STATE OF WISCONSIN

In the Matter of | DECISION

Office of Inspector General, Petitioner | FOF/152814

v.

[redacted], Respondent

The attached proposed decision of the hearing examiner dated December 18, 2013, is hereby modified as follows and as such is adopted as the final order of the Department.

PRELIMINARY RECITALS

Pursuant to a petition filed October 08, 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 FoodShare benefits.

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

Respondent:

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

FINDINGS OF FACT

1. Petitioner (CARES # [redacted]) is a resident of Milwaukee County who received FS in Milwaukee County during the time period of July - October 2012. (Testimony of Ms. Dresen)

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)

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 December 12, 2013. The Respondent did not contact the administrative law judge with a phone number where he could be reached. The OIG indicated that the Administrative Disqualification Hearing Notice was sent to Petitioner at her last known address, with no returned mail. The OIG provided a phone number for the Respondent from its records, [redacted], but twice an out-going message was received stating, "The person you are calling is unavailable. Please try again, later." Consequently, the hearing was held in the Respondent's absence.

The Respondent should note that pursuant to the Federal Regulation cited above, she has ten days from the December 12, 2013 date to contact the Division of Hearings and Appeals and provide a claim of good cause for her failure to be available for the hearing.

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."

The OIG argued that Respondent's use of her EBT card showed suspicious transactions, such as transactions with large dollar amounts over $25.00 given 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 in July 2012. I agree that the multiple transactions on July 25 and on July 26 are unusual. Their similar cents value also is unusual. But an uncomfortable suspicion does not equate to a firm conviction that trafficking occurred.

It should be noted that the OIG alleged that Petitioner trafficked her benefits between July 2012 and October 2012, but in Exhibit 8, the OIG noted no suspicious activity for August 2012, only one suspicious transaction for September 2012 and only one suspicious transaction for October 2012 for $15.08.

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 between July 1, 2012 and October 31, 2012.

CONCLUSIONS OF LAW

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 between July 1, 2012 and October 31, 2012.

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