



STATE OF WISCONSIN

In the Matter of

DECISION

Office of Inspector General, Petitioner

FOF/151105

vs.

██████████, Respondent

The attached proposed decision of the Administrative Law Judge dated October 10, 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 14 day
of February, 2014.

Kevin E. Moore
Kevin E. Moore, Deputy Secretary
Department of Health Services



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

██████████, Respondent

PROPOSED DECISION

Case #: FOF - 151105

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 Office of the Inspector General to disqualify ██████████ from receiving FoodShare benefits (FS) for one year, a hearing was held on Monday, September 23, 2013 at 01:00 PM, at Milwaukee, 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:

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

Respondent:

██████████
██████████

ADMINISTRATIVE LAW JUDGE:

John Tedesco
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 July 1, 2012 through October 31, 2012.

2. [REDACTED] & [REDACTED] ([REDACTED]) was disqualified from the SNAP program due to trafficking violations.
3. Petitioner shopped at [REDACTED] with her FS card between 7/1/12 and 10/31/12.
4. [REDACTED] was very close to petitioner's residence.
5. Petitioner's children would use her card at times.
6. Petitioner often shopped shortly after benefits were deposited on the 3rd of the month.
7. On August 14, 2013, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that petitioner trafficked \$174.92 in FS benefits.

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.

Based upon the record before me, I find that the petitioner has not established by clear and convincing evidence that the respondent intentionally violated FS program rules. The Department's case was premised on the fact that [REDACTED] had been disqualified from SNAP for trafficking, and the following three factors: (1) that petitioner made large purchases at [REDACTED]; (2) that petitioner's often made multiple purchases within a 24-48 hour period; and, (3) that many of the purchases ended in \$.00, \$.50, and \$.85.

Petitioner had reasonable and plausible rebuttal for each of these factors pointed to by the Department. Petitioner explained that she bought many things at this store because it was downstairs from her residence. Initially, the Department representative argued that this store was 3 miles away. The representative stated that this was additional support of the claim of misconduct. Later, however, as I began to look up the addresses on Google Maps, the Department representative conceded that the address was just downstairs and that she was confusing this case with another. This was a significant lapse in an effort to meet a "clear and convincing" burden.

Petitioner also explained that she purchased baby formula and cases of juice, both expensive items, at the convenience store. The Department representative stated that at the time of the store inspection in September 2012 (see ex. #1) that the store did not sell baby formula. Petitioner credibly stated that the store sold baby formula at that time. I note that the store inspection survey indicates via checkboxes that the store does not stock infant formula or infant cereal. This is apparently the data the representative was relying upon when she argued that the store did not sell formula. But, how does this fit with the inspector's handwritten drawing of the store layout which reflects that "infant food" is shelved near the entrance to the right of household items and adjacent to soup, flour and rice? Again, this makes the data the Department relies upon more unreliable.

As for the claim of multiple purchases in a short amount of time, petitioner is on a FS program that deposited benefits once a month on the 3rd of the month. The petitioner explained that when benefits were deposited she would have gone without necessary items for a while and would immediately seek to replenish her stores. This is a perfectly reasonable explanation in rebuttal. She also explained that her children would take the FS card after a deposit of benefits and go to the store to do shopping or get themselves treats.

Finally, I note that of the 15 transactions highlighted by the Department as suspicious, only 5 transactions ended in \$.00, \$.50, or \$.85 (see ex. 1). The Department characterizes this as "many." Such a characterization only causes me to wonder what other assertions are similarly exaggerated or embellished. I fail to see how this establishes a pattern or can be asserted as one of the factors showing misconduct by petitioner. Furthermore, petitioner explained that she would often buy bulk items, such as a case of juice, which the vendor would simply charge her a flat fee (for example \$20.00 per case). Petitioner could not explain whether tax was charged as part of the price of if it was not charged.

Most critically, I found petitioner credible. She did not seem to be making up stories while the hearing progressed. Her voice exhibited conviction. And her explanations were reasonable. The Department had too few data points to create a compelling case for a pattern that could overcome petitioner's testimony.

CONCLUSIONS OF LAW

The Department failed to meet its burden.

NOW, THEREFORE, it is **ORDERED**

That the petitioner's determination is reversed.

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 Madison,
Wisconsin, this 10 day of October, 2013



John Tedesco
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