



FH
[REDACTED]

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

In the Matter of

Milwaukee Enrollment Services, Petitioner

DECISION

v.

[REDACTED], Respondent

FOF/147901

PRELIMINARY RECITALS

Pursuant to a petition filed March 11, 2013, under Wis. Admin. Code §HA 3.03, and see, 7 C.F.R. § 273.16, to review a decision by the Milwaukee Enrollment Services to disqualify [REDACTED] from receiving FoodShare benefits (FS) for a period of one year, a hearing was held on May 02, 2013, at Milwaukee, 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: Pamela Hazley

Milwaukee Enrollment Services
1220 W Vliet St
Milwaukee, WI 53205

Respondent:

[REDACTED]
[REDACTED]
[REDACTED]

ADMINISTRATIVE LAW JUDGE:

Kelly Cochrane
Division of Hearings and Appeals

FINDINGS OF FACT

1. Respondent (CARES # [REDACTED]) is a resident of Milwaukee County who received FS in Wisconsin during the time period of August, 2010 - September 2012. Exhibit 1.
2. On April 8, 2011 respondent completed an FS renewal. Exhibit 3.

3. On April 12, 2011 the agency processed respondent's FS renewal. The case was pended for verification of income. Exhibit 2.
4. On April 18, 2011 the agency processed the paystubs respondent had provided to the agency to update the respondent's income. See Exhibit 2 and 4.
5. On April 20, 2011 the agency issued a notice of decision to respondent stating that effective April 8, 2011 she was eligible for FS. Exhibit 4b.
6. On September 19, 2011 the agency issued a notice of decision to respondent stating that effective October 1, 2011 her FS would end because it had not received her six month report form (SMRF). Exhibit 5.
7. On October 11, 2011 a phone review was conducted for respondent's FS case, and the case was again pended for verification of income. See Exhibit 2.
8. On October 19, 2011 the agency processed the paystubs respondent had provided to the agency to update the respondent's income. See Exhibit 6.
9. On October 20, 2011 the agency issued a notice of decision to respondent stating that effective October 6, 2011 she was eligible for FS. Exhibit 6a.
10. On April 12, 2012 respondent again submitted verification of income to the agency. Exhibit 7. The agency processed the paystubs respondent had provided to the agency to update the respondent's income and to issue FS. See Exhibit 1.
11. On September 28, 2012 the agency received an alert stating that a State Wage match showed a discrepancy between the income respondent had been providing to the agency and that which had been reported to the State of Wisconsin. See Exhibit 8 and 9.
12. On November 8, 2012 the agency issued a notice of decision to respondent stating that she had been overpaid FS in the amount of \$1770 for the time period of 4/8/11-9/30/11 (claim # [REDACTED]) and in the amount of \$3256 for the time period of October 6, 2011 to September 30, 2012 (claim # [REDACTED]). Exhibit 9.
13. On March 11, 2013 the agency issued an Administrative Disqualification Hearing Notice to respondent. Exhibit 10. That is the subject of this decision.

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. As noted above, respondent provided her paystubs on three different occasions as a means of verifying her income in order to qualify financially for FS. The agency argued that respondent had consistently underreported her income and pointed out the discrepancies between the wages reported to the state by respondent's employer and the wages reported on the paystubs that respondent submitted to the agency. The agency admitted that it had originally used the gross pay listed on the paystubs to confirm her income instead of checking through each of the pay rates listed. However, when it received the alert about the discrepancies and reviewed the paystubs again, it determined that the gross pay did not add up to that which was stated

(see Exhibit 4 and 6) and in some cases, the year-to-date gross earnings never changed despite a succession of paystubs which would cause an increase in the year-to-date (see Exhibit 7).

Additionally, the state wage record (see Exhibit 9), 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 significantly more than she reported on the paystubs 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.

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, when compared with the rather dubious information set forth on the paystubs that respondent selected and 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 understated her income and consistently allowed the agency to continue issuing benefits to her based on the understated 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. She did nothing to correct this information and even produced altered or falsified paystubs to support her information. In addition, the notices of decision advised respondent of her obligation to file a change report if her monthly income exceeded the income limit. 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

The agency can disqualify the respondent from the FoodShare program for one year because it has established by clear and convincing evidence that she intentionally violated the rules of that program.

THEREFORE, it is

ORDERED

That the agency may make a finding that the respondent committed a first IPV of the FoodShare program and disqualify her from the program for one year.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. See also, 7 C.F.R. sec. 273.16(e)(4) for the specific time limits for claiming good cause for missing the scheduled hearing. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

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 Milwaukee,
Wisconsin, this 15th day of May, 2013

\sKelly Cochrane
Administrative Law Judge
Division of Hearings and Appeals



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The preceding decision was sent to the following parties on May 15, 2013.

Milwaukee Enrollment Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability