



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

██████████, Respondent

DECISION

Case #: FOF - 171529

Pursuant to petition filed January 19, 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 ██████████ from receiving FoodShare benefits (FS) one year, a hearing was held on Tuesday, April 5, 2016 at 08:30 AM at ██████████, Wisconsin. This case was originally scheduled for March 1, 2016. At that time, the respondent requested that the case be rescheduled to allow her time to retain an attorney. On April 5, 2016, the respondent appeared for the hearing but she had not retained an attorney.

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
PO Box 309
Madison, WI 53701

Respondent:

██████████
██████████
██████████

ADMINISTRATIVE LAW JUDGE:

Debra Bursinger
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # ██████████) is a resident of Milwaukee County who received FS benefits in Milwaukee County from October 24, 2013 through November 1, 2014.

2. On October 9, 2013, the respondent submitted an online change report to the agency reporting that her job with [REDACTED] ended on October 2, 2013. At that time, she was receiving healthcare benefits.
3. On October 15, 2013, the respondent submitted an application for FS benefits. He provided pay statements for her son from [REDACTED] reporting average hour of 46.69 @ \$8.25/hour. The agency verified respondent's employment ended with [REDACTED]
4. On October 16, 2013, the agency issued a Notice of Decision to the respondent informing her that she would receive FS benefits of \$330/month for herself and two additional household members effective November 1, 2013. The notice informed her that she was over the program income limit for October, 2013. This was based on gross household income of \$3,035.01 which included respondent's income for October, 2013 from [REDACTED], earned income for respondent's son from [REDACTED] and child support in the amount of \$521.55. For November, 2013, the counted income included child support and earned income from respondent's son. The notice further informed the respondent that she was required to report to the agency by the 10th day of the next month if her gross monthly household income exceeded \$1,627.50.
5. On October 24, 2013, the respondent contacted the agency to report that the child support income the agency was counting was incorrect.
6. On October 25, 2013, the agency issued a Notice of Decision to the respondent informing her that she would receive FS benefits of \$406/month effective November 1, 2013. The notice informed her that this was based on gross household income of \$1,096.61 which included earned income of her son from [REDACTED] and child support. The notice also informed the respondent that she was required to report to the agency by the 10th day of the next month if her gross monthly household income exceeded \$1,627.50.
7. On March 21, 2014, the agency received an alert that the respondent had wages reported with [REDACTED].
8. On May 19, 2014, the respondent submitted a Six Month Report Form (SMRF) to the agency. She reported a household of three. She reported her son's employment with [REDACTED]. She reported that her employment at [REDACTED] ended on February 13, 2014.
9. On October 6, 2014, the agency received verification from The Work Number that the respondent started employment with [REDACTED] on October 15, 2013. Her first paycheck was October 24, 2013. Her actual gross wages were reported as follows:

October, 2013	\$1,025.35
November, 2013	\$2,603.90
December, 2013	\$3,109.82
January, 2014	\$3,149.20
February, 2014	\$2,553.12

10. On January 25, 2016, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that failed to report an increase in income in order to obtain additional FS benefits.

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 not established by clear and convincing evidence that the respondent intentionally violated FS program rules. At the hearing, the respondent testified that she believed she had reported her job at [REDACTED] but conceded that it was possible she forgot to do so. She stated that she was feeling very stressed at that time. She testified that she did not have an issue with repaying any benefits that she should not have received. However, she testified that she did not intentionally fail to report in order to receive more benefits. She noted that she reported when the job ended and that she has a history of reporting changes.

I conclude that the evidence is not clear and convincing that the respondent intentionally failed to report her employment at [REDACTED]. The evidence does indicate that the respondent has a history of reporting changes. I agree with the respondent that if she had intentionally not reported starting her job at [REDACTED], it would not be logical for her to report that her job there ended. I further note that she did report when the job ended. I conclude the evidence is not clear and convincing that the respondent intentionally violated FS regulations when she failed to timely report her employment and wages.

CONCLUSIONS OF LAW

The agency has not established by clear and convincing evidence that the respondent committed an IPV.

NOW, THEREFORE, it is ORDERED

The IPV Case #1103-78615 is hereby REVERSED and that the OIG cease enforcement efforts.

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 Milwaukee,
Wisconsin, this 16th day of May, 2016

\sDebra Bursinger
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
- ██████████ - 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 May 16, 2016.

Office of the Inspector General
Public Assistance Collection Unit
Division of Health Care Access and Accountability
[REDACTED]@wisconsin.gov