

3. On May 22, 2012 the agency issued a notice of decision to respondent stating that her FS application was approved and she would receive FS. See Exhibit A. The notice listed the income reported in the home (including [REDACTED]) and stated petitioner's FS reporting requirements, including that she needed to report to the agency if her monthly household income rose above \$2836.
4. On May 30, 2012 respondent's employment with [REDACTED] ended.
5. On June 7, 2012 respondent began employment with [REDACTED]. See Exhibit H. She worked for [REDACTED] until November 15, 2013. This information was not provided to the agency until April 4, 2014.
6. On August 20, 2012 the agency mailed respondent her a six month reporting form (SMRF) and instructions. Exhibit J.
7. On September 7, 2012 respondent reported to the agency that respondent's employment with [REDACTED] ended on May 30, 2012 per the SMRF. See Exhibit E. Respondent did not report the employment with [REDACTED].
8. On March 3, 2013 respondent had an annual FS renewal. See Exhibit K. Respondent did not report the employment with [REDACTED]. The renewal form provided a FS penalty warning for giving false information or hiding information to receive FS.
9. Respondent's last paycheck was issued on 8/23/13 from [REDACTED]. See Exhibit H.
10. On August 31, 2013 respondent's FS ended due to her refusal to cooperate with a Quality Control review. See Exhibits C and L.
11. On May 28, 2014 the agency issued a notice of FS overpayment to respondent. Exhibit M. The amount of the overpayment was \$2131 for the period of 3/1/13-8/31/13 for misrepresentation of or failure to report earned income due to client error.
12. On November 5, 2014, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that respondent withheld facts related to income and employment in order to receive FS.

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., 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 exist a reasonable doubt that the opposite is true.

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 agency argued that respondent had intentionally failed to report her income with [REDACTED] at her September 2012 SMRF and in March 2013 at her FS renewal. Respondent appeared at hearing. Her testimony

was varied. She testified that she had reported the [REDACTED] income in September and March by having her employer fill out the necessary paperwork and that she mailed it in. Her testimony then varied about whether or not she had reported in September however. Regardless, there is no such paperwork to review now for either timeframe. What we do have are the SMRF and renewal forms themselves. See Exhibits E, J and K. Nowhere in those forms does respondent make a note of new employment. Further, the agency's case notes describe a phone interview with respondent wherein she reported on April 15, 2013 that her husband was the only one employed at that time. See Exhibit E. And despite her testimony that she believed her FS ended in April 2013, she received notices beyond the March 2013 renewal showing the agency was not counting her employment with [REDACTED] and that she continued to use her FS beyond April 2013. (Exhibit P). As her income level was used to determine the amount of her monthly FS allotment, it is clear that respondent received a benefit from not reporting her income. See Exhibit M.

The greater weight of the evidence shows respondent did not report the [REDACTED] earnings. Misstating facts with the intention of receiving or continuing to receive FS benefits and failing to report changes in income are violations of the FS program under Wis. Stat. §§49.795(2) and (2m). Both have occurred here and there is no doubt that a violation of the FS program has occurred. That respondent intended to commit an IPV is also clear. Respondent consistently failed to report her income with [REDACTED] and consistently allowed the agency to continue issuing benefits to her based on the wrong income. She did nothing to correct this information. Rather, she signed under the penalty of perjury that what she submitted to the agency was correct and that she understood that giving incorrect information could result in a termination of her benefits, a fine or imprisonment. And, she continued to use the benefits even after she received notices showing what the agency was using for household income.

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, and that this violation was the first such violation committed by the respondent. Therefore, the petitioner correctly seeks to disqualify the respondent from the FS program for one year.

CONCLUSIONS OF LAW

1. The respondent violated, and intended to violate, the FS program rule specifying that an intentional program violation of the FoodShare program occurs when a recipient intentionally makes a false or misleading statement, or misrepresents, conceals or withholds facts.
2. The violation specified in Conclusion of Law No. 1 is the first such violation committed by the respondent.

NOW, THEREFORE, it is

ORDERED

That the petitioner's determination is sustained, and that the petitioner may make a finding that the respondent committed a first IPV of the FoodShare program and disqualify the respondent from the program for 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 13th day of January, 2015

\sKelly Cochrane
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
- Sherrie Johnson - 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 January 13, 2015.

Office of the Inspector General
Public Assistance Collection Unit
Division of Health Care Access and Accountability
sherrie.johnson@dhs.wisconsin.gov