



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

DECISION

Case #: FOF - 161913

Redact

, Respondent

Pursuant to petition filed November 14, 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 *Redact* from receiving FoodShare benefits (FS) for one year, a hearing was held on Tuesday, January 6, 2014, by telephone.

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:

Redact

Redact

ADMINISTRATIVE LAW JUDGE:

Peter McCombs
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # *Redact*) is a resident of Milwaukee County sporadically for the past several years. Exhibit 3.
2. Respondent's Facebook account posted the following offer on September 16, 2014: "who selling some stamps please inbox me ty". Exhibit 2.

3. On November 24, 2014, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that the respondent attempted to purchase FS benefits via social media.

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).

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 be a reasonable doubt as to their existence.

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.

Trafficking FoodShare benefits violates the program’s rules. Wis. Stat. § 946.92(2g). It includes attempting to buy or sell FoodShare benefits. 7 CFR § 271.2; see also Wis. Stat. § 946.92(1)(dm)6. FoodShare recipients lose their eligibility if the petitioner 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 petitioner seeks to disqualify the respondent for one year because it contends that she attempted to purchase FoodShare benefits through a posting on Facebook that asked, “who selling some stamps please inbox me ty”. Exhibit 2.

The respondent attempted to explain her Facebook posting testifying that the posting referred to postage stamps, not FS benefits. She stated that postage stamps cost more at the store near her home, and therefore she was seeking to buy some from her online Facebook friends. In support of this contention she further specified that she was looking for just one postage stamp. She closed her testimony noting that she was aware that it is illegal to buy or sell FoodShare benefits.

The record does not reveal any responses to the respondent’s initial posting, or any related follow-up posts made by the respondent. Nor is there any evidence in the record that she actually bought any benefits from someone. The respondent appeared at the hearing and specifically refuted the argument that she was attempting to purchase FS benefits. The petitioner does not have any first-hand knowledge of the situation, so the single Facebook posting constitutes the entirety of the evidence of the respondent’s attempt to purchase FS benefits.

I find the respondent’s explanation that she was seeking postage stamps online to be questionable at best, if not an outright fabrication. However, the petitioner has the burden of proof here, not the respondent. Relying solely upon one Facebook posting, with no other corroborating evidence of the respondent’s intent dooms the petitioner’s argument in the instant case. The respondent could have, but did not, conduct a proper investigation using standard law enforcement tools to strengthen its case. 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 failed to establish by clear and convincing evidence that the respondent intentionally violated FS program rules. The Office of Inspector General’s burden of proof is important in this matter because it must do more than show that it is simply more likely than not that the respondent intentionally violated the FoodShare program’s rules. Although the evidence raises skepticism about the respondent’s asserted defense, the scant evidence presented does not rise to the level of clear and convincing evidence. Therefore, the petitioner’s determination is reversed.



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAMail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on January 28, 2015.

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

Redact @wisconsin.gov