



3. On August 4, 2014, the Respondent updated his household information, indicating that he was the only person in his household. He did not delete any members from his household. (Exhibit 1, pg. 17)
4. The Respondent was held in custody at the Kenosha County Jail between January 26, 2014 and February 13, 2014. (Exhibit 1, pg. 11)
5. The Respondent's EBT card was used on February 9, 2014, during his incarceration. (Exhibit 1, pg. 14)
6. On July 9, 2014, Ms. Housley checked the Kenosha County Sheriff's Department website and discovered that the Respondent was taken into custody again on March 27, 2014 and that he was still in custody as of July 9, 2014. (Testimony of Ms. Housely; Exhibit 1, pg. 12)
7. The Respondent's EBT card was on March 28, 2014, April 15, 2014, May 4, 2014 and May 17, 2014, during his incarceration. (Exhibit 1, pg. 15)
8. On August 1, 2014, the Petitioner's mother, HC, signed a waiver of administrative disqualification hearing, relating to her use of FoodShare benefits that she was not entitled to. However, she did not admit to the facts underlying the charges. (Exhibit 21, pgs. 48 and 49)
9. On October 8, 2014, the Office of Inspector General (OIG) prepared an Administrative Disqualification Hearing Notice alleging that on an unspecified date the Respondent allowed his FoodShare card to be used while he was incarcerated. (Exhibit 1, pg. 2)

### 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*

A hearing in this case was originally scheduled for November 18, 2014. At that time the Respondent requested an adjournment because he was very ill and because he had not yet received OIG's evidentiary packet. The

adjournment was granted and the hearing rescheduled to December 29, 2014. The Division of Hearings and Appeals sent the Respondent a notice, advising him of the date and time of the hearing.

On December 29, 2014, an attempt was made to reach the Respondent for his hearing at the same number used to reach him on November 18, 2014. The Respondent's mother answered the phone and indicated he was not home. A message was left for the Respondent advising him that the hearing would take place without him and that he had ten days to contact the ALJ and explain his absence.

The Respondent did not contact the administrative law judge and he 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).

*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 might be reasonable doubt that the elements have been shown.

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

In the case at hand, OIG asserts that the Respondent violated the rules of the FoodShare / food stamp program by allowing someone to use his EBT card while he was incarcerated.

#### 7 CFR §274.7 Benefit redemption by eligible households.

(a) *Eligible food.* Program benefits may be used only by the household, or other persons the household selects, to purchase eligible food for the household, which includes, for certain households, the purchase of prepared meals, and for other households residing in certain designated areas of Alaska, the purchase of hunting and fishing equipment with benefits.  
*Emphasis added*

An individual may have one authorized buyer who has access to his account, but if there is a second authorized user, a second EBT card should be issued in the authorized user's name, with a unique Personal Identification Number and a Primary Account Number (PAN) with an indicator of "03". See Wis. Admin. Code §§252.04 and 252.07. See also *Process Help Manual (PHM) §80.1.2.3* This authorized buyer would be designated on the Representatives Details page in the Cares Worker Web database. *Process Help Manual (PHM) §80.1.2.3*

In the case at hand, the card used in the subject transactions after March 4, 2014, was that of the Respondent, not an authorized buyer. (See Exhibit 1, pgs. 14 and 15)

The Household Members print out provided by OIG only lists the Respondent in the household. Although the screen was updated on August 4, 2014, outside the period in question, it does not show anyone having been deleted from the Respondent's case. (Exhibit 1, pg. 17) As such, the Respondent must have been the only person in his FoodShare household during his incarceration.

It is not likely the subject purchases were made in anticipation of the Respondent's eventual release from custody, because perishable items such as fresh meat and vegetables were purchased during the three to four months of the Respondent's incarceration. (See Exhibit 1, pgs. 23-31) The remaining question then, is whether the EBT card was used with the Respondent's permission. If so, the Respondent violated the program rules.

OIG argues that Respondent's mother, HC, used the card and as such, she must have had the Respondent's permission to use the card based upon their relationship, based upon the fact that they lived together and based upon the fact that she used the Respondent's pin number.

In order to prove HC used the card, OIG relied upon a waiver of administrative disqualification hearing signed by HC in August 2014. First, the signed waiver of administrative disqualification hearing contains no specific information showing that the violations involved in that case were the same as that involved here. Second, HC made no admissions when she waived her right to a hearing. As such, HC's waiver of administrative disqualification hearing does not prove that she used the Respondent's card, nor does it prove that she did so with his consent.

OIG also relied upon an e-mail (hearsay statement) from Rachel Albro, a Loss Prevention Investigator from Roundy's Foods, which had attached surveillance photos and copies of transaction receipts. (See Exhibit 1, pgs. 21-30) First, the surveillance photos are not useful, since there was no one who has seen HC, who could testify the person in the photos was HC. Further, the person's face cannot be seen. Second, Ms. Albro's e-mail states that the Perks card used in the transactions that occurred on March 16, March 28, April 16, May 4 and May 17 belonged to HC, but is not clear how Ms. Albro knows this, as she did not attach any record showing what HC's perk card number was. In addition, the receipts do not explicitly refer to a Perks card, although there is a long serial number under the words, "Coupons Tendered" that might be the Perks number. Without testimony from Ms. Albro, there is no way to know. As such, the e-mail and its attachments are not sufficient to establish HC used the Respondent's card and it certainly does not establish whether the card was used with the Respondent's consent.

There is a case comment from May 23, 2014, indicating that the Respondent's mother was contacted and advised against using her son's EBT card. However, there is no indication that she admitted using the card. (See Exhibit 1, pg. 9)

Regardless of whether Respondent's mother used his card or whether some other person used his EBT card, the fact remains that the person had to have used the Respondent's pin number. According to the EBT Card Detail Printout, the Respondent's PIN number had not been changed since November 3, 2011. (Exhibit 1, pg. 16) It is, therefore, reasonable to presume the Respondent provided the pin number to the user and effectively consented to

the use of his EBT card. Because the Respondent did not appear at the hearing and offer testimony to the contrary, there is no evidence to rebut this presumption.

Based upon the record before me, I find that OIG has established by clear and convincing evidence that the Respondent intentionally violated FS program rules, and that this violation was the first such violation committed by the Respondent. Therefore, OIG correctly seeks to disqualify the respondent from the FS program for one year.

### **CONCLUSIONS OF LAW**

1. The respondent violated, and intended to violate, the FS program rule specifying that food stamps are to be used exclusively to purchase food for the eligible household.
2. The violation specified in Conclusion of Law No. 1 is the first such violation committed by the respondent.

**NOW, THEREFORE, it is ORDERED**

That OIG's determination is sustained, and that OIG may make a finding that the Respondent committed a first IPV of the FoodShare program and disqualify the Respondent from the program for one year, effective the first month following the date of receipt of this decision.

### **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 9th day of January, 2015.

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\sMayumi Ishii  
Administrative Law Judge  
Division of Hearings and Appeals

- c: Office of the Inspector General - email  
Public Assistance Collection Unit - email  
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The preceding decision was sent to the following parties on January 9, 2015.

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Division of Health Care Access and Accountability  
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