



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

In the Matter of

Winnebago County Department of Human Services, Petitioner

vs.

██████████ Respondent

DECISION

Case #: FOF - 174411

Pursuant to petition filed May 17, 2016, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Winnebago County Department of Human Services to disqualify ██████████ from receiving FoodShare benefits (FS) one year, a hearing was held on Tuesday, June 28, 2016 at 09:00 AM at Oshkosh, Wisconsin.

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:

Winnebago County Department of Human Services

220 Washington Ave.

PO Box 2187

Oshkosh, WI 54903-2187

Respondent:

██████████
██████████
██████████

█

ADMINISTRATIVE LAW JUDGE:

David D. Fleming

Division of Hearings and Appeals

FINDINGS OF FACT

1. Respondent (CARES # ██████████) is a resident of Winnebago County who received FoodShare (FoodShare) benefits in Winnebago County from October 1, 2013 through June 1, 2015.
2. The agency, Petitioner herein, sent Respondent an Administrative Disqualification notice dated May 19, 2016 that informed Respondent that it was seeking to disqualify Respondent from receipt of FoodShare benefits for 1 year for violating FoodShare program rules; specifically, failing to report a bonus/commission or earned income increase.
3. Respondent completed an online FoodShare application on July 12, 2013. On that application she reported employment at a fundraising organization working 33 hours per week at a pay rate of \$10.25 per

hour and that she was paid every 2 weeks. That was confirmed by the employer via an Employer Verification of Earnings.

4. On December 6, 2013 Respondent completed a six month report form and on that form reported a raise to \$10.50 per hour and that she worked the same number of hours per pay period. She provided only one paystub at that time.
5. Respondent's household size at all times involved here was 2. The income reporting threshold was 130% of the Federal Poverty Level; for a household of 2 this was \$1640.00 from October 1, 2012 through September 30, 2012, FSH, §8.1.1.1, Release 12-02; \$1681.00 for the period from October 1, 2013 through September 30, 2014, FSH, §8.1.1.1, Release 13-02 and \$1705.00 from October 1, 2014 through September 30, 2015.; FSH, §8.1.1.1; Release 14-03.
6. The agency sent Respondent a notice dated August 5, 2013 that she was required to report household income if it exceeded \$1640.00.
7. Respondent failed to appear for the scheduled January 11, 2016 Intentional Program Violation (IPV) hearing and did not provide any good cause for said failure to appear. The hearing notice was sent to the address for Respondent's current open FoodShare case.

DISCUSSION

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 the petitioner presented at hearing.

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.

Finally, the FSH contains the following reporting provision:

6.1.1.2 Change Reporting for All Other Food Units (Reduced Reporting)

All other food units are only required to report if their total monthly gross income exceeds 130% (8.1.1) of the FPL for their reported food unit size. This change must be reported by the 10th of the month following the month in which the total income exceeded 130% of the FPL.

As long as a food unit's total income is less than 130% of the FPL, a food unit need not report changes in income, assets, address changes, household composition, etc. This is known as "Reduced Reporting" requirements.

If a food unit has reported total income exceeding 130% of the FPL for their food unit size, and the food unit remains open for FoodShare due to categorical eligibility, the food unit has fulfilled their change reporting requirement for the remainder of the FoodShare certification period.

...

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.

This is really a close case, especially as this is not a preponderance standard. Again the burden is on the agency and the standard is clear and convincing. There is no question that income in excess of 130% of the FPL was not reported between July 2013 application and the December 2013 six month report form. Nonetheless, there are two problems. First, the agency received only one paycheck and that was not provided for the hearing record so there is no way of knowing if bonuses and/or commissions were shown on that check, either for that check or in the year to date area of the check. Second, without more as to that paycheck and the missing paycheck, it is not clear that the failure to report was an intentional misstatement or concealment. Based on these factors, I do not find that Respondent knowingly failed to report income and do not, therefore, permit imposition of this IPV.

There is a \$6918 overpayment claim in effect for this case as Respondent here did not appeal the overpayment notices; this decision has no bearing on any overpayment recovery efforts by the Department or local agency.

CONCLUSIONS OF LAW

That the evidence is not sufficient to demonstrate that Respondent committed a FoodShare intentional program violation.

NOW, THEREFORE, it is ORDERED

That this request to impose an intentional program violation is dismissed.

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 4th day of August, 2016

\sDavid D. Fleming
Administrative Law Judge
Division of Hearings and Appeals

c: East Central IM Partnership - email
Public Assistance Collection Unit - email
Division of Health Care Access and Accountability - email
[REDACTED] - 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 August 4, 2016.

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