STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of:

Office of the Inspector General, Petitioner

vs. DECISION

Case #: FOF - 160440

[redacted] Respondent

Pursuant to a petition filed July 23, 2014, under Wis. Admin. Code § HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Office of Inspector General ["OIG"] to disqualify [redacted] from receiving FoodShare benefits ["FS"] for 12 months, a Hearing was held via telephone on Tuesday, October 21, 2014 at 12:00 noon.

The issue for determination is whether Respondent committed an Intentional Program Violation ["IPV"].

There appeared at that time via telephone the following persons:

PARTIES IN INTEREST:

Petitioner:

Office of the Inspector General
Department of Health Services - OIG
PO Box 309
Madison, WI 53701
BY: Nicole Housley, Trafficking Agent

Respondent (did not appear at October 21, 2014 Hearing):
[redacted]

ADMINISTRATIVE LAW JUDGE:
Sean Maloney
Division of Hearings and Appeals

FINDINGS OF FACT

1. Respondent (CARES #[redacted]) was a resident of Milwaukee County who received FS benefits in Wisconsin.

2. On June 4, 2014 the following single message appeared on Respondent's *Facebook* account: "Any stamps for sale?" Exhibits #2, #4 & #6.

3. Respondent did not appear at the October 21, 2014 disqualification Hearing or call or write to show good cause for being absent or to request that the Hearing be rescheduled.

DISCUSSION

An IPV consists of having intentionally:

"(1) made a false or misleading statement, or misrepresented, concealed or withheld facts; or (2) committed any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any State statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of coupons, authorization cards or reusable documents used as part of an automated benefit delivery system (access device)." 7 C.F.R. § 273.16(c) (2014); See also, *FoodShare Wisconsin Handbook,* ["FWH"] § 3.14.1; *Income Maintenance Manual*, ["IMM"] Chapter 13.

"Trafficking means:

(1) The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signature, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone;

(2) The exchange of firearms, ammunition, explosives, or controlled substances, as defined in section 802 of title 21, United States Code, for SNAP benefits;

(3) Purchasing a product with SNAP benefits that has a container requiring a return deposit with the intent of obtaining cash by discarding the product and returning the container for the deposit amount, intentionally discarding the product, and intentionally returning the container for the deposit amount;

(4) Purchasing a product with SNAP benefits with the intent of obtaining cash or consideration other than eligible food by reselling the product, and subsequently intentionally reselling the product purchased with SNAP benefits in exchange for cash or consideration other than eligible food; or

(5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.

(6) Attempting to buy, sell, steal, or otherwise affect an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signatures, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone."

7 C.F.R. § 271.2 (2014); FWH § 3.14.1. (*italics* in original).

The federal Food and Nutrition Service ["FNS"] considers the offer to sell FS benefits to be a violation of FS regulations, constituting an IPV. October 4, 2011 United States Department of Agricultural ["USDA"] memo; Exhibit #5A. Specifically, effective November 21, 2013 the existing FS trafficking rule was updated to include the attempt to buy or sell FS benefits online and in public. An IPV may be pursued against individuals suspected of making such an attempt. USDA *Administrative Notice* 34-2013 (September 5, 2013); Exhibit #5D.

Wisconsin statutes provide, in the parts relevant here, as follows:

> "(2) No person may misstate or conceal facts in a food stamp program application or report of income, assets or household circumstances with intent to secure or continue to receive food stamp program benefits.
>
> (2m) No person may knowingly fail to report changes in income, assets, or other facts as required under 7 USC 2015(c)(1) or regulations issued under that provision.
>
> (3) No person may knowingly issue food coupons to a person who is not an eligible person or knowingly issue food coupons to an eligible person in excess of the amount for which the person's household is eligible.
>
> (4) No eligible person may knowingly transfer food coupons except to purchase food from a supplier or knowingly obtain food coupons or use food coupons for which the person's household is not eligible.
>
> (5) No supplier may knowingly obtain food coupons except as payment for food or knowingly obtain food coupons from a person who is not an eligible person.
>
> (6) No unauthorized person may knowingly obtain, possess, transfer or use food coupons.
>
> (7) No person may knowingly alter food coupons."

Wis. Stat. §§ 49.795(2) - (7) (2011-12).

The agency may disqualify only the individual who either has been found to have committed the IPV or has signed a waiver or consent agreement, and not the entire household. However, any remaining household members must agree to make restitution within 30 days of the date of mailing a written demand letter, or their monthly allotment will be reduced. If disqualified, an individual will be ineligible to participate in the FS program for one year for the first violation, two years for the second violation, and permanently for the third violation. 7 C.F.R. §§ 273.16(b)(1), (11) & (12) (2014).

