



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

DECISION

██████████, Respondent

Case #: FOF - 152038

Pursuant to petition filed September 11, 2013, 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) for one year, a telephone hearing was held on Wednesday, November 20, 2013 at 11:15 A.M., at Madison, 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

By: Nadine Stankey

Department of Health Services - OIG

PO Box 309

Madison, WI 53701

Respondent:

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

ADMINISTRATIVE LAW JUDGE:

Kenneth Duren

Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # [REDACTED]) is a resident of Milwaukee County who received FS benefits in Milwaukee County from at least May 1 – October 31, 2012.
2. The respondent made 10 FoodShare purchase transactions with [REDACTED] between May 1 – August 17, 2012. 5 of 10 purchases ended in a total with an ending value of .00 cents. 2 of the 10 purchases had an ending value of .50 cents. 2 of 10 purchases exceeded \$20. An additional purchase was for \$18.15. A \$24.80 purchase transaction was completed on August 15, 2012, i.e., within 24 hours of a \$41.50 transaction on August 14, 2012. A third purchase was completed within 48 hours later, for \$18.15.
3. On August 15, 2012, the petitioner also used her QuestCard to purchase \$85.71 of groceries in a transaction at a WalMart discount grocer.
4. The respondent made 10 FS transactions at [REDACTED] on 10 dates, out of a total of 47 transactions in the date range of May 1 – October 31, 2012. Conversely, she also frequented big box discount groceries including Aldi's, Lena's, Woodman's, Sams Club, Walmart, and Pick N Save during this date range on at least 9 occasions to make larger food purchases at big box grocers with lower price structures.
5. [REDACTED] was a minimally stocked 2400 square foot grocery store, with limited counter space, no scanner, and a glass divider with low profile slot separating the cashier from the buying public, making it very difficult to ring up large amounts of groceries. The store did not have carts or baskets. [REDACTED] was determined by the federal Food & Nutrition Service (FNS) to be engaged in the trafficking of FoodShare benefits and the store was disqualified as a vendor by the FNS due to these activities. It is no longer an authorized FoodShare vendor.
6. 11% of all purchases made by shoppers at [REDACTED] exceeded \$20, and 89% were less than \$20, as determined in the FNS survey resulting in the store's disqualification.
7. 20% of the respondent's purchases at [REDACTED] met or exceeded \$20 in the test period identified in Finding of Fact #3. 70% of the petitioner's purchases ended in values of .00 or .50 cents.
8. The Department requested the instant Administrative Disqualification Hearing on October 3, 2013, and thereby filed the appeal as the petitioner. [REDACTED] [REDACTED] is the respondent.
9. On October 3, 2013, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that the respondent trafficked in FS benefits with [REDACTED].
10. On October 3, 2013, the petitioner agency prepared an Administrative Disqualification Hearing Notice alleging that the respondent trafficked in FS benefits with [REDACTED]. The Notice informed her of a hearing date and time, and how to appear, and the hearing was set for November 7, 2013. The petitioner did not appear, but the notice returned to the Department, so the hearing was rescheduled for November 20, 2013, and the respondent was re-notified with a new address.
11. The petitioner lived about 2 blocks from [REDACTED] until a date unknown in August, 2012. She testified that her power was disconnected at her residence in August, 2012, presumably for non-payment of her utility bill.

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. §§ 49.795(2-7).

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. 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 opposite is true.

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.

First, I am convinced by the Department's evidence that the petitioner was trafficking in FS benefits. The primary evidence is the proof that she had 7 purchases in a one month span at [REDACTED] that ended either in .00 or .50 cents. These consistent purchase totals in rounded values stretch the probability of random outcomes to well beyond the breaking point. In addition, the large purchases were inconsistent with the petitioner's repeated

access to larger discount grocers throughout the tested period. In particular, the petitioner transacted \$41.50 at T and J on August 14, 2012; then \$85.71 at WalMart on August 15, 2012; and then a \$24.80 transaction at T and J *also on August 15, 2012*; and another \$18.15 transaction at T and J on August 17, 2012. The respondent's testimony that she was without power and relying on T and J to meet her food needs and storing the food in a cooler is given the lie by the simple fact that on August 15th she *also* made a large purchase of food at WalMart for \$85.71. I find the respondent's testimony on this point to be highly convenient, self-serving, uncorroborated by any other witness or document, contradicted by Exhibit #5 demonstrating the purchase at WalMart on August 15, 2012, and not credible. I find the Department has established a clear and convincing evidentiary case showing that the respondent engaged in FS trafficking with ██████████ repeatedly in August, 2012.

In addition, I find the evidence that the respondent intended to violate FS program rules barring trafficking in order to receive non-food items from ██████████ because the pattern of her transactions in the test period, and particularly in August, 2012, was consistent with the manner of trafficking found extant at ██████████ ██████████ in general in the FS Survey Report, and for which ██████████ was disqualified from being a FS vendor. Engaging in the transactions on repeated occasions for .00 and .50 transaction totals evinces the respondent's intent to cooperate in the trafficking scam for non-food items being perpetrated at ██████████ ██████████ by FS eligible customers and the store owner.

Based upon the record before me, I find that the petitioning Department has established by clear and convincing evidence that the respondent intentionally violated FS program rules, and that this violation was the first such violation committed by the respondent. Therefore, the petitioner correctly seeks to disqualify the respondent from the FS program for one year.

CONCLUSIONS OF LAW

1. The respondent violated, and intended to violate, the FS program rule specifying that FS participants not traffick FS benefits for non-food items.
2. The violation specified in Conclusion of Law No. 1 is the first such violation committed by the respondent.

NOW, THEREFORE, it is ORDERED

That the petitioner's determination is sustained, and that the petitioner 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).

APPEAL TO COURT

You may also 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 Petitioner 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, WI 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 225.53.

Given under my hand at the City of Madison,
Wisconsin, this 21st day of November, 2013

\sKenneth Duren
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



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 November 21, 2013.

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