



FH
[REDACTED]

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

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

FOO/150088

PRELIMINARY RECITALS

Pursuant to a petition filed June 19, 2013, under Wis. Admin. Code § HA 3.03(1), to review a decision by the Racine County Department of Human Services in regard to FoodShare benefits (FS), a hearing was held on July 09, 2013, at Racine, 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:

[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street
Madison, Wisconsin 53703

By: Dean Landvatter

Racine County Department of Human Services
1717 Taylor Ave
Racine, WI 53403-2497

ADMINISTRATIVE LAW JUDGE:

Kelly Cochrane
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Racine County, who received FS in Wisconsin during the time period of June to October, 2012.
2. On August 31, 2012 the agency received a report that petitioner had been using her FS continuously in the State of Mississippi for two consecutive months.

3. On October 17, 2012 an investigator completed his investigation of petitioner and her suspected move to Mississippi. See Exhibit A.
4. On February 25, 2013 petitioner was issued a Racine County Ordinance Citation for welfare fraud. See Exhibit J.
5. On June 6, 2013 the petitioner pled no contest to the welfare fraud violation. See Exhibit K.
6. On June 11, 2013 the agency issued a FoodShare Disqualification Notice to respondent. Exhibit L. That is the subject of this decision.

DISCUSSION

An Intentional Program Violation (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 (FSH), §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 USC 2015(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.

The first element requires a showing that an IPV was committed and that includes 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, 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. See 7 CFR 273.16(c). Here, the agency hung its hat on the fact that the petitioner pled no contest to the welfare fraud ordinance in Racine County. This is not a criminal offense and results only in a money penalty. The ordinance reads:

Sec. 11-24. Prohibiting fraud in public assistance and housing accommodations cases.

(a) Definitions.

- (1) False representation(s) include failing to report change of income, assets, household members, employment, or other relevant circumstance.
- (2) Public Assistance as used in this section includes medical assistance, child and spousal support services, child care benefits, Wisconsin Home Energy Assistance Program and subprograms, the Food Share Program and Wisconsin Works Program and subprograms under W.S.A., ch. 49.
- (3) Housing or Dwelling Accommodations as used in this section includes assistance obtained through the Housing Assistance programs under W.S.A., § 66.1205.
- (4) The term "person" used in this section includes all partnerships, associations, corporations, as well as an individual.

(b) Fraud with respect to public assistance and low income housing.

- (1) No person shall secure or assist in securing public assistance under W.S.A., ch. 49, or assistance in dwelling accommodations under W.S.A., § 66.1205 by making false representations.
- (2) Any person receiving public assistance under W.S.A., ch. 49, or assistance for dwelling accommodations under W.S.A., § 66.1205, who has been notified by the authority of the obligation to report a change in income, assets, household members,

- employment or other relevant circumstances, shall notify the authority of the change within ten (10) days.
- (c) No person shall do any act designed to interfere with the proper administration of a public assistance program or dwelling accommodation program.
- (d) No person may accept any supplies or articles issued to another person as public assistance in exchange for or in payment for anything not authorized by the program of assistance. No person may purchase any supplies or articles knowing it to have been issued to another person as public assistance.
- (e) No person who accepts public assistance may tender any alcoholic beverages, cigarettes or anything else not authorized by the program of assistance.
- (f) No person or dependent may sell or exchange supplies or articles issued to that person or dependent as public assistance nor may that person or dependent person use or dispose of such supplies or articles in any other way than as authorized.
- (g) Any person who makes any statement in a written application for aid under W.S.A., ch. 49 or ch. 66, shall be considered to have made an admission as to the existence, correctness and validity of any facts stated which shall be taken as prima facie evidence against the party making it in any complaint, information or indictment, and in any action or proceeding brought for enforcement of any provision of this section.
- (h) Penalties. Any person who violates any provision of this section shall upon conviction, be subject to a forfeiture not to exceed one thousand dollars (\$1,000.00) together with costs of prosecution and penalty assessments; and in default of payment of such forfeiture and costs shall be subject to imprisonment in the county jail until such forfeiture and costs are paid. Any person charged with a violation of this section may pay the amount enumerated in section 5-3(a) at the county clerk of court's office in lieu of a court appearance.
- (i) Enforcement. The provisions of this chapter shall be enforced by the sheriff's office and the human services director. The use of citations, as described in chapter 5, is hereby authorized.

