



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: February 17, 2017
MAHS Docket No.: 16-013050
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 January 20, 2017, 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 a comment on social media appearing to offer to buy EBT benefits.
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. 5-6). The document and MDHHS testimony 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 items from social media accounts (Exhibit 1, p. 8). The items included a Twitter profile selfie, various photographs from ██████████, screenshots of a Twitter account, and screenshots from a ██████████ account. A "tweet" dated ██████████, stated, "I NEED A BRIDGE CARD!!!!!! Who's selling? Lol"

MDHHS contended the presented social media evidence was associated with Respondent. MDHHS contended Respondent's alleged tweet sufficiently qualified as an attempt to buy FAP benefits for consideration other than eligible food.

Social media accounts, such as Twitter or Facebook, are 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. 9) performed by the Michigan State Police. MDHHS testimony indicated the document was obtained as part of the investigation against Respondent. A selfie from the Twitter account posting a need for an EBT card was identified as Respondent, based on a match to a Michigan Department of Corrections photograph. These considerations are indicative that Respondent made the posting offering to buy EBT benefits.

It must be acknowledged that if someone bothered to forge a social media account, the forger would likely use the name, photos, and telephone number of the person for whom the account was forged. All such information is not difficult to obtain and would lend an authenticity to the forged account.

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's Twitter offer had the requisite intent to establish an IPV. A public inquiry asking who is selling EBT benefits with an expressed desire to buy such benefits is indicative of an intent to traffic FAP benefits.

"Lol" is understood within social media as an out-loud laugh. It will often be used when someone is joking. Consideration was given to whether posting "Lol" was insightful concerning Respondent's intent.

The mere use of "Lol" is indicative of a joking intent. This consideration is indicative that Respondent was not serious when posting an offer to buy EBT benefits.

The testifying agent indicated Respondent's post stood alone. The implication of the testimony was that Respondent did not post the offer in the context of an article about EBT cards or any other context that would justify posting an offer to buy an EBT card unless Respondent was serious about doing so. The testifying agent's testimony was credible and not rebutted.

At this point in the analysis, a finding on Respondent's intent will be reserved for later. The analysis will proceed to consider whether Respondent's posting amounted to attempted FAP benefit trafficking.

Neither MDHHS policy nor federal regulations appear to define an attempted FAP benefit purchase. MDHHS contended that federal regulations provide insight in defining "attempted" FAP benefit trafficking.

MDHHS provided a memorandum (Exhibit 1, pp. 12-13) from the acting director of the Program Accountability and Administration Division of Food and Nutrition Service concerning offers to sell SNAP benefits online. The memorandum was dated [REDACTED]. The memorandum stated that FNS considered social media offers to sell EBT cards constituted an IPV. The memorandum went on to specifically state that "posting your EBT card for sale online" violated SNAP regulations and constituted an IPV under 7 CFR 273.16 (c)(2).

MDHHS essentially contended that the provided memorandum qualifies as a controlling federal regulation. MDHHS further contended, the memorandum's statement that selling an EBT card is an IPV is interchangeable with an online offer to buy EBT benefits. Both contentions have merit and shortcomings.

An interpretation of federal law by a FNS director is not necessarily controlling law; it is simply one person's opinion of how law should be interpreted. If FNS intended such an interpretation, then the interpretation could be incorporated within federal regulations; such an incorporation has occurred.

On [REDACTED] the Food and Nutrition Service published a "final rule", in part, concerning the definition of attempted trafficking. The relevant section of the rule reads as follows:

Additionally, this final rule amends the definition of trafficking to include actions that clearly express the attempt to sell or buy SNAP benefits or EBT cards in person or online through Web sites and social media. 78 FR 212 (August 21, 2013).

The federal regulation clearly allows establishment of an IPV when actions **clearly express** an attempt to sell or buy EBT benefits. It is debatable whether Respondent's posting is such a clear expression.

As noted above, Respondent's "offer" was qualified with words indicating a joke. This consideration supports rejecting Respondent's statement as an attempt to traffic FAP benefits.

Respondent's offer did not include a specific amount of FAP benefits nor a purchase price for benefits. The lack of specificity in Respondent's statement lessens the possibility that Respondent's actions were a clear expression of attempt.

MDHHS conceded Respondent's offer received no known responses. This supports rejecting Respondent's offer as a clear expression of FAP benefit trafficking. It is known that Respondent could have completed an EBT benefit purchase via private messaging or other private forms of communication. Though a FAP trafficking transaction may have been completed outside of MDHHS' eyes, presented evidence did not verify such an outcome.

Based on presented evidence, 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



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]