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# STATE OF WISCONSIN
## Division of Hearings and Appeals

In the Matter of

Office of the Inspector General,
Petitioner

v.

[redacted], Respondent

DECISION

FOF/152042

## PRELIMINARY RECITALS

Pursuant to a petition filed September 11, 2013, under Wis. Admin. Code §HA 3.03, and see, 7 C.F.R. § 273.16, to review a decision by the Office of the Inspector General to disqualify [redacted] from receiving FoodShare benefits (FS) for a period of one year , a hearing was held on November 18, 2013, at Milwaukee, Wisconsin. Prior to that hearing, the Department sent notice to respondent instructing him to contact the ALJ with his contact information for the hearing. The notice provided this ALJ's name and telephone number. The respondent did not contact the ALJ with his contact information for the telephone hearing. At the time of the noticed telephone hearing this ALJ attempted to contact petitioner at the number present in the case file ([redacted]). That number resulted in a recording that the phone was not in service. The hearing was held without an appearance by respondent. At 10:59am, two hours following the scheduled time of hearing, respondent called this ALJ. Respondent stated to the ALJ that he did not understand his need to provide valid contact information pursuant to the hearing notice. Respondent requested a reschedule of the hearing, which was granted. The hearing was rescheduled to December 9. On December 8, respondent called this ALJ and left a voicemail indicating his telephone number for the December 9 hearing ([redacted]). At the time of the noticed December 9 hearing (1:00pm), this ALJ called the number provided and there was no answer after 5 rings. This ALJ then disconnected with the Department representative. At 1:40pm, respondent called this ALJ and again left a voicemail indicating that he could be reached at the same number. This ALJ called back that number again within 10 minutes of respondent's call and again there was no answer at the number after 5 rings. Petitioner has not provided good cause for his non-appearance at the time of the hearing. The Decision in this case is based on the record created at the initial hearing on 11/18/13.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

Department of Health Services
Division of Health Care Access and Accountability
1 West Wilson Street, Room 651

Madison, Wisconsin 53703
By: Nadine Stankey
Office of the Inspector General
Department of Health Services
1 West Wilson Street
Madison, WI 53701

Respondent:

[redacted]

ADMINISTRATIVE LAW JUDGE:
John P. Tedesco
Division of Hearings and Appeals

## FINDINGS OF FACT

1. Petitioner (CARES # [redacted]) is a resident of Milwaukee County who received FS during August 2012.
2. During that period the respondent periodically made FS purchases at [redacted], a small corner store that since has been disqualified as an FS vendor due to trafficking violations.
3. [redacted] was disqualified for three specific bases that are tied to FS trafficking according to the USDA Food and Nutrition Services (FNS): (1) an unusual number of transactions ending in the same cents value, and (2) excessively large purchase transactions. The store's only cash register was through a small opening in a security window and had no price scanner. There were no shopping baskets for customers to place multiple items that would add up to large purchase amounts. The store stocked minimal amounts of groceries, and had an emphasis on snack items.
4. The respondent made purchases on respondent's FS card that fit these categories of trafficking. In addition, respondent had greater access to larger stores with better prices and more selection. Petitioner did not live near the [redacted] store.
5. By a notice dated October 7, 2013, the PACU informed the respondent that it was requesting a first FS IPV sanction by holding a hearing on November 18, 2013 at 9:00 a.m.

## DISCUSSION

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 a federal, state, or local court order, an Administrative Disqualification Hearing (ADH) decision, or a prehearing waiver.

*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).

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.

In order for the county 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. It is used in civil cases where a higher standard is required because the outcome could result in serious social consequences for, or harsh effects on an individual. See 32A C.J.S., Evidence §1023. While the terminology for this intermediate standard of proof varies from state to state, it is clear that it is what is required by the FS regulations. See Jackson v. State, 546 So.2d 745 (Fla. App. 2 Dist. 1989).

The Wisconsin Supreme Court viewed the various standards of proof as degrees of certitude. 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.

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.

What is needed to prove the first element, that an IPV as defined in 7 C.F.R. §273.16(c) was committed, is clear. In order to prove the second element, 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.

This is not a clear cut situation because there is no first hand evidence that the respondent engaged in trafficking, i.e. no witnesses saw respondent do so and neither respondent nor the [redacted] storekeepers admitted to the charges. However, it is inferred that the FNS did substantial research on trafficking activity and actions associated with trafficking. [redacted] was disqualified as an FS vendor for taking part in trafficking activities, and the respondent clearly took part in activities identified as trafficking. As noted in the findings, not only did the respondent fit the trafficking profile, but other actions also focus on the likelihood that he used his FS card for trafficking at [redacted]. In particular the respondent lived much closer to large grocery stores with better selection and prices, and yet respondent made large purchases at [redacted] which was 6-9 miles from his residence. There were 50 retailers in the SNAP program that were closer to respondent. Such a pattern makes no sense unless the respondent was utilizing [redacted] for reasons other than purchasing food items.

Finally, the respondent did not appear for this hearing, from which I draw an adverse inference as to respondent's possible culpability. Respondent has provided the Department with no credible explanation for respondent's conduct. I conclude, therefore, that the respondent committed, and intended to commit, an FS IPV.

## CONCLUSIONS OF LAW

The respondent committed an FS IPV by engaging in FS trafficking at a grocery store that later was disqualified by the FNS for the activities that the respondent engaged in.

**THEREFORE, it is** **ORDERED**

That the IPV is sustained, and the respondent is hereby ineligible to participate in the FoodShare program for a period of one year, effective the first month following the date of receipt of this decision.

**REQUEST FOR A REHEARING**

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found

new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. See also, 7 C.F.R. sec. 273.16(e)(4) for the specific time limits for claiming good cause for missing the scheduled hearing. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

**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 Respondent 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, Wisconsin 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 227.53.

Given under my hand at the City of Madison,
Wisconsin, this 10th day of December, 2013

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\sJohn P. Tedesco
Administrative Law Judge
Division of Hearings and Appeals

**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 December 10, 2013.

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