



FH
[REDACTED]

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

In the Matter of

Milwaukee Enrollment Services, Petitioner

DECISION

v.

FOF/162502

[REDACTED]
[REDACTED]
[REDACTED]

PRELIMINARY RECITALS

Pursuant to a petition filed December 08, 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 [REDACTED] from receiving FoodShare benefits (FS) for a period of one year, a hearing was held on January 22, 2015, at Milwaukee, Wisconsin.

The issue for determination is whether the Respondent committed an Intentional Program Violation (IPV).

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: Pamela Hazley, HSPC Sr.
Milwaukee Enrollment Services
1220 W. Vliet St., Room 106
Milwaukee, WI 53205

Respondent:

[REDACTED]
[REDACTED]
[REDACTED]

ADMINISTRATIVE LAW JUDGE:

Mayumi M. Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. The Respondent (CARES # [REDACTED]) is a resident of Milwaukee County who received FoodShare benefits in between August 2012 and September 2014. (Exhibit 7)
2. The Respondent began working for [REDACTED] ([REDACTED]) on May 1, 2012 and she received her first pay check on June 5, 2012. The Respondent was employed with [REDACTED] at least through October 30, 2014. (Exhibit 19)
3. The Respondent was paid semi-monthly. She earned \$13.39 an hour and worked somewhere between 36 and 50 hours per week between May 1, 2012 and June 5, 2012. (Exhibit 19)
4. On June 13, 2012, the Respondent completed an ACCESS renewal stating that the only household income she was receiving came from unemployment benefits. The Respondent did not report her employment with / income from [REDACTED] (Exhibit 8)
5. The Respondent electronically signed the June 2012 renewal indicating that the information was complete and correct and that she understood the penalties for giving false information or breaking the rules. (Exhibit 8)
6. On August 5, 2013, the Respondent received a paycheck for 69 hours at a rate of \$13.39 an hour. In July 2013, the Respondent received two paychecks for 64 hours and 54.50 hours respectively, at a rate of \$13.390 an hour. (Exhibit 19)
7. On August 5, 2013, the Respondent completed an application for FoodShare benefits indicating that she was working for [REDACTED], but did not accurately report her earnings. The Respondent reported working 15 hours per pay period at a rate of \$10.09 an hour. (Exhibit 11)
8. The Respondent signed the application stating that the information was complete and correct and that she knew that there were penalties for providing false information or breaking the rules. (Exhibit 11)
9. The Respondent also submitted a letter purporting to be from a project supervisor at [REDACTED], indicating that as of July 29, 2013, the Respondent had been re-hired and would only be working 5-10 hours per week at \$10.09 an hour. (Exhibit 10)
10. In actuality, the Respondent had been working continuously for [REDACTED] since May 1, 2012. (Exhibit 19)
11. On January 30, 2014, the Respondent submitted a six-month report form (SMRF), in which she indicated that she was working for [REDACTED], 5-10 hours per pay period at \$10.09 an hour. The Respondent signed the SMRF, indicating that the information was correct and complete. (Exhibit 12)
12. On February 6, 2014, the Respondent submitted a letter purporting to be from a Direct Human Resource Supervisor at [REDACTED], indicating the Respondent was working 5-10 hours at \$10.09 an hour. (Exhibit 13)
13. In actuality, the Respondent had been working between 60 to 80 hours a pay period at \$13.39 an hour, between August 2013 and February 2014. (Exhibit 19)
14. On July 24, 2014, the Respondent completed another SMRF, in which she indicated working 10 hours a pay period at a rate of \$10.09 an hour. The Respondent signed the SMRF indicating that the information was complete and correct. (Exhibit 14)
15. The Respondent also submitted an Employer Verification of Earnings Form dated August 5, 2014, indicating that she was working 5 hours a week at \$10.09 an hour. (Exhibit 15)
16. In actuality, the Respondent was working 60 to 70 hours a pay period at \$13.39 an hour between March 2014 and September 2014. (Exhibit 19)

17. On November 20, 2014, Milwaukee Enrollment Services sent the Respondent FoodShare Overpayment Notices, claims [REDACTED], [REDACTED] and [REDACTED], seeking recovery of an overpayment of benefits for the period running from August 1, 2012 through September 30, 2014. (Exhibits 16-18)
18. The Petitioner did not file an appeal of the overpayment, as of the date of the hearing. (Testimony of Ms. Hazley)
19. On December 15, 2014, Milwaukee Enrollment Services prepared an Administrative Disqualification Hearing Notice alleging the Respondent provided false information to obtain more FoodShare benefits than she was entitled to receive. (Exhibit 1)

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 January 22, 2015. The Respondent was advised of the date and time of the hearing, in an Administrative Disqualification Hearing Notice that was sent to her at an address in Milwaukee. Ms. Hazley indicated that the Respondent has an open and on-going FoodShare case at that the address on the Administrative Disqualification Hearing is the address the Respondent last reported to the agency. (See also Exhibit 1) Ms. Hazley further testified that the agency did not receive any returned mail.

The Respondent did not appear for the hearing and she did not contact the Division of Hearings and Appeals within ten days of the hearing to explain her absence. Thus, it is found that the Respondent did not have good cause for her failure to appear for the hearing.

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., 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 elements have been shown.

The Merits of OIG’s Case

In the case at hand, Milwaukee Enrollment Services (the agency) asserts that the Respondent violated the rules of the FoodShare Program by withholding information and providing false information about her income, in order to receive more Foodshare benefits that she would have otherwise received.

It is clear that the Respondent provided false information when she completed the June 2012 renewal, because she failed to report her employment and income from [REDACTED]. Indeed, her employment and earnings were verified directly by her employer in Exhibit 19. The compensation report included in Exhibit 19 is reliable as a regularly kept business record.

It is also clear that the Respondent provided false information about her income, grossly underreporting it, when she completed an August 2013 application, a January 2014 SMRF and a July 2014 SMRF. She claimed to be working 5-10 hours per pay period at a rate of \$10.09 an hour. However, according to her employer’s records she was working closer to 50-70 hours a pay period at \$13.39 an hour.

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).

There is nothing in the record to rebut the presumption that the Respondent intentionally withheld information and outright lied about her household income to get more benefits. Indeed, it is extremely difficult to believe the Respondent did not know she was working more than 5 to 10 hours per week at \$3.00 an hour more than she reported.

Milwaukee Enrollment Services has met its burden to prove, by clear and convincing evidence, that the Respondent intentionally violated the rules of the FoodShare program by withholding information and by providing false information about her income.

CONCLUSIONS OF LAW

The Respondent committed an intentional program violation (IPV) by withholding information about and by providing false information her household income, contrary to 7 C.F.R. §273.16(c).

This is the Respondent's first IPV.

THEREFORE, it is ORDERED

That the agency's determination is sustained, and that it may 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, Wisconsin 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 (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 11th day of February, 2015.

\sMayumi M. Ishii
Administrative Law Judge
Division of Hearings and Appeals



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 February 11, 2015.

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