



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

██████████, Respondent

DECISION

Case #: FOF - 163833

Pursuant to petition filed February 10, 2015, 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) one year, a hearing was held on Monday, March 30, 2015 via phone. It was rescheduled twice as noted below.

The issue for determination is whether 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:

David D. Fleming
Division of Hearings and Appeals

The hearing for this matter was originally scheduled for March 30, 2015. Respondent did not appear on that day and the hearing was held without her as required by Federal law. She called the Division of Hearings and Appeals shortly after to ask that the matter be rescheduled as she had not received the hearing notice on time. It was rescheduled to May 18, 2015. She did not appear on May 18, 2015 at the time of the hearing but called later that day to indicate she had just been released from the Kenosha County jail. The matter was rescheduled to June 23, 2015. Respondent did not appear on June 23, 2015. This decision is based on the hearing conducted on March 30, 2015.

FINDINGS OF FACT

1. The respondent (CARES # [REDACTED]) is a resident of Kenosha County who received FS benefits in Kenosha County from October 1, 2013 through October 1, 2013.
2. Petitioner sent Respondent an Administrative Disqualification Hearing Notice dated February 23, 2015 informing Respondent that Petitioner sought to disqualify Respondent from receipt of FoodShare benefits for a year for misuse of those benefits; specifically that Respondent had traded her FoodShare benefits for cash.
3. Surveillance video from a Kenosha area grocery shows Respondent checking out groceries in the amount of \$142.97 and then moving down the check-out line to a different register where she uses her FoodShare card to check out groceries for another individual in the amount of \$164.02 who then gives her cash.

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. §§ 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).

In order for a 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 be a reasonable doubt as to their existence.

In order to prove the second element, i.e., intention, there must be clear and convincing evidence that the FoodShare 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.

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

This case deals with an allegation of trafficking. Relevant here, under 7 CFR §271.2, trafficking means:

Trafficking means:

- (1) The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signature, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone;

...

This definition became effective November 19, 2013. The Wisconsin Statutes contains the following provision:

(dm) “Traffic food stamp program benefits” means to do any of the following:

1. Buy, sell, steal, or otherwise accomplish the exchange of, directly, indirectly, in collusion with others, or individually, food stamp program benefits issued and accessed through the electronic benefit transfer program under s. 49.797, or by manual voucher and signature, for cash or other consideration that is not food.

Wis. Stats., §946.92(1)(dm)1.

I am approving the imposition of the IPV in this case. Respondent is clearly seen making a purchase of food for another individual and then accepting cash. Application and renewal forms notify FoodShare recipients that they may not exchange their FoodShare benefits. Respondent signed these forms. I am, therefore, concluding that

Respondent intentionally violated FoodShare program rules and that this violation was the first such violation committed by the respondent. Petitioner may disqualify Respondent from the FoodShare program for one year.

CONCLUSIONS OF LAW

1. That Respondent violated, and intended to violate, the FoodShare program rule specifying that a person may not sell FoodShare benefits.
2. That the violation specified in Conclusion of Law No. 1 is the first such violation committed by Respondent.

NOW, THEREFORE, it is ORDERED

That Petitioner may make a finding that Respondent committed a first IPV of the FoodShare program and disqualify 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 24th day of June, 2015

\sDavid D. Fleming
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 June 24, 2015.

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