDA, whose report is contained in Exhibits 3 and 4. The report is not sufficient to prove that the Respondent was purchasing non-eligible items with her EBT card. First, while the USDA's desire to keep the identity of the investigator confidential is understandable, the result is that there is no basis upon which to find the hearsay declarant credible or reliable. Second, even if the audit done by the USDA could be deemed reliable, any guilt on the part of the grocery store does not translate directly to guilt on the part of the Respondent. Indeed, saying that the Respondent was guilty of trafficking benefits just because she shopped at [REDACTED] is like saying a person must have engaged in mortgage fraud, just because the bank through which he obtained his extremely low interest home loan was found to have engaged in illegal lending practices. Third, the most recent letter from the USDA to the grocery store indicates that the USDA's findings would be final unless the grocery store filed an appeal. There is nothing in the record indicating whether an appeal was ever filed, or if the findings actually were final. (See Exhibit 4)

The OIG also argued that Respondent's use of her EBT card showed suspicious transactions, such as transactions with large dollar amounts, large numbers of transactions in a short amount of time, and transactions with even dollar or half dollar amounts. However, suspicion is not the same as clear and convincing evidence and the OIG was unable to explain how these unusual transactions proved that the Respondent was purchasing cigarettes, tissue and cleaning supplies with her benefits.

Based upon the foregoing, it is found that the OIG has failed to meet its burden to prove, by clear and convincing evidence, that the Respondent intentionally violated the rules of the FoodShare program by trafficking her benefits in the form of purchasing cigarettes, tissue and cleaning supplies.

Ms. Stankey later testified on the second hearing date that she spoke to Respondent on July 1, 2013, concerning some suspicious transactions on her EBT card and that Respondent indicated that her adult sons took her card, used it to purchase items and to get cash back. Respondent further stated that when she found out that her sons misused the card, she kicked them out of the home. (See Exhibit 14)

Respondent's statements to Ms. Stankey concerning the misuse of her EBT card do not establish the first prong of the IPV analysis, that she was the individual that committed the trafficking violation. It establishes that her sons trafficked her benefits and indicates they did so without her permission. In order to hold Respondent liable, the OIG must provide evidence of Respondent's intentional complicity in the trafficking.

Respondent's statement to Ms. Stankey is unclear regarding whether she had previously given her sons her EBT card and pin number and it does not make clear how her sons got the EBT card and pin number at the time they trafficked the FoodShare benefits. What does seem clear, is that the sons were not authorized users on the account. Looking at Exhibit 8, all of the Primary Account Numbers (PAN) on the transactions involving Respondent's FoodShare benefits appear to be the same. Had there been a second authorized user, a second PAN should appear. *See Wis. Admin. Code §§252.04 and 252.07. See also Process Help Manual (PHM) §80.1.2.3*

The fact that Respondent's sons had her card and pin number is, indeed, troubling, because it is the FoodShare recipient's responsibility to safeguard his/her pin number and EBT card, which is why lost FoodShare benefits are generally not replaced until after the EBT card is reported lost or stolen. *See Wis. Admin. Code §§252.08 and 252.18.* However, even if Respondent was foolish enough to give her EBT card and pin number to her sons, that is not the same as being complicit in trafficking. Even if one takes a negative inference from Petitioner's failure to appear, there is no evidence that she was a knowing participant in the trafficking.

Based upon the record before me, I find that the OIG has not established by clear and convincing evidence that the Respondent intentionally violated FoodShare program rules by trafficking benefits.

I would note that 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..." One would think that if Respondent willingly and knowingly gave her sons her EBT card and pin number to purchase food for themselves, that she would be in violation Wis. Stats. §49.795(3). However, Respondent did not include such a potential violation in its Notice of Administrative Disqualification to Respondent.

CONCLUSIONS OF LAW

There is insufficient evidence to prove, by clear and convincing evidence, that the Respondent committed an Intentional Program violation by trafficking benefits.

NOW, THEREFORE, it is **ORDERED**

That IPV Case Number [REDACTED] is hereby reversed and that the Department of Health Services cease enforcement efforts.

NOTICE TO RECIPIENTS OF THIS DECISION:

This is a Proposed Decision of the Division of Hearings and Appeals. IT IS NOT A FINAL DECISION AND SHOULD NOT BE IMPLEMENTED AS SUCH.

If you wish to comment or object to this Proposed Decision, you may do so in writing. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your comments and objections to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy to the other parties named in the original decision as “PARTIES IN INTEREST.”

All comments and objections must be received no later than 15 days after the date of this decision. Following completion of the 15-day comment period, the entire hearing record together with the Proposed Decision and the parties’ objections and argument will be referred to the Secretary of the Department of Children and Families for final decision-making.

The process relating to Proposed Decision is described in Wis. Stat. § 227.46(2).

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).

Given under my hand at the City of Milwaukee, Wisconsin,
this 15th day of October, 2013. 2013

\sMayumi Ishii
Administrative Law Judge
Division of Hearings and Appeals

- c: Public Assistance Collection Unit - email
- Public Assistance Collection Unit - email
- Division of Health Care Access and Accountability - email



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The preceding decision was sent to the following parties on October 15, 2013.

Public Assistance Collection Unit
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Division of Health Care Access and Accountability