



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

██████████ Respondent

DECISION
Case #: FOF - 153911

Pursuant to petition filed December 4, 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 to disqualify ██████████ from receiving FoodShare benefits (FS) for one year, a hearing was held on Wednesday, January 22, 2014 at 09:15 AM, at Milwaukee, Wisconsin. The record was held open to allow the parties an opportunity to respond to the objections of hearsay, which were received.

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

There appeared at that time 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 Patricia Delessio
Legal Action of Wisconsin Inc
230 West Wells Street Room 800
Milwaukee, WI 53203

ADMINISTRATIVE LAW JUDGE:

Kelly Cochran
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # [REDACTED]) is a resident of Milwaukee County who received FS benefits in Milwaukee County from August 5, 2010 through January 24, 2011.
2. On April 22, 2005, an unidentified person from USDA Food and Nutrition Services (FNS), conducted a site visit at [REDACTED] Market (FNS #0024930). Exhibit 3.
3. [REDACTED] Market was permanently disqualified from the FS program in 2011. See Exhibit 2 vs. *Chidi Onukwugha v. United States*, No. 11-CV-907. 2013 WL 1620247 (E.D. Wis. April 12, 2013). The disqualification occurred because [REDACTED] Market met at least three specific bases that are tied to FS trafficking according to the 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. The store had only one cash register and point of sale device, and little counter space on which to place items for purchase. There were no shopping baskets or carts for customers.
4. On December 19, 2013, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that respondent committed an intentional program violation by trafficking FS at [REDACTED] Market.

DISCUSSION

An intentional program violation of the FoodShare program occurs when a recipient intentionally does the following:

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; *see also* 7 C.F.R. §273.16(c) and Wis. Stat. §§49.795(2-7).

An intentional program violation can be proven by a court order, a diversion agreement entered into with the local district attorney, a waiver of a right to a hearing, or an administrative disqualification hearing, *FoodShare Wisconsin Handbook*, §3.14.1. The petitioner can disqualify only the individual found to have committed the intentional violation; it cannot disqualify the entire household. Those disqualified on grounds involving the improper transfer of FS benefits are ineligible to participate in the FoodShare program for one year for the first violation, two years for the second violation, and permanently for the third violation. Although other family members cannot be disqualified, their monthly allotments will be reduced unless they agree to make restitution within 30 days of the date that the FS program mails a written demand letter. 7 C.F.R. § 273.16(b).

In order for the petitioner 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 a program violation per 7 C.F.R. § 273.16(e)(6). 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. ...

Kuehn, 11 Wis.2d at 26.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

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., 4th 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.

In order to prove the second element, i.e., intention, 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 petitioner asserts that the respondent intentionally violated SNAP regulations by trafficking FoodShare benefits. 7 CFR §271.2 defines “trafficking” as, “the buying or selling of coupons, ATP cards or other benefits instruments for cash or consideration other than eligible food; or the exchange of firearms, ammunition, explosives, or controlled substances, as defined in section 802 of title 21, United States Code for coupons.”

In order to prove its case, the petitioner presented testimony and evidence. The evidence submitted is:

- Exhibit 1: Charge and Summary of Evidence;
- Exhibit 2: A FNS printout stating that [REDACTED] Market was permanently disqualified on June 15, 2011;
- Exhibit 3: FNS Store Survey of [REDACTED] Market dated April 22, 2005;
- Exhibit 4: EBT Sanction Determination for [REDACTED] Market;
- Exhibit 5: EBT Summary for respondent;
- Exhibit 6: EBT Edge Report for [REDACTED] Market;
- Exhibit 7: FS Transaction Summary for respondent.

