



FH
[REDACTED]

**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of

Office of the Inspector General, Petitioner

DECISION

v.

[REDACTED] Respondent

FOF/154848

PRELIMINARY RECITALS

Pursuant to a petition filed January 17, 2014, 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 [REDACTED] from receiving FoodShare benefits for a period of ten years, a hearing was held on March 06, 2014, at Wausau, Wisconsin.

NOTE: The record was held open to allow the Office of Inspector General (OIG) to supplement the record with a Confirmed Assistance Group Eligibility History print out and an Individual Eligibility History Print out for one child. They have been marked as Exhibit 24 and entered into the record.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV) by providing false information in order to obtain duplicate Food Stamp benefits for two children.

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: Megan Ryan, PARIS Specialist
Office of the Inspector General
Department of Health Services
1 West Wilson Street
Madison, WI 53701

Respondent:

[REDACTED]
[REDACTED]
[REDACTED]

ADMINISTRATIVE LAW JUDGE:

Mayumi M. Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. Respondent (CARES # [REDACTED]) is a resident of Marathon County who received FoodShare benefits in Wisconsin between September 1, 2010 and February 28, 2013. (Exhibit 24)
2. On January 13, 2014, the OIG sent the Respondent an Administrative Disqualification Hearing Notice, indicating that it believed that she provided false information in order to receive duplicate Food Stamp benefits, in the amount of \$4442 between September 1, 2009 and February 28, 2013. (Exhibit 1)
3. On July 6, 2009, the Respondent completed a Six Month Report Form (SMRF) in which she reported six people in her household, including [REDACTED] and [REDACTED]. (Exhibit 5)
4. On September 2, 2009, the Respondent signed an application summary and again reported [REDACTED] and [REDACTED] being in her household. (Exhibit 6)
5. On August 3, 2010, the Respondent completed an application summary and reported [REDACTED] and [REDACTED] being in the household. (Exhibit 7)
6. On August 6, 2010, the Respondent signed a SMRF stating that [REDACTED] and [REDACTED] were in her household. (Exhibit 8)
7. On June 22, 2011, the Respondent signed a SMRF reporting [REDACTED] and [REDACTED] in her household. (Exhibit 9)
8. On September 6, 2012, the Respondent signed an application summary, again reporting that [REDACTED] and [REDACTED] were in her household. (Exhibit 10)
9. On March 7, 2013, the Respondent signed an application summary indicating that [REDACTED] and [REDACTED] were in her household (Exhibit 11)

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'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.

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 March 6, 2014. The Administrative Disqualification Hearing Notice was sent to the Respondent at [REDACTED], advising her of the date and time of the hearing. The notice further told the Respondent to contact "Ms. Ishii" with a phone number where the respondent could be reached for the hearing. The Respondent did not contact ALJ Ishii with a phone number.

The Division of Hearings and Appeal obtained a phone number for the Petitioner of [REDACTED] that was printed on its file for the Respondent. An attempt was made to contact the Respondent at that number, but the outgoing message indicated that the phone number was disconnected or no longer in service. Consequently, the hearing took place in the Respondent's absence.

The Respondent did not contact the administrative law judge and did not submit anything within 10 days of the hearing date. As such, it is found that the Respondent did not have good cause for her non-appearance.

The Applicable Regulations

In the case at hand asserts that the Respondent lied about where her children's residence in order to receive duplicate FoodShare benefits. For this alleged violation, the OIG wishes to ban the Respondent from the FoodShare program for a period of ten years.

Per 7 C.F.R. §273.16(b)(5), "an individual found to have made a fraudulent statement or representation with respect to the identity or place of residence of the individual in order to receive multiple food stamp benefits simultaneously shall be ineligible to participate in the Program for a period of 10 years." *See also FoodShare Wisconsin Handbook, § 3.14.12*

However, because the OIG does not assert that the Respondent provided false information about the Respondent's residence, it alleges that she provided false information about the residence of two children, in order to receive duplicate benefits. As such, the provisions of 7 C.F.R. §273.16(b)(5) do not apply in this case. The more applicable regulations are found in of 7 C.F.R. §273.16(c) and 7 C.F.R.

