



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Eau Claire County Department of Human Services, Petitioner

vs.

██████████, Respondent

DECISION

Case #: FOF - 200608

Pursuant to petition filed November 30, 2020, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Eau Claire County Department of Human Services to disqualify ██████████ ██████████ from receiving FoodShare benefits (FS) for a period of one year, a hearing was held on Wednesday, January 6, 2021 at 08:15 AM at Madison, 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:

Eau Claire County Department of Human Services
721 Oxford Avenue
PO Box 840
Eau Claire, WI 54702-0840
By: ██████████

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 currently incarcerated in the Wisconsin State Prison System who received FoodShare benefits in Eau Claire County from July 17, 2020, through October 26, 2020.

2. The respondent has been incarcerated since July 17, 2020.
3. The respondent's FoodShare debit card was used to purchase \$991.33 worth of food from July 17, 2020, through October 26, 2020. That card has a PIN associated with it that is provided only to the respondent. The card was not reported missing during this period.
4. On December 1, 2020, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that the respondent allowed another person to use his FoodShare card while he was incarcerated.
5. The respondent failed to appear for the scheduled January 6, 2021, Intentional Program Violation (IPV) hearing and did not provide any good cause for his failure to appear.

DISCUSSION

A FoodShare recipient commits an intentional program violation if he intentionally violates the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute by transferring FoodShare benefits or a QUEST card. *FoodShare Wisconsin Handbook*, § 3.14.1; *see also* 7 C.F.R. § 273.16(c) and Wis. Stat. §§ 946.92(2). A QUEST card is the debit card a FoodShare recipient uses to access his benefits. If the Department proves by clear and convincing evidence that a recipient intentionally violated the program's rules, he loses his eligibility for one year for the first violation. 7 CFR §§ 273.16(e)(6) and (b)(1)(i). The Department seeks to disqualify the respondent because it contends that he allowed others to debit his QUEST card while he was in prison.

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 allowed someone else to use his card to purchase FoodShare while he was incarcerated 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).

A hearing must proceed if the respondent cannot be found or fails to appear without good cause. 7 C.F.R. § 273.16(e)(4). The respondent was served by a letter sent December 1, 2020, but did not appear or respond in any way to the department's allegations. The department's representative, [REDACTED], testified that he tracked down the respondent and his prison identification number and used the proper channels to send him all of the materials related to his potential disqualification. The Division of Hearings and Appeals and the prison system are capable of conducting hearings by telephone, so the respondent's incarceration did not prevent him appearing. Because he did not appear or claim a good cause reason for not appearing at the hearing despite being properly notified, I must determine whether he intentionally violated the FoodShare program's rules solely on the evidence presented by the department.

The respondent has been in the Wisconsin State Prison System since July 17, 2020. While there, he continued to receive FoodShare benefits through October 26, 2020, and other persons debited \$991.33 from his card during this period. Residents of institutions that provide over half of their meals cannot receive FoodShare. 7 CFR §273.1(a)(7)(vi). FoodShare policy denies benefits to all those incarcerated for more than 30 days unless they are released under the Huber law to care for and purchase and prepare food for their families. *FoodShare Wisconsin Handbook*, § 3.2.1.2.2. No one else was in the respondent's FoodShare household or authorized to use his QUEST card, and those in prison do not have Huber privileges. This means that he should not have even been eligible, much less able to let others to use his card. It is his fault and not the agency's that his benefits continued because recipients must report changes of circumstances that affect their benefits within 10 days. 7 CFR § 273.12(a)2. In addition, Wisconsin FoodShare recipients cannot knowingly transfer food coupons "except to purchase food from a supplier..." Wis. Stat. § 49.795(4). Because the respondent undoubtedly violated both of these provisions, the only question is whether he did so intentionally.

I understand that cancelling a FoodShare debit card is probably not foremost in the mind of one going to prison. But even if he forgot that he had to report his incarceration as a change of circumstances, all recipients are told they cannot transfer their benefits to someone else. Cards are sometimes lost or stolen, but whoever found or stole the card could only use it if he knew the card's PIN. It's not impossible that someone could end up with the respondent's card and PIN without his knowledge, but explaining this implausible situation would require a rather healthy imagination. The respondent did not appear and testify here, so there is no reasonable basis for finding anything other than that he gave his card and PIN to another person to use while he was in prison. Therefore, based upon the record before me, I find that the agency has established by clear and convincing evidence that he intentionally violated FoodShare program rules, and that this was his first such violation. The agency 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 FoodShare recipients not traffic their 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 the petitioner may make a finding that the respondent committed a first IPV of the FoodShare program and disqualify him 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

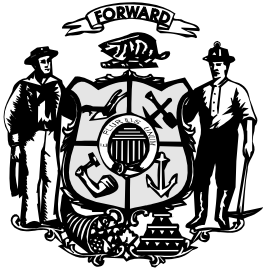
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified 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 6th day of January, 2021

\sMichael D. O'Brien
Administrative Law Judge
Division of Hearings and Appeals

c: Great Rivers Consortium - email
Public Assistance Collection Unit - email
Division of Health Care Access and Accountability - email



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
5th Floor North
4822 Madison Yards Way
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAMail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on January 6, 2021.

Eau Claire County Department of Human Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability