



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

██████████, Respondent

DECISION
Case #: FOF - 152991

Pursuant to petition filed October 21, 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 ["OIG"] to disqualify ██████████ ██████████ from receiving FoodShare benefits ["FS"] for one year, a Hearing was held via telephone on Tuesday, February 4, 2014 at 11:45 AM. At Respondent's request Hearings scheduled for January 14, 2014 and December 11, 2013 were rescheduled.

The issue for determination is whether the Respondent committed an Intentional Program Violation ["IPV"].

There appeared at that time via telephone the following persons:

PARTIES IN INTEREST:

Petitioner:

Office of the Inspector General
Department of Health Services - OIG
PO Box 309
Madison, WI 53701

Respondent:

██████████
██████████
██████████

Respondent's Representative:

Attorney Beth Ann Richlen
Wisconsin Judicare, Inc.
300 Third Street, Suite 210
P. O. Box 6100
Wausau, WI 54402-6100

ADMINISTRATIVE LAW JUDGE:

Sean Maloney
Division of Hearings and Appeals

FINDINGS OF FACT

1. Respondent (CARES # [REDACTED]) is a resident of Marathon County who received her own FS benefits in Wisconsin during the time periods relevant to this *Decision*. Exhibit #E-1.
2. Respondent's brother [REDACTED] passed away on September 7, 2013 when he was 64 years old; [REDACTED] received his own FS benefits (separate from Respondent) in Wisconsin; several months prior to his death [REDACTED] moved into Respondent's home because he was on Hospice care and was no longer able to care for himself, he had very limited functioning and once he moved into Respondent's home he did not leave except for medical appointments; [REDACTED]'s move into Respondent's home was not reported to the FS agency; [REDACTED] signed documents allowing Respondent to take care of his affairs, including his FS; during the months that Respondent cared for [REDACTED] she routinely used both her FS and [REDACTED]'s FS to buy food for both of them; Respondent provided care for [REDACTED] until the time of his death on September 7, 2013. Exhibits A, B, #E-1, #E-2 & #E-3.
3. The time leading-up to and immediately after [REDACTED]'s death was very stressful for Respondent due to the demands of care-giving and due to the fact her father was also dying. Exhibits A & B.
4. On September 8, 2013 Respondent used [REDACTED]'s FS to purchase \$35.22 worth of food. Exhibits #E-3 & #E-4.
5. On September 11, 2013 Respondent used [REDACTED]'s FS to purchase \$57.55 worth of food. Exhibits #E-3 & #E-4.
6. When Respondent used [REDACTED]'s FS to purchase food on September 8, 2013 and September 11, 2013 she did so as a matter of routine; she had been doing so for months and it did not occur to her that it might be improper or incorrect.

DISCUSSION

An IPV consists of having intentionally:

“(1) made a false or misleading statement, or misrepresented, concealed or withheld facts; or (2) committed any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any State statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking¹ of coupons,

¹ “*Trafficking* means: (1) The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signature, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone; (2) The exchange of firearms, ammunition, explosives, or controlled substances, as defined in section 802 of title 21, United States Code, for SNAP benefits; (3) Purchasing a product with SNAP benefits that has a container requiring a return deposit with the intent of obtaining cash by discarding the product and returning the container for the deposit amount, intentionally discarding the product, and intentionally returning the container for the deposit amount; (4) Purchasing a product with SNAP benefits with the intent of obtaining cash or consideration other than eligible food by reselling the product, and subsequently intentionally reselling the product purchased with SNAP benefits in exchange for cash or consideration other than eligible food; or (5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food. (6) Attempting to buy, sell, steal, or otherwise affect an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal

authorization cards or reusable documents used as part of an automated benefit delivery system (access device).” 7 C.F.R. § 273.16(c) (2014); See also, *FoodShare Wisconsin Handbook*, [“FWH”] § 3.14.1; *Income Maintenance Manual*, [“IMM”] Chapter 13.

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 USC 2015(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) (2011-12).

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. 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. 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. 7 C.F.R. §§ 273.16(b)(1), (11) & (12) (2014).

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. 7 C.F.R. § 273.16(e)(6) (2014).

identification numbers (PINs), or by manual voucher and signatures, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone.” 7 C.F.R. § 271.2 (2014); FWH § 3.14.1. (*italics in original*).

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. “[T]his level of proof, ‘or an even higher one, has traditionally been imposed in cases involving allegations of civil fraud’” *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 282 (1990). 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.

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. 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.

Recently, the Wisconsin Supreme Court has clarified that “[i]f a party must prove its case by clear and convincing evidence ‘[a] mere preponderance of the evidence is not sufficient.’ [citation omitted]. This is particularly true when the burden of proof has due process implications. [citation omitted].” *Matter of Mental Commitment of Melaine L.*, 2013 WI 67 ¶ 88, n. 25, 349 Wis. 2d 148, 187-188, n. 25, 833 N.W.2d 607.

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.

OIG argues that Respondent committed an IPV solely because she spent the benefits of a deceased person.² See, *CWW Process Help* manual 80.7; Exhibit #E-5. However, as explained above, in order to show that an IPV has occurred there must be clear and convincing evidence that the recipient both committed and intended to commit

² OIG does not argue that Respondent committed an IPV because she failed to report that ■ moved into her home.

an IPV. In this case there is not clear and convincing evidence that Respondent intended to commit an IPV. In fact, the evidence in the record of this matter is that the time leading-up to and immediately after ■'s death was very stressful for Respondent due to the demands of care-giving and due to the fact her father was also dying, that when she used ■'s FS to purchase food on September 8th and September 11th she did so as a matter of routine because she had been doing so for months, and it did not occur to her that it might be improper or incorrect.

CONCLUSIONS OF LAW

For the reasons discussed above, there is not clear and convincing evidence that Respondent intended to commit an IPV.

THEREFORE, it is **ORDERED**

That the IPV is REVERSED and the petition for review herein is dismissed.

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). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

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, no more than 30 days after the date of this hearing decision. 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 Madison,
Wisconsin, this 13th day of February, 2014

\sSean Maloney
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
 - Attorney Beth Ann Richlen - email
 - Nadine Stankey - email



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAMail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on February 13, 2014.

Office of the Inspector General
Public Assistance Collection Unit
Division of Health Care Access and Accountability
Attorney Beth Ann Richlen
NadineE.Stankey@wisconsin.gov