



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

██████████, Respondent

DECISION

Case #: FOF - 169600

Pursuant to petition filed October 23, 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, December 8, 2015 at 09:45 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 - OIG
PO Box 309
Madison, WI 53701

Respondent:

██████████
████████████████████
████████████████████

ADMINISTRATIVE LAW JUDGE:

Debra Bursinger
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # ██████████) is a resident of Dane County who received FS benefits in Dane County from November 1, 2009 through January 1, 2016.
2. Between June 1, 2015 and August 31, 2015, the respondent was the only individual in her household eligible to purchase FS items. Also included in the respondent's household at that time were her four minor children.

3. In July, 2015, the respondent was homeless. She stayed at the [REDACTED]. Her children stayed with a friend of the respondent. The respondent sometimes stayed with her friend and ate at her friend's home. Her friend's adult son also lived in the home.
4. On July 6, 2015, there were two transactions on the respondent's card at [REDACTED]. One transaction was at 6:16 p.m. for \$99.73. The second transaction was at 10:03 p.m. for \$104.82. Video surveillance from [REDACTED] shows an adult male using the respondent's card at 6:16 p.m. Video surveillance from [REDACTED] shows an older adult female using the respondent's card at 10:03 p.m. The respondent identified the male and female as her friend and her friend's son.
5. On July 8, 2015, the respondent contacted the agency to discuss a replacement EBT card. Before the card was replaced, the respondent found her card.
6. On October 30, 2015, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that respondent allowed items to be purchased with her EBT card that were not for her household.

DISCUSSION

An intentional program violation of the FoodShare program occurs when a recipient intentionally does the following:

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.

FoodShare Wisconsin Handbook, § 3.14.1; *see also* 7 C.F.R. § 273.16(c) and Wis. Stat. §§ 946.92(2).

An intentional program violation can be proven by a court order, a diversion agreement entered into with the local district attorney, a waiver of a right to a hearing, or an administrative disqualification hearing, *FoodShare Wisconsin Handbook*, § 3.14.1. The petitioner can disqualify only the individual found to have committed the intentional violation; it cannot disqualify the entire household. Those disqualified on grounds involving the improper transfer of FS benefits are ineligible to participate in the FoodShare program for one year for the first violation, two years for the second violation, and permanently for the third violation. Although other family members cannot be disqualified, their monthly allotments will be reduced unless they agree to make restitution within 30 days of the date that the FS program mails a written demand letter. 7 C.F.R. § 273.16(b).

In order for the petitioner 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 a program violation per 7 C.F.R. § 273.16(e)(6). In *Kuehn v. Kuehn*, 11 Wis.2d 15 (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. ...

Kuehn, 11 Wis.2d at 26.

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 be a reasonable doubt as to their existence.

In order to prove the second element, i.e., intention, there must be clear and convincing evidence that the FS recipient intended to commit the IPV. The question of intent is generally one to be determined by the trier of fact. *State v. Lossman*, 118 Wis.2d 526 (1984). 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). Thus, there must be clear and convincing evidence that the FS recipient knew that the act or omission was a violation of the FS Program but committed the violation anyway.

In this case, the OIG asserts that the respondent violated 7 CFR 274.7(a) which states as follows:

Eligible food. Program benefits may be used only by the household, or other person the household selects, to purchase eligible food for the household.

OIG further relies on the Wisconsin FoodShare Handbook section which defines a FS Group and which states as follows:

Food unit/Food Group/Relationships. One or more persons who live in the same household and purchase and prepare food together for home consumption.

Wisconsin FS Handbook, § 3.3.1.

The agency argues that the respondent allowed someone not in her FS group or household to use her EBT card to purchase items that were not intended for the respondent’s household.

At the hearing, the respondent identified the individuals in the video surveillance. She testified that she (the respondent) was homeless in July, 2015 and staying primarily at The [REDACTED] shelter. Her children stayed with her friend, the older female adult in the video. The adult male in the video is the son of her friend. The respondent testified that The [REDACTED] did not have any place for her to store purchased food. Because her children were staying at her friends, she allowed her friend and son to use her EBT card to purchase food for her children. Respondent also ate at her friend’s house during the month so the food was also consumed by her.

Based on the language of the federal regulations cited above at 7 CFR 274.7(a), the respondent could select an individual to purchase eligible food for her household. I found the respondent’s testimony to be credible that she allowed her friend and friend’s son to purchase eligible food for the respondent and her children.

Based upon the record before me, I find that the petitioner has not established by clear and convincing evidence that the respondent violated or intended to violate FS program rules when she allowed her friend to purchase food for her (respondent's) children while the respondent was living at a homeless shelter. The petitioner may not disqualify the respondent from the FS program on these grounds.

CONCLUSIONS OF LAW

There is insufficient evidence to demonstrate that the respondent committed or intended to commit an intentional program violation of FS regulations.

NOW, THEREFORE, it is ORDERED

That the petitioner's determination of an intentional program violation is REVERSED, and the petition for review is hereby dismissed.

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 19th day of January, 2016

Debra Bursinger
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
- Kevin Rinka - email



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The preceding decision was sent to the following parties on January 19, 2016.

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