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

In the Matter of

PACU – 5173,
Respondent

v.

DECISION

FOF/149158

PRELIMINARY RECITALS

Pursuant to a petition filed May 01, 2013, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the PACU - 5173 to disqualify Kathryn A. Ehlinger from receiving FoodShare benefits (FS) for a period of one year, a hearing was held on July 25, 2013, at Milwaukee, Wisconsin. The hearing continued on August 23, 2012. The record was held open at the end of the hearing for submission of additional documentation by the agency and a response to that documentation from the Respondent and the agency. The record closed on September 16, 2013.

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:

Respondent:

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

By: Keegan Trentzsch
PACU - 5173
P.O. Box 8939
Madison, WI 53708-8938

Respondent:

[REDACTED]
[REDACTED]
[REDACTED]

|

ADMINISTRATIVE LAW JUDGE:

Debra Bursinger
Division of Hearings and Appeals

FINDINGS OF FACT

1. Respondent is a resident of Milwaukee County who received FS and BC+ benefits during the time period of May, 2011 to December, 2012.
2. On January 17, 2011, the agency issued a Notice of Decision informing the Respondent that her application for BC+ benefits dated December 15, 2010 was denied for failure to supply requested verifications. See Department Exhibit #12F.
3. On March 24, 2011, the Respondent submitted an application for BC+ benefits. In the application, she reported herself, HG (father of one of Respondent's children and her unborn child), and two minor children as household members. She reported employment information for herself and HG. See Department Exhibit #12E.
4. On March 30, 2011, the agency issued a Notice of Proof requesting verification of information from the Respondent.
5. On April 6, 2011, the Respondent submitted another application for BC+ benefits to the agency as well as additional documentation in response to the request for verification. In the application, she listed herself and two minor children as household members. In addition, she listed HG as the "absent parent" of one child and her unborn child. See Department Exhibit #12B. The additional documentation submitted included a statement from the Respondent indicating that she and HG are raising a family together and she was unsure if he should be included in her household. Also attached were pay statements for HG, a utility bill addressed to HG and Respondent at [REDACTED] from February, 2011, Social Security cards for Respondent, HG and two minor children, birth certificates for Respondent, HG and the two minor children, 2010 property tax statement addressed to HG and Respondent at [REDACTED], a child support summary for Respondent's child (not HG's child), and insurance information for HG, including a statement that HG had insurance for his minor child through his employer. See Department Exhibit #5.
6. On May 5, 2011, the Respondent submitted an application for FS benefits and family planning services. She reported herself and two minor children in the household. She reported HG as the "absent parent" of one child and her unborn child. She reported his date of absence as April 26, 2011. See Department Exhibit #12C.
7. On May 20, 2011, the agency issued a Notice of Decision informing the Respondent that she was approved for BC+ and FS effective May 1, 2011 based on a household size of three, including Respondent and her two minor children.
8. On January 28, 2013, the agency received an online complaint from HG stating he and Respondent have resided together from 2005 through December 3, 2012.
9. The agency issued undated letters to the Respondent and HG informing them that the agency received information that HG resided with the Respondent from at least 2011 until he moved out in December, 2012. The letter states that the agency investigated this and determined that HG did, in fact, reside with the Respondent and she failed to accurately report HG's residence to the agency. A FS overpayment of \$6,163 was calculated and a BC+ overpayment of \$17,904.85 was calculated for the period of May 1, 2011 – December 31, 2012. The letter informed the Respondent and HG that they would receive additional information in the mail including a repayment agreement. See Department Exhibit #18.

