STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

La Crosse County Department of Human Services, Petitioner

vs.

REHEARING DECISION
Case #: FOF - 157656

Redact, Respondent

Pursuant to petition filed May 16, 2014, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the La Crosse County Department of Human Services to disqualify Redact from receiving FoodShare benefits (FS) for one year, a telephonic hearing was held on Wednesday, December 17, 2014. The respondent had sought a rehearing concerning a decision issued in this matter on August 8, 2014, per a hearing originally heard on July 9, 2014. That rehearing request was granted, and rehearings subsequently scheduled for September 30, 2014, October 27, 2014, and November 25, 2014, were rescheduled at the respondent's request.

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:

La Crosse County Department of Human Services
300 N. 4th Street
PO Box 4002
La Crosse, WI 54601

Respondent:
Redact
Redact

Respondent's Representative:
Attorney Redact
Redact
Redact

ADMINISTRATIVE LAW JUDGE:
Peter McCombs
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # Redact) is a resident of Vernon County who received FS benefits in La Crosse County from July 25, 2011, through September 30, 2012.

2. Respondent was the primary person in a 2-person FS assistance group that included her minor child.

3. On July 25, 2011, respondent applied for FoodShare, BadgerCare and Childcare by submitting an ACCESS online application. On the application, she identified her employer as [redacted].

4. On July 25, 2011, respondent faxed two documents to the agency for job verification; both bore the signature signed of the law firm's owner, [redacted]. One document stated employment income of $10.00 per hour with no set hours. The other document showed that respondent worked an average of 25 hours per week at $10.00/hr.

5. Based upon the information provided by the respondent, the petitioner calculated her employment income: 50 hours biweekly at $10.00 per hour, multiplied by 2.15, for a total monthly gross income of $1,075 per month. Respondent also received child support income of $582.01 per month.

6. On August 9, 2011, petitioner approved monthly FS for the respondent in the amount of $294.

7. On December 1, 2011, respondent submitted a FoodShare Six Month Report form. She again reported employment income from [redacted]. She provided an Employer Verification of Earnings form showing 25 hours per week at $10.50 per hour. Petitioner confirmed continued FoodShare of $311 per month.

8. On May 22, 2013 the petitioner received a State Wage Information Collection Agency (SWICA) discrepancy identifying a potential under-reporting of respondent's earnings.

9. On April 14, 2014 the petitioner faxed a request to [redacted], the CPA firm that does payroll for [redacted], asking for respondent's gross pay information. On April 16, 2014, [redacted] reported that when the respondent applied for FS on July 25, 2011, she was being paid $1461.54 biweekly, and that continued through September, 2012.

10. On June 2, 2014, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that petitioner misreported her earned income from [redacted].

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 be a reasonable doubt as to their existence.

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 submitted a prima facie case establishing that the respondent committed an IPV and intended to do so when she submitted false information to the petitioner concerning her employment. The burden then shifted to the respondent to rebut the petitioner's case. I conclude that she has done so.

The respondent testified credibly that her employment at Redact unfortunately coincided with a highly contentious divorce between her employer and his wife. She stated that her employer used her position

and her pay to hide assets during the pendency of his divorce, including placing certain bank accounts in her name. She said that while she was technically paid the payroll check amounts as indicated, she did not receive all of those funds. She stated that her employer bribed and threatened her.

The petitioner did not substantively challenge her rebuttal. The petitioner could have easily addressed the respondent's allegations by requesting the appearance of Ms. Redact or issuing a subpoena for Mr. Redact's testimony, but it did not do so. While the petitioner did ask questions of the respondent expressing its disbelief that she did not create this overpayment intentionally, the petitioner was unable to establish that any of her testimony was false. While petitioner may have tipped the scales in favor of a finding that petitioner committed an IPV, it did not establish that she did so intentionally.

Accordingly, the agency cannot disqualify the respondent from the FoodShare program for one year.

CONCLUSIONS OF LAW

For the reasons discussed above, there is no clear and convincing evidence that respondent intended to commit an IPV.

NOW, THEREFORE, it is **ORDERED**

That the petitioner'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 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 23rd day of December, 2014.

_____

\sPeter McCombs
Administrative Law Judge
Division of Hearings and Appeals

c: Western Region For Economic Assistance - email
Public Assistance Collection Unit - email
Division of Health Care Access and Accountability - email
Attorney Redact - email
Bob Uebele - email

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The preceding decision was sent to the following parties on December 23, 2014.

La Crosse County Department of Human Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
Attorney Redact
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