



**STATE OF WISCONSIN**  
**Division of Hearings and Appeals**

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In the Matter of

Office of the Inspector General, Petitioner

vs.

DECISION

Case #: FOF - 157504

██████████, Respondent

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Pursuant to petition filed May 9, 2014, 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 hearing was held on Tuesday, July 15, 2014 at 2:30 PM, by telephone. The hearing record was held open for submission of affidavits from the petitioner; those affidavits were received.

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:

██████████, fraud investigator

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

Respondent:

██████████  
██████████  
██████████

**ADMINISTRATIVE LAW JUDGE:**

Nancy Gagnon  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. The respondent (CARES # ██████████) is a resident of Washington County who received FS benefits in Washington County from at least August 1, 2010 through November 30, 2013. During that period, the

respondent claimed that her twin sons were residing at least 50% with her. This caused her to receive more FS than she would have received as a household of one.

2. The respondent is divorced from the father of her two minor twin sons, JK and EK. The father is [REDACTED]. A Milwaukee County court order dated September 14, 2011 declares that [REDACTED] is to have primary placement of the twins from September 14, 2011 forward. The order also says, "by agreement the boys have been living with Dad since June 9, 2010." The respondent's address was [REDACTED]. [REDACTED]'s address was 1024 Elm Avenue, South Milwaukee. See, Exhibit 4-C.
3. The twins have been enrolled in the South Milwaukee school district since August 2010 (8<sup>th</sup> grade).
4. The respondent's twins resided with her at least half time prior to September 14, 2011. They did not live at least half time with her thereafter.
5. On June 13, 2014, the petitioner prepared and issued an *Administrative Disqualification Hearing Notice* alleging that the respondent received FS benefits for children who were not residing with her.

### 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., 4<sup>th</sup> 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.

## CONCLUSION

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 Department produced sufficient evidence to make a *prima facie* case that the twins were not living at least 50% with the respondent throughout the August 2010 through November 2013 period. The respondent testified that the twins lived with her more than half time throughout the period, notwithstanding their undisputed attendance in the South Milwaukee school system, 45 minutes’ drive away. She further testified that the boys spent more time at her residence because they did not get along with [REDACTED]’s wife. That fragment of the story seems plausible to me. However, when the respondent was asked to describe how the boys’ time was divvied up between the parents, she testified that she had them during the week, and they split weekend time 50/50. Given her testimony that the boys participated in South Milwaukee sports teams (which she perceives as superior to those in [REDACTED]), I am skeptical that the boys would be transported after the end of the school day – perhaps lengthened by a sports practice or game – all the way back to [REDACTED] on a school night. If this is all that the respondent offered, I would have agreed that she was falsely reporting the boys’ presence throughout the entire period. However, the record was held open for affidavits. Affidavits were received from the boys and [REDACTED]. [REDACTED]’s affidavit states that the boys “come and go as they please but mainly reside in [REDACTED] with their mother; but when my divorce is final they may be coming back to South Milwaukee.” The affidavits have created enough doubt in my mind about the period preceding the placement court order to conclude that there is not clear and convincing evidence that the boys were not living primarily with their mother during the August 2010 to September 14, 2011 period. However, the respondent has not offered enough to rebut the Department’s case for the September 14, 2011 through November 30, 2013 period. September 14, 2011 was the date of the court order that declares that primary placement was with the father. If the expectation was that the boys would go on spending more than half time with their mother, why did the father pursue the placement change? Why would the mother forego child support from that day forward? Because I believe, based on clear

and convincing evidence, that the boys lived primarily with their father after the court order placed them with their father, the respondent failed to correctly report her household composition thereafter. 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 specifying that accurate numbers of household members be reported.
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 31st day of July, 2014

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Nancy Gagnon  
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  
[REDACTED] - email





**State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

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The preceding decision was sent to the following parties on July 31, 2014.

Office of the Inspector General  
Public Assistance Collection Unit  
Division of Health Care Access and Accountability  
[REDACTED]@wisconsin.gov