10. On March 28, 2013, the agency issued a letter to the Respondent informing her that the agency received information that HG resided with her from December 2005 through December 2012. It noted that she did not report his residence and the agency would look back to determine what income should have been used. It offered the Respondent an opportunity to provide copies of all paystubs for herself and HG for all jobs since January 1, 2005. See Respondent Exhibit #56.
11. On April 15, 2013, the agency issued a Medicaid/BadgerCare Overpayment Notice to the Respondent and HG informing them of the agency's intent to recover an overpayment of \$17,904.82 for the period of May 1, 2011 – December 31, 2012. The notice further informed the Respondent that the agency determined the overpayment is the result of fraud. See Department Exhibit #18.
12. On April 15, 2013, the agency issued Notifications of FS Overissuance to the Respondent informing her that the agency seeks to recover a total of \$6,163 for the period of May 1, 2011 – December 31, 2012. See Department Exhibits #31 – 34.
13. The Department issued an Administrative Disqualification Hearing Notice to the Respondent informing her that the agency determined she had intentionally violated FS and BC+ program rules and is disqualified from participation in those programs.
14. On May 1, 2013, an appeal was filed with the Division of Hearings and Appeals.

DISCUSSION

A. Disqualification for MA/BC+ Intentional Program Violation

The Department's Administrative Disqualification Hearing Notice disqualified the Respondent based on intentional program violations (IPV) of the FS and BC+ programs. The Medicaid statutes and rules in Wisconsin have no provision for IPV's so the issue of the Respondent's disqualification based on a MA/BC+ IPV is moot and not addressed in this decision.

B. Disqualification for FS Intentional Program Violation

The FS regulations define an IPV 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 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 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.

In this case, I do not find that there is sufficient evidence to conclude that the Respondent committed an IPV or that she intended to commit an IPV.

The agency alleges that the Respondent resided with HG from 2005 – December, 2012 but she did not report to the agency that she and HG resided together in 2011 when she applied for benefits. Therefore, the agency did not include HG's income in determining the eligibility of Respondent's household for FS and BC+ benefits when the Respondent applied for benefits in April and May, 2011. The agency asserts that HG's income put the household over the income limit and the household was not eligible for FS and BC+ benefits. It is the agency's position that the Respondent intentionally failed to report HG as a member of the household in order to obtain benefits.

In support of its assertion that Respondent and HG resided together the agency noted that the Respondent included HG as a household member in the BC+ application dated March 24, 2011 (see Department Exhibit #12E) but reported him as an “absent parent” in the BC+ application dated April 6, 2011 (see Department Exhibit #12B). She also reported HG as an absent parent in the May 5, 2011 application for FS. The agency argues that the Respondent became aware that she would not be eligible if HG was included in the household and therefore re-submitted her BC+ application without HG in the household. The agency also asserted that the Respondent had been denied BC+ benefits in January, 2011 when HG was included in her household. The agency argued this is evidence that Respondent was aware she would be denied benefits if HG was included in the household.

The agency’s arguments on this point are not supported by the evidence. In January, 2011, the Respondent’s BC+ application was denied based on her failure to supply requested verifications, not because the household was over the income limit (see Department Exhibit #12F). When the Respondent next applied on March 24, 2011, she did include HG in the household (see Department Exhibit #12E). In April, she supplied HG’s pay statements and other relevant information about HG (see Department Exhibit #5). Therefore, the agency’s argument that she applied without reporting HG in the household because she knew that his income would put the household over the limit is not supported by any evidence and is inconsistent with the facts.

On the April 6, 2011 application, the Respondent did report HG as an “absent parent” in the application (see Department Exhibit #12B). However, in a written statement she submitted that same day, she indicates that she and HG are “raising a family together” but she wasn’t “100% sure if needed to be included as a person in the household because we are not related.” She included his information “if needed just in case.” The information she submitted included HG’s pay statements, his SS card and number, his health insurance information, a utility bill from February, 2013 addressed to HG and Respondent and a property tax bill address to HG and Respondent. Respondent informed the agency that HG’s insurance covered their daughter. See Department Exhibit #5. Respondent was clearly uncertain about whether to include HG in the household and provided HG’s information to the agency in the event that the agency determined he should be included. She also provided information about her daughter’s health insurance from HG’s employer. There is no evidence that the agency followed up with the Respondent or HG at the time to determine his residence or whether coverage was required for the child. The Respondent’s written statement submitted on April 6, 2011 with her application should have prompted the agency to verify HG’s residence at that point.

