Intentional Program Violation Hearings: The Issue Is Proof

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7 CFR § 273.16 Disqualification for intentional Program violation.

(a) Administrative responsibility.

(1) State agency shall be responsible for investigating any case of alleged intentional Program violation, and ensuring appropriate cases are acted upon either through administrative disqualification hearings or referral to court of appropriate jurisdiction in accordance with procedures outlined in this section. Administrative disqualification procedures or referral for prosecution action should be initiated by State agency in cases in which State agency has sufficient documentary evidence to substantiate an individual has intentionally made one or more acts of intentional Program violation as defined in paragraph (c) of this section. If State agency does not initiate administrative disqualification procedures or refer for prosecution a case involving an overissuance caused by a suspected act of intentional Program violation, State agency shall take action to collect the overissuance by establishing an inadvertent household error claim against household in accordance with procedures in § 273.18. State agency should conduct administrative disqualification hearings in cases in which State agency believes facts of individual case do not warrant civil or criminal prosecution through appropriate court system, in cases previously referred for prosecution that were declined by appropriate legal authority, and in previously referred cases where no action was taken within reasonable period of time and referral was formally withdrawn by State agency. State agency shall not initiate administrative disqualification hearing against accused individual whose case is currently being referred for prosecution or subsequent to any action taken against accused individual by the prosecutor or court of appropriate jurisdiction, if the factual issues of the case arise out of the same, or related, circumstances. The State agency may initiate administrative disqualification procedures or refer a case for prosecution regardless of the current eligibility of the individual.

(2) Each State agency shall establish a system for conducting administrative disqualifications for intentional Program violation which conforms with the procedures outlined in paragraph (e) of this section. FNS shall exempt any State agency from the requirement to establish an administrative disqualification system if the State agency has already entered into an agreement, pursuant to paragraph (g)(1) of this section, with the State's Attorney General's Office or, where necessary, with county prosecutors. FNS shall also exempt any State agency from the requirement to establish an administrative disqualification system if there is a State law that requires the referral of such cases for prosecution and if the State agency demonstrates to FNS that it is actually referring cases for prosecution and that prosecutors are following up on the State agency's referrals. FNS may require a State agency to establish an administrative disqualification system if it determines that the State agency is not promptly or actively pursuing suspected intentional Program violation claims through the courts.

(3) The State agency shall base administrative disqualifications for intentional Program violations on the determinations of hearing authorities arrived at through administrative disqualification hearings in accordance with paragraph (e) of this section or on determinations reached by courts of appropriate jurisdiction in accordance with paragraph (g) of this section. However, any State agency has the option of allowing accused individuals either to waive their rights to administrative disqualification hearings in accordance with paragraph (f) of this section or to sign disqualification consent agreements for cases of deferred adjudication in accordance with paragraph (h) of this section. Any State agency which chooses either of these options may base administrative disqualifications for intentional Program violation on the waived right to an administrative disqualification hearing or on the signed disqualification consent agreement in cases of deferred adjudication.

(b) Disqualification penalties.

(1) Individuals found to have committed an intentional Program violation either through an administrative disqualification hearing or by a Federal, State or local court, or who have signed either a waiver of right

to an administrative disqualification hearing or a disqualification consent agreement in cases referred for prosecution, shall be ineligible to participate in the Program:

(i) For a period of twelve months for the first intentional Program violation, except as provided under paragraphs (b)(2), (b)(3), (b)(4), and (b)(5) of this section;

(ii) For a period of twenty-four months upon the second occasion of any intentional Program violation, except as provided in paragraphs (b)(2), (b)(3), (b)(4), and (b)(5) of this section; and

(iii) Permanently for the third occasion of any intentional Program violation.

(2) Individuals found by a Federal, State or local court to have used or received benefits in a transaction involving the sale of a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) shall be ineligible to participate in the Program:

(i) For a period of twenty four months upon the first occasion of such violation; and

(ii) Permanently upon the second occasion of such violation.

(3) Individuals found by a Federal, State or local court to have used or received benefits in a transaction involving the sale of firearms, ammunition or explosives shall be permanently ineligible to participate in the Program upon the first occasion of such violation.

(4) An individual convicted by a Federal, State or local court of having trafficked benefits for an aggregate amount of $500 or more shall be permanently ineligible to participate in the Program upon the first occasion of such violation.

(5) Except as provided under paragraph (b)(1)(iii) of this section, an individual found to have made a fraudulent statement or representation with respect to the identity or place of residence of the individual in order to receive multiple food stamp benefits simultaneously shall be ineligible to participate in the Program for a period of 10 years.

(6) The penalties in paragraphs (b)(2) and (b)(3) of this section shall also apply in cases of deferred adjudication as described in paragraph (h) of this section, where the court makes a finding that the individual engaged in the conduct described in paragraph (b)(2) and (b)(3) of this section.

(7) If a court fails to impose a disqualification or a disqualification period for any intentional Program violation, the State agency shall impose the appropriate disqualification penalty specified in paragraphs (b)(1), (b)(2), (b)(3), (b)(4), and (b)(5) of this section unless it is contrary to the court order.

(8) One or more intentional Program violations occurring prior to April 1, 1983 shall be considered only one previous disqualification when determining appropriate penalty for case under consideration.

(9) Regardless of when an action taken by an individual which caused an intentional Program violation occurred, the disqualification periods specified in paragraphs (b)(2) and (b)(3) of this section shall apply to any case in which the court makes the requisite finding on or after September 1, 1994.

(10) For the disqualification periods in paragraphs (b)(1), (b)(5) or (b)(6) of this section, if the offense occurred prior to the implementation of these penalties, the State agency may establish a policy of disqualifying these individuals in accordance with the disqualification periods in effect at the time of the offense. This policy must be consistently applied for all affected individuals.

(11) State agencies shall disqualify only the individual found to have committed the intentional Program violation, or who signed the waiver of the right to an administrative disqualification hearing or disqualification consent agreement in cases referred for prosecution, and not the entire household.

(12) Even though only the individual is disqualified, the household, as defined in § 273.1, is responsible for making restitution for the amount of any overpayment. All intentional Program violation claims must be established and collected in accordance with the procedures set forth in § 273.18.

