



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner
V.

[Redacted] Respondent

DECISION

FOF/152982

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 to impose an intentional program violation (IPV), 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 who received FoodShare benefits in Milwaukee County from May 15, 2012 through October 15, 2012.
2. On November 5, 2013 the agency issued an Administrative Disqualification Hearing Notice to Respondent advising her of the allegation that she had trafficked her FoodShare and that a hearing was scheduled to review the allegations. Petitioner seeks to disqualify Respondent from receipt of FoodShare for one year.

3. Respondent made purchases using her FoodShare benefits at [REDACTED] 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. [REDACTED]'s address was [REDACTED]; Respondent's address during the time period relevant here was [REDACTED] Street. Respondent's address was between 3 to 3 1/2 miles from [REDACTED]. At that time there were approximately 50 other retailers who accept FoodShare benefits closer to her residence than [REDACTED].
6. Respondent made purchases or transactions on 19 occasions using her FoodShare card at [REDACTED]. Ten of those transactions were for more than \$20. The highest was \$59.95. Petitioner made a number of purchases at [REDACTED] within short time frames:
  - a. May 15, 2012 - 4 purchases totaling \$94.50;
  - b. June 15, 2012 - 2 purchases, both at 7:20 PM, totaling \$50.90;
  - c. July 15, 2012 - 5 purchases totaling \$34.20;
  - d. July 16, 2012 - 2 purchases, within 8 minutes, totaling \$52.10 and
  - e. October 15, 2012 - 2 purchases, within 6 minutes, totaling \$63.19.

Respondent made other purchases at legitimate food stores contemporaneous to the purchases at [REDACTED], for example, on May 16, 2012, at [REDACTED], Respondent spent \$94.71. On July 15, 2012 she spent \$119.08 at [REDACTED] on July 16, 2012 she spent \$147.16 at [REDACTED].

7. Respondent did not appear for the hearing. She 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.

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. Respondent did not call to provide a number where she could be reached for the 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 a FoodShare vendor for taking part in trafficking activities with recipients is clear. I also conclude that Respondent was participating in trafficking herself.

Respondent made purchases on her FoodShare card at [REDACTED] at times that were fairly close in proximity to the purchases at mainstream, legitimate grocers. For example, on July 15, 2012 Respondent made five purchases at [REDACTED] and a purchase at Woodman's the amount of \$119.08. The Woodman's purchase was made *after* three of the [REDACTED] purchases and *before* going back to [REDACTED] for two additional purchases. With [REDACTED] being at least 3 miles from Respondent's residence at the time and multiple other vendors nearby I can find no compelling reason why Respondent would need to go out of her way to shop at [REDACTED]. 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 FoodShare vendor by the Federal FoodShare 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 Petitioner 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, WI 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 225.53.

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

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



**State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

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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