At the hearing, the Respondent testified that HG was living with her on April 6, 2011 when she submitted the BC+ application but the relationship was poor at that time and he was in the process of moving out. The Respondent has consistently reported that HG moved out of the home at [REDACTED], [REDACTED] on April 26, 2011. The Respondent’s testimony at the hearing is consistent with what was reported in her FS application of May 5, 2011 where she reported HG as an “absent parent” effective April 26, 2011. Her testimony is also consistent with the applications on March 24 and April 6 when she initially reported his residence with her and then submitted a statement indicating her uncertainty about whether to include him in the household. The Respondent’s submission of documents on April 6, including HG’s pay statements and insurance information and the statement regarding the uncertainty of his residence rebut the agency’s arguments and demonstrate that Respondent did not intend to conceal HG’s residence or income from the agency. The agency erred in failing to verify HG’s residence at the time of application on April 6, 2011 given the Respondent’s statement indicating her uncertainty of whether HG should be included in the household.

The agency also argued that HG continued to live with the Respondent through December, 2012 and the Respondent continued to misrepresent or conceal his residence and income. The agency relies on various documents in addition to the Respondent’s applications (as noted above) to support its contention that HG

and the Respondent lived together from May 1, 2011 – December, 2012. These documents include Wisconsin Circuit Court Access Program (CCAP) printouts from various court proceedings involving HG and the Respondent, child support documents, credit reports, voter registration information for HG, and a criminal complaint for HG. The source of address information on all of these documents is unknown and not reliable. The agency argues that the addresses in these documents were “reported” by the Respondent and HG. There is no evidence to affirm this. The CCAP documents submitted by the agency show different addresses for HG during the relevant time period. The credit reports and child support documents submitted by the agency contain address information that is either contradictory or inaccurate, making them unreliable as evidence. For example, the credit report for the Respondent indicates her address as of February, 2013 at [REDACTED]. It is undisputed that she has not resided there since December 3, 2012. No individual from the child support agency appeared to testify and explain the inconsistent information in its documents. The criminal complaint for a domestic abuse incident refers to “their residence” at [REDACTED]. It is undisputed that the Respondent and HG jointly owned the property at the time of this incident so it is not clear what the officer meant and no police officer testified to explain the statement. The voter registration document indicates that HG registered in 2008 and provided [REDACTED] as his address but this is not evidence of his residence from May, 2011 – December, 2012. See Department Exhibits #2, 3, 8, 9, 10 and 23.

The unreliability of the agency’s investigation and evidence is further demonstrated by the fact that the Respondent produced CCAP records, municipal court citations, DMV records, police records, a no contact order dated June 5, 2012, bank statements and child support records that show HG’s address was 2232 W. Carrington Ave., [REDACTED] (his mother’s home) during the relevant time period. See Respondent Exhibits #9, 13, 14, 15, 18, 19, 20, 23, 30 and 31.

The agency also relied on the testimony of HG who testified at the hearing that he and the Respondent lived together from 2005 – December 3, 2012. HG has made numerous statements and reports about his address from April, 2011 – December, 2012. There is absolutely no consistency in his statements and the statements completely and entirely contradict each other. Further, HG testified that he made his complaint to the agency alleging Respondent misrepresented his residence on January 28, 2013 when he was angry with the Respondent because of child support and child custody matters. He was not aware at the time that his complaint would be against his self-interest. None of HG’s statements or testimony can be considered as reliable evidence based on his complete lack of credibility. See Department Exhibits #1 and 11.

