RICK SNYDER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
Christopher Seppanen
Executive Director

MIKE ZIMMER
DIRECTOR

[redacted]

Date Mailed: April 12, 2016
MAHS Docket No.: 16-000937
Agency No.: [redacted]
Petitioner: OIG
Respondent: [redacted]

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 with Mich Admin Code, R 400.3130 and R 400.3178. After due notice, a telephone hearing was held 30, 2016 from Detroit, Michigan. The Department was represented by [redacted], 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) and 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 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 January 20, 2016, 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 FAP and MA benefits issued by the Department.

4. The Department's OIG indicates that the time period it is considering the fraud period is April 1, 2014 through September 30, 2014 for FAP and April 1, 2014 through August 31, 2014 for MA.

5. During the alleged fraud period, Respondent was issued [redacted] in FAP benefits by the State of Michigan, and the Department alleges that Respondent was entitled to $0 in such benefits during this time period.

6. The Department alleges that Respondent received [redacted] in MA benefits during the time period and was eligible for $0.

7. The Department alleges that Respondent received an OI in FAP and MA benefits in the amount of [redacted]

8. This was Respondent's first alleged IPV.

9. 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), Department of Health and Human Services Bridges Eligibility Manual (BEM), and Department of Health and Human Services Reference Tables Manual (RFT). Prior to Bridges implementation, 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 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.

When a client group receives more benefits than they are entitled to receive, DHS must attempt to recoup the OI. BAM 700, p. 1. (2014)

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 (2014), p. 7; BAM 720 (2014), 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. 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 overissuance relates to MA. BAM 720, p. 16. Refusal to repay will not cause denial of current or future MA if the client is otherwise eligible. BAM 710 (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 concurrent receipt of benefits. BAM 720, p. 16.

Therefore, the undersigned may only find an IPV if there is clear and convincing evidence that the 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. Thus, the Department must not only prove that the respondent committed an act, but that there was intent to commit the act.

In this case, the Department has established that respondent was aware of the responsibility to report all changes to the Department. Respondent has no apparent physical or mental impairment that limits the understanding or ability to fulfill the reporting responsibilities. However, the undersigned is not convinced that the Department has met its burden of proof in providing clear and convincing evidence that the respondent intended to defraud the Department with regard to their FAP eligibility.

The burden of proof that the Department must meet in order to prove Intentional Program Violation is very high. It is not enough to prove that the respondent was aware of the requirements to report at some point, nor is it enough to prove that the respondent did not report in a timely manner. The Department must prove in a clear and convincing manner, that, not only did the respondent withhold critical information, but that the respondent withheld this information with the intent to commit an IPV.

In other words, the Department must prove that the respondent did not simply forget to meet their obligations to report, but rather, actively sought to defraud the Department.

The Department has not proven that in the current case. Respondent was approved for FAP benefits on June 2, 2011. The respondent's statement of benefits shows that the benefits were used out of state beginning on February 3, 2014. There is no indication that respondent applied for benefits while intending to live out of state, or while living out of state.

While the undersigned admits that, given the amount of time respondent's benefits were used out of state, respondent possibly knew at some point that they should report and apply for residency in another state, it is important to remember that "possible" is an evidentiary threshold far below "clear and convincing". Clear and convincing evidence requires something more, some piece of evidence that clearly elevates respondent's actions from a mere failure to report a location change into something clearly malicious.

This does not require evidence that proves maliciousness and intent beyond a reasonable doubt, but something more is required nonetheless. In the current case, all the Department has proven is that respondent did not report. There is no IPV absent a showing that respondent was actually living in the state in question and intentionally failed to report. There is no evidence that clearly supports a finding that there was intent to commit an IPV, versus a respondent who, for instance, simply forgot their obligation. As such, the Administrative Law Judge declines to find an IPV in the current case.

There was an additional redetermination filed on May 1, 2014; however, there is no indication that respondent had actually changed residency at the time, and as such, the undersigned does not believe this redetermination is clear and convincing evidence.

This is of course, assuming that respondent had a requirement to report a change, is liable for recoupment, or was overissued benefits as a result of a loss of residency status. In the current case, the Department has only provided one exhibit, a statement

of where respondent's benefits were used, to show respondent's intent to move out of state; however, the undersigned does not believe this exhibit meets the clear and convincing evidence standard required to find an overissuance in this matter.

