



**STATE OF WISCONSIN**  
**Division of Hearings and Appeals**

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In the Matter of

Office of the Inspector General, Petitioner

vs.

DECISION

Case #: FOF - 159593

██████████, Respondent

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Pursuant to petition filed August 1, 2014, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Office of the Inspector General to disqualify ██████████ from receiving FoodShare benefits (FS) for one year, a hearing was held on Tuesday, September 23, 2014 at 10:00 a.m. by a telephone call originating in Eau Claire, Wisconsin.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

The following persons appeared:

**PARTIES IN INTEREST:**

Petitioner:

Office of the Inspector General  
Department of Health Services - OIG  
PO Box 309  
Madison, WI 53701

Respondent:

██████████  
██████████  
██████████

**ADMINISTRATIVE LAW JUDGE:**

Michael O'Brien  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. The respondent is a resident of Milwaukee County who has received FoodShare there intermittently since July 1, 2008.
2. On August 19, 2014, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that the respondent attempted to purchase FoodShare from a friend through Facebook.

3. A friend of the respondent posted this on Facebook on June 14, 2014: “I got \$500 food stamps for sale.” The respondent then posted: “I need a 100 of them right now.” When a worker asked whether she attempted to buy FoodShare from this man, the worker wrote that the respondent answered, “Mhhhm.”
4. The respondent did not take any other action to purchase FoodShare from this person. There is no evidence that she had money to buy the benefits.
5. The respondent did not purchase any FoodShare from this or any other person.

## DISCUSSION

Trafficking FoodShare benefits violates the program’s rules. Wis. Stat. § 946.92(2g). Trafficking includes attempting to buy FoodShare benefits. 7 CFR § 271.2; *see also* Wis. Stat. § 946.92(1)(dm)6. FoodShare recipients lose their eligibility if the Department proves by clear and convincing evidence that they intentionally violated the program’s rules; the penalty for the first violation is one year. 7 CFR §§ 273.16(e)(6) and (b)(1)(i). The Department seeks to disqualify the respondent for one year because it contends that she attempted to purchase FoodShare benefits from a friend on Facebook.

Clear and convincing is a middle level of proof that requires the Department to show that more than just a preponderance of the evidence supports its position but does not require it to eliminate all reasonable doubt, as it would have to in a criminal case:

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 v. Kuehn*, 11 Wis.2d 15, 26 (1959)*Kuehn*, 11 Wis.2d at 26.

*Wisconsin Jury Instruction – Civil 205* explains that this level of evidence must clearly have more convincing power than the opposing evidence:

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.

The *McCormick* treatise suggests that the standard “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., 4<sup>th</sup> ed. 1992). Thus, to find that the respondent intentionally violated the FoodShare program’s rules, the evidence must induce a firm conviction that she attempted to purchase FoodShare benefits and that she did so intentionally, although there may be a reasonable doubt that this is true. Intent is a subjective state of mind determined upon all of the facts. *Lecus v. American Mut. Ins. Co. of Boston*, 81

Wis.2d 183 (1977). A person is presumed to know and intend the probable and natural consequences of her voluntary words or acts. *See, John F. Jelke Co. v. Beck*, 208 Wis. 650 (1932).

The respondent's case arose after the Department's intern monitored Facebook and other social media postings for illegal FoodShare trafficking. He discovered a public posting by P.M., a childhood friend of the respondent, that stated: "I got \$500 food stamps for sale." The respondent then posted: "I need a 100 of them right now." She did not post any more responses to this solicitation. Nor did she buy any benefits from P.M. [REDACTED], the agency worker, testified that the intern continued to monitor the internet. Although he found several other persons living near the respondent who attempted to sell FoodShare on Facebook, he found no evidence that she answered any of them. There also is no evidence that she ever purchased FoodShare from anyone else. But Ms. [REDACTED], who interviewed her, testified that she acknowledged that she needed more FoodShare and that she tried to get another Quest card from someone else. And Ms. [REDACTED] testified and wrote that when she asked her if she tried to purchase FoodShare from P.M., she answered, "Mhhhm." The respondent denied these accusations.

Whether this evidence establishes that she intentionally violated FoodShare rules depends primarily upon what constitutes an attempt. I cannot find any definition of *attempt* in state and federal FoodShare rules, regulations, and statutes, but Wisconsin FoodShare offenses are found in Wis. Stat. § 946.92, which is part of the state's criminal code. The general criminal definition of *attempt* "requires that the actor have an intent to perform acts and attain a result which, if accomplished, would constitute such crime and that the actor does acts toward the commission of the crime which demonstrate unequivocally, under all the circumstances, that the actor formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor." Wis. Stat. § 939.32(3). The Wisconsin Supreme Court interpreted this section to mean that "to prove intent, the state must prove an intent to commit a specific crime accompanied by sufficient acts to demonstrate unequivocally that it was improbable the accused would desist of his or her own free will." Once the person acts with the requisite intent, voluntary abandonment is not a defense. *State v. Stewart*, 143 Wis.2d 28, 31 (1988). For example, if a person pointed a loaded gun at another and demanded money, but then panicked and fled, it would constitute an attempt. But acts of the accused " 'must not be so few or of such an equivocal nature as to render doubtful the existence of the requisite intent.' " *Id.*, at 35-36. "The law does not ordinarily punish a person for guilty intentions alone." The trier of fact must determine whether "under all the circumstance it was too late for the person to have repented and withdrawn." *Id.* at 37 and 40. The "defendant's conduct must pass that point where most men, holding such an intention as the defendant holds, would think better of the conduct and desist." *Id.* at 40.

