



STATE OF WISCONSIN

In the Matter of

DECISION

Office of Inspector General,
Petitioner

FOF/152764

v.

██████████, Respondent

The attached proposed decision of the hearing examiner dated December 23, 2013, is hereby modified as follows and as such is adopted as the final order of the Department.

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 Office of the Inspector General to disqualify ██████████ ██████████ from receiving FoodShare benefits (FS) for one year, a telephonic hearing was held on Tuesday, December 10, 2013 at 01:00 PM, at Milwaukee, Wisconsin.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV) that disqualifies him from the FS program for 10 years.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

Office of the Inspector General
Department of Health Services - OIG
PO Box 309
Madison, WI 53701

Respondent:

██████████
██████████
██████████
██████████

ADMINISTRATIVE LAW JUDGE:

Kelly Cochran
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # [REDACTED]) is a resident of Milwaukee County who received FS benefits for himself and his son, [REDACTED] in Milwaukee County from March 6, 2012 through February 28, 2013.
2. Respondent's son received FS in [REDACTED] from at least January 2011-February 2013. Exhibits 1-2.
3. On July 17, 2012 respondent completed a renewal for FS in Wisconsin. Exhibit 3. At that time he reported that his son was living with him in Wisconsin.
4. On August 12, 2012 respondent completed a six month report form for FS in Wisconsin. Exhibit 4. At that time he reported that his son was living with him in Wisconsin.
5. On January 17, 2013 respondent completed a renewal for FS in Wisconsin. Exhibit 5. At that time he reported that his son was living with him in Wisconsin.
6. On November 4, 2013, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that respondent provided false information regarding the residence of his son in order to receive duplicate FS.
7. The respondent failed to appear for the scheduled December 10, 2013 Intentional Program Violation (IPV) hearing and did not provide any good cause for said failure to appear.

DISCUSSION

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. An individual found to have made a fraudulent statement or representation with respect to the identity or place of residence of the individual in order to receive multiple food stamp benefits simultaneously shall be ineligible to participate in the Program for a period of 10 years. See 7 CFR §273.16(b)(5). 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.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear convincing power. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the McCormick treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 McCormick on Evidence § 340 (John W. Strong gen. ed., 4th ed. 1992).

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.

I find that the respondent misrepresented where his son was living in order to receive more FS in Wisconsin. The continuous affirmative reporting of his son in his home at each FS renewal makes this clear. The petitioner showed that the son was receiving it at that time in [REDACTED] through his mother’s FS case there. The respondent has not responded to those allegations either by way of this hearing or in response to letters that the agency mailed to him advising him of the allegations. The petitioner’s representative testified at hearing that she did have a conversation with the respondent in November 2013 however, and that respondent admitted at that time to his son not being in his home for purposes of receiving FS in Wisconsin. I will take his lack of response or appearance as an admission of the allegations and find that the agency has met its burden of proof with the evidence it has presented that the intentional program violation occurred. The only problem with the agency’s case is the penalty period it seeks to impose. The regulation states:

Except as provided under paragraph (b)(1)(iii) of this section [which provides for permanently disqualifying an individual for the third occasion of any intentional program violation], an individual found to have made a fraudulent statement or representation with respect to the identity or place of residence of the individual in order to receive multiple food stamp benefits simultaneously shall be ineligible to participate in the Program for a period of 10 years.

See 7 CFR §273.16(b)(5). Clearly, the respondent’s misrepresentation was not so that *he* would receive multiple benefits simultaneously. Thus, the penalty period would be for the first intentional program violation, which carries a penalty of one year. 7 C.F.R. § 273.16(b)(1)(i). There was no evidence to suggest that any other penalty would be appropriate in this case.

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 involved the misrepresentation of facts, namely where his son was living. Therefore, the petitioner correctly seeks to disqualify the respondent, however, the penalty is to disqualify him from the FS program for one year. See 7 CFR §273.16(b)(1)(i).

