



**STATE OF WISCONSIN  
Division of Hearings and Appeals**

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In the Matter of

Winnebago County Department of Human Services,  
Petitioner

DECISION

v.

FOF/171485

[REDACTED], Respondent

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**PRELIMINARY RECITALS**

Pursuant to a petition filed January 15, 2016, under Wis. Admin. Code §HA 3.03, and see, 7 C.F.R. § 273.16, to review a decision by the Winnebago County Department of Human Services to disqualify [REDACTED] from receiving FoodShare benefits (FS) for a period of one year, a hearing was held on March 01, 2016, at Oshkosh, Wisconsin.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

Department of Health Services  
Division of Health Care Access and Accountability  
1 West Wilson Street, Room 651  
Madison, Wisconsin 53703

By: [REDACTED], Fair Hearing Coordinator  
Winnebago County Department of Human Services  
220 Washington Ave.  
PO Box 2187  
Oshkosh, WI 54903-2187

Respondent:

[REDACTED]  
[REDACTED]  
[REDACTED]

**ADMINISTRATIVE LAW JUDGE:**

Mayumi M. Ishii  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner (CARES # [REDACTED]) is a resident of Winnebago County who received FoodShare benefits from May 1, 2015 through September 30, 2015. (Exhibit 3)

2. On April 13, 2015, the Respondent completed an on-line ACCESS Six Month Report Form (SMRF) in which she reported only herself in her household. The Respondent reported no income. The Respondent electronically signed the SMRF, swearing under penalty of perjury, that the information was complete and correct. (Exhibit 4)
3. The Respondent received paychecks beginning April 10, 2015 and ending July 17, 2015. They were for the following amounts:

4/10/15 - \$375.34	
4/24/15 - \$646.58	Total Income in April = \$1021.82
5/8/15 - \$791.22	
5/22/15 - \$1877.73	Total Income in May = \$1877.73
6/5/15 - \$1238.52	
6/19/15 - \$1400.42	Total Income in June = \$2638.94
7/3/15 - \$1217.98	
7/17/15 - \$611.05	Total Income in July = \$1829.03

The Respondent received no income from this employer in August or September 2015.

4. On January 25, 2016, the agency prepared an Administrative Disqualification Hearing Notice alleging that the Respondent committed an Intentional Program Violation by failing to timely report her employment/income. (Exhibit 1)

### DISCUSSION

#### *Respondent's Non-appearance*

The Respondent did not appear for this hearing. This circumstance is governed by the regulation in 7 C.F.R. §273.16(e)(4), which states in part:

If the household member or its representative cannot be located or fails to appear at a hearing initiated by the State agency without good cause, the hearing shall be conducted without the household member being represented. **Even though the household member is not represented, the hearing official is required to carefully consider the evidence and determine if intentional Program violation was committed based on clear and convincing evidence.** If the household member is found to have committed an intentional program violation but a hearing official later determines that the household member or representative had good cause for not appearing, the previous decision shall no longer remain valid and the State agency shall conduct a new hearing. The hearing official who originally ruled on the case may conduct a new hearing. In instances where the good cause for failure to appear is based upon a showing of nonreceipt of the hearing notice, the household member has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. In all other instances, *the household member has 10 days from the date of the scheduled hearing to present reasons indicating a good cause for failure to appear. A hearing official must enter the good cause decision into the record.*

*Emphasis added*

The hearing in this case took place on March 1, 2016. The Respondent was advised of the date and time of the hearing, in an Administrative Disqualification Hearing Notice that was sent to her, via certified

mail, at an address on [REDACTED] [REDACTED] indicated that this was the Respondent's last known address. However, the notice and related documents were returned to the agency as unclaimed.

Because the Respondent did not claim the notice, she did not receive it. As such, she did not provide a phone number where she could be reached at the time of the hearing. An attempt was made to reach the Respondent at a number listed in the file [REDACTED] without success.

The Respondent did not contact the Division of Hearings and Appeals within ten days of the hearing to explain her absence. Accordingly, it is found that she did not have good cause for her failure to appear.

#### *The Definition of an Intentional Program Violation*

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.

7 C.F.R. § 273.16(c); *see also* Wis. Stat. §§ 946.92(2).

The Department's written policy restates federal law, below:

#### **3.14.1 IPV Disqualification**

7 CFR 273.16

A person commits an Intentional Program Violation (IPV) when s/he intentionally:

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.

An IPV may be determined by the following means:

1. Federal, state, or local court order,
2. Administrative Disqualification Hearing (ADH) decision,
3. Pre-charge or pretrial diversion agreement initiated by a local district attorney and signed by the FoodShare recipient in accordance with federal requirements, or
4. Waiver of the right to an ADH signed by the FoodShare recipient in accordance with federal requirements.

*FoodShare Wisconsin Handbook*, §3.14.1.

The agency may disqualify only the individual who either has been found to have committed the IPV or has signed a waiver or consent agreement, and not the entire household. If disqualified, an individual will be ineligible to participate in the FS program for one year for the first violation, two years for the second violation, and permanently for the third violation. However, any remaining household members must

agree to make restitution within 30 days of the date of mailing a written demand letter, or their monthly allotment will be reduced. 7 C.F.R. §273.16(b).

*What is the County Agency's Burden of Proof?*

In order for the agency 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 violation of the food stamp program per 7 C.F.R. §273.16(e)(6).

"Clear and convincing evidence" is an intermediate standard of proof which is more than the "preponderance of the evidence" used in most civil cases and less than the "beyond a reasonable doubt" standard used in criminal cases.

In Kuehn v. Kuehn, 11 Wis.2d 15, 26 (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. In criminal cases, while not normally stated in terms of preponderance, the necessary certitude is universally stated as being beyond a reasonable doubt.

*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 elements have been proven.

*The Merits of the County Agency's Case*

In the case at hand, the county agency asserts that the Respondent committed an intentional program violation between May 1, 2015 and September 30, 2015 by failing to report her employment/income.

In the April 13, 2015 on-line ACCESS SMRF, the Respondent reported no income, but she had been working shortly before that and received a paycheck three days earlier on April 10, 2015. Consequently, the Respondent was not truthful in the SMRF, when she claimed to have no income.

While the agency has strong evidence showing that the Respondent lied in her SMRF, the agency's case proof of intent is weaker.

The question of intent is generally one to be determined by the trier of fact. State v. Lossman, 118 Wis.2d 526 (1984). While, there is a general rules that a person knows and intends the probably and natural consequences of his or her own voluntary words or acts, intention is a subjective state of mind to be determined upon all the facts. See John F. Jelke Co. v. Beck, 208 Wis. 650 (1932); 31A C.J.S. Evidence §131; Lecus v. American Mut. Ins. Co. of Boston, 81 Wis.2d 183 (1977).

There is no reliable documentation in the record showing that the Respondent was given the penalty warning as required by 7 C.F.R. §273.2(b)(ii), which states that, "Each application form shall contain...In prominent and boldface lettering and understandable terms a description of the civil and criminal provisions and penalties for violations of the Food Stamp Act." Without evidence that the Respondent was given the rules and advised of the penalties for violating the rules, including disqualification from the food stamp / SNAP program, it is difficult for the agency to show that the Respondent acted intentionally.

However, when the Respondent signed her April 13, 2015, Six Month Report form she did swear under penalty of perjury that the information in the SMRF was correct and complete. As such, she had to know it was against the rules of the FoodShare program to lie, since lying would also constitute the criminal offense of perjury. Accordingly, it is found that the Respondent committed an IPV by lying in the April SMRF.

I note, however, that the hearing notice alleged a violation extending through September 2015. The agency provided no proof of income beyond July 17, 2015. Consequently, the IPV with regard to the months of August and September cannot be sustained.

### **CONCLUSIONS OF LAW**

The agency has met its burden to prove, by clear and convincing evidence, that the Respondent committed an intentional program violation by lying in her April 13, 2015 SMRF.

This is the first such violation.

**THEREFORE, it is**

**ORDERED**

That IPV case number [REDACTED] is hereby sustained and that the agency may 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 served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,  
Wisconsin, this 15th day of March, 2016

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\sMayumi M. Ishii  
Administrative Law Judge  
Division of Hearings and Appeals



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

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The preceding decision was sent to the following parties on March 15, 2016.

Winnebago County Department of Human Services  
Public Assistance Collection Unit  
Division of Health Care Access and Accountability  
[REDACTED]@co.winnebago.wi.us