STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

[redacted], Respondent

DECISION
Case #: FOF - 163835

Pursuant to petition filed February 10, 2015, 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 [redacted] from receiving FoodShare benefits (FS) one year, a hearing was held on Wednesday, April 29, 2015 at 10:00:00 AM via telephone.

The issue for determination is whether 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: Nicole Housley

Respondent:
[redacted]

ADMINISTRATIVE LAW JUDGE:
David Fleming
Division of Hearings and Appeals

FINDINGS OF FACT

1. Respondent (CARES #[redacted]) was a resident of Manitowoc County at the time of this hearing. He has received FoodShare in the past but his case closed in 2011.
2. On or about February 23, 2015 Petitioner issued an Administrative Disqualification Notice seeking to disqualify Respondent from receipt of FoodShare for a period of 12 months alleging that he attempted to

sell FoodShare benefits via Facebook and Twitter with posts dated on August 24, 2014 and October 11, 2014.

3. On August 24, 2014 the following was posted to a Facebook account opened by Respondent:

   "yesterday I ask AP if I could buy some stamps
   With her nose turnt up she gonna say I don't get those!!!!
   Well make a call boo boo!!
   don't act like
   U ain't connected with the underworld
   Cuz your caseworker cut you off …..".

4. On October 11, 2014 the following was posted to a Facebook account and Twitter opened by Respondent: "Food Stamps on deck hit my inbox".

5. The accounts to which the posts noted at Finding #s 3 and 4 were made on accounts for Respondent's band.

6. Respondent was incarcerated in the [redacted] as of October 24, 2014 and remained so through at least the April 29, 2015 hearing.

7. Posts have been made to the social media accounts involved here after Respondent's incarceration, thus Respondent is not the only person with access to those accounts.

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 a 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 FoodShare 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.

This case deals with an allegation of trafficking. Relevant here, under 7 CFR §271.2, trafficking means:

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;
>
> …
>
> (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.

This definition became effective November 19, 2013.[1] The previous definition of trafficking did not include attempted trafficking.

[1] https://www.federalregister.gov/articles/2013/08/21/2013-20245/supplemental-nutrition-assistance-program-trafficking-controls-and-fraud-investigations

Respondent did participate in this hearing and the issue is whether he made the posts at issue here so there is no need to analyze the elements of 'attempt' further for this case.

I am not approving the imposition of the IPV in this case. Respondent testified that others have access to the accounts involved here and that he did not make the posts involved here. The tipping point for me here is the fact that Respondent was incarcerated as of October 24, 2014 yet a post was made to these accounts on November 8, 2014 and Petitioner could not have made the post from that date. While he was not incarcerated on August 24, 2014 or October 11, 2014, the fact that someone was able to make the November 8, 2014 post supports his testimony that others have access to his accounts. There is no proof that he made the August 24, 2014 or October 11, 2014 post given the fact that others have access to the account.

CONCLUSIONS OF LAW

That the evidence is not sufficient to demonstrate by clear and convincing evidence that Respondent violated the FoodShare program rule specifying that a person may not attempt to buy or sell FoodShare benefits.

NOW, THEREFORE, it is **ORDERED**

The matter is remanded to the agency to rescind the Administrative Disqualification (IPV) that was the subject of this hearing and must do so within 10 days of the date of this Decision.

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 Milwaukee, Wisconsin, this 28th day of May, 2015

_____

\sDavid Fleming
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 May 28, 2015.

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