



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

DECISION

Case #: FOF - 159718

██████████ Respondent

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 - OIG
PO Box 309
Madison, WI 53701

Respondent:

██████████
██████████
██████████

ADMINISTRATIVE LAW JUDGE:

Corinne Balter
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 from October 1, 2009 through September 1, 2014.
2. On June 9, 2014 the respondent's facebook friend, posted on Facebook, "Who gt sum stamps for sale...???" The respondent replied 100 for 50. The friend then responded, "U still wanna sale them stamps ██████████"
3. On August 21, 2014, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that the respondent attempted to buy FoodShare on Facebook.

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). Trafficking FoodShare benefits includes “the attempt to buy or sell SNAP (FoodShare) benefits online and in public.” *Administrative Notice* 34-2013.

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).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence, a firm conviction as to the existence of each of the two elements even though there may 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.

In this case the only issue is whether the respondent is responsible for the Facebook post, 100 for 50. The respondent argued that there was no way to know that he was referring to FoodShare with a post saying 100 for 50. In his words, he could be selling anything, although he never directly admitted that he was responsible for that post. It is important to look at the entire evidence in this case. The Facebook friend, clearly referenced stamps, referring to FoodShare benefits. The respondent replied to that post and then the friend again responded specifically stating stamps. It is also important to note that although the respondent states that he the agency cannot prove that that post referred to FoodShare, he does not say what he was referring to in that post. Clearly this respondent was responsible for the post, if indeed, the post was about something else, then the respondent could have said, “I was referring to x, or I was referring to y.” The respondent did not do that.

The respondent further argued that he gives out his Facebook password and that his account was hacked. I don’t find that testimony credible. In fact, none of the respondent’s testimony was credible. The Department told the respondent that if his Facebook page was hacked, they would dismiss this case, if the respondent could show anything like an e-mail from or to Facebook prior to the hearing showing his account was hacked. The respondent said that he would not be able to provide that. Thus, his testimony that Facebook page was hacked is just not credible. A person hacking another person’s Facebook page would not go on Facebook looking to sell FoodShare to another Facebook friend.

The best point that the respondent made was that he did not have any money on his FoodShare account to sell at that time. The agency agreed that his account had a zero balance on June 9. This does not show that the respondent did not try to sell FoodShare benefits on June 9. I don’t know if when the respondent went to sell his card, he learned there was no benefits. At this point the respondent would have already attempted to sell his FoodShare benefits. It could also have been that he was selling his card for future months. The respondent’s testimony that someone else used his Facebook account to post that comment about selling FoodShare benefits is not credible. I find that regardless of whether the respondent on money on his FoodShare card that he was attempting to sell FoodShare benefits.

Based upon the record before me, I find that the petitioner has established by clear and convincing evidence that the respondent intentionally violated FS program rules, and that this violation was the first such violation committed by the respondent. Therefore, the petitioner correctly seeks to disqualify the respondent from the FS program for one year.

CONCLUSIONS OF LAW

1. The respondent violated, and intended to violate, the FS program rule specifying that he not traffic FoodShare benefits.

2. The violation specified in Conclusion of Law No. 1 is the first such violation committed by the respondent.

NOW, THEREFORE, it is ORDERED

That the petitioner's determination is sustained, and that the petitioner may make a finding that the respondent committed a first IPV of the FoodShare program and disqualify the respondent from the program for one year, effective the first month following the date of receipt of this decision.

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

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

APPEAL TO COURT

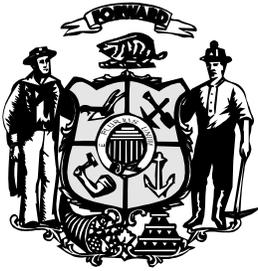
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified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

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

Given under my hand at the City of Milwaukee,
Wisconsin, this 17th day of October, 2014

\sCorinne Balter
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
- Nadine Stankey - email



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The preceding decision was sent to the following parties on October 17, 2014.

Office of the Inspector General
Public Assistance Collection Unit
Division of Health Care Access and Accountability
NadineE.Stankey@wisconsin.gov