STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs. DECISION

Case #: FOF - 153940

[redacted], Respondent

Pursuant to petition filed December 4, 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 [redacted] from receiving FoodShare benefits (FS) for one year, a hearing was held on Thursday, March 6, 2014 at 09:15 AM, at Milwaukee, Wisconsin.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV)by trafficking his FoodShare Benefits.

There appeared at that time the following persons:

PARTIES IN INTEREST:
Petitioner:

Office of the Inspector General
By Nadine Stankey, Card Trafficking Auditor
Department of Health Services - OIG
PO Box 309
Madison, WI 53701

Respondent:
[redacted]

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 . (Exhibit 7)
2. On December 19, 2013, the Office of Inspector General (OIG) prepared an Administrative Disqualification Hearing Notice alleging that the Respondent trafficked his FoodShare benefits at [redacted]

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 was originally scheduled for January 21, 2014. The Respondent did not contact the Division of Hearings and Appeals to provide a phone number where he could be reached. On the day of the hearing, January 21, the OIG representative provided a number for the Respondent, ([redacted]) [redacted], from its records. A message was left for the Respondent, with his sister, at that number, advising him that the hearing would take place in his absence, but that he had ten days to call and provide good cause for his non-appearance.

On January 22, 2014, the respondent called and indicated that he was not available for the hearing on January 21, 2014, because he had been in a serious car accident and was unable to retrieve his mail from his sister. The Respondent confirmed that his sister's address was still his mailing address. ALJ Ishii warned the Respondent that he needed to check his sister's mail regularly so that he receives the hearing notice. The Respondent also indicated that he could be reached at ([redacted]) [redacted] for the hearing.

On January 22, 2014, the Division of Hearings and Appeals sent the Respondent a notice, advising him of the new date and time of the hearing: March 6, 2014 at 9:00 a.m. At the appointed time, ALJ Ishii twice attempted to contact the Respondent at ([redacted]) [redacted], without success. An attempt was made to reach the Respondent through his sister at ([redacted]) [redacted]. Respondent's sister suggested calling the Respondent at ([redacted]) [redacted], but that number was disconnected. Consequently, the hearing again proceeded in the Respondent's absence.

The Respondent did not contact the Division of Hearings and Appeals within 10 days of the hearing to explain his non-appearance. As such, it is found that the Respondent did not have good cause for his non-appearance.

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'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.

The agency may disqualify only the individual who either has been found to have committed the IPV or has signed a waiver or consent agreement, and not the entire household. If disqualified, an individual will be ineligible to participate in the FS program for one year for the first violation, two years for the second violation, and permanently for the third violation. However, any remaining household members must agree to make restitution within 30 days of the date of mailing a written demand letter, or their monthly allotment will be reduced. 7 C.F.R. §273.16(b).

In order for the agency to establish that an FS 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

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.

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.

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.

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 his 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."

When asked for a specific theory of the case, the OIG indicated that it had no specific theory of what occurred, but generally believed the respondent was purchasing non-eligible items with his FoodShare benefits.

The OIG produced no testimony from anyone who saw the Respondent purchase non-eligible items with his FoodShare benefits, nor did the OIG produce any receipt or other documentation showing that the Respondent's EBT card was used to purchase non-eligible items. The OIG representative asserted that she spoke to other people who admitted purchasing non-eligible items at [redacted], however, one person's guilt does not automatically translate into another person's guilt. Further, the verbal hearsay statements of unnamed individuals are not reliable and do not meet the clear and convincing evidence standard.

The OIG attempted to argue that the Respondent's purchases at [redacted] prove he purchased non-eligible items because he had two high dollar purchases, one for $89.98 on November 26, 2010 and one for $99.85 on November 6, 2010. The OIG relies upon the Client Summary, Exhibit 10, to show the Respondent's purchases. However, the EBT card numbers in Exhibit 10, do not match the EBT card numbers for Respondent in the EBT Summary marked as Exhibit 7:

> Last four digits of card numbers in Exhibit 7 : [redacted]

Last four digits of card numbers in Exhibit 10: [redacted]

As such, there is insufficient evidence to link the Respondent to the allegedly suspicious purchases documented in Exhibit 10.

Even if the transactions listed in Exhibit 10 could be attributed to the Respondent, the only evidence that non-eligible items were sold at elevated prices are the hearsay statements of unnamed individuals. As discussed above, this evidence is not reliable. Further, the OIG bases its definition of a "high dollar" purchase upon criteria allegedly established by the Food and Nutrition Service (FNS). However, the OIG has provided no documentation from the FNS establishing or defining the criteria.

The OIG argued that Respondent's purchases at [redacted] also fit other trafficking criteria, i.e. purchases with even cent amounts or multiple purchases in a short period of time, but again, the OIG cannot link the Respondent to the suspicious purchases. Further, the OIG was unable to clearly explain how these purchases prove the Respondent purchased something he wasn't supposed to.

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 his benefits by purchasing non-eligible items.

CONCLUSIONS OF LAW

The OIG has not met its burden to prove, by clear and convincing evidence, that the Respondent trafficked his FoodShare benefits by purchasing non-eligible items.

NOW, THEREFORE, it is **ORDERED**

That claim number 610033367 is hereby reversed and that OIG cease enforcement efforts.

REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

APPEAL TO COURT

You may also 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 Milwaukee, Wisconsin, this 20th day of March, 2014.

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\sMayumi Ishii
Administrative Law Judge
Division of Hearings and Appeals

c: Office of the Inspector General - email
Public Assistance Collection Unit - email
Division of Health Care Access and Accountability - email

State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on March 20, 2014.

Office of the Inspector General
Public Assistance Collection Unit
Division of Health Care Access and Accountability