



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

DECISION
Case #: FOF - 153923

██████████, Respondent

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 Tuesday, January 28, 2014 at 3:00 PM, by telephone.

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

By: Nadine Stankey
Card Trafficking Auditor

Respondent:

██████████
██████████
██████████

ADMINISTRATIVE LAW JUDGE:

Nancy Gagnon
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # ██████████) is a resident of Milwaukee County who received FS benefits in Milwaukee County from March 1, 2010 through at least December 14, 2010.

2. During the March through December 2010 period, the respondent engaged in behavior consistent with trafficking, which is forbidden by federal regulation. She repeatedly made large “purchases” at a small convenience store, ██████████ ██████████, in addition to some purchases at legitimate grocery stores. Multiple purchases often occurred on the same day, and purchases ended in “0” for 60 percent of the time. ██████████ has no carts or baskets to facilitate large purchases, as 95% of purchases by all customers made at the store are for less than \$30. The store has one cash register, and a small counter with a barrier. ██████████ stocks minimal amounts of groceries, and has more of an emphasis on snack items.
3. ██████████ has been permanently disqualified from participation in the Foodshare program by the federal government in June 2011, due to trafficking violations occurring in 2010 and 2011. The owner admitted to trafficking FS for diapers.
4. The respondent engaged in 15 FS transactions at ██████████ during the subject period. Multiple same day purchases occurred on August 29, 2010, when the petitioner made a \$51.29 purchase followed by a \$51.25 purchase. Similarly, on December 14, 2010, the petitioner made a \$50.70 purchase followed by a \$51.29 purchase. Multiple same day purchases constitute a suspicious behavior under FNS trafficking profiling standards. Per her FS utilization history, the petitioner is also a regular shopper at ██████████, a store being investigated for improper activity.
5. On December 19, 2013, the petitioner issued an *Administrative Disqualification Hearing Notice* to the respondent notifying her of an FS disqualification hearing scheduled for January 28, 2014. In the *Notice*, the Department alleged that the respondent committed an IPV by intentionally trafficking her FS benefits.
6. The petitioner appeared at the January hearing. Her testimony was not credible.

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 any WAY.

CONCLUSION

I conclude that the agency has established, by clear and convincing evidence, that the respondent intentionally trafficked a portion of her FS benefits. The respondent engaged in suspicious transactions at a store that has been disqualified as a FoodShare vendor by the federal government, due to trafficking. During the subject period in 2010, the petitioner engaged in behavior consistent with trafficking. She repeatedly made large “purchases” at a

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 30th day of January, 2014

\sNancy Gagnon
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



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on January 30, 2014.

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