



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

██████████ Respondent

DECISION

Case #: FOF - 164551

Pursuant to petition filed March 11, 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 ██████████ from receiving FoodShare benefits (FS) one year, a hearing was held on Tuesday, April 21, 2015 at 11:15 AM at ██████████, 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:

██████████
██████████
██████████

ADMINISTRATIVE LAW JUDGE:

Debra Bursinger
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # ██████████) is a resident of Milwaukee County who received FS benefits in Milwaukee County from December 11, 2014 through March 1, 2015.
2. Respondent received FS benefits starting December 11, 2014. Though she had previously applied for FS benefits in August, 2012 and March, 2014, she had not been previously found eligible for benefits. On the

March 31, 2014 application, the following FS penalty warning informed the applicant/respondent of the rules of the FS program: “Any member of the household who intentionally breaks any of the following rules can be barred from FoodShare for 12 months after the first violation; 24 months after the second violation or for a first violation involving a controlled substance; and permanently for the third violation:

- Giving false information or hiding information to continue getting FoodShare benefits.
- Trading, selling, or altering FoodShare benefits.
- Using FoodShare benefits to buy non-food items, like alcohol or tobacco, or
- Using another persons FoodShare benefits, identification card or other documentation.

. . . You will also be permanently disqualified if you are convicted of trafficking FoodShare benefits of \$500 or more. You will be ineligible to participate for 10 years if you are found to have made a fraudulent statement or representation with respect to identify and residence in order to receive multiple benefits at the same time. . .”

3. On September 30, 2014, the following exchange took place on facebook:
SNLE: “Food stamps for sale 50 for \$25”
Respondent: “Mee”
PNP: “[Respondent] B**** NAW . . .I NEED THEM!!!”
SNLE: “Well um lol yeahh”
Respondent: “Girl let The needy buy em Lol precious What u gone cook us then since I’m letting u buy them”
4. On March 18, 2015, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that respondent committed an IPV when she attempted to traffick FS benefits.

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.

This case deals with an allegation of trafficking. Under 7 CFR §271.2, 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;

(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.

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

OIG alleges that the Respondent attempted to traffic / purchase FoodShare benefits, based upon a Facebook response to an offer to sell food stamps. OIG provided no other evidence of attempted trafficking - no changes in EBT usage patterns, no continued dialogue regarding the sale of food stamps establishing a place to meet and method of sale, and no testimony from anyone who might have witnessed the Respondent's attempt to purchase Foodstamps.

The Federal Registrar addressing the amendment to the trafficking definition indicates that "attempt" consists of the "intent to do an act, an overt action beyond mere preparation, and the failure to complete the act." Fed. Register Vol. 79, No. 162, pg. 51655 This is consistent with the standards for establishing attempt promulgated by the Wisconsin legislature, the Wisconsin courts and the Federal courts.

Wis. Stats. §939.32(3) states that, "An attempt to commit a crime 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."

The Wisconsin Court of Appeals in *State v. Henthorn*, 281 Wis.2d 526, 518 N.W.2d 544 (Wis. App. 1998) restated the holding by the Wisconsin Supreme Court in *Hamiel v. State*, 92 Wis.2d 656, 666, 285 N.W.2d, that, "[I]t must ... be shown that: (1) the defendant's actions in furtherance of the crime clearly demonstrate, under the circumstances that he [or she] had the requisite intent to commit the crime ...; and (2) that having formed such intent the defendant had taken sufficient steps in furtherance of the crime so that it was improbable that he [or she] would have voluntarily terminated his [or her] participation in the commission of the crime."

The Federal Courts have dealt with establishing standards for determining when one has attempted to violate the law, as follows:

"As was true at common law, the mere intent to violate a federal criminal statute is not punishable as an attempt unless it is also accompanied by significant conduct...Not only does the word 'attempt' as used in common parlance connote action rather than mere intent, but more importantly, as used in the law for centuries, it encompasses both the overt act and intent elements." *U.S. v. Resendiz-Ponce*, 549 U.S.102, 127 S.Ct. 782, 107 (2007).

The Seventh Circuit Court of Appeals in *U.S. v. Sanchez*, 615 F.3d 836, 843 and 844 (7th Cir. 2010) followed this standard, stating that one must not only show an intent to violate the law, but also that the defendant took a substantial step toward completing the crime. The Court of Appeals further stated that, "a substantial step is 'some overt act adapted to, approximating, and which in the ordinary and likely course of things will result in, the commission of the particular crime'....and that it is 'something more than mere preparation, but less than the last

act necessary before the actual commission of the substantive crime’...The line between mere preparation is inherently fact specific; conduct that would appear to mere preparation in one case might qualify as a substantial step in another.”

OIG argues that there should be no reliance upon Federal and State criminal codes/cases to define attempt for administrative disqualification procedures. Perhaps OIG is confusing defining an act with the burden of proof to show the act occurred. These are two different things.

However, as discussed above, the Federal Register discussing the legislative history behind the amendment to the trafficking definition stated that attempt requires 1) an intent to do an act, 2) an overt action beyond mere preparation, and 3) the failure to complete the act. This is the same definition established by the Federal Courts in criminal matters.

Further, trafficking / attempted trafficking can be prosecuted as a crime under both Federal and Wisconsin statutes. See 7 CFR §271.5; 7 CFR §273.16(a), (b)(2), (4) and 7 U.S.C. Sections 2024(b) and (c). See also Wis. Stats. §942.92(3) In addition, an IPV can be proven by a conviction. 7 CFR §273.16 and FoodShare Wisconsin Handbook, § 3.14.1 As such, it is reasonable and necessary to apply the same definition of “attempt” that has been established by both the legislatures and the courts

Based upon the record before me, I find that the petitioner has not established by clear and convincing evidence that the respondent intentionally violated FS program rules. The respondent wrote “mee” in response to an offer to see FS benefits and almost immediately withdrew any offer to buy the benefits. This does not constitute sufficient overt action on the part of the respondent to commit an IPV. The respondent was not receiving FS benefits at the time and the warning on the March application did not clearly give notice that attempting to buy FS benefits is an IPV. In addition, as noted, the respondent almost immediately withdrew the offer. Therefore, I conclude that the petitioner has not presented sufficient evidence to demonstrate that the respondent committed and intended to commit an IPV.

CONCLUSIONS OF LAW

There is insufficient evidence to establish that the respondent committed an IPV.

NOW, THEREFORE, it is ORDERED

That a 1 year IPV disqualification sanction may not be imposed on the respondent and the petitioner’s IPV action 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 Milwaukee,
Wisconsin, this 18th day of May, 2015

\sDebra Bursinger
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 18, 2015.

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