



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

██████████, Respondent

DECISION
Case #: FOF - 154439

Pursuant to petition filed December 27, 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 ten years, a telephone hearing was held on Tuesday, February 11, 2014 at 02:45 PM.

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:

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

Respondent:

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

ADMINISTRATIVE LAW JUDGE:

Peter McCombs
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # ██████████) is a resident of Dane County who received FS benefits in Dane County from at least June 1, 2012 through November 30, 2012.

2. The respondent submitted an ACCESS application dated May 2, 2012, which indicated that her sister, CM, was living with her.
3. CM received FS benefits in the State of Mississippi from April 18, 2012, through at least February, 2014.
4. On January 3, 2014, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that petitioner provided false information in order to receive FS benefits.

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. 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).

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.

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).

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.

The petitioner asserts that the respondent violated FS regulations regarding receipt of duplicate FS benefits, and therefore the respondent should be subject to a 10-year disqualification period. FS policy states:

3.14.1.2 IPV Disqualification for Receipt of Multiple FS Benefits

A person who makes a false or misleading statement, or misrepresents, conceals or withholds facts including but not limited to identity or place of residence in order to receive multiple FS benefits simultaneously shall be ineligible for a period of 10 years.

FoodShare Wisconsin Handbook, § 3.14.1.2. See also, 7 CFR 273.16(5).

The petitioner has established by clear and convincing evidence that the respondent misrepresented CM’s residence when she submitted the May, 2012, ACCESS application for FS benefits. Testimony provided by the respondent at hearing contradicted information that the respondent provided to the petitioner previously, and simply stated, the respondent’s story fails to hold water.

The petitioner’s notice to the respondent asserts the imposition of a 10-year disqualification period. That time period is warranted in circumstances where a respondent has intentionally misrepresented or made false statements in order to receive duplicate benefits. *Id.* However, in the instant matter, the record does not indicate that the respondent’s misrepresentations were made with intent to receive duplicate benefits. There is nothing in the record to demonstrate that the respondent received duplicate benefits, knew that CM received benefits in another state, sought duplicate benefits for CM, nor that CM even knew about her inclusion in the respondent’s ACCESS application. I also question the propriety of alleging a violation of duplication of benefits where the respondent was not the recipient of benefits in two states. The petitioner has not established that the respondent’s actions violate the FS duplicate benefits prohibition warranting a 10-year disqualification.

Based upon the record before me, I conclude that the petitioner has failed to establish by clear and convincing evidence that the respondent intentionally violated FS program rules regarding receipt of duplicate benefits. Nothing in this decision will prevent the petitioner from pursuing an alternate disqualification period based upon the actions of the respondent, subsequent to the issuance of new, proper notice to the respondent.

CONCLUSIONS OF LAW

1. There is not clear and convincing evidence that the respondent violated, and intended to violate, the FS program rule specifying that FS recipients may not receive duplicate benefits.
2. The agency cannot disqualify the respondent from the FS program for a period of 10 years.

NOW, THEREFORE, it is ORDERED

That the matter is remanded to the petitioner to rescind the Administrative Disqualification from respondent's FS case. This action shall be taken within 10 days following issuance 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). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 19th day of March, 2014.

\sPeter McCombs
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
Megan Ryan - email



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on March 19, 2014.

Office of the Inspector General
Public Assistance Collection Unit
Division of Health Care Access and Accountability
megan.ryan@wisconsin.gov