

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

IN THE MATTER OF:



Reg. No.: 14-009783
Issue No.: 3005
Case No.: [REDACTED]
Hearing Date: November 03, 2014
County: WAYNE-49

ADMINISTRATIVE LAW JUDGE: Lynn Ferris

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 November 3, 2014, from Detroit, Michigan. The Department was represented by [REDACTED], Trafficking 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 Food Assistance Program (FAP) benefits that the Department is entitled to recoup?
2. Did the Department establish, by clear and convincing evidence, that Respondent committed an Intentional Program Violation (IPV)?
3. Should Respondent be disqualified from receiving benefits for 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 August 28, 2014, 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 Respondent be disqualified from receiving program benefits.
3. Respondent was a recipient of FAP benefits issued by the Department.
4. The Department has alleged that on January 27, 2014, the Respondent trafficked his food assistance EBT card when he posted to his [REDACTED] "Bridge Card for sale." Exhibit 1 p. 11.
5. The [REDACTED] presented the Respondent using the name of [REDACTED]. Exhibit 1.
6. The Department does not seek an overissuance for this transaction.
7. The Department also alleges that the Respondent trafficked his FAP benefits on June 17, 2013 at [REDACTED] alleging : "food stamp card was used at [REDACTED] located at [REDACTED] membership is registered to a business specializing in seafood (undisclosed name). The items listed on the sales receipt are items which can be used in the preparing of seafood type meals (Oil, 25 lb. of Sugar, and Flour). Additionally, the drinks listed (Water, Hawaii Punch, and Tropical Punch) on the sales receipt can be broken down for individual sale. "
8. The Department seeks an overissuance of [REDACTED] the amount spent at [REDACTED] [REDACTED] for this transaction. Exhibit 1 p. 28
9. This was Respondent's first alleged IPV.
10. A notice of hearing was mailed to Respondent at the last known address and 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 273. The Department (formerly known as the Family Independence Agency) administers FAP pursuant to MCL 400.10; the Social Welfare Act, MCL 400.1-.119b; 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 \$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 (May 2014), p. 12-14.

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 (May 2014), 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 seeks to demonstrate that the Respondent trafficked his FAP benefits on two different theories. First, that Respondent attempted to traffic his FAP benefits based on an offer to sell his benefits. The attempt that the Department relies on is that on [REDACTED], the Respondent posted the following to his [REDACTED]: "Bridge Card for sale." Two people responded to inquire how much. No response was posted by the Respondent. Exhibit 1, p 11.

The Department's case is based upon the definition of trafficking, based upon an August 21, 2013 Final and Interim Final Rule effective November 21, 2013, which changed the definition of food stamp trafficking to include any attempt to buy and sell food stamp benefits online or in public.

The rule now reads in pertinent part:

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. (Changes to the previous rule in bold). CFR 271.2

This rule change effectively creates a new class of IPV's, without any requirement for a finding of an overissuance of benefits occurred as a result of the trafficking. The mere attempt to engage in food stamp trafficking is enough to order a disqualification from receiving future food stamp benefits. Given this change, it must be decided whether the current case falls within the definition of trafficking.

When FNS was considering this specific change the FNS was considering the definition of "attempt." From the Federal Register, Vol. 78, No 162, Wednesday, August 21, 2013, pg. 51655:

In the proposed rule, FNS clarified the definition of trafficking to include the intent to sell SNAP benefits. FNS received numerous comments that the definition of trafficking should use the word "attempt" instead of "intent." Commenters state that the word

“intent” permits State agencies to take action based on what people are thinking and not what they are doing. “Attempt” consists of the intent to do an act, an overt action beyond mere preparation, and the failure to complete the act...FNS agrees with both these comments and has made this change in the final regulation change.

Specifically, when creating this new regulation, FNS clearly meant for there to be an “overt action beyond mere preparation” when contemplating Intentional Program Violation charges against a Respondent.

In the current case, the Respondent posted on [REDACTED] “Bridge Card for sale” and the Department seeks an IPV for trafficking as an attempt within the meaning of the rule and that by this post alone Respondent committed trafficking of his FAP benefits. At the time of the post, the Respondent had no remaining food assistance left on his EBT card. The Department alleges that the posting of this status constituted an attempt to sell food stamps that was prohibited by the regulation change of November 21, 2013.

An attempt as defined by FNS requires an “overt action beyond mere preparation.” In the current case, Respondent’s status post was merely preparation, an inquiry into whether there was a buyer. Respondent had not yet taken an overt action in an attempt to commit the IPV from which the Respondent would be committed to the IPV. By merely posting the status, and even though there were two inquiries as to how much, no further action is shown or posted in response to those inquiries. Given the lack of response from Respondent, the Respondent could still have thought better of the situation and decided not to go through with it. At best, the Respondent was shown to be thinking about it (selling his food assistance benefits) and did not by doing so commit an IPV. This type of activity was considered and ruled out when FNS changed the wording in the new rule from intent to attempt. Therefore, it is determined that the Respondent did not commit an IPV by his status post on [REDACTED].

The second theory which the Department seeks to impose is based upon use of the Respondent’s EBT card at [REDACTED] in conjunction with someone else’s account, and that the items were purchased for the account holder, an alleged fish restaurant, and is explained by the Department as follows:

On June 17, 2013, Respondent’s food stamp card was used at [REDACTED]
[REDACTED]
membership is registered to a business specializing in seafood. The items listed on the sales receipt are items which can be used in the preparing of seafood type meals (Oil, 25 lb. of Sugar, and Flour). Additionally, the drinks listed (Water, Hawaii Punch, and Tropical Punch) on the sales receipt can be broken down for individual sale. “

The Department could not disclose the name of the fish restaurant and thus it appears the Department can only demonstrate at best that the Respondent used his EBT card at [REDACTED] to purchase the items. There is no evidence to demonstrate intent to commit trafficking. It cannot even be confirmed that the alleged transaction was done using another's [REDACTED] card or that the Respondent was not a [REDACTED] member, other than the testimony of the Department. This testimony by the Department is hearsay and as such are afforded limited, if any weight, in this case. See MRE 801; MRE 802.

Based on the evidence presented, the Department failed to establish, by clear and convincing evidence, that Respondent trafficked his FAP benefits at [REDACTED] in the above transaction. Thus, the Department has failed to establish that Respondent committed an IPV on its second theory.

Disqualification

A court or hearing decision that finds a client committed IPV disqualifies that client from receiving program benefits. BAM 720, p. 12. 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. 13.

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 (July2013), 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, because the Department failed to establish an IPV, the Department is not entitled to a finding of disqualification from receipt of FAP benefits.

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.

In this case, because the Department failed to establish an IPV with regard to the [REDACTED], the Department is not entitled to a finding of overissuance.

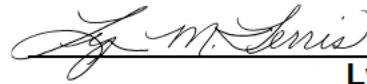
DECISION AND ORDER

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 not established by clear and convincing evidence that Respondent committed an IPV.

2. Respondent did not receive an OI of program benefits in the amount of [REDACTED] from the FAP program.

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



Lynn Ferris
Administrative Law Judge
for Maura Corrigan, Director
Department of Human Services

Date Signed: **11/13/2014**

Date Mailed: **11/14/2014**

LMF/tm

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

cc:

