



STATE OF WISCONSIN

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In the Matter of

DECISION

Office of Inspector General,  
Petitioner

FOF/152979

v.

██████████, Respondent

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The attached proposed decision of the hearing examiner dated January 3, 2014, is hereby modified as follows and as such is adopted as the final order of the Department.

Pursuant to petition filed October 21, 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, December 12, 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, including on August 23, 2012.
2. Respondent was sent an Administrative Disqualification Hearing Notice, dated November 5, 2013. The Notice alleged that Respondent trafficked his FoodShare benefits at ██████████ on one day, August 23, 2012, when he made two purchases at ██████████ a purchase for \$3.00 at 6:35 p.m. and a purchase for \$60.00 at 6:38 p.m. 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] 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 2400 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.
4. The respondent failed to appear for the scheduled December 12, 2013 Intentional Program Violation (IPV) hearing and did not provide any good cause for said failure to appear.

### 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).

7 C.F.R. §273.16(e)(4) provides that the hearing shall proceed if the respondent cannot be located or fails to appear without good cause. The respondent did not appear or claim a good cause reason for not attending the hearing. Therefore, I must determine whether the respondent committed an IPV based solely on the evidence that the petitioner presented at hearing.

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.

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., 4<sup>th</sup> ed. 1992).

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 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. I cannot conclude that there is clear and convincing evidence that respondent engaged in trafficking or fraudulent use of FS benefits based on two transactions on one day. The agency argues that the respondent’s \$60 purchase at [REDACTED] was not typical and noted that respondent usually makes small purchases. The agency further argues that the respondent’s two transactions are just three minutes apart. I note that 7 CFR §271.2 defines “trafficking” as, “the buying or selling of coupons, ATP cards or other benefits instruments for cash or consideration other than eligible food; or the exchange of firearms, ammunition, explosives, or controlled substances, as defined in section 802 of title 21, United States Code for coupons.”

The agency did not, in this case, explain exactly what the respondent did with the FS benefits to lead to a conclusion that he trafficked benefits on this particular day. While the \$60 transaction is unusual for the respondent, I cannot conclude that its unusual nature in itself is clear and convincing evidence that he committed an act that meets the definition of “trafficking.”

Based upon the record before me, I find that the petitioner has not established by clear and convincing evidence that the respondent intentionally violated FS program rules.

**CONCLUSIONS OF LAW**

1. There is not clear and convincing evidence that this respondent intended to commit the IPV.
2. 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 30<sup>th</sup> day  
of March, 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 - 152979

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The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

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**PARTIES IN INTEREST:**

Petitioner:

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

Respondent:

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**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 August 23, 2012 through August 23, 2012.

2. Respondent was sent an Administrative Disqualification Hearing Notice, dated November 5, 2013. The Notice alleged that Respondent trafficked his FoodShare benefits at [REDACTED] on one day, August 23, 2012, when he made two purchases at [REDACTED] a purchase for \$3.00 at 6:35 p.m. and a purchase for \$60.00 at 6:38 p.m. 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] 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 2400 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.
4. The respondent failed to appear for the scheduled December 12, 2013 Intentional Program Violation (IPV) hearing and did not provide any good cause for said failure to appear.

## **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;  
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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.

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7 C.F.R. §273.16(e)(4) provides that the hearing shall proceed if the respondent cannot be located or fails to appear without good cause. The respondent did not appear or claim a good cause reason for not attending the hearing. Therefore, I must determine whether the respondent committed an IPV based solely on the evidence that the petitioner presented at hearing.

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:

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*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 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.

I cannot conclude that there is clear and convincing evidence that respondent engaged in trafficking or fraudulent use of FS benefits based on two transactions on one day. The agency argues that the respondent's \$60 purchase at [REDACTED] was not typical and noted that respondent usually makes small purchases. The agency further argues that the respondent's two transactions are just three minutes apart.

I note that 7 CFR §271.2 defines "trafficking" as, "the buying or selling of coupons, ATP cards or other benefits instruments for cash or consideration other than eligible food; or the exchange of firearms, ammunition, explosives, or controlled substances, as defined in section 802 of title 21, United States Code for coupons."

The agency did not, in this case, explain exactly what the respondent did with the FS benefits to lead to a conclusion that he trafficked benefits on this particular day. While the \$60 transaction is unusual for the respondent, I cannot conclude that its unusual nature in itself is clear and convincing evidence that he committed an act that meets the definition of "trafficking." There is no first hand evidence that the respondent engaged in trafficking, i.e. no witnesses saw him do so.

Based upon the record before me, I find that the petitioner has not established by clear and convincing evidence that the respondent intentionally violated FS program rules.

### **CONCLUSIONS OF LAW**

1. There is not clear and convincing evidence that this respondent intended to commit the IPV.

2. 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.

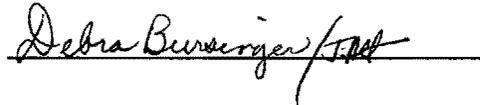
**NOTICE TO RECIPIENTS OF THIS DECISION:**

This is a Proposed Interim 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. Stat. § 227.46(2).

Given under my hand at the City of Milwaukee,  
Wisconsin, this 3rd day of January, 2014



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