



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

DECISION

Case #: FOF - 160241

██████████ (no appearance), Respondent

Pursuant to petition filed August 7, 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 ██████████ (no appearance) from receiving FoodShare benefits (FS) for one year, a hearing was held on October 20, 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).

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:

██████████ (no appearance)

ADMINISTRATIVE LAW JUDGE:

Michael O'Brien
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # ██████████) is a resident of Milwaukee County.
2. On November 6, 2014, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that the respondent attempted to traffic Foodshare by obtaining benefits through Facebook.

3. The respondent failed without good cause to appear for the scheduled October 20, 2014, Intentional Program Violation (IPV) hearing.
4. On May 26, 2014, the respondent posted the following statement on Facebook: “Lowkey anybody trying to sell their Food Stamps/EBT or know someone that got the plug I’m trying to fill the fridge I have to feed people haha Hit me up”

DISCUSSION

Trafficking FoodShare benefits violates the program’s rules. Wis. Stat. § 946.92(2g). It 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 he attempted to purchase FoodShare benefits through a posting 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, but it does not require absolute certainty:

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., 4th ed. 1992). Thus, to find that the respondent intentionally violated the FoodShare program’s rules, the evidence must induce a firm conviction that he attempted to purchase FoodShare benefits and that he 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 his voluntary words or acts. *See, John F. Jelke Co. v. Beck*, 208 Wis. 650 (1932).

The respondent's case arose after the Department monitored Facebook and other social media postings for illegal FoodShare trafficking. Its employee discovered this public posting by the respondent:

Lowkey anybody trying to sell their Food Stamps/EBT or know someone that got the plug I'm trying to fill the fridge I have to feed people haha Hit me up

He did not post any more responses to this solicitation. Nor is there any evidence that he bought any benefits from someone. Other persons living near him attempted to sell FoodShare on Facebook, but there is no evidence that he answered any of them. The respondent did not appear at the hearing, so this decision must be based entirely the agency's evidence. But the worker who appeared does not have any first-hand knowledge of the situation, so the single Facebook posting is the only evidence against him.

Whether this evidence establishes that he 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 issue is whether the agency's evidence establishes that it is highly probable that under all circumstances it was too late for the respondent to repent and withdraw from purchasing FoodShare benefits. Because the agency must prove this by clear and convincing evidence, it is a close case, but I find that it was too late for the respondent to repent and withdraw. This matter differs in two important respects from *Case # FOF - 160241*, which determined that a woman who in response to a person selling FoodShare on Facebook stated, "I need a 100 of them right now." That decision found that the agency had not met its burden of proof and overturned its finding of a violation. The first difference is that the earlier respondent was answering someone else's inquiry. Answering another person's inquiry can be done quickly and with almost no thought; unless the person takes some more action toward the commission of the offense, it displays little more than guilty intentions. Posting a request to buy FoodShare benefits requires more deliberation. The person decides that he needs more FoodShare than he has and then conceives and follows through on a plan to obtain the FoodShare. The second difference is that the respondent in the earlier matter appeared at the hearing and offered a plausible explanation of what happened. In the current case, because the respondent did not appear, I received no explanation that may have convinced me that the posting was not a serious attempt to purchase FoodShare.

I note to the agency that if the respondent had offered a plausible explanation of what occurred, I would have been reluctant to find that he completed an attempt. The reason, as I pointed out in the earlier decision, is that Facebook "is a bastion of mindless yapping" where "[p]eople react quickly, insult their best friend, and opine belligerently on topics they know nothing about." This does not mean that the agency will never prevail against those it alleges have attempted to buy and sell FoodShare on social media if that person testifies that he did not. But the agency should conduct a proper investigation using standard law enforcement tools. These tools could include follow-up

inquiries under assumed names to those who post the information. This takes more effort, and thus is less efficient, than merely combing the internet and bringing an action against anyone who does something suspicious. But efficiency standing alone is rarely a virtue in law enforcement, especially if it interferes with justice.

Based upon the record before me, I find that the petitioner has established by clear and convincing evidence that the respondent intentionally violated FoodShare 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 FoodShare 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 his first such violation.

NOW, THEREFORE, it is ORDERED

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

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

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

APPEAL TO COURT

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

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

Given under my hand at the City of Madison,
Wisconsin, this 7th day of November, 2014

\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
- Nadine Stankey - email



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on November 7, 2014.

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