(13) The individual must be notified in writing once it is determined that he/she is to be disqualified. The disqualification period shall begin no later than the second month which follows the date the individual receives written notice of the disqualification. The disqualification period must continue uninterrupted until completed regardless of the eligibility of the disqualified individual's household.

(c) Definition of intentional Program violation. Intentional Program violations shall consist of having intentionally:

(1) Made a false or misleading statement, or misrepresented, concealed or withheld facts; or

(2) Committed any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any State statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of coupons, authorization cards or reusable documents used as part of an automated benefit delivery system (access device).

(d) Notification to applicant households. The State agency shall inform the household in writing of the disqualification penalties for intentional Program violation each time it applies for Program benefits. The penalties shall be in clear, prominent, and boldface lettering on the application form.

(e) Disqualification hearings. State agency shall conduct administrative disqualification hearings for individuals accused of intentional Program violation in accordance with requirements of this section.

(1) Consolidation of administrative disqualification hearing with fair hearing. The State agency may combine a fair hearing and an administrative disqualification hearing into a single hearing if the factual issues arise out of the same, or related, circumstances and the household receives prior notice that hearings will be combined. If the disqualification hearing and fair hearing are combined, the State agency shall follow the timeframes for conducting disqualification hearings. If the hearings are combined for the purpose of settling the amount of the claim at the same time as determining whether or not intentional Program violation has occurred, the household shall lose its right to a subsequent fair hearing on the amount of the claim. However, the State agency shall, upon household request, allow the household to waive the 30-day advance notice period required by paragraph (e)(3)(i) of this section when the disqualification hearing and fair hearing are combined.

(2) Disqualification hearing procedures.

(i) State agencies have the option of using the same hearing officials for disqualification hearings and fair hearings or designating hearing officials to conduct only disqualification hearings.

(ii) Provisions of § 273.15 (m), (n), (o), (p), and (q)(1) are also applicable for disqualification hearings.

(iii) At the disqualification hearing, the hearing official shall advise the household member or representative that they may refuse to answer questions during the hearing.

(iv) Within 90 days of the date the household member is notified in writing that a State or local hearing initiated by the State agency has been scheduled, the State agency shall conduct the hearing, arrive at a

decision and notify the household member and local agency of the decision. The household member or representative is entitled to a postponement of the scheduled hearing, provided that the request for postponement is made at least 10 days in advance of the date of the scheduled hearing. However, the hearing shall not be postponed for more than a total of 30 days and the State agency may limit the number of postponements to one. If the hearing is postponed, the above time limits shall be extended for as many days as the hearing is postponed.

(v) The State agency shall publish clearly written rules of procedure for disqualification hearings, and shall make these procedures available to any interested party.

(3) Advance notice of hearing.

(i) The State agency shall provide written notice to the individual suspected of committing an intentional Program violation at least 30 days in advance of the date a disqualification hearing initiated by the State agency has been scheduled. If mailed, the notice shall be sent either first class mail or certified mail-return receipt requested. The notice may also be provided by any other reliable method. If the notice is sent using first class mail and is returned as undeliverable, the hearing may still be held.

(ii) If no proof of receipt is obtained, a timely (as defined in paragraph (e)(4) of this section) showing of nonreceipt by individual due to circumstances specified by State agency shall be considered good cause for not appearing at hearing. State agency shall establish circumstances in which non-receipt constitutes good cause for failure to appear. Such circumstances shall be consistent throughout State agency.

(iii) The notice shall contain at a minimum:

(A) The date, time, and place of the hearing;

(B) The charge(s) against the individual;

(C) A summary of the evidence, and how and where the evidence can be examined;

(D) A warning that the decision will be based solely on information provided by the State agency if the individual fails to appear at the hearing;

(E) Statement that the individual or representative will, upon receipt of the notice, have 10 days from the date of the scheduled hearing to present good cause for failure to appear in order to receive a new hearing;

(F) A warning that a determination of intentional Program violation will result in disqualification periods as determined by paragraph (b) of this section, and a statement of which penalty the State agency believes is applicable to the case scheduled for a hearing;

(G) A listing of the individual's rights as contained in § 273.15(p);

(H) Statement that hearing does not preclude State or Federal Government from prosecuting individual for intentional Program violation in civil or criminal court, or from collecting any overissuance(s); and

(I) If there is an individual or organization available that provides free legal representation, the notice shall advise the affected individual of the availability of the service.

(iv) A copy of the State agency's published hearing procedures shall be attached to the 30-day advance notice or the advance notice shall inform the individual of his/her right to obtain a copy of the State agency's published hearing procedures upon request.

(v) State agency shall develop advance notice form containing the information required by this section.

(4) Scheduling of hearing. The time and place of the hearing shall be arranged so that the hearing is accessible to the household member suspected of intentional Program violation. 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 as specified in paragraph (e)(3)(ii) of this section, 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.

(5) Participation while awaiting a hearing. Pending disqualification hearing shall not affect individual's or household's right to be certified and participate in Program. Since State agency cannot disqualify household member for intentional Program violation until the hearing official finds that the individual has committed intentional Program violation, the State agency shall determine eligibility and benefit level of household in same manner it would be determined for any other household. For example, if misstatement or action for which household member is suspected of intentional Program violation does not affect household's current circumstances, household would continue to receive allotment based on latest certification action or be recertified based on new application and its current circumstances. However, the household's benefits shall be terminated if certification period has expired and household, after receiving notice of expiration, fails to reapply. State agency shall also reduce or terminate household's benefits if State agency has documentation which substantiates that household is ineligible or eligible for fewer benefits (even if these facts led to suspicion of intentional Program violation and resulting disqualification hearing) and household fails to request hearing and continuation of benefits pending hearing. For example, State agency may have facts which substantiate household failed to report change in its circumstances even though State agency has not yet demonstrated failure to report involved an intentional act of Program violation.

(6) Criteria for determining intentional Program violation. The hearing authority shall base the determination of intentional Program violation on clear and convincing evidence which demonstrates that the household member(s) committed, and intended to commit, intentional Program violation as defined in paragraph (c) of this section.

