



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

██████████, Respondent

DECISION

FOF/153013

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.

Pursuant to petition filed October 21, 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 Wednesday, December 18, 2013 at 10:15 AM, at Milwaukee, Wisconsin. The issue for determination is whether the respondent committed an Intentional Program Violation (IPV) by trafficking FoodShare benefits.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

Nadine Stankey, Card Trafficking Auditor
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 is a resident of Milwaukee County. (Testimony of Ms. Stankey)
2. The Respondent has not had an open FoodShare case in several years. (Testimony of Ms. Stankey)

3. On November 6, 2013, the OIG sent the Respondent an Administrative Disqualification Hearing Notice alleging that the Respondent trafficked FoodShare benefits by using the card of a deceased person.
4. [REDACTED] passed away on October 1, 2013. (Exhibits 5 and 9)
5. On October 2, 2013, the agency deposited \$200 into [REDACTED]'s FoodShare account. On this same day, someone used [REDACTED]'s FoodShare card at [REDACTED], making a \$25.62 purchase. (Exhibits 6 and 7)
6. The Respondent and [REDACTED] lived together since February 2013 at an address in [REDACTED]. [REDACTED]'s contribution to the household was his FoodShare benefits. The Respondent paid for all other living expenses. (Exhibit 9)

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

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 on file, which was on Townsend Street, and that she received no returned mail. Ms. Stankey further indicated that it appears that the Respondent received the notice and other accompanying documents because the Respondent attached a copy of the first page of the FoodShare Charge and Summary of Documents to a letter that the Respondent sent to the Office of Inspector General on or about December 4, 2013. (Exhibit 9)

The Respondent did not contact the administrative law judge with a phone number where she could be reached. Consequently, the OIG provided a phone number for the Respondent from its records, (414) 698-2409. The phone number was tried twice and both times the outgoing message indicated that, "the person you are calling is unavailable. Please try again, later." Consequently, the hearing was conducted in the absence of the Respondent.

The Respondent did not contact the Division of Hearings and Appeals, within ten days of the December 18, 2013 hearing, with an explanation for her failure to appear for the hearing. Therefore, it is found that there is no good cause for the Respondent's failure to appear 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 benefits. It specifically notified her that she used the FoodShare card of a deceased person. It is an IPV to violate the FoodShare Act’s prohibition against the unauthorized use of FS benefits.

The case at hand raises several issues such as proper notification. However, they do not need to be resolved for me to conclude that the OIG did not prove by clear and convincing evidence that Respondent intended to commit an IPV. Exhibit 9 is a statement from Respondent reflecting her belief that the FS benefits were ■■■’s contribution to the household in lieu of rent and used to feed his five children who visited. The OIG must meet a high standard of proof not only with regard to whether Respondent committed the act but that she intended to wrongly use the benefits. Although I am not concluding that Respondent’s statement is unassailable, it is enough given the record before me that I conclude that the OIG did not meet its burden.

The Respondent should note that the unauthorized use of FoodShare benefits can subject a person to Federal prosecution under sections 15(b) and (c) of the FoodStamp Act. 7 CFR 271.5(b) Specifically, where the unauthorized use is under \$100, a guilty party may be fined up to \$1000 and imprisoned for up to one year. 7 CFR 271.5(b)(1). The unauthorized use of FoodShare benefits can also subject a person to criminal prosecution under state law, with the same potential penalties. Wis. Stats. §49.795(6) and (8).

In addition, the Respondent might be liable for a FoodShare overpayment, if she and ■■■ were part of the same Food Unit/Household and her income went unreported. See *FoodShare Wisconsin Handbook (FSH)* § 7.3.2.1 – Overissuance Claims Against Food Units; *FSH* § 4.3.1 – Income; *FSH* §3.3.1.1 – Households, Units, Groups; See also 7 C.F.R. § 273.18(b), 7 CFR §273.11(a)(4)(i) and 7 CFR § 273.9(b).

CONCLUSIONS OF LAW

The OIG did not prove by clear and convincing evidence that the Respondent committed an IPV.

NOW, THEREFORE, it is ORDERED

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

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