STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

[redacted], Respondent

DECISION
Case #: FOF - 164726

Pursuant to petition filed March 18, 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 09:15 AM at , Wisconsin.

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

Respondent:
[redacted]

ADMINISTRATIVE LAW JUDGE:
David Fleming
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES #[redacted]) is a resident of Milwaukee County who received FoodShare benefits during the period of
2. On March 24, 2015, Petitioner prepared an Administrative Disqualification Hearing Notice alleging that Respondent attempted to buy FoodShare benefits via Facebook.

3. On October 2, 2014 a person posted the following on Facebook: "Who got stamps in box me asap please!!!". Respondent then posted the following to Facebook: "Inbox me too!!! Lbvs". In Facebook parlance 'lbvs' likely means 'laughing but very serious'.
4. Respondent's FoodShare balance at the time of her post was $0.00.

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.

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

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;
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> …
>
> (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.

The Federal Registrar addressing the amendment to the trafficking definition indicates that "attempt" consist of the "intent to do an act, an overt action beyond mere preparation, and the failure to complete the act."[2] This is consistent with the standards for establishing attempt promulgated by the Wisconsin legislature, the Wisconsin courts and the Federal courts.

The Department contends here that Respondent as a FoodShare recipient has been warned that one cannot buy or sell FoodShare benefits, that this Facebook post shows intent and overt action, that her FoodShare balance was $0.00 at the time of the post and that the post was still there as of February 2015 and could have been removed by Respondent. I do not subscribe to this theory. The Department's argument is, at its core, that a rather vague solicitation without any detail, e.g., establishing a price, a meeting place to make a transaction or the like is, all by itself, the 'crime'. If it were, there would be no need for the third element - 'the failure to complete the act'.

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

[2] *See https://www.federalregister.gov/articles/2013/08/21/2013-20245/supplemental-nutrition-assistance-program-trafficking-controls-and-fraud-investigations#h-13*

Division of Hearings and Appeals decisions are not precedential, nonetheless, the Discussion from a prior Division of Hearings and Appeals decision contains a useful analysis of attempt:

> "…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."
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> 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[3] 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."[4]" [footnotes 3 and 4 omitted here]
> *Division of Hearings and Appeals decision # 160652 at pages 4 and 5, issued November 12, 2014.*

I understand that the IPV is not a crime but in the absence of an alternative and comprehensive legal analysis, the above further develops the concept of intent and overt action.

By itself, I cannot conclude that the statement noted at Finding # 3 is enough to prove by clear and convincing evidence that Respondent has made an attempt to buy FoodShare. The post does not constitute an overt action as contemplated above. There is no other evidence of attempted trafficking - no continued dialogue regarding the sale of food stamps establishing price, a place to meet and method of sale and no posts from anyone who might have contacted the Respondent to sell FoodShare. The post here was sent on October 2, 2014 and, while not removed, there is no indication of any follow-up. There are no subsequent posts submitted here to buttress or clarify. Respondent here did not even initiate the conversation string. I cannot conclude that there is clear and convincing evidence of both intent and overt action to buy FoodShare.

CONCLUSIONS OF LAW

That the evidence is not sufficient to clearly and convincingly demonstrate that Respondent violated, and intended to violate, the FoodShare program rules prohibiting an attempt to buy and sell FoodShare.

NOW, THEREFORE, it is

ORDERED

The matter is remanded to the agency to rescind the Administrative Disqualification (IPV) from Respondent's FoodShare case. This action shall be taken within 10 days of the date 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 Milwaukee, Wisconsin, this 4th day of June, 2015 2015

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\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
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 June 4, 2015.

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