FH
[redacted]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

DECISION

FOO/172374

PRELIMINARY RECITALS

Pursuant to a petition filed February 26, 2016, under Wis. Admin. Code § HA 3.03(1), to review a decision by the Brown County Human Services in regard to FoodShare benefits (FS), a telephonic hearing was held on March 22, 2016, at Green Bay, Wisconsin. At the request of the parties, the record was held open until April 8, 2016 for consecutive briefs to the Division of Hearings and Appeals (DHA) with a copy to the other party. Both parties timely submitted their briefs to DHA which are received into the hearing record.

The issue for determination is whether a no contest plea without any evidentiary hearing or evidentiary findings resulting from a violation of Brown County Ordinance 30.05(1) is sufficient to impose a FoodShare (FS) Intentional Program Violation (IPV) disqualification and thus to reduce petitioner's FS benefits.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[redacted]

Petitioner's Representative:

Attorney [redacted]
Legal Action of Wisconsin
[redacted]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703
By: Attorney [redacted]
Brown County Interim Corporation Counsel
305 E. Walnut Street
P.O. Box 23600
Green Bay, WI 54305-3600

ADMINISTRATIVE LAW JUDGE:
Gary M. Wolkstein
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [redacted]) is a resident of Brown County who received FS for a household of two (petitioner and her daughter) in Brown County.

2. On or about October 30, 2015, the Brown County Sheriff mailed to petitioner a citation for violating Brown County ordinance 30.05(1), Prohibiting Fraud in Public Assistance, Housing Accommodations and Energy Assistance Cases. Section 30.05(1) states: "No person shall willfully make any false representation with the intent to (a) secure public assistance, (b) dwelling accommodations under s. 66.402, Wis. Stats., as amended from time to time, or (c) energy assistance under Chap. 49, Wis. Stats. as amended from time to time for him/herself or for some other person. The letter indicated that a hearing was scheduled in Brown County Circuit Court in Case No. [redacted].

3. Petitioner did appear with her counsel, Attorney [redacted], for her [redacted], 2016 Circuit Court date in Case No. [redacted]. During that appearance, Circuit Court Thomas J. Walsh found petitioner guilty in a judgment on a No Contest Plea of violating Brown County Ordinance No. 30.05(1).

4. Judge Walsh's judgment in Case No. [redacted] lacked any evidentiary findings because no one testified during the circuit court case as to the facts underlying the ordinance violation or citation, and no exhibits or evidence were received into the Court record regarding the underling facts of the citation. The only finding was that due to a no contest plea, the Court determined that petitioner did violate Brown County Ordinance 30.05(1).

5. Neither any Court nor any administrative disqualification hearing found that petitioner committed FS fraud or that petitioner committed a FS Intentional Program Violation (IPV).

6. On February 8, 2016, the county agency sent a Notice to the petitioner that her FS would be reduced from $357 to $194 effective March 1, 2016, because she was disqualified from the Wisconsin FS program beginning March 1, 2016 due to an IPV (thus reducing her FS household from two to one person).

DISCUSSION

7 C.F.R. §273.16(b) provides as follows:

> (1) Individuals found to have committed an intentional Program violation either through an administrative disqualification hearing or by a Federal, State or local court, or who have signed either a waiver of right to an administrative disqualification hearing or a disqualification consent agreement in cases referred for prosecution, shall be ineligible to participate in the Program:
> (i) For a period of twelve months for the first intentional Program violation….

Similarly, the Department's FS Handbook, §3.14.1, provides:

> 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.

The definition of an IPV is found at 7 C.F.R. §273.16(c):

> Intentional Program violations shall consist of having intentionally:
> (1) Made a false or misleading statement, or misrepresented, concealed or withheld facts; or
> (2) Committed any 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 cards or reusable documents used as part of an automated benefit delivery system (access device).

If the agency files an ADH, the person must be notified at least 30 days before the hearing and have the opportunity to defend the charge. 7 C.F.R. §273.16(e)(3). The agency must prove the IPV by clear and convincing evidence. 7 C.F.R. §273.16(e)(6). If the person fails to appear for the ADH, the agency still must present its evidence to the Administrative Law Judge, and the judge must determine if the IPV was committed based on clear and convincing evidence. 7 C.F.R. §273.16(e)(4).

The issue in this case is whether the finding of guilty of an ordinance violation on the basis of a No Contest Plea is sufficient to warrant disqualification from the FS program. I conclude that it does not given the specific facts and applicable law regarding this case.

In the instant case, the Brown County ordinance subsection under which petitioner was found guilty was Brown County ordinance 30.05(1), Prohibiting Fraud in Public Assistance, Housing Accommodations and Energy Assistance Cases. Section 30.05(1) states: "No person shall willfully make any false representation with the intent to (a) secure public assistance, (b) dwelling accommodations under s. 66.402, Wis. Stats., as amended from time to time, or (c) energy assistance under Chap. 49, Wis. Stats. as amended from time to time for him/herself or for some other person.

