STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Milwaukee County Department of Human Services, Petitioner

vs. DECISION

[redacted], Respondent Case #: FOF - 165148

Pursuant to petition filed April 2, 2015, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Milwaukee County Department of Human Services to disqualify [redacted] from receiving FoodShare benefits (FS) for a period of one year, a hearing was held on Monday, June 15, 2015 at 09:45 AM, at Milwaukee, Wisconsin.

NOTE: On the date of the hearing Milwaukee Enrollment Services supplemented Exhibit 14 with a Merchant Summary print out, making the exhibit a total of three pages in length.

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:

Department of Health Services
1 West Wilson Street, Room 651
Madison, WI 53703

By: Tygene Taylor
Milwaukee Enrollment Services
1220 W. Vliet Street
Milwaukee, Wisconsin 53205

Respondent:

[redacted]

ADMINISTRATIVE LAW JUDGE:

Mayumi Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES #[redacted]) is a resident of Milwaukee County.

2. On April 13, 2012, Milwaukee Enrollment Services sent the Respondent an Eligibility and Benefits Booklet. Although it did not specifically address selling FoodShare benefits for cash, it did advise the Respondent of the penalties for intentionally violating the rules of the FoodShare program. (Exhibits 10 and 11)

3. On August 29, 2012, the Petitioner completed a six-month report form. (Exhibit 9)

4. The Respondent typically received her FoodShare benefits on the 12th of the Month, in the amount of $526.00 per month. (Exhibit 5)

5. The Respondent was assigned an EBT card ending in [redacted], which was active until July 16, 2013, when the card needed to be replaced after having been damaged. (Exhibit 13)

6. The Respondent's EBT card was used to redeem benefits at [redacted] on September 12, 2012, in the amount of $200; on December 13, 2012, in the amount of $130.00 and on December 15, 2012, in the amount of $110.00. (Exhibit 13)

7. In August 2010, the owner of [redacted] stopped acting as a distributor of seafood and meat and began "recruiting QUEST card beneficiaries for the purpose of purchasing their benefits…paying the beneficiaries a percentage of the card value and retaining a percentage for himself. The Quest card holder never received any food products in exchange for redeeming his or her benefits." This enterprise continued until January 2013. (Exhibit 12)

8. On May 14, 2015, Milwaukee Enrollment Services prepared an Administrative Disqualfication Hearing Notice, alleging that the Respondent violated the rules of the FoodShare program by selling $440 in FoodShare benefits between September 12, 2012 and December 15, 2012. (Exhibit 2)

DISCUSSION

Respondent's Non-appearance

The Respondent did not appear for this hearing. This circumstance is governed by the regulation in 7 C.F.R. §273.16(e)(4), which states in part:

> If the household member or its representative cannot be located or fails to appear at a hearing initiated by the State agency without good cause, the hearing shall be conducted without the household member being represented. *Even though the household member is not represented, the hearing official is required to carefully consider the evidence and determine if intentional Program violation was committed based on clear and convincing evidence.* If the household member is found to have committed an intentional program violation but a hearing official later determines that the household member or representative had good cause for not appearing, the previous decision shall no longer remain valid and the State agency shall conduct a new hearing.

> The hearing official who originally ruled on the case may conduct a new hearing. In instances where the good cause for failure to appear is based upon a showing of nonreceipt of the hearing notice, the household member has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. In all other instances, *the household member has 10 days from the date of the scheduled hearing to present reasons indicating a good cause for failure to appear. A hearing official must enter the good cause decision into the record.*
>
> *Emphasis added*

The hearing in this case took place on June 15, 2015. The Respondent was advised of the date and time of the hearing, in an Administrative Disqualification Hearing Notice that was sent to her at [redacted]. Ms. Taylor indicated that this was the Respondent's last known address and that there is no indication in the record that the agency received any returned mail.

The Respondent did not appear at the hearing and the Respondent did not contact the Division of Hearings and Appeals within 10 days to explain her failure to appear. As such, it is found that the Respondent did not have good cause for her non-appearance.

The Merits of OIG's Claim

An IPV is defined at 7 C.F.R. §273.16(c) as intentionally: making a false or misleading statement or misrepresenting; concealing or withholding facts; or committing any act that constitutes a violation of the Food Stamp Act, federal regulations or any Wisconsin statute relating to the use, presentation, transfer, acquisition, receipt or possession of food stamp coupons or an authorization to participate (ATP) card.

The Department's written policy restates federal law, below:

> **3.14.1 IPV Disqualification**
> 7 CFR 273.16
> A person commits an Intentional Program Violation (IPV) when s/he intentionally:
> 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.