(7) Decision format. The hearing authority's decision shall specify the reasons for the decision, identify the supporting evidence, identify the pertinent FNS regulation, and respond to reasoned arguments made by the household member or representative.

(8) Imposition of disqualification penalties.

(i) If the hearing authority rules that the individual has committed an intentional Program violation, the household member must be disqualified in accordance with the disqualification periods and procedures in paragraph (b) of this section. The same act of intentional Program violation repeated over a period of time must not be separated so that separate penalties can be imposed.

(ii) No further administrative appeal procedure exists after an adverse State level hearing. The determination of intentional Program violation made by a disqualification hearing official cannot be reversed by a subsequent fair hearing decision. The household member, however, is entitled to seek relief

in a court having appropriate jurisdiction. The period of disqualification may be subject to stay by a court of appropriate jurisdiction or other injunctive remedy.

(iii) Once a disqualification penalty has been imposed against a currently participating household member, the period of disqualification shall continue uninterrupted until completed regardless of the eligibility of the disqualified member's household. However, the disqualified member's household shall continue to be responsible for repayment of the overissuance which resulted from the disqualified member's intentional Program violation regardless of its eligibility for Program benefits.

(9) Notification of hearing decision.

(i) If the hearing official finds that the household member did not commit intentional Program violation, the State agency shall provide a written notice which informs the household member of the decision.

(ii) If hearing official finds household member committed intentional Program violation, State agency shall provide written notice to household member prior to disqualification. Notice shall inform household member of decision and reason for decision. In addition, the notice shall inform the household member of the date the disqualification will take effect. If the individual is no longer participating, the notice shall inform the individual that the period of disqualification will be deferred until such time as the individual again applies for and is determined eligible for Program benefits. The State agency shall also provide written notice to the remaining household members, if any, of either the allotment they will receive during the period of disqualification or that they must reapply because the certification period has expired. The procedures for handling the income and resources of the disqualified member are described in § 273.11(c). A written demand letter for restitution, as described in § 273.18(d)(3), shall also be provided.

(iii) Each State agency shall develop a form for notifying individuals that they have been found by an administrative disqualification hearing to have committed intentional Program violation. The form shall contain the information required by this section.

(10) Local level hearings.

(i) State agency may choose to provide administrative disqualification hearings at local level in some or all of its project areas with a right to appeal to a State level hearing. If a local level disqualification hearing determines that a household member committed intentional Program violation, notification of hearing decision described in paragraph (e)(9) of this section shall also inform household member of right to appeal decision within 15 days after receipt of notice, date disqualification will take effect unless a State level hearing is requested, and that benefits will be continued pending a State level hearing if the household is otherwise eligible. If household member appeals local level decision, advance notice of hearing, as described in paragraph (e)(3) of this section, shall be provided at least 10 days in advance of scheduled State level hearing and shall inform household member that local hearing decision will be upheld if household or its representative fails to appear for the hearing without good cause. When a local level decision is appealed, the State agency shall conduct the State level hearing, arrive at a decision, and notify the household member and local agency of the decision within 60 days of the date the household member appealed its case. The prior decision shall not be taken into consideration by the State hearing officer in making the final determination. In all other respects, local level disqualification hearings shall be handled in accordance with the procedures specified in this section for State level hearings.

(ii) The State agency shall develop appropriate forms which contain the information required by this section for notification of a local level hearing decision and advance notice of a scheduled State level hearing for appeal of a local level decision.

(f) Waived hearings. Each State agency shall have the option of establishing procedures to allow accused individuals to waive their rights to an administrative disqualification hearing. For State agencies which

choose the option of allowing individuals to waive their rights to an administrative disqualification hearing, the procedures shall conform with the requirements outlined in this section.

(1) Advance notification.

(i) State agency shall provide written notification to household member suspected of intentional Program violation that member can waive his/her right to administrative disqualification hearing. Prior to providing written notification to household member, State agency shall ensure evidence against household member is reviewed by someone other than eligibility worker assigned to accused individual's household and a decision is obtained that such evidence warrants scheduling a disqualification hearing.

(ii) The written notification provided to the household member which informs him/her of the possibility of waiving the administrative disqualification hearing shall include, at a minimum:

(A) Date signed waiver must be received by State agency to avoid holding of hearing and a signature block for accused individual, along with a statement that the head of household must also sign the waiver if the accused individual is not the head of household, with an appropriately designated signature block;

(B) Statement of accused individual's right to remain silent concerning the charge(s), and that anything said or signed by the individual concerning the charge(s) can be used against him/her in a court of law;

(C) Fact that waiver of disqualification hearing will result in disqualification and reduction in benefits for period of disqualification, even if accused individual does not admit to facts as presented by State agency;

(D) Opportunity for the accused individual to specify whether or not he/she admits to facts as presented by State agency. This opportunity shall consist of the following statements, or statements developed by the State agency which have the same effect, and a method for the individual to designate his/her choice:

(1) I admit to the facts as presented, and understand that a disqualification penalty will be imposed if I sign this waiver; and

(2) I do not admit that the facts as presented are correct. However, I have chosen to sign this waiver and understand that a disqualification penalty will result;

(E) The telephone number and, if possible, name of the person to contact for additional information; and

(F) Fact that remaining household members, if any, will be held responsible for repayment of claim.

(iii) State agency shall develop waiver of right to an administrative disqualification hearing form which contains information required by this section and information described in paragraph (e)(3) of this section for advance notice of hearing. If household member is notified of possibility of waiving his/her right to an administrative disqualification hearing before the State agency has scheduled a hearing, State agency is not required to notify household member of date, time and place of hearing at that point as required by paragraph (e)(3)(i)(A) of this section.

(2) Imposition of disqualification penalties.

(i) If household member suspected of intentional Program violation signs waiver of right to administrative disqualification hearing and signed waiver is received within timeframes specified by State agency, household member shall be disqualified in accordance with disqualification periods specified in paragraph (b) of this section. Period of disqualification shall begin with the first month which follows the date the household member receives written notification of disqualification. If act of intentional Program violation which led to the disqualification occurred prior to the written notification of the disqualification periods specified in paragraph (b) of this section, the household member shall be disqualified in accordance with

the disqualification periods in effect at the time of the offense. The same act of intentional Program violation repeated over a period of time shall not be separated so that separate penalties can be imposed.

