



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Nadine Stankey for the Office of the Inspector General, Petitioner

vs.

[REDACTED], Respondent
[REDACTED]
[REDACTED]
[REDACTED]

DECISION

Case #: FOF - 163541

Pursuant to petition filed January 29, 2015, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Nadine Stankey for the Office of the Inspector General to disqualify [REDACTED] from receiving FoodShare benefits (FS) for one year, a hearing was held on Tuesday, March 17, 2015 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:

Nadine Stankey for the Office of the Inspector General
Department of Health Services - OIG
P.O. Box 309
Madison, WI 53701

Respondent:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

ADMINISTRATIVE LAW JUDGE:

Mayumi Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. The Respondent (CARES # [REDACTED]) is a resident of Winnebago County who received FoodShare benefits.
2. The Respondent was incarcerated at the Winnebago County Jail from June 11, 2012 to September 20, 2012. (Exhibit 3)
3. The Respondent's EBT card was used between July 16, 2012 and September 16, 2012. (Exhibit 5, pg. 4 and Exhibit 6)
4. The Respondent was deemed ineligible for FoodShare benefits for non-financial reasons between October 1, 2012 to July 31, 2014. (Exhibit 5, pg. 3)
5. A second EBT card was issued to the Respondent sometime around August 2014. (Exhibit 5, pg. 4 and Exhibit 6)
6. A third EBT card was issued to the Respondent in August / September 2014. (Exhibit 5, pg. 4 and Exhibit 6)
7. The Respondent was incarcerated from October 6, 2014 to December 7, 2014. (Exhibit 3)
8. On October 31, 2014, the agency received a letter from the Respondent indicating that he lost his FoodShare card. The Respondent asked for a replacement to be sent to him at an address on Jackson Street. The Respondent indicated that this was a temporary address and he directed the agency to keep his mailing address on Higgins, unchanged. (Exhibit 5, pg. 5)
9. For reasons not known to the Office of Inspector General, no replacement card was issued to the Respondent. (Testimony of Ms. Stankey)
10. The Respondent's EBT card was used between October 14, 2014 and November 29, 2014. (Exhibit 5, pg. 4 and Exhibit 6)
11. On February 6, 2015, the Office of Inspector General (OIG) prepared an Administrative Disqualification Hearing Notice, alleging that the Respondent allowed another person to use his FoodShare benefits while he was incarcerated from June 11, 2012 to September 20, 2012 and again when he was incarcerated from October 6, 2014 to December 7, 2014.

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 took place on March 17, 2015. The Respondent was notified of the date and time of the hearing in an Administrative Disqualification Hearing Notice sent to him at an address on Higgins Avenue. The notice further instructed the Respondent to contact the Administrative Law Judge with a phone number where he could be reached for the hearing.

The Respondent did not contact the Administrative Law Judge with a phone number. There was an unsuccessful attempt to reach the Respondent at the last phone number he provided, [REDACTED]. A voicemail was left for the Respondent and the hearing proceeded in 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., 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 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 was that of the Respondent, not an authorized buyer. (Exhibits 5 and 6)

The Household Members print out provided by OIG only lists the Respondent in the household. (Exhibit 5, pg. 2) Although the screen was updated on August 22, 2014, outside the periods in question, it does not show anyone having been deleted from the Respondent's case. (Id.) As such, the Respondent must have been the only person in his FoodShare household during his incarcerations.

The remaining question then, is whether the EBT card was used with the Respondent's permission. If so, the Respondent violated the program rules.

June 11, 2012 to September 20, 2012

The evidence presented by OIG in this case is much thinner than in other cases. The record does not make clear who obtained the Respondent's EBT card while he was in jail. The record lacks the EBT card detail printout that would show when the Respondent changed his PIN number. As such, it is not clear whether someone managed to usurp the Respondent's date of birth and social security number, in order to change the pin number. Indeed, it is not unheard of for roommates to steal such information. Further, the Respondent replaced his EBT card and it is not entirely clear from the record why this was done.

Based upon the foregoing, it is found that OIG has not met its burden to prove, by clear and convincing evidence, that the Respondent committed an IPV by allowing a person outside his household to use his benefits during his incarceration from June 11, 2012 to September 20, 2012.

October 6, 2014 to December 7, 2014

OIG argues that Respondent's on again/off again roommate/girlfriend, used the card during this period of time and as such, she must have had the Respondent's permission to use the card based upon their relationship and based upon the fact that she used the Respondent's pin number.

The evidence presented by OIG in this case is, again, much thinner than in other cases. Again, this record lacks the EBT card detail printout that would show when the Respondent last changed his PIN number. Further, the Respondent had submitted a letter to the agency in October 2014, indicating that his EBT card was lost and that he needed a new one, though the agency never followed through with this request to deactivate the card and issue a new one. As such, the card continued to be used during the time in question.

OIG surmises that the Respondent found the card, but there is no clear evidence of that.

Ms. Stankey testified that she spoke to the Respondent on January 26, 2015, at which time he indicated that between October 6, 2014 and December 7, 2014, he released his property to his girlfriend. Ms. Stankey testified that the Respondent denied giving anyone permission to use his EBT card and he denied giving anyone his pin number. Ms. Stankey testified that the Respondent indicated that his pin number was his social security number, so it would be easy for him to remember, but that he also wrote it on the back of his EBT card. Ms. Stankey testified that when she pointed out the logical inconsistency of his statement, the Respondent only stated, "Yeah, you're right". When asked whether he would file a police report, concerning the improper use of his EBT card, the Respondent stated that he was not that kind of person and would not file a complaint against his girlfriend.

Given the Respondent's admittedly non-sensical statement about how he remembers his pin number and given that it doesn't appear that the Respondent complained or made contact with the agency, even though it took no action on his October request for a new EBT card, it is reasonable to presume the Respondent provided the pin number to his girlfriend and effectively consented to the use of his EBT card. (See Case Comments – Exhibit 4) In addition, it could be argued that the Respondent constructively consented to his girlfriend's use of his EBT benefits by refusing to take action against her use of his EBT card / FoodShare benefits.

Based upon the record before me, I find that OIG has established by clear and convincing evidence, that the Respondent intentionally violated FoodShare program rules between October 2014 and December 2014, and that this violation was the first such violation committed by the Respondent. Therefore, OIG correctly seeks to disqualify the Respondent from the FoodShare program for one year.

CONCLUSIONS OF LAW

1. The Respondent violated, and intended to violate, the FoodShare program rule specifying that benefits may only be used by the FoodShare 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 the petitioner's determination is sustained, and that the petitioner 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 1st day of April, 2015

\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
- 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 April 1, 2015.

Office of the Inspector General
Public Assistance Collection Unit
Division of Health Care Access and Accountability
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