



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of
Office of the Inspector General, Petitioner

vs.

DECISION
Case #: FOF - 161286

[Redacted], Respondent

Pursuant to petition filed October 17, 2014, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Office of the Inspector General to disqualify [Redacted] from receiving FoodShare benefits (FS) for ten years, a telephonic hearing was held on Wednesday, December 10, 2014 at 10:15 AM. Post-hearing, the petitioner requested to supplement the record with additional comments and documentation. The respondent objected to the petitioner's request to supplement the record.

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:

[Redacted]
[Redacted]

Respondent's Representative:

[Redacted]
[Redacted]
[Redacted]

ADMINISTRATIVE LAW JUDGE:

Peter McCombs
Division of Hearings and Appeals

FINDINGS OF FACT

- 1. The respondent (CARES # [Redacted]) is a resident of Milwaukee County; she relocated to Wisconsin from Connecticut in September of 2013.

2. Respondent applied for FS benefits in Wisconsin on October 8, 2014. At that time, respondent notified her case worker that she received FS benefits from the State of Connecticut. Following her worker's instruction, respondent attempted to contact Connecticut to report her move to Wisconsin, but was unsuccessful. She reported this to her worker, who offered to email Connecticut.
3. Respondent was approved for and received FS benefits in Milwaukee County from October 8, 2013, through March 31, 2014.
4. The respondent received and accessed FS benefits from Connecticut between October 8, 2013, and March 31, 2014.
5. On October 21, 2014, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that respondent received dual FS benefits from Connecticut and Wisconsin.

### 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).

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., 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 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.

The petitioner contends that the respondent received duplicate FS benefits in Connecticut and Wisconsin, thereby warranting a 10 year disqualification period. The petitioner conceded at hearing that there appeared to be agency error in Connecticut that contributed to the issuance of duplicate benefits. Additionally, the respondent supplied an August 28, 2014, letter from the USDA to the Connecticut Department of Social Services, which identified serious concerns regarding Connecticut’s processing of FS matters. The respondent testified credibly regarding her attempts to contact Connecticut following her relocation to Wisconsin. She stated that she informed her Wisconsin worker of her Connecticut FS benefits, and that her worker ultimately offered to email Connecticut regarding the status of her FS case there. This testimony was corroborated by petitioner’s electronic Case Comments, which indicate that the worker faxed an out-of-state inquiry to Connecticut on October 10, 2013, and called Connecticut on October 11, 2013 to verify closure of the case there on September 30, 2013. See, Exhibit R-1. She testified that she continued to use the benefits on her Connecticut FS card, as both states were aware of her new residence. Respondent indicated that she was never requested to verify the closure of her Connecticut case. The respondent further presented testimony that she is disabled (learning disability, vision) and a SSI recipient. She argued, in sum, that she was simply unaware that accessing both Connecticut and Wisconsin FS benefits was improper.

The petitioner did not substantively rebut the testimony provided by the respondent, but instead argued that the respondent’s spending of her Connecticut benefits constitutes proof of her intentional program violation. Again, the respondent argued on cross examination that she supplied her worker with all of the information that was requested, and never intended to mislead or omit anything. While the petitioner may have presented a prima facie case establishing that the respondent committed an IPV, it did not establish that she did so intentionally. Accordingly, the agency cannot disqualify the respondent from the FoodShare program for one year.

At hearing, the petitioner also raised potential intentional program violations concerning petitioner's failure to report certain cash benefits and failing to correctly report her household composition. Neither of these issues were identified in the Administrative Disqualification Hearing Notice dated October 21, 2014, nor was a sanction pertaining to those alleged IPVs identified therein. As such, I do not find that those alleged IPVs are properly subject to determination at this time in this case, as the respondent received no notice of them prior to hearing.

Post-hearing the respondent sought to supplement the record with additional argument and documentation. The respondent objected, noting:

The state has the burden in this case to submit sufficient evidence to meet the clear and convincing evidence standard and should have submitted all evidence it felt was needed to sustain the IPV when it scheduled the hearing.

*Delessio email*, December 10, 2014. I concur with the respondent. The petitioner had an opportunity to present its case at hearing, and did not request additional time to do so prior to the record closing at conclusion of the hearing. Presenting additional argument and documentation post-hearing places the respondent at a disadvantage in that the respondent cannot effectively question the assertions raised by the petitioner, nor effectively impeach the proffered documentation. The record closed at the conclusion of the telephonic hearing; additional argument and documentation submitted via email by the petitioner post-hearing is not included in the record.

### **CONCLUSIONS OF LAW**

For the reasons discussed above, there is no clear and convincing evidence that respondent intended to commit an IPV.

**NOW, THEREFORE**, it is **ORDERED**

That the petitioner's determination of an intentional program violation is reversed, and the petition for review is hereby dismissed.

### **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 23rd day of December, 2014.

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\sPeter McCombs  
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
- Redact - email



## State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on December 23, 2014.

Office of the Inspector General  
Public Assistance Collection Unit  
Division of Health Care Access and Accountability

*Redact* @wisconsin.gov