



STATE OF WISCONSIN

In the Matter of



DECISION

FOF 152051

The proposed decision of the Administrative Law Judge dated December 5, 2013, is hereby adopted as the final order of the Department.

REQUEST FOR A REHEARING

This is a final administrative decision. You may petition for an administrative rehearing by submitting a specific written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. This request must be received by the Division within 20 days of the date of this Order. The process for requesting a rehearing petition is contained in Wisconsin Statutes § 227.49.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than 30 days after the date of this hearing decision (or 30 days after a denial of a timely rehearing request, if you ask for one). For purposes of appeal to Circuit Court, the Respondent in this matter is the Department of Health Services. Appeals 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. The process for appeals to the Circuit Court is contained in Wisconsin Statutes §§ 227.52 and 227.53.

Given under my hand at the City of Madison,
Wisconsin, this 23 day of January,
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

Office of the Inspector General,
Petitioner

PROPOSED DECISION

v.

FOF/152051

[Redacted], Respondent

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, by a telephone call originating in Eau Claire, 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 FS from May through October 2012.

2. From May through September 2012, the respondent's FoodShare card was debited twice at [REDACTED] a small corner store that has since been disqualified for trafficking FoodShare with the program's recipients. Both debits occurred on June 4, 2012. One was for \$38.90 and the other, which occurred 11 minutes later, was for \$10.
3. The respondent's EBT card was debited for \$151.84 at [REDACTED] on June 4, 2012. That day she manually inquired about her balance between shopping at [REDACTED] and [REDACTED] and had an electronic inquiry of her balance after this at [REDACTED] just before using the card there. *Exhibit 5.*
4. 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.*

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 IPV's 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 at [REDACTED]. Both occurred on June 4, 2012. One was for \$38.90 and the other, which occurred 11 minutes later, was for \$10. She also used the card to purchase \$151.84 worth of food at [REDACTED] earlier that day. Between the purchases at [REDACTED] and those at [REDACTED] she called to inquire about her balance on the card. When she got to [REDACTED] the balance was checked electronically.

The Office of Inspector General contends that because the respondent had never shopped there any other time, had both manual and electronic balance inquiries, and made one purchase over \$20, it has proven that she was trafficked her benefits. This evidence, along with her failure to appear at the hearing, certainly raises a reasonable suspicion that she was trafficking her benefits, and might establish that she did so by the preponderance of the evidence. The question is whether the agency's evidence clearly and convincingly establishes that she trafficked her FoodShare benefits.

"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. In *Slomowitz v. Walker*, 429 So.2d 797, 800 (Fla. 4th. DCA 1983), the court held that clear and convincing must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

People generally do not buy large amounts of food at convenience stores, but this does not mean that they never do. Snacks, cereal, and frozen pizza can add up quickly, especially when they are overpriced. The argument that the respondent never shopped there before or after cuts both ways. If she had been using her FoodShare debit card to purchase nonfood items, it is likely she would have done so more than once, but the agency offered no evidence of this. In addition, she used her card at [REDACTED] at 8:40 a.m. and at [REDACTED] around 10:45 p.m. Because 14 hours passed between when she used her card at [REDACTED] and at [REDACTED] this does not appear to be an instance where a person went to a large, well-stocked grocery store to buy food and then went to [REDACTED] to complete her shopping by purchasing items such as toilet paper or cigarettes that she could not obtain legally with her card. Given how late it was when she went to [REDACTED] it is plausible that she was visiting someone that day and picked up some snacks or frozen pizzas to finish the evening. Buying more than a few dollars' worth of food at [REDACTED] at any time is not rationale, but as the evening progresses, rationality often fades. Assuming that she bought snacks or pizzas involves some conjecture, but so does the Office of Inspector General's argument that she decided just once to go to [REDACTED] to purchase nonfood items.

The agency's evidence does not produce in my mind a firm belief or conviction, without hesitancy, that the respondent trafficked her FoodShare benefits. This means that it has not proven its case by clear and convincing evidence. 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.

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 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 5 day of December, 2013



Michael D. O'Brien
Administrative Law Judge
Division of Hearings and Appeals