



STATE OF WISCONSIN

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In the Matter of

DECISION

Office of Inspector General, Petitioner

FOF/152056

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

Office of the Inspector General, Petitioner

vs.

██████████, Respondent

**PROPOSED DECISION**

Case #: FOF - 152056

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Pursuant to petition filed September 11, 2013, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Office of the Inspector General to disqualify ██████████ from receiving FoodShare benefits (FS) for one year, a hearing was held on Thursday, November 14, 2013 at 01:45 PM, 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:

Office of the Inspector General  
Department of Health Services - OIG  
PO Box 309  
Madison, WI 53701

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 September 1, 2012 through October 31, 2012.

2. On October 7, 2013, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that Respondent trafficked FoodShare benefits with [REDACTED].
3. 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.
4. [REDACTED] 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.

## **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 agency asserts that the respondent's transactions at [REDACTED] fit all three categories of trafficking noted in Finding of Fact #4. Further, the agency noted that there are numerous grocery stores closer to the respondent's home, that she had access to larger stores and that she made purchases at a larger store on the same day that she made purchases at [REDACTED].

The respondent appeared for the hearing via telephone. She responded to the agency's assertion that she does not live near [REDACTED] by testifying that her aunt's house is around the corner from [REDACTED] (at [REDACTED]) and that she purchased snacks and other food items from [REDACTED] when visiting her aunt.

The respondent testified that she is unable to recall what food items she purchased at [REDACTED] during the relevant time period but that she generally purchased snacks and other items for that day's consumption. She denied purchasing cigarettes or household items with her FS card.

The respondent conceded that it was difficult to conduct a large transaction at [REDACTED] due to limited counter space and the plastic barrier. She testified that she made more than one trip to the counter with items and stated that the cashier would come from around the back of the counter to bag groceries. I note that the Petitioner's largest purchases were for \$28.99, \$31.99, \$41.80 and \$41.30.

I reviewed the respondent's transaction summary in Exhibit 5. There was one day when the Petitioner made a purchase at [REDACTED] on the same day that she made a purchase at [REDACTED]. However, those purchases were approximately 10 hours apart in time so I do not find this to be convincing evidence of trafficking.

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 September 1, 2012 – October 31, 2012.

## CONCLUSIONS OF LAW

The OIG has not proved, by clear and convincing evidence, that the respondent trafficked FS benefits at [REDACTED] during the period of September 1, 2012 – October 31, 2012.

**NOW, THEREFORE, it is ORDERED**

That if this decision is adopted by the DHS Secretary as the Final Decision:

The IPV Case Number [REDACTED] is hereby reversed and that the Department of Health Services cease enforcement efforts.

### 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. Stats. § 227.46(2).

Given under my hand at the City of Milwaukee,  
Wisconsin, this 2<sup>nd</sup> day of December, 2013.



Debra Bursinger  
Administrative Law Judge  
Division of Hearings and Appeals

c: Office of the Inspector General - email  
Public Assistance Collection Unit - email  
Division of Health Care Access and Accountability - email