



**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 - 159594

██████████, Respondent

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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: Nicole Housely

Office of the Inspector General  
Department of Health Services - OIG  
PO Box 309  
Madison, WI 53701

Respondent:

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

**ADMINISTRATIVE LAW JUDGE:**

Michael O'Brien  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. The respondent (CARES # ██████████) is a resident of Waupaca County who received FS benefits in Waupaca County from March 2, 2014 through April 14, 2014.
2. On October 13, 2014, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that the respondent allowed other persons to use her FS debit card while she was incarcerated.
3. The respondent failed to appear for the scheduled September 23, 2014, Intentional Program Violation (IPV) hearing and did not provide any good cause for her failure to appear.
4. The respondent lived in a one-person household.

5. The respondent was in jail without Huber privileges from November 22, 2013, through February 20, 2014.
6. While the respondent was in jail, her FoodShare card was debited for \$191.37. Whoever used the card needed the respondent's pin number to gain access to it.
7. The petitioner was aware that others could not use her FoodShare card.

### 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).

7 C.F.R. §273.16(e)(4) provides that the hearing shall proceed if the respondent cannot be located or fails to appear without good cause. The respondent did not appear or claim a good cause reason for not attending the hearing. Therefore, I must determine whether the respondent committed an IPV based solely on the evidence that the petitioner presented at hearing.

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 petitioner was incarcerated from November 22, 2013, through February 20, 2014. While in jail, she continued to receive FoodShare benefits, and other persons debited \$191.37 from her card. This violated at least two FoodShare rules. Residents of institutions that provide over half of their meals cannot receive FoodShare. 7 CFR §273.1(a)(7)(vi). Wisconsin FoodShare policy denies benefits to all those incarcerated for more than 30 days unless they are released under the Huber law to care for and purchase and prepare food for their families. *FoodShare Wisconsin Handbook*, § 3.2.1.2.2. The respondent was part of one-person FoodShare household, and she did not have Huber privileges while in jail. This means that she should not have even been eligible, much less able to let others to use her card. That her benefits continued is her fault and not the agency’s because recipients must report a change of circumstances that affects their benefits within 10 days. 7 CFR § 273.12(a)2. In addition, Wisconsin FoodShare recipients cannot knowingly transfer food coupons “except to purchase food from a supplier...” Wis. Stat. § 49.795(4). Because the respondent undoubtedly violated both of these provisions, the only question is whether she did so intentionally.

Even if she did not remember that she had to report her incarceration as a change of circumstances, the record establishes that she knew that she could not transfer her benefits to someone else. The agency worker testified that she talked to the respondent who at first claimed that she allowed her son to use her benefits because she wanted to feed her child, but she quickly revised her story to claim that her card must have been stolen. Her son was not part of her household and thus could not use her FoodShare to feed himself, which her quick revision indicates she was aware of. As for her claim that her card was stolen, this lacks credibility because it was made only after she recanted that she allowed her son to use the card. Furthermore, if her card had been stolen, whoever used it would need her personal identification number, which that person could only receive from her. It defies common sense to believe that someone who stole a card would call the victim to obtain the PIN and that the victim would then provide the number to the thief.

The record before me establishes by clear and convincing evidence that the respondent intentionally violated FS program rules and that this violation was her first such violation committed. Therefore, the petitioner correctly seeks to disqualify her from the FS program for one year.

### **CONCLUSIONS OF LAW**

1. The respondent violated, and intended to violate, the FS program rule specifying that only those eligible for benefits can use a FS card.
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 it may make a finding that the respondent committed a first IPV of the FoodShare program and disqualify her 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 Madison,  
Wisconsin, this 13th day of October, 2014

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\sMichael O'Brien  
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  
Nicole Housley - email



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

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The preceding decision was sent to the following parties on October 13, 2014.

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