(ii) No further administrative appeal procedure exists after an individual waives his/her right to an administrative disqualification hearing and a disqualification penalty has been imposed. The disqualification penalty cannot be changed by a subsequent fair hearing decision. The household member, however is entitled to seek relief in a court having appropriate jurisdiction. The period of disqualification may be subject to stay by a court of appropriate jurisdiction or other injunctive remedy.

(iii) Once a disqualification penalty has been imposed against a currently participating household member, the period of disqualification shall continue uninterrupted until completed regardless of the eligibility of the disqualified member's household. However, the disqualified member's household shall continue to be responsible for repayment of the overissuance which resulted from the disqualified member's intentional Program violation regardless of its eligibility for Program benefits.

(3) Notification of disqualification. The State agency shall provide written notice to the household member prior to disqualification. The State agency shall also provide written notice to any remaining household members of the allotment they will receive during the period of disqualification or that they must reapply because the certification period has expired. The notice(s) shall conform to the requirements for notification of a hearing decision specified in paragraph (e)(9) of this section. A written demand letter for restitution, as described in § 273.18(d)(3), shall also be provided.

(4) Waiver of hearing at local level. Any State agency which has adopted the two-tiered approach for administrative disqualification hearings may also provide for waiver of the right to disqualification hearing procedures outlined in this section.

(g) Court referrals. Any State agency exempted from requirement to establish an administrative disqualification system in accordance with paragraph (a) of this section shall refer appropriate cases for prosecution by a court of appropriate jurisdiction in accordance with requirements outlined in this section.

(1) Appropriate cases.

(i) State agency shall refer cases of alleged intentional Program violation for prosecution in accordance with agreement with prosecutors or State law. Agreement shall provide for prosecution of intentional Program violation cases and include understanding that prosecution will be pursued in cases where appropriate. Agreement shall also include information on how, and under what circumstances, cases will be accepted for possible prosecution and criteria set by prosecutor for accepting cases for prosecution, such as a minimum amount of overissuance which resulted from intentional Program violation.

(ii) State agencies are encouraged to refer for prosecution under State or local statutes those individuals suspected of committing intentional Program violation, particularly if large amounts of food stamps are suspected of having been obtained by intentional Program violation, or individual is suspected of committing more than one act of intentional Program violation. State agency shall confer with its legal representative to determine types of cases which will be accepted for possible prosecution. State agencies shall also encourage State and local prosecutors to recommend to courts that a disqualification penalty as provided in section 6(b) of the Food Stamp Act be imposed in addition to other civil or criminal penalties.

(2) Imposition of disqualification penalties.

(i) State agencies shall disqualify an individual found guilty of intentional Program violation for the length of time specified by the court. If the court fails to impose a disqualification period, the State agency shall impose a disqualification period in accordance with the provisions in paragraph (b) of this section, unless contrary to the court order. If disqualification is ordered but a date for initiating the

disqualification period is not specified, the State agency shall initiate the disqualification period for currently eligible individuals within 45 days of the date the disqualification was ordered. Any other court-imposed disqualification shall begin within 45 days of the date the court found a currently eligible individual guilty of civil or criminal misrepresentation or fraud.

(ii) Once a disqualification penalty has been imposed against a currently participating household member, the period of disqualification shall continue uninterrupted until completed regardless of the eligibility of the disqualified member's household. However, the disqualified member's household shall continue to be responsible for repayment of the overissuance which resulted from the disqualified member's intentional Program violation regardless of its eligibility for Program benefits.

(3) Notification of disqualification. If the court finds household member committed intentional Program violation, State agency shall provide written notice to household member. Notice shall be provided prior to disqualification, whenever possible. Notice shall inform the household member of the disqualification and the date the disqualification will take effect. The State agency shall also provide written notice to the remaining household members, if any, of the allotment they will receive during the period of disqualification or that they must reapply because the certification period has expired. The procedures for handling the income and resources of the disqualified member are described in § 273.11(c). In addition, the State agency shall provide the written demand letter for restitution described in § 273.18(d)(3).

(h) Deferred adjudication. Each State agency shall have the option of establishing procedures to allow accused individuals to sign disqualification consent agreements for cases of deferred adjudication. State agencies are encouraged to use this option for those cases in which a determination of guilt is not obtained from a court due to the accused individual having met terms of a court order or which are not prosecuted due to the accused individual having met the terms of an agreement with the prosecutor. For State agencies which choose the option of allowing individuals to sign disqualification consent agreements in cases referred for prosecution, the procedures shall conform with the requirements outlined in this section.

(1) Advance notification.

(i) The State agency shall enter into an agreement with the State's Attorney General's Office or, where necessary, with county prosecutors which provides for advance written notification to the household member of the consequences of consenting to disqualification in cases of deferred adjudication.

(ii) Written notification provided to the household member which informs him/her of the consequences of consenting to disqualification as a part of deferred adjudication shall include, at a minimum:

(A) A statement for the accused individual to sign that the accused individual understands the consequences of consenting to disqualification, along with a statement that the head of household must also sign the consent agreement if the accused individual is not the head of household, with an appropriately designated signature block.

(B) A statement that consenting to disqualification will result in disqualification and a reduction in benefits for the period of disqualification, even though the accused individual was not found guilty of civil of criminal misrepresentation or fraud.

(C) A warning that the disqualification periods for intentional Program violations under the Food Stamp Program are as specified in paragraph (b) of this section, and a statement of which penalty will be imposed as a result of the accused individual having consented to disqualification.

(D) A statement of the fact that the remaining household members, if any, will be held responsible for repayment of the resulting claim, unless the accused individual has already repaid the claim as a result of meeting the terms of the agreement with the prosecutor or the court order.

(iii) The State agency shall develop a disqualification consent agreement, or language to be included in the agreements reached between the prosecutors and accused individuals or in the court orders, which contains the information required by this section for notifying a household member suspected of intentional Program violation of the consequences of signing a disqualification consent agreement.

(2) Imposition of disqualification penalties.

