

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

IN THE MATTER OF:



Reg. No.: 15-005967
Issue No.: 3005
Case No.: [REDACTED]
Hearing Date: September 29, 2015
County: Wayne-District 76

ADMINISTRATIVE LAW JUDGE: C. Adam Purnell

HEARING DECISION FOR INTENTIONAL PROGRAM VIOLATION

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and MCL 400.37 and in accordance with 7 CFR 273.16 and Mich Admin Code, Rule 400.3130 upon the Department of Health and Human Services' (Department's) request for a hearing. After due notice, a telephone hearing was held on September 29, 2015 from Lansing, Michigan. The Department was represented by [REDACTED] 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 commit an Intentional Program Violation (IPV)?
2. Should Respondent be disqualified from receiving Food Assistance Program (FAP) benefits?

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 April 23, 2015 to establish that Respondent had allegedly committed an IPV.
2. The OIG has requested that Respondent be disqualified from receiving FAP benefits.
3. Respondent was previously a recipient of FAP benefits.
4. Respondent was aware that it was unlawful to attempt to buy or sell FAP benefits for cash or consideration.

5. Respondent had no apparent physical or mental impairment that would limit the understanding or ability to comply with the policies and/or laws that govern FAP benefits.
6. The Department's OIG alleges that on February 14, 2015, Respondent offered to purchase FAP benefits online through social media.
7. The Department's OIG does not allege that Respondent engaged in a transaction that involved FAP benefits.
8. This was Respondent's first alleged FAP IPV.
9. A notice of hearing was mailed to Respondent at the last known address and was returned by the US Post Office as undeliverable.

CONCLUSIONS OF LAW

Department policies are contained in the Bridges Administrative Manual (BAM), the Bridges Eligibility Manual (BEM), and the 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-.3011.

Intentional Program Violation

An Intentional Program Violation (IPV) is a benefit overissuance (OI) resulting from the willful withholding of information or other violation of law or regulation by the client or his/her authorized representative. See Bridges Program Glossary (BPG) at page 24. When a client group receives more benefits than they are entitled to receive, the Department must attempt to recoup the OI. BAM 700, (5-1-2014) 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 Michigan Civil Jury Instruction (Mich Civ JI) 8.01.

The Department has the burden of establishing by clear and convincing evidence that the Respondent committed an IPV. The clear and convincing evidence standard, which is the most demanding standard applied in civil cases, is established where there is evidence so clear, direct and weighty and convincing that a conclusion can be drawn

without hesitancy of the truth of the precise facts in issue. *Smith v Anonymous Joint Enterprise*, 487 Mich 102; 793 NW2d 533 (2010), reh den 488 Mich 860; 793 NW2d 559 (2010).

Clear and convincing proof is that which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the precise facts in issue. Evidence may be uncontroverted and yet not be clear and convincing. Conversely, evidence may be clear and convincing even if contradicted. *Id.*

An IPV is suspected for a client who is alleged to have trafficked or is trafficking FAP benefits. BAM 720, (10-1-2014) p 1. "Trafficking" is the buying or selling of FAP benefits for cash or consideration other than eligible food. BAM 700, p 2. A person is disqualified from FAP when an administrative hearing decision, a repayment and disqualification agreement or court decision determines FAP benefits were trafficked. BEM 203, (1-1-2014) pp 2-3. These FAP trafficking disqualifications are a result of: (1) fraudulently using, transferring, altering, acquiring, or possessing coupons, authorization cards, or access devices; or (2) redeeming or presenting for payment coupons known to be fraudulently obtained or transferred. BEM 203, p 3.

With regard to FAP cases only, an IPV exists when an administrative hearing decision, a repayment and disqualification agreement or court decision determines FAP benefits were trafficked. BAM 700, p 8.

For FIP, SDA, CDC and FAP cases, the Department will disqualify an active **or** inactive recipient who:

- Is found by a court or hearing decision to have committed IPV, **or**
 - Has signed a Request for Waiver of Disqualification Hearing (DHS-826) or Disqualification Consent Agreement (DHS-830), **or**
 - Is convicted of concurrent receipt of assistance by a court, **or**
 - For FAP, is found by MAHS or a court to have trafficked FAP benefits.
- BAM 720, pp 15-16.

Clients who commit an IPV are disqualified for a standard disqualification period except when a court orders a different period. BAM 720, p 15. Clients are disqualified for periods of 1 (one) year for the first IPV, 2 (two) years for the second IPV, a lifetime disqualification for the third IPV, and 10 (ten) years for a concurrent receipt of benefits. BAM 720, p 16. If the court does not address disqualification in its order, the standard period applies. BAM 720, p 16.

On August 21, 2013, the United States Department of Agriculture (USDA) Food and Nutrition Service (FNS) published the SNAP Trafficking Controls and Fraud Investigations Final and Interim Final Rule, which became 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 provides as follows:

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. (With emphasis added). 7 CFR 271.2

This change expanded the definition of trafficking to include individuals who attempt to buy, sell, steal or otherwise affect an exchange of SNAP (also known as "FAP") benefits. In addition, the individual can be found to have attempted to traffic FAP benefits either directly or indirectly, acting alone or acting with others. This new rule

does not provide that the individual receive an overissuance of assistance but appears to serve the basis for disqualification from future FAP benefits.

