



**STATE OF WISCONSIN**  
**Division of Hearings and Appeals**

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In the Matter of

Office of the Inspector General, Petitioner

vs.

DECISION

Case #: FOF - 153868

██████████, Respondent

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Pursuant to petition filed December 4, 2013, under 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 Wednesday, January 29, 2014, by telephone.

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

**PARTIES IN INTEREST:**

Petitioner:

Office of the Inspector General  
Department of Health Services  
P.O. Box 309  
Madison, WI 53701  
By: Nadine Stankey

Respondent:

██████████  
██████████  
████████████████████

**ADMINISTRATIVE LAW JUDGE:**

Brian C. Schneider  
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 during the period March 1, 2010 through February 15, 2011.

2. During that period the respondent made FS purchases at [REDACTED] Food, a small corner store that since has been disqualified as an FS vendor due to trafficking violations.
3. [REDACTED] Food 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 were no shopping baskets for customers to place multiple items that would add up to large purchase amounts. The store stocked minimal amounts of groceries, and had an emphasis on snack items.
4. During the entire period only four purchases were made using the respondent's FS card at [REDACTED]. Two were noticeable. On November 17, 2010, \$82.75 was charged to the card. Just three days before the respondent had made purchases totaling \$200 at [REDACTED], and then there were five smaller purchases at various stores between those charges and November 17.
5. On December 14, 2010, the respondent made \$220 in purchases at [REDACTED] and [REDACTED]; then on December 16, she made a \$46 purchase at [REDACTED]. Less than two hours later on December 16 \$52.00 was charged to the respondent's FS card at [REDACTED] Food.
6. On December 19, 2013, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that the respondent trafficked FS.

### 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.

*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).

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.

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 her do so and neither she nor the [REDACTED] Food storekeeper admitted to the charges (at least entirely; the storekeeper’s version changed over time). However, it is inferred that the FNS did substantial research on trafficking activity and actions associated with trafficking. [REDACTED] Food was disqualified as an FS vendor for taking part in trafficking activities, and the two purchases in question by the respondent fit the profile. An especially large purchase at [REDACTED] just three days after the respondent made a major purchase at [REDACTED] is suspicious given how difficult it would be to ring up \$82 at the tiny [REDACTED] check out area. It is even more suspicious given that the respondent made smaller purchases at other stores in the days after the [REDACTED] purchases. The respondent could get to [REDACTED] [REDACTED], and she had plenty of options to shop for small supplemental food items. Thus a sudden \$82 charge at [REDACTED] is questionable.

The second charge at [REDACTED] on December 16 is equally disturbing. The respondent purchased over \$250 in food at [REDACTED] and [REDACTED] in mid-December, including a \$46 purchase at [REDACTED] just before 8:00 p.m. on

December 16. Then at 9:40 p.m. the respondent spent \$52 at [REDACTED]. Given [REDACTED]'s history, the only reasonable conclusion that can be reached is that the respondent sought [REDACTED] Food out to utilize the store owner's willingness to allow FS cards to purchase non-food items. Anybody with access to a [REDACTED] would be loath to spend that kind of money at an expensive corner store.

The respondent appeared for the hearing and was given an opportunity to respond. Given the high standard of proof, any reasonable and credible explanation could have swayed me to the respondent's position. However, the respondent testified that she did not remember shopping at [REDACTED] Food. That is not a response that can sway a decision maker. Even if it is three years ago, I find it hard to believe that a person on a short budget for food would totally forget spending \$82 at a corner grocery store when she regularly shopped at larger, less expensive stores. I conclude, therefore, that the OIG has shown convincingly that the respondent probably took part in the trafficking at [REDACTED] Food, and that the respondent did not rebut the evidence. I note that the law does not require a pattern of trafficking; just one instance is enough to trigger the IPV finding.

### **CONCLUSIONS OF LAW**

1. The respondent violated, and intended to violate, the FS program rule specifying that a recipient shall not traffic FS.
2. The violation specified in Conclusion of Law No. 1 is the first such violation committed by the respondent.

**NOW, THEREFORE,** it is

**ORDERED**

That the petitioner's determination is sustained, and that the petitioner may make a finding that the respondent committed a first IPV of the FoodShare program and disqualify the respondent from the program for one year, effective the first month following the date of receipt of this decision.

### **APPEAL TO COURT**

You may appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to Circuit Court, the Petitioner in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail, no more than 30 days after the date of this hearing decision. The address of the Department is: 1 West Wilson Street, Room 651, Madison, WI 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other “PARTIES IN INTEREST” named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 225.53.

Given under my hand at the City of Madison,  
Wisconsin, this 3rd day of February, 2014

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\sBrian C. Schneider  
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



**State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

Brian Hayes, Administrator  
Suite 201  
5005 University Avenue  
Madison, WI 53705-5400

Telephone: (608) 266-3096  
FAX: (608) 264-9885  
email: [DHAMail@wisconsin.gov](mailto:DHAMail@wisconsin.gov)  
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on February 3, 2014.

Office of the Inspector General  
Public Assistance Collection Unit  
Division of Health Care Access and Accountability