(i) If household member suspected of intentional Program violation signs disqualification consent agreement, household member shall be disqualified in accordance with disqualification periods specified in paragraph (b) of this section, unless contrary to court order. Period of disqualification shall begin within 45 days of the date household member signed the disqualification consent agreement. However, if the court imposes a disqualification period or specifies the date for initiating the disqualification period, the State agency shall disqualify the household member in accordance with the court order.

(ii) Once a disqualification penalty has been imposed against a currently participating household member, the period of disqualification shall continue uninterrupted until completed regardless of the eligibility of the disqualified member's household. However, the disqualified member's household shall continue to be responsible for repayment of the overissuance which resulted from the disqualified member's intentional Program violation regardless of its eligibility for Program benefits.

(3) Notification of disqualification. If household member suspected of intentional Program violation signs disqualification consent agreement, State agency shall provide written notice to member and prior to disqualification, whenever possible. Notice shall inform household member of disqualification and date it will take effect. State agency shall also provide notice to remaining household members, if any, of allotment they will receive during disqualification period or that they must reapply because certification period has expired. Procedures for handling income and resources of disqualified member are described in § 273.11(c). State agency shall provide written demand letter for restitution described in 273.18(d)(3).

(i) Reporting requirements.

(1) State agency shall report to FNS information concerning individuals disqualified for an intentional Program violation, including those disqualified based on determination of administrative disqualification hearing official or court of appropriate jurisdiction, and those disqualified as a result of signing either a waiver of right to disqualification hearing or disqualification consent agreement in cases referred for prosecution. Information shall be submitted to FNS to be received within 30 days of disqualification.

(2) State agencies shall report information concerning each individual disqualified for an intentional Program violation to FNS. FNS will maintain this information and establish the format for its use.

(i) State agencies shall report information to the disqualified recipient database in accordance with procedures specified by FNS.

(ii) State agencies shall access disqualified recipient information from the database that allows users to check for current and prior disqualifications.

(3) The elements to be reported to FNS are name, social security number, date of birth, gender, disqualification number, disqualification decision date, disqualification start date, length of disqualification period (in months), locality code, and the title, location and telephone number of the locality contact. These elements shall be reported in accordance with procedures prescribed by FNS.

(i) The disqualification decision date is the date that a disqualification decision was made at either an administrative or judicial hearing, or the date an individual signed a waiver to forego an administrative or judicial hearing and accept a disqualification penalty.

(ii) The disqualification start date is the date the disqualification penalty was imposed by any of the means identified in § 273.16(i)(3)(i).

(iii) The locality contact is a person, position or entity designated by a State agency as the point of contact for other State agencies to verify disqualification records supplied to the disqualified recipient database by the locality contact's State.

(4) All data submitted by State agencies will be available for use by any State agency that is currently under a valid signed Matching Agreement with FNS.

(i) State agencies shall, at minimum, use data to determine eligibility of individual Program applicants prior to certification, and for 1 year following implementation, to determine eligibility at recertification of its currently participating caseload. In lieu of 1-year match at recertification requirement and for same purpose, State agencies may conduct one-time match of participating caseload against active disqualifications in disqualified recipient database. State agencies have option of exempting minors.

(ii) State agencies shall also use the disqualified recipient database for the purpose of determining the eligibility of newly added household members.

(5) Disqualification of individual for intentional Program violation in one jurisdiction shall be valid in another. One or more disqualifications for intentional Program violation, occurring prior to April 1, 1983, shall be considered as only one previous disqualification when determining appropriate penalty to impose in case under consideration, regardless of where disqualification(s) took place. State agencies are encouraged to identify and report any individuals disqualified for intentional Program violation prior to April 1, 1983. State agency submitting such historical information should take steps to ensure availability of appropriate documentation to support disqualifications in event independent verification is needed.

(6) If a State determines that supporting documentation for a disqualification record that it has entered is inadequate or nonexistent, the State agency shall act to remove the record from the database.

(7) If a court of appropriate jurisdiction reverses a disqualification for an intentional Program violation, the State agency shall take action to delete the record in the database that contains information related to the disqualification that was reversed in accordance with instructions provided by FNS.

(8) If an individual disputes the accuracy of the disqualification record pertaining to him/herself the State agency submitting such record(s) shall be responsible for providing FNS with prompt verification of the accuracy of the record.

(i) If a State agency is unable to demonstrate to the satisfaction of FNS that the information in question is correct, the State agency shall immediately, upon direction from FNS, take action to delete the information from the disqualified recipient database.

(ii) In instances where State agency is able to demonstrate to the satisfaction of FNS that the information in question is correct, the individual shall have an opportunity to submit a brief statement representing his or her position for the record. The State agency shall make the individual's statement a permanent part of the case record documentation on the disqualification record in question, and shall make the statement available to each State agency requesting an independent verification of that disqualification.

(j) Reversed disqualifications. In cases where the determination of intentional program violation is reversed by a court of appropriate jurisdiction, the State agency shall reinstate the individual in the program if the household is eligible. The State agency shall restore benefits that were lost as a result of the disqualification in accordance with the procedures specified in § 273.17(e).

45 CFR § 235.110 Fraud.
State plan requirements: A State plan under title I, IV-A, X, XIV, or XVI of the Social Security Act must provide:

(a) That the State agency will establish and maintain:

(1) Methods and criteria for identifying situations in which a question of fraud in the program may exist, and

(2) Procedures developed in cooperation with the State's legal authorities for referring to law enforcement officials situations in which there is valid reason to suspect that fraud has been practiced.

The definition of fraud for purposes of this section will be determined in accordance with State law.

(b) For methods of investigation of situations which there is a question of fraud, that do not infringe on the legal rights of persons involved and are consistent with the principles recognized as affording due process of law.

(c) For the designation of official position(s) responsible for referral of situations involving suspected fraud to the proper authorities.

FRAUD (legal definition from http://www.lectlaw.com/def/f079.htm)

The term 'fraud' is generally defined in the law as an intentional misrepresentation[1] of material existing fact made by one person to another with knowledge of its falsity and for the purpose of inducing the other person to act, and upon which the other person relies with resulting injury or damage. Fraud may also include an omission or intentional failure to state material[2] facts, knowledge of which would be necessary to make other statements not misleading.

