



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

DECISION

Case #: FOF - 160238

██████████ Respondent

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:

Corinne Balter
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 July 1, 2012 through October 31, 2014.
2. ██████████ is a small convenience store that accepts FoodShare (FS) benefits. It is located at ██████████. The owner of the store is ██████████.
3. On May 30, 2014 the Wisconsin Department of Alcohol and Tobacco Enforcement and the Milwaukee Police Department conducted a check at ██████████. ██████████ was the employee working when officials conducted this check.

4. During this check officials located 17 different Quest/FS cards. Each of these cards belonged to different people. Three people were related. Others lived on the same street near the store. Others had told the FS program that there were homeless, but they used the same post office box. None of the FS cards were reported lost on or before the day of this check.
5. The majority of the Quest/FS cards were kept in a box where the owner keeps cash when people buy lottery tickets.
6. During this check officials also located 35 WIC checks. The WIC checks are provided to low income mothers to purchase baby formula. The cost of baby formula varies from place to place. A mother gets so many cans of baby formula per month, but because the cost varies, the mother writes in the amount on the check when she purchases the formula. The WIC checks found were signed with no amounts written in. The store also had 7 WIC folders. In order to purchase the formula, the mother presents the WIC check with the WIC folder demonstrating that the signatures match.
7. Two of the 17 card holders signed waivers, agreeing to a one year sanction for an intentional program violation. These individuals did not make any admissions.
8. Nadine Stankey from the Office of the Inspector General scheduled interviews with all 17 card holders. Six of the card holders appeared for the interviews. The morning interviews were different from the afternoon interviews. One person stated that the owner had called him and told him what to say. The afternoon interviews appeared rehearsed.
9. The owner told authorities that people left their Quest/FS cards and WIC checks with him, and that he held onto these items. The owner did not provide any further explanation.
10. Some of the Quest/FS cards were used at [REDACTED] with the employee, [REDACTED]s, [REDACTED] card. This respondent's FS card was never used with [REDACTED]'s [REDACTED] card.
11. On September 12, 2014, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that the respondent trafficked his FoodShare card at [REDACTED].
12. The respondent failed to appear for the scheduled October 21, 2014 Intentional Program Violation (IPV) hearing and did not provide any good cause for said failure to appear.

DISCUSSION

Trafficking FoodShare benefits violates the program's rules. Wis. Stat. § 946.92(2g). Trafficking includes attempting to buy FoodShare benefits. 7 CFR § 271.2; *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. 7 CFR §§ 273.16(e)(6) and (b)(1)(i).

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. §§ 946.92(2).

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).

7 C.F.R. §273.16(e)(4) provides that the hearing shall proceed if the respondent cannot be located or fails to appear without good cause. The respondent did not appear or claim a good cause reason for not attending the hearing. Therefore, I must determine whether the respondent committed an IPV based solely on the evidence that the petitioner presented at hearing.

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 there is significant evidence that the respondent trafficked his FS benefits. The owner's explanation that people leave their cards in his store and that he holds onto the cards until people come back is not credible. One person stated that the owner called him and told him what to say during the interview with Nadine Stankey from the Office of the Inspector General. The owner could have called at least some, if not all, of the card holders to explain that he had their cards. There is a number on the back of the card to report if a card is lost or stolen. The owner did not report any of these cards lost. The owner had signed WIC checks without an amount listed. Some of these 17 cards had been used with a store employee's [REDACTED] card. The FS card owners were either relatives, neighbors, or shared the same PO Box. If there were only one card, it would be conceivable that a person lost the card in the store, and the owner was holding onto the card, however, this owner had 17 different cards and 35 signed WIC checks. This respondent did not appear at the face to face meeting with the Office of the Inspector General. This respondent also did not appear at the hearing to provide an alternate explanation. In this case I find that this was a scheme in which benefits were being trafficked. This respondent has failed to provide any explanation as to why he was not a part of this large scheme with [REDACTED].

Based upon the record before me, I find that the petitioner has established by clear and convincing evidence that the respondent intentionally violated FS program rules, and that this violation was the first such violation committed by the respondent. Therefore, the petitioner correctly seeks to disqualify the respondent from the FS program for one year.

CONCLUSIONS OF LAW

1. The respondent violated, and intended to violate, the FS program rule specifying that he not traffick FoodShare benefits or QUEST cards.
2. The violation specified in Conclusion of Law No. 1 is the first such violation committed by the respondent.

NOW, THEREFORE, it is ORDERED

That the petitioner's determination is sustained, and that the petitioner may make a finding that the respondent committed a first IPV of the FoodShare program and disqualify the respondent from the program for one year, effective the first month following the date of receipt of this decision.

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

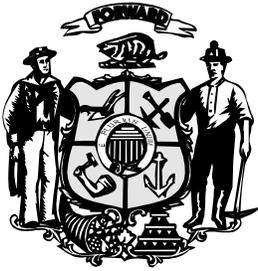
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified 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 Milwaukee,
Wisconsin, this 3rd day of November, 2014

\sCorinne Balter
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



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on November 3, 2014.

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