STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Brown County Human Services Department, Petitioner

vs.

[redacted], Respondent

DECISION
Case #: FOF - 206676

Pursuant to petition filed October 31, 2022, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Brown County Human Services Department ("the agency") to disqualify [redacted] from receiving FoodShare benefits (FS) for a period of one year, a hearing was held on Tuesday, December 13, 2022 at 09:15 AM via teleconference initiated from 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:

Brown County Human Services Department
Economic Support-2nd Floor
111 N. Jefferson St.
Green Bay, WI 54301
By: Sharon Johnson

Respondent:
[redacted]
Did Not Appear

ADMINISTRATIVE LAW JUDGE:
Teresa A. Perez
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES #[redacted]) is a resident of Brown County who received FS benefits from October 2003 through June 2004 and from September 2022 with occasional gaps in benefits.

2. On June 10, 2019, November 1, 2019, and October 30, 2019, Respondent reported to the agency that her children, [redacted], [redacted], [redacted], and [redacted] were residing with her.

3. On February 18, 2021, the agency received a report from a third party that [redacted] was residing with her grandmother. In March or April 2021, the agency removed [redacted] from Respondent's FS household.

4. On May 11, 2021, Respondent completed and signed a FS renewal by telephone. The renewal documentation indicates that Respondent reported or confirmed that [redacted], [redacted], and [redacted] were residing with her and that [redacted] was living outside of the home.

5. On August 30, 2021, the agency was notified by a third party that [redacted] had been awarded guardianship of [redacted] as of August 17, 2021. The agency subsequently removed [redacted] from Respondent's FS household.

6. On November 8, 2021, Respondent completed and signed a six moth report form by telephone. The associated documentation indicates that Respondent reported or confirmed that [redacted] and [redacted] were residing with her and that [redacted] and [redacted] were living outside of the home.

7. In December 2021, [redacted] died and on December 14, 2021, Respondent reported to the agency that [redacted] was again residing with her again.

8. In February 2022, the agency was notified by a third party that [redacted] was no longer residing with Respondent and subsequently removed [redacted] from Respondent's FS case.

9. On March 7, 2022, the agency contacted the Brown County Sheriff's Office and requested that an investigation be conducted to determine the following: (1) whether [redacted] and [redacted] were residing with their grandmother and, if so, how long they had been residing with her, and (2) to determine how long [redacted] lived with his grandmother prior to his grandmother dying in December 2021.

10. On November 4, 2022, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that Respondent failed to report that her children, [redacted], [redacted], and [redacted] were no longer in her home.

11. The respondent failed to appear for the scheduled December 13, 2022 Intentional Program Violation (IPV) hearing and did not provide any good cause for said failure to appear.

DISCUSSION

An intentional program violation (IPV) of the FoodShare (FS) 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 individual who commits an IPV can be disqualified from participation in the FS program. The length of the disqualification period depends, in part, on the nature of the IPV. See 7 C.F.R. § 273.16(b). Generally, an individual will be disqualified for twelve months after committing her or his first IPV. See 7 C.F.R. §

273.16(b)(1)(i). The agency can disqualify only the individual found to have committed the intentional violation; it cannot disqualify the entire household. 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).

An IPV 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.

When an administrative disqualification hearing is scheduled and the respondent does not appear, the hearing shall nevertheless proceed if the respondent cannot be located or fails to appear without good cause. See 7 C.F.R. §273.16(e)(4). Here, the agency demonstrated that it sent a hearing notice to Respondent via certified mail, return receipt requested prior to the hearing and that the notice instructed Respondent to contact the undersigned administrative law judge (ALJ) with a telephone number at which Respondent would be available at the date and the time of the hearing. The respondent did not do so and the ALJ was unable to reach her for the hearing at the number associated with her agency case file. Because Respondent did not appear or claim a good cause reason for not attending the hearing, the Division of Hearings and Appeals must determine whether the respondent committed an IPV based solely on the evidence that the agency presented at hearing.

To establish, at hearing, that a FS recipient has committed an IPV, the petitioner must provide the following two separate elements through the presentation of clear and convincing evidence: (1) the recipient committed a program violation; and (2) the recipient 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 agency here contended that Respondent reported that three of her children were residing with her when they were not in order to receive FS benefits to which she was not entitled. More specifically, the agency found that the three children's living arrangements were as follows:

(1) [redacted] resided with his grandmother from May 2019 until sometime in February 2021, lived with Respondent from sometime in February 2021 until sometime in April 2021, and moved back in with his grandmother in or around May 2021, lived with Respondent again from February 2022 until April 27, 2022, and since that time has resided with his father and stepmother.
(2) [redacted] lived with her grandmother consistently from August 15, 2020 through at least May 12, 2022.
(3) [redacted] lived with his grandmother from 2015 until her death in early December 2021.

