

2. On or about August 2, 2013, the respondent submitted an application for FS benefits to the Wisconsin FS agency. She reports that she is a resident of Wisconsin with an address on [REDACTED], Fond du Lac. She reported a household of two including herself and her minor child.
3. On or about September 25, 2013, the respondent submitted another application. She again reported that she is a resident of Wisconsin with an address on [REDACTED], Fond du Lac.
4. On October 9, 2013, the agency issued a Notice of Decision to the respondent informing her that she would receive FS benefits of \$85 for September, 2013, \$367 for October, 2013 and \$347/month effective November 1, 2013.
5. On February 19, 2014, the respondent submitted a renewal application. She again reported that she is a resident of Wisconsin with an address on [REDACTED], Fond du Lac. She also reported employment with [REDACTED] in Muskego starting November 8, 2013.
6. In May, 2014, the respondent submitted a utility bill to the agency to verify her Wisconsin residency and address.
7. On June 16, 2014, the respondent submitted a renewal application. She reported she is a resident of Wisconsin with an address on [REDACTED], Fond du Lac. She reported employment with [REDACTED] in Muskego.
8. On June 18, 2014, the agency issued a Notice of Decision to the respondent informing her that she would continue to receive Wisconsin FS benefits.
9. On November 12, 2014, the respondent submitted a renewal application. She reported she is a resident of Wisconsin with an address on [REDACTED], Fond du Lac. She reported she receives unemployment compensation benefits beginning November 1, 2014.
10. On November 17, 2014, the agency issued a Notice of Decision to the respondent informing her that she would continue to receive Wisconsin FS benefits.
11. In February, 2015, respondent's second child was born in Illinois.
12. On May 5, 2015, the respondent submitted a Six Month Report Form (SMRF). She reported no address changes.
13. In May, 2015, the respondent reported that she started work at [REDACTED] in Brookfield. Information from The Work Number indicates that she worked less than two weeks.
14. In July, 2015, respondent was hired by the [REDACTED] and worked through August, 2015 in Illinois.
15. On October 6, 2015, respondent was hired at [REDACTED] in Bolingbrook, Illinois. She reported an Illinois address to the employer.
16. On October 7, 2015, the agency received an alert from the child support agency that there was an address change for the respondent to [REDACTED], Chicago. This is also the address of the father of respondent's child.
17. In October, 2015, the respondent registered to vote in Illinois.
18. On November 19, 2015, an agency worker spoke with the owner of an apartment in Illinois who verified that the respondent lived there.
19. Petitioner's Wisconsin FS benefits have been used exclusively in Illinois since January, 2014 with the exception of two transactions in Kansas in October, 2015.
20. A [REDACTED] Consumer Credit Report obtained by the agency on or about October 19, 2015 reports the respondent's address on [REDACTED] in Chicago and a previous address on [REDACTED] in Chicago.
21. On January 25, 2016, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that failed to report she was no longer a Wisconsin resident, allowing others to use her FS card.

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. While there is some evidence that respondent traveled back and forth frequently between Wisconsin and Illinois, the most convincing evidence is the respondent's EBT transaction and usage report. None of the respondent's Wisconsin FS benefits were used in Wisconsin but were almost exclusively used in Illinois from January, 2014 – October, 2015. Her benefits were consistently used several times/week throughout the period. There are a few times when she does not use her EBT card for a couple of weeks but she did not use her card either in Illinois or Wisconsin during that period so it does not support her claim of being a Wisconsin resident. The EBT usage evidence along with the voter registration in Illinois, periodic short-term employment in Illinois, statements from her landlord in Illinois, respondent's child being born in Illinois and a report of an Illinois address change to the child support agency are sufficient for the OIG to meet its burden of demonstrating that the respondent intentionally reported a Wisconsin address while living in Illinois. At the hearing, the respondent continued to deny her Illinois residency, claiming that she lived in Wisconsin but visited family in Illinois frequently and preferred to buy her groceries there. Given the frequency that her card was used in Illinois, her testimony is simply not credible. She also claimed that her children attended day care in Wisconsin. She was allowed time to provide evidence of her children attending day care in Wisconsin but no additional evidence of such was provided by the respondent. She also claimed that her children received medical services in Wisconsin. Again, she was allowed time to submit evidence but did not do so. 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 a recipient must be a resident of Wisconsin to obtain and use Wisconsin FS benefits.
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 Milwaukee,
Wisconsin, this 17th 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 17, 2016.

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