



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Brown County Human Services, Petitioner

vs.

DECISION

Case #: FOF - 160549

██████████ Respondent

Pursuant to petition filed September 12, 2014, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Brown County Human Services to disqualify ██████████ from receiving FoodShare benefits (FS) for one year, a hearing was held on Thursday, October 23, 2014 at 10:00 AM, at ██████████, Wisconsin.

NOTE: Because the agency representative was unfamiliar with IPV hearings, the record was held open for one day to give the representative an opportunity to supplement the record and provide copies of the documents to the Respondent. Exhibits 4-8 were added to the record post-hearing.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV) between May 4, 2012 and September 30, 2012.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

Brown County Human Services
Economic Support-2nd Floor
111 N. Jefferson St.
██████████ WI 54301

By: Bob Ubele, Economic Support Specialist

Respondent:

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

ADMINISTRATIVE LAW JUDGE:

Mayumi Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. On April 11, 2012, the Respondent (CARES # [REDACTED]) completed a phone renewal, indicating that she was homeless, that she was not receiving any public cash assistance, that she had not lost employment and that she had no income from providing room and/or board. The Respondent signed the signature page of the summary on April 18, 2012 and returned it to the county agency on April 23, 2012. (Exhibits 4 and 8)
2. On May 7, 2012, CDPU sent the Petitioner a notice indicating that she would be receiving \$180.00 in FoodShare benefits for May 2012 and that as of June 2012, she would receive \$200 per month in Foodshare benefits. The notice further indicated that the agency had no income on file for the Respondent's household. (Exhibit 5)
3. The Respondent received the \$200 per month in FoodShare benefits on July 5, 2012 and August 5, 2012. (Exhibit 6)
4. The Respondent began employment in February 2012 and worked relatively regularly through June 5, 2012. Her first paycheck was issued on February 17, 2012 and her last paycheck was issued on June 15, 2012. (Exhibit 3)
5. On September 12, 2014, Mr. Ubele sent the Division of Hearings and Appeals a copy of an Administrative Disqualification Hearing Notice that he sent to the Respondent. However, the notice does not indicate a date that it was mailed to the Respondent. (Exhibit 1)
6. On October 23, 2014, Mr. Uebele sent the Respondent a letter indicating that the agency was relying upon a FoodShare Case Summary, a Case Summary signature, an About Your Benefits letter and a FoodShare disbursement printout to prove that she engaged in an intentional program violation. (Exhibit 7)

DISCUSSION

Respondent's Non-appearance

The Respondent did not appear for this hearing. This circumstance is governed by the regulation in 7 C.F.R. §273.16(e)(4), which states in part:

If the household member or its representative cannot be located or fails to appear at a hearing initiated by the State agency without good cause, the hearing shall be conducted without the household member being represented. *Even though the household member is not represented, the hearing official is required to carefully consider the evidence and determine if intentional Program violation was committed based on clear and convincing evidence.* If the household member is found to have committed an intentional program violation but a hearing official later determines that the household member or representative had good cause for not appearing, the previous decision shall no longer remain valid and the State agency shall conduct a new hearing. The hearing official who originally ruled on the case may conduct a new hearing. In instances where the good cause for failure to appear is based upon a showing of nonreceipt of the hearing notice, the household member has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. In all other instances, *the household member has 10 days from the date of the scheduled hearing to present reasons indicating a good cause for failure to appear. A hearing official must enter the good cause decision into the record.*

Emphasis added

The hearing in this case took place on October 23, 2014. The Respondent was advised of the date and time of the hearing, in an Administrative Disqualification Hearing Notice that was sent to her at [REDACTED], in [REDACTED], Wisconsin. Mr. Uebele indicated that this was the Respondent's last known mailing address and that the agency did not receive any returned mail.

The Respondent did not follow the instructions in the hearing notice to call the ALJ with a phone number where she could be reached. However, Mr. Uebele provided a phone number, ([REDACTED]) [REDACTED], for the Respondent. An unsuccessful attempt was made to reach the Respondent at the number. ALJ Ishii left a voicemail message for the Respondent.

The Respondent did not contact the Division of Hearings and Appeals within 10 days to explain her failure to appear. As such, it is found that the Respondent did not have good cause for her non-appearance.

