



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

DECISION

v.

[Redacted] Respondent

FOF/152981

PRELIMINARY RECITALS

Pursuant to a petition filed October 21, 2013, under Wis. Admin. Code §HA 3.03, and see, 7 C.F.R. § 273.16, to review a decision by the Office of the Inspector General in regard to , a hearing was held on December 16, 2013, at Milwaukee, Wisconsin.

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

There appeared at that time and place the following persons:

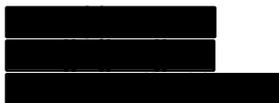
PARTIES IN INTEREST:

Petitioner:

Department of Health Services
Division of Health Care Access and Accountability
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: Nadine Stankey
Office of the Inspector General
Department of Health Services
1 West Wilson Street
Madison, WI 53701

Respondent:



ADMINISTRATIVE LAW JUDGE:

David D. Fleming
Division of Hearings and Appeals

FINDINGS OF FACT

- 1. Respondent (CARES # [Redacted]) is a resident of Milwaukee County who received FoodShare in Milwaukee during the time period of May 1, 2012 through October 31, 2012.
2. On November 5, 2013 the agency issued an Administrative Disqualification Hearing Notice to Respondent advising him 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. During that period Respondent made purchases using his FoodShare benefits at [REDACTED] Grocery Store (hereinafter [REDACTED]) a small neighborhood store that since has been disqualified for trafficking FoodShare with FoodShare recipients.
4. [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.
5. Respondent made purchases or transactions on 12 occasions totaling \$372.70 at [REDACTED] during the time period involved here. Those were:

a.	May 5 at 12:04 AM	\$41.50
b.	May 5 at 1:49 PM	\$24.81
c.	June 5 at 10:50 AM	\$28.60
d.	June 5 at 4:49 PM	\$26.17
e.	July 5 at 4:38 PM	\$39.80
f.	July 6 at 3:20 PM	\$40.32
g.	September 11 at 12:32 PM	\$26.50
h.	September 11 at 6:49 PM	\$11.00
i.	September 12 at 7:40 AM	\$39.01
j.	September 13 at 7:34 PM	\$17.50
k.	September 14 at 1944	\$52.50
l.	October 8 at 11:40 AM	\$24.99.
6. On May 5, 2012 Respondent also made purchases of \$133.69 at [REDACTED], on June 5, 2012 Respondent made \$145.23 in purchases at [REDACTED] [REDACTED]; on July 5, 2012 Respondent made multiple purchases at [REDACTED] and [REDACTED] for almost \$300.00; on September 11, 2012 Respondent made a purchase \$53.49 at [REDACTED] and on October 8, 2012 Respondent made a purchase of \$175 at [REDACTED]
7. Respondent did not appear for the hearing. Petitioner did not contact the Division of Hearings and Appeals within 10 days with a good cause argument for missing the hearing.

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.

Wisconsin statutes provide, in the parts relevant here, as follows:

(2) No person may misstate or conceal facts in a food stamp program application or report of income, assets or household circumstances with intent to secure or continue to receive food stamp program benefits.

(2m) No person may knowingly fail to report changes in income, assets or other facts as required under 7 USC2015(c)(1) or regulations issued under that provision.

(3) No person may knowingly issue food coupons to a person who is not an eligible person or knowingly issue food coupons to an eligible person in excess of the amount for which the person's household is eligible.

(4) No eligible person may knowingly transfer food coupons except to purchase food from a supplier or knowingly obtain food coupons or use food coupons for which the person's household is not eligible.

(5) No supplier may knowingly obtain food coupons except as payment for food or knowingly obtain food coupons from a person who is not an eligible person.

(6) No unauthorized person may knowingly obtain, possess, transfer or use food coupons.

(7) No person may knowingly alter food coupons.

Wis. Stat. §§ 49.795(2-7).

The county 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 county 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).

There is no litmus test to show the trier of facts when properly admitted evidence is of a sufficient degree to be clear and convincing. In Smith v. Department of Health and Rehab. Serv., 522 So.2d 956 (Fla. App. 1 Dist. 1988), the court discussed this issue as it relates to a FS IPV:

In Slomowitz v. Walker, 429 So.2d 797, 800 (Fla. 4th. DCA 1983), the court held that: Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Smith, 522 So.2d at 958. The Wisconsin Supreme Court viewed the various standards of proof as degrees of certitude. 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. In criminal cases, while not normally stated in terms of preponderance, the necessary certitude is universally stated as being beyond a reasonable doubt.

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.

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.

Respondent made purchases on his FoodShare card at [REDACTED] at times that were fairly close in proximity to purchases at mainstream, legitimate grocers. See Exhibit #4. I can find no compelling reason to go out of the way to shop at [REDACTED] when Respondent clearly has access to mainstream, well stocked grocers. This is a convenience store without a scanner, carts or baskets and a very limited assortment of convenience foodstuffs. Finally, [REDACTED] itself was ultimately disqualified from being a FS vendor by the Federal FS agency because it determined the store had engaged in a pattern of fraudulent FoodShare transactions with many FoodShare recipients. Respondent has not responded to the allegations by appearing for this hearing. There is a negative inference to be drawn from this lack of a response and this, coupled the agency evidence, leads me to conclude that the agency has demonstrated that Respondent has committed a FoodShare program intentional program violation.

CONCLUSIONS OF LAW

That Respondent committed a FoodShare IPV by engaging in FoodShare 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 that was the subject of this hearing is sustained and Respondent 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.

REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). That good cause request must be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 3rd day of January, 2014

\sDavid D. Fleming
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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Madison, WI 53705-5400

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The preceding decision was sent to the following parties on January 3, 2014.

Office of the Inspector General
Public Assistance Collection Unit
Division of Health Care Access and Accountability