



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

██████████ Respondent

DECISION

Case #: FOF - 168792

Pursuant to petition filed September 18, 2015, under 7 C.F.R. §273.16, to review a decision by the Office of the Inspector General (OIG) to disqualify ██████████ from receiving FoodShare benefits (FS) for a period of ten years, a hearing was held on November 4, 2015, by telephone.

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

PARTIES IN INTEREST:

Petitioner:

Office of the Inspector General
Department of Health Services
P.O. Box 309
Madison, WI 53701

Respondent:

██████████
██████████
██████████
|

Respondent's Representative:

Atty. ██████████
Legal Action of Wisconsin, Inc.

██████████
██████████

ADMINISTRATIVE LAW JUDGE:

Brian C. Schneider
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # ██████████) is a resident of Milwaukee County who has received FS benefits in Milwaukee County since July 1, 2012.
2. On May 24, 2012, the respondent applied on-line for FS in Milwaukee County for herself, her husband, and two children. Exhibit 1. She reported that she was not getting FS in that month, and she reported no income.

3. On May 24, 2012 an agency representative processed the application. She queried the Illinois agency and learned that the respondent was open for Medical Assistance (MA) and FS there for May and June. She also learned that the respondent and her husband both received social security. On June 4 the respondent provided proof of identification, social security income, and a letter from the Illinois agency saying that the respondent's MA was ending July 1, 2012 because the respondent no longer lived in Illinois. FS opened effective July 1, 2012.
4. The respondent reported her Wisconsin move to the Illinois agency. Illinois closed the respondent's MA but not her FS. FS continued to be issued by Illinois through the end of October, 2012.
5. In late 2014 the Wisconsin agency received a state match with Illinois. The match showed that the respondent's husband and children had a separate FS case from the respondent in Illinois, and that case was still open. While investigating the husband's FS case, the Wisconsin agency also discovered that the respondent's separate FS case had not closed at the end of June, 2012, but had continued through October, 2012. All FS issued by Illinois between July 1 and October 31, 2012 had been transacted.
6. The agency determined that the household was overpaid FS due to receiving duplicate FS.
7. On September 28, 2015, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that the respondent reported false information in order to receive duplicate FS from two states.

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).

There is a specific provision that applies to this case. 7 C.F.R. §273.16(b)(5) provides: "... an individual found to have made a fraudulent statement or representation with respect to the identity or place of residence of the individual in order to receive multiple food stamp benefits simultaneously shall be ineligible to participate in the Program for a period of 10 years."

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).

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.

Based upon the record before me, I find that the petitioner has not established by clear and convincing evidence that the respondent intentionally violated FS program rules in order to receive FS from two jurisdictions. Therefore the petitioner cannot disqualify the respondent from the FS program for ten years.

It is true that the respondent reported on her Wisconsin application that she did not receive FS elsewhere and that she had no income. Both errors were discovered almost immediately, and only days after the application was filed the respondent sent in verification of both her income and her Illinois status. I think it was just as easily the respondent’s errors in dealing with the computer application process as deliberate falsehoods by the respondent. Furthermore, it is unquestioned that the respondent informed Illinois about her move to Wisconsin. Why Illinois closed only MA and not FS is purely speculative. Ms. [REDACTED] suggested that Illinois recipients have different workers for MA and FS, but we do not know that for sure. It is evident that Illinois has different procedures than Wisconsin, but whether the respondent deliberately used those procedures to fool the two agencies is absolutely

guesswork, not clear and convincing. I now have dealt with the respondent and her husband's case over two appeals processes (the other being the overpayment, primarily case no. FOP-163492), and neither individual strikes me as being savvy enough to deliberately game the system as alleged.

The respondent testified that she did not use her Illinois FS card after she moved to Wisconsin, and I note that the respondent's husband testified in the overpayment hearing that he did not use his Illinois FS card in Wisconsin. It is known that the respondent's card was used in Milwaukee, as the evidence shows that the last transaction was at an [REDACTED]'s in Milwaukee. The [REDACTED]'s store number appears in several transactions on the Illinois usage list, but that store number does not show up on the respondent's Wisconsin usage list. Thus it is possible that someone else used the respondent's FS card. As I pointed out in the overpayment decision, the usage by another person does not shield the couple from liability for the overpayment because it was their responsibility to close the Illinois FS. However, the doubts raised about the usage, and by the process by which the Illinois FS remained open, shields the respondent from imposition of a ten-year sanction. I cannot conclude that she made a fraudulent representation in order to receive multiple FS benefits simultaneously.

I am aware of final decision no. FOF-154850, dated May 28, 2014, in which the Wisconsin Department's Deputy Secretary wrote:

Respondent must be honest in her dealings with both states. The integrity of the program, and the ease and speed of application, must depend upon the accuracy and honesty in fact of applicants and recipients. A representation does not require an affirmative act. It may also occur by failing to disclose information that would correct a false impression. Here the respondent had a duty to disclose her residency, and that failure to disclose is a representation. See *State v. Ploeckelman*, 2007 WI App 31, 299 Wis.2d 251; *Kaloti Enterprises, Inc. v. Kellogg Sales Company*, 283 Wis.2d 555 (2005). The Respondent allowed the continuing and false representation that she was a Missouri resident and denied on her Wisconsin application that she was receiving Foodshare in another state. This amounts to an intended misrepresentation of residency for the purpose of receiving duplicate benefits.

This instance is distinguished from that case because the respondent here did report her move to Illinois. Again, why the Illinois FS remained open is uncertain, and it is known that the respondent's Illinois FS remained open for only four months after the move. Given that the respondent has denied using the Illinois FS card, the evidence does not support imposition of the sanction.

CONCLUSIONS OF LAW

It has not been shown by clear and convincing evidence that the respondent made a fraudulent statement or representation with respect to her place of residence in order to receive multiple food stamp benefits simultaneously.

NOW, THEREFORE, it is ORDERED

That the petitioner's determination of an intentional program violation is reversed, and the petition for review is hereby dismissed.

APPEAL TO COURT

You may 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 9th day of November, 2015

\sBrian C. Schneider
Administrative Law Judge
Division of Hearings and Appeals

- c: Office of the Inspector General - email
- Public Assistance Collection Unit - email
- Division of Health Care Access and Accountability - email
- Attorney [REDACTED] - email
- [REDACTED] [REDACTED] - email



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The preceding decision was sent to the following parties on November 9, 2015.

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