An individual found to have made a fraudulent statement or representation with respect to the identity or place of residence of the individual in order to receive multiple food stamp benefits simultaneously shall be ineligible to participate in the FS program for a period of 10 years. 7 C.F.R. § 273.16(b)(5) (2014); FWH 3.14.1.2.

In order for the agency 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 an intentional program violation per 7 C.F.R. § 273.16(e)(6) (2014).

Clear and convincing evidence is an intermediate standard of proof which is more than the *preponderance of the evidence* used in most civil cases and less than the *beyond a reasonable doubt* standard used in criminal cases. It is used in civil cases where a higher standard is required because the outcome could result in serious social consequences for, or harsh effects on an individual. See 32A C.J.S., Evidence §1023. "[T]his level of proof, 'or an even higher one, has traditionally been imposed in cases involving allegations of civil fraud . . . '" *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 282 (1990). While the terminology for this intermediate standard of proof varies from state to state, it is clear that it is what is required by the FS regulations.

There is no litmus test to show the trier of facts when properly admitted evidence is of a sufficient degree to be clear and convincing. The Wisconsin Supreme Court viewed the various standards of proof as degrees of certitude. 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. In criminal cases, while not normally stated in terms of preponderance, the necessary certitude is universally stated as being beyond a reasonable doubt."

Kuehn, 11 Wis.2d at 26.

Recently, the Wisconsin Supreme Court has clarified that '[i]f a party must prove its case by clear and convincing evidence '[a] mere preponderance of the evidence is not sufficient.' [citation omitted]. This is particularly true when the burden of proof has due process implications. [citation omitted]." *Matter of Mental Commitment of Melaine L.*, 2013 WI 67 ¶ 88, n. 25, 349 Wis. 2d 148, 187-188, n. 25, 833 N.W.2d 607.

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.

What is needed to prove the first element, that an IPV as defined in 7 C.F.R. §273.16(c) was committed, is clear. In order to prove the second element, 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, Respondent did not appear at the Hearing. If the person suspected of the IPV (or his or her representative) cannot be located or fails to appear without good cause the Hearing must be conducted without the IPV suspect being represented. 7 C.F.R. 273.16(e)(4) (2014).

"The time and place of the hearing shall be arranged so that the hearing is accessible to the household member suspected of intentional Program violation. If the household member or its representative cannot be located or fails to appear at a hearing initiated by the State agency without good cause, the hearing shall be conducted without the household member being represented. Even though the household member is not represented, the hearing official is required to carefully consider the evidence and determine if intentional Program violation was committed based on clear and convincing evidence. If the household member is found to have committed an intentional Program violation but a hearing official later determines that the household member or representative had good cause for not appearing, the previous decision shall no longer remain valid and the State agency shall conduct a new hearing. The hearing official who originally ruled on the case may conduct the new hearing. In instances where good cause for failure to appear is based upon a showing of nonreceipt of the hearing notice as specified in paragraph (e)(3)(ii) of this section, the household member has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. In all other instances, the household member has 10 days from the date of the scheduled hearing to present reasons indicating a good cause for failure to appear. A hearing official must enter the good cause decision into the record."

7 C.F.R. § 273.16(e)(4) (2014).

The Respondent did not present a good cause reason for failing to appear at the Hearing. Therefore, the determination of whether Respondent committed an FS IPV must be based solely on what DHS presented at the Hearing.

The sole evidence offered by OIG is that on June 4, 2014 the following single message appeared on Respondent's *Facebook* account: "Any stamps for sale?" There is no supporting evidence in the record of this matter to show

that the word "stamps" means FS. Indeed, the evidence in the record of this matter is that FS benefits are more commonly referred to as "Food Stamps" or "EBT" by users of *Facebook*. Exhibit #5B. OIG argued that other sorts of stamps, such as postage stamps, could have been purchased by Respondent at nearby retail outlets. This may be true -- but clear and convincing evidence is required. OIG has not provided clear and convincing evidence.

CONCLUSIONS OF LAW

For the reasons discussed above, a 12 month IPV disqualification sanction may not be imposed on Respondent.

NOW, THEREFORE, it is **ORDERED**

That a 12 month IPV disqualification sanction not be imposed on Respondent and that the IPV is REVERSED.

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 18th day of November, 2014

_____

\sSean Maloney
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
Nicole Housley - email

State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on November 18, 2014.

Office of the Inspector General
Public Assistance Collection Unit
Division of Health Care Access and Accountability
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