



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

DECISION

Office of Inspector General,
Petitioner

FOF/152059

v.

██████████, Respondent

The attached proposed decision of the hearing examiner dated December 23, 2013, is hereby modified as follows and as such is adopted as the final order of the Department.

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 Office of the Inspector General to disqualify ██████████ from receiving FoodShare benefits (FS) for one year, a hearing was held on Thursday, December 12, 2013 at 02:15 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:

Debra Bursinger
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # [REDACTED]) is a resident of Milwaukee County who received FS benefits in Milwaukee County from June 1, 2012 through August 31, 2012.
2. During that period the respondent made FS purchases at [REDACTED], a small corner store that since has been disqualified for trafficking FS with FS recipients. Respondent made purchases on June 5, 2012 and August 29, 2012.
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. On October 7, 2013, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that respondent trafficked FS benefits.

DISCUSSION

An intentional program 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.

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).

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 OIG asserts that the respondent trafficked FS benefits by purchasing non-food items with her FS card. Further, it alleges that the respondent had an unusual number of transactions ending in \$.00, \$.25 and \$.75. In addition, it alleges she had multiple transactions in a short period of time and excessively large purchase transactions. The OIG stated that large purchases were difficult at [REDACTED] because there was limited counter space at the cash register and a plastic barrier between the cashier and customer. The OIG also noted that respondent had access to larger grocery stores.

Respondent testified that she had a boyfriend that lived near [REDACTED] so she purchased items on two dates while visiting him. She testified that she recalled going to [REDACTED] because her boyfriend's roommate, who has a car, was not available to take her to a larger store on those two dates. She recalled that she purchased juice, water, snacks, candy and side dishes for dinner. She stated she is aware that these items were higher priced at [REDACTED] but she did not have access to a car on those dates to go to a larger store. In response to allegations that it is difficult to make large purchases, the respondent conceded that it was difficult to make purchases at the small counter, that she was required to hold numerous items in her hands, walk back and forth from the shelf to the counter and place bagged items on the floor during checkout. The respondent denied purchasing any non-food items, specifically noting that she is not a smoker and would not have purchased cigarettes.

With regard to the allegations that the respondent made purchases within a short period of time, I reviewed the transaction summary and note that there is one day when the respondent made three separate purchases at [REDACTED]. On June 5, 2012, she made purchases at 3:15 p.m., 8:22 p.m. and 8:23 p.m. While it might seem difficult to ring up two purchases in a minute, I note that the second purchase was relatively small at \$10. The agency was unable to provide any evidence of what any of the purchases were for.

The OIG indicated that it believed the respondent was purchasing non-eligible items, such as cigarettes, tissue and cleaning supplies, with her FoodShare benefits. However, the OIG produced no testimony from anyone who saw the Respondent do this, nor did the OIG produce any receipt or other documentation showing that the Respondent's EBT card was used to purchase these non-eligible items. The remainder of OIG's case is also based largely on hearsay and conjecture about the respondent's purchases. With respondent's testimony to rebut the OIG's assertions, I cannot conclude that the agency has met its burden of proving by clear and convincing evidence that the respondent trafficked FS benefits at [REDACTED] during the period of June 1, 2012 – August 31, 2012.

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. Therefore, the petitioner incorrectly seeks to disqualify the respondent from the FS program for one year.

CONCLUSIONS OF LAW

The OIG has not proved, by clear and convincing evidence, that the respondent trafficked FS benefits at [REDACTED] grocery store during the period of June 1, 2012 – August 31, 2012.

NOW, THEREFORE, it is

ORDERED

That if this decision is adopted by the DHS Secretary as the Final Decision:

The IPV Case Number [REDACTED] is hereby reversed and that the Department of Health Services cease enforcement efforts.

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 20th day
of March, 2014.

Kevin E. Moore

Kevin E. Moore, Deputy Secretary
Department of Health Services



STATE OF WISCONSIN
Division of Hearings and Appeals

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██████████, Respondent

PROPOSED DECISION
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The OIG asserts that the respondent trafficked FS benefits by purchasing non-food items with her FS card. Further, it alleges that the respondent had an unusual number of transactions ending in \$.00, \$.25 and \$.75. In addition, it alleges she had multiple transactions in a short period of time and excessively large purchase transactions. The OIG stated that large purchases were difficult at [REDACTED] because there was limited counter space at the cash register and a plastic barrier between the cashier and customer. The OIG also noted that respondent had access to larger grocery stores.

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Based upon the record before me, I find that the petitioner has established by clear and convincing evidence that the respondent intentionally violated FS program rules, and that this violation was the first such violation committed by the respondent. Therefore, the petitioner correctly seeks to disqualify the respondent from the FS program for one year.

CONCLUSIONS OF LAW

The OIG has not proved, by clear and convincing evidence, that the respondent trafficked FS benefits at [REDACTED] grocery store during the period of June 1, 2012 – August 31, 2012.

NOW, THEREFORE, it is ORDERED

That if this decision is adopted by the DHS Secretary as the Final Decision:

The IPV Case Number [REDACTED] is hereby reversed and that the Department of Health Services cease enforcement efforts.

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 Department of Health Services for final decision-making.

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

Given under my hand at the City of Milwaukee, Wisconsin, this 23 day of December, 2013



Debra Bursinger
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