



**STATE OF WISCONSIN**  
**Division of Hearings and Appeals**

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In the Matter of

Milwaukee County Department of Human Services, Petitioner

vs.

DECISION

██████████ Respondent

Case #: FOF - 165150

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Pursuant to petition filed April 2, 2015, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Milwaukee Enrollment Services to disqualify ██████████ from receiving FoodShare benefits (FS) for a period of one year, a hearing was held on Monday, June 15, 2015 at 10:15 AM, at Milwaukee, Wisconsin.

NOTE: On the date of the hearing, Milwaukee Enrollment Services supplemented Exhibit 17 with a print out of a Merchant Summary for John Henry Distribution, making the Exhibit a total of three pages in length.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV) by selling \$350.00 in FoodShare benefits to John Henry Distribution in January and February 13, 2012.

There appeared at that time the following persons:

**PARTIES IN INTEREST:**

Petitioner:

Department of Health Services  
1 West Wilson Street, Room 651  
Madison, WI 53703

By: Tygene Taylor, Income Maintenance Specialist Advanced  
Milwaukee Enrollment Services  
1220 W. Vliet Street  
Milwaukee, Wisconsin 53205

Respondent:

██████████  
██████████  
██████████

█

ADMINISTRATIVE LAW JUDGE:  
Mayumi Ishii  
Division of Hearings and Appeals

### FINDINGS OF FACT

1. The Respondent (CARES # [REDACTED]) is a resident of Milwaukee County who received \$200.00 per month in FoodShare benefits in January and February 2012. (Exhibit 6)
2. On July 14, 2011, the Respondent electronically signed an ACCESS application, indicating that he understood the penalties for giving false information or breaking the rules. In that application, it clearly stated the penalties for selling FoodShare benefits. (Exhibit 11)
3. On July 15, 2011 and again on December 14, 2011, an Eligibility and Benefits booklet was mailed to the Respondent. Though the warning in the E&B booklet was not as clear concerning the penalties for selling benefits, the booklet did advise the Respondent that he could be barred from the FoodShare program for intentionally violating the rules of the program. (Exhibits 13 and 14)
4. On May 13, 2015, Milwaukee Enrollment Services prepared an Administrative Disqualification Hearing Notice alleging that the Respondent sold \$350.00 in FoodShare benefits to John Henry Distribution in January and February 2012. (Exhibit 4)

### 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 June 15, 2015. The Respondent was advised of the date and time of the hearing, in an Administrative Disqualification Hearing Notice that was sent to him at [REDACTED] [sic] [REDACTED]. Ms. Taylor indicated that this was the Respondent's last known address and that there is no indication in the record that the agency received any returned mail.

The Respondent did not appear at the hearing and the Respondent did not contact the Division of Hearings and Appeals to explain his failure to appear. As such, it was found that the Respondent did not have good cause for his non-appearance and the hearing proceeded in his absence.

### *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., 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 opposite is true.

In the case at hand, Milwaukee Enrollment Services has not shown, by clear and convincing evidence, that the Respondent sold his benefits to John Henry Distribution between January and February 2012.

Page 3 of Exhibit 17 shows EBT transactions for John Henry Distribution on January 12, 2012 and February 13, 2012 conducted by a person with the same name as the Respondent. The EBT card number associated with those transactions ends in 7756. However, page 2 of Exhibit 17, lists two EBT cards for the Respondent, neither of which end in 7756. As such, there is insufficient evidence connecting the Respondent to the transactions occurring with John Henry Distribution on January 12, 2012 and February 13, 2013.

### **CONCLUSIONS OF LAW**

Milwaukee Enrollment Services has not shown, by clear and convincing evidence, that the Respondent sold his benefits to John Henry Distribution between January and February 2012.

**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 17th day of June, 2015.

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\sMayumi Ishii  
Administrative Law Judge  
Division of Hearings and Appeals

- c: Miles - email
- Public Assistance Collection Unit - email
- Division of Health Care Access and Accountability - email
- Pamela Hazley - email



**State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

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The preceding decision was sent to the following parties on June 17, 2015.

Milwaukee Enrollment Services  
Public Assistance Collection Unit  
Division of Health Care Access and Accountability  
[Pamela.Hazley@dhs.wisconsin.gov](mailto:Pamela.Hazley@dhs.wisconsin.gov)