



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

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In the Matter of

Office of the Inspector General, Petitioner

vs.

██████████, Respondent

DECISION

Case #: FOF - 154692

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Pursuant to petition filed January 14, 2014, 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 Wednesday, March 12, 2014 at 02:30 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:**

Peter McCombs (telephonically)  
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 July 1, 2012 through October 31, 2012. The respondent resides with her two minor children, ages 13 and 17.

2. During that period the respondent's EBT card was used to make FS purchases at [REDACTED] Convenience Store (FNS # [REDACTED]), a small store that since has been disqualified for trafficking FS with FS recipients. Exhibit 1.
3. [REDACTED] Convenience Store was disqualified from the FS program and met at least 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 and point of sale device was through a small opening in a security window. There was little counter space on which to place items for purchase. There were no shopping baskets or carts for customers to place multiple items that would add up to large purchase amounts. There was no fresh produce or meat available for purchase. Exhibit 1.
4. On January 7, 2014, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that the respondent trafficked her FS benefits.

### 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.

In the case at hand, the Department of Health Services, Office of the Inspector General (OIG) asserts that the respondent intentionally violated SNAP regulations by trafficking her 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.”

With regard to the purchase of non-eligible food items, the petitioner produced no testimony from anyone who saw the respondent do this, nor did the petitioner produce any receipt or other documentation showing that the respondent’s EBT card was used to purchase non-eligible items.

The petitioner analyzed the respondent’s use of her EBT card in conjunction with the FNS Store Survey form to establish that [REDACTED] was trafficking benefits and that the respondent shopped there. Those reports are not sufficient to prove trafficking. First, the respondent credibly testified that she is employed second shift, and many of the identified instances of trafficking occurred while she was at work. Second, the petitioner credibly testified that her teenage (minor) son had access to and used her EBT card. Third, I note that guilt on the part of the grocery store does not translate directly to guilt on the part of the respondent. The record lacks sufficient information establishing that the petitioner herself trafficked FS benefits at [REDACTED].

The OIG argued that respondent’s use of her EBT card showed suspicious transactions, such as transactions with large dollar amounts over \$25.00 given the size of the store, large numbers of transactions in a short amount of time, and transactions with even dollar or half dollar amounts. However, suspicion is not the same as clear and convincing evidence. Simply stated, the petitioner has failed to place the respondent at the scene, and thereby has failed to demonstrate that the petitioner is responsible for the suspicious transactions.

This is a very close case. Based upon the credible testimony provided by the respondent, and upon the record before me, I find that the petitioner has failed to meet its burden to prove, by clear and convincing evidence, that the Respondent intentionally violated the rules of the FoodShare program by trafficking her benefits between July 1, 2012 and October 31, 2012.

**CONCLUSIONS OF LAW**

The petitioner has failed to meet its burden to prove, by clear and convincing evidence, that the respondent intentionally violated the rules of the FoodShare program by trafficking her benefits between July 1, 2012, and October 31, 2012.

**THEREFORE, it is ORDERED**

That IPV Case Number [REDACTED] is hereby reversed, and that the Department of Health Services cease all enforcement efforts. All actions required by this Order shall be completed within 10 days following issuance of this Decision.

**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 17th day of April, 2014.

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\sPeter McCombs  
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
- Erica Dresen - email



## State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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

Office of the Inspector General  
Public Assistance Collection Unit  
Division of Health Care Access and Accountability  
[ericam.dresen@wi.gov](mailto:ericam.dresen@wi.gov)