STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

[redacted], Respondent

DECISION
Case #: FOF - 165768

Pursuant to petition filed April 30, 2015, 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 [redacted] from receiving FoodShare benefits (FS) for ten years, a hearing was held on Thursday, June 18, 2015 at 09:00 AM in Dane County, Wisconsin.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV) by lying about her residence in order to receive dual benefits.

There appeared at that time the following persons:

PARTIES IN INTEREST:
Petitioner: By: Megan Ryan, PARIS Agent

Office of the Inspector General
Department of Health Services
PO Box 309
Madison, WI 53701

Respondent:
[redacted]

ADMINISTRATIVE LAW JUDGE:
Mayumi Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. The Respondent (CARES #[redacted]) received FoodShare benefits in Wisconsin between January 2011 through November 2011 and again from May 2014 through October 2014. (Exhibits 9 and 10)

2. On June 1, 2011, the Respondent completed an ACCESS application in which she indicated that she was homeless, but living in Wisconsin. The Respondent electronically signed the application, indicating that the information was correct and complete and that she understood the penalties for providing false information or breaking the rules. (Exhibit 3)

3. On August 19, 2011, the Respondent completed an ACCESS on-line renewal, in which she indicated that she was homeless, but living in Wisconsin. The Respondent electronically signed the renewal, indicating that the information was correct and complete and that she understood the penalties for giving false information or breaking the rules. (Exhibits 5 and 6)

4. On May 16, 2014, the Respondent completed an on-line ACCESS application in which she indicated that she was homeless, but living in Wisconsin. The application contained a penalty warning, advising the Petitioner that she could be disqualified from the FoodShare program for up to ten years, if she provided false information. The Respondent electronically signed the application, indicating that the information she provided was correct and complete. The Respondent also indicated that she understood the penalties for giving false information or breaking the rules. (Exhibit 12)

5. On May 11, 2015, the Office of Inspector General prepared an Administrative Disqualification Hearing Notice, alleging that the Respondent provided false information to get more food stamp benefits that she was otherwise entitled to, during the period of June 1, 2011 to November 30, 2011 and for the period of May 19, 2014 to October 31, 2014. (Exhibit 1)

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 June 18, 2015. The Respondent was advised of the date and time of the hearing, in an Administrative Disqualification Hearing Notice that was sent to her at a post office box in Madison, Wisconsin. Ms. Ryan indicated that this was the Respondent's last known address and that OIG did not receive any returned mail.

The June 18, 2015 notice directed the Respondent to contact me, at least two days prior to the hearing, to provide a phone number where she could be reached for the hearing. The Respondent did not call me with a phone number.

An attempt was made to contact the Respondent at a phone number contained in the file; however an individual with initials [redacted] answered and indicated that the Respondent was homeless, didn't live there, and was transient.

Based upon all of the foregoing, the decision was made to proceed in the Respondent's absence. 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.

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 OIG 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 may exist a reasonable doubt that the elements have been shown.

The Merits of OIG's Case

In the case at hand, the Office of the Inspector General (OIG) asserts that the Respondent violated the rules of the FoodShare Program by lying about her residence in order to receive dual benefits during two periods of time, June 1, 2011 to November 30, 2011 and for May 19, 2014 to October 31, 2014. During the first period of time, it is alleged that the Respondent received benefits in Wisconsin, Georgia and Oregon. During the second period of time, it is alleged that the Respondent received benefits in Wisconsin and California.

"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)*

Per 7 C.F.R. §273.16(b)(5), "an individual found to have made a fraudulent statement or representation with respect to the identity or place of residence of the individual in order to receive multiple food stamp benefits

simultaneously shall be ineligible to participate in the Program for a period of 10 years." *See also FoodShare Wisconsin Handbook, § 3.14.12*

I. Georgia

Exhibit 9 contains a copy of the FoodStamp Issuance History Disbursement from Wisconsin, which is reliable as a regularly kept business record of the State of Wisconsin. It shows that the Respondent received benefits in Wisconsin from June 1, 2011 through November 2011. However, the only evidence that OIG has presented to show that the Respondent received benefits in Georgia, is an e-mail from a "Personal Advocate" stating that the Respondent received benefits from April 2011 through September 2011. (See Exhibit 8) There is nothing about that hearsay information that lends it any guarantees of reliability. Indeed, there is no way to know how the declarant obtained the information or whether she got it right. As such, it is found that OIG has not met its burden to prove, by clear and convincing evidence, that the Respondent received dual benefits between April 2011 and September 2011.

