STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

[redacted], Respondent

DECISION
Case #: FOF - 164727

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 Tuesday, June 9, 2015 at 10:00:00 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:
[redacted]

ADMINISTRATIVE LAW JUDGE:
David Fleming
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES #[redacted]) is a resident of Kenosha County. He no longer had an open FoodShare case at the time of the events here but has received FoodShare in the past.
2. On March 24, 2015, Petitioner prepared an Administrative Disqualification Hearing Notice alleging that Respondent attempted to traffic his FoodShare benefits via social media by 4 Facebook posts.

3. Respondent made the following posts on his Facebook page that led to this request by the Department to impose the IPV:

8/11/14	"Who has food stamps"
8/22/14	"You got that EBT or Link hit the box.."
10/02/14	"Who selling stamps?"
10/06/14	"I need a back up who got them stamps? It's that time of the month"

(*grammar in original posts*)

4. Respondent did not appear for this hearing.

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 FoodShare program mails a written demand letter. 7 C.F.R. § 273.16(b).

Also, 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. Respondent did not appear or claim a good cause reason for not attending the hearing. Respondent did not call to provide a number where she could be reached for the hearing. Therefore, I must determine whether Respondent committed an IPV based solely on what the agency presented at hearing

In order for a petitioner to establish that a FoodShare 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 FoodShare 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.

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. *See Wis. Stats. §939.32(3); State v. Henthorn, 281 Wis.2d 526, 518 N.W.2d 544 (Wis. App. 1998) restating holding by the Wisconsin Supreme Court in Hamiel v. State, 92 Wis.2d 656, 666, 285 N.W.2d; 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).*

While the agency argues that the overt action beyond mere preparation is the act of creating and using Facebook, I do not agree that these constitute attempt. Nonetheless, I am imposing the IPV request here for other reasons. While not the strongest of cases, here it is the repeated requests and the specificity of the language in his Facebook posts that end up convincing me that there clear and convincing evidence that Respondent intentionally violated FoodShare program rules. As this violation was the first such violation committed by Respondent, Petitioner correctly seeks to disqualify Respondent from the FoodShare program for one year.

CONCLUSIONS OF LAW

1. That Respondent violated, and intended to violate, the FoodShare program rule prohibiting trafficking in FoodShare benefits.

2. The violation specified in Conclusion of Law No. 1 is the first such violation committed by Respondent.

NOW, THEREFORE, it is

ORDERED

That Petitioner's determination is sustained, and that Petitioner may make a finding that Respondent committed a first IPV of the FoodShare program and may disqualify 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.

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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*

[3] Wisconsin is in the 7th Federal Judicial Circuit and as such, holdings from the 7th Circuit Court of Appeals are binding.

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 8th day of July, 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 July 8, 2015.

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