During the March 22, 2016 hearing and in her initial and reply briefs, petitioner's counsel, Attorney [redacted], provided multiple persuasive reasons for why the county agency incorrectly imposed a FS Intentional Program Violation (IPV) disqualification to reduce petitioner's FoodShare (FS) benefits from $357 to $194 effective March 1, 2016. First, there is a problem in the county agency's case in that the ordinance on its face does not provide specifically to the FS program or that the person committed an act for the "purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of coupons" from the FS program. Instead, the violation ambiguously refers to "public assistance", "dwelling accommodations" and "energy assistance." Those allegations are too vague to specifically be the basis for a FS IPV disqualification of the petitioner.

A second problem, and the biggest one, is that the agency did not show to the tribunal, by clear and convincing evidence, that the petitioner committed an IPV. She was found guilty in a judgment on a No Contest Plea of violating ordinance no. 30.05(1). However, that judgment lacked any evidentiary findings, because no one testified during the circuit court case as to the facts underlying the ordinance violation or citation, no evidence was received into the Court record regarding the underling facts of the citation, and the only finding was that due to a no contest plea, the Court determined that petitioner did violate Brown County Ordinance 30.05(1).

It contradicts the requirements of the 7 C.F.R. §273.16 that a person can be disqualified from the FS program without showing by clear and convincing evidence that an IPV occurred, but even without any evidentiary findings during the petitioner's [redacted], 2016 Court hearing. If a recipient fails to appear

for an administrative disqualification hearing (ADH), the agency still must convince an administrative law judge that an IPV occurred. It makes no sense that the burden would be so high on an administrative tribunal with experience in handling ADHs, but that no such burden for any level of evidentiary proof would be required before a local, county or State court that may have little or no working knowledge of FoodShare IPV procedures.

A third problem with the sanction is that the court entered a plea of no contest on petitioner's behalf. Wis. Stat., §904.10 provides that a plea of no contest is not admissible in any civil or criminal proceeding against the person who made the plea. See also Williams v. Housing Authority of city of Milwaukee, 2010 WI App 14 which held that a no contest plea can not be used to establish facts in any other proceeding, even in an administrative proceeding. On an administrative level, in Wisconsin Division of Hearings and Appeals decision FOO/165625, the ALJ concluded that in a FS IPV appeal, a no contest plea could not be used as an admission. The county agency was unable to provide any reliable legal authority to refute such decisions. The county agency thus cannot utilize the no contest plea as the basis for moving against petitioner in a FS IPV action.

During the March 22, 2016 hearing, the county agency representative (and witnesses) and in the March 31, 2016 responsive brief by county legal counsel, [redacted], [redacted], the county agency was unable to refute the petitioner's convincing case that the agency incorrectly imposed a FS IPV against the petitioner for the reasons explained above. Attorney [redacted] incorrectly asserted that in administrative proceedings a no contest plea may be used to establish facts, and also incorrectly argued that a no contest plea entered in a case regarding an Ordinance violation is an admission of guilt for a FS IPV case. Finally, Ms. [redacted] incorrectly made assertions based upon the assumption that an IPV hearing had properly taken place regarding the petitioner in Case No. [redacted]. However, the petitioner was never properly found to have committed a FoodShare IPV in that Court plea or any other Court or administrative proceeding.

In her Reply brief, Attorney [redacted] persuasively summarized the petitioner's strong position:

> Ms. [redacted] is not subject to a FoodShare IPV disqualification. Ms. [redacted] was never found to have committed a FoodShare IPV. Neither the citation nor the judgment indicates whether [redacted] was regarding FoodShare benefits. The circuit court did not receive any evidence other than the citation and did not make any factual findings. More is required for a FoodShare IPV disqualification than a determination that an individual violated an ordinance covering multiple public benefits.

Accordingly, for the reasons set forth above, I conclude that the petitioner's no contest plea without any evidentiary hearing or evidentiary findings resulting from a violation of Brown County Ordinance 30.05(1) is insufficient to impose a FS Intentional Program Violation (IPV) disqualification .

CONCLUSIONS OF LAW

The petitioner's no contest plea without any evidentiary hearing or evidentiary findings resulting from a violation of Brown County Ordinance 30.05(1) is insufficient to impose a FS Intentional Program Violation (IPV) disqualification and thus to reduce petitioner's FoodShare (FS) benefits from $357 to $194 effective March 1, 2016.

THEREFORE, it is **ORDERED**

That the matter is remanded to the county agency with instructions to: a) rescind the one-year IPV sanction against petitioner; and b) restore full FS benefits to the petitioner based upon the IPV sanction as of March 1, 2016 for a FS group of two, within 10 days of this decision.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision.** Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

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, Wisconsin 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 (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 Madison,
Wisconsin, this 2nd day of May, 2016.

\sGary M. Wolkstein
Administrative Law Judge
Division of Hearings and Appeals

State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: http://dha.state.wi.us

The preceding decision was sent to the following parties on May 2, 2016.

Brown County Human Services
Division of Health Care Access and Accountability
Attorney [redacted]