



**STATE OF WISCONSIN**  
**Division of Hearings and Appeals**

---

In the Matter of

Burnett County Department of Social Services, Petitioner

vs.

DECISION

Case #: FOF - 161040

---

Pursuant to petition filed October 6, 2014, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Burnett County Department of Social Services to disqualify [REDACTED] from receiving FoodShare benefits (FS) for one year, a hearing was held on Tuesday, November 18, 2014 at 09:30 AM, at Siren, Wisconsin.

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:

Representative: Aaron Borreson

Burnett County Department of Social Services  
7410 County Road K, #280  
Siren, WI 54872

Respondent:

[REDACTED]  
[REDACTED]  
[REDACTED]

**ADMINISTRATIVE LAW JUDGE:**

Mayumi Ishii  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. On July 12, 2014, the Respondent (CARES # [REDACTED]) completed an on-line ACCESS application for FoodShare benefits, listing her residence at [REDACTED] (Exhibit 3)

2. On August 22, 2014, the agency received a rental type agreement dated July 2, 2014, which indicated that the Petitioner would be allowed to live in “our old home” at [REDACTED] in exchange for babysitting a younger brother. (Exhibit 4)
3. Sometime around September 3, 2014, Investigator Borreson went to the property at [REDACTED] and saw a trailer home on the site, which looked uninhabited. Investigator Borreson did not see any utility hook-ups on the trailer and when he looked in the windows, it appeared to him that the trailer was used for storage, because it was packed floor to ceiling with boxes and miscellaneous items. (Testimony of Investigator Borreson; Exhibit 2)
4. The Property is owned by Burnett County. (Exhibit 5)
5. On December 3, 2014, Investigator Borreson prepared an Administrative Disqualification Hearing Notice alleging that the Respondent, “Misrepresented eligibility to receive or attempt to receive FoodShare benefits you were not entitled to.” (Exhibit 1)
6. The Administrative Disqualification Hearing Notice did not list an overpayment, because the county agency determined that the Petitioner would have received the same amount of FoodShare benefits, had she correctly listed herself as homeless. (Testimony of Inv. Borreson)
7. Petitioner’s case has since been closed due to loss of contact. (Testimony of Inv. Borreson)

## 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 November 18, 2014. The county agency sent the Respondent an Administrative Disqualification Hearing Notice at [REDACTED] [REDACTED] [REDACTED]. Inv. Borreson indicated that this notice was returned. Consequently, on October 10, 2014, the agency sent another copy of the Administrative Disqualification Hearing Notice to an address at [REDACTED]. Inv. Borreson testified that this was the mailing address listed for the Respondent and that the agency did not receive any returned mail from that address.

The notice instructed the Respondent to contact the administrative law judge with a phone number where she could be reached for the hearing, but she failed to do so. An attempt was made to contact the Respondent at [REDACTED] the

phone number last known to the agency and the outgoing message indicated that voice mailbox was full and no longer accepting messages. Consequently, the hearing proceeded in the Respondent's absence.

The Respondent did not contact the administrative law judge and did not submit anything within 10 days of the hearing date. As such, it is found that the Respondent did not have good cause for her non-appearance.

*What is an Intentional Program Violation?*

7 C.F.R. §273.16(c) states that Intentional Program Violations shall consist of having intentionally:

- 1) Made a false or misleading statement or misrepresented facts; or
- 2) Committed an act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any State statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of coupons, authorization card or any other reusable documents used as part of an automated delivery system (access device).

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).

*What is OIG's burden of Proof?*

In order for the agency to establish that a FoodShare 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"(a.k.a. "more likely than not") used in most civil cases and less than the "beyond a reasonable doubt" standard used in criminal cases.

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., 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 as to the existence of each of the two elements even though, there may exist a reasonable doubt that the elements have been shown.

#### *The Merits of OIG’s Claim*

In the case at hand, the county agency asserts that the Respondent lied about her residence in her application for Wisconsin FoodShare benefits.

In her July 2012 application for benefits, the Petitioner claimed to be living at the address on Bloom Road. However, Inv. Borreson testified credibly that he went to the trailer at that address and that it appeared to be uninhabited, because there were no utility hook-ups and it was packed from floor to ceiling with boxes and miscellaneous items. Inv. Borreson testified that he did not see any furniture in the trailer and that he did not see a refrigerator, when he looked in the windows. In addition, the property on which the trailer home rests is owned by Burnett County and not by the Respondent’s mother, as claimed in the rental agreement provided to the agency. Based upon the foregoing, it is found that the Petitioner was not truthful about her residence.

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. However, 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 FoodShare Program but committed the violation anyway.

In this case, it is undisputed that the Petitioner derived no benefit from providing the Bloom Road address; that is, she did not receive more FoodShare benefits than to which she was otherwise entitled. This calls into serious question whether the Respondent knew she was violating the rules of the FoodShare program. After all, why lie if you don’t

have to? Without additional evidence concerning why the Respondent completed her application as she did, there is insufficient information, at this time, to find that she acted with the intent to violate the FoodShare program rules.

I note to the county agency that there appears to be more to the story here, than meets the eye. The Respondent turned 19 years old this past year, which means that if she remained in her mother's household, her income would need to be added to the income counted for her mother's FoodShare case. It might be wise to conduct further investigation, interviewing neighbors at her mother's residence and reviewing DWD records to see what address the Respondent lists with her employer(s) or to request information directly from the Respondent's employer(s).

### CONCLUSIONS OF LAW

The county agency has not met its burden to prove that the Respondent committed an intentional program violation.

**NOW, THEREFORE, it is ORDERED**

That IPV case [REDACTED] is hereby reversed.

### **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 5th day of December, 2014

\_\_\_\_\_  
\\sMayumi Ishii  
Administrative Law Judge  
Division of Hearings and Appeals

- c: Great Rivers Consortium - email
- Public Assistance Collection Unit - email
- Division of Health Care Access and Accountability - email
- Aaron Borreson - email





**State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

Brian Hayes, Administrator  
Suite 201  
5005 University Avenue  
Madison, WI 53705-5400

Telephone: (608) 266-3096  
FAX: (608) 264-9885  
email: DHAMail@wisconsin.gov  
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on December 5, 2014.

Burnett County Department of Social Services  
Public Assistance Collection Unit  
Division of Health Care Access and Accountability  
[Aaron.Borreson@co.eau-claire.wi.us](mailto:Aaron.Borreson@co.eau-claire.wi.us)