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STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Oneida County Department of Social Services ,
Petitioner

v.

[redacted], Respondent

DECISION

FOF/142620

PRELIMINARY RECITALS

Pursuant to a petition filed July 26, 2012, under Wis. Admin. Code §HA 3.03, and see, 7 C.F.R. § 273.16, to review a decision by the Oneida County Department of Social Services to disqualify [redacted] from receiving FoodShare benefits (FS) for a period of one year, a hearing was held on November 8, 2012, at Rhinelander, Wisconsin.

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

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

Department of Health Services
Division of Health Care Access and Accountability
1 West Wilson Street
Madison, Wisconsin 53703
By: Amy Mayo, Support Programs Supr.
Oneida County Department of Social Services
Oneida Avenue
PO Box 400
Rhinelander, WI 54501

Respondent:

([redacted])
[redacted]

ADMINISTRATIVE LAW JUDGE:
Nancy J. Gagnon (telephonically)
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [redacted]) is a resident of Oneida County who received FS in Oneida County Department of Social Services during the time period of February - August 2012.

2. The County sent a written *Administrative Disqualification Hearing Notice*, dated September 26, 2012, to the respondent notifying him of an FS disqualification hearing scheduled for November 8, 2012. See Exhibit 1.

3. The respondent did not appear at the November 8, 2012 hearing, or telephone or write to offer good cause for being absent. Similarly, he did not make contact to request that the hearing be rescheduled.

4. In the *Notice*, the County alleged that the respondent committed an IPV by misstating or concealing facts from the County with intent.

5. Throughout the subject period, the petitioner represented to the Department that he lived in an apartment separate from his wife, [redacted] He therefore received FS as a household of one. Likewise, his wife received FS as a household of one person. The two individual households received more FS than they would have received as a combined household of two.

6. During a home visit and investigative interview on July 5, 2012, the County's investigator observed that the respondent and his wife were residing together. Further, the respondent admitted that they had resided together at the Pelican Street apartment since February, 2012.

7. The respondent and his wife have lived together since February 2012. As a result of the respondent's intentional misstatements, the County determined that the respondent's household was overpaid in FS from February through August, 2012.

DISCUSSION

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.

Wisconsin statutes provide, in the parts relevant here, as follows:

> (2) No person may misstate or conceal facts in a food stamp program application or report of income, assets or household circumstances with intent to secure or continue to receive food stamp program benefits.
>
> (2m) No person may knowingly fail to report changes in income, assets or other facts as required under 7 USC2015(c)(1) or regulations issued under that provision.
>
> (3) No person may knowingly issue food coupons to a person who is not an eligible person or knowingly issue food coupons to an eligible person in excess of the amount for which the person's household is eligible.
>
> (4) No eligible person may knowingly transfer food coupons except to purchase food from a supplier or knowingly obtain food coupons or use food coupons for which the person's household is not eligible.
>
> (5) No supplier may knowingly obtain food coupons except as payment for food or knowingly obtain food coupons from a person who is not an eligible person.
>
> (6) No unauthorized person may knowingly obtain, possess, transfer or use food coupons.
>
> (7) No person may knowingly alter food coupons.

Wis. Stat. §§ 49.795(2-7).

The county 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).

I. CLEAR AND CONVINCING EVIDENCE IS NEEDED TO ESTABLISH AN IPV.

In order for a county 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 county must demonstrate by clear and convincing evidence that the recipient: 1) committed; and 2) intended to commit an intentional program violation. 7 C.F.R. § 273.16(e)(6) (1998); See also, 7 C.F.R. § 273.16(c); *IMM* II-D-2.2.0 & 11.2.1; *FS Handbook*, 6.1.0.

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. It is used in civil cases where a higher standard is required because the outcome could result in serious social consequences for, or harsh effects on, an individual. 32A C.J.S., Evidence § 1023. While the terminology for this intermediate standard of proof varies from state to state, it is clear that it is what is required by the FS regulations. *Jackson v. State*, 546 So.2d 745 (Fla. App. 2 Dist. 1989).

