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

In the Matter of



DECISION

FOF- 174208

PRELIMINARY RECITALS

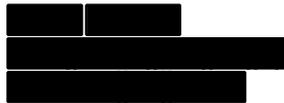
On May 18, 2016, the Dane County Department of Human Services notified the respondent that pursuant to Wis. Admin. Code § HA 3.03, and 7 C.F.R. § 273.16, it intended to disqualify him from the FoodShare program for one year for violating the program's rules. A hearing was held by telephone in the matter June 23, 2016.

The issue for determination is whether the respondent intentionally violated the FoodShare program's rules.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Respondent:



Petitioner:

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



Dane County Department of Human
Services
1819 Aberg Avenue
Suite D
Madison, WI 53704-6343

ADMINISTRATIVE LAW JUDGE:

Michael O'Brien
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # ) is a resident of Dane County.
2. The respondent was an ongoing recipient of FoodShare. On February 17, 2014, he added his son to his case.
3. The respondent never had placement of his son at least half of the time.
4. The respondent's false assertion that his son lived with him at least half of the time allowed him to receive \$3,135 more in FoodShare than he was entitled to from February 11, 2014, through October 31, 2015.
5. On May 18, 2016, the petitioner notified the respondent that it would seek to disqualify him from the FoodShare program for one year because he misstated his family size when seeking benefits.
6. The respondent failed to appear for the June 23, 2016, hearing and did not provide any good reason for his failure to appear.

DISCUSSION

FoodShare recipients commit an intentional program violation if they intentionally make a false or misleading statement or if they misrepresent, conceal, or withhold facts. If the Department proves by clear and convincing evidence that they intentionally violated the program's rules, they lose their eligibility; the penalty for the first violation is one year. 7 CFR §§ 273.16(e)(6) and (b)(1)(i). The Department seeks to disqualify the respondent for one year because it contends that he reported that his son lived with him half of the time when the child actually lived with his mother. Because FoodShare benefits depend in part upon the number of persons in the household, this allowed the respondent to receive \$3,135 more in FoodShare than he was entitled to from February 11, 2014, through October 31, 2015.

Clear and convincing is a middle level of proof that requires the Department to show that more than just a preponderance of the evidence supports its position but does not require it to eliminate all reasonable doubt, as it would have to in a criminal case:

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 v. Kuehn, 11 Wis.2d 15, 26 (1959)*Kuehn*, 11 Wis.2d at 26.

Wisconsin Jury Instruction – Civil 205 explains that this level of evidence must clearly have more convincing power than the opposing evidence, but it does not require absolute certainty:

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.

The *McCormick* treatise suggests that the standard “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, to find that the respondent intentionally violated the FoodShare program’s rules, the evidence must induce a firm conviction that he attempted to purchase FoodShare benefits and that he did so intentionally, although there may be a reasonable doubt that this is true. Intent is a subjective state of mind determined upon all of the facts. *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis.2d 183 (1977). A person is presumed to know and intend the probable and natural consequences of his voluntary words or acts. *See, John F. Jelke Co. v. Beck*, 208 Wis. 650 (1932).

The agency submitted records showing that the respondent reported on February 17, 2014, that his son was living with him at least half of the time. *Exhibit 4*. He later reported on FoodShare renewal documents dated July 15, 2014, February 5, 2015, and June 24, 2015, that his son never lived with him. *Exhibit 1*. But child support records indicate that he never had physical placement of his child. *Exhibit 5*. The respondent did submit a statement purportedly from his son’s mother indicating that their son lived with him, but her signature on this statement does not match her signature on other documents. *Exhibits 6 and 7*. Taken together, the court records indicating that his son’s mother had placement of him, the apparent forgery of the document contradicting this evidence, and the lack of testimony—and thus any explanation—by the respondent of these events establish by clear and convincing evidence that he intentionally violated the FoodShare program’s rules. This is his first intentional violation of the program’s rules. Therefore, the petitioner correctly seeks to disqualify him from the FoodShare program for one year.

CONCLUSIONS OF LAW

1. The respondent violated, and intended to violate, the FoodShare program rule specifying that a recipient not provide false information to obtain additional FoodShare benefits.
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 it 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

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

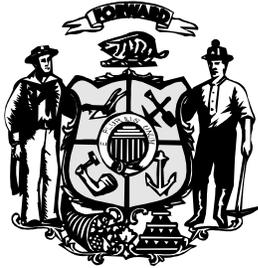
APPEAL TO COURT

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, **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 Madison,
Wisconsin, this 20th day of July, 2016

\s _____
Michael O'Brien
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin \DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on July 20, 2016.

Dane Cty. Dept. of Human Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
[REDACTED]@countyofdane.com