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GOVERNOR

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

SHELLY EDGERTON
DIRECTOR

[REDACTED]

Date Mailed: July 27, 2016
MAHS Docket No.: 15-004834
Agency No.: [REDACTED]
Petitioner: OIG
Respondent: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Michael J. Bennane

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 [REDACTED], 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 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 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. On [REDACTED], the Department's OIG filed a hearing requesting an IPV be established based on intentional trafficking of FAP benefits.
2. The OIG has requested that Respondent be disqualified from receiving program benefits.

3. The Department's OIG indicates the attempted trafficking occurred on [REDACTED]
4. The Department's OIG did not present any previous applications to demonstrate the Respondent's acknowledgment of program rules.
5. The Department's OIG did not interview or present any basis for establishing whether the Respondent had any physical or mental impairment that would have limited his understanding of the program rules.
6. The Department presented no evidence that benefits were actually sold or transferred.
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 U.S. 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.

Effective October 1, 2014, the Department's OIG requests IPV hearings for the following cases:

- Willful overpayments of \$500.00 or more under the AHH program.
- FAP trafficking overissuances 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 amount for the FIP, SDA, CDC, MA and FAP programs combined is \$500 or more, or
- the total amount is less than \$500, 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; ASM 165.

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; BAM 720.

An IPV is also suspected for a client who is alleged to have trafficked FAP benefits. BAM 720.

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 (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's OIG filed a hearing request alleging the Respondent attempted to buy FAP benefits based upon a [REDACTED] post dated [REDACTED]. The year is not included on the Facebook post. To demonstrate the Respondent was the person who posted this post, the Department's OIG submitted a copy of the post itself

under the name of [REDACTED]. In the post, the individual states: "I need a bridge card,,im cashing out...hit my inbox asap...frfr...u need cash I got u...inbox yo boy". Exhibit 1, p. 9. The Department's OIG further included [REDACTED] [REDACTED] profile page. This page indicated [REDACTED] as the user and listed the user as male. No other identifiers were provided. Exhibit 1, p. 10. The Department's OIG then presented a post by [REDACTED] showing a picture of his girlfriend and indicated her full name. The Department's OIG then indicated they attempted to contact the Respondent utilizing a number listed in BRIDGES. The voicemail messaged stated the Respondent's girlfriend voicemail.

The Department's OIG indicated the Respondent had applied for benefits on his own in [REDACTED]. This application was not provided. The Respondent was noted to have been a group member on his girlfriend's case with the Department. The Department's OIG provided a copy of the rules provided to applicants at application. Exhibit 1, p. 17. This application is not the Respondent's or his girlfriend's. There are not dates on the application to indicate whether this copy of the rules was the same one being provided back in [REDACTED].

The Department's OIG presented a copy of a Supplemental Nutrition Assistance Program (SNAP) memo issued on [REDACTED], dealing with the sale or intent to sell SNAP benefits. Exhibit 1, p. 15. This memo articulates the use of public or online sites and social media to offer to sell SNAP benefits. The memo indicates the following:

Section 7(b) of the Act and 7 CFR 247.7(a) lay out exactly how SNAP benefits must be used and that using SNAP benefits in any other way (e.g., posting your EBT card for sale online) would violate SNAP regulations and would constitute an IPV under 7 CFR 273.16(c)(2). The verbal offer of sale to another individual or posting of an EBT card for sale online is evidence that the household member committed an IPV.

The memo provides direction regarding posts listing Electronic Benefits Transfer (EBT) benefits for sale on public and social media.

On [REDACTED], the U.S. Department of Agriculture (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 [REDACTED]. Federal Register, Vol. 78, No 162, Wednesday, August 21, 2013, pp. 51649-51658, see available link at http://www.fns.usda.gov/sites/default/files/FR-082113_SNAP.pdf.

In part, the final rule amends the trafficking definition "to include actions that clearly express the attempt to sell or buy SNAP benefits or Electronic Benefit Transfer (EBT) cards in person or online through Web sites and social media." Federal Register, Vol. 78, No. 162, Wednesday, [REDACTED], p. 51650. 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).

7 CFR 271.2 (emphasis added).

In the present case, the question faced by the undersigned is whether the behavior of the Respondent in the current case falls within the definition of trafficking (7 CFR 271.2).

The Department alleges that Respondent committed an IPV of FAP benefits based on his alleged social media post (Facebook) offering to buy FAP benefits on [REDACTED]. Again, the year of the post is not included in the exhibit.

The profile name of [REDACTED] posted the message in question. The Department's OIG then presented pictures from [REDACTED] but with a profile name now being [REDACTED]. The Department's OIG alleges that Respondent used [REDACTED] on [REDACTED]. As noted above, the Department's OIG presented a copy of the user profile in which the Respondent's name is listed without any other identifiers provided in the profile. The Department's OIG utilized pictures posted of the Respondent's girlfriend by [REDACTED] as evidence of identity. This post was dated [REDACTED] although no year is indicated. Exhibit 1, p. 11. The Department's OIG further provided an array of photos on this [REDACTED] [REDACTED] page showing the Respondent's girlfriend, a child and an adult male. The pictures of the child appears with a post from [REDACTED] indicating the child's name and noting he is the child's father was dated [REDACTED]. Exhibit 1, p. 12.

The Department's OIG was unable to present either the application completed by the Respondent in [REDACTED] or any application submitted in which he was alleged to be a group member. Without these documents, this ALJ is unable to determine what the Respondent was aware of in regards to program rules and responsibilities. The Department OIG did not interview the Respondent or have any contact with the Respondent or any person involved with Respondent. The investigation appears to be limited to the [REDACTED] post and the steps attempting to link the post to the Respondent. The Department OIG did not present any responses to the post on Facebook or any evidence showing any actions beyond the singular post.

In order to answer the question, posed by the Department's OIG, we must first 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, the Respondent posted his [REDACTED] page on [REDACTED] a status that read, “I need a bridge card,,im cashing out....hit my inbox asap...frfr...u need cash I got u...inbox yo boy”. Exhibit 1, p. 9.

The Department alleges that this post constitutes an attempt to buy food stamps that was prohibited by the regulation change of [REDACTED].

The undersigned disagrees and finds this post on social media fails to meet 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 post was an inquiry on whether someone had food stamps 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. The Department’s OIG failed to present as discussed above any responses to the post on [REDACTED] or steps taken beyond the singular post.


Based on the evidence presented the Department’s OIG has only demonstrated the Respondent was 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”. For that reason, the undersigned declines to find that Respondent is guilty of attempted trafficking, and holds that no IPV was committed. It is also noted the Department’s OIG failed to present clear and convincing evidence of when the post was made. The evidence fails to indicate a year, which fails to also support the assertion of an IPV by trafficking occurred on [REDACTED].

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:

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

MJB/jaf



Michael J. Bennane
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]

Petitioner

[REDACTED]

Respondent

[REDACTED]

cc:

[REDACTED]