STATE OF WISCONSIN

In the Matter of

Office of the Inspector General, Petitioner

vs.

[redacted], Respondent

DECISION

FOF/152817

The proposed decision of the Administrative Law Judge dated January 3, 2014, is modified as follows and, as such, is hereby adopted as the final order of the Department.

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 Wisconsin Department of Health Services ["DHS"] to disqualify [redacted] from receiving FoodShare benefits ["FS"] for one year, a Hearing was held via telephone on Tuesday, November 12, 2013 at 01:15 PM A Hearing scheduled for December 3, 2013 was rescheduled.

The issue for determination is whether Respondent committed an Intentional Program Violation ["IPV"].

There appeared at that time via telephone the following persons:

PARTIES IN INTEREST:
Petitioner:

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

Respondent (did not appear at December 16, 2013 Hearing):
[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 FS benefits in Milwaukee County from July 1, 2012 through October 1, 2012.

2. Based on various circumstantial evidence DHS has concluded that Respondent committed an IPV by "[t]rafficking your Foodshare benefits with [redacted] [sic] [redacted] & [redacted]."

3. Respondent did not appear at the December 16, 2013 disqualification Hearing or call or write to show good cause for being absent or to request that the Hearing be rescheduled.

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, possession, or trafficking[1] of food stamp coupons or an Authorization To Participate ["ATP"] card. See also, *FoodShare Wisconsin Handbook,* ["FWH"] § 3.14.; *Income Maintenance Manual*, ["IMM"] Chapter 13.

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.

FWH § 3.14.1.

Wisconsin statutes provide, in the parts relevant here, as follows:

> (2) No person may misstate or conceal facts in a food stamp program application or report of income, assets or household circumstances with intent to secure or continue to receive food stamp program benefits.
>
> (2m) No person may knowingly fail to report changes in income, assets, or other facts as required under 7 USC 2015(c)(1) or regulations issued under that provision.

[1] *Trafficking* means, among other things, the buying or selling of coupons, ATP cards, or other benefit instruments for cash or consideration other than eligible food. 7 C.F.R. § 271.2

(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.

(7) No person may knowingly alter food coupons.

Wis. Stat. §§ 49.795(2) - (7) (2011-12).

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. 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. 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. 7 C.F.R. §§ 273.16(b)(1), (11) & (12).

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. "[T]his level of proof, 'or an even higher one, has traditionally been imposed in cases involving allegations of civil fraud . . . '" *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 282 (1990). 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.

The Wisconsin Supreme Court viewed the various standards of proof as degrees of certitude. 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. In criminal cases, while not normally stated in terms of preponderance, the necessary certitude is universally stated as being beyond a reasonable doubt." *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.

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).

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.

In this case, Respondent did not appear at the Hearing. If the person suspected of the IPV (or his or her representative) cannot be located or fails to appear without good cause the Hearing must be conducted without the IPV suspect being represented. 7 C.F.R. 273.16(e)(4).

> "If the household member or its representative cannot be located or fails to appear at a hearing initiated by the State agency without good cause, the hearing shall be conducted without the household member being represented. Even though the household member is not represented, the hearing official is required to carefully consider the evidence and determine if intentional Program violation was committed based on clear and convincing evidence. If the household member is found to have committed an intentional Program violation but a hearing official later determines that the household member or representative had good cause for not appearing, the previous decision shall no longer remain valid and the State agency shall conduct a new hearing. The hearing official who originally ruled on the case may conduct the new hearing. In instances where good cause for failure to appear is based upon a showing of nonreceipt of the hearing notice . . . , the household member has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. In all other instances, the household member has 10 days from the date of the scheduled hearing to present reasons indicating a good cause for failure to appear. A hearing official must enter the good cause decision into the record." 7 C.F.R. § 273.16(e)(4) (2011).

The Respondent did not present a good cause reason for failing to appear at the Hearing. Therefore, the determination of whether Respondent committed an FS IPV must be based solely on what DHS presented at the Hearing.

Based on various circumstantial evidence DHS has concluded that Respondent committed an IPV by "[t]rafficking your Foodshare benefits with [redacted] [sic] [redacted] & [redacted]."

The evidence offered by DHS is that a Milwaukee store known as [redacted] & [redacted] ["[redacted]"] was determined by the federal Food and Nutrition Service ["FNS"] to have committed trafficking violations and was permanently barred from the FS program. [redacted] was "minimally stocked", "approximately 500 square feet", "had limited counter space", "limited staple food stock (no fresh produce or meat)"[2], "only one POS device and one cash registrar", the registrar is located behind a plastic barrier with a small opening, and "did not have carts or baskets." DHS concluded that Respondent committed an IPV (trafficking) solely because Respondent made a total of 5 purchases at [redacted] on October 9, 2012 (2 purchases) and October 10, 2012 (3 purchases) and fit a certain profile that included "unusually large FS purchases"[3] (the 5 purchase amounts were: $22.00; $10.85; $41.23; $39.50; & $9.18), purchases "within a short time frame" (the 3 October 10th purchases took place from 10:33 to 19:39); and FS purchases that ended in the same cents value ($0.00; $0.50; and, $0.85; 3 of the 5 purchases meet this criteria).[4] Exhibits #1, #2, #3, #4 & #5.

The OIG did not prove by clear and convincing evidence that Respondent committed an IPV. A transaction occurred in the morning of October 9 for $22.00 and in the evening for $10.85. There is nothing inherently suspicious about this. The following morning three transactions occurred over the course of 2 ½ hours which is not in such quick succession that an innocent explanation is implausible. Further, only two of them were sizeable and all were for different dollar amounts -- $41.23, $39.50 and $9.18. Based on only this 24-hour time period I cannot conclude that trafficking is highly probable and that the proof is clearly convincing.

CONCLUSIONS OF LAW

For the reasons discussed above, there is not clear and convincing evidence that Respondent committed an IPV.

THEREFORE, it is

ORDERED

that, if this *Proposed Decision* is adopted by the DHS Secretary as the Final Decision in this matter, the IPV is REVERSED and the petition for review herein is DISMISSED.

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2 Although the evidence is that [redacted] did have eligible food that could be legally purchased with FS. Exhibit #1.

3 The DHS representative testified that at [redacted] a purchase over $25 was an unusually large purchase.

4 FNS states: "It is reasonable to question why people would make substantial purchases, i.e., transactions of at least $25, at this store. An EBT debit over $25 is suspicious due to the limited counter space size, the lack of carts and baskets, the customer base's access to and use of area supermarkets." Exhibit #1, page 1. This may be so -- but "reasonable" and "suspicious" do not rise to the level of clear and convincing evidence. This is no doubt why FNS states that its case summary and documentation is to be used "for the sole purpose of assisting ... investigation of suspected SNAP/Electronic Benefits fraud" -- not as the basis upon which to conclude, by clear and convincing evidence, that an IPV has occurred. Additionally investigation is required. Exhibit #1, page 2.

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 6 day of March, 2014.

Kevin E. Moore

Kevin E. Moore, Deputy Secretary
Department of Health Services