



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED], Respondent
[REDACTED]
[REDACTED]

DECISION

FOF- 173361

PRELIMINARY RECITALS

Pursuant to a petition filed April 15, 2016, under Wis. Admin. Code §HA 3.03, and see, 7 C.F.R. § 273.16, to review a decision by the Milwaukee Enrollment Services to disqualify [REDACTED] from receiving FoodShare benefits (FS) for a period of one year, a hearing was scheduled for May 16, 2016 at Milwaukee, Wisconsin.

The Petitioner asked to reschedule the hearing, because he accidentally went to the wrong location. The hearing was rescheduled to June 14, 2016 and took place as scheduled.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

NOTE: Judicial Notice is being taken of the criminal complaint, plea agreement and conviction in Federal District Court Case [REDACTED] / [REDACTED]

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

Department of Health Services
1 West Wilson Street, Room 651
Madison, WI 53703

By: [REDACTED] Income Maintenance Specialist Advanced
Milwaukee Enrollment Services
1220 W. Vliet St., Room 106
Milwaukee, WI 53205

ADMINISTRATIVE LAW JUDGE:

Mayumi Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County. He received benefits from March 30, 2012 through August 31, 2012. He was deemed ineligible from September 1, 2012 through October 31, 2012. He received FoodShare benefits, again, between from November 19, 2012 through November 30, 2012. (Exhibits 5 and 6)
2. The Respondent generally received \$200 per month on the 3rd of the month, except in November 2012 when he received \$280 on November 19, 2012. (Exhibit 5)

3. In April 2012, the agency sent the Respondent an Eligibility and Benefits Booklet that warned the Respondent that he could be disqualified from the FoodShare program for selling or trading his benefits (Exhibits 8 and 12)
4. On November 19, 2012, at 11:02 a.m., the Respondent completed an ACCESS application for FoodShare benefits. He electronically signed the application, indicating "I understand the penalties for giving false information or breaking the rules." This application contained a penalty warning that advised the Petitioner that he could be disqualified from the FoodShare program if he traded or sold his benefits. (Exhibit 9)
5. The owner of [REDACTED] was no longer a subcontractor distributing seafood and meat, at the time he became an authorized SNAP vendor in August 2010. Instead, he was purchasing FoodShare benefits for cash, paying the benefit recipients only a percentage of the face value of the card. He engaged in this enterprise until January 2013. (Exhibit 13)
6. On November 19, 2012, at 4:51 p.m. an EBT card ending in [REDACTED] was used at [REDACTED] to make a \$200 "purchase". (Exhibit 3)
7. The EBT card ending in [REDACTED] was issued to the Respondent on May 30, 2012 and is still the Petitioner's current EBT card. (Exhibit 4; Testimony of the Respondent)
8. On April 15, 2016, Milwaukee Enrollment Services (the agency) sent the Respondent an Administrative Disqualification Hearing notice, indicating that it believed he trafficked his FoodShare benefits with [REDACTED] on November 19, 2012. (Exhibit 2)

DISCUSSION

What is an IPV?

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).

What is the Agency's Burden of Proof?

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., 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 an IPV occurred.

The Merits of the Agency's Case

The agency has met its burden to prove, by clear and convincing evidence, that the Respondent trafficked his benefits as alleged. First, the transaction took place on November 19, 2012, the very day the Respondent submitted his application for benefits, after not receiving benefits for two months. It is unlikely anyone else but the Respondent would have known he had benefits on November 19, 2012. Second, the transaction was for a whole dollar amount, which makes it less likely a legitimate food purchase took place. Third, the EBT card used to conduct the transaction is the same card the Respondent still uses. Indeed, the Respondent took the card out at the hearing and showed it to this tribunal. Fourth, in November 2012, [REDACTED] was no longer a subcontractor distributing meat and seafood; but was instead purchasing EBT benefits for a fraction of face value. As such, the Respondent had to have been selling his benefits.

Based upon the foregoing, it is found that the agency has met its burden to prove, by clear and convincing evidence, that the Respondent was trafficking (selling) his FoodShare benefits on November 19, 2012.

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 sold his benefits to [REDACTED]. On the contrary, the Petitioner was warned about selling/trading his benefits when the agency sent him the Eligibility and Benefits Booklet in April 2012 and he was warned again, at 11:00 in the morning on November 19, 2012, when he completed his application for benefits, but by 6:00 p.m. on November 19, 2012, the Respondent sold his benefits, anyway.

CONCLUSIONS OF LAW

The Respondent committed an intentional program violation (IPV) by trafficking his benefits with [REDACTED] on November 19, 2012. This is the first such violation.

THEREFORE, it is

ORDERED

That the IPV for case number [REDACTED] is sustained and that the Respondent is hereby ineligible to participate in the FoodShare program for a period of 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

If you disagree with this decision, you may appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 11th day of July, 2016

\s _____
Mayumi Ishii
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 July 11, 2016.

Milwaukee Enrollment Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
[REDACTED]@dhs.wisconsin.gov