And, the agency found that Respondent inaccurately reported her household composition on July 22, 2019, November 6, 2019, October 30, 2020, May 11 2021, and November 8, 2021. The agency has not however met its evidentiary burden for the reasons set forth below.

First, I note that two of the agency's specific allegations are inconsistent with documentation they provided. The agency contended that on Petitioner's May 2021 renewal, she reported [redacted] to be residing with her. However, the documentation of that renewal indicates that Respondent confirmed that [redacted] was out of the house at that time. Similarly, the agency contended that on her November 8, 2021 six month report form, Respondent reported [redacted] and [redacted] to be residing with her despite the related documentation which indicates that Respondent at that time confirmed that both of them were outside of the house.

The evidentiary shortcomings detailed above could have been surmounted had the agency shown that Respondent's June 10, 2019, November 1, 2019, and October 30, 2019 reports to the agency regarding her household composition were intentionally inaccurate. Although the agency established that Respondent reported [redacted], [redacted], and [redacted] to be living with her on those dates, the agency did not establish that those reports were false.

The deputy sheriff's report, upon which the agency relied in determining the timeframes and locations of the children's living arrangements, states that "multiple police, court, and school records and three witnesses were used to corroborate [the] timeframe." Although the report indicates that the investigating sheriff reviewed records regarding nine incidents that involved one or more of the children, the only documentation offered regarding those incidents was a CAD incident report from February 2022 and a written warning issued to [redacted] in September 2019. The September 2019 warning lists [redacted] address as [redacted] residence and the school records offered by the agency list Respondent's address as his address since at least September 2020 and identify Respondent as his guardian. Likewise, the school records offered regarding [redacted] and [redacted] indicate they shared an address with Respondent and that Respondent was their guardian. It is thus not clear why the school records were considered to "corroborate the timeframe."

The final category of evidence the deputy sheriff identified were interviews with three individuals: [redacted], who is the grandmother of both [redacted] and [redacted]; [redacted], who is the stepmother of [redacted], [redacted], and [redacted]; and [redacted]. He asked each of those individuals about the dates and places [redacted], [redacted], and [redacted] had resided prior to May 2022. None of those individuals appeared at hearing and the statements they provided to the

deputy sheriff differed in regards to specific dates. For instance, according to the deputy sheriff, [redacted] reported that her brother [redacted] lived with Respondent "for a short time during the school year" (though the school year to which she referred is not specified). In contrast, [redacted] reported that [redacted] resided with Respondent "part of one summer" (though the summer to which she referred is not specified). [redacted] offered the most detailed report regarding the dates [redacted] resided in various places though she was incarcerated from August 29, 2019 until June 20, 2020 so she would not have firsthand knowledge of any changes in residence during that period. Nevertheless, she reported to the deputy sheriff that [redacted] resided with [redacted] from May 2019 until sometime in February 2021 and again from May 2021 until sometime in February 2022 and that he resided with Respondent from February 2021 until sometime in May 2021 and again as of February 2022.

The evidence presented to prove where the three children resided was not only almost entirely hearsay but, more problematically, hearsay of questionable reliability and hearsay that was, in some critical aspects, inconsistent. Although the agency's decision to initiate an investigation into Respondent's household composition was well-founded, that is not the standard that must be met to prevail in an administrative disqualification hearing. None of the three individuals whose statements the deputy sheriff largely relied on in reaching his conclusions appeared at hearing to testify so I did not have the opportunity to attempt to inquire about or possibly clear up inconsistencies among their statements. The school records that the agency offered contradict much of the hearsay statements from those three individuals. And, as mentioned above, none of the court records the sheriff reviewed were offered as evidence and documentation regarding only two of the nine police interactions described in the sheriff's report were introduced. One of those records—the CAD incident report—constitutes additional hearsay.

The record as a whole thus does not clearly or convincingly establish which dates the children were residing with Respondent and thus does not establish whether she inaccurately reported her household composition at any time.

CONCLUSIONS OF LAW

For the reasons discussed above, there is not clear and convincing evidence that the respondent intended to commit an IPV.

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.

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 February, 2023

\sTeresa A. Perez
Administrative Law Judge
Division of Hearings and Appeals

c: Bay Lake Consortium - email
Public Assistance Collection Section - email
Division of Medicaid Services - email
Sharon Johnson - email

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The preceding decision was sent to the following parties on February 9, 2023.

Brown County Human Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
[redacted]