STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

REHEARING

vs.

DECISION

Case #: FOF - 153902

[redacted], Respondent

Pursuant to petition filed December 4, 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 Wednesday, July 9, 2014 at 02:00 PM, at Milwaukee, Wisconsin. The matter was initially scheduled for hearing on January 22, 2014. A rehearing request was filed and granted based on failure of respondent to receive notice of the initial hearing.

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:
[redacted]

ADMINISTRATIVE LAW JUDGE:
John Tedesco
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 October 11, 2010 through February 16, 2011.

2. Respondent transacted business at [redacted] Food Market using his FS EBT card between 6/4/10 and 2/16/11.
3. On May 29, 2014, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that respondent trafficked FS at [redacted] Food Market.

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. §§ 946.92(2).

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., 4th 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.

The petitioner asserts that the respondent intentionally violated SNAP regulations by trafficking FoodShare benefits. 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."

In order to prove its case, the petitioner presented testimony and documentary evidence. The petitioner relied in part upon an investigation of [redacted] Food Market conducted in *2005* by an unidentified person employed by the FNS and is hearsay. The petitioner also relied upon the undated EBT Sanction Determination for [redacted] Food Market which is also hearsay. There is no dispute that [redacted] Food Market was disqualified from the FS program. See *Chidi Onukwugha v. United States*, No. 11-CV-907. 2013 WL 1620247 (E.D. Wis. April 12, 2013). However, any guilt on the part of the store does not translate directly to guilt on the part of the respondent.

The petitioner argued that respondent's use of his EBT card showed suspicious transactions, such as transactions with large dollar amounts. The petitioner provided a printout of all of respondent's FS transactions which included four transactions over $95. Indeed, the court writes in the case against the store,

> While [redacted] Food Market is small, it is well-stocked and offers a relatively wide selection of groceries. Thus, it is reasonable that nearby residents without ready access to a larger full-line grocery store, such as those who testified on Onukwugha's behalf, will do much of their grocery shopping at [redacted] Food Market and therefore may be reasonably expected to spend more than $40.00 in a single trip. Although the absence of shopping carts, an optical scanner, or substantial counter space will undoubtedly complicate a large purchase, the testimony of Onukwugha's customers made clear that shoppers will bear this inconvenience in the absence of a better alternative. A review of the 309 transactions demonstrates that many of the transactions are those of just a few households. In fact, based upon the court's review, 271 of the 309 transactions are from households who made more than one purchase of greater than $40.00 at [redacted] Food Market during the relevant six-month period. While this is arguably consistent with a few customers repeatedly exchanging their SNAP benefits for cash, the more reasonable and logical explanation is the innocent one—certain customers simply choose to do a large portion of their shopping at [redacted] Food Market.

Chidi Onukwugha v. United States, No. 11-CV-907. 2013 WL 1620247, p.6 (E.D. Wis. April 12, 2013).

One of the other bases for finding that respondent was trafficking were the purchases ending in $.98, $.00 or $.50. or the "ending in same cent value" category. Apparently [redacted] Food Market had a pattern of transactions ending in $.98. See *Chidi Onukwugha v. United States*, No. 11-CV-907. 2013 WL 1620247 (E.D. Wis. April 12, 2013). The court writes about this category as well. It found that the owner did engage in "even dollar pricing to some degree…but that there is no pricing strategy that is likely to end with final totals in larger transactions disproportionately ending in $0.98" *Id.* at 8-9. The court found that such anomalies in purchase totals for the $.98 could not be reasonably expected absent some manner of manipulation by the store owner. *Id.* I agree that the small even dollar purchases such as $1.00 and $3.00 exist. Indeed, 9 or the 24 transaction during this time period are small whole dollar purchases. The Department has argued that small dollar transactions prior to large transactions indicate the store owner checking the balance in order to determine that there is an amount to traffic. But, this only happens once in the 24 transactions. It is at least equally likely that the store owner charges a flat rate of a dollar for a candy bar for example which would be a tax-free purchase, and that sometimes a customer buys one, two or three of these.

In sum, suspicion is not the same as clear and convincing evidence. We know that the owner was trafficking, choosing to end a number of purchases in $.98. What I do not know is whether the respondent was any part of that, or if the owner was simply making up his own prices as he went. Further, there is no consistent pattern on which to find that the respondent trafficked his FS benefits. Based upon the foregoing, it is found that the OIG has failed to meet its burden to prove, by clear and convincing evidence, that the Respondent intentionally violated the rules of the FS program by trafficking his FS benefits.

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**

That the IPV is REVERSED. This action shall be taken within 10 days of the date of this decision.

REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

APPEAL TO COURT

You may also 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 30th day of July, 2014

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\sJohn Tedesco
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
Attorney Patricia DeLessio - 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
Internet: http://dha.state.wi.us

The preceding decision was sent to the following parties on July 30, 2014.

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