



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

██████████, Respondent

DECISION

Case #: FOF - 168439

Pursuant to petition filed September 3, 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 11:15 AM at , 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:

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 # ██████████) is a resident of Milwaukee County who did not receive benefits in 2013 and most of 2014. She received benefits from October 1, 2014 to March 2015 and then for the month of May 2015. (Exhibit A)

2. On March 7, 2011, the Respondent reported that JP had moved in with her, but was not “relevant” to her case. The county agency did not add JP to Respondent’s case. (Exhibit C)
3. On April 1, 2011 the Respondent’s newborn child was added to her case. (Exhibit C)
4. On December 15, 2011, the Respondent added, “her son’s father to case.” (Exhibit C)
5. On November 28, 2012, the Respondent completed a six-month report form in which she listed herself, MP and JP as part of her household. The Respondent signed the form, indicating it was correct and complete. (Exhibit E)
6. Sometime in early 2013, JP was removed from the Respondent’s case. However, OIG did not provide a copy of the change report that prompted the removal, nor did it provide the case comments from that period of time. (Exhibit P)
7. On April 2, 2013, the Respondent completed an on-line ACCESS application for FoodShare and Childcare indicating that she lived in the upper “unit” of a home on [REDACTED] with her two-year old son, MP. The application contained a penalty warning advising the Respondent that she could be disqualified from the FoodShare program, if she provided false information. The Respondent electronically signed the application indicating that the information was correct and complete and that she understood the penalties for providing false information. (Exhibit G)
8. On September 6, 2013, the Respondent submitted a six-month report form in which she again reported living at the [REDACTED] address, only with her son. She signed the form, indicating the information was correct and complete. (Exhibit I)
9. On September 26, 2014, the Respondent signed a six-month report form, indicating that she still lived in the “upper” unit of the [REDACTED] address, with her son. The Respondent indicated the information was correct and complete. (Exhibit M)
10. On April 6, 2015, the Petitioner called the county agency to complete a phone review. The Respondent indicated that she still lived in the “upper” unit of the [REDACTED] address with just her son, who was by then four years old. The Respondent telephonically signed the review, indicating that she understood the penalties for providing false information and that the information was correct and complete. (Exhibits O and P)
11. JP was on community supervision and from September 7, 2012 through July 25, 2013, Pamela [REDACTED] was his probation/parole agent. (Testimony of Ms. [REDACTED])
12. JP reported the [REDACTED] address as his residence to the Department of Corrections and Ms. [REDACTED] conducted home visits at that residence. JP reported living with the Respondent and their child. (Testimony of Ms. [REDACTED]; Exhibit D)

13. The [REDACTED] residence was set up as a “Polish Flat”, with the main part of the home as the “upper” unit and the basement as a “lower unit”. Agent [REDACTED] conducted her home visits with JP in the upper unit. Respondent’s parents lived in the “lower”/basement unit. (Testimony of Ms. [REDACTED])
14. JP was employed and receiving income each month from April 2013 through November 2013 and from November 2014 to March 2015. (Exhibit H)
15. The address on the paystubs is the [REDACTED] address, but does not designate upper or lower unit. (Id.)
16. On January 5, 2014, a civil suit was filed in Federal District Court naming JP as a plaintiff, and indicating that at least as of that date, JP’s residence was the [REDACTED] address, though there is no designation of upper or lower unit. (Exhibit K)
17. The KIDS database for tracking child support payments, updated JP’s address to the [REDACTED] address, with no unit designation, based upon employer verification, not JP’s report. (Exhibit N)
18. TransUnion indicated that the most recent address reported for JP, was reported in February 2007 and was the [REDACTED] address, with no unit designation. (Exhibit S)
19. On September 14, 2015, OIG prepared an administrative disqualification hearing notice, alleging that the Respondent committed an intentional program violation by failing to report JP and his income as part of her household, between April 2013 and May 2015. (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 October 14, 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 [REDACTED] St. Ms. Johnson indicated that that this was the Respondent's last known address and that there was no returned mail.