The respondent probably displayed guilty intentions when she responded to P.M.'s post on Facebook. But did the evidence establish that it is highly probable that under all circumstances it was too late for her to repent and withdraw from purchasing his benefits? Because this answer depends upon her subjective state of mind, her later actions and statements are relevant. There is no evidence that she discussed the price of these benefits or that she had any means to buy them. Although others in her neighborhood tried to sell FoodShare benefits online, there is no evidence that she tried to buy them. Nor is there any evidence that she tried at other times to buy benefits from P.M. Because she undoubtedly had numerous opportunities to try to obtain additional benefits, this suggests that whatever notion she had of buying benefits from P.M., she thought better of it and desisted from following through.

On the other hand, her response of "mhhhm" when asked if she tried to purchase FoodShare from P.M. suggests that she did make this attempt. Still this evidence, even standing apart from the evidence just discussed, is not overwhelming. She denied admitting to the investigators that she tried to purchase FoodShare from P.M. She also denied attempting to purchase a Quest card. Because this was a telephone hearing, it is difficult to judge her credibility. But even if I assume that she answered the agency's inquiry about attempting to purchase benefits from P.M. positively, she could have been admitting only that she wrote the response on his Facebook page, which adds nothing to the evidence already available. Her behavior and testimony at the hearing was that of an excitable person who does not wait to fully understand a question before answering it. There is also a chance the investigator may have misunderstood her answer. There is a reason those testifying in court are asked to rephrase

answers like “uh huh,” “uh uh,” and “hmm mm” to “yes” or “no”: the positive answer so closely resembles the negative that the response is easily misunderstood or misinterpreted—and even the most honest people misinterpret evidence in a way that supports their position. As for her alleged attempt to purchase a Quest card, if this happened, it indicates that she is actively seeking to purchase benefits. But there was not enough evidence on this point to determine what actually occurred or how relevant it was.

Finally, one must view the context under which this alleged attempt took place. Anyone who reads the postings on Facebook knows that the site is a bastion of mindless yapping. People react quickly, insult their best friend, and opine belligerently on topics they know nothing about. If even a fraction of those posting put their thoughts into action, society would descend into chaos. But they don't. The respondent is a poor woman who undoubtedly would like more FoodShare benefits. When she answered the post on Facebook, she may have been making a serious attempt to illegally purchase those benefits. Or she may have simply been expressing an opinion that it would be nice to have these extra benefits. As noted, there is no evidence that she had the means to buy P.M.'s benefits; she probably made what can be considered an initial inquiry. The *Stuart* decision citing *Hamiel v. State*, 92 Wis.2d 656, 656, n.4 (1979) suggested when trying to determine whether an attempt occurred, one should view the accused's acts as a film that suddenly stopped. If there is only one reasonable answer to what will happen next, she has done enough to complete an attempt; if there is more than one reasonable answer, she has not done enough. *State v. Stuart*, 143 Wis.2d at 42. A film that stopped when the respondent posted, “I need a 100 of them right now,” would have more than one reasonable outcome. Maybe she would purchase the benefits; maybe she would not. This uncertainty would be so even if no one else bought the benefits first, and it remains so even if one considers her actions and statements after the posting. The totality of the credible evidence does not establish that it is highly probable under all circumstances that she unequivocally attempted to purchase FoodShare benefits. Therefore, the Department has failed to prove by clear and convincing evidence that she intentionally violated the FoodShare program's rules, and its decision must be reversed.

### **CONCLUSIONS OF LAW**

For the reasons discussed above, there is no clear and convincing evidence that the respondent intended to commit an IPV.

**NOW, THEREFORE, it is ORDERED**

That the petitioner's determination of an intentional program violation is reversed, and the petition for review is dismissed.

### **REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR**

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

### **APPEAL TO COURT**

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as “PARTIES IN INTEREST” **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

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

Given under my hand at the City of Madison,  
Wisconsin, this 16th day of October, 2014

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\sMichael O'Brien  
Administrative Law Judge  
Division of Hearings and Appeals

- c: Office of the Inspector General - email
- Public Assistance Collection Unit - email
- Division of Health Care Access and Accountability - email
- ██████████ - email



**State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

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The preceding decision was sent to the following parties on October 16, 2014.

Office of the Inspector General  
Public Assistance Collection Unit  
Division of Health Care Access and Accountability  
[REDACTED]@wisconsin.gov