An employment verification was also submitted into evidence as an attempt to show residency; while the undersigned feels that this verification is certainly probative, it does not meet the clear and convincing standard, for several reasons. First, many jobs often require travel, for extended periods of time. Where a person works sometimes has little bearing on where a person lives. Second, the employment verification does not indicate whether this respondent's employment was a temporary assignment or not; one may leave on temporary assignment, even for extended periods, without giving up residency in one location. Finally, employment cannot be used to establish residency. It is perfectly legal, and quite common, for an employee to work for an employer in a different state while still residing in their origin state. Jobs can be transitory. True residency is established by other factors, most importantly that being where one holds oneself as living. See, *Cervantes v. Farm Bureau*, 726 NW 2nd 73 (2006). Thus, for these reasons, while the undersigned certainly finds the job probative as to respondent's true residence, it is not clear and convincing evidence of residence.

It should be noted that this document could have been used to show respondent's income during the time period and a possible OI through unreported income; however, the Department failed to make that argument and presented no recoupment budgets detailing the OI.

While it is true that respondent used their benefits in another state for several months, there is no evidence that respondent actually lived in the state in question, specifically during the time period alleged, such as a driver's license, leases, applications for benefits from the other state's agencies, or evidence of respondent's intent to stay in the state in question. A statement that respondent had received benefits in the other state had no context, other than a blanket statement that the respondent is currently receiving benefits from that state; as such, the statement is irrelevant to the current question. The Department has provided no other evidence that respondent actually resided in the state in question during the time period alleged.

Contrary to popular belief, BEM 220, Residency, does not set any particular standard as to when a person is legally residing in another state, nor does it state that the simple act of using food benefits in another state counts as residing in that other state. BEM 220 does not give a maximum time limit that a respondent may leave the state and lose residency in the State of Michigan. The simple act of leaving the state—even for an extended length of time—does not in any way remove a benefit's residency status for the purposes of the FAP program.

Because there is not enough supporting evidence to show that respondent was actually living in another state during the time period in question, the undersigned cannot hold

that they were, and as such, must decide that they lawfully received FAP benefits and there is no overissuance in the current case.

With regards to the MA overissuance, BAM 710, pg. 2 states that the amount of the overissuance in most cases is the "amount of the MA payments". However, BAM 710 does not define the term "MA payments".

A plain reading of the term would suggest that the term "MA payments" means the amount the Department paid to medical providers for respondent's MA benefits; this amount would not include the cost of administering the MA program for DHHS client.

The Department, as support for their MA overissuance contention, submitted a list of the premiums paid by the Department for administering respondent's inclusion in the MA program.

The undersigned declines to find this amount as an overissuance. After researching both state and federal law, including the Code of Federal Regulations, the undersigned can find no support allowing for the recoupment of administrative costs (such as premiums) for a client error or IPV in the MA program. BAM 710 contemplates specifically recouping differences in deductibles when the deductible amount is the result of a client error or IPV; such a recoupment would be recouping specific payments for treatment and care under the MA program. There is no mention of administrative costs in policy, or state or federal law, and as such, the undersigned cannot find that a request to recoup such costs is lawful absent specific policy allowing it.

As policy does not specifically define MA payments to include administrative premium costs, the undersigned finds that the Department improperly requested recoupment of such costs, even assuming the undersigned would find that the respondent resided in the state in question.

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 not commit an IPV by clear and convincing evidence.

2. Respondent did not receive an OI of program benefits in the amount [redacted] in FAP benefits or [redacted] in MA benefits.

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

RC/tm

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

NOTICE OF APPEAL: A party may appeal this Order in circuit court within 30 days of the receipt date. A copy of the circuit court appeal must be filed with the Michigan Administrative Hearing System (MAHS).

A party may request a rehearing or reconsideration of this Order if the request is received by MAHS within 30 days of the date the Order was issued. The party requesting a rehearing or reconsideration must provide the specific reasons for the request. MAHS will not review any response to a request for rehearing/reconsideration.

A written request may be mailed or faxed to MAHS. If submitted by fax, the written request must be faxed to (517) 335-6088; Attention: MAHS Rehearing/Reconsideration Request.

If submitted by mail, the written request must be addressed as follows:

Michigan Administrative Hearings
Reconsideration/Rehearing Request
P.O. Box 30639
Lansing, Michigan 48909-8139

DHHS

[redacted]

[redacted]

[redacted]

[redacted]

cc: [redacted]