STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

[redacted], Respondent

DECISION
Case #: FOF - 173581

Pursuant to petition filed April 11, 2016, 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 [redacted] from receiving FoodShare benefits (FS) for a period of one year, a hearing was held on Tuesday, May 24, 2016 at 2:15 PM by telephone. The hearing record was held open for seven days for a submission from the respondent regarding 2012 and 2013 residence; that submission was received.

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
P.O. Box 309
Madison, WI 53701

By: [redacted], PARIS Interstate Agent

Respondent:
[redacted]

ADMINISTRATIVE LAW JUDGE:
Nancy Gagnon
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES #[redacted]) is a resident of Texas who received Wisconsin FS benefits via Milwaukee County from at least December 1, 2011 through June 30, 2014.
2. On her December 21, 2011 required annual renewal, the respondent reported that she continued to live in Milwaukee, Wisconsin as a FS household of one person. She filed additional renewals on November 13,

2012, and November 20, 2013, again reporting that she lived in Milwaukee, Wisconsin. As a result, she remained open for Wisconsin FS from at least December 2011 through June 2014.

3. The respondent used her Wisconsin FS card in Wisconsin from March through October 2011. In November 2011, she began using the Wisconsin card in Tennessee. The card was exclusively used in Tennessee from December 2011 (month of the first suspect renewal, above) through May 2012. The card was then used in Wisconsin from June 2012 through January 2013. The card was exclusively used in Tennessee from February 2013 into February 2014, when Texas usage appeared. Usage in Tennessee resumed in March 2014 and continued into September 2014. Wisconsin FS were discontinued thereafter.

4. The petitioner moved out of Wisconsin in July 2013. She has not resided in Wisconsin since that date.
5. On April 13, 2016, the petitioner prepared an *Administrative Disqualification Hearing Notice* alleging that the respondent provided false address information to incorrectly obtain Wisconsin FS. The *Notice* was received by the respondent.
6. The respondent's violation of FS rules regarding giving correct information at annual review, and regarding timely reporting of address changes, was intentional.

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).

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 be a reasonable doubt as to their existence.

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.

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. On her December 21, 2011 required annual renewal, the respondent reported that she continued to live in Milwaukee, Wisconsin as a FS household of one person. She filed additional renewals on November 13, 2012, *and November 20, 2013*, again reporting that she lived in Milwaukee, Wisconsin. As a result, she remained open for Wisconsin FS from at least December 2011 through June 2014. However, she moved out of Wisconsin to Memphis, Tennessee in July 2013, and did not return to Wisconsin to live thereafter.

The respondent's Wisconsin FS card usage pattern is summarized as follows:

- Exclusively used in Tennessee from December 2011 - May 2012.
- Used in Wisconsin from June 2012 - January 2013.
- Exclusively used in Tennessee from February 2013 - February 2014, then Texas usage appeared.
- Usage in Tennessee resumed in March 2014 and continued into September 2014.

If the respondent offered nothing to counter this usage information, I would agree that Wisconsin was not her state of residence for the two periods alleged by the Department (December 2011 – May 2012, and March 2013 – June 2014). However, the respondent did proffer other evidence.

Specifically, the respondent testified that she was visiting in Tennessee from December 2011 into May 2012 because her sister was dying from cancer there, and another relative was badly injured in an accident. She maintained intent to return to Wisconsin, and did so by June 2012. She testified that she then moved away from Wisconsin by July 2013 and did not return. Her FS usage from July 2013 forward was all outside of Wisconsin, consistent with that portion of her testimony. In support of her testimony that she did not intend to move from Wisconsin until July 2013, the respondent proffered (post-hearing) copies of her monthly rent checks for her apartment on [redacted], for December 2011, January, February, and March 2012, and June and July 2012. Payment of rent for a Wisconsin residence creates enough doubt as to the respondent's residence for the December 2011 through May 2012 period, such that I cannot conclude that clear and convincing evidence supports a finding that the respondent was not a Wisconsin resident during this period.

Jumping forward to 2013, the respondent produced monthly Wisconsin rent checks for February, March, April and June 2013. She also produced a copy of a notarized notice to the Rent Assistance program in Wisconsin advising that she was moving out of her [redacted] apartment no later than July 31, 2013. Finally, she proffered a *Tenant Move at Recertification/Responsibility Affidavit* for the City of Milwaukee, declaring that she was moving by July 31, 2013. All of these documents are consistent with the respondent's testimony regarding her residence in 2013.

I infer that the respondent is hoping that this Judge will negate the FS overpayment assessed by the Department for the December 2011 through May 2012 period for $575 (claim [redacted]) and reduce the $807 overpayment for the March through November 2013 period (claim [redacted]). However, this proceeding is not an overpayment hearing. Overpayments can be challenged through a separate hearing request and process. The purpose of *this* proceeding is to determine whether the respondent intentionally violated FS rules that require accurate reporting of residence. Although the respondent did not violate the rule during the whole timeframe alleged by the Department, she did clearly did violate the rule for a portion of it: July 2013 through June 2014. That period of violation is enough for me to conclude that she violated the rule and will be subject to sanction.

The respondent did not testify that she was not given written warnings to report an address change or to give truthful information on her annual renewals. She knew the reporting rules, but disregarded them. 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 she must correctly report her address and residence at application, and timely report address changes.
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.

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 24th day of June, 2016

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\sNancy Gagnon
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
[redacted] - email

State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on June 24, 2016.

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