

2. The respondent applied for FS on May 28, 2015. On that application, she stated that she was separated from her husband, [REDACTED], and that he was not living in her household. The husband was working at [REDACTED], Eau Claire, at that time and through to the present. If he was in the respondent's household, his income would have been included in determining eligibility and calculating the monthly allotment amount.
3. The respondent completed a periodic FS renewal on July 20, 2015. She again asserted that she is separated from her husband, and that he did not reside with her. Both the application and renewal documents advise the applicant that it is against program rules to give false information, and that there are penalties for doing so.
4. The husband receives child support for his daughter, who resides with the respondent. The address he supplied to the child support agency for the child from May 28 through November 4, 2015, is the respondent's address of [REDACTED], Chippewa Falls. The lease for the respondent's address during the period lists both the respondent and her husband as tenants. Other business records for the period show the respondent's address being used by her husband (e.g., credit reports, utility disconnection notice, bank records, his employer records). No alternative business mailing address was used.
5. Due to a physical problem, the respondent drove her husband's Trailblazer during the subject period, and parked it in front of her residence. Her husband, in turn, drove her Mazda 626 sedan. The Mazda was repeatedly observed parked in front or adjacent to the respondent's residence at evening and early morning times (e.g., October 30 at 5:45 a.m., November 6 at 6:00 a.m. and 10:45 p.m., November 8 at 10:00 p.m., November 9 at 5:50 a.m., November 13 at 7:30 a.m.).
6. Documentation of an alternative address for the husband during the subject period was not proffered into the hearing record.
7. As of the date of hearing, the respondent had not filed for a legal separation from her husband. The respondent's husband resided with the respondent at the [REDACTED] address from May into November, 2015.
8. On November 18, 2015, the petitioner prepared an *Administrative Disqualification Hearing Notice* alleging that the petitioner intentionally received excess FS by falsely stating that her husband was not living in her household. The respondent received the *Notice*.

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.

CONCLUSION

The respondent does not deny her husband’s identity, that they are not legally separated, or that he earns income that would reduce the amount of FS that her household receives. His business records for the May – November

period continued to use the respondent's address. The respondent correctly pointed out that she could not control his failure to use a new business address. That information *alone* is not enough to conclude that he continued to reside with her. However, when that information is added to the investigator's repeated observation of the Mazda vehicle used by the husband at times consistent with overnight stays at the respondent's residence, it seems more likely than not that the husband was residing with the respondent. Additionally, a believable alternative address for the husband during the period was not provided. At one point in the investigation, the respondent told an agency worker that the husband was living out of his (her Mazda?) car. On October 29, she told the investigator that the husband was living with a girlfriend, but could not supply the girlfriend's name or address. The respondent produced the neighbor, [REDACTED], from [REDACTED], at hearing. He testified that the husband stayed overnight from two to seven nights per month during the subject period. That means that he was spending the majority of his nights elsewhere. It is more plausible that he spent nights at the neighbor's when disagreeing with the respondent, rather than that he was "residing" at a house next door for a small minority of the time. Also, the respondent posted Facebook messages that suggested that she and the respondent lived together. *See*, Exhibit 10. This is a minor piece of evidence, but does add to the substantial accumulation of evidence against the respondent.

Finally, the respondent was not credible. Her explanation for why a legal separation or divorce proceeding had not been started was that she hoped to adopt her husband's daughter (not her biological child), and that her chances of doing so were better if she was still married to the girl's father. She believes that termination of the birth mother's parental rights is a possibility in this scenario. Also, the respondent stated that she has a boyfriend who has recently moved to this area from Texas. This all seems quite convoluted, and did not enhance her credibility.

When all of the credible information is considered, the result is that the Department has established by clear and convincing evidence that the respondent's husband was not residing outside of her household from May into November 2015, and that the respondent intentionally reported false information regarding his residence to the Department to get larger FS allotments. Based upon the record before me, I find that the petitioner has established 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 she cannot give false information to obtain more FS than she is entitled to.
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 Madison,
Wisconsin, this 26th day of January, 2016

\sNancy Gagnon
Administrative Law Judge
Division of Hearings and Appeals

- c: Great Rivers Consortium - email
- Public Assistance Collection Unit - email
- Division of Health Care Access and Accountability - email
- ██████████ - email



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAMail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on January 26, 2016.

Chippewa County Department of Human Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
[REDACTED]@co.eau-claire.wi.us