



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION
Case #: FOF - 174119

PRELIMINARY RECITALS

On May 5, 2016, Milwaukee Enrollment Services filed a hearing request under Wis. Admin. Code §HA 3.03 and 7 C.F.R. § 273.16, because it wanted to disqualify the Respondent from the FoodShare program for a period of one year. The hearing was held on June 17, 2016, in Milwaukee, Wisconsin.

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

NOTE: Judicial notice is being taken of the plea agreement and conviction in case [REDACTED] from the Federal District Court

The Record was held open until the end of the day to give the agency an opportunity to submit an EBT Card Issuance/Return History. It has been marked as Exhibit 16 and entered into the record.

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
1220 W. Vliet St., Rom 106
Milwaukee, WI 53205

Respondent:

[REDACTED]
[REDACTED]
[REDACTED]

ADMINISTRATIVE LAW JUDGE:
Mayumi Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County who received FoodShare benefits from September 2011 through August 2012. She typically received her benefits on the 2nd of the month and from March 2, 2012 to August 2012 the Respondent received \$1,014 per month in benefits. (Exhibit 5)
2. On August 16, 2011, the agency sent the Respondent an Eligibility and Benefits booklet that warned her about the consequences of selling or trading her benefits, including disqualification from the program. (Exhibits 9 and 10)
3. In August 2010, the owner of [REDACTED] became an authorized SNAP vendor, but he was no longer a subcontractor distributing seafood and meat. Instead, he was purchasing FoodShare benefits for cash, paying the benefit recipients only a percentage of the face value of the card. This conduct continued until January 2013. (Exhibit 11)
4. On March 26, 2012, an EBT card ending in 4171 and attributed to the Respondent was used to make a \$100 "purchase" with [REDACTED] (Exhibit 14)
5. The card ending in 4171 was issued to the Respondent on October 6, 2010 and was not replaced until July 31, 2012. (Exhibits 13 and 16)
6. On May 16, 2015, Milwaukee Enrollment Services (the agency) prepared an Administrative Disqualification Hearing notice, alleging that the Respondent trafficked \$100 in benefits with [REDACTED] on March 26, 2012. (Exhibit 3)

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 June 17, 2016. The Respondent was advised of the date and time of the hearing, in an Administrative Disqualification Hearing Notice that was sent to her at an address on 41st Street. [REDACTED] indicated that this was the Respondent's last known mailing address and that the Respondent had an open FoodShare case. [REDACTED] further indicated that the agency did not receive any returned mail.

The Respondent did not appear at the hearing and 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 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 the Respondent committed the IPV.

The Merits of the Agency's Case

In the case at hand, Milwaukee Enrollment Services (the agency) alleges that the Respondent sold \$100 worth of benefits on March 26, 2012.

It is found that the agency has established, by clear and convincing evidence, that the Respondent was selling her FoodShare benefits on March 26, 2012.

First, the Respondent redeemed benefits in a whole dollar amount, \$100. This makes it less likely she made a legitimate food purchase. Second, the EBT card that was used was not replaced by the Respondent until July 31, 2012, four months after the subject transactions, making it unlikely the Respondent's card was lost or stolen on March 26, 2012. Third, during this time, [REDACTED] was no longer a subcontractor distributing meat and seafood; it/he was instead purchasing EBT benefits for a fraction of face value. As such, the Respondent had to have been selling her benefits.

Based upon the foregoing, it is found that the Respondent was trafficking her FoodShare benefits on March 26, 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).

The agency's evidence with regard to intent is a little shaky. Per 7 CFR 273.16(d), "...The State agency shall inform the household in writing of the disqualification penalties for intentional program violation each time it applies for program benefits. The penalties shall be in clear, prominent and bold face lettering on the application form."

The agency did not provide a copy of an application that the Respondent completed prior to March 2012, to show she was given notice as required by the Federal Regulations. However, it is this examiner's understanding that the general practice of the agency is to mail an Eligibility and Benefits Booklet after an application has been completed, and in August 2011, the agency sent the Respondent an Eligibility and Benefits booklet that warned her about the consequences of selling her benefits. Still the Respondent went ahead and sold her benefits, anyway. Based upon the foregoing, it is found that the Respondent intentionally violated the rules of the FoodShare program by selling her benefits on March 26, 2012.

I note that the Respondent did not appear at the hearing to offer any additional evidence to rebut the presumption that she knew what she was doing and understood the potential consequences of her actions.

CONCLUSIONS OF LAW

The Respondent committed an intentional program violation (IPV) by trafficking her benefits with [REDACTED] on March 26, 2012.

THEREFORE, it is

ORDERED

That the IPV for claim 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 _____ 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 15, 2016.

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