STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Milwaukee County Department of Human Services, Petitioner

vs. DECISION

[redacted], Respondent Case #: FOF - 172895

Pursuant to petition filed March 18, 2016, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Milwaukee County Department of Human Services to disqualify [redacted] from receiving FoodShare benefits (FS) for a period of one year, a hearing was held on Thursday, April 28, 2016 at 12:30 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:

Department of Health Services
1 West Wilson Street, Room 651
Madison, WI 53703

By: [redacted]
Milwaukee Enrollment Services
1220 W. Vliet Street
Milwaukee, Wisconsin 53205

Respondent:

[redacted]

ADMINISTRATIVE LAW JUDGE:
Michael O'Brien
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent ([redacted]) who received FS benefits in Milwaukee County in August 2011.
2. The respondent was issued a QUEST card that allowed her access to her monthly FoodShare allotment. QUEST cards are electronic benefit transfer cards that replaced food stamp coupon booklets.
3. The respondent's QUEST card was debited $100 at [redacted] Distribution, LLC ([redacted]) on August 13, 2011. It is not clear who was using the card when it was debited.
4. [redacted] was a licensed vendor of the United States Department of Agriculture Food and Nutrition Service, which enabled it to redeem QUEST cards.
5. [redacted] was classified as a mobile vendor and operated out of private vehicles. Between August, 2010 and January 2013, [redacted] redeemed approximately $778,000 in QUEST benefits from food stamp benefit recipients who were not purchasing food, but instead receiving cash for providing access to their QUEST benefits.
6. On or about February 15, 2013, [redacted], doing business as [redacted], pled guilty to a charge of unlawfully purchasing and redeeming FS benefits. [redacted] admitted that no food or groceries were ever provided by [redacted]/or [redacted] in exchange for Quest benefits.
7. On March 24, 2016, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that respondent intentionally transferred $100 in FS benefits to [redacted] in exchange for cash payments.

DISCUSSION

Trafficking FoodShare benefits violates the program's rules. Wis. Stat. § 946.92(2g). It includes selling FoodShare benefits for cash. 7 CFR § 271.2; *see also* Wis. Stat. § 946.92(1)(dm)1. FoodShare recipients lose their eligibility if the department proves by clear and convincing evidence that they intentionally violated the program's rules; the penalty for the first violation is one year. 7 CFR §§ 273.16(e)(6) and (b)(1)(i). The Department seeks to disqualify the respondent for one year because it contends that she exchanged her FoodShare benefits for cash.

Clear and convincing is a middle level of proof that requires the Department to show that more than just a preponderance of the evidence supports its position but does not require it to eliminate all reasonable doubt, as it would have to in a criminal case:

> 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 v. Kuehn, 11 Wis.2d 15, 26 (1959)*Kuehn*, 11 Wis.2d at 26.

Wisconsin Jury Instruction – Civil 205 explains that this level of evidence must clearly have more convincing power than the opposing evidence, but it does not require absolute certainty:

> 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.

The *McCormick* treatise suggests that the standard "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, to find that the respondent intentionally violated the FoodShare program's rules, the evidence must induce a firm conviction that she attempted to purchase FoodShare benefits and that she did so intentionally, although there may be a reasonable doubt that this is true. Intent is a subjective state of mind determined upon all of the facts. *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis.2d 183 (1977). A person is presumed to know and intend the probable and natural consequences of her actions

The allegations against the respondent occurred as part of the [redacted] investigation. [redacted] Distribution was a licensed FoodShare vendor operated by [redacted]. But he did not sell any food. Instead he purchased FoodShare benefits from others for less than their stated value and then redeemed those benefits. Between August, 2010 and January 2013, [redacted] redeemed approximately $778,000 in benefits in this manner from food stamp benefit recipients. On February 15, 2013, [redacted] pled guilty to unlawfully purchasing and redeeming FoodShare benefits. He admitted that he never provided food in exchange for the benefits.

The respondent's card was redeemed $100 in FoodShare benefits with [redacted] Distribution on August 13, 2011. Due to the nature of this illicit business, the most reasonable explanation is that whoever used the card there received cash for these transactions. But the respondent contends that she was not the one who used the card at [redacted] Distribution. She had a child who was 16 at the time who used the card to buy food for the family. I am skeptical of this explanation. Still, the facts are that the card was used incorrectly only once, and it is not unusual for someone to have a teenage child do at least some grocery shopping to pick up a few items at a neighborhood grocery store. The respondent did sound credible when she testified. Because the department seeks to disqualify the respondent from the FoodShare program, it must do more than show that it is more likely than not that she intentionally violated the program's rules. Given these circumstances, I cannot find that it established by clear and convincing evidence that she intentionally violated FoodShare program rules. Therefore, the petitioner cannot disqualify her from the FoodShare program for one year.

CONCLUSIONS OF LAW

For the reasons discussed above, there is no clear and convincing evidence that the respondent intended to commit an IPV.

NOW, THEREFORE, it is **ORDERED**

That the petitioner's determination of an intentional program violation is reversed, and the petition for review is hereby dismissed.

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 12th day of May, 2016

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\sMichael O'Brien
Administrative Law Judge
Division of Hearings and Appeals

c: Miles - email
Public Assistance Collection Unit - email
Division of Health Care Access and Accountability - email
[redacted] - email

State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on May 12, 2016.

Milwaukee Enrollment Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
[redacted]