



STATE OF WISCONSIN

In the Matter of

DECISION

Office of Inspector General, Petitioner

FOF/151100

vs.

██████████, Respondent

The attached proposed decision of the Administrative Law Judge dated October 7, 2013, is hereby adopted as the final order of the Department.

APPEAL TO COURT

You may appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI, 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of
Madison, Wisconsin, this 13 day
of February, 2014.

Kevin E. Moore

Kevin E. Moore, Deputy Secretary
Department of Health Services

FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

PACU - 5173, Petitioner

PROPOSED DECISION

v.

[REDACTED], Respondent

FOF/151100

PRELIMINARY RECITALS

Pursuant to a petition filed July 30, 2013, under Wis. Admin. Code §HA 3.03, and see, 7 C.F.R. § 273.16, to review a decision by the PACU - 5173 to disqualify [REDACTED] from receiving FoodShare benefits (FS) for a period of one year, a hearing was held on September 26, 2013, at Milwaukee, Wisconsin, by telephone.

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

PARTIES IN INTEREST:

Petitioner:

Department of Health Services
Division of Health Care Access and Accountability
1 West Wilson Street
Madison, Wisconsin 53703

By: Nadine Stankey, Card Trafficking Auditor
PACU - 5173
P.O. Box 8939
Madison, WI 53708-8938

Respondent:

[REDACTED] (Did Not Appear)
[REDACTED]

ADMINISTRATIVE LAW JUDGE:

Kelly Cochrane
Division of Hearings and Appeals

FINDINGS OF FACT

1. Respondent (CARES # [REDACTED]) is a resident of Milwaukee County who received FS during the time period of May 1, 2012 - October 31, 2012.

2. During that period the respondent periodically made FS purchases at [REDACTED], a small corner store that since has been disqualified for trafficking FS with FS recipients.
3. [REDACTED] was disqualified for three specific bases that are tied to FS trafficking according to the USDA Food and Nutrition Services (FNS): (1) an unusual number of transactions ending in the same cents value, (2) multiple transactions made by the same purchaser in unusually short time frames, and (3) excessively large purchase transactions. The store's only cash register was through a small opening in a security window and had no price scanner. There was little counter space on which to place items for purchase. There were no shopping baskets or carts for customers to place multiple items that would add up to large purchase amounts.
4. The respondent made purchases on his FS card that fit all three categories of trafficking. In addition, he made purchases from legitimate full-service grocery stores closer to his residence within minutes of using his FS card at [REDACTED], he generally made all of his purchases within 2-3 days after his FS card was re-supplied each month and there was also a gap where he did not make purchases at [REDACTED] between June and August 2012.
5. On August 12, 2013 the agency issued an Administrative Disqualification Hearing Notice to the respondent advising him of the allegation that he had trafficked his FS and that a hearing was scheduled to review the allegations.

DISCUSSION

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).

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. It is used in civil cases where a higher standard is required because the outcome could result in serious social consequences for, or harsh effects on an individual. See 32A C.J.S., Evidence §1023. While the terminology for this intermediate standard of proof varies from state to state, it is clear that it is what is required by the FS regulations. See Jackson v. State, 546 So.2d 745 (Fla. App. 2 Dist. 1989).

The Wisconsin Supreme Court viewed the various standards of proof as degrees of certitude. 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.

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.

What is needed to prove the first element, that an IPV as defined in 7 C.F.R. §273.16(c) was committed, is clear. In order to prove the second element, 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.

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. This, despite this administrative law judge (ALJ) calling him on the day and time of the instant hearing, at his telephone number of record, leaving a message for him on the importance of the scheduled hearing and where to return the call. The respondent made no contact with this ALJ prior to or post-hearing. Therefore, I must determine whether the respondent committed an IPV based solely on what the agency presented at hearing.

The FNS did substantial research on trafficking activity and actions associated with trafficking. That [REDACTED] was disqualified as an FS vendor for taking part in trafficking activities with recipients is clear. I find that respondent clearly took part in such activities and was participating in trafficking himself.

The respondent made purchases on his FS card that fit all three categories of trafficking. In addition, he made purchases from legitimate full-service grocery stores closer to his residence within minutes of using his FS card at [REDACTED]. There was also a gap where he did not make purchases at [REDACTED] between June and August 2012, evidencing that there was no specific need for shopping at [REDACTED]. The respondent has not responded to those allegations either by way of this hearing or in response to letters that the agency mailed to him advising him of the allegations. I will take his lack of response or appearance as an admission of the allegations and find that the agency has met its burden of proof with the evidence it has presented.

CONCLUSIONS OF LAW

The respondent committed an FS IPV by engaging in FS trafficking at a grocery store that later was disqualified by the FNS for the activities that the respondent engaged in.

THEREFORE, it is

ORDERED

That the IPV is sustained and the respondent, [REDACTED], 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. These actions are to be completed within 10 days of the date of the Secretary's Final Decision, if adopted therein.

NOTICE TO RECIPIENTS OF THIS DECISION:

This is a Proposed Decision of the Division of Hearings and Appeals. IT IS NOT A FINAL DECISION AND SHOULD NOT BE IMPLEMENTED AS SUCH. If you wish to comment or object to this Proposed Decision, you may do so in writing. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your comments and objections to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy to the other parties named in the original decision as 'PARTIES IN INTEREST.'

All comments and objections must be received no later than 15 days after the date of this decision. Following completion of the 15-day comment period, the entire hearing record together with the Proposed Decision and the parties' objections and argument will be referred to the Secretary of the for final decision-making.

The process relating to Proposed Decision is described in Wis. Stat. § 227.46(2).

Given under my hand at the City of Milwaukee,
Wisconsin, this 7 day of October, 2013



Kelly Coshrane
Administrative Law Judge
Division of Hearings and Appeals