



STATE OF WISCONSIN

Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

██████████, Respondent

DECISION

Case #: FOF - 204161

Pursuant to petition filed January 14, 2022, 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 telephonic hearing was held on Thursday, February 24, 2022 at 09:45 A.M. at Madison, Wisconsin.

The issue for determination is whether the respondent committed a first offense 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
BY: ██████████, Fraud Investigator
PO Box 309
Madison, WI 53701

Respondent:

██████████ (Did not appear)

██████████
██████████
██████████

ADMINISTRATIVE LAW JUDGE:

Kenneth D. Duren
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # [REDACTED]) is a resident of Winnebago County who received FS benefits in Winnebago County from at least October 1, 2019 through September 30, 2021, as the casehead of a FS group of himself and three of his minor children.
2. At renewal ACCESS application filed online on October 6, 2019, the respondent failed to report that the mother of at least one child-in-common with him, i.e. [REDACTED] [REDACTED], was residing in the home with him and at least one child-in-common. See Exhibit D-2. He reported children in the home named [REDACTED], age 1; [REDACTED], age 11; and [REDACTED], age 13. He reported “[REDACTED] [REDACTED]” as the other parent of the two older children; and “[REDACTED] [REDACTED]” as the other parent of [REDACTED]. See, Exhibit D-2, at pp. 7-8.
3. On September 15, 2021, Fraud Investigator [REDACTED] mailed a verification request letter to the respondent and [REDACTED] [REDACTED] (a/k/a, “[REDACTED] [REDACTED]”) at [REDACTED], [REDACTED], [REDACTED], informing them that information had come to her attention that [REDACTED] [REDACTED] had been living with the respondent and his children at that address since he initially applied for FoodShare benefits in October, 2019. She requested that the household provide verification that [REDACTED] [REDACTED] had been residing at any other location, from “a non-biased third party” including examples like tax returns, bank statements, loan paperwork, lease agreements for other rentals, utility bills, credit card statements, medical records or any other form of verification. (The request specified not to use statements from friends or family.) The investigator also asked [REDACTED] to contact her by phone or email. This verification was due by October 15, 2021. See, Exhibit D-4.
4. Some attempts at verification were apparently received by the petitioner agency from the respondent during September & October, 2021, as to income of the respondent and [REDACTED], prior to October 15, 2021; but by October 20, 2021, the income information needed from the household was still pending. No verification provided established that the biological mother had not been living with the respondent and their children since October, 2019. See, Exhibit B. There is also no indication in the record that the biological mother ever attempted to contact [REDACTED].
5. On January 18, 2022, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that respondent failed to report the biological mother of children-in-common was residing in his home with him and their children-in-common. This notice was mailed to the respondent’s last known address on record with the Department of Health Services of [REDACTED]. There was no indication in the record that it returned to the Department as undeliverable.
6. The respondent failed to appear for the scheduled February 24, 2022 Intentional Program Violation (IPV) hearing and did not provide any good cause for said failure to appear for the hearing or provide a telephone number to the assigned administrative law judge for a telephonic appearance.
7. [REDACTED] [REDACTED] was residing with the respondent in the period of at least October 1, 2019 through September 30, 2021, and the respondent did not report her to the county agency as a FS household member or report any income she may have received. See, Exhibits B and E, attached nos. 1-6.
8. [REDACTED] [REDACTED] is the biological mother of at least one child-in-common with the respondent, and that child ([REDACTED]) was living with the couple in the period identified in Finding of Fact #7.

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.

The evidence presented by the petitioner agency clearly and convincingly demonstrates that the respondent failed to report that his now wife (then biological mother of at least one child-in-common with him) was living with him and this child-in-common; nor provide any information on her earned or unearned income, if any, at his initial application or at renewal in October, 2019 in the subject period of eligibility. He also failed to respond to a direct request for verification of her residence at any other location in the period of time since October, 2019 with verification that established that she was living elsewhere. *See*, Finding of Fact Nos. 2-5 and 7-8; and *see*, Exhibits B, D & E.

In addition, the local agency had fully informed the respondent in the past of his obligation to report changes in household composition and/or income. *See*, Exhibit D-3. The wife/biological mother was living in the home. *See*, Exhibits E, 2-5; and *see*, Exhibit B, Case Comments on October 13, 2021. *See also*, Finding of Fact Nos. 7-8. The household was required to report ██████████ presence in the home, and any income she may have had as such a parent in the home. He clearly did not do so on Exhibit D-2. (I.e., *see* the online ACCESS application dated October 6, 2019, at pp. 5-7). The omission of this critical reporting fact, after he was informed in the Access Application of the change reporting requirements (*see*, Exhibit D-2, at p. 20) and intentional program violation provisions establishes that he intended to violate FS rules and not report that she was in his household, or whether she had any income. *See*, Exhibit D-3, “Enrollment and Benefits Booklet” at pp. 1-10; and Exhibit d-2 at pp. 19. Subsequent verification demonstrates ██████████ told a state agency worker that she married the respondent on August 21, 2021, and that she had been gainfully employed since at least July 8, 2019. *See*, Exhibit B, at Case Comments for September 8, 2021.

The respondent did not appear at the hearing and so did not provide any rebuttal evidence to the agency’s prima facie case that ██████████ had been unreported to the agency and was living with his FS group in the tested period.

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 by failing to report this biological mother of children-in-common with him was living in the FS household in the tested period, 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. *See, See*, 7 C.F.R. § 273.16(c)(1).

As a sidenote to the agency, the agency verification request letter that requires a recipient to verify household residence *without* relying upon the statements of friends or relatives is *not* a correct restatement of the Department’s verification policy. Such a statement presumes that all friends and relative will not tell the truth or not be reliable reporters of family facts or history. That is not what the verification policy requires. Nor, in my experience, is it a fact borne out by all such statements. Oftentimes, people are truthful solely because they are truthful people. Sometimes they even make statements against their interests or those of friends and relatives. Rather, the Department requires truthful reporting and verification from whatever source is provided. And in some instances, the statements of other persons, including relatives or friends, or even the recipient, may be the “best evidence” available to the Department. *See, FoodShare Wisconsin Policy Handbook*, §1.2.1.3; *see also generally, ibid.*, §1.2.1-1.2.6. I respectfully suggest a review of this verification policy. In any event, the respondent has defaulted, and the agency has provided clear and convincing evidence of the asserted intentional program violation at issue here, and it is sustained.

CONCLUSIONS OF LAW

1. The respondent violated, and intended to violate, the FS program rules because he misrepresented his household composition and withheld and concealed from the Department the information that the biological mother of at least one child-in-common with him was living with him and this child in the period of October, 2019, to approximately September, 2021, in contravention of 7 C.F.R. § 273.16(c)(1).
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

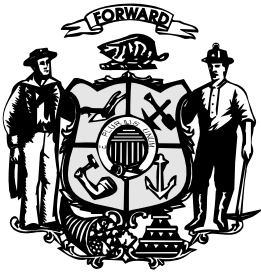
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified 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 9th day of March, 2022



\sKenneth D. Duren
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



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The preceding decision was sent to the following parties on March 9, 2022.

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

