

2. The respondent made purchases at [REDACTED] [REDACTED] during the period of July 12, 2010 to February 12, 2011. The Department concluded that respondent was trafficking in FS benefits at [REDACTED] Food for three general, statistical reasons: 1) respondent made unusually large FS purchases with his EBT card considering the size of store, its limited food selections, and the availability of larger stores in the area; 2) respondent made an unusual amount of FS purchases with his EBT card within a short time frame at [REDACTED] Food with two purchases on December 10, 2010 of \$.35 and then \$79.98; and four purchases on January 10, 2011 totaling \$64.00 (including 3 purchases of \$20); and 3) many of respondent's purchases with his EBT card at [REDACTED] Food ended in the same cents value (such as \$00, \$.50 and \$.98) and such purchases are unusual and may be an indicator of card trafficking.
3. On December 19, 2013, the petitioner prepared an Administrative Disqualification Hearing Notice alleging respondent trafficked in FoodShare (FS) benefits at [REDACTED] [REDACTED].

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., 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 Department argued that it correctly disqualified the respondent’s FS for one year for the reasons set forth in Finding of Fact #2 above. While such general, statistical allegations may be suspicious, it does not nearly rise to the level of clear and convincing proof. The Department’s asserted that many of respondent’s purchases with his EBT card at [REDACTED] Food ended in the same cents value (such as \$00, \$.50 and \$.98), and alleged such purchases are unusual and may be an indicator of card trafficking. The statistical fact that some purchases on certain dates ended in \$00, \$.50 and \$.98 may be only an indication of pricing in that store or only a coincidence that many items ended in those cent values.

The OIG representative also indicated that it was possibly suspicious that within a short period purchased items of \$.35 and then \$79.87. However, the respondent may have simply forgotten items or decided he wanted to share some of those food items with other friends. In fact, respondent only lived about two blocks away from [REDACTED] Foods so trips to that store were convenient and fast. In any case, such hearsay examples without more specific non-hearsay evidence do not establish the Department’s inference of FS fraud in this case. The other statistical allegations of suspicious patterns in Finding of Fact #2 are too general and vague to establish a clear evidentiary basis for a finding of fraud.

The Department in particular argued that it was suspicious that respondent purchased \$60 worth of Nachos within a period of 1½ hour on January 10, 2011, and that such purchases were likely trafficked FS at [REDACTED] [REDACTED]. However, during the January 29, 2014 hearing, the respondent responded credibly that on January 10, 2011, there was a “special” at [REDACTED] Foods for \$20 for a purchase of Nachos. He thus decided to buy three

purchases of those Nachos because he thought it was such a good deal. Such explanation is possible. OIG also asserted that it was a violation of 7 CFR 274.7(a) to purchase hot foods with an EBT card food items which will be eaten in the store. Attachment 3. However, OIG did not present any evidence to establish that respondent intended or did eat all or some of the three purchases of Nachos while still in the [REDACTED] Foods Market. In any case, assertion makes no sense. It is much more likely that respondent took all or most of the Nachos to his home to eat over a period of a few days or with others. OIG was unable to refute the testimony by respondent.

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, and that this violation was the first such violation committed by the respondent. Therefore, the petitioner incorrectly seeks to disqualify the respondent from the FS program for one year.

CONCLUSIONS OF LAW

The Department did not establish by clear and convincing evidence that respondent trafficked in FoodShare benefits at [REDACTED].

NOW, THEREFORE, it is ORDERED

That the petitioner's determination is **reversed**, and that the petitioner shall withdraw any finding that the respondent committed a first IPV of the FoodShare program and shall not sanction the respondent.

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 17th day of March, 2014

\sGary Wolkstein
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

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The preceding decision was sent to the following parties on March 17, 2014.

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