



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

DECISION

Case #: FOF - 160242

██████████ (No appearance), Respondent

Pursuant to petition filed September 12, 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
By: Nadine Stankey

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 Dane County.
2. On August 7, 2014, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that the respondent attempted to traffic FoodShare 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 June 8, 2014, the respondent posted the following statement on Facebook: “SO NOBODY HAS ANY FOOD STAMP FOR SALE ????? IM REALLY IN NEED OF 500 BY TUESDAY F U GOT SUM HIT MY INBOX ASAP PLZ!!!!”

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 she 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 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 monitored Facebook and other social media postings for illegal FoodShare trafficking. Its employee discovered this public posting by the respondent on June 8, 2014:

SO NOBODY HAS ANY FOOD STAMP FOR SALE ???? IM REALLY IN NEED OF 500 BY TUESDAY F U GOT SUM HIT MY INBOX ASAP PLZ!!!!

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

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 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 of the agency's higher burden of proof, this is a close case, but I find that it was too late for him 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 she needs more FoodShare than she has and then conceives and follows through on a plan to obtain the FoodShare. By the tone of the respondent's post, it appears that this may not have been her first post; even if it was not her first post, she was certainly adamant about her need to obtain benefits. 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.

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.



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.

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Division of Health Care Access and Accountability
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