

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

IN THE MATTER OF:

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Reg. No.: 15-003640
Issue No.: 3005
Case No.: ██████████
Hearing Date: July 22, 2015
County: MACOMB-DISTRICT 12

ADMINISTRATIVE LAW JUDGE: Robert J. Chavez

HEARING DECISION FOR INTENTIONAL PROGRAM VIOLATION

Upon the request for a hearing by the Department of Health and 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 45 CFR 235.110; and with Mich Admin Code, R 400.3130 and 400.3178. After due notice, a telephone hearing was held on July 22, 2015, 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 the Department establish, by clear and convincing evidence, that Respondent committed an Intentional Program Violation (IPV)?
2. Should Respondent be disqualified from receiving benefits for the 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 March 16, to establish an Intentional Program Violation.
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 alleges that Respondent attempted to traffic in FAP benefits.
5. The Department's OIG indicates that the offense in question was committed on January 7, 2014.
6. The Department alleges no overissuance.
7. This was Respondent's first alleged IPV.
8. 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 Health and Human Services Bridges Administrative Manual (BAM), Bridges Eligibility Manual (BEM), Adult Services Manual (ASM), and Reference Tables Manual (RFT).

The Food Assistance Program (FAP) [formerly known as the Food Stamp program] is established by the Food and Nutrition Act of 2008, 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 Department of Human Services) administers FAP pursuant to MCL 400.10; the Social Welfare Act, MCL 400.1-.119b; and Mich Admin Code, R 400.3001 to .3015.

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 their reporting responsibilities.

BAM 700; 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.

The federal Food Stamp regulations read in part:

(c) Definition of Intentional Program Violation. Intentional Program Violation shall consist of having intentionally:

- (1) made a false or misleading statement, or misrepresented, concealed or withheld facts; or
- (2) committed any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any State statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of coupons, authorization cards or reusable documents used as part of an automated benefit delivery system (access device). 7 CFR 273.16(c).

(6) Criteria for determining intentional program violation. The hearing authority shall base the determination of intentional program violation on clear and convincing evidence which demonstrates that the household member(s) committed, and intended to commit, intentional program violation as defined in paragraph (c) of this section. 7 CFR 273.16(c)(6).

The Department's OIG requests IPV hearings for cases when:

- benefit overissuance are not forwarded to the prosecutor.
- prosecution of welfare fraud is declined by the prosecutor for a reason other than lack of evidence, and
- the total overissuance amount is \$500 or more, or
- the total overissuance amount is less than \$500, and
 - the group has a previous intentional program violation, or
 - the alleged IPV involves FAP trafficking, or

- the alleged fraud involves concurrent receipt of assistance,
- the alleged fraud is committed by a state/government employee.

BAM 720 (2014), p. 12.

A court or hearing decision that finds a client committed IPV disqualifies that client from receiving program benefits. A disqualified recipient remains a member of an active group as long as he lives with them. Other eligible group members may continue to receive benefits. BAM 720, p. 12.

Clients who commit an IPV are disqualified for a standard disqualification period except when a court orders a different period, or except when the overissuance relates to MA. BAM 720, p. 13. 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 concurrent receipt of benefits. BAM 720, p. 16.

Therefore, the undersigned may only find an IPV if there is clear and convincing evidence that Respondent intentionally made a false or misleading statement, or intentionally withheld information with the intention to commit an IPV with regard to the FAP program, or intentionally engaged in an act that constitutes trafficking of food stamp benefits. Thus, the Department must not only prove that Respondent committed an act, but that there was intent to commit the act.

In the current case, the Administrative Law Judge is not convinced that the Department has met its burden of proof in providing clear and convincing evidence that Respondent trafficked their FAP benefits.

On August 21, 2013, the USDA Food and Nutrition Service (FNS) published the SNAP Trafficking Controls and Fraud Investigations Final and Interim Final Rule; this final rule would become effective on November 21, 2013.

