



STATE OF WISCONSIN

In the Matter of

Office of the Inspector General, Petitioner

DECISION

v.
[REDACTED], Respondent

FOF/152359

The attached proposed decision of the hearing examiner dated January 14, 2014, is hereby modified as follows and as such is adopted as the final order of the Department.

PRELIMINARY RECITALS

Pursuant to a petition filed September 23, 2013, under Wis. Admin. Code §HA 3.03, and see, 7 C.F.R. § 273.16, to review a decision by the Office of the Inspector General in regard to FoodShare benefits, a hearing was held on December 18, 2013, at Milwaukee, Wisconsin.

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

NOTE: The record was held open until December 30, 2013, to give the Respondent an opportunity to submit additional photos and documentation. Nothing was received by the designated deadline.

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: Erica Dresen, Senior Auditor
Office of the Inspector General
Department of Health Services
1 West Wilson Street
Madison, WI 53701

Respondent:

[REDACTED]

ADMINISTRATIVE LAW JUDGE:

Mayumi M. Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. Respondent (CARES # [REDACTED]) is a resident of Milwaukee County who received FoodShare benefits during the time period of July - October 2012. (Testimony of Respondent)
2. Respondent used her FoodShare benefits at [REDACTED] and [REDACTED] during the time in question, July to October 2012. [REDACTED] is a small store and there are no carts or baskets for customer to use. (Testimony of Respondent)
3. Respondent typically purchased chips, noodles, bananas, apples or snack cakes. Chips generally cost \$.50; snack cakes were \$.50; Juice was \$.85 to \$2.00 and noodles cost around a \$1.00. (Testimony of Respondent)
4. On September 7, 2012, the Respondent's EBT card was swiped twice, once at 13:23 for \$40.00, and again at 13:37, 14 minutes later for \$43.00. (Exhibit 5)
5. On October 18, 2012, the Respondent's EBT card was used three times. Twice at 11:51 for \$25.45 each; and again, one minute later at 11:52 for \$25.45. It is not clear if all three transactions went through. (Exhibit 5)
6. During the time in question, the Respondent worked full time for the [REDACTED] hair salon, which was located in the same building at the convenience store. (Testimony of Respondent)
7. The Respondent is distantly related to the owners of the [REDACTED] and [REDACTED]. (Testimony of Respondent)
8. On October 9, 2013, the Office of Inspector General (OIG) sent the Respondent an Administrative Disqualification Hearing Notice to 5251 N. 47th Street, advising her that it was seeking to disqualify her from the FoodShare program for one year, because she trafficked her FoodShare benefits at [REDACTED] and [REDACTED]. (Exhibit 1)

DISCUSSION

RESPONDENT'S CLAIMS OF PROCEDURAL DEFECTS

At the hearing, the Respondent attempted to make a claim that the OIG's pursuit of an Intentional Program Violation sanction was procedurally defective. Specifically, the Respondent claimed that she never received the Administrative Disqualification Hearing Notice nor the Charge and Summary of Evidence.

Ms. Dresen testified credibly that the OIG sent the Respondent the foregoing documents by certified mail and regular mail. Ms. Dresen testified that the documents sent certified mail were returned as "refused" but she did not receive back the documents sent by regular mail.

A hearing was scheduled for November 14, 2013, and took place in the Respondent's absence because she could not be reached at the time of the hearing. However, the Respondent called shortly thereafter and claimed she didn't know about the hearing, so her request for an adjournment was granted. Ms. Dresen indicated that the OIG would resend the information and the Division of Hearings and Appeals issued a new hearing notice. There is no evidence that the third mailing was returned to OIG and the Respondent confirmed receipt of the hearing notice from the Division of Hearings and Appeals.

