



STATE OF WISCONSIN

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In the Matter of

DECISION

Office of Inspector General, Petitioner

FOF/151095

vs.

██████████, Respondent

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The attached proposed decision of the Administrative Law Judge dated December 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



**STATE OF WISCONSIN**  
**Division of Hearings and Appeals**

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In the Matter of

Public Assistance Collection Unit, Petitioner

vs.

██████████, Respondent

PROPOSED DECISION

Case #: FOF - 151095

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Pursuant to petition filed July 30, 2013, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Public Assistance Collection Unit to disqualify ██████████ ██████████ from receiving FoodShare benefits (FS) for one year, a hearing was held on Friday, November 1, 2013 at 10:00 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:

Public Assistance Collection Unit  
P.O. Box 8938  
Madison, WI 53708-8938

Respondent:

██████████  
██████████

**ADMINISTRATIVE LAW JUDGE:**

Debra Bursinger  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. The respondent (CARES # ██████████) is a resident of Milwaukee County who received FS benefits in Milwaukee County from May 1, 2012 through October 31, 2012.

2. During that period the respondent made FS purchases at [REDACTED], a small corner store that since has been disqualified for trafficking FS with FS recipients.
3. T & J 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. On August 9, 2013, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that respondent trafficked FS benefits.

## **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).

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 OIG asserts that the respondent trafficked FS benefits by purchasing non-food items with her FS card. Further, it notes that the respondent had an unusual number of transactions ending in \$.00, \$.50 and \$.90. In addition, it alleges she had multiple transactions in a short period of time and excessively large purchase transactions. The OIG stated that large purchases were difficult at [REDACTED] because there was limited counter space at the cash register and a plastic barrier between the cashier and customer. The OIG also noted that there are a number of grocery stores closer to the respondent's home

Respondent testified that she has family and friends that live near [REDACTED] so that she sometimes shopped at [REDACTED] when she visited them. She also testified that [REDACTED] is on a bus route so it is easy for her to get to the store. She testified that she goes to [REDACTED] specifically to get certain food items that she cannot get at stores closer to her – Philly Cheese Steaks and White Castle burgers. She stated she is aware that these items can be purchased at Sam's Club but she cannot get there without a car. In response to allegations that it is difficult to make large purchases, the respondent conceded that it was difficult to make purchases at the small counter, that she was required to hold numerous items in her hands as well as place them on the floor when checking out.

With regard to the allegations that the respondent made purchases within a short period of time, I reviewed the transaction summary and note that there are two days when the respondent made two separate purchases at [REDACTED]. On October 14, 2012, she made two purchases approximately 4 hours apart. On January 14, 2013, she made two purchases approximately 1 ½ hours apart. Though the January date was noted by the OIG in its transaction summary as suspicious, it falls outside the alleged trafficking time period contained in the Administrative Disqualification notice.

The OIG indicated that it believed the respondent was purchasing non-eligible items, such as cigarettes, tissue and cleaning supplies, with her FoodShare benefits. However, the OIG produced no testimony from anyone who saw the Respondent do this, nor did the OIG produce any receipt or other documentation showing that the Respondent's EBT card was used to purchase these non-eligible items. The remainder of OIG's case is also based largely on hearsay and conjecture about the respondent's purchases. With respondent's testimony to rebut the OIG's assertions, I cannot conclude that the agency has met its burden of proving by clear and convincing evidence that the respondent trafficked FS benefits at [REDACTED] during the period of May 1, 2012 – October 31, 2012.