In part, this final rule changed the definition of food stamp trafficking to include any attempt to buy and sell food stamp benefits online or in public. More specifically, the federal rule now reads that:

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;

(2) The exchange of firearms, ammunition, explosives, or controlled substances, as defined in section 802 of title 21, United States Code, for SNAP benefits;

(3) Purchasing a product with SNAP benefits that has a container requiring a return deposit with the intent of obtaining cash by discarding the product and returning the container for the deposit amount, intentionally discarding the product, and intentionally returning the container for the deposit amount;

(4) Purchasing a product with SNAP benefits with the intent of obtaining cash or consideration other than eligible food by reselling the product, and subsequently intentionally reselling the product purchased with SNAP benefits in exchange for cash or consideration other than eligible food; or

(5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.

(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 change effectively creates a new class of Intentional Program Violations, a class in which there is no need for a finding of an overissuance of benefits, and where the mere attempt to engage in food stamp trafficking is enough to order a disqualification from future food stamp benefits.

Therefore, the question faced by the Administrative Law Judge is whether the behavior of the Respondent in the current case falls within the definition of trafficking given to us by CFR 271.2.

In order to answer this question, we must first make an attempt to define the word “attempt”, as contemplated in the regulation.

Black’s Law Dictionary (7th Ed.) defines “attempt” as:

1. The act or an instance of making an effort to accomplish something, esp. without success.
2. *Criminal Law*. An overt act that is done with the intent to commit a crime but that falls short of completing the crime.

The dictionary offers further explanation:

“An attempt to commit an indictable offence is itself a crime. Every attempt is an act done with intent to commit the offence so attempted. The existence of this ulterior intent or motive is the essence of the attempt....[Yet] although every attempt is an act done with intent to commit a crime, the converse is not true. Every act done with this intent is not an attempt, for it may be too remote from the completed offence to give rise to criminal liability, notwithstanding the criminal purpose of the doer. I may buy matches with intent to burn a haystack, and yet be clear of attempted arson; but if I go to the stack and there light one of the matches, my intent has developed into criminal intent. John Salmond, *Jurisprudence* 387 (Glanville L. Williams ed., 10th ed. 1947).

More specifically, attempt requires a clear, overt act to commit the crime, which itself creates a sort of “point of no return”, with which one may not turn back from the crime itself, but results in a failure to actually commit the crime in question.

More importantly, it appears the FNS was considering this specific definition of “attempt” when it wrote the regulation in question.

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, Respondent posted to their [REDACTED] on [REDACTED] a status that read, in pertinent part “Who has food stamps for sale”. Department Exhibit 5.

The Department alleges that the posting of this status constituted an attempt to buy food stamps that was prohibited by the regulation change of November 21, 2013, though the Department submitted a memo written in October 2011 by FNS offering a policy interpretation. This interpretation was ultimately succeeded by the November 21, 2013 rule change.

The undersigned disagrees that this status meets the legal definition of attempt.

Attempt, as defined by FNS and legal scholars, requires an “overt action beyond mere preparation”; in the current case, Respondent’s status post was merely preparation, an inquiry into whether there were even food stamps available to purchase. 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, Respondent could still have thought better of the situation and decided to not go through with it; at the point in question, Respondent was merely thinking about committing the IPV, an action that FNS specifically ruled out as an IPV when they changed the wording in their rule from “intent” to “attempt”.

The undersigned has no qualms that the post shows that Respondent was clearly thinking about committing the IPV at that point in time; however, just as buying matches does not constitute attempted arson, so does inquiring as to whether there are even food stamps to buy not constitute attempted trafficking.

For that reason, the undersigned declines to find that Respondent is guilty of attempted trafficking, and holds that no IPV was committed.

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.



Robert J. Chavez
Administrative Law Judge
for Nick Lyon, Director
Department of Health and Human Services

Date Signed: **7/23/2015**

Date Mailed: **7/23/2015**

RJC/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. A copy of the claim or application for appeal must be filed with the Michigan Administrative Hearing System (MAHS).

CC:

[REDACTED]