



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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March 6, 2014



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

Re: Final Decision
[REDACTED], Case Number FOF - 151102

Dear Parties:

Enclosed is a copy of the Final Decision in the above-referenced matter.

Sincerely,

Denise Olson
Legal Secretary

c: Public Assistance Collection Unit - email
Public Assistance Collection Unit - email
Division of Health Care Access and Accountability - email



STATE OF WISCONSIN

In the Matter of

Office of the Inspector General, Petitioner

DECISION

vs.

FOF/151102

██████████, Respondent

The proposed decision of the Administrative Law Judge dated December 30, 2013, is modified as follows and, as such, is hereby adopted as the final order of the Department.

Pursuant to petition filed September 23, 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 hearing was held on Tuesday, November 12, 2013 at 01:15 PM, at Milwaukee, Wisconsin. A hearing set for September 17, 2013 was rescheduled for September 25th because the notice was sent to the wrong address. The September 25, 2013 hearing was rescheduled at Petitioner's request. A hearing date was picked with Petitioner and was supposed to be October 21, 2013 but was erroneously scheduled on October 15, 2013 and held that day without Petitioner's presence. He did call Division of Hearings and Appeals-Madison to claim good cause for missing the October 15, 2013 hearing but there was no further contact with Petitioner and a hearing finally scheduled for December 16, 2013. As Petitioner did not appear for that hearing date the hearing record from October 15, 2013 was used to make the Decision.

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
Department of Health Services - OIG
PO Box 309

Respondent:

██████████
██████████
██████████

ADMINISTRATIVE LAW JUDGE:

David D. Fleming
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 during the time period involved here.

2. Respondent was sent an Administrative Disqualification Hearing Notice, dated August 21, 2013. That was sent to the wrong address and reissued though the date of that reissue is not in the record. The Notice alleged that Respondent trafficked his FoodShare benefits at [REDACTED] during the period from May 1, 2012 to October 31, 2012. The Notice advised Respondent of the allegation that he had trafficked his FoodShare and that a hearing was scheduled to review the allegations. Petitioner seeks to disqualify Respondent from receipt of FoodShare for one year.
3. [REDACTED] was disqualified for three specific bases that are tied to FoodShare 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. [REDACTED] was a small store of about 2400 square feet, very little fresh produce or meat and one sales register. There were no shopping baskets or carts for customers to place multiple items that would add up to large purchase amounts.
4. Respondent made purchases or transactions on 2 occasions using his FoodShare card at [REDACTED] totaling \$100.42. These were both on October 19, 2012:
 - i. \$64.92 at 5:59 PM and
 - ii. \$35.50 at 9:28 PM.

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).

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 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.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that "yes" should be the answer because of its greater weight and clear convincing power. "Reasonable certainty" means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the "middle burden." The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the McCormick treatise states that "it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that

they must be persuaded that the truth of the contention is highly probable.” 2 McCormick on Evidence § 340 (John W. Strong gen. ed., 4th ed. 1992).

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.

The FNS did substantial research on trafficking activity and actions associated with trafficking. That [REDACTED] was disqualified as a FoodShare vendor for taking part in trafficking activities with recipients is clear. Nonetheless, this is not a clear cut situation because there is no first hand evidence that the Respondent engaged in trafficking, i.e. no witnesses saw her do so.

The agency notes that within about 2.5 hours before the first [REDACTED] purchase Petitioner made a \$100.23 transaction at another legitimate food store - [REDACTED]. The agency argues that the high dollar amount of these two [REDACTED] purchases is clear and convincing evidence of trafficking.

I note that 7 CFR §271.2 defines “trafficking” as, “the buying or selling of coupons, ATP cards or other benefits instruments for cash or consideration other than eligible food; or the exchange of firearms, ammunition, explosives, or controlled substances, as defined in section 802 of title 21, United States Code for coupons.”

I am not going to impose the IPV sanction here. Though the 2 transactions were larger than the average at [REDACTED] only one is an even dollar amount. While this may raise suspicions, there is a significant standard of proof required in these cases. There are no receipts or other primary source evidence. Two transactions of different dollar amounts are not enough to show a pattern. While there is a negative inference to be drawn from Petitioner’s lack of pursuit of an appearance for this matter, I cannot conclude that these 2 transactions are enough to find by clear and convincing evidence that Respondent trafficked his FoodShare benefits under the Code of Federal Regulation definition.

CONCLUSIONS OF LAW

1. That there is not clear and convincing evidence that this Respondent intended to commit the IPV.
2. That the agency cannot disqualify the Respondent from the FoodShare program for one year under an IPV sanction.

NOW, THEREFORE, it is

ORDERED

The matter is remanded to the agency to rescind the Administrative Disqualification (IPV) from Respondent’s FoodShare case. This action shall be taken within 10 days of the date of the final decision in this matter if it is accepted as final by 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 6 day
of March, 2014.

Kevin E. Moore

Kevin E. Moore, Deputy Secretary
Department of Health Services