

**STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
ADMINISTRATIVE HEARINGS FOR THE
DEPARTMENT OF HUMAN SERVICES**

IN THE MATTER OF:

██████████
██████████
██████████

Reg. No.: 2013-64187
Issue No.: 3055
Case No.: ██████████
Hearing Date: October 21, 2013
County: Wayne (15)

ADMINISTRATIVE LAW JUDGE: Eric Feldman

HEARING DECISION FOR INTENTIONAL PROGRAM VIOLATION

Upon the request for a hearing by the Department of Human Services (Department), this matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9, and in accordance with Titles 7, 42 and 45 of the Code of Federal Regulation (CFR), particularly 7 CFR 273.16, and with Mich Admin Code, R 400.3130 and R 400.3178. After due notice, a telephone hearing was held on October 21, 2013 from Detroit, Michigan. The Department was represented by ██████████, Regulation Agent of the Office of Inspector General (OIG).

Respondent did not appear at the hearing and it was held in Respondent's absence pursuant to 7 CFR 273.16(e), Mich Admin Code R 400.3130(5), or Mich Admin Code R 400.3178(5).

ISSUES

1. Did Respondent receive an overissuance (OI) of
 Family Independence Program (FIP) State Disability Assistance (SDA)
 Food Assistance Program (FAP) Child Development and Care (CDC)
 Medical Assistance (MA)
benefits that the Department is entitled to recoup?
2. Did Respondent, by clear and convincing evidence, commit an Intentional Program Violation (IPV)?
3. Should Respondent be disqualified from receiving
 Family Independence Program (FIP)? State Disability Assistance (SDA)?
 Food Assistance Program (FAP)? Child Development and Care (CDC)?

FINDINGS OF FACT

The Administrative Law Judge, based on the competent, material, and substantial evidence on the whole record, finds as material fact:

1. The Department's OIG filed a hearing request on August 20, 2013, to establish an OI of benefits received by Respondent as a result of Respondent having allegedly committed an IPV.
2. The OIG has has not requested that Respondent be disqualified from receiving program benefits.
3. Respondent was a recipient of FIP FAP SDA CDC MA benefits issued by the Department.
4. Respondent was was not aware of the responsibility that trafficking of benefits is unlawful and a violation of policy and could result in a disqualification from receipt of future benefits and recoupment of issued benefits.
5. Respondent had no apparent physical or mental impairment that would limit the understanding or ability to fulfill this requirement.
6. The Department's OIG indicates that the time period it is considering the fraud period is December 1, 2009 to May 31, 2011.
7. The Department alleges that Respondent trafficked \$1,518.00 in FIP FAP SDA CDC MA benefits.
8. This was Respondent's first second third alleged IPV.
9. A notice of hearing was mailed to Respondent at the last known address and was was not returned by the US Post Office as undeliverable.

CONCLUSIONS OF LAW

Department policies are contained in the Department of Human Services Bridges Administrative Manual (BAM), Department of Human Services Bridges Eligibility Manual (BEM), and Department of Human Services Reference Tables Manual (RFT). Prior to August 1, 2008, Department policies were contained in the Department of Human Services Program Administrative Manuals (PAM), Department of Human Services Program Eligibility Manual (PEM), and Department of Human Services Reference Schedules Manual (RFS).

The Food Assistance Program (FAP) [formerly known as the Food Stamp (FS) program] is established by the Food Stamp Act of 1977, as amended, and is implemented by the federal regulations contained in Title 7 of the Code of Federal Regulations (CFR). The

Department (formerly known as the Family Independence Agency) administers FAP pursuant to MCL 400.10, *et seq.*, and Mich Admin Code, R 400.3001 through R 400.3015.

The Department's OIG requests IPV hearings for the following cases:

- FAP trafficking OIs that are not forwarded to the prosecutor,
- prosecution of welfare fraud or FAP trafficking is declined by the prosecutor for a reason other than lack of evidence, and
 - the total OI amount for the FIP, SDA, CDC, MA and FAP programs is \$1000 or more, or
 - the total OI amount is less than \$1000, **and**
 - the group has a previous IPV, or
 - the alleged IPV involves FAP trafficking, or
 - the alleged fraud involves concurrent receipt of assistance (see BEM 222), or
 - the alleged fraud is committed by a state/government employee.

BAM 720 (July 2013), p. 12.

Intentional Program Violation

Suspected IPV means an OI exists for which all three of the following conditions exist:

- The client intentionally failed to report information **or** intentionally gave incomplete or inaccurate information needed to make a correct benefit determination, and
- The client was clearly and correctly instructed regarding his or her reporting responsibilities, and
- The client has no apparent physical or mental impairment that limits his or her understanding or ability to fulfill reporting responsibilities.

BAM 700 (July 2013), p. 7; BAM 720, p. 1.

An IPV is also suspected for a client who is alleged to have trafficked FAP benefits. BAM 720, p. 1.