Racine County Ordinance, §11-24.

Here, I will assume that the agency is alleging that petitioner failed to report the “relevant circumstance” of her address or her residency. According to the ordinance, “false representation(s) include *failing to report change* of income, assets, household members, employment, or other relevant circumstance.” However, this is not a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute; it is an ordinance. There is no evidence associated with this conviction to show that this court found an IPV; rather my read of the ordinance shows that there is no requirement for intent to be shown in order to be found guilty. With respect to a Wisconsin Statute, I will assume that the agency argues that petitioner violated either Wis. Stat. §§49.795(2) or (2m) which provide that no person may misstate or conceal facts in a report of household circumstances with intent to secure or continue to receive food stamp program benefits or that no person may knowingly fail to report changes in other facts as required under 7 USC 2015(c)(1) or regulations issued under that provision.

There is no dispute that petitioner was required to report her change of address under the Wisconsin FS policy, which states that food units are required to report an address change within 10 days when a move takes place. See *FSH*, §6.1.1.1. She did not report her change of address to the agency and agrees that she was staying with a variety of family members in Wisconsin and in Mississippi during the time frame in issue. It was her testimony that she moved out of her Wisconsin residence on Howland Ave in April because her landlord was in foreclosure and left for Mississippi in early May to visit family. She came back to Wisconsin in June (as evidenced by her FS spent in Wisconsin, see Exhibit B2) and then went back to Mississippi when “the kids were out of school.” Her time in Mississippi was then prolonged due to a death in the family. Her testimony was that she never permanently moved to Mississippi, however,

she is originally from there and still has family there. She did not deny being in Mississippi or using her Wisconsin FS there. The Case Comments show she reported having a banking account in Mississippi to the agency. She provided proof that she had her Social Security checks sent to an address in Mississippi, and that she still was doing so as of February 2013, when there was no dispute she was back in Wisconsin. There was no information to show petitioner had established a residence in Mississippi; rather the scant evidence provided shows me what she testified to – that she was in Mississippi for a time visiting family. The *FSH* states that if it becomes known that a FS member “does not reside in Wisconsin, action must be taken to deny or terminate FS benefits for this individual.” *FSH*, §1.2.3.5. Further, if the agency had questioned her residency, the *FSH* directs the agency as follows:

A worker may become aware of information that makes Wisconsin residency questionable on an ongoing FS case. Examples of questionable residency include:

1. Refusing to provide the address where the food unit is living,
2. Notices returned as "undeliverable with no known forwarding address", and
3. Agency receives unclear information.

If the agency has been unable to obtain the member’s current address to determine Wisconsin residency, Wisconsin residency is questionable and the agency must:

- Enter a "Q?" in the Resides in Wisconsin Verification field on the Current Demographics page to pend FS),
- If information is provided by the customer, make the necessary updates to the case, and
- If there is no response from the customer by the verification due date, update the Resides in Wisconsin Verification field with a "QV".

Id. There is no evidence that the agency followed this policy; rather it decided that it would pursue a fraud investigation.

The evidence leads me to believe that she failed to report a change in address, but it does not show me that there was an intentionality in failing to report it. It is clear she did not seek duplicate benefits in Mississippi and there is no other evidence to show that she was withholding any information about visiting or having contacts in Mississippi or that she established residency there. In sum, I do not find that there is clear and convincing evidence that this respondent *intended* to commit the IPV. Accordingly, the agency cannot disqualify the respondent from the FoodShare program for one year.

CONCLUSIONS OF LAW

1. There is not clear and convincing evidence that this respondent intended to commit the IPV.
2. The agency cannot disqualify the respondent from the FoodShare program for one year under an IPV sanction.

THEREFORE, it is

ORDERED

The matter is remanded to the agency to rescind the Administrative Disqualification (IPV) from respondent’s FS case. This action shall be taken within 10 days of the date of this decision.

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. 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 12th day of August, 2013

\sKelly Cochrane
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 August 12, 2013.

Racine County Department of Human Services
Division of Health Care Access and Accountability