STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Wisconsin Department of Health Services ["DHS"] , Petitioner

vs.

[redacted], Respondent

DECISION
Case #: FOF - 152190

Pursuant to petition filed September 16, 2013, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Wisconsin Department of Health Services ["DHS"] to disqualify [redacted] from receiving FoodShare benefits ["FS"] for 12 months, a Hearing was held via telephone on Monday, November 11, 2013 at 12:15 PM.

The issue for determination is whether the respondent committed an Intentional Program Violation ["IPV"].

There appeared at that time via telephone the following persons:

PARTIES IN INTEREST:

Petitioner:

Public Assistance Collection Unit
P.O. Box 8938
Madison, Wisconsin
53708-8938
BY: Judy Johnson, HSPC, Sr.

Respondent:
[redacted]

ADMINISTRATIVE LAW JUDGE:
Sean Maloney
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES #[redacted]) is a resident of the State of Wisconsin who received FS from the State of Wisconsin from April 1, 2013 through August 31, 2013. Exhibits #1 & #5.

2. The State of Wisconsin Department of Health Services ["DHS"] sent Respondent a written notice entitled *Administrative Disqualification Hearing Notice* notifying her of an FS disqualification Hearing scheduled for November 11, 2013 ["Notice"]; the Notice was dated October 1, 2013.

3. In the Notice, DHS alleged that Respondent had "dual participation" in the FS program; specifically, DHS alleged that Respondent knowingly received FS for her minor son who was not a resident of Wisconsin (he resided in the State of Iowa). Exhibits #2, #3, #4, #5 & #6.

4. Respondent did not appear at the November 11, 2013 disqualification Hearing or call or write to show good cause for being absent or to request that the Hearing be rescheduled.

5. During the time period April 1, 2013 to August 31, 2013 petitioner knowingly received FS from the State of Wisconsin for her minor son who was not a resident of Wisconsin (he resided in the State of Iowa); in doing so she made a false statement about his place of residence. Exhibits #2, #3, #4, #5 & #6.

DISCUSSION

An IPV consists of having intentionally: (1) made a false or misleading statement, or misrepresented, concealed or withheld facts; or, (2) committed any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin State statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing, or trafficking of FS coupons, authorization cards, or reuseable documents used as part of an automated benefit delivery system (access device). 7 C.F.R. § 273.16(c) (2011); See also, Wis. Stat. § 49.795 (2011-12); *Food Share Wisconsin Handbook* ["FSWH"] 3.14.1 & 7.3.1.1.

A county 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 a specified period of time. 7 C.F.R. § 273.16(b)(1) (2011); FSWH 3.14.1.1. However, the remaining household members are responsible to make restitution for the amount of any overpayment. 7 C.F.R. §§ 273.16(b)(1), (11) & (12) (2011).

A person who makes a false or misleading statement, or misinterprets, conceals or withholds facts (including but not limited to identity or place of residence) in order to receive multiple FS benefits simultaneously commits an IPV. FSWH 3.2.1, 3.4.1 & 3.14.1.2.; See also, 7 C.F.R. § 273.16(b)(5) (2011); Wis. Stat. § 49.795(2) (2011-12); Exhibit #7.

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.[1] 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) (2011); See also, 7 C.F.R. § 273.16(c) (2011).

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, 348 N.W.2d 159 (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, 190, 260 N.W.2d 241 (1977). 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 Wisconsin Supreme Court views the various standards of proof as degrees of certitude. In *Kuehn v. Kuehn*, 11 Wis.2d 15, 104 N.W.2d 138 (1960), 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.

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[1] *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 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* at 958.

> "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.

Thus, in order to find that an FS IPV has been 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.

In this case, the respondent did not appear at the Hearing.

> "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) (2011).

The Respondent did not present a good cause reason for failing to appear at the Hearing. Therefore, the determination of whether Respondent committed an FS IPV must be based solely on what DHS presented at the Hearing.

There is clear and convincing evidence in the record of this matter that Respondent committed, and intended to commit, an FS IPV. Respondent knowingly received FS in Wisconsin for her minor son who was not a resident of Wisconsin (he resided in the State of Iowa). In order to so she made a false statement about her son's place of residence. According to DHS this is Respondent's 1st IPV. Therefore, Respondent is immediately disqualified from the FS program for a time period of 12 months. See, 7 C.F.R. § 273.16(b)(1)(i) (2011); FSWH 3.14.1.1.1.

CONCLUSIONS OF LAW

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) (2011).

NOW, THEREFORE, it is

O R D E R E D

The IPV is SUSTAINED. Respondent is hereby ineligible to participate in the Food Stamp ["FS"] program for a time period of 12 months.

REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4).

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 Petitioner 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, Room 651, Madison, WI 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 225.53.

Given under my hand at the City of Madison, Wisconsin, this 22nd day of 2013

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\sSean Maloney
Administrative Law Judge
Division of Hearings and Appeals

c: Office of the Inspector General - email
Public Assistance Collection Unit - email
Division of Health Care Access and Accountability - email
Judy Johnson - email

State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on November 22, 2013.

Office of the Inspector General
Public Assistance Collection Unit
Division of Health Care Access and Accountability
Judy.Johnson@dhs.wisconsin.gov