



STATE OF WISCONSIN Division of Hearings and Appeals

In the Matter of

Milwaukee Enrollment Services, Petitioner

vs.

██████████, Respondent

DECISION

Case #: FOF - 206811

Pursuant to petition filed November 9, 2022, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Milwaukee Enrollment Services to disqualify ██████████ from receiving FoodShare benefits (FS) for a period of one year, a hearing was held by telephone on Wednesday, December 28, 2022 at 09:15 AM, Milwaukee, 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:

Milwaukee Enrollment Services
1220 W Vliet St
Milwaukee, WI 53205

Respondent:

██████████
██████████████████
████████████████████

ADMINISTRATIVE LAW JUDGE:

Jason M. Grace
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # [REDACTED]) is a resident of Milwaukee County who received FS benefits in Milwaukee County from at least September, 2020 through June, 2022.
2. On September 21, 2020 respondent completed a FS renewal for a household of one. He reported he was no longer employed. He further reported employment with [REDACTED] ended in July, 2020.
3. On September 22, 2020, an About Your Benefits letter was issued to respondent listing sole source of income as social security.
4. On December 7, 2020, respondent was issued an About Your Benefits letter listing sole source of income as social security. He was instructed to report by the 10th day of the following month if income exceeded \$1,383.00.
5. Respondent was issued FS benefits September, 2020 to September, 2021.
6. On August 19, 2021, the agency sent respondent a Notice of Proof Needed letter, indicating he needed to provide verification of employment status with [REDACTED].
7. On or about September 3, 2021, an EVFE form was sent to the agency regarding respondent's employment with [REDACTED]. The form indicated respondent's employment with [REDACTED] ended 8-1-2021, with his last paycheck dated 8-31-2021.
8. On September 22, 2021, respondent completed another FS renewal as a household of one. He reported he was not employed.
9. Respondent was issued FS benefits October, 2021 until June, 2022.
10. On or about February 17, 2022, the agency received an EVFE form for respondent regarding employment with [REDACTED]. The form indicated that respondent had never been employed by [REDACTED].
11. On April 12, 2022, the agency received a phone call from [REDACTED], the fiscal agent for payment for [REDACTED]. The fiscal agent reported that respondent's employment for [REDACTED] had not ended.
12. State Wage Records indicate that respondent had employment income as follows:
 - 3rd Quarter (July, Aug, Sept) 2020: \$6,571.78 = \$2,190.59/month
 - 4th Quarter (Oct, Nov, Dec) 2020: \$7,662.20 = \$ 2,554.06/month
 - 1st Quarter (Jan, Feb, March) 2021: \$6,567.60 = \$2,189.20/month
 - 2nd Quarter (April, May, June) 2021: \$7,654.98 = \$2,551.66/month
 - 3rd Quarter (July, Aug, Sept) 2021: \$6,567.60 = \$2,189.20/month
 - 4th Quarter (Oct, Nov, Dec) 2021: \$7,662.20 = \$2,554.06 /month
13. In November, 2022, the agency received confirmation from the fiscal agent for [REDACTED] that respondent was employed January, 2020 – August, 2022. It was indicated he worked fulltime and was paid every two weeks. The fiscal agent further provided the agency paystubs for respondent for January 8, 2021 – October 28, 2022 and a W-2 reflecting 2020 wages of \$27,769.18.

14. Respondent was mailed an Enrollment and Benefits Handbook on September 22, 2020 and September 23, 2021. The handbook notified him of FS program rules, regulations, and consequences for breaking the rules. This included the warning that violations based on the intentional providing of false information could result in being barred from the FS program.
15. On November 9, 2022, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that respondent submitted a fraudulent EVFE form reporting employment ended with [REDACTED].
16. The respondent failed to appear for the scheduled December 28, 2022 Intentional Program Violation (IPV) hearing and did not provide any good cause for said failure to appear.

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.

In this case, respondent did not appear at the hearing. If the person suspected of the IPV (or his or her representative) cannot be located or fails to appear without good cause the hearing must be conducted without the IPV suspect being represented. 7 C.F.R. 273.16(e)(4).

"If the household member or its representative cannot be located or fails to appear at a hearing initiated by the State agency without good cause, the hearing shall be conducted without the household member being represented. Even though the household member is not represented, the hearing official is required to carefully consider the evidence and determine if intentional Program violation was committed based on clear and convincing evidence. If the household member is found to have committed an intentional Program violation but a hearing official later determines that the household member or representative had good cause for not appearing, the previous decision shall no longer remain valid and the State agency shall conduct a new hearing. The hearing official who originally ruled on the case may conduct the new hearing. In instances where good cause for failure to appear is based upon a showing of nonreceipt of the hearing notice . . . , the household member has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. In all other instances, the household member has 10 days from the date of the scheduled hearing to present reasons indicating a good cause for failure to appear. A hearing official must enter the good cause decision into the record." 7 C.F.R. § 273.16(e)(4) (2011).

The respondent did not present a good cause reason for failing to appear at the hearing. Therefore, the determination of whether respondent committed an FS IPV must be based solely on what the petitioner presented at the hearing.

FS is a means-tested program based upon household size, allowed expense deductions, and household income. As noted above, a FS recipient commits an Intentional Program Violation by intentionally making a false or misleading statement or misrepresents or withholds facts in order to receive FS benefits. See, Wisconsin FoodShare Handbook, § 3.14.1; Wis. Stat. § 946.92(2); and 7 C.F.R. § 273.16(c). FS applicants and recipients are required to accurately report household income and employment to the FS agency. Wis. Stat. § 946.92(2).

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, 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.

CONCLUSIONS OF LAW

1. The respondent violated, and intended to violate, 7 C.F.R. § 273.16(c) and Wis. Stat. § 946.92(2).
2. The agency properly seeks to disqualify respondent from the FoodShare program for a period of one year pursuant to 7 C.F.R. §273.16(b)(1).

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).

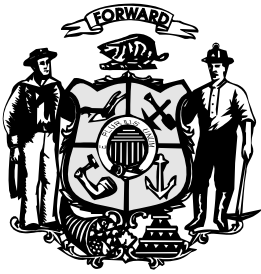
The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 3rd day of January, 2023

A handwritten signature in blue ink, appearing to read 'J M Grace', is written over a horizontal line.

\sJason M. Grace
Administrative Law Judge
Division of Hearings and Appeals

c: Miles - email
Public Assistance Collection Unit - email
Division of Health Care Access and Accountability - email
Dena Kaap - 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 3, 2023.

Milwaukee Enrollment Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
[REDACTED]