The Respondent confirmed that her correct address was the [REDACTED] used by both the OIG and the Division of Hearings and Appeals. Wis. Stats. §891.46 creates a presumption that service has occurred upon mailing, stating that, "summonses, citations, notices, motions and other papers required or authorized to be served by mail in judicial or administrative proceedings are presumed to be served when deposited in the U.S. mail with properly affixed evidence of prepaid postage." Further, "the mailing of a letter creates a presumption that the letter was delivered and received." State ex. rel Flores, 183 Wis.2d

587 at 612, 516 N.w.2d 362 (1994) Thus, the party challenging the presumption bears the burden of presenting credible evidence of non-receipt. *Id* at 613.

The Respondent claimed, incredibly, that she has problems with her mail and that it gets mixed up with the mail of three different homes in her neighborhood. It should be noted that the Respondent also claimed that she filed complaints with the post-office and that she would supply proof of those reports. However, no such documentation was submitted by the designated deadline. Given that all items sent to the Respondent through regular U.S. mail were not returned and given that the Respondent received the hearing notice mailed by the Division of Hearings and Appeals to the Respondent at the same address used by the OIG to send its documents to the Respondent, it is found that the Respondent timely received the Administrative Disqualification Hearing Notice and the FoodShare Program Charge and Summary of Evidence.

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 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 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 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.

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).

In the case at hand, the Department of Health Services, Office of the Inspector General (OIG) asserts 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.”

With regard to the purchase of non-eligible food items, the Respondent denied using her EBT card to purchase non-eligible food items. 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 non-eligible items. As such, the OIG has not met its burden to prove this portion of the allegation.

Exhibit 5 shows multiple purchases that are highly suspicious, with those on September 7 and October 18 being most noteworthy. The transactions on those dates follow:

9/7	1:23 p.m.	\$ 40.00
	1:37 p.m.	\$ 43.00
	1:38 p.m.	\$ 4.75
	5:29 p.m.	\$170.31 elsewhere
10/18	11:51 a.m.	\$ 25.45
	11:51 a.m.	\$ 25.45*
	11:52 a.m.	\$ 25.45

* marked as unspecified but was a completed transaction

In *Onukwugha v. U.S.*, 2013 WL 1620247, the Seventh Circuit Court of Appeals noted that FoodShare transactions that occur in relatively quick succession are extremely suspicious, and they are even more so when they are large and for identical amounts.

Respondent testified that she typically purchased low cost items such as snacks, noodles and juice, which ranged in price from \$.50 to \$2.00. The Respondent testified that she is not, "a little thing" and that she snacks a lot, but she also claimed that she would never spend \$50 at [REDACTED]. This does not explain the transactions totaling \$83.00 within 13 minutes of each other on September 7, 2012 or the two purchases for \$25.45 within a minute of each other on October 18, 2012.

The Respondent claimed that in at least the instance where two \$25.45 purchases were made within a minute of each other that the sales person told her that her card did not go through and that he had to swipe it a second time. However, there are three swipes for this amount on October 18. The Respondent further claimed that some of the other transactions over \$25.00 occurred because she would purchase on credit and the balance due would be taken off of her quest card without interest. (7 CFR 278.6 (e)(4)(ii) imposes a one-year disqualification for the first offense, for stores who accept food stamp benefits in payment for items sold to a household on credit.)

Respondent has not been able to defend some of the transactions in question or plausibly explain others. Her testimony of her typical shopping pattern at [REDACTED] actually supports the suspicions raised by these transactions. This, coupled with her incredible testimony as to mailing issues, persuades me that a rational consideration of the evidence results in sustaining the OIG disqualification action rather than accepting her rebuttals.

CONCLUSIONS OF LAW

The OIG has met its burden to prove, by clear and convincing evidence, that the Respondent committed an intentional program violation by trafficking her FoodShare benefits.

THEREFORE, it is

ORDERED

That IPV case number [REDACTED] is hereby sustained and that the Department of Health Services may impose the disqualification period.

APPEAL TO COURT

You may 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
Madison, Wisconsin, this 3rd day
of April, 2014.

Kevin E. Moore
Kevin E. Moore, Deputy Secretary
Department of Health Services