



RICK SNYDER
GOVERNOR

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

SHELLY EDGERTON
DIRECTOR

[REDACTED]

Date Mailed: November 16, 2016
MAHS Docket No.: 16-006027
Agency No.: [REDACTED]
Petitioner: OIG
Respondent: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Christian Gardocki

**HEARING DECISION FOR INTENTIONAL PROGRAM VIOLATION AND
OVERISSUANCE**

Upon the request for a hearing by the Michigan Department of Health and Human Services (MDHHS), 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 October 13, 2016, from Detroit, Michigan. The Michigan Department of Health and Human Services (MDHHS) was represented by [REDACTED] regulation agent with the Office of Inspector General. Respondent did not appear.

ISSUE

The issue is whether MDHHS established that Respondent committed an intentional program violation (IPV) based on trafficking of 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. Respondent was an ongoing FAP benefit recipient.
2. A store (hereinafter "Store") was investigated for trafficking FAP benefits.
3. From September 2012 through May 2013, Respondent made 89 purchases from Store.

4. MDHHS alleged 11 of Respondent's purchases involved FAP benefit trafficking based on some combination of the transactions being too large for Store's inventory, for whole dollar amounts, for multiple purchases per day, and/or for being minutes apart.
5. On [REDACTED], MDHHS requested a hearing to establish Respondent committed an IPV and is responsible for an overissuance of [REDACTED] in allegedly trafficked FAP benefits from September 2012 through May 2013.

CONCLUSIONS OF LAW

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. MDHHS (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. MDHHS policies are contained in the Bridges Administrative Manual (BAM), Bridges Eligibility Manual (BEM), and Reference Tables Manual (RFT).

MDHHS requested a hearing to establish Respondent committed an IPV. [MDHHS] may request a hearing to... establish an intentional program violation and disqualification... [or to] establish a collectable debt on closed cases. BAM 600 (October 2015), p. 4.

MDHHS presented an Intentional Program Violation Repayment Agreement (Exhibit 1, pp. 5-6), dated [REDACTED]. The unsigned repay agreement and MDHHS testimony alleged Respondent trafficked [REDACTED] in FAP benefits from September 2012 through May 2013.

The Code of Federal Regulations defines an IPV. Intentional program violations 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. 7 CFR 273.16 (c).

[For FAP benefits only, an] IPV is suspected for a client who is alleged to have trafficked FAP benefits. BAM 720 (January 2016), p. 1. Trafficking is [established by one of the following]:

- The buying, selling or stealing of FAP benefits for cash or consideration other than eligible food. Examples would be liquor, exchange of firearms, ammunition, explosives or controlled substances.
- Selling products purchased with FAP benefits for cash or consideration other than eligible food.

- Purchasing containers with deposits, dumping/discarding product and then returning containers to obtain cash refund deposits.
- Attempting to buy, sell or steal FAP benefits for cash or consideration other than eligible food.

BAM 700 (January 2016), p. 2.

IPV is suspected when there is **clear and convincing** [emphasis added] evidence that the client or CDC provider has intentionally withheld or misrepresented information for the purpose of establishing, maintaining, increasing or preventing reduction of program benefits or eligibility. *Id.* 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. It is a standard which requires reasonable certainty of the truth; something that is highly probable. Black's Law Dictionary 888 (6th ed. 1990).

MDHHS alleged Respondent trafficked FAP benefits by selling FAP benefits, presumably for cash. The evidence against Respondent was circumstantial. Generally, circumstantial evidence is less persuasive than direct evidence, however, at some point, circumstantial evidence may accumulate to meet the clear and convincing requirement of an IPV. The simplified argument against Respondent is as follows:

- Store was involved in FAP trafficking.
- Store has a limited supply of food where it is unlikely that someone would make regular and/or large purchases of food.
- Over a period of time, Respondent had suspicious transactions at Store which were indicative of trafficking FAP benefits.
- Therefore, Respondent trafficked FAP benefits.

MDHHS presented various photos (Exhibit 1, pp. 10-13) of the inside of Store. The photos displayed a relatively small canned food area, various snack displays, fruit and vegetable displays (some without any items for sale), an ice cream freezer, two freezers of beverages, and other sale areas which were not readily identifiable. The photos also included a photo of 3 EBT card with papers wrapped around them. The documents and photos were from FNS and presumably obtained as part of the investigation of Store for FAP benefit trafficking.

MDHHS presented the photographs in an attempt to verify Store's involvement with trafficking. Few certain conclusions can be made from the presented evidence.

The presented photographs of the inside of Store were indicative of a store with a relatively small (compared to larger grocery stores) inventory of food items. Though the store's food inventory appeared to be modest, it cannot be stated with any certainty that Store trafficked in FAP benefits simply based on the presented photographs.

MDHHS presented a Benchmark: Store FS Trans Stats by Month (Exhibit 1, p. 14-15). Minimum, maximum, average, and total EBT transaction for "Combination Grocery/Other", "Fruits/Veg Specialty", and "Small Grocery Store" were stated.

MDHHS alleged the report was indicative of fraud because Store's EBT transactions were too frequent and/or large in amounts given Store's food inventory. The allegation was not persuasive based on the "Benchmark" report. The report was not clear if the listed transaction summary was for Store's transactions or for stores of a similar size and inventory of Store. For such evidence to be indicative of fraud, some contrast must be established between Store's transactions and those from a store with a comparable food inventory.

