# STATE OF WISCONSIN

In the Matter of

Office of the Inspector General, Petitioner

AMENDED DECISION

vs.

FOF/152349

[redacted], Respondent

This amended decision is correcting an error that mistakenly omitted the Conclusions of Law and Order.

Pursuant to petition filed September 23, 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 [redacted] from receiving FoodShare benefits (FS) for one year, a hearing was held on Tuesday, November 12, 2013 at 01:15 PM, at Milwaukee, Wisconsin.

The issue for determination is whether 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
By: Erica Dresen

Respondent:
[redacted]

ADMINISTRATIVE LAW JUDGE:
David D. Fleming
Division of Hearings and Appeals

## FINDINGS OF FACT

1. The Respondent (CARES #[redacted]) is a resident of Milwaukee County who received Food Stamps (known as FoodShare in Wisconsin) benefits in Milwaukee County from July 1, 2012 through October 1, 2012.

2. Respondent was sent an Administrative Disqualification Hearing Notice that, though dated September 4, 2013, was sent to Respondent in early October 2013. The Notice alleged that Respondent trafficked his FoodShare benefits at [redacted] and [redacted] ([redacted]) during the period from July 1,

2012 to October 31, 2012. The Notice advised Respondent of the allegation that he had trafficked his FoodShare and that a hearing was scheduled to review the allegations. Petitioner seeks to disqualify Respondent from receipt of FoodShare for one year.

3. [redacted] is a small neighborhood store that has been disqualified for trafficking FoodShare with FoodShare recipients. [redacted] was disqualified for three specific bases that are tied to FoodShare 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. [redacted] was a small store of about 500 square feet, very little fresh produce or meat and one sales register. There were no shopping baskets or carts for customers to place multiple items that would add up to large purchase amounts.

1. [redacted]'s address was [redacted]; Respondent's girlfriend and mother of his children lived at [redacted] during the time relevant here. This is 3- 4 blocks from [redacted].

4. Respondent made purchases or transactions on 17 occasions using his FoodShare card at [redacted] totaling $330.89. This included $34.35 in July 2012, $102.26 in August 2012, $92.55 in September 2012 and $101.73 in October 2012.

## 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.

The 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).

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 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, 26 (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.

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. 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 FNS did substantial research on trafficking activity and actions associated with trafficking. That [redacted] was disqualified as a FoodShare vendor for taking part in trafficking activities with recipients is clear. Nonetheless, this is not a clear cut situation because there is no first hand evidence that the Respondent engaged in trafficking, i.e. no witnesses saw him do so.

Respondent does not dispute that he made the purchases alleged at [redacted]. He testified, however, that during the time involved here the mother of his children lived 3-4 blocks from [redacted] and he would go to her house to watch the children while she was at school or work. He also stated that the prices at [redacted] were high but it was convenient and, as a practical matter, there was not much choice. He testified that he had no car at that time and had to get food to feed himself and the children. The foodstuffs he recalled buying seem to be on the FNS list of

the [redacted] inventory. I found Respondent's testimony to be credible and his story plausible. Given the clear and convincing standard, I do not find the evidence sufficient to demonstrate that Respondent committed an IPV.

## CONCLUSIONS OF LAW

1. That there is not clear and convincing evidence that this Respondent intended to commit the IPV.
2. That the agency cannot disqualify the Respondent from the FoodShare program for one year under an IPV sanction.

**NOW, THEREFORE,** it is **ORDERED**

The matter is remanded to the agency to rescind the Administrative Disqualification (IPV) from Respondent's FoodShare case. This action shall be taken within 10 days of the date of the final decision in this matter if it is accepted as final by 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 21 day of February, 2014.

Kevin E Moore

Kevin E. Moore, Deputy Secretary
Department of Health Services