§273.16(b)(1)(i)-(iii). This determination is consistent with a decision issued by Kevin E. Moore, Deputy Secretary for the Department of Health Services, in case FOF-152764.

As indicated above, 7 C.F.R. §273.16(c) states that intentional program violations, “shall consist of having intentionally:

- (1) Made a false or misleading statement or misrepresented, concealed or withheld fact; or
- (2) Committed any act that constitute a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any State statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of coupons, authorization cards or reusable documents used as part of an automated benefit delivery system (access device)” .

It should be noted that Wis. Stat. §49.795(2) provides in relevant part, “No person may misstate or conceal facts in a food stamp program application or report of income, assets or household circumstances with intent to secure or continue to receive food stamp benefits.”

7 C.F.R. §273.16(b)(1)(i)-(iii) states that individuals who have been found to have committed intentional program violations shall be ineligible to participate in food stamp programs, “for a period of twelve months for the first intentional Program violation...”, “for a period of twenty-four months upon the second occasion of any intentional Program violation..” and “permanently for the third occasion of any intentional Program violation.”

The Merits of OIG’s Claim

In order to prove that the Respondent lied about where her children resided, in order to receive duplicate benefits, the OIG must show the following:

1. That she reported the children in her household in Wisconsin during the time in question,
2. That she received benefits for the children in Wisconsin during the time in question,
3. That the children were receiving benefits in another state,
4. That the Respondent knew the children received benefits in another state, AND
5. That the children were not, in fact, residing with the Respondent in Wisconsin during the time in question.

The time period in question is September 2009 to February 2013.

1. *Did the Respondent report [REDACTED] and [REDACTED] in her household during the time in question?*

The signed six month report forms and application summaries that are marked as Exhibits 6-11 are regularly kept records of the Department of Health Services and as such, are reliable and sufficient evidence that the Respondent reported the children as being in her household between September 2009 and February 2013.

2. *Did the Respondent receive benefits for [REDACTED] and [REDACTED] in Wisconsin during the time in question?*

Exhibit 24, a Confirmed Assistance Group Eligibility History Print Out is reliable as a regularly kept business record of the Department of Health Services. It establishes that the Respondent received FoodShare benefits between September 2010 through February 2013 and that her benefits ranged between \$660 per month and \$1052 per month. Exhibit 24, however, does not show that the Respondent received benefits prior to September 1, 2010.

Exhibit 3, shows screen shots from the CARES systems, showing the individual eligibility history for [REDACTED] and [REDACTED]. That is found to be reliable as a regularly kept record of the Department of Health Services and

shows that [REDACTED] and [REDACTED] received benefits in Wisconsin intermittently between August 2009 and February 28, 2013. (See also Exhibit 24)

It is reasonable to conclude, based upon the information in Exhibits 24 and 3 that the Respondent received FoodShare benefits for [REDACTED] and [REDACTED] in Wisconsin, at least from September 2010 through February 28, 2013.

3. *Did [REDACTED] and [REDACTED] receive benefits in another state and if so, did the Respondent know?*

In order to prove [REDACTED] and [REDACTED] were receiving benefits in another state, specifically Kentucky, the OIG relied upon an e-mail from a Jennifer Royse listing dates that [REDACTED] and [REDACTED] allegedly received benefits in Kentucky. The OIG did not provide any type of reliable, regularly kept record from Kentucky's state agency showing when [REDACTED] and [REDACTED] received benefits and on whose case they received the benefits. Regrettably, a mere e-mail does not bear a substantial indicia of reliability. As such, it is not sufficient to prove, by clear and convincing evidence, that [REDACTED] and [REDACTED] received benefits in another state, nor does it establish that the Respondent knew the kids were getting benefits in another state.

4. *Were [REDACTED] and [REDACTED] actually living outside Petitioner's home during the time in question?*

Although the OIG cannot prove the Respondent received duplicate benefits for the children, it is worth examining whether there is evidence that [REDACTED] and [REDACTED] were living someplace other than with the Respondent, since lying about household composition in order to receive benefits would still be an intentional program violation under 7 C.F.R. §273.16(c) *supra*.

In order to prove the children were not living with the Respondent, the OIG relied upon six exhibits.

