



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Marathon County Department of Social Services, Petitioner

vs.

DECISION

Case #: FOF - 161743

Redact

, Respondent

Pursuant to petition filed November 6, 2014, under Wis. Admin. Code § HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Marathon County Department of Social Services to disqualify *Redact* from receiving FoodShare benefits (FS) for one year, a hearing was held on Thursday, December 18, 2014 at 08:30 AM, at Wausau, 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:

Marathon County Department of Social Services
400 E. Thomas Street
Wausau, WI 54403

Respondent:

Redact

Redact

ADMINISTRATIVE LAW JUDGE:

Michael O'Brien
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # *Redact*) is a resident of Marathon County who received FS benefits in Marathon County from January 1, 2014 through February 28, 2014.
2. The respondent's son was in jail from October 14, 2013, through February 18, 2014. She had a review on January 8, 2014, but did not report this.

3. On November 10, 2014, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that the respondent falsely reported at her FS interview that her son was living with her.
4. The respondent failed to appear for the scheduled December 18, 2014 Intentional Program Violation (IPV) hearing and did not provide any good cause for said failure to appear.

DISCUSSION

FoodShare recipients commit an intentional program violation if they intentionally make a false or misleading statement or if they misrepresent, conceal, or withhold facts. If the Department proves by clear and convincing evidence that they intentionally violated the program's rules, they lose their eligibility; the penalty for the first violation is one year. 7 CFR §§ 273.16(e)(6) and (b)(1)(i). The Department seeks to disqualify the respondent for one year because it contends that she failed to report during her January 2014 review that her son was in jail and thus did not live with her. Because she did not report this, she received \$311 more in FoodShare than she was entitled to.

Clear and convincing is a middle level of proof that requires the Department to show that more than just a preponderance of the evidence supports its position but does not require it to eliminate all reasonable doubt, as it would have to in a criminal case:

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 v. Kuehn, 11 Wis.2d 15, 26 (1959)*Kuehn*, 11 Wis.2d at 26.

Wisconsin Jury Instruction – Civil 205 explains that this level of evidence must clearly have more convincing power than the opposing evidence, but it does not require absolute certainty:

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.

The *McCormick* treatise suggests that the standard “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, to find that the respondent intentionally violated the FoodShare program's rules, the evidence must induce a firm conviction that he attempted to purchase FoodShare benefits and that he did so intentionally, although there may be a reasonable doubt that this is true. Intent is a subjective state of mind determined upon all of the facts. *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis.2d 183 (1977). A person is presumed to know and intend the probable and natural consequences of his voluntary words or acts. *See, John F. Jelke Co. v. Beck*, 208 Wis. 650 (1932).

The respondent's son was in jail from October 14, 2013, through February 18, 2014. She had a review on January 8, 2014, but did not report this. Because the amount of FoodShare one receives depends in part upon household size, she received \$311 more in FoodShare than she was entitled to. She did not appear and thus could not dispute the facts or point to any extenuating circumstances. The agency has established by clear and convincing evidence that the respondent committed an intentional program violation and correctly seeks to disqualify her from the program for one year.

CONCLUSIONS OF LAW

1. The respondent violated, and intended to violate, the FS program rule specifying that a recipient shall provide accurate information to the agency.
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 Madison,
Wisconsin, this 12th day of January, 2015

\sMichael O'Brien
Administrative Law Judge
Division of Hearings and Appeals

c: Central Consortium - 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 January 12, 2015.

Marathon County Department of Social Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
Redact@co.portage.wi.us