



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Wisconsin Dept. of Health Services - Office of the Inspector General, Petitioner

vs.

DECISION

██████████, Respondent.

FOF - 152039

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 Wisconsin Dept. of Health Services - Office of the Inspector General to disqualify ██████████ from receiving FoodShare benefits (FS) for one year, a telephone hearing was held on Thursday, November 7, 2013 at 10:15 AM, 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:

Wisconsin Dept. of Health Services - Office of the Inspector General
Department of Health Services – OIG
By: Nadine Stankey
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 January 1, 2012 through January 28, 2013.
2. The respondent made 9 FoodShare purchase transactions with [REDACTED] Store between April 23 – October 10, 2012. 7 of 9 purchases ended in a total with an ending value of .00 cents. One additional purchase had an ending value of .90 cents. 7 of 9 purchases exceeded \$20. An additional purchase was for \$18.00. Two \$40 purchase transactions were completed one minute apart on August 9, 2012, at [REDACTED] Store. A third purchase was completed within 24 hours later, for \$42.00; and a fourth purchase was completed at [REDACTED] Store for \$18.00 within another 48 hours later. On October 10, 2012, the petitioner made a \$40 purchase at [REDACTED] Store, and then 3 hours and 10 minutes later, a \$21.22 purchase.
3. The respondent made 9 FS transactions at [REDACTED] Store on 8 dates, out of 54 transactions in the date range of May 1 – October 31, 2012. Conversely, she frequented [REDACTED], [REDACTED] and [REDACTED] during this date range on several occasions to make larger food purchases at big box grocers with lower price structures.
4. [REDACTED] Store was a minimally stocked 2400 square foot grocery store, with limited counter space 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] Store 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.
5. 11% of all purchases made by shoppers at [REDACTED] Store exceeded \$20, and 89% were less than \$20, as determined in the FNS survey resulting in the store's disqualification.
6. 77.77% of the respondent's purchases at [REDACTED] Store met or exceeded \$20 in the test period identified in Finding of Fact #1.
7. On October 3, 2013, the petitioner agency prepared an Administrative Disqualification Hearing Notice alleging that the responded trafficked in FoodShare benefits with [REDACTED] Store. The Notice informed her of a hearing date and time, and how to appear, and the hearing was set for November 7, 2013.
8. The Department requested the instant Administrative Disqualification Hearing on October 3, 2013, and thereby filed the appeal as the petitioner. [REDACTED] is the respondent.

DISCUSSION

An intentional policy 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.

Respondent [REDACTED] appeared by telephone and testified that she had *never* transacted any business at [REDACTED] Store. Rather, she asserted, someone, maybe a male friend named [REDACTED], had stolen her QUEST card and done so. When asked how he would have her Personal Identification Number, she indicated that she protects her PIN and that someone could have gotten the PIN changed.

The Department requested that the record be held open for 10 days to research the respondent's QUEST card replacement and PIN change history. Exhibit #10 demonstrates that there were *no* PIN changes during the entire period of January 1, 2012, to January 31, 2013. See, Exhibit #10, p.3.

This Quest card was used to conduct 9 transactions at [REDACTED] Store, on the dates of April 23, 2012, May 15, 2012, July 19, 2012, August 9, 2012 (twice), August 10, 2012, August 12, 2012, and October 10, 2012

(twice). This transaction history undercuts the petitioner's testimony that she never shopped at [REDACTED] Store, and I find her testimony on this point to be self-serving, evasive, convenient, contradicted by credible evidence in the form of FS transaction records (Exhibits #5 & #10), uncorroborated by any other witness, and not credible.

Based upon this history of multiple high dollar purchases at a poorly stocked convenience store (at a rate of 77.77% of all transactions at this store by this FS recipient), multiple transactions ending in .00 values (again in 77.77% of transactions at this store by this FS recipient) and repeat high dollar purchases in a very short time frame on two occasions (August 9 - 12, 2012; and October 10, 2012), I conclude that the petitioner agency has established by clear and convincing evidence that the respondent ([REDACTED]) intentionally violated FS program rules in order to traffick in FS benefits at [REDACTED] Store, 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 recipients shall not traffick in FoodShare or QUEST card benefits.
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). This claim must be filed with the Division of Hearings & Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

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 13th day of 2013, 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

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The preceding decision was sent to the following parties on November 13, 2013.

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