Thus, to constitute fraud, a misrepresentation must be false [or an omission must make other statements misleading], and it must be 'material' in the sense that it relates to a matter of some importance or significance rather than a minor or trivial detail.

To constitute fraud, a misrepresentation (or omission) must also relate to an "existing fact." Ordinarily, a promise to do something in the future does not relate to an existing fact and cannot be the basis of a claim for fraud unless the person who made the promise did so without any present intent to perform it or with a positive intent not to perform it. Similarly, a mere expression of opinion does not relate to an existing fact and cannot be the basis of a claim of fraud unless the person stating the opinion has exclusive or superior knowledge of existing facts which are inconsistent with such opinion.

To constitute fraud the misrepresentation (or omission) must be made knowingly and intentionally, not as a result of mistake or accident; that is, that the person either knew or should have known of the falsity of the misrepresentation (or the false effect of the omission), or that he made the misrepresentation (or omission) in negligent disregard of its truth or falsity.

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[1] To make a "misrepresentation" simply means to state as a fact something which is false or untrue. To make a material "omission" is to omit or withhold the state of a fact, knowledge of which is necessary to make other statements not misleading.

[2] The word "material" means that the subject matter of the statement (or concealment) related to a fact or circumstance which would be important to the decision to be made as distinguished from an insignificant, trivial or unimportant detail*; i.e.* the fraud committed must relate directly to the ability to obtain or retain SNAP or TANF.

Smith v. Department of Health and Rehabilitative Services
522 So.2d 956, 13 Fla.L.Weekly 712 (Florida 1st DCA, 1988)

On appeal from order of the Department of Health and Rehabilitative Services disqualifying food stamp recipient from participation in program due to intentional program violation, the District Court of Appeal held that documentary evidence of recipient's failure to report income was not clear and convincing evidence of her intent to commit intentional program violation Reversed.

Headnotes:

1. **Evidence**
   "Clear and convincing evidence" is intermediate standard of proof, more than preponderance of evidence standard used in most civil cases and less than beyond a reasonable doubt standard used in criminal cases.
2. **Public Assistance**
   Department of Health and Rehabilitative Services failed to prove by clear and convincing evidence that food stamp recipients intended to commit intentional program violation through documentary evidence of failure to report income from employment on her food stamp application; thus, recipient could not be disqualified from food stamp program on basis of that violation.

OPINION
*957 *PER CURIAM*

This cause is before us on appeal from a final order of the Department of Health and Rehabilitative Services (HRS) disqualifying appellant from participation in the food stamp program due to an intentional program violation. Appellant argues that HRS failed to present clear and convincing evidence of appellant's intent to commit an intentional program violation. We agree and reverse.

An administrative disqualification hearing was held on September 16, 1986, to determine whether appellant could be sanctioned for allegedly committing an intentional program violation in connection with her family's receipt of food stamps. Two employees from HRS's Office of Overpayment, Fraud, and Recoupment (OOFR) were present and placed under oath. Neither appellant nor any other witness appeared.

The hearing officer identified HRS as having the burden of proof by clear and convincing evidence. HRS based its case on allegations that appellant failed to report income from employment on her food stamp application.

HRS identified and presented certain documents as follows:

1. A food stamp application dated November 27, 1984, signed by appellant and her husband, showing the social security check of appellant's husband as the only reported income, with a notice of verification/penalty warning signed by appellant.
2. A rights and responsibilities form signed by appellant at an interview on December 6, 1984.
3. A food stamp work sheet completed at the December 1984 interview reporting social security as the only income, an anticipated change dealing with grandchildren who were leaving the household at a later date, and indicating that appellant's rights and responsibilities were explained during the interview.
4. A food stamp record dated December 7, 1984, certifying appellant's household as eligible for food stamps for January 1985 through March 1985, based on a reported income of $382 per month in social security income.

5. A food stamp application for recertification dated March 7, 1985, signed by appellant's husband and an authorized representative on March 5, 1985, showing no reported income from work with a notice of verification/penalty warning signed by appellant.
6. A rights and responsibilities form signed by appellant and dated April 3, 1985.
7. A request for verification containing a section on reporting changes dated April 3, 1985, requesting proof of savings and the husband's disability.
8. A food stamp work sheet which a certified worker completed on April 10, 1985, listing $395 in social security income as the only reported income, and indicating that rights and responsibilities were explained to the household.
9. A food stamp record dated April 10, 1985, showing certification of food stamps from April 1985 through September 1985.
10. An income verification report generated by the Auditor General indicating that appellant earned $303.60 in unreported income during the first quarter of 1985 from the Polk County School Board.
11. An HRS Form 2630 dated September 18, 1985, and prepared by a food stamp worker making a nonfraud referral to OOFR after an interview with appellant, who stated that she did not report the income from the school board because it was nonpermanent and part-time work.
12. A reply from a request for verification of employment from the Polk County School Board listing the dates and amount of pay that appellant received, with a notation that a telephone call verified the listed dates and pay periods.
13. A report of claim determination dated March 28, 1986, showing $66 in overissuance of food stamps.
14. A copy of the microfiche food stamp issuance history from June 1983 to December 1985, showing the dates and amounts of food stamp benefits received. *958
15. A rights and responsibilities form dated January 5, 1984, signed by appellant.

HRS felt that appellant understood her responsibility to report income on an application and subsequent changes in reported income because she had received food stamps for a long time. HRS requested that appellant be disqualified from the food stamp program for six months because she had failed to report her income from the Polk County School Board. Neither of HRS's employees from OOFR claimed to have any personal knowledge of the allegations made or of the information contained in the documents submitted to the hearing officer.

The hearing officer's final order dated February 13, 1987, found that appellant committed an intentional program violation. He imposed a six-month disqualification penalty on appellant.
We agree with appellant that the hearing officer erred in disqualifying appellant based solely on the above-mentioned documentary evidence. The Code of Federal Regulations defines an intentional violation as follows:

> For purposes of determining through administrative disqualification hearings whether or not a person has committed an intentional program violation, intentional program violations shall consist of having *intentionally:* (1) made a false or misleading statement, or misrepresented, concealed or withheld facts, or (2) committed any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any State statute relating to the use, presentation, transfer, acquisition, receipt, or possession of food stamps coupons.... (emphasis added). 7 C.F.R. § 273.16(c) (1986).

