



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Milwaukee Enrollment Services, Petitioner

vs.

██████████, Respondent

DECISION

Case #: FOF - 162497

Pursuant to petition filed December 8, 2014, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Milwaukee Enrollment Services to disqualify ██████████ ██████████ from receiving FoodShare benefits (FS) one year, a hearing was held on Wednesday, January 28, 2015 at 2:00 pm at Milwaukee, 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:

Milwaukee Enrollment Services
1220 W Vliet St
Milwaukee, WI 53205

By: Pamela Hazley, HSPC Sr.

Respondent:

██████████
██████████
██████████

By: ██████████
██████████

ADMINISTRATIVE LAW JUDGE:

Nancy Gagnon (telephonically)
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # ██████████) is a resident of Milwaukee County who received FS benefits in Milwaukee County from December 16, 2011 through November 30, 2013. She currently receives FS.

2. The respondent was employed at ██████████ during the December 2011 through November 2013 period, and she timely reported that employment and hourly pay (\$12.12 x 30 hours weekly) to the Department. *See*, Exhibit 1-E, SMRF of December 16, 2011.
3. As a follow-up to the December 16 SMRF, the Department issued an income verification request. A letter responding to that request was timely received on December 27, confirming pay of \$12.12 hourly and 30 hours of employment per week. When calculated using FS rules, the result is gross pay of **\$1,563.48**.
4. Per the employer-reported state wage data exchange record from the Department of Workforce Development, the respondent received gross wages of \$9,249 (\$3,083 monthly average) from ██████████ for the first quarter of 2012. In the second quarter of 2012, ██████████ paid her gross wages of \$9,712 (\$3,237 monthly average), in the third quarter \$9,991 (\$3,330 monthly average), and the fourth quarter \$11,382 (\$3,794, monthly). *See*, Exhibits 1-H, M, R.
5. On June 7, 2012, the respondent performed a telephonic case renewal in which employment and income information is reviewed. She again reported earning \$12.12 hourly, and working 30 hours weekly. Her answers were reduced to writing by the Department, and the respondent signed off on and returned the signature page. Wage verification was requested.
6. On June 27, 2012, an employer verification letter was received (late). The letter confirms the \$12.12 hourly rate, but states that the respondent has been working 75 hours every two weeks since April 1, 2012. *See*, Exhibit 1-L.
7. On November 8, 2012, the respondent filed a paper SMRF, reporting “no change” to her income, and confirming pay of \$12.12 hourly, with 75 hours worked biweekly.
8. On May 2, 2013, the respondent filed an online case renewal. She again reported earning \$12.12 hourly for the same number of hours.
9. At some point in the April through June 2013 period, the respondent began a second job performing services for a client in the IRIS assistance program.
10. On November 4, 2013, the respondent filed a paper SMRF with the Department. She reported that her hourly rate was now \$12.62, and that she was still working 75 hours every two weeks. She did not report employment through or income from IRIS. *See*, Exhibit 1-V.
11. Per the employer-reported state wage data exchange record, the respondent received quarterly gross wages in 2013 from ██████████ as follows: \$11,277 in the first quarter, \$7,552 in the second quarter, \$8,080 in the third quarter, and \$6,966 in the fourth quarter. Per the same record, she received quarterly gross wages in 2013 from IRIS as follows: \$1,569 in the second quarter, \$7,056 in the third quarter, and \$7,846 in the fourth quarter. *See*, Exhibit 1-X.
12. Throughout 2012 and 2013, the Department issued many documents to the respondent advising her to report income increases above 130% of the poverty level for her household size (\$1,920 in 2012, \$1,962 in 2013) within 10 days. *See*, Exhibits 1-I, N, Q, U.
13. On December 15, 2014, the petitioner prepared an *Administrative Disqualification Hearing Notice* alleging that respondent misrepresented and concealed pertinent facts related to her income. A one-year sanction was requested.

14. The respondent's testimony that she did not realize that her gross income exceeded income reporting threshold requirements, for over a year and half, was not credible.

DISCUSSION

I.

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 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.

II.

The respondent does not contest that she is required to accurately report her income and employment. Nonetheless, she clearly withheld pertinent facts regarding her total income and IRIS employment from the Department. The respondent repeatedly provided income information that led the Department to believe that she was earning half or less of her actual income. There were multiple opportunities within the framework of mandatory reporting reviews for her to make her actual income known, and the respondent did not accurately portray her actual hours or gross earnings at any of them.

The closer part of this case is the question as to whether the Department has met the “clear and convincing” standard with the regard to the respondent’s intent while she misled the Department as to her income and employment. The respondent testified that she unsure why the wage match data differs from her employer letters (and her reporting) showing the \$12.12 hourly wage and 30 hours worked weekly. Her best guess was overtime hours. Apparently, she was working *a lot* of overtime hours, and this volume of overtime hours should have prompted a report by her to the Department. The wage verification form sent by the Department to the respondent (for forwarding to the employer) specifically lists a space to enter estimated overtime hours and overtime hourly pay. For whatever reason, the respondent always returned a minimalist letter from the employer with regular hours and pay, and no mention of the overtime. If the employer or respondent had returned the Department’s form, the overtime should have been captured in the contemporaneous documentation. The respondent did not explain why the employer opted to not use the form, or list the large, ongoing amount of overtime in its verification letters.

The respondent further testified that she did not realize that she had tripped the \$1,920 reporting thresholds because she had no idea how much her gross earnings were. She stated that her paychecks are directly deposited, and that she does not do online banking. However, she receives a monthly paper statement showing her paycheck deposits. I will assume that she receives an annual W2 form for her employer showing gross annual wages, and that she may file an annual tax return. In any event, I did not find it probable that the respondent had no idea how much she received in gross earnings during 2012 and 2013. Rather, to borrow from *McCormick* above, it is highly probable that the respondent had at least a rough idea of her gross earnings, and that she certainly knew that her gross earnings were exceeding the reporting threshold.

Finally, the respondent testified that she did not report her IRIS earnings because she believed the county agency knew of IRIS earnings through the magic of cross-matched computer records. *I.e.*, because IRIS is a state-administered, Medicaid-related program, the portion of state government that administers the FoodShare program would know that she was working for an IRIS client and would know in real/contemporaneous time how much

she was earning. State government is a large entity. There can no reasonable expectation that one division knows the minutiae of components of another division. That is an example of why income reporting rules exist. I believe that it was highly probable that the respondent knew she was supposed to report her IRIS income and intentionally chose to disregard the reporting requirement.

Based upon the record before me, I conclude 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 (*e.g.*, 7 C.F.R. § 273.21) specifying that she must timely and truthfully report income changes.
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 24th day of March, 2015

\sNancy Gagnon
Administrative Law Judge
Division of Hearings and Appeals

c: Miles - email
Public Assistance Collection Unit - email
Division of Health Care Access and Accountability - email
Attorney Patricia Delessio - email
Pamela Hazley - 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 March 24, 2015.

Milwaukee Enrollment Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
Attorney Patricia Delessio
Pamela.Hazley@dhs.wisconsin.gov