



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

████████████████████

DECISION

Case #: ██████████████████

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, February 18, 2014 at 02:00 PM, at Milwaukee, Wisconsin.

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:

██████████████████
██████████████████
████████████████████

ADMINISTRATIVE LAW JUDGE:

Debra Bursinger
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 7, 2010 through October 5, 2010.
2. On April 22, 2005, an unidentified person from USDA Food and Nutrition Services (FNS), conducted a site visit at ██████████████████ (FNS ██████████████████ Exhibit 3.

3. [REDACTED] 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] 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. Respondent's FS card was used at [REDACTED] 30 times between March 7, 2010 – October 5, 2010. Purchases on the respondent's FS card included the following:

03/07/2010, 3:00 p.m.	\$ 2.00
07/06/2010, 5:14 p.m.	\$ 3.00
07/17/2010, 10:33 a.m.	\$ 2.50
08/05/2010, 12:32 p.m.	\$ 1.74
08/05/2010, 4:19 p.m.	\$49.99
08/05/2010, 4:20 p.m.	\$49.74
08/07/2010, 10:45 a.m.	\$ 1.00
08/31/2010, 5:42 p.m.	\$50.06
08/31/2010, 6:00 p.m.	\$52.50
10/05/2010, 5:28 p.m.	\$50.03
10/05/2010, 5:54 p.m.	\$ 1.29
10/05/2010, 7:52 p.m.	\$40.00

See Exhibit E-7.

5. On December 19, 2013, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that respondent trafficked FS benefits at [REDACTED].

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.

In this case, the agency alleges that the purchases noted in Finding of Fact #4 above are evidence of trafficking. In particular, the agency notes that six of the purchases on the respondent’s card are for high dollar transactions. It further notes that large purchases on August 5, August 31 and October 5, 2010 were made within a short amount of time. The agency asserts that it would be difficult to make large purchases in these short periods of time given the limited counter space, lack of carts and baskets and the manual cash register at Angel Food. The agency also asserts that six of these transactions end in \$.00, .50 or .98, additional evidence of trafficking.

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 17th day of March, 2014

\sDebra Bursinger
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 March 17, 2014.

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