II. Oregon

In order to prove the Respondent received benefits in Oregon, OIG again relied upon an e-mail, this time from a "vsepulve", indicating the Respondent received food stamps in Oregon from October 2011 through November 2011. As with the e-mail from Georgia, there is nothing about the hearsay information from Oregon that lends it any guarantees of reliability. Indeed, the full name of the declarant is not even known and there is no way to know how the declarant obtained the information or whether she got it right. As such, it is found that OIG has not met its burden to prove, by clear and convincing evidence, that the Respondent received dual benefits in October and November 2011.

III. California

Exhibit 12 is a copy of an application for FoodShare benefits that the Respondent submitted to the State of Wisconsin in May 2014. It was electronically signed by the Respondent and is therefore reliable evidence that the Respondent made representations to the State of Wisconsin that she was living here.

Exhibit 10 is a Confirmed Assistance Group Eligibility History showing that the Respondent was found eligible for FoodShare benefits in Wisconsin from May 2014 through October 2014. Exhibit 10 is reliable as a regularly kept business record of the State of Wisconsin.

According to the testimony of the OIG representative, Exhibit 20 is an EBT card transaction history for the Respondent's Wisconsin benefits. Assuming for the sake of argument that this is correct, it shows that the Respondent was using her benefits in Wisconsin in May 2015. As such, there is no evidence that she lied to Wisconsin regarding her residence at the time of application.

Exhibit 15 is a Notice of Action from San Joaquin County, addressed to the Respondent, indicating that her CalFresh (food stamp) benefits would be ending as of September 30, 2014. This document is reliable because it is regularly kept business record of San Joaquin County and it is record that the county / state is legally obligated to retain. Thus, it establishes that the Respondent received FoodStamps in California prior to September 20, 2014.

However, OIG provided no applications for benefits from California, nor anything equivalent to a Case Comment record. As such, it cannot prove that the Respondent lied about her residence to the State of California. Indeed, it is possible that the Respondent notified the State of California that she was moving to Wisconsin in May 2014, but they did not take action on the reported change. In the absence of reliable documentation from California showing what the Respondent reported when, there is no way to know if she lied to California about her residence. OIG has not met its burden to prove, by clear and convincing evidence, that the Respondent lied about

her residence to obtain dual benefits. Thus, the 10-year sanction under 7 C.F.R. §273.16(b)(5) may not be imposed.

The remaining question is whether the Respondent intentionally violated the rule requiring an applicant to live in the state in which she applies for benefits, which would warrant a *lesser* sanction.

Assuming arguendo that Exhibits 18, 19 and 20 show that dual benefits were received under the Respondent's name from both California and Wisconsin, there are still some questions about whether the Respondent purposefully violated the rules of the FoodShare / food stamp program.

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.

Comparing Exhibit 18 to Exhibit 20 raises some serious questions regarding who was using the benefits and what, if anything, the Respondent knew about it. For example, Exhibit 18 shows the Respondent's California benefits being used in Chandler, Arizona on September 8, 2014 at 3:45 in the afternoon, but on that same date, at 6:20 p.m. (3:20 p.m. Arizona time), the Respondent's Wisconsin benefits were used in Lansing, Michigan. It is not possible for the Respondent to have been in both places at the virtually the same time.

Another example that raises questions about what happened with the Respondent's benefits occurred in August 2014. The California benefits were used in Arizona on August 12th and 15th, but the Wisconsin benefits were used on August 13th, 14th and 16th in Eau Claire, Wisconsin. If the Respondent were using both cards, she would be doing a lot of flying or driving back forth to cover thousands of miles.

Based upon the foregoing, a second person had to have been involved with the food stamp benefits in question. However, there just isn't enough information in the record to know what that involvement was and what the Respondent knew about it. Was her card stolen? Did she sell her benefits? Did someone steal her identity? Did she give her benefits away?

Given the likelihood that a second person was involved and given the lack of information concerning what that involvement was or what the Respondent knew about it, OIG cannot prove, by clear and convincing evidence, that the Respondent possessed the requisite intent to violate the rules of the FoodShare / food stamp program.

It should be noted that nothing precludes OIG from doing further investigation and seeking disqualification, once it figures out exactly what was going on with the Respondent's benefits.

CONCLUSIONS OF LAW

OIG has not met its burden to prove, by clear and convincing evidence, that the Respondent committed an intentional program violation by lying to receive dual benefits.

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 29th day of June, 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
Megan Ryan - email

State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on June 29, 2015.

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