



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

DECISION

Case #: FOF - 159691

██████████, Respondent

Pursuant to petition filed June 27, 2014, 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, September 23, 2014 at 10:00 a.m. by a telephone call originating in Eau Claire, 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:

Office of the Inspector General
Department of Health Services - OIG
PO Box 309
Madison, WI 53701

Respondent:

██████████
██████████
██████████

ADMINISTRATIVE LAW JUDGE:

Michael O'Brien
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # ██████████) is a resident of Columbia County who received FoodShare benefits there from January 1, 2013 through July 13, 2013.

2. On June 27, 2014, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that the respondent intentionally violated the FoodShare program's rules by allowing persons not in her household to use her FoodShare benefits.
3. The respondent let a homeless person use her FoodShare benefits early in 2013. That person continued using the respondent's benefits after the respondent moved to Wisconsin. The respondent did not receive anything in return for using her benefits.
4. The respondent did not know that she could not allow persons outside of her household to use her FoodShare benefits.

DISCUSSION

Only eligible members of the FoodShare household can use the FoodShare benefits issued to it. 7 CFR § 274.7(a). FoodShare recipients lose their eligibility if the Department proves by clear and convincing evidence that they intentionally violated the program's rules; the penalty for the first violation is one year. 7 CFR §§ 273.16(e)(6) and (b)(1)(i). The Office of Inspector General seeks to disqualify the respondent for one year because she allowed a homeless person to use her FoodShare benefits. She concedes that this happened but contends that she did not know it was illegal to help others by giving them her benefits.

Clear and convincing is a middle level of proof that requires the Office to show that more than just a preponderance of the evidence supports its position but does not require it to eliminate all reasonable doubt, as it would have to in a criminal case:

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. ...

Kuehn v. Kuehn, 11 Wis.2d 15, 26 (1959)*Kuehn*, 11 Wis.2d at 26.

Wisconsin Jury Instruction – Civil 205 explains that this level of evidence must clearly have more convincing power than the opposing evidence:

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.

The *McCormick* treatise suggests that the standard "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, to find that the respondent intentionally violated the FoodShare program's rules, the evidence must induce a firm conviction that she transferred her FoodShare benefits to someone else and that she did so intentionally, although there may be a reasonable doubt that this is

true. Intent is a subjective state of mind determined upon all of the facts. *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis.2d 183 (1977). A person is presumed to know and intend the probable and natural consequences of her voluntary words or acts. *See, John F. Jelke Co. v. Beck*, 208 Wis. 650 (1932).

The respondent lived in Connecticut until early 2013, when she moved to Wisconsin. She testified that while in Connecticut, she let meet a homeless single mother on the street and gave that woman her FoodShare card and personal identification numbers because she felt sorry for her. As she explained to the worker before the hearing and testified to at the hearing, “I have a really big heart.” She said that she told the woman to only debit the benefits if she really needed food. After the respondent moved back to Wisconsin, the other person continued to debit the benefits. The respondent apologized for not knowing the rules and promised not to let others use her card again.

Because the respondent admits that she let another person use the card, the issue is whether she intentionally violated the rules when she allowed this use. That she was informed that she alone could use her benefits is not particularly persuasive because the warning was buried in a several-page notice that she probably never read after receiving it. Most people forget information that they do not use regularly. For example, I almost always have to review the relevant program’s rules before writing a decision. Similarly, the Division of Hearings and Appeals requires workers in many of the cases before it (although not in those pertaining to intentional violation of the FoodShare program) to submit their documents and telephone numbers through the Division’s scheduling program but many never do, especially if they infrequently participate in hearings.

What is more important in the current matter is whether the respondent’s claim that she gave her FoodShare away out of charity is believable. Although few people remember all of the FoodShare rules, most undoubtedly know that they cannot sell or trade their benefits. On the other hand, many fewer probably realize that they cannot help someone else out by transferring benefits without receiving anything in return. The agency did not provide any evidence that the respondent received anything in return for her benefits, but under the circumstances here—she was living in Connecticut when her benefits were transferred there was no suspicion at that time that she was doing anything wrong—it would be unlikely that it would come up with any direct evidence of this.

Whether the respondent really was acting altruistically and did not know she could not give her benefits away is difficult to determine and brings out the tension between wanting to avoid both naiveté or gullibility and cynicism. She certainly sounded believable, giving the impression of a model neighbor and citizen. She explained that she always tries to help others even though she has her own unmet needs, being an underemployed single mother of three who does not receive any child support. She also explained that she did not know the person would continue to use her benefits. Finally, she said that she never gave her card number out after a friend told her that it was illegal to do so. Still, one wonders why she did not notice and report that the person in Connecticut continued to debit around \$50 regularly, and sometimes over \$100, from her account.

The Office of Inspector General’s burden of proof is important in this matter because it must do more than show that it is more likely than not that the respondent intentionally violated the FoodShare program’s rules. Although the evidence raises skepticism about her defense, the consistency and sincerity of her testimony convince me that it is highly probable that she did not intentionally violate the program’s rules. Therefore, the Office’s determination is reversed.

CONCLUSIONS OF LAW

For the reasons discussed above, there is no clear and convincing evidence that the respondent intended to commit an IPV.

NOW, THEREFORE, it is

ORDERED

That the petitioner's determination of an intentional program violation is reversed, and the petition for review is hereby dismissed.

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 Madison,
Wisconsin, this 14th day of November, 2014

\sMichael O'Brien
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
- Nadine Stankey - email



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on November 14, 2014.

Office of the Inspector General
Public Assistance Collection Unit
Division of Health Care Access and Accountability
NadineE.Stankey@wisconsin.gov