There is no litmus test to show the trier of fact when properly admitted evidence is of a sufficient degree to be clear and convincing. In *Smith v. Department of Health and Rehab. Serv.* , 522 So.2d 956 (Fla. App. 1 Dist. 1988), the court discussed this issue as it relates to an FS IPV:

> "In *Slomowirtz v. Walker*, 429 So.2d 797, 800 (Fla. 4th. DCA 1983), the court held that: Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." *Smith*, 522 So.2d at 958.

The Wisconsin Supreme Court views the various standards of proof as degrees of certitude. In *Kuehn v. Kuehn*, 11 Wis.2d 15 (1959), the court held that:

> "In the class of cases involving fraud . . . the certitude must be of a greater degree than in ordinary civil cases, but need not be that degree necessary to find a conviction in criminal cases. . . . [C]ertitude must be reasonable, *i.e.*, based on reasons. 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." (*italics* in original) *Kuehn*, 11 Wis.2d at 26-27.
>
> "It is possible the contestant having the burden of proof may have the preponderance of the evidence fair, clear, or otherwise in his favor and still fall short of convincing the jury to a reasonable certainty of the existence of the facts for which he is contending." *Kuehn*, 11 Wis.2d at 28.

II. AN IPV MUST BE THE RESULT OF INTENTIONAL WRONGDOING.

The question of intent is generally one to be determined by the trier of fact. *State v. Lossman*, 118 Wis.2d 526, 348 N.W.2d 159 (1984). Intention is a subjective state of mind to be determined upon all the facts including the declarations, if any, of the person inquired about. *Lecus v. American Mut. Ins. Co. of Boston* , 81 Wis.2d 183, 190, 250 N.W.2d 241 (1977). 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. *John F. Jelke Co. v. Beck*, 108 Wis. 650 (1932); 31A C.J.S. Evidence § 131.

III. CONCLUSION.

Thus, to conclude that an FS IPV has been committed, the trier of fact (hearing examiner/administrative law judge) must believe that the evidence establishes the existence of the two elements (commission of the offense, and intent) even though she may have a reasonable doubt that the opposite is true.

In this case, the respondent did not appear at the hearing. Nonetheless, the County was required to put in evidence proving the intentional commission of the offense:

> 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 the new hearing. In instances where 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.

7 C.F.R. § 273.16(e)(4) ; see also, *IMM*, II-D-6.4.6, 11.4.2. The respondent did not present a good cause reason for failing to appear at the hearing. Therefore, I must determine whether the respondent committed an FS IPV based solely on what the County presented at the hearing.

I conclude that the agency has established, by clear and convincing evidence that the respondent intentionally misstated that he and his wife lived apart. The agency produced application documents and a sheriff's department investigation report that supplied the necessary evidence. *See*, Exhibit 3. The respondent's wife also acknowledged her falsification to an agency worker prior to this hearing.

Wisconsin State law is clear: No person may misstate or conceal facts in an FS application or report of income, assets or household circumstances with intent to secure or continue to receive FS benefits. No person may knowingly fail to report changes in income, assets or other facts as required by law or regulation. Wis. Stat. §§ 49.127(2) & (2m) (1995-96).

Additionally, Wisconsin State policy is as follows: It is FS program fraud to conceal circumstances, or a change in circumstances, which, if made known, would have resulted in a decrease or discontinuance of FS. *IMM* , I-D-2.3.0.4.

Thus, based on the evidence as specified in the above Findings of Fact, I find that there is clear and convincing evidence that the respondent committed, and intended to commit, an FS IPV.

CONCLUSIONS OF LAW

The respondent committed, and intended to commit, a Food Stamp (FS) Intentional Program Violation (IPV) pursuant to 7 C.F.R. §§273.16(c) & 273.16(e)(6)(1999).

NOW, THEREFORE, it is **ORDERED**

That the respondent is hereby ineligible to participate in the FS program for the period of time specified by law for his circumstances.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Madison,
Wisconsin, this 14th day of November, 2012

_____

Nancy J. Gagnon
Administrative Law Judge
Division of Hearings and Appeals

State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on November 14, 2012.

Oneida County Department of Social Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability