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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: January 4, 2017
MAHS Docket No.: 16-014995
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 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. Respondent was an ongoing FAP benefit recipient.
2. A store (hereinafter "Store") was found guilty of FAP benefit trafficking through a federal administrative process.
3. Respondent made 4 purchases from Store totaling [REDACTED].

4. Respondent's purchases did not clearly and convincingly involve EBT benefit trafficking.
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 December 2012 through January 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 unsigned Intentional Program Violation Repayment Agreement (Exhibit 1, pp. 8-9), dated [REDACTED]. The document and MDHHS testimony alleged Respondent trafficked [REDACTED] in FAP benefits from December 2012 through January 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 exchanging FAP benefits for cash and/or non-EBT eligible items. 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 a letter to Store from the United States Department of Agriculture (USDA) Food Nutrition Service (Exhibit 1, pp. 15-16). The letter was dated December 24, 2014. The letter informed Store of a 5-year disqualification from accepting EBT benefits.

MDHHS presented various photos of Store (Exhibit 1, pp. 24-28). The photos showed Store was a gas station with additional items available for purchase. Photographs appeared to show Store sold various items which are presumably purchasable with EBT benefits; such items included beverages (Store had several freezers), candy, snack items (e.g. potato chips, beef jerky...), and gum. Other photographed items for sale included sunglasses, various pills, cigarettes, and auto supplies.

MDHHS presented a summary of the Michigan State Police investigation against Store for FAP benefit trafficking (Exhibit 1, pp. 29-33). The investigation summary included interview summaries with Store's owner, Store's owner's brother (who was also an employee), and various patrons of Store who allegedly trafficked FAP benefits. The summary noted Store's owner and an employee confessed to exchanging EBT benefits for cash and items ineligible for EBT purchase.

MDHHS presented various monthly reports of EBT purchases (Exhibit 1, pp. 48-53) for stores of similar size in Store's area. It was notable that in January 2013, Store's average EBT transaction was \$23.97; among the 12 other stores listed, the next highest average EBT transaction was \$8.97. It was also notable that Store's highest EBT transaction was for \$644.53 in January 2013; the highest transaction for other listed stores was \$195.00. Store's average EBT transaction in April 2014 was \$20.24; the second highest average EBT transaction for other listed stores was \$9.05.

MDHHS presented various reports of Store's EBT history (Exhibit 1, pp. 54-56). The reports included a breakdown of EBT transaction amounts.

MDHHS sufficiently verified Store's involvement with FAP benefit trafficking. Based on Respondent's history with Store, MDHHS alleged Respondent engaged in FAP benefit trafficking.

MDHHS presented Respondent's EBT transaction history with Store (Exhibit 1, p. 60). The history listed a total of 6 transactions between Respondent and Store; 4 of Respondent's EBT transactions at Store exceeded \$50; MDHHS alleged all 4 transactions involved trafficking. The transactions alleged to be trafficking are as follows:

DATE	AMOUNT(S)
[REDACTED]	[REDACTED]

MDHHS inferred that EBT transactions with Store exceeding \$50 involved FAP benefit trafficking. The inference has some logic.

Generally, persons do not make legitimate EBT purchases exceeding \$50 from gas station marts. This generalization is based partially on such stores generally charging a premium for food items, compared to larger stores. The generalization is based partially on convenience stores having a limited inventory of EBT eligible items. The generalization is based partially on convenience stores lacking traditionally desirable food items (e.g. meats, fruits, vegetables, many canned goods...).

Generally, persons do not make legitimate EBT purchases exceeding \$50 from gas station marts. This generalization is based partially on such stores generally charging a premium for store items, compared to larger stores. It is also atypical for persons to need \$50 or more in food items (e.g. chips, candy, pop...) typically sold at gas station marts. Some gas station marts may have a large section of food items (e.g. meats, fruits, vegetables...), though photographs of Store were not indicative that Store had such items for sale.

Respondent's EBT purchases were suspiciously large given Store's apparent inventory. The suspicion can only grow when factoring that the convenience mart engaged in FAP benefit trafficking.

MDHHS established a basis for suspecting Respondent's involvement in FAP benefit trafficking. Though Respondent's EBT history at Store was suspicious, it cannot be stated to be clear and convincing evidence of FAP trafficking.

Legitimate EBT transactions exceeding \$50 at Store would be exceptional, but there was no evidence to justify that such transactions clearly and convincingly involved FAP trafficking. MDHHS testimony essentially conceded the \$50 threshold was capricious.

MDHHS did not allege that Store's inventory was so insubstantial that \$50 or \$100 EBT purchases were impossible. Respondent's transactions pushed the limits of plausible legitimacy, however, [REDACTED] (Respondent's largest transaction with Store) is not deemed so improbably large that benefit trafficking should be assumed.

MDHHS testimony implied Respondent's statements during the investigation were indicative of FAP trafficking. MDHHS testified Respondent stated he made EBT purchases for the benefit of others, including purchases in exchange for rent. Such a purchase would be FAP trafficking. Though the MDHHS representative was credible and highly qualified, the statements were hearsay without any particular likelihood of reliability other than the qualification of the person reciting them. Despite Respondent's incriminating statements, the statements are too unreliable to be accepted as evidence of trafficking.

Based on presented evidence, it is found that MDHHS did not 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 it is entitled to receive, MDHHS must attempt to recoup the overissuance. BAM 700 (January 2016), p. 1. An overissuance [bold lettering removed] is the amount of benefits issued to the client group or CDC provider in excess of what it was eligible to receive. *Id.* Recoupment [bold lettering removed] is a MDHHS action to identify and recover a benefit overissuance. *Id.*, p. 2. 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 December 2012 through January 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

Petitioner

[REDACTED]

DHHS

[REDACTED]

[REDACTED]

Respondent

[REDACTED]