Furthermore, HRS must prove the intent to commit an intentional program violation by clear and convincing evidence. The Code of Federal Regulations provides:

> The hearing authority shall base the determination of intentional program violation on *clear and convincing* evidence which demonstrates that the household member(s) committed, and *intended* to commit, intentional program violation as defined in paragraph (c) of this section. (emphasis added). 7 C.F.R. § 273.16(e)(6) (1986).

[1] "Clear and convincing evidence" is an intermediate standard of proof, more than the "preponderance of the evidence" standard used in most civil cases, and less than the "beyond a reasonable doubt" standard used in criminal cases. *See State v. Graham,* 240 So.2d 486 (Fla. 2d DCA 1970). In *Slomowitz v. Walker,* 429 So.2d 797, 800 (Fla. 4th DCA 1983), the court held that:

> Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

[2] The evidence presented below is insufficient to meet this heavy burden. HRS produced no witnesses at the hearing. The hearing officer based his finding entirely on documentary evidence representing certain facts. These facts merely show that appellant engaged in part-time work for which she received small amounts of unreported income. The unreported income resulted in the overissuance of $66 in food stamps to appellant's family. When appellant first discussed the earnings with her social worker, she explained that she did not know she had to report nonpermanent and part-time work. The social worker accepted that explanation and made a nonfraud referral to OOFR. Based on these facts, the hearing officer erred in finding clear and convincing evidence of appellant's intent to commit an intentional program violation.

HRS argues that the lack of a contemporaneous objection precludes this court's review of the sufficiency of the evidence. This argument is without merit. In most judicial and administrative proceedings, nonappearance by one party usually results *959 in dismissal of the action or judgment by default. *See, e.g.,* Fla.R.Civ.P. 1.500, Fla.Admin.Code Rule 10–2.061. However, the Code of Federal Regulations provides that

> "[e]ven 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 on clear and convincing evidence." 7 C.F.R. § 273.16(e)(4) (1986), in pertinent part.

Section 120.68(13)(a), Florida Statutes, allows this court to give mandatory, prohibitory, and declaratory relief and to order agency action or exercise of discretion required by law, set aside agency action, remand the case, or to decide the rights, privileges, obligations, requirements or procedures at issue. Appellant is entitled to judicial review of this adverse action pursuant to Section 120.68(1), Florida Statutes. The lack of a procedural objection does not preclude her right to challenge the sufficiency of the evidence as required by law. The requirement that HRS prove its case by clear and convincing evidence would be meaningless if the household member could not question the sufficiency of that evidence.

Mere failure to report income does not establish by clear and convincing evidence that there was intent to commit an intentional program violation. Therefore, the hearing officer erred in disqualifying appellant from the food stamp program. The resolution of the case on this issue makes it unnecessary to address other questions raised by appellant. We conclude by noting that this case shows and brings into sharp focus the need for a better screening procedure involving an exercise of agency discretion.

REVERSED.

Annette Johnson v. Department of Health and Rehabilitative Services
546 So.2d 741, 14 Fla.L.Weekly 1576 (Florida 1st DCA, 1989)

Administrative proceeding was brought to disqualify claimant from participating in food stamp program. Department of Health and Rehabilitative Services determined claimant intentionally violated provisions of food stamp program and imposed six-month disqualification penalty as sanction, and claimant sought review. The District Court of Appeal, Ervin, J., held that: (1) the exhibits purporting to show existence of unreported income were inadmissible hearsay, and (2) Department failed to establish by clear and convincing evidence that claimant intentionally violated provisions of food stamp program. Reversed.
Headnotes:

1. **Weight and sufficiency of evidence**
   Hearsay is admissible in administrative setting, but alone is insufficient to support finding unless it would be admissible over objection in civil action. West's F.S.A. § 120.58(1)(a).
2. **Weight and sufficiency of evidence**
   Testimony of Division of Public Assistance Fraud investigators at food stamp disqualification hearing merely amounted to additional hearsay, and was insufficient to corroborate hearsay contained in exhibits purporting to show existence of unreported income, where neither investigator possessed personal knowledge regarding sources of employment and income information in exhibits.
3. **Weight and sufficiency of evidence**
   Computer printout of income earned by food stamp claimant, generated by Department of Commerce and obtained by running claimant's social security number through Department's computers, lacked sufficient trustworthiness to be admissible under public records exception to hearsay rule, and thus, could not support finding of violation at administrative disqualification hearing. West's F.S.A. § 90.803(8).
4. **Weight and sufficiency of evidence**
   Employment verification and employee earnings information forms contained in exhibit were not admissible under business records exception to hearsay rule, and could not support finding of violation at administrative food stamps disqualification hearings, as they were not kept by employer in regular course of his business and were not introduced at hearing by custodian of employer's business records, or by any other qualified witness who acted within course of employer's business. West's F.S.A. § 90.803(6)(a).
5. **Evidence**
   The Department of Health and Rehabilitative Services failed to establish by clear and convincing evidence that food stamps claimant had unreported income or that she intentionally violated provisions of food stamp program, as would justify disqualification penalty.

OPINION

Appellant, Annette Johnson, seeks review of an order rendered by the Department of Health and Rehabilitative Services, Office of Public Assistance Appeal Hearings (HRS), determining that she intentionally violated provisions of the food stamp program and imposing, as a sanction therefor, a six-month disqualification penalty. Because HRS failed to establish by clear and convincing evidence that appellant intentionally violated the provisions of the food stamp program, we reverse.