An IPV requires that the Department establish by clear and convincing evidence that the client has intentionally withheld or misrepresented information for the **purpose** of establishing, maintaining, increasing or preventing reduction of program benefits or eligibility. BAM 720, p. 1 (emphasis in original); see also 7 CFR 273(e)(6). Clear and convincing evidence is evidence sufficient to result in a clear and firm belief that the proposition is true. See M Civ JI 8.01.

In this case, the Department alleges that Respondent committed an IPV of his FAP benefits because he trafficked \$1,518.00 between December 1, 2009 and May 31, 2011.

BAM 700 defines trafficking as:

- The buying or selling of FAP benefits for cash or consideration other than eligible food. Examples would be liquor, exchange of firearms, ammunition, explosives or controlled substances.
- Selling products purchased with FAP benefits for cash or consideration other than eligible food.
- Purchasing containers with deposits, dumping/discarding product and then returning containers to obtain cash refund deposits.

BAM 700, p. 2.

The Department argument against Respondent for trafficking FAP benefits is as follows:

- there exists a food store (hereinafter referred to as “Store”), where the United States Department of Agriculture (“USDA”) determined that the Store was engaged in food trafficking and ultimately led to the Store’s permanent disqualification from the Supplemental Nutrition Assistance Program (SNAP);
- Store has a limited supply of food and counter space where it is unlikely that someone would make regular and/or large purchases of food;
- Store had Electronic Benefit Transfer (EBT) transactions of FAP benefits which averaged a higher amount in transactions than similar stores in the same size and area;
- over a period of time, Respondent regularly purchases food at Store using FAP benefits; and
- thus, Respondent trafficked FAP benefits.

First, the Department presented evidence from the USDA that the Store engaged in FAP trafficking, which resulted in the Store’s permanent disqualification from SNAP on August 18, 2011. See Exhibit 1.

Second, the Department argued that the Store has a limited supply of food and counter space where it is unlikely that someone would make regular and/or large purchases of

food. The Department testified that the Store was stocked with dairy products, breads, cereals, deli meats, frozen pizza, hot baked pizza, and fried chicken. The Department also testified that the stock is typical of convenience stores and included prepackaged convenience foods/snacks, crackers/cookies, canned foods, and baby formula which were expired. Additionally, the Department testified that there is limited counter space, no optical scanners, no carts/baskets, and a limited food inventory. The Department infers that the Store did not have the food items or the physical means to support high dollar transactions.

Also, the Department presented pictures in an attempt to demonstrate the above description of the Store's layout. A review of the photos does demonstrate that the Store has a small checkout area. See Exhibit 1. The pictures also show non-food items, a food area, a deli area, packaged meat, liquor area, and the back of the store. See Exhibit 1.

The pictures presented by the Department do indicate somewhat that a person would have difficulty making large transactions because of the limited food supply and small counter space.

Third, the Department showed the Store's average transactions between August 2008 and July 2011. See Exhibit 1. The Store's average transactions began at \$8.74 in August 2008, but the average amount rose later in time. For example, in March 2010 (during the alleged fraud time in this case), the Store's average transaction was \$33.27. See Exhibit 1. The Department's exhibit indicated that between August 2008 and July 2011, the Store's average transaction amount was \$29.12 See Exhibit 1. Moreover, the Department also showed the Store's average transactions were greater than transactions at comparable establishments. See Exhibit 1.

Based on the above information, the Department testified it is unlikely that someone would make purchases of food in the Store for more than \$50.

Finally, to establish that Respondent trafficked his FAP benefits at the Store, the Department relied on Respondent's FAP transaction history, which showed that between December 8, 2009 and May 13, 2011, he spent \$1,880.00 of his FAP benefits at the Store. See Exhibit 1. However, the Department testified that it only considered amounts at or above \$50 during the time period at the Store to be trafficking. The Department testified that it considered \$1,518 of it to be trafficking for the purchases made between December 2009 and May 2011.

Additionally, the Department contends that FAP trafficking often involves unlikely transactions which are not representative of the Store's typical FAP benefits purchases. The Department testified that it reviewed the purchases from the Store and they were suspicious due to them being of single transactions of \$99 to \$161. Moreover, the Department testified the purchases were consistent patterns in which all purchases were made between the 8th to 14th of each month. For example, on February 9, 2010, Respondent made a purchase of \$171.71. See Exhibit 1. Then, the next purchase

Respondent would make for a large amount would be on March 8, 2010 for \$101.99. See Exhibit 1. This pattern would continue consistently for approximately once a month until May 2011. See Exhibit 1.

However, a review of the transactions also indicated that these purchases would be considered reasonable. It could be reasonable for someone to make purchases with their EBT card once a month. The transaction history does not indicate any purchases that are close in proximity and/or if they are broken-up into smaller amounts to hide the fraud.

