STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

[redacted], Respondent

DECISION
Case #: FOF - 152055

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 Office of the Inspector General to disqualify [redacted] from receiving FoodShare benefits (FS) for one year, a hearing was held on Thursday, December 12, 2013 at 02:30 PM, at Milwaukee, Wisconsin. This case was originally scheduled for a hearing on November 14, 2013 at 1:15 p.m. At that date and time, the ALJ contacted the respondent who indicated that he was not aware of the hearing and had not received the agency's disqualification notice or exhibits. His request to reschedule was granted so that the agency could re-send the notice and exhibits. The respondent's address and phone were verified. On December 12, 2013, the agency verified that it sent the notice and exhibits to the 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:
[redacted]

ADMINISTRATIVE LAW JUDGE:
Debra Bursinger
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 October 1, 2012 through October 31, 2012.
2. During that period the respondent made FS purchases at [redacted] Grocery Store, a small corner store that since has been disqualified for trafficking FS with FS recipients.

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, (2) multiple transactions made by the same purchaser in unusually short time frames, and (3) 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 was little counter space on which to place items for purchase. There were no shopping baskets or carts for customers to place multiple items that would add up to large purchase amounts.

4. The respondent made purchases on his FS card that fit all three categories of trafficking. In addition, he made a purchase at a legitimate full-service grocery store on the same day and between his purchases at [redacted]. In addition, he purchased items at [redacted] even though there are numerous other grocery stores closer to his home. See Exhibits 5 and 7.
5. On October 7, 2013, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that respondent trafficked FS benefits.
6. The respondent failed to appear for the scheduled December 12, 2013 Intentional Program Violation (IPV) hearing and did not provide any good cause for said failure to appear. An attempt was made to contact the respondent at the phone number he provided for the hearing. The individual who answered the phone stated the respondent was not available. A message was left regarding the purpose of the call. Respondent failed to contact DHA post-hearing with any good cause for his failure to appear.

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. §§ 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 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 FNS did substantial research on trafficking activity and actions associated with trafficking. That [redacted] was disqualified as an FS vendor for taking part in trafficking activities with recipients is clear. I find that respondent took part in such activities and was participating in trafficking himself. The respondent made purchases on his FS card that fit all three categories of trafficking. In addition, he made purchases using his FS card from a legitimate full-service grocery store on the same day and between purchases at [redacted]. In addition, there are numerous grocery stores closer to his home than [redacted]. See Exhibits 5 and 7.

The respondent has not responded to the allegations either by way of this hearing or in response to letters that the agency mailed to him advising him of the allegations. The case was originally scheduled for a hearing on November 14, 2013 at 1:15 p.m. The ALJ contacted the respondent. At that time, the respondent indicated he was not aware of the hearing or the agency action. He indicated he had not received the agency's disqualification notice and exhibits. He requested a postponement so that the agency could re-send the documents. The respondent's address and phone number were verified at that time. The agency did re-send the documents to the respondent and the hearing was rescheduled. A hearing notice was issued to the respondent at the proper address. On December 12, 2013, the individual who answered the respondent's phone stated that he was not available. A

message was left indicating the purpose of the call. The respondent did not contact DHA post-hearing with good cause for his lack of appearance. I will take his lack of response or appearance as an adverse inference of the allegations and find that the agency has met its burden of proof based on the evidence presented.

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 trafficking of FS benefits is prohibited.
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 Milwaukee, Wisconsin, this 23rd day of December, 2013

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\sDebra Bursinger
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

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The preceding decision was sent to the following parties on December 23, 2013.

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