



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Marinette County Department of Human Services, Petitioner

vs.

██████████, Respondent

DECISION

Case #: FOF - 175108

Pursuant to petition filed June 21, 2016, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Marinette County Department of Human Services to disqualify ██████████ from receiving FoodShare benefits (FS) one year, a hearing was held on Thursday, August 4, 2016 at 10:45 AM at Marinette, Wisconsin.

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

NOTE: The record was held open until the end of the day to give Marinette County an opportunity to submit an application summary. It has been marked as Exhibit 6 and entered into the record.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

Marinette County Department of Human Services
By ██████████, Fraud Investigator
Wisconsin Job Center, Suite B
1605 University Drive
Marinette, WI 54143

Respondent:

██████████
██████████
██████████

ADMINISTRATIVE LAW JUDGE:

Mayumi M. Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # ██████████) is a resident of Marinette County.

2. On November 17, 2014, the Respondent completed a phone interview and provided a telephonic signature. According to worker [REDACTED], the Respondent reported last working for a home improvement firm in October 2014 and that his last check was received in October 2014. (Exhibit 2)
3. On November 18, 2014, the agency sent the Respondent an application summary, which indicated the Respondent reported no income. In its cover letter, the agency directed the Respondent to contact the agency if any of the information was incorrect. The Respondent telephonically/electronically signed the application, stating that the information was correct and complete and that he understood the penalties for giving false information or breaking the rules. (Exhibit 6)
4. The Respondent received two paychecks from the home improvement firm in November 2014. One dated November 7, 2014, for a pay period ending November 1, 2014 and one dated November 14, 2014 for a pay period ending November 8, 2014. (Exhibit 3)
5. On June 30, 2016, Marinette County prepared an Administrative Disqualification Hearing Notice alleging that the Respondent lied in his November 2014 application when he claimed to have no income. (Exhibit 5)

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

This hearing took place on August 4, 2016. The Respondent was advised of the date, time and location of the hearing in an Administrative Disqualification Hearing Notice that was sent to her at an address on [REDACTED]. This appears to be his last reported address and there is no indication in the record that the agency received any returned mail.

The Respondent did not appear for the hearing. Consequently, the hearing took place in her absence. The Respondent did not contact the Division of Hearings and Appeals within ten days of the hearing date to explain his absence. As such, it is found that he did not have good cause for his failure to appear at the hearing.

What is an Intentional Program Violation (IPV)?

An IPV is defined at 7 C.F.R. §273.16(c) as intentionally: making a false or misleading statement or misrepresenting; concealing or withholding facts; or committing any act that constitutes a violation of the Food Stamp Act, federal regulations or any Wisconsin statute relating to the use, presentation, transfer, acquisition, receipt or possession of food stamp coupons or an authorization to participate (ATP) card.

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 FoodShare 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 agency's burden of proof?

In order for the agency to establish that a FoodShare (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 an intentional program violation 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., 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 Respondent committed an IPV.

The Merits of the Agency’s Case

In the case at hand, the agency asserts that the Respondent committed an intentional program violation by misrepresenting his household income, when he failed to report his November 2014 income from the home improvement firm.

The November 17, 2014 application summary is reliable as a regularly kept record of the Department of Health Services and as a statement of a party opponent. It establishes that the Respondent reported having no current income.

The case comments are reliable as a regularly kept business record of the Department of Health Services and establishes that the worker reported receiving information from the Respondent that his last check was received in October 2014.

The paystubs in Exhibit 3, show that the Respondent did, in fact, receive two paychecks in November 2014.

Accordingly, it is found that the Respondent misrepresented his income when he completed the November 2014 application/renewal.

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. However, intention is also 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).

This is where the agency’s case becomes fuzzy.

There is no indication that the Petitioner continued working for the home improvement firm after November 8, 2014. So, there is no reason why the Respondent would have anticipated receiving any future income from the home improvement firm when he completed his application on November 17, 2014. Under such circumstances, it is difficult to conclude the Respondent acted with the requisite intent to deceive the agency, when he reported having no current income.

This is particularly true, given that “eligibility and benefit calculations for FoodShare are based upon prospectively budgeted monthly income using estimated amounts.” *FoodShare Wisconsin Handbook §4.1.1* So, even if Petitioner correctly reported that his employment ended November 8, 2016, and that his last check was November 14, 2014, his prospectively budgeted income would still be zero. This again calls into question whether the Respondent intended to deceive the agency with the purpose of receiving more benefits than he was otherwise entitled to.

Further, per 7 CFR 273.16(d), “...The State agency shall inform the household in writing of the disqualification penalties for intentional program violation each time it applies for program benefits. The penalties shall be in clear, prominent and bold face lettering on the application form.” The case comments do not show that the worker read the penalty warning to the Respondent and the record contains no copy of the telephonic signature script. Consequently, the agency cannot show the Respondent was actually made aware of what the rules are and what the disqualification penalties are for providing false information or otherwise breaking the rules. The Respondent cannot make a knowing and intentional decision to violate the rules of the program if he has not been made aware of those rules and the consequences for breaking the rules.

Based upon the record before me, I find that the agency has not established by clear and convincing evidence that the Respondent acted with the intent to deceive the agency so he could get more benefits than he was otherwise entitled to receive.

CONCLUSIONS OF LAW

The agency has not established by clear and convincing evidence that the Respondent intentionally violated the rules of the FoodShare program.

NOW, THEREFORE, it is ORDERED

That IPV claim [REDACTED] is hereby reversed.

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 25th day of August, 2016

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

c: Bay Lake Consortium - email
Public Assistance Collection Unit - email
Division of Health Care Access and Accountability - email
[REDACTED] - email



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The preceding decision was sent to the following parties on August 25, 2016.

Marinette County Department of Human Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
[REDACTED]@marinettecounty.com