



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

██████████, Respondent

DECISION

Case #: FOF - 167102

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 Tuesday, August 18, 2015 at 01:30 PM 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:

Representative: Tanya Allen, Fraud Investigator

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

Respondent:

██████████
██████████
██████████

ADMINISTRATIVE LAW JUDGE:

Mayumi Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. The Respondent received FoodShare benefits from November 2014 through April 2015. (Exhibit 1C)
2. On March 27, 2014, the Respondent completed an on-line renewal, listing a Wisconsin residence. The renewal contained a penalty warning and the Respondent electronically signed the renewal, indicating the

information was correct and complete and that she understood the penalties for providing false information or breaking the rules. (Exhibits 2 and 4A)

3. On March 31, 2015, the county agency sent the Respondent the Eligibility and Benefits booklet that explained the penalties for providing false information, including disqualification from the FoodShare program. (Exhibits 3A and 4D)
4. On June 23, 2014, the Respondent completed an ACCESS change report listing a Wisconsin residence. However, there was no signature, certifying the information as true and correct. (Exhibits 2 and 3C)
5. On September 26, 2014, the Respondent completed an ACCESS Six Month Report From (SMRF) listing a Wisconsin residence. She electronically signed the SMRF, indicating the information was correct and complete. The agency processed the SMRF on September 30, 2014. (Exhibits 2 and 4B)
6. On November 8, 2014, the Respondent completed an ACCESS renewal, listing a Wisconsin residence. The renewal provided a penalty warning and the Respondent electronically signed the renewal, indicating that the information was correct and complete and that she understood the penalties for providing false information or breaking the rules. (Exhibit 4C)
7. On November 10, 2014, the Respondent completed on on-line renewal/application, listing a Wisconsin residence. She electronically signed the application, indicating that the information was correct and complete and that she understood the penalties for giving false information or breaking the rules. (Exhibits 2 and 3E)
8. Between August 2014 and April 2015 the Respondent's EBT card was used exclusively in [REDACTED] Texas. (Exhibit 4E)
9. The Petitioner was employed at a business in [REDACTED], Texas from October 2014 through April 2015. (Exhibit 4F)
10. The respondent (CARES # [REDACTED]) is a resident of Milwaukee County who received FS benefits in [REDACTED] County from October 1, 2013 through October 1, 2013.
11. On July 10, 2015, the Office of Inspector General (OIG) prepared an administrative disqualification hearing notice that alleged the Petitioner violated the rules of the FoodShare program between Noember 2014 and April 2015, by providing false information about her residence, claiming to be in Wisconsin when, in fact, she was in Texas. (Exhibit 5A)

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 August 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 addresses in Wisconsin and Texas.

Ms. Allen testified that those were the Respondent's last known addresses and that OIG did not receive any returned mail.

The notices further instructed Ms. Allen to contact me with a phone number where she could be reached for the hearing. Ms. Allen did not contact me with a phone number. Two attempts were made to contact the Respondent at (414) [REDACTED], but the out-going message indicated that the phone number or area code was incorrect.

Ms. Allen has not contacted the Division of Hearings and Appeals within ten days of her hearing to explain her failure to be available. Accordingly, it is found that there is no good cause for Ms. Allen's failure to be available for the hearing.

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 belief that the Respondent intentionally violated the rules of the FoodShare program by lying about her residence, 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, OIG asserts that the Respondent violated the rules of the FoodShare program between November 2014 and April 2015, by claiming to be a Wisconsin resident when, in fact, she was residing in Texas.

“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)

OIG provided the renewals signed and submitted by the Respondent. These are regularly kept business records of the State of Wisconsin and are reliable evidence that the Respondent reported a Wisconsin residence between November 2014 and April 2015.

EBT Edge records are also reliable as regularly kept records of the State of Wisconsin and are sufficient to establish that the Respondent's EBT card was used exclusively in [REDACTED] Texas.

It is highly unlikely that the Respondent would have been using her card in Texas during the six months in question without actually living in Texas. Further, the Employer Verification of Earnings form further indicates that the Respondent was working in Texas. Again, it is highly unlikely that she was commuting between Texas and Wisconsin.

Based upon the foregoing, it is found that the Respondent was actually living in Texas and that the Respondent lied in her applications and renewals.

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. 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).

There is no evidence to rebut the presumption that the Respondent intentionally violated the rules of the FoodShare program by lying about her residence. On the contrary, she received an Eligibility and Benefits booklet in March 2014 that warned her about the penalties for providing false information, and she was warned each time she completed an on-line renewal in March 2014, September 2014 and November 2014, but she lied about her residence anyway.

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

CONCLUSIONS OF LAW

1. The Respondent violated, and intended to violate Rules 7 CFR §273.3(a) and 7 C.F.R. §273.16(c), by lying about a Wisconsin residence between November 2014 and April 2015.
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 OIG's determination is sustained, and that OIG 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 8th day of September, 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
- 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 September 8, 2015.

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