



STATE OF WISCONSIN

In the Matter of

DECISION

Office of Inspector General, Petitioner

FOF/152789

v.

██████████, Respondent

The attached proposed decision of the hearing examiner dated December 23, 2013, is hereby modified as follows and as such is adopted as the final order of the Department.

Pursuant to petition filed October 8, 2013, 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 (FS) for one year, a hearing was held on Thursday, December 12, 2013 at 01:00 PM, at Milwaukee, Wisconsin.

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:

OIG:

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

Respondent:

██████████
██████████
██████████

ADMINISTRATIVE LAW JUDGE:

Mayumi Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # [REDACTED]) is a resident of Milwaukee County who received FS benefits in Milwaukee County from July 1, 2012 through October 31, 2012. (Testimony of Ms. Dresen; Testimony of Respondent)
2. On November 7, 2013, the OIG prepared an Administrative Disqualification Hearing Notice alleging that the respondent trafficked her Foodshare benefits at [REDACTED] and [REDACTED], herein after referred to as [REDACTED]. (Exhibit 1)
3. [REDACTED] is a small neighborhood convenience store that does not provide carts or baskets, has one point of sale and uses a calculator to ring up sales. (Testimony of Respondent)

DISCUSSION

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.”

I note that the Respondent, in her testimony, confirmed that the photos contained in Exhibit 4 did accurately portray a portion of [REDACTED]; stated that there were no carts or baskets; that staff used a calculator to ring up sales, and that there was a space in which to stack the groceries that one would purchase.

The OIG argued that Respondent’s use of her EBT card showed suspicious transactions, such as transactions with large dollar amounts over \$25.00 give the size of the store, large numbers of transactions in a short amount of time, and transactions with even dollar or half dollar amounts. In particular the OIG noted a series of transactions that took place between July 12, 2012 and July 15, 2012.

It is true that the majority of Respondent's purchases end in even dollars or cents that are multiples of "5." This is unusual but little else about her shopping patterns at [REDACTED] are highly suspicious.

Petitioner testified credibly that food items at [REDACTED] were expensive, stating that a box of cereal might cost \$5.00 to \$6.00 and that a pizza might cost the same. As such, it would not necessarily take a lot to reach \$25.00 in groceries. In addition, Petitioner testified that she would give her kids her EBT card to use. Petitioner also testified that in July 2012, her children had a sleepover at her cousin's house, which is located a ½ block from [REDACTED] and that she believed she left her EBT card with them to use.

The Petitioner's explanation for the suspicious transactions is plausible and credible. 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 non-eligible items or trading the benefits for cash.

CONCLUSIONS OF LAW

The OIG has not met its burden to prove that the Respondent trafficked her benefits at [REDACTED] between July 1, 2012 and October 31, 2012.

NOW, THEREFORE, it is ORDERED

That IPV Case Number [REDACTED] is hereby reversed and that the Department of Health Services cease enforcement efforts, if the Secretary of the Department of Health Services adopts this decision as a final decision.

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