The Merits of OIG's Claim

An IPV is defined at 7 C.F.R. §273.16(c) as intentionally: making a false or misleading statement or misrepresenting; concealing or withholding facts; or committing any act that constitutes a violation of the Food Stamp Act, federal regulations or any Wisconsin statute relating to the use, presentation, transfer, acquisition, receipt or possession of food stamp coupons or an authorization to participate (ATP) card.

The Department's written policy restates federal law, below:

3.14.1 IPV Disqualification

7 CFR 273.16

A person commits an Intentional Program Violation (IPV) when s/he intentionally:

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.

An IPV may be determined by the following means:

1. Federal, state, or local court order,
2. Administrative Disqualification Hearing (ADH) decision,
3. Pre-charge or pretrial diversion agreement initiated by a local district attorney and signed by the FoodShare recipient in accordance with federal requirements, or
4. Waiver of the right to an ADH signed by the FoodShare recipient in accordance with federal requirements.

FoodShare Wisconsin Handbook, §3.14.1.

The agency may disqualify only the individual who either has been found to have committed the IPV or has signed a waiver or consent agreement, and not the entire household. If disqualified, an individual will be ineligible to participate in the FS program for one year for the first violation, two years for the second violation, and permanently for the third violation. However, any remaining household members must agree to make restitution within 30 days of the date of mailing a written demand letter, or their monthly allotment will be reduced. 7 C.F.R. §273.16(b).

In order for the agency 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 an intentional program violation per 7 C.F.R. §273.16(e)(6).

"Clear and convincing evidence" is an intermediate standard of proof which is more than the "preponderance of the evidence" used in most civil cases and less than the "beyond a reasonable doubt" standard used in criminal cases. It is used in civil cases where a higher standard is required because the outcome could result in

In Kuehn v. Kuehn, 11 Wis.2d 15, 26 (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. In criminal cases, while not normally stated in terms of preponderance, the necessary certitude is universally stated as being beyond a reasonable doubt.

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 reasonable doubt as to the existence of the elements.

In the case at hand, the agency asserts that the Respondent committed an intentional program violation because she withheld information from the agency when she completed her renewal on April 11, 2012. Specifically, the agency asserts that the Respondent withheld information about her employment / earned income.

The April 11, 2012 renewal is reliable as a regularly kept business record of the State of Wisconsin and is sufficient to show that the Respondent did not report receiving any income. (See Exhibit 5) The printout from the Work Number website is also reliable as a regularly kept business record and shows that the Respondent got a job in February 2012 and was continuing to work through June 5, 2012, receiving her last paycheck for \$37.62 on June 15, 2012. (See Exhibit 3). Accordingly, it is found that the Respondent withheld facts that would have affected the amount of FoodShare benefits she received on May 4, 2012 and June 5, 2012.¹

Because the record contains no income information beyond the June 15, 2012 paycheck, there is no proof that the Respondent had income after that time and was therefore withholding income information. As such, the IPV will not be sustained for the period after June 15, 2012. I note that there is also no evidence that the Respondent received a FoodShare disbursement after August 5, 2012. (See Exhibit 6)

¹ FoodShare allotments are based upon prospectively budgeted monthly income and the agency must budget all income of FoodShare household. *FoodShare Wisconsin Handbook* §§4.1.1 and 4.3.1; 7 CFR §273.9(b)

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). There is nothing in the record to rebut the presumption that the Respondent knew that she would get more FoodShare benefits that she was entitled to, by withholding information about her income.

Based upon the record before me, I find that the agency has established by clear and convincing evidence that the Respondent intentionally violated FoodShare program rules by withholding income information that would have affected the benefits she received in May 2012 and June 2012. I also find that this violation was the first such violation committed by the Respondent, as there is no evidence to the contrary.

CONCLUSIONS OF LAW

That the Respondent committed a FoodShare IPV by withholding information about her income that would have affected the amount of FoodShare benefits she received in May 2012 and June 2012.

NOW, THEREFORE, it is ORDERED

That IPV case number [REDACTED] is sustained for the period of May 4, 2012 through June 15, 2012, and that the Respondent is hereby ineligible to participate in the FoodShare program for a period of 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 Milwaukee,
Wisconsin, this 7th day of November, 2014.

\sMayumi Ishii
Administrative Law Judge
Division of Hearings and Appeals

c: Bay Lake Consortium - email
Public Assistance Collection Unit - email
Division of Health Care Access and Accountability - email
Bob Uebele - 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.

Brown County Human Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
Uebele.bob@co.la-crosse.wi.us