



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

DECISION

Case #: FOF - 154173

██████████, Respondent

Pursuant to petition filed December 17, 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 Tuesday, March 11, 2014 at 01:30 PM, at Milwaukee, Wisconsin.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV) by trafficking her FoodShare benefits at ██████████ Convenience Store.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

Office of the Inspector General
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 (CARES # [REDACTED]) is a resident of Milwaukee County who received FS benefits in Milwaukee County from September 1, 2011 through October 31, 2011. (Exhibit 10)
2. On January 13, 2014, the Office of Inspector General (OIG) prepared an Administrative Disqualification Hearing Notice alleging that the Respondent trafficked her FoodShare benefits at [REDACTED] Convenience Store. (Exhibit 3)

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 February 18, 2014 at 2:30 p.m. The Respondent contacted the Division of Hearings and Appeals on February 17, 2014 and provided a phone number where she could be reached for the hearing: ([REDACTED]) [REDACTED]

On the morning of February 18, 2014, the OIG Representative contacted the Division of Hearings and Appeals and requested an adjournment, stating that she was ill. ALJ Ishii called the Respondent to ask if she had any objections to rescheduling. The Respondent indicated that she had no objections and confirmed her mailing address as [REDACTED] [REDACTED].

On February 20, 2014, the Division of Hearings and Appeals sent the Respondent a notice, advising her of the new date and time of the hearing: March 11, 2014 at 1:30 p.m. At the appointed time, ALJ Ishii twice attempted to contact the Respondent at ([REDACTED]) [REDACTED], without success. Both times the outgoing message indicated that the Respondent's mailbox was full and was not accepting new messages.

To date, the Respondent has not contacted the Division of Hearing and Appeals to explain her failure to appear. As such, it is found that the Respondent did not have good cause for her 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 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 had no specific theory of what occurred, but generally believed the respondent was either purchasing non-eligible items or selling her benefits for cash.

With regard to the assertion that the Respondent was purchasing non-eligible items, the OIG produced no testimony from anyone who saw the Respondent purchase non-eligible items with her 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 trafficking their benefits at [REDACTED] Convenience store in this manner, 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. As such, the OIG has not met its burden to prove the Respondent purchased non-eligible items with her FoodShare benefits.

With regard to the assertion that the Respondent trafficked her FoodShare benefits by trading her benefits for cash, the OIG relied upon an audit of the Respondent's purchases at [REDACTED] Convenience Store and deemed the following transactions to be suspicious:

10-26-11	8:04 a.m.	\$1.50
12-07-11	8:36 a.m.	\$11.05
12-07-11	8:37 a.m.	\$59.99
12-14-11	7:41 a.m.	\$1.40
12-21-11	10:54	\$1.79
12-21-11	10:56	\$59.99
12-21-11	12:14	\$35.50
12-21-11	15:09	\$24.50
12-22-11	13:42	\$6.65
12-22-11	13:42	\$1.00
12-28-11	12:48	\$42.00
12-28-11	12:49	\$32.00

(Client Summary, Exhibit 10)

However, the OIG produced no documentation from the Cares Worker Web, showing what the Respondent's EBT Card Numbers were. Further, in Exhibit 10, under the Client Summary, the EBT card

number attributed to the Respondent does not match the EBT card numbers in the Transaction Summary portion of Exhibit 10. Indeed, the last four digits of the EBT Card attributed to the Respondent in the Client Summary are 5579, and the last four digits of the EBT card number listed in the Transaction Summary are 8317. Consequently, there is insufficient evidence in the record to link the Respondent to the suspicious transactions listed in Exhibit 10.

Even if the transactions in Exhibit 10 could be linked to the Respondent, the OIG would not meet its burden of proof. The OIG states that these transactions are suspicious because 1) They fit trafficking criteria established by the Food and Nutrition Service (FNS), which include transactions of high dollar amount, multiple transactions in a short period of time, transactions ending in even cent amounts (.00, .25, .50); 2) The Respondent couldn't possibly have made the higher dollar purchases because the store was so small, had no counter space and had no carts or baskets; and 3) The Respondent's purchasing patterns show that in other months, she went to other big box stores to make larger grocery purchases and so, would have no need to go to [REDACTED] Convenience Store.

The OIG's claim that Respondent's transactions are consistent with trafficking criteria fails for four reasons. First, the OIG has provided no documentation from the FNS establishing what the criteria is, defining what a "high dollar transaction" means, nor defining what "multiple transactions in a short period of time means". The OIG cannot simply expect an ALJ to take their word for what the criteria is. Second, the OIG Representative indicated that she had nothing in writing from the FNS. It is extremely difficult to believe that the OIG would prepare its investigators and hearing representatives in the investigation of trafficking without obtaining written material from the FNS and disseminating it to OIG staff. Third, the OIG representative stated that there need only be one criteria present in order to establishing trafficking. However, it is extremely difficult to believe that a single transaction for \$1.50 or \$1.40 is sufficient to prove someone was engaging in trafficking on a particular day. Finally, the OIG representative was unable to explain how the alleged trafficking pattern fits into a scheme in which an individual is trading benefits for cash.

The OIG's claim that the Respondent could not have possibly made purchases in the amount of \$30, \$40 or \$50 because of the size of the store, its inventory, the cost of the inventory and the lack of baskets/carts fails because it is based primarily upon the hearsay statements of an unnamed individual contained in an FNS audit. The hearsay statements of an unnamed individual cannot be deemed reliable or sufficient evidence upon which to make a finding of fact. Indeed, the Supreme Court in Gehin v. Wisconsin Group Insurance Board, 278 Wis. 2d 111, 692 N.W.2d 572, 2005 WI 16, held that the relaxed evidentiary standards in administrative proceedings was, "not meant to allow the proceedings to degenerate to the point where an administrative agency relies only on unreliable evidence." Gehin, 278 Wis. 2d 111, ¶51, 692 N.W.2d 572. In addition, the audit contains no price point information. The OIG's claims regarding the conditions of [REDACTED] Grocery also fail, because the audit upon which it relies was conducted in late June 2011, two months before the period of trafficking alleged. There is no basis

in the record to conclude the inventory or store conditions were necessarily the same during the time the Respondent is alleged to have trafficked her benefits.

The OIG's claims regarding Respondent's shopping patterns fails, because the OIG provided no documentation showing both the names and store numbers of the other stores at which the Respondent shopped. In addition, the fact that the Respondent might make one or two grocery purchases at a larger grocery chain for \$100- \$200, does not mean that it is outside the realm of possibility that she would go to a local convenience store a few days or weeks later for other items.

Finally, I note that suspicion is not the same as clear and convincing evidence. Indeed, the evidence needed to reach a reasonable suspicion is far less than that needed to meet the clear and convincing evidence standard.

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 by exchanging her benefits for cash.

CONCLUSIONS OF LAW

1. The OIG did not meet its burden to prove, by clear and convincing evidence, that the Respondent trafficked her FoodShare benefits between September 1, 2011 and December 31, 2011.

NOW, THEREFORE, it is

ORDERED

That IVP case number [REDACTED] is hereby reversed and that the 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.

\sMayumi Ishii
Administrative Law Judge
Division of Hearings and Appeal

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