STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Department of Health Services Office of the Inspector General, Petitioner

vs.

[redacted], Respondent

DECISION
Case #: FOF - 153941

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 Department of Health Services Office of the Inspector General to disqualify [redacted] from receiving FoodShare benefits (FS) for one year, a hearing was held on Tuesday, January 21, 2014 at 03:45 PM, at Milwaukee, Wisconsin.

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

There appeared at that time the following persons:

PARTIES IN INTEREST:
Petitioner:

Department of Health Services
Division of Health Care Access and Accountability
1 West Wilson Street
Madison, WI 53701

By: Nadine Stankey, Card Trafficking Auditor
Office of the Inspector General
1 West Wilson Street
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 from April 10, 2010 through February 15, 2011.

2. On December 19, 2013, the OIG sent Petitioner an Administrative Disqualification Hearing Notice, claim number [redacted], alleging that she trafficked $671.39 worth of FoodShare benefits at [redacted] between April 20, 2010 and February 15, 2011.

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.

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 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."

When asked for a specific theory of the case, the OIG indicated that it believed the respondent was purchasing non-eligible items. However, the OIG produced no testimony from anyone who saw the Respondent do this, nor did the OIG produce any receipt or other documentation showing that the Respondent's EBT card was used to purchase these non-eligible items. In short, the OIG had no idea what the Respondent actually purchased from [redacted] during the time in question.

Ms. Stankey testified that she spoke to other customers of [redacted] that admitted to purchasing non-eligible items. However, the OIG did not subpoena any of those customers to testify at the hearing and the verbal hearsay statements of unnamed individuals do not constitute reliable evidence of anything. In addition, none of the individuals with whom Ms. Stankey spoke ever stated that they saw the Respondent purchase non-eligible items with her EBT card.

In order to prove its case, the OIG relied upon an audit of [redacted], conducted in 2005 and an undated and unsigned EBT Sanction Determination, finding it "more likely than not" the owner of [redacted] was trafficking benefits. (Exhibits 5 and 6) More specifically, OIG relied upon the statements the owner allegedly made to his

attorney, that the attorney then passed on to a third party that might or might not be the author of the EBT Sanction Determination.

With regard to the 2005 audit, it is five years out of date and comprised of the hearsay statements of an unnamed individual. As such, the information within the report cannot be deemed reliable evidence of what the store was like in 2010/2011 when the Respondent is alleged to have trafficked her benefits.

With regard to the store owner's triple, possibly quadruple hearsay statement in which he allegedly admitted having accepted EBT benefits in exchange for diapers, there is nothing about that hearsay information that lends it an indicia of reliability.

With regard to the remainder of the EBT Sanction Determination, it is unsigned and undated and as such, there is no way to know if that was, in fact, the final decision in the [redacted] matter. Even if it was, the EBT Sanction Determination does not prove the Respondent trafficked her benefits.

First, it does not clearly cite to its sources of information. Second, the burden of proof used in that determination was clearly a lesser burden of proof than is required to establish an IPV; the end of the determination refers to a "more likely than not" finding. Third, it is a fallacious argument to state that because the store owner was trafficking benefits, a particular patron must have also trafficked benefits. Indeed, saying that the Respondent was guilty of trafficking benefits just because she shopped at [redacted] is like saying a person must have engaged in mortgage fraud, just because the bank through which he obtained his extremely low interest home loan was found to have engaged in illegal lending practices.

The only other evidence OIG provided to prove its case was a series of seemingly suspicious transactions, in particular transactions occurring on October 15, 2010 for $101.00, on January 15, 2011 for $81.00 and on February 15, 2011 for $110.00. Petitioner testified that she sometimes had high dollar purchases at [redacted] because they had "meat deals" and she would buy five, ten or twenty pounds of meat at a time.

While these transactions are suspicious and while the Respondent's testimony regarding "meat deals" is dubious, the fact remains that a reasonable suspicion is not the same as clear and convincing evidence. The burden of proof falls on the OIG and they have not produced any reliable evidence to refute the Petitioner's claims regarding her purchases or the inventory of meat at [redacted], during the time in question.

Ms. Stankey testified that these suspicious transactions prove that the Petitioner was purchasing non-approved items because other people she interviewed reported buying ineligible items at inflated prices, in particular cigarettes, at a cost of $20.00 and $30.00 *per pack*. However, as discussed above, none of the people that Ms. Stankey interviewed were subpoenaed to testify at the hearing and the verbal hearsay statements of unnamed individuals is not reliable enough to prove anything. In addition, it is somewhat questionable whether anyone would really pay $20.00 or $30.00 in FoodShare benefits for a single pack of cigarettes.

In summary, there is no reliable evidence in the record that explains how these suspicious transactions prove the Respondent purchased something she wasn't supposed to. Indeed, the OIG could not state what the Respondent was allegedly purchasing.

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.

CONCLUSIONS OF LAW

The OIG has not met its burden to prove, by clear and convincing evidence, that the Respondent trafficked her benefits by purchasing non-eligible items at [redacted]

NOW, THEREFORE, it is **ORDERED**

That IPV Case Number [redacted], is hereby reversed and that the Department of Health Services 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).

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

For purposes of appeal to Circuit Court, the Petitioner in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, WI 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 225.53.

Given under my hand at the City of Milwaukee, Wisconsin, this 12th day of February, 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

Brian Hayes, Administrator
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: http://dha.state.wi.us

The preceding decision was sent to the following parties on February 12, 2014.

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