Based on the foregoing information and evidence, the Department has failed to establish that Respondent committed an IPV involving his FAP benefits. First, it is reasonable to conclude that Respondent could purchase items at the Store using his EBT card. Even though the Store had limited counter space, there was available food items that Respondent could purchase.

Second, the pictures presented by the Department do indicate somewhat that a person would have difficulty making large transactions because of the limited food supply and small counter space. However, the pictures also showed food products that are intended for consumption. For example, the pictures included meat, drinks, food, etc. Based on this information, it can be inferred that Respondent could purchase legitimate transactions based on the submitted photos.

Third, the Department's main argument was based on Respondent's FAP transaction history. The Department attempted to show that the transactions were suspicious due to them being of single transactions of \$99 to \$161. Moreover, the Department testified the purchases were consistent patterns in which all purchases were made between the 8th to 14th of each month. However, as described in detail above, these single purchases could be reasonable because the Store does appear to have the food supply to support the once-a-month transactions. The periods in between the transactions were also reasonable transactions. Again, it is possible for the Respondent to make purchases with his EBT card once a month. The transaction history does not indicate any purchases that are close in proximity and/or if they are broken-up into smaller amounts to hide the fraud. The FAP transaction history the Department presented is not persuasive enough to conclude that the Respondent is involved in trafficking.

In summary, an IPV requires that the Department establish by clear and convincing evidence that the client has intentionally withheld or misrepresented information for the **purpose** of establishing, maintaining, increasing or preventing reduction of program benefits or eligibility. BAM 720, p. 1 (emphasis in original). The Department failed to establish by clear and convincing evidence that Respondent trafficked his FAP benefits at the Store. A review of the evidence presented scenarios were Respondent could reasonable purchase food items for consumption and not result in FAP trafficking. Thus, the Department has failed to establish that Respondent committed an IPV involving his FAP benefits.

It should also be noted that the Department testified that multiple DHS clients have confessed that they have trafficked their FAP benefits at the Store by buying food and non-food items on credit and getting cash for 50 cents per \$1. However, this is not a statement from the Respondent. This statement from the Department that multiple DHS clients confessed that they have trafficked their FAP benefits at the Store would be considered hearsay. "Hearsay" is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Michigan Rules of Evidence (MRE) 801(c). This statement does not fall within any of the hearsay exemptions. The statement has minimal effect and is not persuasive.

Disqualification

A court or hearing decision that finds a client committed IPV disqualifies that client from receiving program benefits. BAM 720, p. 15. A disqualified recipient remains a member of an active group as long as he lives with them, and other eligible group members may continue to receive benefits. BAM 720, p. 15.

Clients who commit an IPV are disqualified for a standard disqualification period except when a court orders a different period, or except when the OI relates to MA. BAM 720, p. 13. Refusal to repay will not cause denial of current or future MA if the client is otherwise eligible. BAM 710 (July 2013), p. 2. Clients are disqualified for periods of one year for the first IPV, two years for the second IPV, lifetime disqualification for the third IPV, and ten years for a FAP concurrent receipt of benefits. BAM 720, p. 16.

In this case, the Department has failed to satisfy its burden of showing that Respondent committed an IPV concerning FAP benefits. Therefore, Respondent is not subject to a disqualification under the FAP program.

Overissuance

When a client group receives more benefits than they are entitled to receive, the Department must attempt to recoup the OI. BAM 700, p. 1.

For FAP trafficking, the OI amount for trafficking-related IPV is the value of the trafficked benefits as determined by:

- The court decision.
- The individual's admission.
- Documentation used to establish the trafficking determination, such as an affidavit from a store owner or sworn testimony from a federal or state investigator of how much a client could have reasonably trafficked in that store. This can be established through circumstantial evidence.

BAM 720, p. 8.

In this case, the Department's OIG indicates that the time period it is considering the fraud period is December 1, 2009 to May 31, 2011. The Department also alleges that Respondent trafficked \$1,518. However, as stated in the analysis above, the Department has failed to establish that Respondent committed an IPV involving his FAP benefits. The Department was unable to prove that Respondent was involved in FAP trafficking. Thus, the Department has failed to satisfy its burden of showing that Respondent did receive an OI of program benefits in the amount of \$1,518 in FAP benefits and an overissuance is not present in this case.


DECISION AND ORDER

The Administrative Law Judge, based upon the above Findings of Fact and Conclusions of Law, and for the reasons stated on the record, concludes that:

1. Respondent did did not commit an IPV by clear and convincing evidence.
2. Respondent did did not receive an OI of program benefits in the amount of \$1,518 from the following program(s) FIP FAP SDA CDC MA.

The Department is ORDERED to

delete the OI and cease any recoupment action.



Eric Feldman
Administrative Law Judge
for Maura Corrigan, Director
Department of Human Services

Date Signed: November 7, 2013

Date Mailed: November 7, 2013

NOTICE: The law provides that within 30 days of receipt of the above Decision and Order, the Respondent may appeal it to the circuit court for the county in which he/she lives.

EJF/cl

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