



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

██████████, Respondent

DECISION

Case #: FOF - 175699

Pursuant to petition filed July 21, 2016, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Office of the Inspector General to disqualify ██████████ from receiving FoodShare benefits (FS) for a period of one year, a hearing was held on Monday, September 19, 2016 at 11:30 AM at , Wisconsin.

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

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

Office of the Inspector General
Department of Health Services - OIG
PO Box 309
Madison, WI 53701

Respondent:

██████████
██████████
██████████

ADMINISTRATIVE LAW JUDGE:

Michael D. O'Brien
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # ██████████) is a resident of Wisconsin who received FS benefits in Milwaukee County periodically from 2012 through 2014.
2. The respondent's son was employed by the ██████████ from April 15, 2012, through November 9, 2012. He also applied for FoodShare through the state of California on November 27, 2012.

3. On his October 3, 2012, the respondent reported FoodShare six-month reporting form that his son lived with him.
4. The respondent received a FoodShare allotment based upon the assumption that his son lived in his house during the entire time his son was employed by the [REDACTED]
5. On August 2, 2016, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that the respondent misstated the number of persons living in his household when he renewed his benefits.
6. The respondent failed to appear for the scheduled September 19, 2016 Intentional Program Violation (IPV) hearing and did not provide any good cause for said 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 in Wisconsin while actually living in California. Because FoodShare benefits depend in part upon the number of persons in the household, this allowed the respondent to receive more benefits than he was entitled to.

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 received FoodShare through much of 2012 through 2014. On October 3, 2012, he reported on his six-month renewal form that his son was living with him. But California wage and FoodShare records submitted by the department show that his son was employed by the [REDACTED] at least from April 15, 2012, through November 9, 2012, and that his son applied for FoodShare through the state of California on November 27, 2012. The respondent did not appear at the hearing, so I must rely solely on the department's evidence. Those records demonstrate clearly and convincingly that the respondent's son did not live with him when he renewed his benefits. Claiming that someone who is living and working 2,000 miles away lives in one's household is not the type of mistake that occurs because one does not understand the program's rules. Therefore, I also find that the department has also clearly and convincingly established that he violated the program's rules intentionally. Because this is his first intentional violation of the program's rules, the department correctly seeks to disqualify him from the FoodShare program for one year.

CONCLUSIONS OF LAW

1. The respondent violated, and intended to violate, the FS program rule specifying that a FoodShare recipient report changes in the number of persons in the household.
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 Madison,
Wisconsin, this 30th day of September, 2016

\sMichael D. O'Brien
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
[REDACTED] - email



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on September 30, 2016.

Office of the Inspector General
Public Assistance Collection Unit
Division of Health Care Access and Accountability

