



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Marinette County Department of Human Services, Petitioner

vs.

██████████, Respondent

DECISION

Case #: FOF - 164254

Pursuant to petition filed February 26, 2015, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Marinette County Department of Human Services to disqualify ██████████ from receiving FoodShare benefits (FS) one year, a hearing was held on Tuesday, April 14, 2015 at 09:45 AM at Marinette, Wisconsin.

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

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

Marinette County Department of Human Services
Wisconsin Job Center Suite B
1605 University Drive
Marinette, WI 54143

Respondent:

██████████
████████████████████
████████████████████

ADMINISTRATIVE LAW JUDGE:

David Fleming
Division of Hearings and Appeals

FINDINGS OF FACT

1. Respondent (CARES # ██████████) received FoodShare benefits in the State of Wisconsin from April 1, 2014 through July 31, 2014.
2. On March 3, 2015, Petitioner prepared and mailed to Respondent an Administrative Disqualification Hearing Notice alleging that Respondent provided false information as to her Wisconsin residency so as to receive FoodShare benefits in Wisconsin.

3. Respondent applied for FoodShare in Wisconsin on March 21, 2014 for herself and 2 children using her mother's address in [REDACTED]. The case opened effective April 1, 2014.
4. In late May 2014 Petitioner received an anonymous written tip that Respondent's husband had Respondent move from their [REDACTED], Michigan residence to her mother's residence in [REDACTED], Wisconsin in order to apply for FoodShare in Wisconsin and then moved back to [REDACTED].
5. After the May anonymous tip the agency took action to close Respondent's Wisconsin FoodShare case but left it open after Respondent called to state she was living in [REDACTED] with her mother.
6. Respondent's FoodShare were not used in [REDACTED] but in [REDACTED] and Marinette.
7. Respondent had a FoodShare overpayment in 2011 for using a Wisconsin address to obtain FoodShare in Wisconsin while living in Michigan. Respondent did not appeal that overpayment.

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 a petitioner to establish that an 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 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 FoodShare recipient knew that the act or omission was a violation of the FoodShare Program but committed the violation anyway.

In this case Petitioner’s staff spoke to the landlord of Respondent’s mother and he indicated that Respondent lived with her mother for about 2 weeks in late February or early March 2014 but were asked to leave because Respondent’s children were so noisy. Respondent used her FoodShare in [REDACTED] Michigan and Marinette Wisconsin but never in [REDACTED]. Her mother did, however, use her own FoodShare in [REDACTED].

Respondent testified that she and her husband were not getting along so moved to Wisconsin to live with her mother. When asked why she her FoodShare was used in [REDACTED], Michigan and Marinette but not [REDACTED], she indicated that she and a boyfriend went to [REDACTED] to visit people.

The standard of proof is, again, clear and convincing. There is evidence here that is hearsay – the statements attributed to Respondent’s mother’s landlord and the anonymous tip itself. Hearsay is admissible in administrative hearings but must be corroborated in order to use it as a basis for a finding. See, generally, *Gehin v. Wisconsin Group Insurance Board*, 278 Wis. 2d 111, ¶ 52 (2005).

If applying in Wisconsin, a person must reside in Wisconsin. *FoodShare Wisconsin Handbook*, §3.2.1. Given the 2011 overpayment, Respondent would know this.

This is a close case. Had the agency subpoenaed the landlord it might have been much clearer. I am, however, finding that Respondent did commit an IPV here. I am persuaded by the FoodShare usage. It makes no sense that one would live in [REDACTED] and that all of the usage would be in Marinette and Menomonee. I realize that the communities are not far apart but that none of Respondent’s FoodShare are used in [REDACTED] while she claims to be living there is not believable; especially as she testified that she had no car. I conclude that Petitioner has established by clear and convincing evidence that Respondent intentionally violated FoodShare program rules, and that this violation was the first such violation committed by Respondent. Therefore, Petitioner correctly seeks to disqualify Respondent from the FoodShare program for one year.

CONCLUSIONS OF LAW

1. That Respondent violated, and intended to violate, the FoodShare program rule specifying that a person reside in Wisconsin in order to receive FoodShare in Wisconsin and concealed or withheld that information.
2. The violation specified in Conclusion of Law No. 1 is the first such violation committed by Respondent.

NOW, THEREFORE, it is ORDERED

That Petitioner’s determination is sustained, and that Petitioner may make a finding that Respondent committed a first IPV of the FoodShare program and disqualify 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 18th day of May, 2015

\sDavid Fleming
Administrative Law Judge
Division of Hearings and Appeals

- c: Bay Lake Consortium - email
Public Assistance Collection Unit - email
Division of Health Care Access and Accountability - email
Sandra Waugus - email



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The preceding decision was sent to the following parties on May 18, 2015.

Marinette County Department of Human Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
swaugus@marinettecounty.com