



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

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

DECISION
FOF/152986

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 Department of Health Services' Office of the Inspector General to impose a sanction for an intentional program violation, a hearing was held on January 21, 2014, at Milwaukee, 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:



ADMINISTRATIVE LAW JUDGE:

David D. Fleming
Division of Hearings and Appeals

FINDINGS OF FACT

- 1. Respondent (CARES # [Redacted]) is a resident of Milwaukee County and a FoodShare recipient.
2. On November 5, 2013 the agency issued an Administrative Disqualification Hearing Notice to Respondent advising her of the allegation that she had used the FoodShare benefits of an incarcerated

individual and that a hearing was scheduled for December 16, 2013 to review the allegations. Petitioner seeks to disqualify Respondent from receipt of FoodShare for one year.

3. Respondent did not appear for the December 16, 2013 hearing and the hearing was conducted without her as required by Federal regulation. Petitioner contacted the Division of Hearings and Appeals after the hearing with good cause and the hearing scheduled again for January 21, 2014. Respondent did appear for that hearing.
4. BU is an individual certified to receive FoodShare benefits as a one person household. BU was incarcerated as of July 20, 2013. His FoodShare benefits were used at a Milwaukee area [REDACTED] on August 3, 2013 in the amount of \$100.00. The person using the FoodShare benefits of BU made the purchases using the PNS rewards card 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.

*FoodShare Wisconsin Handbook, §3.14.1.*

Wisconsin Statute §49.795 states, in relevant part:

#### **49.795 Food stamp offenses. (1)** In this section:

(a) "Eligible person" means a member of a household certified as eligible for the food stamp program or a person authorized to represent a certified household under 7 USC 2020 (e) (7).

(b) "Food" means items which may be purchased using food coupons under 7 USC 2012 (g) and 2016 (b).

(c) "Food stamp program" means the federal food stamp program under 7 USC 2011 to 2029.

...

(e) "Unauthorized person" means a person who is not one of the following:

1. An employee or officer of the federal government, the state, a county, a multicounty consortium, or a federally recognized American Indian tribe acting in the course of official duties in connection with the food stamp program.
2. A person acting in the course of duties under a contract with the federal government, the state, a county, a multicounty consortium, or a federally recognized American Indian tribe in connection with the food stamp program.
3. An eligible person.
4. A supplier.
5. A person authorized to redeem food coupons under 7 USC 2019.

...

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

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

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.

*Wisconsin Jury Instruction – Civil 205* also provides guidance as to the clear and convincing standard:

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., 4<sup>th</sup> ed. 1992).

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 is a FoodShare recipient herself, she is aware through the application and/or renewal process that she did not have the right to use the FoodShare benefits of an incarcerated individual who was a one-person FoodShare household.

While Respondent made a few statements at the hearing she basically invoked her right to remain silent. There is, however, a negative inference to be drawn from that.

I am sustaining the IPV sanction. 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)*. Further, it makes little sense to give your PNS rewards card to another person to use as the card is readily obtained by any shopper at any PNS store. Respondent was not a member of BH's household and, based on her own FoodShare case, had to have been aware that the FoodShare benefit she was using were not hers to use. Pursuant to §49.795, Stats., Respondent, vis-à-vis BU's FoodShare benefits, was an unauthorized person possessing and using FoodShare benefits.

### **CONCLUSIONS OF LAW**

That Respondent committed a FoodShare IPV by using the FoodShare benefits belonging to a FoodShare household that she 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.

### **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 6th day of February, 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 February 6, 2014.

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