An IPV may be determined by the following means:

> 1. Federal, state, or local court order,
> 2. Administrative Disqualification Hearing (ADH) decision,
> 3. Pre-charge or pretrial diversion agreement initiated by a local district attorney and signed by the FoodShare recipient in accordance with federal requirements, or
> 4. Waiver of the right to an ADH signed by the FoodShare recipient in accordance with federal requirements.
>
> *FoodShare Wisconsin Handbook,* §3.14.1.

The agency may disqualify only the individual who either has been found to have committed the IPV or has signed a waiver or consent agreement, and not the entire household. If disqualified, an individual will be ineligible to participate in the FS program for one year for the first violation, two years for the second violation, and permanently for the third violation. However, any remaining household members must agree to make restitution within 30 days of the date of mailing a written demand letter, or their monthly allotment will be reduced. 7 C.F.R. §273.16(b).

In order for the agency 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 an intentional program violation per 7 C.F.R. §273.16(e)(6).

"Clear and convincing evidence" is an intermediate standard of proof which is more than the "preponderance of the evidence" used in most civil cases and less than the "beyond a reasonable doubt" standard used in criminal cases.

In Kuehn v. Kuehn, 11 Wis.2d 15, 26 (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. In criminal cases, while not normally stated in terms of preponderance, the necessary certitude is universally stated as being beyond a reasonable doubt.

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.

The Milwaukee Enrollment Services has established, by clear and convincing evidence, that the Respondent sold her benefits. First, the Respondent redeemed her benefits in even dollar amounts. Second, the benefits were redeemed on or near the day she typically received her FoodShare benefits. Third, the Respondent redeemed her benefits at [redacted], at a time when it was exclusively in the business of purchasing FoodShare benefits. As such, the Respondent had to have been selling her FoodShare benefits.

Based upon the foregoing, it is found that the agency has met its burden to prove, by clear and convincing evidence, that the Respondent was trafficking (selling) her FoodShare benefits between September 2012 and December 2012.

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).

Looking at the record, one might argue that the Respondent could not have acted intentionally, because she was not given adequate warning that selling her benefits for cash would result in her disqualification from the FoodShare Program.

There is no reliable documentation in the record showing that the Respondent was given the penalty warning as required by 7 C.F.R. §273.2(b)(ii), which states that, "Each application form shall contain…In prominent and boldface lettering and understandable terms a description of the civil and criminal provisions and penalties for violations of the Food Stamp Act." Indeed, the agency did not provide a full application that was completed by the Respondent. Further, the renewal/six month report form that was completed by the Respondent in August 2012 did not contain a penalty warning and there are no notes in the case comments that anyone read the penalty warning to the Respondent.

However, the Eligibility and Benefits booklet discusses using Foodshare benefits for purchasing food. Though the booklet does not specifically address selling FoodShare benefits for cash, it does state, "Fraud or intentional program violations by anyone in your household may result in disqualification from FoodShare. This means you will not be able to get FoodShare benefits for: One year after the first violation…" It goes on to state, "You will also be permanently barred if you are convicted of trafficking benefits of $500 or more." In addition, the booklet states that, "Individuals who trade (buy or sell) benefits for a controlled substance/illegal drug(s), will be barred from receiving FoodShare benefits for a period of two years for the first offense and permanently for the second offense" and that, "Individuals who trade (buy or sell) benefits for firearms, ammunition, or explosives, will be barred from receiving FoodShare benefits permanently."

This is an extremely close case, and it would behoove the agency to include better documentation of its provision of the FoodShare penalty warning. However, there is no indication in the record that the Respondent suffers from a cognitive disability or is unable to read. As such, it should have been clear to the Respondent that she was to use her benefits to buy food and that she was violating the rules of the FoodShare program by selling her benefits for cash.

Looking at the totality of the circumstances, it is found that the Respondent knew she was violating the rules of the Foodshare program by selling her benefits for cash, that she knew there could be serious consequences for doing so, but she sold her benefits anyway.

Accordingly, it is found that the Respondent intentionally violated the rules of the FoodShare program by selling $440 in benefits to [redacted].

CONCLUSIONS OF LAW

The Respondent intentionally violated the rules of the FoodShare program by trafficking (selling) her FoodShare benefits and that this is the first intentional program violation for the Respondent.

NOW, THEREFORE, it is **ORDERED**

That Milwaukee Enrollment Service's determination is sustained, and that it 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 26th day of June, 2015.

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\sMayumi Ishii
Administrative Law Judge
Division of Hearings and Appeals

c: Miles - email
Public Assistance Collection Unit - email
Division of Health Care Access and Accountability - email
Pamela Hazley - email

State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on June 26, 2015.

Milwaukee Enrollment Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
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