



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[Redacted]
[Redacted]
[Redacted] did not appear

DECISION
Case #: FOF - 173909

PRELIMINARY RECITALS

On April 27, 2016, the Petitioner filed a hearing request under Wis. Admin. Code §HA 3.03, and see, 7 C.F.R. § 273.16, alleging that Respondent committed a FoodShare benefits (FS). The hearing was held on June 6, 2016, by telephone.

The issue for determination is whether Respondent committed an intentional program violation.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Respondent:

[Redacted]
[Redacted]
[Redacted]

Petitioner :

Department of Health Services
1 West Wilson Street, Room 651
Madison, WI 53703

By: [Redacted]
Office of the Inspector General
Department of Health Services - OIG
PO Box 309
Madison, WI 53701

ADMINISTRATIVE LAW JUDGE:

David D. Fleming
Division of Hearings and Appeals

FINDINGS OF FACT

- 1. Petitioner (CARES # [Redacted]) was not a resident of Wisconsin at the time period involved here.
2. On May 2, 2016 Petitioner sent Respondent an Administrative Disqualification Hearing Notice alleging that Respondent violated FoodShare program regulation by failing to report that he had

moved from the State of Wisconsin. The agency alleges that Rep was out of State for the period of March 1, 2015 to September 1, 2015.

3. The allegation here is based on Respondent's FoodShare card usage and interviews with the person at the address at which he claimed to be living in Wisconsin as well as the owner of that property. He reported the same address on a January 2015 six month report form (SMRF) and on an August 2015 review form.
4. Respondent renewed or reapplied for FoodShare on August 14, 2014. At that time he claimed to be living at an address on [REDACTED] in Appleton Wisconsin. Of 133 purchases using Respondent's FoodShare card during the period of March 2014 through October 2015 only 22 were made in Wisconsin and none after October 2014.
5. The person who lived at the address in Appleton that was claimed by Respondent said he moved between September and November 2014 when he moved to Chicago. This is corroborated by usage records. The owner of the [REDACTED] property was not aware of Respondent living at that residence.
6. Respondent did not appear for this hearing.

DISCUSSION

An intentional program violation of the FoodShare (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).

7 C.F.R. §273.16(e)(4) provides that the hearing shall proceed if the respondent cannot be located or fails to appear without good cause. The respondent did not appear or claim a good cause reason for not attending the hearing. Therefore, I must determine whether the respondent committed an IPV based solely on the evidence that Petitioner presented at hearing.

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 exist a reasonable doubt that the opposite is true.

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.

Also relevant here is the following:

...
Verification of residency is required for FoodShare eligibility, with an exception for homeless and migrant workers.

If it becomes known that a FoodShare applicant or member does not reside in Wisconsin, action must be taken to deny or terminate FoodShare benefits for this individual.

Residency must be verified at the time of application and whenever a member states that he or she resides in Wisconsin, but his or her Wisconsin residency is determined questionable. Do not require a specific type of verification. See 1.2.6.1 Required Verification to Determine Eligibility.

...
FSH, §1.2.3.5.

Respondent did not appear but the agency representative did have an opportunity to talk to Respondent about the circumstances here. He claimed to be traveling back and forth between Chicago and Appleton to take care of his sick mother in Illinois and would buy food at a meat market where prices were cheap. This is not close to being believable. I am sustaining the IPV alleged here. Respondent did not report the move to Chicago and, bluntly, lied on a January SMRF and an August 2015 review form as to his residency. This is clear and convincing evidence that Respondent intentionally violated FoodShare program rules. As this violation was the first such violation committed by Respondent, Petitioner correctly seeks to disqualify Respondent from the FoodShare program for one year.

CONCLUSIONS OF LAW

This is clear and convincing evidence that Respondent intentionally violated FoodShare program rules. As this violation was the first such violation committed by Respondent, Petitioner correctly seeks to disqualify Respondent from the FoodShare program for one year.

NOW, THEREFORE, it is ORDERED

That Petitioner may make a finding that Respondent committed a first IPV of the FoodShare program and disqualify 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.

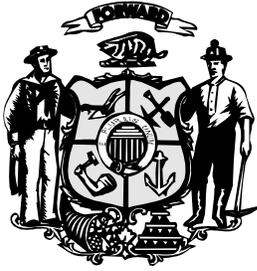
APPEAL TO COURT

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, **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 (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 15th day of July, 2016

\s _____
David D. Fleming
Administrative Law Judge
Division of Hearings and Appeals



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 July 15, 2016.

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