



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: March 2, 2017
MAHS Docket No.: 17-001280
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Darryl Johnson

HEARING DECISION

Following Petitioner's request for a hearing, this matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and 400.37; 7 CFR 273.15 to 273.18; 42 CFR 431.200 to 431.250; 45 CFR 99.1 to 99.33; and 45 CFR 205.10; and Mich Admin Code, R 792.11002. After due notice, a telephone hearing was held on February 28, 2017, from Lansing, Michigan. The Petitioner appeared on her own behalf. The Department of Health and Human Services (Department) was represented by Eligibility Specialist [REDACTED].

ISSUE

Did the Department properly close Petitioner's Food Assistance Program (FAP) benefits?

Petitioner had also requested a hearing regarding her eligibility for the Healthy Michigan Plan (HMP) but, during the course of the hearing, she stated she was not contesting any action regarding HMP. Her hearing request on HMP is deemed to be withdrawn.

FINDINGS OF FACT

The Administrative Law Judge, based on the competent, material, and substantial evidence on the whole record, finds as material fact:

1. Petitioner was an on-going FAP recipient.
2. On December 5, 2016, Petitioner applied for State Emergency Relief (SER).
3. Because of her SER application, the Department reviewed Petitioner's eligibility for FAP.

4. Petitioner is a real estate agent who is paid commissions based upon sales, and the brokerage for which she works pays expenses from her commissions. Those expenses include franchise fees, broker fees, dues, listing fees, and other items.
5. The Department reviewed Petitioner's commission history for 2016 (Exhibit A, Page 2) and found that she had earned commissions totaling \$ [REDACTED] for the three months of September, October, and November 2016.
6. The Agent Commissions shown on Page 2 do not take into account expenses that are paid from her commissions.
7. Petitioner submitted a pay stub from June 3, 2016, in the amount of \$ [REDACTED], which represented her net commissions from a sale from June 1, 2016, from which the gross commission was \$ [REDACTED].
8. The Department considers Petitioner to be an employee, and not self-employed.
9. Based upon her earnings from the three month period, the Department calculated Petitioner's income to be \$ [REDACTED] per month (Page 7) and closed her FAP, concluding she had income in excess of the monthly limit of \$ [REDACTED].
10. The Department later changed her monthly income to \$ [REDACTED] (Page 11), which still exceeded the income limit.
11. On January 23, 2016, the Department received Petitioner's hearing request, protesting the closure of her FAP.

CONCLUSIONS OF LAW

Department policies are contained in the Department of Health and Human Services Bridges Administrative Manual (BAM), Department of Health and Human Services Bridges Eligibility Manual (BEM), Department of Health and Human Services Reference Tables Manual (RFT), and Department of Health and Human Services Emergency Relief Manual (ERM).

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. The Department (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.

In this case, the Department based Petitioner's FAP eligibility upon a review of her income over the preceding 90 days, and a determination that she was an employee rather than self-employed.

BEM 502 (1/1/17) pp 2-3 provides a discussion of the differences between employment and self-employment.

EMPLOYMENT OR SELF-EMPLOYMENT INCOME?

It is sometimes difficult to determine if an individual's income should be entered in the earned income or self-employment LUW. Make a determination based on available information and document your rationale. Use the following guidelines to help make that determination; consider the following to be indicators of self-employment:

- The individual sets own work hours.
- The individual provides own tools used on the job.
- The individual is responsible for the service being provided and for the methods used to provide the service.
- The individual collects payment for the services provided from the individual paying for them.

A client need not meet all of the above to be considered self-employed.

Do **not** consider the following in making the determination of whether a client's income is considered self-employment or employment:

- Withholding of income tax from payment made to individual.
- Whether or not the individual files income tax.
- Whether or not individual receives a federal Form 1099.

The Department seems to have focused on the fact that Petitioner does not receive payment directly from the sellers from whom she earns commissions. However, the very nature of real estate sales necessitates that agents be available at times demanded by prospective buyers and sellers. They do not necessarily have a "9-5" job. They use their own vehicles. They are responsible for the services being provided. Examples are provided in BEM 502 where a service is being provided and the service recipient pays a third party, who then pays the service provider. In both examples, the service provider is considered an employee. Those examples can, however, be distinguished from the facts of real estate sales agent. Petitioner pays fees to the broker for whom she works. Her pay is a net figure after the expenses (but not taxes) are deducted from her commissions. The totality of the circumstances leads to the conclusion that Petitioner is to be evaluated based upon the self-employment logical unit of work (LUW), and not the earned income LUW. The Department is to take into account self-employment expenses when it determines FAP eligibility. BEM 502, p. 7.

BEM 505 (4/1/17) explains the process for budgeting income. When an applicant has irregular income, the Department is to “determine the standard monthly amount by adding the amounts entered together and dividing by the number of months used.” In the commission statement (Page 2), Petitioner is shown to have earned gross commissions in 2016¹ totaling \$ [REDACTED]. She had no sales in February, March, May, August, or October. Petitioner testified that her income reported on her 1099 tax form was \$ [REDACTED].

When the Department used the preceding three months of income, it did not take into account expenses that should have been deducted. It also did not take into account the irregular nature of her income. Her gross income for the three months was \$ [REDACTED], and that is the equivalent of \$ [REDACTED] per month (disregarding the cents). However, her 2016 income reported on her 1099 was \$ [REDACTED], which is the equivalent of \$ [REDACTED] per month (disregarding the cents).

The Department did not provide the FAP budgets used in determining that Petitioner is not eligible as evidence. The FAP budget considers expenses as well as income. It is impossible to determine whether the Department accurately counted the expenses in determining her eligibility.

In summary, the Department erred by basing Petitioner’s income on the preceding three months, because those three months are not representative of the irregular income. The Department erred by considering Petitioner to not be self-employed. The Department erred by not deducting expenses from Petitioner’s income. Because it did not provide the FAP budget and shelter expense calculation, the Department has not shown that it took into account the expenses allowed by BEM 556.

DECISION AND ORDER

The Administrative Law Judge, based on the above Findings of Fact and Conclusions of Law, and for the reasons stated on the record, if any, finds that the Department failed to satisfy its burden of showing that it acted in accordance with Department policy when it closed Petitioner’s FAP.

Accordingly, the Department’s decision is **REVERSED**.

THE DEPARTMENT IS ORDERED TO BEGIN DOING THE FOLLOWING, IN ACCORDANCE WITH DEPARTMENT POLICY AND CONSISTENT WITH THIS HEARING DECISION, WITHIN 10 DAYS OF THE DATE OF MAILING OF THIS DECISION AND ORDER:

1. Redetermine Petitioner’s eligibility for FAP as of January 1, 2017.

¹ It appears that the commission statement was created in December 2016, based upon the December 6, 2016 Notice of Case Action (Exhibit A, Pages 6-9), and thus it might not include sales for the entire year.

2. Provide Petitioner with a supplement if she is found to be eligible.



DJ/nr

Darryl Johnson
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] - via electronic
mail

[REDACTED] - via electronic mail

[REDACTED] - via electronic mail

[REDACTED] - via electronic mail

Petitioner

[REDACTED]