



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General

vs.

██████████ Respondent

DECISION

Case #: FOF - 165769

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 ██████████ from receiving FoodShare benefits (FS) for ten years, a hearing was held on Thursday, June 18, 2015 at 09:15 AM by telephone.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV) by lying about his residence.

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:

██████████
██████████
██████████

ADMINISTRATIVE LAW JUDGE:

Mayumi Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. The Respondent (CARES # ██████████) received FoodShare benefits in Wisconsin from October 2011 through May 2014. (Exhibit 12)

2. On October 5, 2011, the Respondent filed an application for Wisconsin Medicaid benefits. As part of the application, the Respondent also applied for FoodShare benefits. On the page in which the Respondent applied for FoodShare benefits, the Respondent provided a Wisconsin address. (Exhibits 3 and 4)
3. There is no FoodShare penalty warning in that application. (Exhibits 3 and 4)
4. On October 12, 2011, the Respondent called the county agency and completed a telephone application. In that application the Respondent indicated that he lived alone in Wisconsin. He electronically signed the application indicating that the information was correct and complete, and that he understood the penalties for giving false information or breaking the rules. (Exhibit 6)
5. On February 24, 2012, the Respondent completed an on-line ACCESS Six Month Report Form (SMRF) in which he indicated he lived in Wisconsin with [REDACTED], who OIG claims is the Respondent's daughter. The Respondent electronically signed the SMRF, indicating that the information was correct and complete. (Exhibit 7)
6. On September 11, 2012, the Respondent completed an on-line ACCESS renewal in which he indicated that he lived in Wisconsin with [REDACTED]. That application contained a penalty warning that advised the Respondent that he could be disqualified from the FoodShare program for ten years if he provided false information to obtain dual benefits. The Respondent electronically signed the renewal indicating that the information was correct and complete and that he understood the penalties for giving false information or breaking the rules. (Exhibit 8)
7. On January 9, 2013, the Respondent filed an on-line ACCESS change report which indicated that he was still living in Wisconsin, but at a different address. (Exhibit 21)
8. On March 3, 2013, the Respondent completed an on-line ACCESS SMRF indicating that he lived in Wisconsin with [REDACTED]. The Respondent electronically signed the SMRF indicating that the information was correct and complete. (Exhibit 9)
9. On September 5, 2013, the Respondent completed an on-line ACCESS renewal, in which he indicated that he lived in Wisconsin with [REDACTED]. That application contained the FoodShare penalty warning. The Respondent electronically signed the application indicating that the information was correct and complete and that he understood the penalties for providing false information or breaking the rules. (Exhibit 10)
10. On February 28, 2014, the Respondent completed an on-line SMRF indicating that he lived in Wisconsin with [REDACTED]. The Respondent electronically signed the SMRF indicating that the information was correct and complete. (Exhibit 11)
11. None of the applications or SMRFs submitted by the Respondent included his wife on his case load. (Exhibits 3, 4, 6, 7, 8 and 21)
12. Respondent's wife, [REDACTED], had a food stamp case in Nevada that was open from October 2011 through December 2011 and from May 2012 through April 2014. She included the Respondent in her household, but not [REDACTED] (Exhibits 14, 15 and 16)
13. On May 11, 2015, the Office of the Inspector General (OIG) prepared an Administrative Disqualification Hearing Notice alleging that the Respondent provided false information in order to obtain more food stamps than he was otherwise entitled to receive for the period of October 5, 2011 through May 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 him at an address in Nevada. 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 he 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 identifying herself as the Respondent's wife of 30 years answered and indicated that the Respondent was not currently with her. The woman indicated that they only had the one cell phone number and that there was no way to get a hold of the Respondent. The woman indicated that the address on the Administrative Disqualification Hearing Notice was correct; that they both lived at the residence and that they likely received the notice.

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 his failure to appear. 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 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 his residence in order to receive dual benefits from Wisconsin and Nevada, for the period of October 2011 through May 2014.

