



STATE OF WISCONSIN

In the Matter of
Office of Inspector General, Petitioner

DECISION
FOF/153010

v.

██████████, Respondent

The attached proposed decision of the hearing examiner dated December 27, 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 21, 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 to disqualify ██████████ ██████████ from receiving FoodShare benefits (FS) for a period of one year, a hearing was held on December 18, 2013, at Racine, Wisconsin.

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

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: Nadine Stankey, Card Trafficking Auditor
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 Racine County who received FS in Racine County during the time in question, January 2013. (Testimony of Ms. Stankey; Exhibit 4)
2. On November 6, 2013, the Department of Health Services, Office of the Inspector General (OIG) sent the Respondent an Administrative Disqualification Hearing Notice, indicating that he trafficked his FoodShare benefits by using his FoodShare card to buy items not intended for his household. (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 18, 2013. Ms. Stankey indicated that she sent the Respondent the Administrative Disqualification Hearing Notice to the last address that the Department of Health Services had not file, and that she received no returned mail. The Respondent did not contact the administrative law judge with a phone number where he could be reached. Consequently, the OIG provided a phone number for the Respondent from its records, (262) 497-5280. The out-going message indicated that the mail box was full, although it should be noted that there was a name spoken, identifying the owner of the voicemail box, but it was unintelligible. Consequently, the hearing was conducted in the absence of the Respondent.

The Respondent should note that pursuant to the Federal Regulation cited above, he has ten days from the December 18, 2013 date to contact the Division of Hearings and Appeals and provide a claim of good cause for his 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).

The Administrative Disqualification Hearing Notice cited Respondent’s IPV to be trafficking or fraudulent use of his benefits. It specifically notified him that he used his FoodShare card to purchase items not intended for his household. The OIG proved that on January 16, 2013 an adult male that was not Respondent used his EBT card to purchase \$209.86 worth of infant formula. Respondent’s household does not include an infant. There are two possible explanations for this. His card might have been lost or stolen, or used without his knowledge. However, there is nothing to indicate that Respondent reported his card was lost or stolen or reported an unknown transaction on his card. Surely \$209.86 less on his card would be noticeable. I do not find this to be a plausible explanation.

The other possibility is that he allowed the actual purchaser to use his card for infant formula for another household. 7 CFR 274.7(a) states that FS may only be used to purchase food for one’s own household. The almost certain conclusion I reach under either scenario is that Respondent fraudulently used his FS benefits and therefore I agree with the OIG disqualification action.

CONCLUSIONS OF LAW

The OIG has shown, by clear and convincing evidence, that the Respondent committed an IPV.

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