



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

██████████ Respondent

DECISION

Case #: FOF - 168805

Pursuant to petition filed September 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 ██████████ from receiving FoodShare benefits (FS) one year, a telephonic hearing was held on Thursday, November 5, 2015 at 01:15 PM.

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
By: Nadine Stankey

Respondent:

██████████
████████████████████
████████████████████

ADMINISTRATIVE LAW JUDGE:

Kelly Cochrane
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 November 7, 2011 through June 30, 2015.
2. The Respondent had a Facebook account under the name "██████████".

3. On February 9, 2015, the Respondent posted, “Who got dem stamps” (Exhibit 3) on his Facebook page. On that same date, Respondent also posted a reply to Shay [REDACTED]’s Facebook page. The post and replies appear as follows:

Shay [REDACTED]: Who got sum stamps I need like 20 dollars
[REDACTED]: I need like 150 lol
Shay [REDACTED]: Dnt try to still my 20 trying to outbid me
[REDACTED]: Lol I aint like that, u can. get da 20 from me
Shay [REDACTED]: No I want them first
[REDACTED]: I gotchu
Shay [REDACTED]: Inbox me I will pick it up nd drop it back off

4. On October 1, 2015, the Office of Inspector General (OIG) prepared an Administrative Disqualification Hearing Notice alleging that the Respondent attempted to traffic FoodShare benefits on-line on Facebook.

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.

This case deals with an allegation of FS trafficking. Under 7 CFR §271.2, trafficking includes “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.”

OIG alleges that the Respondent attempted to traffic FS benefits based upon the Facebook posts identified in Finding of Fact #3. OIG provided no other evidence of attempted trafficking - no changes in EBT usage patterns or amounts, 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 contacted the Respondent to buy his food stamps or showing some exchange of FS with Shay [REDACTED]. The posts from the Shay [REDACTED] page coincide with Respondent’s testimony that he was joking and just trying to make conversation with this woman. I note the two “LOL” comments he left. And, assuming that if he was attempting to traffick on this post, it appears from the evidence that intervention by [REDACTED] thwarted the attempt. Secondly, his own post on his own page also provides insufficient evidence to show that the Facebook post meets the legal standards for proving an attempt as discussed below.

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.” 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) held 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 held:

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 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. See U.S. v. Sanchez, 615 F.3d 836, 843 and 844 (7th Cir. 2010). The Court held 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.” *Id.*

Based on the foregoing, it is difficult to conclude that a single post saying, “Who got dem stamps” is clear and convincing evidence of both an intent to sell or buy FS and an overt act beyond mere preparation to commit the offense. Based upon the record before me, I find that that OIG has not met its burden to prove, by clear and convincing evidence, that the Respondent intentionally violated the FoodShare program rules.

CONCLUSIONS OF LAW

OIG has not met its burden to prove, by clear and convincing evidence, that the Respondent intentionally violated the FS program rules by attempting to traffic FS benefits online.

NOW, THEREFORE, it is ORDERED

That the IPV is REVERSED. 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 23rd day of November, 2015

\sKelly Cochrane
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 November 23, 2015.

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