



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

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In the Matter of

Marinette County Department of Human Services, Petitioner

vs.

██████████ Respondent

DECISION

Case #: FOF - 175110

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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, ████████ 4, 2016 at 11:30 AM at Marinette, 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:

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 March 30, 2015, the Respondent submitted a Six Month Report Form (SMRF) in which she indicated she lived with ████████. The Respondent reported receiving child support income, no earned income in the

household. The Respondent signed the SMRF certifying that her answers were complete and correct and that she understood that she could be fined or imprisoned for providing incorrect information. (Exhibit 4)

3. [REDACTED] obtained employment on February 9, 2015 and received his first paycheck on February 19, 2015. He was employed through May 5, 2015. (Exhibit 5)
4. On June 30, 2016, Marinette County prepared an Administrative Disqualification Hearing Notice, alleging that the Respondent provided misleading information in her March 17, 2015 SMRF by reporting him in the home or by failing to report her son's income. (Exhibit 7)

### 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*

The hearing in this case took place on [REDACTED] 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 in Marinette. [REDACTED] indicated that the Respondent has an open case for healthcare and that the address used was the Respondent's last known address. [REDACTED] further indicated that the agency did not receive any returned mail.

The Respondent did not contact the Division of Hearings and Appeals within ten days of the hearing to explain her absence. Accordingly, it is found that she did not have good cause for her failure to appear.

#### *The Definition of an Intentional Program Violation*

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.

7 C.F.R. § 273.16(c); *see also* Wis. Stat. §§ 946.92(2).

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 FS 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).

### *The County Agency's Burden of Proof?*

In order for the agency 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 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., 4<sup>th</sup> 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 intentional program violation.

#### *The Merits of the County Agency’s Case*

In the case at hand, the county agency attempts to assert two alternate theories of the case. The first theory is that the Respondent withheld information in her March 2014 SMRF by failing to report ██████’s employment income. The second theory, which is inconsistent with the first, is that the Respondent lied in her March 2014 SMRF by claiming that ██████ was in her household.

The county agency’s strategy is puzzling, because if ██████ was not in the Respondent’s household as alleged under theory 2, she had no obligation to report his income, so theory 1 fails. Further, if the county agency is not sure which theory is actually true, it is difficult to conclude that it has clear and convincing evidence to prove either theory. None the less, the evidence will be reviewed for each theory.

#### I. HOUSEHOLD COMPOSITION

The March 2014 SMRF is reliable as a regularly kept business record of the Department of Health Services and as a direct statement of a party opponent. As such, it establishes that the Respondent reported ██████ in her household.

In order to prove ██████ was not in the household, the agency relies solely upon the double hearsay<sup>1</sup> statements of the Respondent in the case comments. Case comments can be considered reliable as a regularly kept business record of the Department of Health Services and used to establish a worker’s observations. They can sometimes be used to establish what a Respondent reported to the agency. However, in this case, given the alternate IPV theories pursued by the agency, it is difficult to ascertain which of the Respondent’s statements to the agency are correct. Without other documentation of ██████’s living situation, there is not enough evidence to prove, by clear and convincing evidence, that ██████ was not in the Respondent’s home when she completed her March 2014 SMRF.

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<sup>1</sup> Double hearsay means there are two layers of hearsay. In this case, layer one is what Respondent told the worker; layer 2 is what the worker wrote down in case comments. Both layers of hearsay must bear an indicia of reliability, in order to support a finding of fact.

I. [REDACTED]'s INCOME

The March 2014 SMRF is reliable as a regularly kept business record of the Department of Health Services and as a direct statement of a party opponent. As such, it establishes that the Respondent reported that no one in her home had earned income.

The Employer Verification of Earnings Form is reliable as a regularly kept record of the Department of Health Services and establishes that [REDACTED] was employed and receiving income at the time the Respondent completed the March 2014 SMRF.

However, the agency does not dispute that [REDACTED] is the Respondent's child. *FoodShare Wisconsin Handbook (FSH) §4.3.2.2* states that earned income is disregarded if a person is "17 years or younger, who is a food unit member under parental control of an adult food unit member and is enrolled in an elementary, high school, technical school, or university. This includes GED classes, and home schools recognized or supervised by the state or local board of education. Disregard the income until the month following the month in which the person turns 18 years of age..."

There are references in the case comments to [REDACTED]'s age, but the agency has provided no actual, reliable documentation of [REDACTED]'s date of birth, such as an application in which the Respondent listed his date of birth or a copy of [REDACTED]'s ID or birth certificate. Consequently, the agency does not have sufficient evidence to prove [REDACTED] was 18 years old or older at the time the Respondent completed the March 2014 SMRF. Because the agency cannot establish [REDACTED]'s age by clear and convincing evidence, it has not established any obligation on the part of the Respondent to report [REDACTED]'s income.

Based upon the record before me, I find that Marinette County has not established by clear and convincing evidence that the Respondent intentionally violated FS program rules.

**CONCLUSIONS OF LAW**

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

**NOW, THEREFORE, it is ORDERED**

IPV Claim Number [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 26th day of August, 2016

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\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



**State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

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The preceding decision was sent to the following parties on August 26, 2016.

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