



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of
Office of the Inspector General, Petitioner

vs.

DECISION

Case #: FOF - 160467

██████████ Respondent

Pursuant to petition filed September 23, 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 Thursday, October 23, 2014 at 09:15 AM, 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:

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 # ██████████) who received FoodShare benefits in Milwaukee County from December 1, 2010 through May 31, 2014. (Exhibit B).
2. On November 11, 2010, the Respondent completed an on-line ACCESS application for FoodShare benefits, indicating that she was homeless, but had a mailing address on ██████████ in Milwaukee, Wisconsin. (Exhibit D)

3. On October 28, 2011, the Respondent completed an application for healthcare, indicating that she was homeless but had a mailing address on [REDACTED] in Milwaukee, Wisconsin. (Exhibits I and J)
4. On May 3, 2012, the Respondent completed an application for Family Planning Services FoodShare and Healthcare, in which she indicated that she was homeless, but had a mailing address on [REDACTED] in Milwaukee, Wisconsin. (Exhibit K)
5. On November 12, 2012, the Respondent completed an application for Family Planning Services FoodShare and Healthcare, in which she indicated that she was homeless, but had a mailing address on [REDACTED] in Milwaukee, Wisconsin. (Exhibit L)
6. On May 31, 2013, the Respondent completed an application for Family Planning Services FoodShare and Healthcare, in which she indicated that she was homeless, but had a mailing address on [REDACTED] in Milwaukee, Wisconsin. (Exhibit L)
7. On November 26, 2013, the Respondent completed an application for Family Planning Services FoodShare and Healthcare, in which she indicated that she was homeless, but had a mailing address on [REDACTED] in Milwaukee, Wisconsin. (Exhibit L)
8. On September 23, 2014, OIG prepared an Administrative Disqualification Hearing Notice alleging that the Respondent lied about her residence and collected FoodShare benefits, while living in Tennessee between July 20, 2011 and May 31, 2014. (Exhibit O)

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 non-receipt 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 October 23, 2014. The Respondent was advised of the date and time of the hearing, in an Administrative Disqualification Hearing Notice that was sent to her at an address on N. [REDACTED] in Milwaukee, Wisconsin. Ms. Johnson indicated that this was the Respondent's last known mailing address and that the agency did not receive any returned mail.

The Respondent was instructed to contact ALJ Ishii to provide a phone number where she could be reached at the time of the hearing. The Respondent did not call in with a number. Ms. Johnson indicated that (414) [REDACTED] was the Respondent's last known phone number, but when ALJ attempted to contact the Respondent at that number, at the time

of the hearing, the Respondent's mother answered the phone and indicated that she did not know where her daughter was living and that her last known address was on [REDACTED]

The Respondent did not appear at the hearing and the Respondent did not contact the Division of Hearings and Appeals within 10 days 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 it is true.

In the case at hand, OIG alleges that the Respondent committed an intentional program violation by lying about her residence. Specifically, OIG alleges that the Respondent was a resident of Tennessee between September 1, 2011 and May 31, 2014, but claimed to live in Wisconsin.

In order to prove its case, OIG must show:

1. That the Respondent reported her address as being in Wisconsin between September 1, 2011 and May 31, 2014.
2. That the Respondent was actually living in Tennessee during the time in question.

Exhibits I-L, are application summaries that show that the Respondent reported that she was living in Wisconsin during the time in question between October 28, 2011 and November 26, 2013. The application summaries are reliable as regularly kept business records of the State of Wisconsin. Accordingly, it is found that OIG has met its burden to prove the Respondent was reporting a Wisconsin residence.

However, with regard to whether Respondent was actually living in Tennessee at the time in question, OIG’s evidence falls short.

First, the OIG representative indicated that Respondent’s last known address was the Wisconsin address reported in her application. This undermines the assertion that Respondent was actually living in Tennessee.

Second, if OIG knows that the Respondent is living in Tennessee, it may very well be a violation of the Respondent’s right to procedural due process to send a hearing notice to a Milwaukee address that OIG believes to be false.

Third, OIG submitted a spreadsheet that purports to show, month by month, the number of EBT transactions that occurred using the Respondent’s EBT card and the cities in which the transactions took place. However, the

information is not sufficient, because there is no information in the spreadsheet showing that it has anything to do with the Respondent.

OIG did submit a more detailed spreadsheet, but it did not provide a copy to the Respondent. As such, it cannot be considered in this decision.

Based upon the record before me, I find that OIG has not established by clear and convincing evidence that the Respondent intentionally violated the rules of the FoodShare program.

CONCLUSIONS OF LAW

OIG has not shown, by clear and convincing evidence, that the Respondent committed an IPV.

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). 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

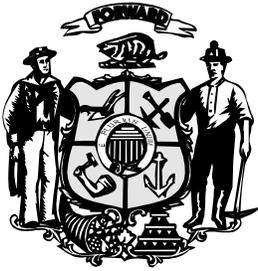
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified 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 4th day of November, 2014.

\\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
- Sherrie Johnson - email



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on November 4, 2014.

Office of the Inspector General
Public Assistance Collection Unit
Division of Health Care Access and Accountability
sherrie.johnson@dhs.wisconsin.gov