



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Waukesha County Health and Human Services, Petitioner

vs.

██████████, Respondent

DECISION

Case #: FOF - 165221

Pursuant to petition filed April 7, 2015, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Waukesha County Health and Human Services to disqualify ██████████ from receiving FoodShare benefits (FS) one year, a telephonic hearing was held on Tuesday, May 19, 2015 at 09:15 AM.

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

PARTIES IN INTEREST:

Petitioner:

Waukesha County Health and Human Services
514 Riverview Avenue
Waukesha, WI 53188

Respondent:

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

ADMINISTRATIVE LAW JUDGE:

Kelly Cochrane
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # ██████████) is a resident of Waukesha County who received FS benefits in Waukesha County from approximately March 1, 2014 through at least February 2015.
2. Respondent had a FS review on September 4, 2014. She reported herself and her daughter in the home with zero income, and FS were issued accordingly. She also reported that she was employed with ██████████ but had not started that job at that time. See Exhibit 10. Respondent was thereafter issued FS as a household of two. See Exhibit 11.

3. On February 10, 2015 respondent's daughter applied for FS for herself. She reported not living with her mother since August 2014. The agency then removed the daughter from respondent's FS case, and began a further review of respondent's FS case. During the review of respondent's case, the agency worker discovered that respondent had 3rd and 4th quarter wages in 2014 reported to the State Wage Record from [REDACTED]. The agency then issued a request for verification of respondent's income to the respondent.
4. On February 25, 2015, respondent submitted an Employer Verification of Earnings form (EVFE) to the agency. See Exhibit 4. The EVFE reported that respondent was not and never was an employee of [REDACTED]. *Id.* The EVFE contained a signature of [REDACTED] as Manager, her phone number, and was dated February 1, 2015. *Id.*
5. On February 26, 2015 an agency worker attempted to call the number listed for [REDACTED] on the EVFE, but it was not a valid number.
6. On March 2, 2015 the agency forwarded the EVFE form to [REDACTED] directly. [REDACTED]'s Human Resources Director, [REDACTED], confirmed to the agency that [REDACTED] had been fired on January 21, 2015 and therefore would not have been authorized to sign the form as of February 1, 2015.
7. On March 8, 2015 respondent submitted another Employer Verification of Earnings form (EVFE) to the agency. See Exhibit 5. The EVFE contains a handwritten note "Corrected Verification 3/6/15". *Id.* It also appears to be the same EVFE as in Exhibit 4, however, the employment information reported in Exhibit 4 is crossed out. It then reports that respondent started working with [REDACTED] on November 14, 2014 and was fired on January 17, 2015. *Id.* It also contains hours worked and rates of pay. *Id.* The EVFE contained a signature of [REDACTED] as Manager, her phone number, and was re-dated March 6, 2015. *Id.*
8. On March 11, 2015 the agency received an EVFE and a printout of respondent's wages from [REDACTED] from September 2014-January 2015. See Exhibit 6.
9. On March 16, 2015 the agency issued a Waiver of Administrative Disqualification Hearing to respondent. Exhibit 2. It requested respondent return the form by March 27, 2015 if she wanted to avoid the hearing. *Id.*
10. On April 9, 2015, the petitioner issued an Administrative Disqualification Hearing Notice alleging that respondent filed a fraudulent verification of earnings form.
11. The respondent failed to appear for the scheduled May 19, 2015 Intentional Program Violation (IPV) hearing and did not provide any good cause for said failure to appear.

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).

7 C.F.R. §273.16(e)(4) provides that the hearing shall proceed if the respondent cannot be located or fails to appear without good cause. The respondent did not appear or claim a good cause reason for not attending the hearing. Therefore, I must determine whether the respondent committed an IPV based solely on the evidence that the petitioner presented at hearing.

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.

Respondent did not appear at the hearing; hence the agency's evidence was uncontradicted. The agency presented evidence showing the two EVFEs submitted by respondent. They were faxed from the respondent's residence. The agency presented evidence to show that the employer did not authorize those EVFEs, and provided proof of her actual income. The agency's representative also testified that petitioner never reported this income to the agency. As her income level was used to determine the amount of her monthly FS allotment, it is clear that respondent received a benefit from underreporting her income. 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 did not report the income from this employer, and understated her income by providing the two falsified EVFEs which were sent from her residence. It would be hard to convince any trier of fact that a wage earner would be unaware of how much money she was earning each pay period. Thus, the agency correctly found that respondent had committed an IPV and was justified in imposing its sanction.

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 misstating facts with the intention of receiving or continuing to receive FS benefits and failing to report changes in income are intentional program violations.
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 8th day of June, 2015

\sKelly Cochrane
Administrative Law Judge
Division of Hearings and Appeals

c: Moraine Lakes Consortium - email
Public Assistance Collection Unit - email
Division of Health Care Access and Accountability - email
Kathy Jones - email



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The preceding decision was sent to the following parties on June 8, 2015.

Waukesha County Health and Human Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
kjones@waukeshacounty.gov