STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Wisconsin Department of Health Services - Office of the Inspector General, Petitioner

vs.

[redacted], Respondent

DECISION
Case #: FOF - 152036

Pursuant to petition filed September 11, 2013, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Wisconsin Department of Health Services - Office of the Inspector General to disqualify [redacted] from receiving FoodShare benefits (FS) for one year, a telephone hearing was held on Thursday, November 7, 2013 at 09:30 AM, 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:

Wisconsin Department of Health Services - Office of the Inspector General
By: Nadine Stankey
Department of Health Services - OIG
PO Box 309
Madison, WI 53701

Respondent: (No Appearance)
[redacted]

ADMINISTRATIVE LAW JUDGE:
Kenneth Duren
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES #[redacted]) is a resident of Milwaukee County who received FS benefits in Milwaukee County from at least January 1, 2012 through October 31, 2012.

2. The respondent transacted his FS card at [redacted] on 21 occasions between January 1, 2012, and March 4, 2013. On 10 of 21occasions he made purchases exceeding $20. On 3 more occasions he made purchases above $19 but less than $20. On 5 of 21 occasions, his purchases ended in the .00 cents value set. On 3 more occasions, his purchases ended in the .99 cents value set; and on two additional occasions his purchases ended in the .90 cents value set. On four occasions, i.e., 8 of 21 transactions occurred on the same day twice. On 5 more occasions he made additional transactions within 24 hours, i.e., on successive days. On at least 4 occasions he purchased much larger quantities of groceries at other larger, cheaper stores on the same day or within 24 hours. See, Exhibit #5, pp. 1-2 (June 15, 2012; July 15, 2012; September 22, 2012; October 15, 2012, and October 17, 2012.) And see, Exhibit #5, p. 3.

3. 47.6% of the petitioner's purchases at [redacted] met or exceeded $20. 61.9% of his purchases at [redacted] exceeded $19.

4. During the tested period described in Finding of Fact #2, the respondent was living 0.3 miles away (i.e., 4 blocks) from [redacted].

5. [redacted] was a minimally stocked 2400 square foot grocery store, with limited counter space and a glass divider with low profile slot separating the cashier from the buying public, making it very difficult to ring up large amounts of groceries. The store did not have carts or baskets. [redacted] was determined by the federal Food & Nutrition Service (FNS) to be engaged in the trafficking of FoodShare benefits and the store was disqualified as a vendor by the FNS due to these activities. It is no longer an authorized FoodShare vendor.

6. 11% of all purchases made by shoppers at [redacted] exceeded $20, and 89% were less than $20, as determined in the FNS survey resulting in the store's disqualification.

7. On October 3, 2013, the petitioner agency prepared an Administrative Disqualification Hearing Notice alleging that [redacted] had trafficked FoodShare benefits with [redacted]. The respondent received the Notice because he contacted the Department and discussed his purchasing patterns with the Department's representative in this IPV action, denying trafficking activities, subsequent to October 3, 2013, and prior to this hearing.

8. The Department requested the instant Administrative Disqualification Hearing on October 3, 2013, and thereby filed the appeal as the petitioner. [redacted] is the respondent.

9. The respondent failed to appear for the scheduled November 7, 2013 Intentional Program Violation (IPV) hearing and did not provide any good cause for said failure to appear.

DISCUSSION

An intentional policy 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).

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 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 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. 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.

The clear and uncontroverted evidence is that the respondent made multiple high dollar purchases with his Quest card at a convenience store without a scanner, carts or baskets and a very limited assortment of convenience foodstuffs, on multiple occasions in the tested period; he frequently made more than one transaction within 24

hours at T and J, with frequent amounts ending in the same cents value set, i.e., .00 cents, .99 cents, and .90 cents. While it is true that he lived relatively nearby the [redacted], the frequency of the high dollar purchases is inconsistent with the fact that on at least 4 occasions he purchased much larger quantities of groceries at other larger, cheaper stores on the same day or within 24 hours. See, Exhibit #5, pp. 1-2 (June 15, 2012; July 15, 2012; September 22, 2012; October 15, 2012, and October 17, 2012.) And finally, [redacted] itself was ultimately disqualified from being a FS vendor by the federal FS agency because it determined the store had engaged in a pattern of fraudulent FS transactions with many FS recipients. Based upon this pattern of transactions, I find the evidence clear and convincing to establish that the respondent was knowingly going to [redacted] specifically to fraudulently benefit from transactions for non-food or cash items, going out of his way to do so even while making larger grocery visits to cheaper stores concurrently, and that this evinces his intent to violate FS regulations. I also infer from his non-appearance even though he had contact with the Department after notice of the hearing and prior to the hearing, that his presence at the hearing and testimony was likely to be adverse to his interests in defense of his case.

Based upon the record before me, I find that the petitioner agency 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 a recipient not traffick FoodShare benefits for cash or non-food items.
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).

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to Circuit Court, the Petitioner in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, WI

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 Madison, Wisconsin, this 18th day of November, 20132013

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\s\sKenneth Duren
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

Brian Hayes, Administrator
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: http://dha.state.wi.us

The preceding decision was sent to the following parties on November 18, 2013.

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

State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: http://dha.state.wi.us

The preceding decision was sent to the following parties on November 19, 2013.

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