STATE OF WISCONSIN

In the Matter of

Office of Inspector General, Petitioner

vs.

[redacted], Respondent

DECISION

FOF/151078

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

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

FH [redacted]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

PACU – 5173,
Petitioner

v.

[redacted], Respondent

PROPOSED DECISION

FOF/151078

PRELIMINARY RECITALS

Pursuant to a petition filed August 9, 2013, under Wis. Admin. Code §HA 3.03, and 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 on September 18, 2013, at Milwaukee, Wisconsin.

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
Madison, Wisconsin 53703
By: Nadine Stankey, Card Trafficking Auditor
PACU - 5173
P.O. Box 8939
Madison, WI 53708-8938

Respondent:

[redacted] (no appearance)

ADMINISTRATIVE LAW JUDGE:
Nancy J. Gagnon
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [redacted]) is a resident of Milwaukee County who received FS in Wisconsin during the time period of May - October 2012.

2. The Department sent a written *Administrative Disqualification Hearing Notice*, dated August 9, 2013, to the respondent notifying her of an FS disqualification hearing scheduled for September

18, 2013. In the *Notice*, the Department alleged that the respondent committed an IPV by intentionally trafficking her FS benefits. It was mailed to her last known address. See Exhibit 12.

3. The respondent did not appear at the September 18, 2013 hearing, or telephone or write to offer good cause for being absent. Similarly, she did not make contact to request that the hearing be rescheduled.

4. During the May through October 2012 period, the respondent engaged in behavior consistent with trafficking, which is forbidden by federal regulation. She repeatedly made large "purchases" at a small convenience store, [redacted], which was not near her residence, in addition to some purchases at closer, legitimate grocery stores. The large purchases often occurred on the same day, and ended in "0" over 60 percent of the time. [redacted] has no carts or baskets to facilitate large purchases, as 89% of purchases by all customers made at the store are for less than $20. The store's only cash register was behind a small opening in a security window, with no price scanner and a small counter. [redacted] stocks minimal amounts of groceries, and has more of an emphasis on snack items.

5. [redacted] has been permanently disqualified from participation in the Foodshare program by the federal government, due to trafficking violations occurring from May through October 2012.

6. The respondent was interviewed by the Department (Ms. Stankey) on July 15, 2013, and offered no explanation for her pattern of suspicious behavior, other than to say that she only went to [redacted] a few times. She engaged in FS transactions at [redacted] *18* times during the subject period.

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 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.

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 USC2015(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.

(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).

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. 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 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 (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. 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. *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.

CONCLUSION

I conclude that the agency has established, by clear and convincing evidence, that the respondent intentionally trafficked a portion of her FS benefits. The respondent engaged in suspicious transactions at a store that has been disqualified as a FoodShare vendor by the federal government, due to trafficking. During the May through October 2012 period, the petitioner engaged in behavior consistent with trafficking. She repeatedly made large "purchases" at a convenience store, [redacted], which was not near her residence. The large purchases often occurred on the same day. The purchase amounts ended in zero to an abnormal degree. [redacted] has no carts or baskets to facilitate large purchases, as 89% of purchases by all customers made at the store are for less than $20. [redacted] stocks minimal amounts of groceries, and has more of an emphasis on snack items. The agency produced documents establishing all of the foregoing. The respondent did not appear for this hearing, from which I draw an adverse inference as to her possible non-liability. She has provided the Department with no credible explanation for her conduct. Thus, I conclude that the respondent committed, and intended to commit, an FS IPV. The Department's decision to disqualify her from FS participation for one year is correct.

CONCLUSIONS OF LAW

The Intentional Program Violation (IPV) determination is sustained, because the respondent committed, and intended to commit, a Food Stamp (FS) IPV, pursuant to 7 C.F.R. §§273.16(c) & 273.16(e).

THEREFORE, it is **ORDERED**

The Intentional Program Violation (IPV) determination is sustained, and the respondent is hereby ineligible to participate in the FS program for the period of time specified by law for her circumstances.

NOTICE TO RECIPIENTS OF THIS DECISION:

This is a Proposed Decision of the Division of Hearings and Appeals. IT IS NOT A FINAL DECISION AND SHOULD NOT BE IMPLEMENTED AS SUCH.

If you wish to comment or object to this Proposed Decision, you may do so in writing. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your comments and objections to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy to the other parties named in the original decision as "PARTIES IN INTEREST."

All comments and objections must be received no later than 15 days after the date of this decision. Following completion of the 15-day comment period, the entire hearing record together with the Proposed Decision and the parties' objections and argument will be referred to the Secretary of the Department of Health Services for final decision-making.

The process relating to Proposed Decision is described in Wis. Stat. § 227.46(2).

Given under my hand at the City of Madison,
Wisconsin, this 2 day of October, 2013

Nancy Gagnon

Nancy J. Gagnon
Administrative Law Judge
Division of Hearings and Appeals