Exhibit 14 is an e-mail string between Megan Ryan, the PARIS agent and a Kathi Hupy. There is nothing about that string of e-mails that bears a sufficient indicia of reliability. As such, it is not sufficient to establish where [REDACTED] and [REDACTED] were living.

Exhibit 15 is another string of e-mail correspondence, this time between Ms. Ryan and a Cati Denfeld. Again, there is nothing about that string of e-mails that bears a sufficient indicia of reliability. As such, it is not sufficient to establish where [REDACTED] and [REDACTED] were living. It is unfortunate that Ms. Denfeld did not testify at the hearing, because her testimony concerning what the Respondent told her, might have provided some reliable evidence concerning the actual residence of [REDACTED] and [REDACTED], during at least part of the time in question.

Exhibits 16 and 17 are rental agreements provided to Marathon County Social Services. The rental agreements are found to be reliable as regularly kept business records of the Department of Health Services.

Exhibit 16 is a rental agreement for the period of February 2009 to February 2010 that appears to have been provided to Marathon Social Services on February 18, 2009. The lease indicates that the Respondent would be paying \$450 per month and living in the apartment with only two children. However, the children are not named, as such [REDACTED] and [REDACTED] might have been those children.

It should be noted that Exhibit 3 is a copy of Case Comment printouts, which are also reliable as regularly kept business records of the Department of Health Services and which also indicate on February 18, 2009, the Petitioner reported rent of \$450 and provided a lease on February 23, 2009.

Exhibit 17 is a rental agreement between only the Respondent and Landlord that was provided to Marathon County Social Services on August 6, 2010. The lease is for a month-to-month tenancy

beginning June 9, 2010 forward, and it states, “The said premises shall be occupied by no more than 3 adults and children”. The lease does not clarify what this means, nor does it name all the people permitted to live on the premises. As such, “no more than 3 adults and children” could mean a total of three occupants; it could mean one adult and two children, it could mean three adults, plus unnamed children; it could mean the two signing adults and one child or it could mean three adults and three children. Thus, even though the hearsay information contained in the lease might be reliable, it is not very helpful in determining whether [REDACTED] and [REDACTED] were living with the Respondent.

Exhibit 4 is an Enrollment History for [REDACTED] from [REDACTED] in Wausau, Wisconsin that shows [REDACTED] was enrolled September 2, 2008; that someone reported to the school that [REDACTED] transferred out of state on October 10, 2008; that he returned on February 18, 2009; that someone reported that he moved out of state on June 10, 2009; that he returned on January 3, 2012 and that someone reported that he moved out of state again on March 2, 2012.

The Enrollment History is reliable as a regularly kept business record of [REDACTED]. However, it is only reliable enough to establish that [REDACTED] was enrolled intermittently and that someone told the school that [REDACTED] moved out of state at various times.

It is unclear from the record who told the school that the child moved out of state. As such, the hearsay statement of the unknown person to the school, asserting that [REDACTED] moved out of state, is not reliable and is therefore, not sufficient to prove [REDACTED] was not in Wisconsin during the time in question.

Given that [REDACTED] was not enrolled at [REDACTED] between June 2009 and January 2012, one might argue that he was not living with the Respondent during the time in question. However, Wausau is not a small town with only one elementary school. It is a larger city and the county seat of Marathon County. Regrettably, there is no reliable information from the Wausau School District showing that the children were not enrolled elsewhere in the district. Indeed, Petitioner’s leases and application summaries show the Respondent had five different addresses in Wausau during the time in question. (See Exhibits 6-11 and 16 & 17) As such, one cannot make the argument that because the children were not enrolled in [REDACTED], they could not have been living with the Respondent.

Exhibit 13 is an Enrollment History for [REDACTED] from [REDACTED]. Regrettably, the hearsay information in that exhibit has the same problems as the information in Exhibit 4. As such it is not sufficient to prove that [REDACTED] was not living with the Respondent or was not living in Wisconsin during the time in question.

CONCLUSIONS OF LAW

The OIG has not met its burden to prove, by clear and convincing evidence, that the respondent provided false information in order to receive duplicate benefits for two children.

THEREFORE, it is

ORDERED

That claim [REDACTED] be 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). That good cause request must be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

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).

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 28th day of March, 2014.

\sMayumi M. Ishii
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on March 28, 2014.

Office of the Inspector General
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