STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Milwaukee Enrollment Services, Petitioner

vs.

[redacted], Respondent

DECISION
Case #: FOF - 152780

Pursuant to petition filed October 4, 2013, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Milwaukee Enrollment Services to disqualify [redacted] from receiving FoodShare benefits (FS) for one year, a hearing was held on Thursday, December 19, 2013 at 01:45 PM, at Milwaukee, Wisconsin.

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

There appeared at that time the following persons:

PARTIES IN INTEREST:
Petitioner:

Milwaukee Enrollment Services
1220 W Vliet St
Milwaukee, WI 53205

Respondent:
[redacted]

ADMINISTRATIVE LAW JUDGE:
Debra Bursinger
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES #[redacted]) is a resident of Milwaukee County who received FS benefits in Milwaukee County from July 1, 2010 through August 21, 2013.
2. On February 24, 2010, respondent completed a FS review. She reported household composition of two including herself and one minor child. On March 16, 2010, the agency issued a Notice of Decision

approving the respondent for continued FS benefits. The notice also informed the respondent of reporting requirements, including household composition changes.

3. On August 4, 2010, respondent completed a FS review and reported the birth of a child. She reported an address of [redacted], Milwaukee, WI. She did not report the father of her children, MT, as part of the household. On August 13, 2010, the agency issued a Notice of Decision for continued FS benefits with a household that included respondent and two minor children.
4. On October 21, 2010, respondent reported MT is residing in her home. The agency erred in not adding MT to the household FS group.
5. On October 21, 2010, at 9:07 p.m., respondent submitted an online ACCESS renewal. She did not include MT in the household. On October 31, 2010, respondent completed another ACCESS renewal which reported MT out of the home as of October 25, 2010.
6. On November 4, 2010, respondent's renewal was processed with MT included in the FS group.
7. On January 5, 2011, respondent completed an ACCESS application in which she reported MT is in the household. Benefits were continued with MT in the household.
8. On March 25, 2011, respondent contacted the agency to have MT removed from her case stating that MT moved out on March 23, 2011.
9. On June 15, 2011, the respondent completed a review and reported no changes.
10. On August 18, 2011, the respondent reported the birth of a child that was added to the FS group. Benefits were issued based on a FS group of one adult and three minor children.
11. On January 20, 2012, the respondent completed a review and reported no changes.
12. On November 13, 2012, respondent testified under oath in a family court proceeding that she and MT, father of her children, have resided together for the previous 7 years.
13. On November 15, 2012, the agency received the information that MT and respondent were residing together and added MT to the household. Based on MT's earned income, the household was not eligible for FS benefits. A notice of decision was issued to the respondent on November 16, 2012.
14. On November 20, 2012, respondent contacted the agency and reported that she and MT lied in court about residing together.
15. On March 11, 2013, respondent submitted a change report indicating MT moved out of the home on March 1, 2013. She reported a new address of [redacted], Milwaukee, WI.
16. On July 18, 2013, MT was added to the case.
17. On August 8, 2013, respondent completed a review and reported that MT moved out of her household in 2005.
18. On October 21, 2013, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that respondent intentionally failed to report accurate household members and address.
19. The respondent failed to appear for the scheduled December 19, 2013 Intentional Program Violation (IPV) hearing and did not provide any good cause for said failure to appear.

DISCUSSION

The Respondent did not appear for this 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 hearing in this case took place on December 19, 2013. The Respondent was instructed via the hearing notice to appear at 1220 W. Vliet St., Milwaukee, WI for the hearing. The respondent did not appear or contact the administrative law judge with a phone number where she could be reached. The OIG indicated that the Administrative Disqualification Hearing Notice was sent to respondent at her last known address, with no returned mail. Consequently, the hearing was held in the Respondent's absence.

The Respondent should note that pursuant to the Federal Regulation cited above, she has ten days from the December 19, 2013 date to contact the Division of Hearings and Appeals and provide a claim of good cause for her failure to be available for the hearing.

An intentional program violation of the FoodShare program occurs when a recipient intentionally does the following:

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.

FoodShare Wisconsin Handbook, § 3.14.1; *see also* 7 C.F.R. § 273.16(c) and Wis. Stat. §§ 49.795(2-7).

An intentional program violation can be proven by a court order, a diversion agreement entered into with the local district attorney, a waiver of a right to a hearing, or an administrative disqualification hearing, *FoodShare Wisconsin Handbook,* § 3.14.1. The petitioner can disqualify only the individual found to have committed the intentional violation; it cannot disqualify the entire household. Those disqualified on grounds involving the improper transfer of FS benefits are ineligible to participate in the FoodShare program for one year for the first violation, two years for the second violation, and permanently for the third violation. Although other family members cannot be disqualified, their monthly allotments will be reduced unless they agree to make restitution within 30 days of the date that the FS program mails a written demand letter. 7 C.F.R. § 273.16(b).

7 C.F.R. §273.16(e)(4) provides that the hearing shall proceed if the respondent cannot be located or fails to appear without good cause. 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 the evidence that the petitioner presented at hearing.

In order for the petitioner 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 a program violation per 7 C.F.R. § 273.16(e)(6). 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. …

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.

In order to prove the second element, i.e., intention, 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.

Based upon the record before me, I find that the petitioner has established by clear and convincing evidence that the respondent intentionally violated FS program rules, and that this violation was the first such violation committed by the respondent. The respondent's statements regarding MT's residence have been inconsistent and self-serving, depending on what is most favorable for the circumstances. So, for example, it was most favorable to the respondent and MT to report to the family court that they were living together but the statement changed when dealing with the FS agency because it was not favorable for them to be residing together. The self-serving nature of the respondent's statements demonstrates a lack of credibility. The agency produced sufficient evidence to establish that MT and respondent were residing together based on residential leases, employment records, court records, voting records and credit reports. The agency further demonstrated that respondent misrepresented her eligibility when she provided her mother's address at [redacted], Milwaukee. Respondent should have included her mother in the FS group as well but failed to report her as part of the household. Respondent failed to appear to rebut any of the agency's evidence. Based on the totality of the evidence, the petitioner correctly seeks to disqualify the respondent from the FS program for one year.

CONCLUSIONS OF LAW

1. The respondent violated, and intended to violate, the FS program rule specifying that misrepresenting eligibility to receive FS benefits is prohibited.
2. The violation specified in Conclusion of Law No. 1 is the first such violation committed by the respondent.

NOW, THEREFORE, it is **ORDERED**

That the petitioner's determination is sustained, and that the petitioner may make a finding that the respondent committed a first IPV of the FoodShare program and disqualify the respondent from the program for one year, effective the first month following the date of receipt of this decision.

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 Milwaukee, Wisconsin, this 20th day of December, 2013

_____

\sDebra Bursinger
Administrative Law Judge
Division of Hearings and Appeals

c: Miles - email
Public Assistance Collection Unit - email
Division of Health Care Access and Accountability - email
Pamela Hazley - email

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The preceding decision was sent to the following parties on December 20, 2013.

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