



**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 - 154693

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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 telephonic hearing was held on Tuesday, March 11, 2014 at 01:00 PM.

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  
By: Erica Dresen

Respondent:

██████████  
██████████  
██████████

**ADMINISTRATIVE LAW JUDGE:**

Kelly Cochrane  
Division of Hearings and Appeals

## FINDINGS OF FACT

1. The respondent (CARES # [REDACTED]) is a resident of Waukesha County who received FS benefits in Milwaukee County from July 1, 2012 through October 31, 2012.
2. During that period the respondent made FS purchases at [REDACTED] ([REDACTED]), a small store that since has been disqualified for trafficking FS with FS recipients.
3. [REDACTED] 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.
4. The respondent made purchases on her FS card that fit the three categories of trafficking.
5. On January 7, 2014, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that respondent trafficked FS benefits at [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., 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.

The FNS did substantial research on trafficking activity and actions associated with trafficking. That [REDACTED] was disqualified as an FS vendor for taking part in trafficking activities with recipients is undisputed. I find here that respondent took part in such activities and was participating in trafficking herself. The respondent made purchases on her FS card that fit the categories of trafficking: an unusual number of transactions ending in the same cents value, excessively large purchase transactions and multiple transactions made by the same purchaser in unusually short time frames.

Respondent’s testimony about why she shopped at [REDACTED] was that it was near her residence at the time. However, the testimony about how her purchases were made at [REDACTED] was inconsistent. At first she testified that her monthly purchases would “of course” look the same (in response to the petitioner’s allegation that her pattern of purchases over time were similar) because that’s what happens when someone uses a grocery list and must figure out how much to spend and save each month. She stated that she was reliant on friends and relatives to get her to a regular grocery store and that she would pay them to do so when they were available. However, one can see by looking at the transactions that there was no pattern as to how much she would spend when she got to a regular grocery store, which she did monthly. Further, if she were using a grocery list it is highly questionable as to why she would shop at [REDACTED] several times on the same day as the regular grocery store, and in particular, how then she would then forget things when shopping at the regular grocery store and need to shop at [REDACTED]. Further, her

testimony was that she would let her kids use her FS at [REDACTED] for junk food with whatever was left over on the FS card, because she would not buy junk food at the regular grocery store. However, if you look at what was spent monthly, this doesn't add up either:

	[REDACTED]	Grocery Stores
July	\$333.72	\$235.90
August	\$246.23	\$278.84
September	\$101.05	\$410.88
October	\$212.55	\$315.30

Finally, when asked about how on July 12, 2012 she could spend \$219.94 at a regular grocery store, and then about an hour and a half later spend \$30.85 at [REDACTED], and then one minute later spend \$30.65 at [REDACTED], she recalled getting a phone call, turning around and getting "more stuff". In sum, I find respondent's testimony to be convenient, self-serving, and not credible.

Based upon the record before me, I find that the petitioner has 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 correctly seeks to disqualify the respondent from the FS program for one year.

**CONCLUSIONS OF LAW**

1. The respondent violated, and intended to violate, the FS program rule specifying that a person commits an IPV when she intentionally 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..
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.

**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 Milwaukee,  
Wisconsin, this 3rd day of April, 2014

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\sKelly Cochrane  
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 3, 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)