



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

DECISION

Case #: FOF - 159694

██████████, Respondent

Pursuant to petition filed August 5, 2014, 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, September 23, 2014 at 10:00 a.m. by a telephone call originating in Eau Claire, 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:

Michael O'Brien
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (██████████) is a Milwaukee County resident who has received FoodShare benefits there intermittently since October 1, 2008. The petitioner is the Office of Inspector General.
2. On June 30, 2014, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that he trafficked his FoodShare benefits by transferring his card to the owner of a grocery store.

3. The respondent lost the Quest card he used for FoodShare purchases sometime between March 9, 2014, and April 10, 2014. He reported that it was lost within a day of discovering that it was missing.
4. The respondent has not used his FoodShare benefits to purchase anything other than eligible food.

DISCUSSION

Trafficking FoodShare benefits violates the program's rules. Wis. Stat. § 946.92(2g). Trafficking includes selling FoodShare benefits or otherwise exchanging them for anything other than eligible food. 7 CFR § 271.2(1); *see also* Wis. Stat. § 946.92(1)(dm)6. FoodShare recipients lose their eligibility if the Department proves by clear and convincing evidence that they intentionally violated the program's rules; the penalty for the first violation is one year. 7 CFR §§ 273.16(e)(6) and (b)(1)(i). The Office of Inspector General seeks to disqualify the respondent for one year because it contends that he intentionally transferred his FoodShare benefits to the owner of [REDACTED] [REDACTED] for consideration other than eligible food.

Clear and convincing is a middle level of proof that requires the Office to show that more than just a preponderance of the evidence supports its position but does not require it to eliminate all reasonable doubt, as it would have to in a criminal case:

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 v. Kuehn, 11 Wis.2d 15, 26 (1959)*Kuehn*, 11 Wis.2d at 26.

Wisconsin Jury Instruction – Civil 205 explains that this level of evidence must clearly have more convincing power than the opposing evidence:

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.

The *McCormick* treatise suggests that the standard “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, to find that the respondent intentionally violated the FoodShare program's rules, the evidence must induce a firm conviction that he transferred his FoodShare benefits to a store owner without receiving eligible food in return and that he did so intentionally, although there may be a reasonable doubt that this is true. Intent is a subjective state of mind determined upon all of the facts. *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis.2d 183 (1977). A person is presumed to know and intend the probable and natural consequences of his voluntary words or acts. *See, John F. Jelke Co. v. Beck*, 208 Wis. 650 (1932).

The Office of Inspector General brought this matter after it found the respondent's Quest card in a cash register drawer at [REDACTED]. The respondent said he noticed that the card was missing on April 10, 2014, the day after he received his \$189 monthly allotment. The agency contends that if he had lost his card, it would have been at [REDACTED] on March 9, 2014, because that was the last place he used it. It also contends that he always shops on 9th of a month, which is the day he receives his benefits.

The agency's case is weak. Someone can lose a card anywhere and at any time. A card can be left behind after being used to purchase items, which is what the agency implies happened here. But it can also fall out of wallet or pocket whenever someone sits or reaches for something in his pants. There is nothing unusual about waiting a day after noticing something is missing, as the respondent did, to report it, because one assumes that it will eventually show up. It was also reasonable for him not to notice that it was missing until April 10. He used up his March benefits on the 9th and did not receive any more until a month later, so he had no reason to notice that it was missing until the next time he shopped on or after April 9, 2014. The agency's argument that he always uses his benefits on the 9th is unconvincing because its own record showing the card's history from January 15, 2014, through April 9, 2014, indicates that he used it on January 15, 17, and 20, 2014; there is no evidence on this record of any purchase being made on January 9, 2014. *Exhibit 5*. The agency has the burden of proof, so if he did shop on January 9, it fell short of its obligation by submitted an incomplete record. And even if it had submitted a record showing he shopped on January 9, 2014, that would still only show that he had done so on the 9th day of a month for three months, well short of short of what is needed to conclusively prove a habit.

That the card was found at [REDACTED] is consistent with the respondent's shopping habits. He shopped at six different stores from January 15, 2014, through March 9, 2014. Of these, he shopped at three only once, but he shopped at [REDACTED] four times—more than any other store in this period. Each time he shopped there, he spent less than \$35, an amount consistent with the smaller purchases made after running out of benefits for the month. *Id.*

Other evidence also supports the respondent. The agency indicated that the owner of [REDACTED] told the agency's worker that he found the card on the floor. Neither the agency supervisor, who recovered the card, nor the store owner testified, but I will accept the owner's statement as one against the agency's interest. It is certainly consistent with the respondent's claim that he lost his card.

But the strongest evidence supporting his position is that the card was never debited after his last purchase on March 9, 2014. If he sold his benefits to the store owner, one would expect that the owner would immediately debit the card. But if the respondent lost the card, the owner would not have the PIN and could not obtain funds from it. Furthermore, turning the actual card over to a store owner is inconsistent with the facts of any case I have heard. What usually happens is that the owner rings up a fake purchase and then gives the cardholder a smaller amount of cash in return. Store owners engaged in fraud are unlikely to hold onto cards because a drawer full of cards would be strong evidence against them. The only reason for an owner to keep a card would be if he planned to continue debiting it every month. This did not happen here. If it had, the card would not show debits for stores other than [REDACTED]. Nor would the respondent have reported it missing; doing so would negate the purpose of turning the card over to the store owner.

In conclusion, the evidence does not clearly and convincingly support the agency's contention that the respondent trafficked his FoodShare benefits. Instead, it clearly and convincingly supports the opposite conclusion: that he did *not* traffic his benefits. Therefore, the Office of Inspector General's decision must be reversed and its petition dismissed.

CONCLUSIONS OF LAW

For the reasons discussed above, there is no clear and convincing evidence that the respondent intended to commit an IPV.

NOW, THEREFORE, it is

ORDERED

That the petitioner's determination of an intentional program violation is reversed, and the petition for review is hereby 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 filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 17th day of October, 2014

\sMichael O'Brien
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
- Nadine Stankey - email



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The preceding decision was sent to the following parties on October 17, 2014.

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