



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Public Assistance Collection Unit, Petitioner

vs.

██████████, Respondent

PROPOSED DECISION
Case #: FOF - 151083

Pursuant to petition filed July 30, 2013, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Public Assistance Collection Unit to disqualify ██████████ ██████████ from receiving FoodShare benefits (FS) for one year, a hearing was held on Thursday, September 19, 2013 at 2:15 PM, at Milwaukee, Wisconsin. The hearing record was held open (with an extension) to October 21, 2013, at the respondent's request.

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:

Nadine Stankey, trafficking auditor

Public Assistance Collection Unit
P.O. Box 8938
Madison, WI 53708-8938

Respondent:

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

ADMINISTRATIVE LAW JUDGE:

Nancy Gagnon
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 from May 1, 2012 through October 31, 2012.

2. The Department sent a written *Administrative Disqualification Hearing Notice*, dated August 9, 2013, to the respondent notifying her of an FS disqualification hearing scheduled for September 19, 2013. In the *Notice*, the Department alleged that the respondent committed an IPV by intentionally trafficking her FS benefits. The alleged trafficking amount was \$285.50. See Exhibit 12.
3. The respondent appeared at the September 19, 2013 hearing.
4. During the May through June 2012 period, the Department alleges that the respondent engaged in behavior consistent with trafficking, which is forbidden by federal regulation. She repeatedly made large purchases at a small convenience store, [REDACTED], which was not near her residence, in addition to some purchases at closer, legitimate grocery stores. Purchases ended in "0," 75 percent of the time, and some purchases occurred on the same day. [REDACTED] has no carts or baskets to facilitate large purchases, as 89% of purchases by all customers made at the store are for less than \$20. The store's only cash register was behind a small opening in a security window, with no price scanner and a small counter. [REDACTED] stocks minimal amounts of groceries, and has more of an emphasis on snack items. The respondent's largest purchase was for \$51.40, on May 12, 2012.
5. [REDACTED] has been permanently disqualified from participation in the Foodshare program by the federal government, due to trafficking violations occurring from May through October 2012.
6. The respondent made 14 purchases at [REDACTED] from May 12 through June 16, 2013. Her children's father ([REDACTED] [REDACTED]) and paternal grandmother ([REDACTED] G.) resided at the address of [REDACTED] [REDACTED] in May and June 2012. The [REDACTED] [REDACTED] address is 1 ½ blocks from [REDACTED]. The respondent made purchases at [REDACTED] when she took her children to visit their grandmother. The respondent did not have a car until mid-July 2012. The respondent stopped going to [REDACTED] because the grandmother died by early June 2012, and the respondent was able to drive to stores with better prices by mid-July.

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.

CONCLUSION

I conclude that the agency has not established, by clear and convincing evidence, that the respondent intentionally trafficked a portion of her FS benefits. The respondent entered into transactions at a store that has been disqualified as a FoodShare vendor by the federal government, due to trafficking. However, the respondent explained that she patronized this store for a brief period because it was near her children's ailing grandmother, whom they were visiting. The respondent documented the residence of the father and grandmother by providing a copy of Mr. [REDACTED]'s lease, post-hearing. The [REDACTED] address is close to [REDACTED]: the store's Teutonia address is between [REDACTED] and [REDACTED]. Thus, the respondent explained why she had made purchases at a convenience store which was not near her residence. I agree with the Department that the purchase amounts ended in zero to an abnormal degree. This "coincidence," plus the significant amount of some of the transactions at the store, do create a suspicion that the respondent might have briefly trafficked with this store. However, this is not enough to meet the clear and convincing standard required in the rule. The respondent has provided the Department with a credible explanation for her conduct. Thus, I conclude that the respondent did not commit an FS IPV. The Department's decision to disqualify her from FS participation for one year is reversed.



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on November 4, 2013.

Public Assistance Collection Unit
Public Assistance Collection Unit
Division of Health Care Access and Accountability