“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*

The Nevada food stamp case is under the Respondent’s wife’s name. None of the Nevada applications for food stamps were included in the record, nor were any Case Comment –type records. Thus, there is no evidence that the Respondent lied to Nevada to help his wife obtain benefits for a household that included him. Indeed, there no evidence that the Respondent even knew, during the time in question, that his wife was receiving food stamp benefits from Nevada.

One might suspect that the Respondent knew about his wife’s applications for Nevada benefits, given their marital status, but suspicion is not the same as clear and convincing evidence.

Given that there is no evidence that the Respondent knew benefits were issued for him in Nevada, there is no evidence that he was intentionally seeking out dual benefits from the two states. As such, the 10-year sanction under 7 C.F.R. §273.16(b)(5) may not be imposed. This also means that there is no evidence that he intentionally obtained benefits from Nevada that he should not have received.

The remaining question is whether the Respondent simply lied to Wisconsin about his residence to obtain benefits here, which would warrant a lesser sanction.

The applications and SMRFs completed by Respondent between October 2011 and February 2014 clearly show that the Respondent reported that he was living in Wisconsin during that time. The Respondent’s Wisconsin EBT card usage is mainly in Wisconsin during the time in question, which would seem to indicate that he was living in Wisconsin, as he claimed.

The remaining evidence that OIG relies upon to prove the Respondent was not living in Wisconsin between October 2011 and May 2014 are the Facebook entries of the Respondent (Exhibit 20) and a statement from the Respondent to the Nevada State Division of Welfare and Supportive Services Investigations (Exhibit 24).

With regard to the Facebook posts, they are not sufficient to prove where the Respondent was living. Though it lists Henderson, Nevada as the Respondent's residence, it is not clear when that information was posted on Facebook.

There is a post dated November 2011, which indicates that the Respondent has been in Wisconsin for two months and that he will be in Wisconsin for at least two more months, but wishes to go home to his wife. However, that only bolsters evidence that the Respondent was, in fact, in Wisconsin when he applied for benefits and was "stuck" here. What is not clear, is how much longer after the post the Respondent remained in Wisconsin, whether he returned to his wife, for how long he was there, if/when he returned to his wife and whether he was temporarily absent from Wisconsin or gone for a longer period of time. The post creates more questions than it really answers.

What is clear, is that the Respondent's wife had access to his Facebook account, since she clearly indicates that she was posting under his name on page 5 of Exhibit 19. As such, the integrity of the information on the Facebook page has been undermined and cannot be relied upon as evidence of the Respondent's whereabouts and activities.

It should be acknowledged that before the hearing started, the woman identifying herself as the Respondent's wife indicated that she and her husband are currently living together in Nevada. However, her statements were not under oath and she was not listed as a potential witness. Further, she has incentive to fabricate testimony regarding whether the Respondent lived / lives with her in Nevada, given that she had an open case and reported the Respondent in her household. As such, none of her statements can be relied upon.

With regard to Exhibit 24, the Respondent appears to have signed that document on May 9, 2014. In that statement, the Respondent indicates, "I [Respondent] moved to Nevada in June 2010. however [sic], I was going back and forth between here and Wisconsin. Between June 2010 and 2014 staying as much as 8 months at a time. 8 mo. (feb 2011-Nov2011)" That is the sum total of his statement.

The problem with the statement is that it is unclear what he meant by "staying as much as 8 mo. at a time." Does that mean eight consecutive months out of 12 months? Is that eight non-consecutive months? In which state was he spending the eight months? Why does it conflict with the February 2011 through November 2011 time frame, which is ten total months? Given how vague and ambiguous the statement is, it is insufficient to prove the Respondent was not living primarily in Wisconsin between October 2011 and May 2014.

Based upon all of the foregoing, it is found that OIG has not met its burden to prove, by clear and convincing evidence, that the Respondent committed an intentional program violation, by lying about his residence.

CONCLUSIONS OF LAW

OIG has not met its burden to prove, by clear and convincing evidence, that the Respondent intentionally violated the rules of the FoodShare program by lying about his residence.

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



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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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