



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

DECISION

██████████ Respondent

Case #: FOF – 158900

Pursuant to a petition filed July 02, 2013, under Wis. Admin. Code §HA 3.03, and see, 7 C.F.R. § 273.16, to review a decision by the Oneida County Department of Social Services to disqualify the respondent, ██████████, from receiving FoodShare (FS) for a period of time, a telephonic hearing was held on August 26, 2014, at Rhinelander, Wisconsin. Ms. ██████████ failed to appear for that hearing and did not provide any good cause for such failure. The OIG representative, ██████████, presented her IPV case against the respondent. On August 27, 2014, the respondent contacted DHA and requested a rehearing and a Hmong translator. That rehearing was granted and an August 27, 2014 notice was sent to the respondent and the petitioner scheduling a rehearing on October 7, 2014 at 3:00 p.m. DHA hired a Hmong translator, ██████████, who appeared for the October 7, 2014 rehearing. However, once again the ██████████ failed to appear for her rehearing and established no good cause for her failure to appear at her rehearing. As of November 7, 2014, the respondent failed to provide to DHA any information to establish any good cause for her failure to appear on August 28, 2014 or October 7, 2014.

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:

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

Respondent:

██████████
████████████████████
████████████████████

ADMINISTRATIVE LAW JUDGE:

Gary Wolkstein
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # [REDACTED]) is a resident of Winnebago County who received FS benefits in Winnebago County from March 1, 2009 through April 1, 2014 for herself and her two children.
2. The respondent and her two children received FoodShare (FS) benefits for a household of three during the period of March, 2009 to April, 2014.
3. During her FS application and subsequent review applications, the respondent failed to report that her husband, [REDACTED] [REDACTED] ([REDACTED] [REDACTED]) resided in her household during the entire period of March, 2009 to April, 2014 and a member of her FS household. She also failed to report his income.
4. The agency subsequently learned and verified that her husband has been residing in the petitioner's FS household during the period of March, 2009 to April, 2014.
5. The respondent's FS overpayment period was from March, 2009 to April, 2014 in the amount of \$8,022.56.
6. The County sent a written *Administrative Disqualification Hearing Notice*, dated July 14, 2014, to the respondent notifying her of an FS disqualification hearing scheduled for August 26, 2014.
7. The respondent did not appear at the August 26, 2014 hearing, or telephone or write to offer good cause for being absent. In the *Notice*, the County alleged that the respondent committed an IPV by misstating or concealing facts from the County with intent that her husband resided in her household and his income.
8. The respondent intentionally failed to report her husband as a member of her household and his income while he was residing in her household. As a result of the respondent's intentional misstatements at application and thereafter, the County determined that the respondent's FS household was overpaid in FS benefits (due to larger household size and her husband's unreported income) during the subject period.
9. On August 27, 2014, the respondent contacted DHA and requested a rehearing and a Hmong translator. That rehearing was granted and an August 27, 2014 notice was sent to the respondent and the petitioner scheduling a rehearing on October 7, 2014 at 3:00 p.m.
10. DHA hired a Hmong translator, [REDACTED] [REDACTED], who appeared for the October 7, 2014 rehearing. However, once again the [REDACTED] [REDACTED] failed to appear for her rehearing, and established no good cause for her failure to appear at her rehearing. Even as of November 7, 2014, the respondent failed to provide to DHA any information to establish any good cause for her failure to appear for the October 7, 2014 rehearing.

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).

7 C.F.R. §273.16(e)(4) provides that the hearing shall proceed if the respondent cannot be located or fails to appear without good cause. The respondent did not appear or claim a good cause reason for not attending the hearing. Therefore, I must determine whether the respondent committed an IPV based solely on the evidence that the petitioner presented at hearing.

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.



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The preceding decision was sent to the following parties on November 11, 2014.

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