Here, the Department's OIG Agent contends that Respondent is guilty of an IPV after he posted on his Facebook page that he planned to purchase a FAP EBT card from someone. According to the Department's OIG Agent, Respondent's post constituted an attempt to buy food stamps in violation of the new FNS Final Rule. Respondent did not appear at the hearing to dispute the Department OIG Agent's contentions.

Testimony and other evidence must be weighed and considered according to its reasonableness. *Gardiner v Courtright*, 165 Mich 54, 62; 130 NW 322 (1911); *Dep't of Community Health v Risch*, 274 Mich App 365, 372; 733 NW2d 403 (2007). The weight and credibility of this evidence is generally for the fact-finder to determine. *Dep't of Community Health*, 274 Mich App at 372; *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Moreover, it is for the fact-finder to gauge the demeanor and veracity of the witnesses who appear before him, as best he is able. See, e.g., *Caldwell v Fox*, 394 Mich 401, 407; 231 NW2d 46 (1975); *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996).

This Administrative Law Judge has carefully considered and weighed the testimony and other evidence in the record. The following is the Administrative Law Judge's findings based on the clear and convincing evidence on the whole record.

The issue before this Administrative Law Judge is whether Respondent's behavior falls within the definition of trafficking as defined by 7 CFR 271.2. The key word that has been introduced in this new rule is the word "attempt." The Final Rule does not provide a definition. However, we can look to the rules of statutory construction to provide guidance. Words undefined in a statute must be given their plain and ordinary meaning, which can be ascertained by looking at dictionary definitions. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002).

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. There is no reason to believe that the FNS intended to adopt any other definition of attempt when it adopted the regulation in question.

In addition, an excerpt from the Federal Register, Vol. 78, No 162, Wednesday, August 21, 2013, pg 51655 reveals:

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.

Accordingly, the undersigned finds that the FNS, when it created this new IPV regulation, intended to require an individual engage in an “overt action beyond mere preparation.”

The record shows that Respondent previously applied for FAP benefits in the State of Michigan. (Exhibit 1, pp 14-37, 38-67) Respondent’s signature on the Assistance Applications in this record certifies that he was aware that fraudulent participation in FAP could result in criminal or civil or administrative claims. (Exhibit 1, pp. 14, 38) The record contains photographs and documentation that established that it was, in fact, Respondent who indicated on February 14, 201, that he “Can’t wait to buy this bridge card. Frfr” (Exhibit 1, pp 9-13).

However, the question is whether this activity is unlawful. In other words, does Respondent's social media post meet the legal definition of attempt to traffic or an attempt to buy or sell FAP benefits? Respondent's February 14, 2015 Facebook post demonstrates that he cannot wait to buy this bridge card. (Exhibit 1, p 9) In Michigan, the EBT card is also referred to as a "Bridge card." By this statement, Respondent clearly is referring to the Michigan EBT card. (Exhibit 1, p 9) There is no evidence in this record that Respondent's engaged in a specific transaction.

As indicated above, an attempt requires "overt action beyond mere preparation." In this case, Respondent's Facebook post can fairly be considered mere preparation rather than an over act toward the purchase of FAP benefits. Respondent's post, which showed that he could not wait to purchase FAP benefits, did not meet the definition of an attempt. 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 making the post on his Facebook page, Respondent had communicated his intent to purchase FAP benefits; however, he did not commit an over act necessary for attempt. For example, a person who says they want to burn down a building has not attempted to commit arson. However, if that same person purchases matches and a gallon of gasoline, then he may have taken the necessary steps toward attempted arson. In this matter, Respondent's post on social media where he indicates that he can't wait to purchase a bridge card is not an attempt to purchase FAP benefits and, by definition, does not sufficiently constitute attempted trafficking.

Under these facts, the Administrative Law Judge finds that there is no clear and convincing evidence that Respondent is guilty of attempted FAP trafficking, and; therefore, cannot be found to have committed an IPV.

Disqualification

A court or hearing decision that finds a client committed IPV disqualifies that client from receiving program 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 OI 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 FAP concurrent receipt of benefits. BAM 720, p. 16.

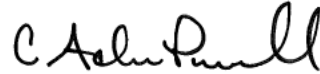
Here, the Department has not shown that Respondent was guilty of his first IPV concerning FAP benefits.

DECISION AND ORDER

The Administrative Law Judge, based upon the above Findings of Fact and Conclusions of Law, concludes that:

1. Respondent did not commit an IPV due to attempted FAP trafficking.

2. IT IS ORDERED that Respondent shall not be disqualified from FAP benefits for a period of 12 months.



C. Adam Purnell
Administrative Law Judge
for Nick Lyon, Director
Department of Health and Human Services

Date Signed: **10/1/2015**

Date Mailed: **10/1/2015**

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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.

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