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STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner
v.
[redacted], Respondent

DECISION

FOF/152983

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 Madison, Wisconsin.

The issue for determination is whether 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:

[redacted]

ADMINISTRATIVE LAW JUDGE:
David D. Fleming
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [redacted]) was, at the time relevant here, a resident of Dane County and has been a FoodShare recipient himself.

2. Respondent was sent an Administrative Disqualification Hearing Notice dated November 5, 2013 that informed Petitioner that the Department of Health Services' Division of Health Care Access and Accountability was seeking to disqualify Respondent from receipt of FoodShare benefits for a 12 month period for use of the FoodShare benefits of a deceased individual. The notice was sent to his last known address based on a FoodShare case in Respondent's name that closed in June 2013. The notice was returned to the agency as undeliverable.

3. Respondent is the son of MLB. MLB passed away on September 6, 2013. She was a FoodShare recipient. Her FoodShare household consists of one person, herself. Benefits in the amount of $187.00 were deposited to her FoodShare account on September 6, 2013.

4. Respondent used MLB's FoodShare benefits on September 7 and 8 2013. He made two purchases at a Hy Vee store in Madison in the amount of $305.40. The Department has been able to document that usage by Respondent by using photos of the person making the transactions involved here and comparing those to Wisconsin Department of Corrections photos of Respondent.

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 (FSH), § 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).

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 Notice referred to at Finding # 2 was returned to the agency but it was sent to Petitioner's most recent address known to the agency and I must determine whether the Respondent committed an IPV based solely on what the agency presented at hearing.

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 Slomowirtz 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.

The agency contends that because Respondent has been a FoodShare recipient himself in the past he has been aware through the application and/or renewal process that he did not have the right to use the FoodShare benefits of a deceased individual who was a one-person FoodShare household.

Certainly anyone who has applied for FoodShare should understand that FoodShare benefits are issued for a household and that the composition of that household is key. *See, e.g., FSH, §3.3.1.* Indeed, unauthorized use of a FoodShare card can subject a person to Federal felony charges where the use is between $100 and $5000 with a penalty being a fine of up to $10,000 and 4 years in prison. *7 CFR 271.5(b)(1).*

I am sustaining the IPV sanction. The security camera photo from Hy Vee from September 8, 2013 is clear and there is no question that it is Respondent. The photo from September 7, 2013 is not as clear but nose, mouth and facial structure also match Respondent's Corrections photos. MLB passed away on September 6, 2013 and $305.40 of her FoodShare benefits were spent by Respondent leaving an account balance of just $3.20 by 9:22 AM on September 8, 2013. He was not a member of MLB's household and, based on his own FoodShare case, had to have been aware that the FoodShare benefit he was using were not his to use.

CONCLUSIONS OF LAW

That Respondent committed a FoodShare IPV by using the FoodShare benefits belonging to a FoodShare household that he was not a member of.

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 8th 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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The preceding decision was sent to the following parties on January 8, 2014.

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