

FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Dane County Department of Human Services ,
Petitioner

DECISION

v.

FOF/144240

[REDACTED] Respondent

PRELIMINARY RECITALS

Pursuant to a petition filed October 03, 2012, under Wis. Admin. Code §HA 3.03, and see, 7 C.F.R. § 273.16, to review a decision by the Dane County Department of Human Services to disqualify [REDACTED] from receiving FoodShare benefits (FS) for a period of one year, a hearing was held on November 19, 2012, at Madison, Wisconsin.

The respondent did not appear at the 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.

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 what the county agency presented at the hearing.

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

There appeared at that time and place the following persons:

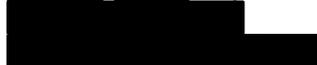
PARTIES IN INTEREST:

Petitioner:

Department of Health Services
Division of Health Care Access and Accountability
1 West Wilson Street
Madison, Wisconsin 53703

By: Bobby Annen
Dane County Department of Human Services
1819 Aberg Avenue
Suite D
Madison, WI 53704-6343

Respondent:

 (did not appear)


ADMINISTRATIVE LAW JUDGE:

Peter McCombs
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # ) is a resident of Dane County who received FS during the time period of September, 2010, to August, 2012.
2. Following a February 10, 2011, Six Month Report Form processing (SMRF), respondent requested that petitioner verify her employment income by February 21, 2012. Exhibit 9. On February 21, 2012, petitioner submitted an Employer Verification Form for Earnings (EVFE), and she was open for FoodShare (FS) and Medical Assistance benefits.
3. EVFE's were also provided July 26, 2012 and February 21, 2012. All submitted EVFE's indicated that petitioner was working 40 hours each week and earning \$12.00 per hour. Exhibit 3.
4. On October 2, 2012, the agency sent petitioner a notification of the FS overissuance identifying an overpayment of \$7,096 paid between September of 2010 and August of 2012. Exhibit 4.
5. On or about October 16, 2012, An Administrative Disqualification Notice was sent to petitioner via certified mail, and the receipt of mailing was signed by 

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).

In order for the county 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. 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. See 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. See Jackson v. State, 546 So.2d 745 (Fla. App. 2 Dist. 1989).

There is no litmus test to show the trier of facts 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 a FS IPV:

In Slomowitz 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 viewed the various standards of proof as degrees of certitude. 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. In criminal cases, while not normally stated in terms of preponderance, the necessary certitude is universally stated as being beyond a reasonable doubt.

Kuehn, 11 Wis.2d at 26. 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.

What is needed to prove the first element, that an IPV as defined in 7 C.F.R. §273.16(c) was committed, is clear. In order to prove the second element, 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.

Respondent did not appear at the hearing; hence the agency's evidence was uncontradicted. The agency argued that respondent had submitted falsified EVFE's regarding her employment with [REDACTED] Exhibit 10. It was also noted that she additionally failed to report her husband's wages. Petitioner's

EVFE's were allegedly signed by [REDACTED] Ms. [REDACTED]'s manager report ed in correspondence to the respondent that per company policy, [REDACTED] does not submit verification forms for employees. Also, Ms. [REDACTED] was not even employed at [REDACTED] when the forms were purportedly signed. Petitioner's doctored EVFE's reflected a lower rate of pay, and therefore, respondent was misled to believe that petitioner was making less than she actually earned. Actual pay stubs received from petitioner's employer contradicted the verification forms received from petitioner and allegedly signed by company employees.

The state wage record, accessed through the agency's CARES system, is automatically populated with earnings information provided directly from the employer to the state. Since the information is used to calculate unemployment insurance expenses and liability, employers have little incentive to overstate earnings. In this case, the wage information provided to the state shows that respondent was paid substantially more than she reported on the forms that she submitted to the agency during the course of her periodic benefit reviews. As her income level was used to determine the amount of her monthly FS allotment, it is clear that respondent received a benefit from underreporting her income, see *FoodShare Handbook*, Table 8.1.2 for the impact that reduced income has on FS benefits.

In order to conclude that an IPV has been committed, I am required to reach a firm conviction, based on clear evidence, that respondent committed a program violation and that she intended to do so. The information presented in the state wage report and [REDACTED] pay stubs, when compared with the rather dubious information set forth on the forms that respondent forwarded to the agency indicates that respondent clearly underreported her income. Misstating facts with the intention of receiving or continuing to receive FS benefits and failing to report changes in income are violations of the FS program under Wis. Stat. §§49.795(2) and (2m). Both have occurred here and there is no doubt that a violation of the FS program has occurred.

That respondent intended to commit an IPV is also clear. Respondent consistently and fraudulently understated her income and consistently allowed the agency to continue issuing benefit to her based on understate income. It would be hard to convince any trier of fact that a wage earner would be unaware of how much money she was earning each pay period. The notices of decision that were provided to respondent stated her calculated household income based on the income information provided. She did nothing to correct this impression and even produced altered or falsified earning information to support her claimed earnings. In addition, the notices of decision advised respondent of her obligation to file a change report if her monthly income exceeded the program's income limits. She did not do so even though her average monthly earnings, as reported to the state by her employer consistently exceeded the reporting threshold. Respondent was aware of her obligation to provide correct and up-to-date information to the agency and she failed to do so. The agency correctly found that respondent had committed an IPV and was justified in imposing its sanction.

CONCLUSIONS OF LAW

Respondent committed and intended to commit an intentional violation of the FS program under 7 CFR §273.16(c). This is respondent's first such violation.

THEREFORE, it is

ORDERED

That the respondent is hereby ineligible to participate in the FoodShare program for a period of one year effective the first month following the date of receipt of this decision.

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 17th day of December, 2012

\sPeter McCombs
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 December 17, 2012.

Dane County Department of Human Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability