STATE OF WISCONSIN

In the Matter of

Office of the Inspector General, Petitioner

vs.

[redacted], Respondent

DECISION

FOF/152050

The proposed decision of the Administrative Law Judge dated December 9, 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 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.

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 Stanke
Office of the Inspector General
Department of Health Services
1 West Wilson Street
Madison, WI 53701

Respondent:

[redacted]

ADMINISTRATIVE LAW JUDGE:
Michael D. O'Brien
Division of Hearings and Appeals

FINDINGS OF FACT

1. The Respondent (CARES # [redacted]) is a resident of Milwaukee County who received FoodShare from June through September 2012.

2. From June through September 2012, the respondent's FoodShare card was debited four times at [redacted], a small corner store that has since been disqualified for trafficking FoodShare with the program's recipients.

3. The USDA Food and Nutrition Services (FNS) disqualified [redacted] for FoodShare trafficking because of (1) an unusual number of transactions ending in the same cents value, (2) multiple transactions made by the same purchaser in unusually short periods of time, and (3) excessively large purchases. The store had one scanner and one cash register, little counter space to place items for purchase, and no shopping baskets or carts to allow customers to place multiple items that would add up to large purchases. Only 11% of the purchases made in the store from May 1, 2012, through October 31, 2012, exceeded $20. *Exhibits 1, 2, and 4.*

4. The respondent's EBT card was debited at [redacted] for $37 on June 11, 2012, . $.40 on July 10, 2012, $2.42 on August 14, 2012, and $47 on September 12, 2012. *Exhibit 5.*

5. The petitioner's EBT card was debited at [redacted] for $103.61 on June 11, 2012, for $58.89 on June 12, 2012, and for $82.58 on August 14, 2012. It was debited at [redacted] for $34.98 on July 10, 2012. *Id.*

DISCUSSION

An intentional policy violation of the FoodShare program occurs when a recipient intentionally does any of 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). Wisconsin law states:

> (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.

Wis. Stat. §§ 49.795(3) – (6).

An intentional policy 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 FoodShare agency can disqualify only the individual found to have committed the intentional violation; it cannot disqualify the entire household. Those disqualified 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 when the agency mails a written demand letter. 7 C.F.R. § 273.16(b). The FoodShare agency has the burden of proving by clear and convincing evidence both that the recipient committed the violation and that she did so intentionally. 7 C.F.R. § 273.16(e)(6).

The Office of Inspector General alleges that the respondent trafficked her FoodShare benefits to [redacted] Store, a small corner store that has since been disqualified from the program for trafficking. She did not provide a telephone number before the hearing and her number was not in the Division of Hearings and Appeals computer database; nor has she called to inquire about her hearing since it took place. As a result, she did not appear in any way at the hearing. When the respondent cannot be located or fails to appear without good cause, FoodShare IPVs proceed without her. 7 C.F.R. §273.16(e)(4). Because this is not a criminal case, an inference can be drawn that when a respondent does not appear after being properly notified of the hearing that she could not defend herself against the allegations. Of course, recipients do move without notifying the FoodShare agency and, for various reasons, their mail does not get forwarded. They do have an obligation to notify the agency of changes of address, but the failure to do so is not, in itself, sufficient reason to find an intentional program violation.

Only 11% of the purchases made at [redacted] exceeded $20. Large food purchases rarely occurred there because it had little counter space and no shopping carts or baskets, it has little fresh produce, its only cooler was broken when the agency investigated it, and most of its items were inexpensive. Those items that do cost more and could be purchased quickly include toilet paper and cigarettes, which cannot be paid for with a FoodShare debit card. From May through October 2012, the respondent used her EBT debit card twice for purchases that exceeded $20. She made a $37 purchase at [redacted] on June 11, 2012 and a $47 purchase on September 12, 2012. She also made purchases of $.40 there on July 10, 2012, and $2.42 on August 14, 2012. On June 11, 2012, she had made a $103.61 purchase at [redacted]. The next day she made a $58.89 purchase there. She had other large purchases at [redacted], but none of these occurred near a large purchase at [redacted]. Based upon this evidence, the Office of Inspector General seeks to disqualify her from the FoodShare program. This evidence, along with her failure to appear at the hearing, certainly raises a reasonable suspicion that she was trafficking her benefits. The question is whether this evidence is clear and convincing.

"Clear and convincing evidence" is an intermediate standard of proof used in civil cases where the outcome could cause significant consequences for the individual. It is a greater burden than the "preponderance of the evidence" used in most civil cases and less than the "beyond a reasonable doubt" used in criminal cases.

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 probable." 2 McCormick on Evidence § 340 (John W. Strong gen. ed., 4th ed. 1992).

People generally do not buy large amounts of food at convenience stores, but this does not mean that they never do. Snacks and cereal can add up quickly. There was only one instance—June 11—where the respondent had a purchase at [redacted] exceeding $20 within a day of when she purchased a large amount of food elsewhere. She made one other significant purchase at [redacted], on September 12,

2012, but did not make any other purchases elsewhere. This evidence would be enough to establish that it is more likely than not that she trafficked her FoodShare benefits, but it does not produce in my mind a firm belief or conviction, without hesitancy, that she did so. Denying benefits to someone is a serious step, which is why the agency's burden is higher in disqualification matters than it is when it decides whether someone is entitled to those benefits in the first place. Although the Office of Inspector General has presented significant evidence against the respondent, it has not proven its case clearly and convincingly. Therefore, it cannot disqualify her from the program for one year.

CONCLUSIONS OF LAW

1. The Office of Inspector General has not established by clear and convincing evidence that the respondent committed a FoodShare IPV by engaging in FoodShare trafficking.
2. The respondent is not disqualified from the FoodShare program for one year.

THEREFORE, it is **ORDERED**

That if this proposed decision is adopted by the Secretary, the IPV is not sustained, and the respondent remains eligible to participate in the FoodShare program. Within 10 days of the date of the Secretary's Final Decision, the Office of Inspector General shall certify that it no longer seeks to disqualify the respondent for one year for the alleged offenses discussed in this decision.

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 19 day of February, 2014.

Kevin E. Moore

Kevin E. Moore, Deputy Secretary
Department of Health Services