MDHHS testimony conceded Store was not yet convicted of FAP benefit trafficking. The absence of charges could be partially due to the shut-down of Store. MDHHS testimony alleged Store closed as a result of the investigation.

Presented evidence that Store engaged in FAP trafficking was not compelling. MDHHS alleged Respondent's transactions with Store (Exhibit 1, pp. 16-18) were further evidence of FAP benefit trafficking.

MDHHS presented Respondent's transaction history from [REDACTED] through [REDACTED], with Store (Exhibit 1, pp. 16-22). The history listed a total of 89 transactions between Respondent and Store. MDHHS alleged 11 involved trafficking. The transactions alleged to be trafficking are as follows:

<u>DATE</u>	<u>AMOUNT(S)</u>	<u>DAILY TOTAL</u>
[REDACTED]	\$33.00 and \$65.56 (14 minutes apart)	\$98.56
[REDACTED]	\$2.34 and \$50.45 (1 minute apart)	\$52.79
[REDACTED]	\$67.55	
[REDACTED]	\$87.66, \$14.99, and \$28.18	\$130.83
[REDACTED]	\$68.99	
[REDACTED]	\$59.88	
[REDACTED]	\$58.92	

FAP benefit trafficking often involves unusual EBT transaction patterns. Patterns consistent with FAP benefit trafficking within Respondent's transaction history are described below.

Generally, a store with an unimpressive food inventory is unlikely to have regular "large" and legitimate EBT transactions. This generality is based on the assumption that most people would prefer to buy food from larger stores with more food inventory.

MDHHS verified 7 dates where Respondent's purchases from Store exceeded \$50.00. MDHHS alleged such purchases from Store are convincingly explained by benefit trafficking.

Photos of fresh vegetables, pop, candy, some canned goods, and bread were presented. The pictures did not establish what items were available at the time of Respondent's purchases. The photos also did not establish all inventory items of Store. Though food purchases from Store exceeding \$50 are probably uncommon (unless trafficking was involved), some legitimate "large" EBT transactions will occur.

EBT transactions occurring multiple times per day may be indicative of FAP benefit trafficking. This indication is based on the practice of smaller stores attempting to disguise FAP benefit trafficking by splitting suspiciously large transactions into smaller transactions. Multiple EBT transactions within a day can also be indicative of a client's legitimate shopping preferences.

Respondent's EBT history indicated multiple dates with multiple EBT transactions. Though the history was unusual, it was not particularly indicative of benefit trafficking.

Generally, legitimate "large" EBT transactions will require the purchase of several food items. Generally, stores require several minutes to process orders involving several food items. Thus, a "large" EBT transaction following another EBT transaction within a time period that the store could not have possibly processed the "large" order can be indicative of FAP benefit trafficking.

MDHHS verified one \$50.34 purchase which was processed only one minute after another EBT transaction. Theoretically, the timeframe might have been closer to 2 minutes as the presented report only identified the minute, not the seconds, an EBT transaction was processed. This particular set of transactions is supportive of FAP benefit trafficking.

Clients who traffic FAP benefits are likely to do so for a whole dollar amount (e.g. \$20.00, \$50.00, \$75.00...). Stores engaged in FAP benefit trafficking are known to typically pay a client \$.50 for each EBT dollar received. Thus, a client or store not attempting to disguise FAP benefit trafficking transactions may have an inordinate amount of transactions for whole dollar amounts. A recurrence of such transactions is particularly alarming when factoring that such transactions should randomly occur only 1 out of 100 times. It should be noted that a store's pricing and/or a person's item preference may coincidentally somewhat increase the likelihood of whole dollar EBT transactions.

Respondent had 1 of 11 alleged EBT transactions with Store for a whole dollar amount. The single whole dollar EBT transaction among several was not particularly indicative of FAP benefit trafficking.

It cannot be doubted that Respondent's FAP benefit history was suspicious for FAP benefit trafficking. Despite the suspicious history, there are plausible explanations for the activity that would not include FAP benefit trafficking. Respondent's suspicious EBT

without particularly persuasive evidence of Store's involvement in FAP trafficking is deemed not to be clear and convincing evidence as required for an IPV.

It is found Respondent did not engage in FAP benefit trafficking. The analysis will proceed to determine if an OI was established.

When a client group receives more benefits than they are entitled to receive, DHS must attempt to recoup the over-issuance (OI). BAM 700 (January 2013), p. 1. An... OI... is the amount of benefits issued to the client group in excess of what they were eligible to receive. *Id.* Recoupment is a DHS action to identify and recover a benefit OI. *Id.* For FAP benefits, an overissuance is also the amount of benefits trafficked (stolen, traded, bought or sold) or attempted to be trafficked. *Id.*, pp. 1-2.

It has already been found MDHHS did not establish that Respondent engaged in FAP benefit trafficking. Without a finding that Respondent engaged in FAP benefit trafficking, no OI can be established.

DECISION AND ORDER

The administrative law judge, based upon the above findings of fact and conclusions of law, finds that MDHHS failed to establish that Respondent trafficked FAP benefits. The MDHHS request to establish an IPV and overissuance of [REDACTED] from September 2012 through May 2013 is **DENIED**.

CG/hw



Christian Gardocki
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]

Petitioner

[REDACTED]

Respondent

[REDACTED]