



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

██████████ Respondent

DECISION
Case #: FOF - 158727

Pursuant to a petition filed July 1, 2014, under 7 C.F.R. §273.16, to review a decision by the Office of the Inspector General (OIG) to disqualify ██████████ from receiving FoodShare benefits (FS) for a period of two years, a hearing was held on August 21, 2014, by telephone. The record was held open 14 days for the respondent to provide additional documentation; it was received by the agency on September 4, 2014.

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:

Office of the Inspector General
Department of Health Services
P.O. Box 309
Madison, WI 53701

Respondent:

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

ADMINISTRATIVE LAW JUDGE:

Brian C. Schneider
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # ██████████) is a resident of Milwaukee County who received FS benefits in Milwaukee County.

2. On April 11, 2014, the following posts appeared on the respondent's Facebook page: "Who selling stamps dont everybody comment at once" and "Who got stamps for sale and when." The Department verified that the page belonged to the respondent.
3. The respondent's birthday is April 7.
4. On July 8, 2014, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that the respondent attempted to traffic FS. The violation would be the respondent's second.

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).

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).

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 exist a reasonable doubt that the opposite is true.

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.

Wis. Stat., §49.795(1)(dm) defines trafficking of FS as to “Buy, sell, steal, or otherwise accomplish the exchange of, directly, indirectly, in collusion with others, or individually, food stamp program benefits issued and accessed through the electronic benefit transfer program ... for cash or other consideration that is not food.” Federal rules include the intent to buy FS online among the prohibited scope of trafficking violations. Exhibit 5.

The issue before me is whether there is clear and convincing evidence that the respondent authored or is responsible for the Facebook posts on April 11, 2014. If so the action would fit within the definition of trafficking and would warrant an FS disqualification. The respondent testified that she did not post the messages; instead it was her boyfriend pretending to be her in order to purchase food for a surprise birthday party for the respondent.

The boyfriend did not testify. After the hearing petitioner submitted a statement purportedly signed by him saying “Tried to buy Foodshare off line.” The statement is of no value; it provides no detail and is not sworn. The respondent could have had the boyfriend testify under oath and did not. In addition, a waiver of an FS disqualification hearing also purportedly was signed by the boyfriend. The waiver is not particularly compelling because he is not an FS recipient; I checked the state benefit history for the boyfriend’s social security number provided on the statement and found that he last received FS in Wisconsin briefly in the year 2000.

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 second such violation committed by the respondent. The simple fact is that the respondent’s Facebook page posted requests to buy FS. The page has ID and password protection; if by chance she gave the ID and password to another person she is liable for that person’s postings. Furthermore, I find it impossible to believe that the respondent would not have looked at her Facebook page, and that her boyfriend seriously believed he could surprise her by posting on her page. The postings actually occurred after the respondent’s birthday, so even the purported reason for the boyfriend’s action lacks credibility. I am convinced that the respondent posted the messages herself or knew about them and took no action to remove them. The petitioner correctly seeks to disqualify the respondent from the FS program for two years.



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on September 8, 2014.

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Division of Health Care Access and Accountability
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