



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

DECISION
Case #: FOF - 161915

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 at 2:30 p.m. by a telephone call originating in Madison, 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:

Redact

Redact

ADMINISTRATIVE LAW JUDGE:

Peter McCombs
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # **Redact**) is a resident of Kenosha County who has received FS benefits in Wisconsin for several years (sporadically). Exhibit 3.

2. Respondent's Facebook account posted the following request on September 4, 2014: "WHO GOT COME STAMPS ON DECK I GOT PPL READY TO BUY SO HMU ASAP" 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.
4. The respondent failed to appear for the scheduled January 6, 2015 Intentional Program Violation (IPV) hearing and did not provide any good cause for said failure to appear.

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).

7 C.F.R. §273.16(e)(4) provides that the hearing shall proceed if the respondent cannot be located or fails to appear without good cause. The respondent did not appear or claim a good cause reason for not attending the hearing. Therefore, I must determine whether the respondent committed an IPV based solely on the evidence that the petitioner presented at hearing.

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.

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).

"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 . . . , 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) (2011).

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 the petitioner presented at the hearing.

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.

The respondent's case arose after the petitioner monitored Facebook and other social media postings for illegal FoodShare trafficking. Its employee discovered this public posting by the respondent on September 4, 2014:

WHO GOT COME STAMPS ON DECK I GOT PPL READY TO BUY SO HMU ASAP

Exhibit 2.

The respondent received comments regarding her post, and responded in kind. *Id.* The respondent did not appear at the hearing, so this decision must be based entirely on the petitioner's evidence. The worker who appeared does not have any first-hand knowledge of the situation, so the Facebook posting is the only evidence against the respondent.

Whether this evidence establishes that the respondent intentionally violated FoodShare rules depends primarily upon what constitutes an attempt. I did not 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 circumstances 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 her offer to buy FoodShare benefits. Because of the respondent's higher burden of proof, this is a close case, but I find that it was too late for her to repent and withdraw. Posting a request to buy FoodShare benefits requires deliberation. By the tone of the respondent's post, and her Facebook comments in response to an individual who was also interested in purchasing FS benefits, it appears clear that the respondent was intent on purchasing FS benefits. I also note that, because the respondent did not appear, I received no explanation that may have convinced me that the posting was not a serious attempt to buy FS 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 FS benefits shall not be trafficked.

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 Madison,
Wisconsin, this 28th day of January, 2015.

\sPeter McCombs
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
- Redact - email



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