



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

██████████, Respondent

DECISION
Case #: FOF - 159820

Pursuant to a petition filed August 14, 2014, under 7 C.F.R. §273.16, to review a decision by the Office of the Inspector General (OIG) to disqualify ██████████ from receiving FoodShare benefits (FS) for a period of ten years, a hearing was held on November 5, 2014, by telephone. A hearing set for October 18, 2014 was rescheduled at the respondent's request.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

PARTIES IN INTEREST:

Petitioner:

Office of the Inspector General
Department of Health Services
P.O. Box 309
Madison, WI 53701
By: Megan Ryan

Respondent:

██████████
██████████
██████████

ADMINISTRATIVE LAW JUDGE:

Brian C. Schneider
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARE # ██████████) is a resident of ██████████ who received FS benefits in Eau Claire County from November 26, 2013 through April 30, 2014.
2. Throughout the period January 1, 2012 through April, 2014, the respondent received FS monthly from the State of ██████████.

3. On November 26, 2013, the respondent applied for FS in Eau Claire County. On her application she asserted that she did not receive FS in another state that month. FS were granted in Wisconsin effective November 26, 2013.
4. Thereafter the respondent utilized both her Wisconsin and [REDACTED] FS cards interchangeably in the Eau Claire area. Benefits on both cards were completely spent down at least through March, 2014. In April, 2014 the respondent moved back to [REDACTED]. She contacted the Wisconsin FS agency to close her case.
5. After receiving the sanction package from the OIG the respondent contacted Ms. Ryan. She told Ms. Ryan that she used both cards, that she would just pick whichever one she happened to grasp first. She thought she informed her [REDACTED] FS worker that she moved to Wisconsin. She alleged that she is forgetful but acknowledged that it seemed odd that she continued to receive [REDACTED] FS.
6. On September 4, 2014, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that the respondent received duplicate FS in Wisconsin and [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. 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).

There is a specific provision that applies to this case. 7 C.F.R. §273.16(b)(5) provides: "... an individual found to have made a fraudulent statement or representation with respect to the identity or place of residence of the individual in order to receive multiple food stamp benefits simultaneously shall be ineligible to participate in the Program for a period of 10 years."

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).

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.

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.

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 by making a false representation about her residence. It is true that she lived in Wisconsin when she applied, but she reported incorrectly that she did not receive FS elsewhere in the month of application, and she did not correct the residency error when it became obvious.

The respondent testified that she thought she closed her case in [REDACTED], and that due to problems with her memory she did not realize that her statement was incorrect. She had three witnesses testify about her memory problems, but she had no medical evidence to support her claim. Furthermore, the respondent’s violation was not one resulting from a bad memory. She knowingly used both her Wisconsin and [REDACTED] FS card to purchase groceries in Wisconsin. She may not have paid attention to which card she used each time, but she knew she had two cards and she knew she was using both of them. As a result the respondent essentially received twice the amount of FS she was eligible to receive, and that is a violation of FS rules.

While it could be argued that the respondent did not make a false misrepresentation to Wisconsin, she clearly misrepresented her residence in [REDACTED]. When she realized that her [REDACTED] case remained open, she continued to use the [REDACTED] benefits when she should have contacted [REDACTED] to report that her case there should close. The Wisconsin Department’s Deputy Secretary found in a prior final decision the following:

[The] Respondent must be honest in her dealings with both states. The integrity of the program, and the ease and speed of application, must depend upon the accuracy and honesty in fact of

applicants and recipients. A representation does not require an affirmative act. It may also occur by failing to disclose information that would correct a false impression. Here the respondent had a duty to disclose her residency, and that failure to disclose is a representation. See *State v. Ploeckelman*, 2007 WI App 31, 299 Wis.2d 251, *Kaloti Enterprises, Inc. v. Kellogg Sales Company*, 283 Wis.2d 555 (2005). The Respondent allowed the continuing and false representation that she was a Missouri resident and denied on her Wisconsin application that she was receiving Foodshare in another state. This amounts to an intended misrepresentation of residency for the purpose of receiving duplicate benefits.

Final Decision no. FOF-154850, dated May 28, 2014, page 5. In this case the respondent allowed the continuing and false representation that she was a [REDACTED] resident. Although she claims that she thought she reported her move to the [REDACTED] agency, the question she answered on the Wisconsin application was not whether she reported a move from her prior residence, but whether she received FS elsewhere in the month she applied for FS in Wisconsin. She had, and she continued the misrepresentation by failing to correct the error in [REDACTED] for five months after the Wisconsin application. This is not forgetfulness, it is deceit.

CONCLUSIONS OF LAW

The respondent violated, and intended to violate, the FS program rule specifying that a person shall not make a false representation about residency to receive FS from more than one state at the same time.

NOW, THEREFORE, it is ORDERED

That the petitioner's determination is sustained, and the respondent is hereby ineligible to participate in the FS program for a period of ten years, effective the first month following the date of receipt of this decision.

APPEAL TO COURT

You may appeal this decision in the Eau Claire County Circuit Court. 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 7th day of November, 2014

\sBrian C. Schneider
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
Megan Ryan - email



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on November 7, 2014.

Office of the Inspector General
Public Assistance Collection Unit
Division of Health Care Access and Accountability
megan.ryan@wisconsin.gov