STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Dane County Department of Human Services, Petitioner

vs.

DECISION
Case #: FOF - 155401

[redacted], Respondent

Pursuant to a petition filed February 10, 2014, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Dane County Department of Human Services to disqualify [redacted] from receiving FoodShare benefits (FS) for one year, a telephonic hearing was held on Tuesday, March 18, 2014 at 03:00 PM, at Baraboo, Wisconsin. At the request of the parties, the record was held open for two weeks for Ms. [redacted] to provide reliable evidence that her father consented to her using his FS card for his FS household, and then for a response by the county agency. Ms. [redacted] failed to timely submit any new evidence to DHA, but the county representative did fax to DHA its closing argument along with a copy of Ms. [redacted]'s Power of Attorney for Health Care. Those documents are received into the hearing record.

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:

Dane County Department of Human Services
1819 Aberg Avenue
Suite D
Madison, WI 53704-6343

Respondent:
[redacted]

ADMINISTRATIVE LAW JUDGE:
Gary Wolkstein
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES #[redacted]), [redacted], is a resident of Sauk County who received FoodShare (FS) benefits in Sauk County.

2. The respondent's father, [redacted], is a FS recipient, who received FS benefits during February, 2014.

3. The respondent has a medical power of attorney for health care decisions on behalf of her father. However, respondent is not her father's guardian and is not his power of attorney for finances or any other type of guardianship rights for her father.

4. [redacted] moved from Wisconsin to Tennessee on or about January 27, 2014.

5. On February 5, 2014, petitioner's daughter (respondent) used $130.80 of her father's FoodShare (FS) Quest card at the [redacted] grocery store in Wisconsin without her father's permission or consent.

6. On February 6, 2014, Mr. [redacted] contacted the Capital Call Center informed county agency workers that his FS card was missing and that likely his daughter had misused his FS card. Mr. [redacted] told the county workers that his FS card was used on February 6, 2014 without his consent or permission. See Exhibits 2, 3, and 7.

7. On February 12, 2014, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that the respondent used another individual's FS card without permission of that individual for her own gain. That notice stated this was a first violation with a one year disqualification period.

8. The respondent appeared for the March 18, 2014 Intentional Program Violation (IPV) hearing.

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. §§ 946.92(2).

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.

During the March 18, 2014, the respondent argued that her father told her that she could use his FS Quest card. Ms. [redacted] also had her 14 year old son testify that he heard some type of message from his grandfather. However, neither Ms. [redacted] nor her son were able to provide any type of reliable documentation of her father's consent for her to use his FS card. The county agency's representative, [redacted], responded persuasively that Mr. [redacted] did not appear on behalf of his daughter to retract his statement that she used his FS card with his permission. Mr. [redacted] further argued correctly that Ms. [redacted]'s Medical Power of Attorney did not provide her

with any legal right to use his FS Quest card or any other of his funds, as she was not his guardian or power of attorney for finances. Moreover, the respondent was unable to provide any evidence that she purchased the food for her father's FS household, as he was living in Tennessee at the time of her $130 grocery purchase on February 5, 2014. Finally, while the record was held open, the respondent failed to submit any written response to the county agency's persuasive March 25, 2014 closing argument.

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. Therefore, 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 indicating that by using her father's FS Quest card without his knowledge or permission for her own personal gain she was violating FS rules.

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). 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 12th day of May, 2014

\sGary Wolkstein
Administrative Law Judge
Division of Hearings and Appeals

c: Capital Consortium - email
Public Assistance Collection Unit - email
Division of Health Care Access and Accountability - email
[redacted] - email

State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on May 12, 2014.

Dane County Department of Human Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
[redacted]@countyofdane.com