The Respondent in this case argued that the agency’s investigation was unreliable for numerous reasons. The Respondent contended that the agency conducted most of its investigation after it had already concluded that she committed an intentional program violation and after it already determined she owed the agency for overissued FS and BC+ benefits. In support of her argument, she noted a letter she received from the agency dated March 28, 2013 in which the agency stated: “We have received information that between December 2005 and December of 2012, [HG] lived in your home. This was information was investigated and we confirmed the allegations.” The letter went on to indicate that the agency would be processing an overpayment for FS and BC+ benefits. The agency’s own investigation summary confirms that the agency received a referral from Waukesha County on March 22, 2013 which included HG’s complaint and written statement, some CCAP records, credit reports, child support history and wage history. According to the agency’s summary, the case was referred that day for overpayment processing. Subsequently, the agency obtained HG’s voter registration, contacted Wisconsin Energies (WE), obtained a criminal complaint, contacted HG’s employer and interviewed HG’s mother. According to the agency’s information, the first contact made with the Respondent was the letter of March 28, 2013 informing her that the agency had concluded its investigation. There was also information that the agency tried to contact her by phone on April 8, 2013.

Given the lack of reliable information supplied to the agency on March 22, 2013 when the referral was made, it is reasonable to expect that the agency would attempt to conduct a more thorough investigation and verify information. Instead, it appears that the agency based its conclusion on the evidence it had on March 22, 2013 and then gathered information to support its conclusion. This casts doubt on the reliability of the investigation. In addition, the agency appears to have ignored or discounted without explanation any evidence that did not support its conclusion. The evidence produced by the Respondent was evidence which the agency could also have easily gathered. Specifically, the Respondent produced CCAP records that show HG actually reporting a new address to the court, a no contact order entered against HG on June 5, 2012 prohibiting him from having any contact with the Respondent, a police report indicating that HG reported he did not live at the [REDACTED] address, and other public records readily available to the agency. A good investigation does not ignore or discount such “exculpatory” evidence.

I note also that the agency’s investigative summary indicates the agency contacted HG’s employer in April, 2013 and asked for address information for him but any information the agency obtained was not provided at the hearing. In addition, the agency’s investigative summary notes that the agency interviewed HG’s mother on May 8, 2013. No information about this interview was provided to the Respondent when she requested it and no evidence of the interview was provided at the hearing. After the hearing but while the record was still open, I requested that the agency provide any documentation of this interview. The agency responded that no documentation of the interview existed. However, on September 4, 2013, the investigator provided a written summary of the interview based on her memory of it. I have given this information no weight as it is not reliable. The investigator stated she had no notes or other documentation of the interview and based the statement only on her memory four months later.

Also troubling is the agency’s lack of proper response to the Respondent’s numerous requests for information about the investigation. The Respondent is entitled to the information upon which the agency is relying to accuse her of intentional misconduct. She is entitled to conduct discovery and is entitled to make open records requests. She is further entitled to have proper responses to those requests from the agency. The agency failed to properly respond to the Respondent and failed to provide information that she was entitled to receive.

The agency has failed to meet its burden of demonstrating that the Respondent committed an intentional program violation. Its evidence is not reliable and was rebutted by the Respondent. The investigation lacked thoroughness and proper analysis of the evidence. This lack of thoroughness, the unreliability of evidence and the agency’s reluctance to provide information about the investigation to the Respondent prior to and during the hearing casts doubt on the overall reliability of the investigation. Based on the totality of the evidence, I conclude that the agency has not met its burden.

CONCLUSIONS OF LAW

The Respondent did not commit an IPV.

THEREFORE, it is

ORDERED

That the agency take all administrative steps necessary to rescind the Administrative Disqualification Hearing Notice issued to the Respondent for the period of May 1, 2011 – December 31, 2012. This action shall be taken as soon as possible but no later than 10 days from the date 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 Milwaukee,
Wisconsin, this 7th day of October, 2013

\sDebra Bursinger
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 October 7, 2013.

Public Assistance Collection Unit
Public Assistance Collection Unit
Division of Health Care Access and Accountability
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