



STATE OF WISCONSIN  
Division of Hearings and Appeals

---

In the Matter of  
Office of the Inspector General, Petitioner

vs.

DECISION  
Case #: FOF - 160820

██████████ Respondent

---

Pursuant to a petition filed September 26, 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 Gerald Jones from receiving FoodShare benefits (FS) for a period of one year, a hearing was held on November 14, 2014, 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:

Representative: Diane Peterson

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 # ██████████) received FoodShare benefits from December 14, 2012 through November 1, 2013. (Exhibit 4)
2. The Respondent's EBT card usage was exclusively in Minnesota between November 2012 to November 2013. (Exhibit 4)
3. On an unspecified date, the Respondent signed an EBT Card Issuance Check List from Milwaukee Enrollment Services. (Exhibit 2)

4. On December 14, 2012, at 8:30 a.m., the Respondent went to court in Hennepin County Minnesota because he had been arrested for loitering on December 13, 2012. He pleaded guilty to and was convicted of a misdemeanor loitering offense. The court ordered the Respondent to serve a two day jail sentence, in lieu of paying a \$128.00 fine. The Respondent received credit for his jail sentence on December 17, 2012. (Exhibit 7)
5. On December 14, 2012, someone, using Respondent's personal information, completed a FoodShare renewal, signing it electronically at 1:02 p.m. At this time, the person reported that he was homeless and listed the [REDACTED] [REDACTED] in Milwaukee, as his mailing address. (Exhibit 1 and 5)
6. On May 16, 2013, the Respondent submitted a handwritten healthcare application in Minnesota that was signed on April 23, 2013. In that application the Respondent stated, "I get Foodshare once a month. I live with my fiancé and everything else comes from side jobs or pick-up work." (Exhibit 6, section 11)
7. The signatures on the EBT Card Issuance Check List and the May 2013 health care application look identical. (Exhibits 2 and 6)
8. On June 17, 2013, the Respondent completed a "Foodshare review", signing it electronically. The Respondent again indicated that he was homeless and listing [REDACTED] (the [REDACTED] [REDACTED]) as a mailing address. (Exhibit 1 and 5)
9. On September 26, 2014, the Office of Inspector General (OIG) prepared an Administrative Disqualification Hearing Notice alleging, "Application fraud to receive benefits the member was not entitled to." (Exhibit 10)

### 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 took place on November 4, 2014. OIG sent the Respondent an Administrative Disqualification Hearing Notice to an address on [REDACTED] in Minnesota. Ms. Peterson indicated that this was the Respondent's last known address for the Respondent<sup>1</sup> and that OIG did not receive any returned mail.

The notice instructed the Respondent to contact the administrative law judge with a phone number where he could be reached, but he failed to do so. An attempt was made to contact the Respondent at ([REDACTED] [REDACTED]) the phone number last known to the agency and the outgoing message indicated that the phone had been disconnected. Consequently, the hearing proceeded 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 his non-appearance.

*What is an Intentional Program Violation?*

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 facts; or
- 2) Committed an act that constitutes 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 card or any other reusable documents used as part of an automated delivery system (access device).

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).

---

<sup>1</sup> This address appears to be from the May 2013 Minnesota health care application.

### *What is OIG's burden of Proof?*

In order for the agency 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"(a.k.a. "more likely than not") used in most civil cases and less than the "beyond a reasonable doubt" standard used in criminal cases.

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., 4<sup>th</sup> 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 elements have been shown.

### *The Merits of OIG's Claim*

In the case at hand, OIG asserts that the Respondent lied about his residence in his applications/renewals for Wisconsin FoodShare benefits between December 14, 2012 and November 20, 2013, by claiming he was a Wisconsin resident when, in fact, he was living in Minnesota.

This case turned out to be more complex than one would have thought at first blush and it is an extremely close call, but after examination of the all of the evidence, OIG has not met its burden of proof.

The agency cannot establish that the Respondent "made a false or misleading statement or misrepresented facts" about his residence. Looking at the Hennepin County Register of Actions (Exhibit 7), it would appear

that the Respondent was in jail, in Minnesota, on December 14, 2012. It is not likely he would have had access to a computer to complete the December 14, 2012 on-line application/renewal for Wisconsin FoodShare benefits. If the Respondent did not electronically sign the December 14, 2012 application, the IPV claim that he lied to Wisconsin about his residence in the December 14, 2012 application / renewal must be reversed.

If the Respondent did not electronically sign the December 2012 application / renewal, this calls into serious question whether he electronically signed the June 2013 application / renewal.

Based upon the foregoing, it is found that OIG cannot establish that the Respondent, himself, lied to Wisconsin about his residence.

However, any intentional violation of the FoodStamp Program Regulations constitutes an IPV.

“A household shall live in the State in which it files an application for participation” in the food stamp program. *7 CFR §273.3(a)*

While the lack of a date on the Wisconsin EBT Card Issuance Check list is troubling, if one compares the signature on that form with the signature on the May 2013 Minnesota application for health care benefits, they look very much the same, which leads to the conclusion that the Respondent signed both forms. Thus, whether he signed the applications/renewals or not, he should have been well aware of the fact that he was receiving Wisconsin FoodShare benefits. Indeed, when the Respondent completed the Minnesota application for health care benefits he specifically stated that he received “FoodShare” benefits monthly and FoodShare benefits are specific to Wisconsin’s food stamp program.

The Respondent’s EBT card usage, during the time in question, was exclusively in Minnesota. Based upon this information and the Respondent’s statement in the May 2013 Minnesota health care application that he lived in Minnesota with his fiancé, it is found that the Respondent was living in Minnesota between December 2012 and November 2013.

Because the Respondent was living in Minnesota, but receiving Wisconsin benefits between December 2012 and November 2013, he violated the requirement under *7 CFR §273.3(a)* that he live in the state in which his application for food stamps is filed.

Intention is a subjective state of mind to be determined upon all the facts, *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis.2d 183 (1977), but there is a general rule that a person is presumed to know and intend the probable and natural consequences of his or her own voluntary words or acts. See *John F. Jelke Co. v. Beck*, 208 Wis. 650 (1932); 31A C.J.S. Evidence §131.

In this case, the record rebuts the presumption that the Respondent was intentionally violating the rules of the food stamp program. OIG has not provided any documentation showing that the Respondent was made aware of the requirement under *7 CFR §273.3(a)*, to reside in the state in which he applied for food stamps. One might think this is common sense, but the Respondent was honest with Minnesota authorities in his application for healthcare, when he specifically stated he was receiving FoodShare benefits. If the Respondent thought he was doing something wrong or illegal, it does not make sense for him to provide this information on the Minnesota application.

Based upon the foregoing, it is found that OIG has not met its burden to prove, by clear and convincing evidence that the Respondent intentionally violated the rules of the food stamp program.

### **CONCLUSIONS OF LAW**

OIG has not established, by clear and convincing evidence. that the Respondent intentionally violated the rules of the FoodShare / food stamp program.

**NOW, THEREFORE,** it is

**ORDERED**

That IPV case number [REDACTED] is hereby reversed.

**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 21st 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
- Diane Peterson - 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](mailto:DHAmail@wisconsin.gov)  
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on November 21, 2014.

Office of the Inspector General  
Public Assistance Collection Unit  
Division of Health Care Access and Accountability  
[diane.peterson@wisconsin.gov](mailto:diane.peterson@wisconsin.gov)