The petitioner relied in part upon an investigation of ██████████ Market conducted in 2005 by an unidentified person employed by the FNS, whose report is contained in Exhibit 3. The report is not sufficient to prove that the respondent was trafficking FS in 2010 or at any time, and there is no basis upon which to find the hearsay declarant credible or reliable. The petitioner also relied upon the undated EBT Sanction Determination for ██████████ Market (Exhibit 4), however, the same results as to the insufficiency of proving that *the respondent* was trafficking FS and, again, there is no basis upon which to find the hearsay declarant credible or reliable. There is no dispute that ██████████ Market was disqualified from the FS program. See *Chidi Onukwugha v. United States*, No. 11-CV-907. 2013 WL 1620247 (E.D. Wis. April 12, 2013). However, any guilt on the part of the store does not translate directly to guilt on the part of the respondent. I add that the date of disqualification differs between the respondent's Exhibit 2 (6/15/11) which it received from some unidentified person from the FNS, and the court case finding the store disqualified (8/30/11). *Id.*

The petitioner also testified that per interviews with other FS recipients there were certain instances of FS trafficking at ██████████ Market. Again, I find this insufficient to prove that the *respondent* was trafficking FS, find no basis upon which to find the unnamed hearsay declarants credible or reliable - even if their statements are against their interest, and not clear or convincing upon which to base a finding of fact. See *Gehin v. Wisconsin Group Ins. Bd.*, 2005 WI 16, 278 Wis.2d 111, 692 N.W.2d 572 (2005).

The petitioner also argued that respondent's use of her EBT card showed suspicious transactions, such as transactions with large dollar amounts. The petitioner provided a printout of all of respondent's FS transactions from September 2, 2010 to February 23, 2011. Exhibit 7. During that timeframe, the agency found three transactions at ██████████ Market that it found as evidence of trafficking: 1) \$98.86 on November 9, 2010; 2) \$79.98 on November 11, 2010, and \$39.94 on November 16, 2010. The agency's testimony was that these transactions were suspicious because up until November 2010 her purchases were for small dollar amounts. While it is true that her purchases at ██████████ Market were for small purchase amounts (under \$6) it is not true for other stores. See Exhibit 7. She had a variety of explanations for those high dollar transactions at ██████████ Market: that her refrigerator 'went out' in late 2010, that she would buy formula (a more expensive item at a store like this) for her niece, that she was living a block away from the store at that time so it was convenient when she didn't have transportation to other larger stores with better prices, and that her children would help her when she shopped by carrying items prior to and after purchase. Indeed, the court writes in the case against the store,

While ██████████ Market is small, it is well-stocked and offers a relatively wide selection of groceries. Thus, it is reasonable that nearby residents without ready access to a larger full-line grocery store, such as those who testified on Onukwugha's behalf, will do much of their grocery shopping at ██████████ Market and therefore may be reasonably expected to spend more than \$40.00 in a single trip. Although the absence of shopping carts, an optical scanner, or substantial counter space will undoubtedly complicate a large purchase, the testimony of Onukwugha's customers made clear that shoppers will bear this inconvenience in the absence of a better alternative. A review of the 309 transactions demonstrates that many of the transactions are those of just a few households. In fact, based upon the court's review, 271 of the 309 transactions are from households who made more than one purchase of greater than \$40.00 at ██████████ Market during the relevant six-month period. While this is arguably consistent with a few customers repeatedly exchanging their SNAP benefits for cash, the more reasonable and logical explanation is the innocent one—certain customers simply choose to do a large portion of their shopping at ██████████ Market.

Chidi Onukwugha v. United States, No. 11-CV-907. 2013 WL 1620247, p.6 (E.D. Wis. April 12, 2013).

One of the other bases for finding that respondent was trafficking were the purchases ending in \$.98, \$.00 or \$.50. These bases were not discussed at hearing, but are part of the agency's charge and summary of evidence and therefore I address them. Of the total purchases the respondent made between August 5, 2010 through January

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 27th day of February, 2014

\sKelly Cochrane
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 Patricia Delessio - email



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The preceding decision was sent to the following parties on February 27, 2014.

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