At the designated time, two attempts were made to contact the Respondent at ([REDACTED]) without success. Voicemail messages were left for the Respondent and the hearing was conducted without her.

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 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 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 between April 2013 and May 2015, by lying about her household composition and income.

It is clear from the April 2, 2013 and April 6, 2015 applications that the Respondent did not report JP and his income to the county agency. It is also clear from the September 6, 2013 and September 26, 2014 six month report forms that the Respondent did not report JP and his income to the county agency.

Agent [REDACTED] gave credible testimony that JP reported that he was living with the Respondent and their child and that she conducted home visits confirming the same between April 2013 and July 25, 2013.

JP's paystubs show that he received income from April 2013 through July 25, 2013. (Exhibit H) His first pay check was dated April 4, 2013, two days after the Respondent completed her April 2013 renewal, but the check was for hours worked during the pay period of March 15, 2013 to March 28, 2013.

Based upon the foregoing, it is found that the Respondent lied by omission, by failing to report JP and his income in her household in her April 2013 application.

Though the Individual Eligibility History in Exhibit A shows that the Respondent did not receive FoodShare benefits between January 1, 2013 and September 30, 2014, the definition of an intentional program violation includes misrepresenting facts for the purpose of acquiring food stamps/food share benefit. *See* 7 C.F.R. §273.16(c). So, even though the Respondent wasn't found eligible, she still filled out the April 2, 2013 application, omitting information about JP, for the purpose of obtaining FoodShare benefits. The Respondent did not appear at the hearing and offer testimony to the contrary. Thus, a violation still occurred.

However, OIG has not met its burden to prove, by clear and convincing evidence, that the Respondent continued to lie after the April 2013 application, because it hasn't provide sufficient evidence that JP actually lived with the Respondent after July 2013, nor has it provided any documentation showing what the Respondent did or did not report between April 2013 and September 2013.

First, the case comments contained in Exhibits C and O do not contain any entries for the period of February 21, 2012 through April 9, 2014. They run from February 7, 2011 to February 20, 2012 and from April 10, 2014 through July 2, 2015. As such, there is no way to know for certain what the Respondent reported between her April 2013 application and her September 2013 six month report form.

Second, the documentary evidence regarding JP's residence after July 2013, does not designate an upper or lower residence. So it is unclear which part of the flat he was living in after July 2013.

Third, the KIDS data base printout shows that information provided to KIDS was from JP's employer, not from JP himself. Thus, this presents a double hearsay issue and diminishes the reliability of that information.

Fourth, the Trans Union report for JP indicates that the [REDACTED] address was last updated in February 2007. This is not consistent with case comments, which indicate he did not move in with the Respondent until March 2011. This again undermines the reliability of the information in that document.

Fifth, case comments indicate that the Respondent told the agency that JP had been living with his mother, but there is no indication in Case Comments that OIG followed-up on this information. (See Exhibit P)

Based upon the foregoing, it is found that OIG has not met its burden to prove, by clear and convincing evidence, that the Respondent lied about JP being in her home after April 2013.

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 nothing in the record to rebut the presumption that the Respondent intentionally withheld information about JP and his income. On the contrary, when the Respondent completed the April 2013 application, she was warned about the penalties for providing false information, including disqualification from the program, but she went ahead and lied on her application, anyway.

CONCLUSIONS OF LAW

1. The Respondent intentionally violated 7 C.F.R. §273.16(c), by withholding information about JP and his income in her April 2013 application for FoodShare benefits.
2. This is the first such violation.
3. OIG has not met its burden to prove, by clear and convincing evidence, that the Respondent lied about JP being in her home after April 2013.

NOW, THEREFORE, it is ORDERED

That IPV case number [REDACTED] is sustained with regard to intentionally withholding information about household composition and income in April 2013.

The agency 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 10th day of November, 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
Sherrie Johnson - email



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The preceding decision was sent to the following parties on November 11, 2015.

Office of the Inspector General
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