HRS sought to prove its case at the disqualification hearing by presenting the testimony of two investigators from the Office of the Auditor General, Division of Public Assistance Fraud (DPAF), and submitting eight exhibits, only two of which tended to show the existence of the alleged unreported income. Exhibit 4, the first of the two pertinent exhibits, consisted of several documents, including an

"Employment Verification" form which named appellant as an employee of Turner House Restaurant and provided basic employment information, and an "Employee Earnings Information" form, indicating the total gross earnings paid to appellant by Turner House Restaurant during each pay period. A notarized affidavit executed by Tom Turner, the President of Turner House Restaurant, certified that Exhibit 4 was either a true and accurate copy of or a compilation of documents prepared and maintained by him in the regular course of his business and that he was the official custodian of the documents.[1] However, the two forms were actually prepared by Investigator Goldfine of the DPAF after she had interviewed Mr. Turner and reviewed his payroll records. Goldfine, however, was unable to say whether the payroll records were completed at or near the time the wages were supposedly paid to appellant, and neither Turner himself nor any other employee of Turner House Restaurant was present at the hearing to testify.

Exhibit 5 was the second exhibit offered by HRS for the purpose of showing the existence of the unreported income. It, too, was accompanied by a notarized affidavit executed by a senior investigator with the DPAF certifying that the document was a true and accurate reproduction of a data compilation which had been authorized and filed with the DPAF. The exhibit consisted of several documents, including a computer printout entitled "Income Verification Report for Food Stamp Cases," disclosing that appellant had earned $819.01 from Turner House Restaurant during the fourth quarter of 1986. Investigator Raper of the DPAF testified that the printout was generated by the Department of Commerce and was obtained by running appellant's social security number through the department's computers. Raper commented the document merely provides an impetus for investigation by supplying a time period and an *approximate* amount of earnings, which must then be verified by further investigation and direct contact with the employer. Raper had no personal knowledge regarding contents of the report and stated it was his understanding that employers routinely provided wage information to Department of Commerce.

[1] The documents that comprise Exhibits *743 4 and 5 are clearly hearsay.[2] It is well settled that hearsay is admissible in an administrative setting, however, hearsay alone is insufficient to support a finding unless it would be admissible over objection in a civil action. *See Harris v. Game and Fresh Water Fish Comm'n,* 495 So.2d 806, 808 (Fla. 1st DCA 1986); § 120.58(1)(a), Fla.Stat. (1987); Fla.Admin.Code Rule 10–2.060(1) (1988). Accordingly, in order for HRS to meet the burden of proof imposed when it relies upon hearsay, such evidence must be corroborated by non-hearsay, or the hearsay evidence must be admissible under some established exception to the hearsay rule.

[2] We find nothing in the form of non-hearsay that tends to corroborate the hearsay contained in Exhibits 4 and 5. We so conclude because—notwithstanding the two DPAF investigators' testimony—neither of the investigators possessed personal knowledge regarding the *sources* of the employment and income information, as reflected on the submitted documents. Consequently, their testimony regarding the employment records merely amounted to additional hearsay.

[3] Turning next to the question of applicable hearsay exceptions, HRS contends the exhibits are admissible under the public records[3] and business records[4] exceptions. We do not agree that Exhibit 5 qualifies under the public records exception, because in our judgment the report lacks sufficient trustworthiness to be admissible pursuant to the requirement of such exception. *See Juste v. Department of Health and Rehabilitative Servs., State of Fla., OFR/DPAF,* 520 So.2d 69, 72 (Fla. 1st DCA 1988) (although computer printouts are public records, their reliability was placed in doubt by the testimony of a witness admitting that errors can occur when social security numbers are used to trace earnings).

As to the documents compiled within Exhibit 4, neither can we agree with HRS's argument that they would be admissible over objection as business records. While the documents themselves might qualify as the DPAF's business records, the statements contained in the documents relating to Turner House Restaurant's business are simply hearsay within hearsay and would only be admissible if they, too,

conformed to the requirements of the business records exception to the hearsay rule. *Harris,* 495 So.2d at 808–09; *Van Zant v. State,* 372 So.2d 502, 503 (Fla. 1st DCA 1979), § 90.805, Fla.Stat. (1987).

If evidence is to be admitted under one of the exceptions to the hearsay rule, it must be offered in *strict* compliance with the requirements of the particular exception. Thus, evidence falling within the parameters of the business records exception is admissible only if the custodian or other qualified witness, acting within the scope of *that* business, is available to testify at the proceeding concerning the records. *Juste,* 520 So.2d at 71. *See also* § 90.803(6), Fla.Stat. (1987); *Harris,* 495 So.2d at 808 n.3 ; C. Ehrhardt, Florida Evidence § 803.6 (2d ed.1984). *744

[4] In the instant case, the "Employment Verification" and "Employee Earnings Information" forms contained in Exhibit 4 were not admissible under the business records exception, because they were not kept by the employer in the regular course of *his* business. Furthermore, the documents were not introduced at the hearing by the *custodian* of the *employer's* business records, or by any other qualified witness who acted within the course of the *employer's* business. Because the only documents tending to support HRS's contention that appellant received wages which she failed to report were hearsay, not admissible under any established exception, we agree with appellant that the order is not supported by clear and convincing evidence.

[5] Not only did HRS fail to establish the existence of the unreported income by clear and convincing evidence, it also failed to establish the intent element under the same standard.[5] *See Smith v. Department of Health and Rehabilitative Servs.,* 522 So.2d 956, 959 (Fla. 1st DCA 1988) ("Mere failure to report income does not establish by clear and convincing evidence that there was intent to commit an intentional program violation.").

REVERSED.

Footnotes

1. Neither Turner's original payroll records reflecting wages paid to appellant, nor copies thereof, were introduced at the hearing.

2. " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." § 90.801(1)(c), Fla.Stat. (1987).

3. Section 90.803(8), Florida Statutes (1987), authorizes the admission of:
Records, reports, statements reduced to writing, or data compilations, in any form, of public offices or agencies, setting forth the activities of the office or agency, or matters observed pursuant to duty imposed by law as to matters which there was a duty to report, excluding in criminal cases matters observed by a police officer or other law enforcement personnel, unless the sources of information or other circumstances show their lack of trustworthiness.

4. Section 90.803(6)(a), Florida Statutes (1987), authorizes the admission of:
A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances show lack of trustworthiness.

5. The standard of proof in cases such as this requires the state to establish by clear and convincing evidence that the food stamp recipient committed, *and intended to commit,* an intentional program violation. 7 C.F.R. § 273.16(e)(6) (1988) (emphasis added).