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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

Date Mailed: November 21, 2016
MAHS Docket No.: 16-007912
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 November 3, 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 February 2012 through August 2013, Respondent made 19 purchases from Store.

4. MDHHS alleged 16 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. Respondent did not clearly and convincingly engage in FAP benefit trafficking.
6. 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 February 2012 through August 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 February 2012 through August 2013.

[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, the 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. 12-15) 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. Other photos included an overhead look of Store's cash register and various papers for which no context was given. 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. The presented photos of documents and EBT cards were neither given context nor explanation. The photos provided little insight into whether Store was involved in FAP benefit trafficking.

MDHHS presented a Benchmark: Store FS Trans Stats by Month (Exhibit 1, pp. 10-11). 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 the inventory. 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 by Store, some

contrast must be established between Store's transactions and those from a store with a comparable food inventory; no such evidence was presented.

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

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

MDHHS presented Respondent's transaction history from [REDACTED], through [REDACTED] with Store (Exhibit 1, pp. 16-17). The history listed a total of 19 transactions between Respondent and Store. MDHHS alleged 16 transactions involved trafficking. The transactions alleged to be trafficking are as follows:

DATE	AMOUNT(S)	DAILY TOTAL
[REDACTED]	\$67.44, \$19.88, and \$16.71 (12 minutes apart)	\$104.03
[REDACTED]	\$51.22	
[REDACTED]	\$73.82 and \$51.19 (6 minutes apart)	\$125.01
[REDACTED]	\$49.69	
[REDACTED]	\$51.03	
[REDACTED]	\$99.35	
[REDACTED]	\$45.55 and \$55.62	\$101.17
[REDACTED]	\$101.20	
[REDACTED]	\$95.85	
[REDACTED]	\$51.22	
[REDACTED]	\$41.11	
[REDACTED]	\$71.39	

Generally, smaller stores with a limited food inventory are not likely to have "large" transactions. Similarly, FAP recipients are not likely to make "large" purchases of food from such stores. Though "large" legitimate EBT purchases from stores such as Store are atypical, they are plausible. It is possible that Respondent lacked transportation and was limited to shopping at Store. It is possible that Respondent's food needs were satisfied by Store's inventory.

Multiple transactions within a short period and/or multiple times per day can be indicative of FAP benefit trafficking. Smaller stores engaged in FAP benefit trafficking have learned that large transactions are red flags of trafficking. As a result, smaller stores engaged in benefit trafficking attempt to disguise the trafficking by dividing a larger transaction into smaller transactions. Often the FAP benefit trafficking store and client do not bother to separate the transactions in time. Thus, same-day transactions from a store within minutes or hours may be indicative of FAP benefit trafficking.

Multiple transactions from the same date can also be explained by a customer visiting a store multiple times per day.

It is suspicious that Respondent had numerous "large" purchases from Store, given the apparently lackluster food offerings of Store. It is also peculiar that Respondent had multiple dates where he made multiple EBT purchases from Store. Though Respondent's EBT expenditures are unusual, they are not deemed to be clear and convincing evidence of FAP benefit trafficking.

Based on presented evidence, it is found that MDHHS did to establish that Respondent trafficked FAP benefits. 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] in FAP benefits from February 2012 through August 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]