STATE OF WISCONSIN

In the Matter of

Office of the Inspector General, Petitioner

vs.

[redacted], Respondent

DECISION

FOF/151015

The proposed decision of the Administrative Law Judge dated October 2, 2013, is modified as follows and, as such, is hereby adopted as the final order of the Department.

PRELIMINARY RECITALS

Pursuant to a petition filed July 30, 2013, under Wis. Admin. Code §HA 3.03, and see, 7 C.F.R. § 273.16, to review a decision by the PACU - 5173 to disqualify [redacted] from receiving FoodShare benefits ["FS"] for a period of one year, a Hearing was held via telephone on September 17, 2013.

The issue for determination is whether the respondent committed an FS Intentional Program Violation ["IPV"].

There appeared at that time via the following persons:

PARTIES IN INTEREST:

Petitioner:

Department of Health Services
Division of Health Care Access and Accountability
1 West Wilson Street
Madison, Wisconsin 53703
By: Nadine Stankey, Card Trafficking Auditor
PACU - 5173
P.O. Box 8939
Madison, WI 53708-8938

Respondent:

[redacted] (did not appear at the September 17, 2103 Hearing)
4902 N 21st St
Milwaukee, WI 53209

ADMINISTRATIVE LAW JUDGE:
Sean P. Maloney
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [redacted]) is a resident of Milwaukee County who received FS during the time period of May - October 2012.
2. Based on various circumstantial evidence the Wisconsin Department of Health Services ["DHS"] has concluded, with regard to petitioner, that she has trafficked FoodShare benefits.

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, possession, or trafficking[1] of food stamp coupons or an Authorization To Participate ["ATP"] card. See also, *FoodShare Wisconsin Handbook,* ["FWH"] § 3.14.; *Income Maintenance Manual*, ["IMM"] Chapter 13.

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.

FWH § 3.14.1.

Wisconsin statutes provide, in the parts relevant here, as follows:

> (2) No person may misstate or conceal facts in a food stamp program application or report of income, assets or household circumstances with intent to secure or continue to receive food stamp program benefits.
>
> (2m) No person may knowingly fail to report changes in income, assets, or other facts as required under 7 USC 2015(c)(1) or regulations issued under that provision.
>
> (3) No person may knowingly issue food coupons to a person who is not an eligible person or knowingly issue food coupons to an eligible person in excess of the amount for which the person's household is eligible.

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[1] *Trafficking* means, among other things, the buying or selling of coupons, ATP cards, or other benefit instruments for cash or consideration other then eligible food. 7 C.F.R. § 271.2

(4) No eligible person may knowingly transfer food coupons except to purchase food from a supplier or knowingly obtain food coupons or use food coupons for which the person's household is not eligible.

(5) No supplier may knowingly obtain food coupons except as payment for food or knowingly obtain food coupons from a person who is not an eligible person.

(6) No unauthorized person may knowingly obtain, possess, transfer or use food coupons.

(7) No person may knowingly alter food coupons.

Wis. Stat. §§ 49.795(2) - (7) (2011-12).

The county 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. 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. 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. 7 C.F.R. §§ 273.16(b)(1), (11) & (12).

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). If the person suspected of the IPV (or his or her representative) cannot be located or fails to appear without good cause the Hearing must be conducted without the IPV suspect being represented. 7 C.F.R. 273.16(e)(4).

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 (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. 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 probably." 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.

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.

The evidence offered by DHS is that a Milwaukee store known as [redacted] ["[redacted]"] was determined by the federal Food and Nutrition Service ["FNS"] to have committed trafficking violations and was permanently barred from the FS program. [redacted] was "minimally stocked", food was "not easily accessible to buyers", it "had limited counter space", "limited staple food stock", "only one POS device and one cash registrar", and "did not have carts or baskets."[2] DHS concluded that petitioner committed an IPV (trafficking) solely because petitioner shopped at [redacted] and fit a certain profile that included at least 2 purchases over $20 (the highest being $47.90; only 11% of purchases at [redacted] were for $20 or more), FS purchases of $101.40 in 3 different transactions all on June 15, 2012, many FS purchases that ended in the same cents value ($.00; $.50; and, $.90), and many FS participating stores that were closer to petitioner's residence than [redacted] (DHS states that [redacted] was "9-10 minutes in travel time" from petitioner's residence). Exhibits #1, #2, #3, #4, #5, #6, #7, #8, #9, & #11.

DHS has not presented clear and convincing evidence that petitioner committed an IPV. Exhibit 8 shows that she infrequently shops at [redacted] – seven transactions in a 5-month period, with four of those transactions occurring in a 24-hour period. It is not, then, significantly telling that this retailer is farther from her home than other retailers. It is indeed suspicious that between October 15 and 16 petitioner conducted four transactions at [redacted], but a suspicion is not sufficient to meet the required burden of proof. Because this is the only instance of this behavior in five months, it is not clearly more convincing that it evidences trafficking than that a justifiable reason existed. Petitioner's large purchases at other stores are spaced a week or more apart from her [redacted] purchases. Other IPV cases brought by DHS involved participants making large purchases at larger, closer retailers occurring on the same or adjacent day as the suspicious purchases that were made at the disqualified convenience store. That behavior increases the probability that the suspicious purchases were in fact trafficking.

The petitioner did not appear at the hearing and because of that I am allowed to draw an adverse inference as to her possible culpability. Even with that inference the evidence is lacking. All of the facts discussed above, *taken together*, present enough doubt that I cannot conclude that trafficking is highly probably and that the proof is clearly convincing.

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[2] At the September 17, 2013 Hearing the DHS representative testified that [redacted] did have eligible food that could be legally purchased with FS. The DHA representative also testified that during a July 2, 2013 telephone conversation petitioner stated that she did not traffick and that she lets her children use her card.

CONCLUSIONS OF LAW

For the reasons discussed above, there is no clear and convincing evidence that petitioner committed an IPV.

THEREFORE, it is

ORDERED

That the petition for review herein be and the same is hereby DISMISSED and the IPV is reversed.

APPEAL TO COURT

You may 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 Madison, Wisconsin, this 14 day of February, 2014.

Kevin E. Moore

Kevin E. Moore, Deputy Secretary
Department of Health Services