



4. The respondent had her FoodShare review on January 7, 2013. She did not report at that time that one son had left her household and that another had obtained employment.
5. On July 7, 2014, the agency prepared an Administrative Disqualification Hearing Notice alleging that the respondent did not report an adult son's income and that a minor child had moved out of the household.
6. The respondent failed to appear for the scheduled August 21, 2014 Intentional Program Violation (IPV) hearing and did not provide any good cause for said failure to appear.

### 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).

The agency can prove an intentional program violation (IPV) can 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. Only the individual found to have committed the violation can be disqualified; the remaining household members are not disqualified. Those who intentionally violate the FoodShare program's rules are ineligible 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).

To establish that an FoodShare recipient has committed an IPV, the agency must prove by clear and convincing evidence both that she committed and that she intended to commit a program violation under 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 that each of the two elements exists even though there may be a reasonable doubt that the opposite is true.

In order to prove the second element, intention, the agency must present clear and convincing evidence that the 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). A person is presumed to know and intend the probable and natural consequences of her 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 recipient knew that the act or omission was a violation of the FoodShare rules but committed the violation anyway.

The amount of FoodShare a household receives depends upon the household’s size and total countable income. A FoodShare household consists of one or more persons who live in the same household and purchase and prepare food together for home consumption. 7 CFR § 273.1(a)(3). Children under 22 years old who live with a parent are considered part of that parent’s household. 7 CFR § 273.1. Household income means all income from any source unless 7 CFR § 273.9(c) excludes it. 7 CFR § 273.9(b). The only income of children that can be excluded is the earned income of children under 18 who attend elementary or secondary school. 7 CFR § 273.9(c)(7). Recipients must report a change of circumstances, including changes in employment and household composition within 10 days or when being certified. 7 CFR § 273.12(a)2 and (3). The FoodShare agency provided evidence that the respondent failed to report at her renewal on January 7, 2013, that a 13-year-old son had moved out and that a 19-year-old son had found a job. As a result, her household received \$3,866 more in FoodShare than it was entitled to from January 7, 2013, through June 30, 2013. The respondent did not appear at the hearing, so I must base my finding on the evidence presented by the county agency. Its worker, Aaron Borreson, interviewed the respondent and he indicated that she did not dispute any of the facts asserted by the agency. Based upon the record before me, I find that the petitioner has established by clear and convincing evidence that the respondent intentionally violated FoodShare 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 program for one year.

### **CONCLUSIONS OF LAW**

1. The respondent violated, and intended to violate, the FoodShare program rule specifying that recipients must report changes in household income and composition.
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 4th day of September, 2014

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\sMichael O'Brien  
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
- Bob Uebele - email



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

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