



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

Case #: FOF - 152040

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 10:30 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:

Wisconsin Dept. of Health Services - Office of the Inspector General
Department of Health Services - OIG
PO Box 309
Madison, WI 53701

Respondent: (No Appearance)

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

ADMINISTRATIVE LAW JUDGE:

Kenneth Duren
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # ██████████) is a resident of Milwaukee County who received FS benefits in Milwaukee County in at least October, 2012.

2. The respondent transacted her FS card at [REDACTED] on 6 occasions in October, 2012. On 1 of 6 occasions she made a total purchase greatly exceeding \$20. On 2 of 6 different occasions, her purchases ended in the .00 cents value set. On two occasions, 4 of the total 6 transactions occurred on the same days (October 15, 2012 and October 18, 2012.) On October 15, 2012, the two transactions total \$79.95 and occurred within an hour and a half window of time. On 2 more occasions she made additional transactions within 24 hours, i.e., on successive days, October 17, 2012, and October 19, 2012. On at least 2 occasions she purchased large quantities of groceries at other larger, cheaper stores on the same day or within 24 hours. See, Exhibit #5, pp. 1-2 (October 15, 2012; and October 16, 2012.) And see, Exhibit #5, p. 3.
3. 16.67% of the respondent's purchases at [REDACTED] met or exceeded \$20.
4. During the tested period described in Finding of Fact #2, the respondent was living 9.6 miles away from [REDACTED]. There are at least 50 SNAP retailers located closer to the respondent's residence than [REDACTED]. See, Exhibit 7.
5. [REDACTED] 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] 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. On October 3, 2013, the petitioner agency prepared an Administrative Disqualification Hearing Notice alleging that the respondent trafficked in FoodShare benefits with [REDACTED] in October, 2012. The Notice informed her of a hearing date and time, and how to appear, and the hearing was set for November 7, 2013. The Notice was mailed to her last known address on file with the Department of Health Services. The respondent did not contact the Department to discuss her purchasing patterns subsequent to October 3, 2013, or prior to this hearing.
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. The respondent failed to appear for the scheduled November 7, 2013 Intentional Program Violation (IPV) hearing and did not provide any good cause for said failure to appear.

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).

7 C.F.R. §273.16(e)(4) provides that the hearing shall proceed if the respondent cannot be located or fails to appear without good cause. The respondent did not appear or claim a good cause reason for not attending the hearing. Therefore, I must determine whether the respondent committed an IPV based solely on the evidence that the petitioner presented at hearing.

In order for the petitioner 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 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.

The clear and uncontroverted evidence is that the respondent made multiple purchases on two of four total dates, and one high dollar purchase on one of six total transactions, with her Quest card at a convenience store without a scanner, carts or baskets and a very limited assortment of convenience foodstuffs. She made concurrent multiple transactions with [REDACTED] in amounts ending in the same cents value set, i.e., .00 cents, on two of the four dates. She lived nearly 10 miles away from the [REDACTED] and bypassed at least 50 other SNAP purveyors to shop at [REDACTED]. In addition the single high dollar purchase at T and J was

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 19th 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

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The preceding decision was sent to the following parties on November 19, 2013.

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