



RICK SNYDER  
GOVERNOR

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

SHELLY EDGERTON  
DIRECTOR



Date Mailed: January 5, 2017  
MAHS Docket No.: 16-013487  
Agency No.: [REDACTED]  
Petitioner: OIG  
Respondent: [REDACTED]

**ADMINISTRATIVE LAW JUDGE: Christian Gardocki**

**HEARING DECISION FOR INTENTIONAL PROGRAM VIOLATION**

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 December 14, 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. On [REDACTED], Respondent posted an interest in purchasing an Electronic Benefit Transfer (EBT) card of FAP benefits on social media.
2. Respondent did not take a substantial step towards the purchase of an EBT card for cash.
3. On [REDACTED], MDHHS requested a hearing to establish Respondent committed an IPV.

**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 unsigned Request for Waiver of Intentional Program Violation Hearing (Exhibit 1, pp. 6-7) dated [REDACTED]. MDHHS alleged Respondent committed an IPV by attempting to traffic FAP benefits.

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 presented a compilation of Respondent's alleged social media posts (Exhibit 1, p. 9). The items included screenshots from Twitter pages. One of the Twitter pages included a selfie. The Twitter page included a post dated [REDACTED] which stated, "But who selling a bridge card tho ion even want the whole time just a lil something lol."

MDHHS contended the presented social media evidence was associated with Respondent. MDHHS contended Respondent's alleged Twitter posting sufficiently qualified as an attempt to buy FAP benefits for consideration other than eligible food. The MDHHS contentions have some obstacles.

Twitter is not known to require any particular confidential information before an account can be created. Thus, such accounts can be easily counterfeited. It must be examined whether Respondent personally posted the statement concerning a purchase of EBT benefits.

MDHHS presented the results of a facial match inquiry (Exhibit 1, p. 10) performed by the Michigan State Police. MDHHS testimony indicated the document was obtained as part of the investigation against Respondent. MDHHS appeared to submit the selfie from the account making the post concerning EBT benefit purchase in an attempt to identify the holder of the account. Respondent was identified as the person in the selfie, based on the similarities to a photo taken of Respondent in a previous criminal justice matter.

Respondent allegedly denied to the testifying agent that he had a Twitter account. Respondent's claim will not be considered due to the failure to assert the claim during the hearing.

Though a social media account can be forged, presented evidence was sufficient to associate the account posting an offer to buy EBT benefits to Respondent. It is found Respondent posted an offer to buy EBT benefits.

It must also be considered whether Respondent had an intent to traffic FAP benefits. A public inquiry of who is selling EBT benefits with an expressed desire to buy such benefits is indicative of an intent to traffic FAP benefits. Establishment of an intent to traffic FAP benefits does not necessarily equate to an attempt to traffic FAP benefits. Consideration must be given to whether Respondent's posting amounts to an attempt.

Neither MDHHS nor federal regulations appear to define what is an "attempt" of FAP benefit trafficking. Guidance can be obtained from criminal law, though it must be emphasized that the present case is not a criminal matter, merely an administrative one.

Attempt is defined by Black's Law Dictionary Free Online 2<sup>nd</sup> Edition (see <http://thelawdictionary.org/attempt/>) as an intent to do a particular criminal thing combined with an act which falls short of the thing intended. Further guidance is found in the print version of Black's Law Dictionary which states the following:

Every act done with [the requisite] 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 a criminal attempt. Black's Law Dictionary, (7<sup>th</sup> Ed. 1999), at 123 (quoting John Salmond, Jurisprudence 387 (Glanville L. Williams ed., 10th ed.1947))

The above definition emphasizes criminal intent does not equate to criminal attempt; just as Respondent's fraudulent intent does not equate to an IPV. The above definition also emphasizes that there is some point when actions become attempt and actions before that point do not amount to an attempt. The analysis will proceed to determine if Respondent's actions amount to an "attempt" of FAP trafficking.

Michigan statutes provide guidance on the definition of attempt. Any person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act towards the commission of such offense, but shall fail in the perpetration, or shall be intercepted or prevented in the execution of the same, when no express provision is made by law for the punishment of such attempt, shall be punished... MCL 750.92.

If Michigan statute is adopted, MDHHS failed in their burden to establish an attempt of FAP benefit trafficking. MDHHS did not establish a failure by Respondent to traffic FAP benefits, nor was it established that Respondent was stopped in the effort to traffic FAP benefits.

Many legal decisions (e.g. State v. Borrero, 147 Wn.2d 353, 58 P.3d 245 (2002)) utilize a "substantial step" test to determine if someone engages in criminal attempt. Several different tests have been utilized by the courts. Some courts consider the "physical proximity" of someone to the completion of an act. Other courts consider whether the acts of the accused go beyond "mere preparation." Other courts consider whether a line was crossed that makes it probable the accused will not desist unless some 3<sup>rd</sup> party stops the accused. The test adopted by Michigan federal courts will be accepted as controlling for the present case.

For an individual to be convicted of an attempt crime, the government must demonstrate a defendant's intent to commit the proscribed criminal conduct together with the commission of an overt act that constitutes a substantial step towards commission of the proscribed criminal activity. United States v. Bilderbeck, 163 F.3d 971, 975 (6th Cir. 1999) citing United States v. Shelton, 30 F.3d 702, 705 (6th Cir.1994). The "substantial step" requirement was first announced in the Fifth Circuit case of United States v.

Mandujano, 499 F.2d 370 (5th Cir.1974), cert. denied, 419 U.S. 1114, 95 S.Ct. 792, 42 L.Ed.2d 812 (1975), which defined a substantial step as “conduct strongly corroborative of the firmness of the defendant's criminal intent.” Id. at 376.

MDHHS conceded there was no direct evidence that Respondent completed the trafficking transactions. This consideration somewhat supports finding that Respondent did not attempt to traffic FAP benefits.

For Respondent to traffic FAP benefits, Respondent would have needed a second party's participation. Respondent would also have to arrange a meeting with the party. Respondent would then have to attend the arranged meeting with enough cash or consideration to complete a purchase of an EBT card. Some negotiation for the price of some unspecified EBT card amount would also need to transpire. Though Respondent's intent to purchase EBT benefits is fairly clear, given the amount of steps remaining to completing the transaction, Respondent's open inquiry to Twitter users is not deemed to be conduct that is “strongly corroborative” of Respondent's intent.

It is found Respondent did not engage in attempted FAP trafficking. Accordingly, the request to establish Respondent committed an IPV is denied.

#### **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 committed an IPV related to an attempted purchase of FAP benefits. The MDHHS request to establish Respondent committed an IPV is **DENIED**.

CG/hw



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**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

**Petitioner**

[REDACTED]

**DHHS**

[REDACTED]

[REDACTED]

**Respondent**

[REDACTED]