



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

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In the Matter of

Office of the Inspector General, Petitioner

vs.

██████████ Respondent

DECISION

Case #: FOF - 167101

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Pursuant to petition filed July 7, 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) one year, a hearing was held on Wednesday, October 14, 2015 at 9:15 AM, at Milwaukee, Wisconsin.

This hearing was originally scheduled for a telephone hearing on August 18, 2015. The Petitioner indicated that he wanted to reschedule the hearing, because his mother passed away and he needed more time to prepare.

The hearing was scheduled to September 8, 2015. The hearing was rescheduled because the Petitioner was driving and the cell phone connection cut off.

The hearing was then scheduled for October 14, 2015. This time, the hearing took place as scheduled.

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:

Office of the Inspector General  
By: Tanya Allen, Fraud Investigator  
Office of Inspector General  
Department of Health Services  
PO Box 309  
Madison, WI 53701

Respondent:

██████████  
██████████  
██████████

**ADMINISTRATIVE LAW JUDGE:**

Mayumi Ishii

**FINDINGS OF FACT**

1. The Respondent (CARES # [REDACTED]) is a resident of Milwaukee County.
2. On December 5, 2013, the Respondent called the agency to complete a renewal. He indicated that he was living in Wisconsin, but homeless. It appears he electronically/telephonically signed the renewal certifying under penalty of perjury and false swearing that the information was correct and complete. However, this is not clearly noted in the case comments. (Exhibits 2 and 3B)
3. On May 28, 2014, the Respondent called the agency to complete a renewal. He telephonically/electronically signed an Application Summary that indicated that he was living in Wisconsin, but homeless. The Petitioner certified under penalty of perjury and false swearing that the information was correct and complete. (Exhibits 2 and Exhibit 3D)
4. On October 28, 2014, the Petitioner telephonically/electronically signed an Application Summary that indicated that he was living in Wisconsin, but homeless. The Petitioner certified under penalty of perjury and false swearing that the information was correct and complete. (Exhibits 2 and Exhibit 3F)
5. The Petitioner obtained employment in March 2013 and received paychecks from April 22, 2013 through August 7, 2013. The Petitioner reported an address in Aventura, Florida to his employer. (Exhibit 4C)
6. On July 10, 2015, The Office of Inspector General (OIG) prepared an Administrative Disqualification Hearing Notice alleging that from May 2013 through February 2015, the Petitioner lied, claiming to be a Wisconsin resident, when, in fact, he was living in Florida. (Exhibit 6)

**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 October 14, 2015. The Petitioner was sent notice of the hearing on September 9, 2015, advising him of the date and time of the hearing and instructing the Petitioner to provide a phone number where he could be reached.

The Petitioner did not call in with a phone number prior to the hearing. Two attempts were made to reach the Petitioner at (414) 334-5625, his last known phone number. However, the Petitioner did not answer. Voicemail messages were left for the Petitioner and the hearing proceeded in his absence.

The Petitioner has not contacted the Division of Hearings and Appeals within ten days of the hearing date. Accordingly, it is found that the Petitioner did not have good cause for his failure to appear.

#### *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.

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, the Office of the Inspector General (OIG) asserts that the Respondent violated the rules of the FoodShare Program by lying about his residence. Specifically, OIG asserts that the Respondent claimed to be living in Wisconsin when, in fact, he was living in Florida, between May 2013 through February 2015.

In order to prove the Respondent was living in Florida, the agency relied upon an EBT report and a Work Number report.

The EBT transaction report lists transactions conducted with five different EBT cards. The only card number the documentation associates with the Respondent, is a card ending in 0122. Those transactions took place in Milwaukee, Wisconsin in February 2015. (See Exhibit 4B)

Because there is no documentation in the record connecting the Petitioner with the other four EBT cards, the EBT transaction report is not sufficient to prove the Respondent was using his EBT card outside Wisconsin, between May 2013 and February 2015.

The only other evidence that might show the Petitioner was living outside of Wisconsin is a Work Number report, which shows the Petitioner obtained employment with a tech company in March 2013 and received paychecks from April 22, 2013 through August 7, 2013, and which shows the Petitioner reported an address in Aventura,

Florida to his employer. (Exhibit 4C) That evidence, standing alone, is not sufficient to establish, by clear and convincing evidence, that the Petitioner was living outside Wisconsin from May 2013 through February 2015.

OIG has not met its burden to prove, by clear and convincing evidence that the Respondent intentionally violated the rules of the FoodShare program. This is particularly true, given that the agency did not provide any documentation showing what the Petitioner reported or did not report, prior to December 2013.

### **CONCLUSIONS OF LAW**

OIG has not met its burden to prove, by clear and convincing evidence, that the Petitioner intentionally violated the rules of the FoodShare program.

**NOW, THEREFORE, it is ORDERED**

That IPV case number [REDACTED] is 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 5th day of November, 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
- Division of Health Care Access and Accountability - email
- Tanya Allen - email





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

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The preceding decision was sent to the following parties on November 5, 2015.

Office of the Inspector General  
Public Assistance Collection Unit  
Division of Health Care Access and Accountability  
[tanya.allen@wisconsin.gov](mailto:tanya.allen@wisconsin.gov)