



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Eau Claire County Department of Human Services, Petitioner

vs.

DECISION

Case #: FOF - 154480

■■■■■, Respondent

Pursuant to petition filed January 2, 2014, under Wis. Admin. Code § HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Eau Claire County Department of Human Services to disqualify ■■■■ ■■■■ from receiving FoodShare benefits (FS) for one year, a hearing was held on Wednesday, February 19, 2014 at 9:00 AM, at Eau Claire, 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:

Eau Claire County Department of Human Services
721 Oxford Avenue
PO Box 840
Eau Claire, WI 54702-0840
By: Aaron Borreson

Respondent:

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ADMINISTRATIVE LAW JUDGE:

Michael O'Brien
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # ■■■■■) is an Eau Claire County resident who received FoodShare benefits in Eau Claire County from December 1, 2012 through October 31, 2013.

2. The respondent completed an online review of her FoodShare benefits on November 8, 2012. She did not report any income and indicated that she was not employed at that time.
3. The respondent was on call for [REDACTED] from June 12, 2012 through July 12, 2013. She was not working the day she completed her online review but did work before and after that date. *See Exhibit 3.*
4. The respondent reported when she began working full time in July 2013.
5. On March 4, 2014, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that the respondent failed to report income earned through a temporary employment agency.

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 FoodShare 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 FoodShare program mails a written demand letter. 7 C.F.R. § 273.16(b).

To establish that a FoodShare recipient has committed an IPV, the agency must prove by clear and convincing evidence both that the recipient committed and intended to commit a program violation per 7 C.F.R. § 273.16(e)(6). The Wisconsin Supreme Court discussed the clear and convincing standard in relation to other burdens of proof in *Kuehn v. Kuehn*, 11 Wis.2d 15 (1959):

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 helpful. 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 the recipient committed an IPV, the trier of fact must derive from the evidence a firm conviction as to the existence of each of the two elements, even though a reasonable doubt may exist that the opposite is true.

Proving the second element, intention, requires clear and convincing evidence that the FoodShare recipient intended to commit the IPV. The question of intent is generally determined by the trier of fact. *State v. Lossman*, 118 Wis.2d 526 (1984). A person is generally presumed to know and intend the natural and probable consequences of 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 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 FoodShare recipient knew that the act or omission violated the FoodShare Program but committed the violation anyway.

The agency’s claim against the respondent rests upon her failure to report wages received from a [REDACTED], a temporary employment agency. From June 12, 2012, through July 12, 2013, she had six assignments through the service. Three were for extended periods and three were for a single day. The first was from June 12 – 22, 2012, the second from August 1 – 31, 2012, the third on October 12, 2012, the fourth on November 2, 2012, the fifth on November 16, 2012, and the last from November 28, 2012, though July 12, 2013. She had an annual review of her FoodShare on November 8, 2012, and reported online that she was not employed. She believed that because she was not working at that particular time, she did not have to report any change. She also reported that she called the change center and was told that, given her circumstances, she did not have to report any change.

It is impossible to know exactly what the exchange was between the respondent and the change center. If she asked whether she had to report a change of circumstances when she was not working at that particular time and had only worked two days in the previous month, she was probably told she did not have to. Generally, recipients must report changes in income and employment only if the changes cause their income to rise over 130% of the federal poverty level, and then they do not have to report until the 10th day of the month following the change. *FoodShare Wisconsin Handbook*, § 6.1.1.2. The respondent did not meet this threshold in November 2012, when she did her online renewal. However, she probably did after August 2012, when she worked the entire month, and almost certainly did after November 2012, when she began working fulltime at \$11 per hour. This means that at some point she violated the FoodShare program rules when she failed to report a change of income. The question is whether the agency has established clearly and convincingly that she did so intentionally.

The respondent appeared to be an intelligent woman, which is supported by the fact that she was hired to work fulltime by the last company [REDACTED] assigned her to. One would expect that she would know that at some point while working fulltime for 7 ½ consecutive months she should have reported this to the agency, even if the work was through a temporary agency. Still, FoodShare rules, like those for most social services programs, can be overwhelming to anyone who is not an economic support specialist. Recipients are told their reporting requirements, but they may forget them. The petitioner did report to the agency when she began working fulltime at a permanent position. This suggests that she was not trying to hide information from the agency and supports the view that her errors were caused by ignorance of the rules rather than an intentional violation of them. In the

end, I am skeptical of her claims, but I lack a firm conviction that those claims are false. Based upon this, I find that the agency has not established by clear and convincing evidence that she committed an IPV and therefore that finding must be reversed.

I note to the petitioner that this decision has no bearing if the agency eventually brings an overpayment claim against her. If the agency brings such a claim, it need only prove its case by the preponderance of the credible evidence, a lower burden in which it only has to show that what it is trying to prove is more likely than not. More importantly, federal rules require the agency to recover all FoodShare overpayments regardless of who is at fault. This means that if the agency brings an action, she will not be able to defend herself by stating that she was unaware that she was required to report a change in her income. .

CONCLUSIONS OF LAW

For the reasons discussed above, there is not clear and convincing evidence that petitioner intended to commit an IPV.

NOW, THEREFORE, it is ORDERED

That the respondent's determination of an intentional program violation is reversed, and the petition for review is hereby dismissed.

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 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, no more than 30 days after the date of this hearing decision. 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 4th day of March, 2014

\sMichael O'Brien
Administrative Law Judge
Division of Hearings and Appeals

c: Great Rivers Consortium - email
Public Assistance Collection Unit - email
Division of Health Care Access and Accountability - email
Aaron Borreson - email



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The preceding decision was sent to the following parties on March 4, 2014.

Eau Claire County Department of Human Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
Aaron.Borreson@co.eau-claire.wi.us