

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

IN THE MATTER OF:



Reg. No.: 2014-1842
Issue No(s): 3005
Case No.: [REDACTED]
Hearing Date: February 11, 2014
County: Midland

ADMINISTRATIVE LAW JUDGE: Dale Malewska

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 February 11, 2014 from Lansing, Michigan. The Department was represented by [REDACTED], Regulation Agent of the Office of Inspector General (OIG).

Participants on behalf of Respondent included: His mother, Phyllis Sutphen.

ISSUES

1. Did Respondent receive an over-issuance (OI) of Food Assistance Program (FAP) 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 Food Assistance Program (FAP)?

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 October 2, 2013, to establish an OI of benefits received by Respondent as a result of Respondent having allegedly committed an IPV.
2. The OIG has requested that the Respondent be disqualified from receiving program benefits.
3. Respondent was a recipient of FAP benefits issued by the Department.

4. Respondent said he received an instruction booklet when his EBT card was newly issued. He said he read it and understood the contents therein. See Testimony of Respondent.
5. Respondent had an apparent physical or mental impairment that would limit his understanding or ability to fulfill this requirement in the form of his then “active alcoholism.” See Testimony of Respondent.
6. The Department’s OIG indicates that the date it is considering the fraud period is October 17, 2012.
7. During the fraud period, Respondent was issued \$ [REDACTED] in FAP benefits by the State of Michigan.
8. The Department alleges that Respondent received an OI in FAP benefits in the amount of \$ [REDACTED]
9. This was Respondent’s first second third alleged IPV.
10. 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 program] is established by the Food Stamp Act of 1977, as amended, 7 USC 2011 to 2036a and is implemented by the federal regulations contained in 7 CFR 271.1 to 285.5. The Department (formerly known as the Family Independence Agency) administers FAP pursuant to MCL 400.10 and Mich Admin Code, R 400.3001 to .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 \$ [REDACTED] or more, or
- the total OI amount is less than \$ [REDACTED] 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 (7-1-2013), 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 (7-1-2013), p. 8; BAM 720, p. 2.

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 evidence¹ 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.

-Trafficking is the buying or selling of FAP benefits for cash or consideration other than eligible food; selling products purchased with FAP benefits for cash or consideration

¹ See In Re [REDACTED] at page 227 (1995) "We agree that the clear and convincing evidence standard, the most demanding standard applied in civil cases..."

other than eligible food; or purchasing containers with deposits, dumping/discarding product and then returning containers to obtain cash refund deposits.

See BAM 700, page 2.

-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 a store can be established through circumstantial evidence.² (BAM 720, page 8)

In this case, the Department argument against Respondent for trafficking FAP benefits is as follows:

- A [REDACTED] observed suspicious activity. Upon investigation he observed the Respondent emptying soda pop containers in the parking lot between the [REDACTED] and the local [REDACTED].
- The food product was [REDACTED] in refundable bottling. [Presumably a FAP eligible food product].
- When asked by the police the Respondent said "...he was down on his luck and was going to redeem the empty cans for gas money."
- There was no arrest or citation – for anything – but the police officer said he would alert the authorities at the Department of Human Services.
- The Police officer [although identified] was not called to testify.
- There was evidence that the Respondent made an EBT purchase at [REDACTED] on October 17, 2014 in the amount of \$ [REDACTED] [The Respondent made other purchases at [REDACTED] on the same day]. See Exhibit #1, pp. 5, 6.
- Thus, Respondent trafficked FAP benefits.

First, the Department presented no evidence that the Respondent actually redeemed the empty containers for their cash redemption value. See Exhibit #1 – throughout.

Second, the Department argued that the mere act of intending to redeem the empty containers for cash was adequate proof under 7 CFR 271 and BAM 700. *Supra* It is not adequate proof.

Based on the above information, the Department witness testified that the Respondent trafficked in empty containers for redeemable cash.

² Subject to the more exacting measurement of persuasion – clear and convincing proof. McCormick, Evidence (4th ed) §340, page 575

However, the Respondent testified that he intended [actually] to redeem the empty containers for money to buy alcohol as he was an active and serious alcoholic at the time – too embarrassed to admit to the police officer the true nature of his problem when he was observed emptying the liquid in the [REDACTED] parking lot.

On review, there was no testimony or evidence that the containers were actually redeemed.

The Department's theory of the case failed on two levels; first, there was a lack of clear and convincing evidence to establish that a violation of law or policy actually took place. There was no proof that the Respondent actually went back to [REDACTED] and received the redemption for his empty containers; second, in order to meet its burden of proof under the clear and convincing standard of review the Department is required to meet an "...exacting measurement." [*Supra*]

In the ALJ's mind it is uncontroverted that the Respondent bought the beverages with the intention to purchase liquor later with the redemption proceeds, but it is neither clear nor convincing that he actually followed through with this thought or that [in his alcoholic stupor] he had the capacity to do so – much more evidence than presented today would have been required to bridge that gap in proof.

Based on the foregoing information and evidence, the Department has failed to establish that Respondent committed an IPV involving his FAP benefits. There was no evidence that the Respondent did anything unlawful or against policy other than empty containers in a parking lot. Apparently, this was inadequate mischief to merit a criminal citation from the police officer as the Respondent said the police officer promised no enforcement action – other than a report to DHS.

There was a failure of proof to establish trafficking in this Respondent – based on this record.

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. The Department failed to establish by clear and convincing evidence that Respondent trafficked his FAP benefits at the [REDACTED] store. Thus, the Department has failed to establish that Respondent committed an IPV involving his FAP benefits.

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 Medicaid. BAM

720, p. 13. Refusal to repay will not cause denial of current or future Medicaid if the client is otherwise eligible. BAM 710 (7-1-2013), 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.

Over-issuance was noted in the summary but neither recoupment nor OI was established based on the record above.

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, if any, concludes that:

1. The Department has established by clear and convincing evidence that Respondent did not commit an intentional program violation (IPV).
2. Respondent did not receive an OI of program benefits in the amount of \$ [REDACTED] from the following program(s) FIP FAP SDA CDC MA.

The Department is ORDERED to delete the OI and cease any recoupment action.



Dale Malewska
Administrative Law Judge
for Maura Corrigan, Director
Department of Human Services

Date Signed: 2/12/14

Date Mailed: 2/12/14

2014-1842/DM

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.

DM/tb

cc:

