



RICK SNYDER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM

SHELLY EDGERTON
DIRECTOR

[REDACTED]
[REDACTED]
[REDACTED]

Date Mailed: March 27, 2018
MAHS Docket No.: 17-013431
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, 42 CFR 431.230(b), 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 March 21, 2018, 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. The record was closed at the commencement of the hearing on the scheduled hearing date.

ISSUES

1. The first issue is whether MDHHS established by clear and convincing evidence that Respondent committed an intentional program violation (IPV) by trafficking Food Assistance Program (FAP) benefits, including imposition of a disqualification of FAP benefits.
2. The second issue is whether MDHHS established Respondent received an overissuance of 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 permanently disqualified from accepting Electronic Benefit Transfer (EBT) transactions due to an EBT transaction history which included transactions in unusually short time frames, excessively large transactions, high EBT transaction averages for Store's type and location, and high EBT totals for Store's type and location.
3. Respondent's EBT transactions from Store included the following dates and amounts:

[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]

4. On August 29, 2017, MDHHS requested a hearing to establish Respondent committed an IPV resulting in a disqualification period of one year and is responsible for an overissuance of \$ [REDACTED] in FAP benefits allegedly trafficked from January 2014 through February 2016.
5. Respondent has no prior history of IPV's.

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 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, in part, to establish that Respondent committed an IPV. [MDHHS] may request a hearing to... establish an intentional program violation, a disqualification, or a debt... BAM 600 (January 2018), p. 5.

MDHHS presented an unsigned Intentional Program Violation Repayment Agreement (Exhibit 1, pp. 7-8), dated August 29, 2017. The document and MDHHS testimony alleged Respondent trafficked \$ [REDACTED] in FAP benefits from January 2014 through February 2016.

[For FAP benefits only, an] IPV is suspected for a client who is alleged to have trafficked FAP benefits. BAM 720 (October 2017), p. 1. Trafficking is:

- The buying, selling or stealing or otherwise effecting an exchange of FAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signature, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone.
- The exchange of firearms, ammunition, explosives, or controlled substances, as defined in section 802 of title 21, United States Code, for FAP benefits.
- Purchasing a product with FAP benefits that has a container requiring a return deposit with the intent of obtaining cash by discarding the product and returning the container for the deposit amount, intentionally discarding the product, and intentionally returning the container for the deposit amount.
- Purchasing a product with FAP benefits with the intent of obtaining cash or consideration other than eligible food by reselling the product, and subsequently intentionally reselling the product purchased with FAP benefits in exchange for cash or consideration other than eligible food
- Intentionally purchasing products originally purchased with FAP benefits in exchange for cash or consideration other than eligible food.
- Attempting to buy, sell, steal, or otherwise affect an exchange of FAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signatures, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone.

BAM 700 (January 2018), p. 2.

IPV is suspected when there is **clear and convincing** [emphasis added] evidence that the client has intentionally withheld or misrepresented information for the purpose of establishing, maintaining, increasing or preventing reduction of program benefits or eligibility. *Id.*, p. 8 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 unauthorized items. Respondent presented circumstantial evidence of trafficking by Respondent. The simplified argument against Respondent is as follows:

- Store engaged 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 transactions at Store which were consistent with trafficking FAP benefits and incompatible with legitimate EBT purchases.
- Therefore, Respondent trafficked FAP benefits.

Judicial notice will be taken for some common knowledge about stores and customers engaged in FAP trafficking. Stores that engage in FAP trafficking typically offer a much smaller supply of food than traditional grocery stores. Generally, customers do not utilize such stores for large purchases of food due to the store's limited inventory and/or premium charged for foods offered. Stores engaged in FAP trafficking monetarily profit in trafficking by paying willing customers a fraction (typically half) of the EBT benefits trafficked. Persons willing to traffic EBT benefits often seek cash amounts that fit their needs but result in an EBT transaction amount (or combined amounts) that is/are inconsistent with legitimate EBT transactions. Stores engaged in trafficking often disguise the trafficking transactions by splitting larger transactions into multiple smaller EBT transactions. Stores engaged in trafficking sometimes lack creativity in disguising trafficking transactions and process trafficked EBT amounts into patterns that are not consistent with legitimate food purchases.

MDHHS presented an investigation report of Store (Exhibit A, pp. 12-14) dated February 1, 2016. The report was completed by an investigator from the United States Department of Agriculture Food Nutrition Service (FNS) investigator following a visit to Store. It was noted that Store's food business was housed in 1,000 square feet. It was noted that Store had no shopping carts or baskets available for customer use. It was noted that Store did not utilize an optical scanner. Conditions of Store were noted to include dusty food items. Store's food inventory was noted to include more than 20 items of the following: milk, breads, snacks, pastas, breakfast cereals, soups, meat jerky, and beans. Items with quantities of less than 20 available items included hot dogs, butter, ice cream, rice, fruits, and tomato sauce.

MDHHS presented various photographs of Store (Exhibit A, pp. 18-25). The photographs were consistent with documentation of Store's inventory. MDHHS indicated that one of the photographs verified a dusty can of corn, as evidenced by an apparent swipe line across the top of the can. The photographs were accompanied by a signed statement by the photographer dated February 1, 2016 (Exhibit A, p. 15) which stated that the photographs accurately portrayed Store.

MDHHS presented a letter from FNS to Store (Exhibit 1, pp. 26-28) dated March 17, 2016. The letter informed Store that an analysis of EBT transactions at Store

demonstrated “clear and repetitive patterns of unusual, irregular, and inexplicable activity for your type of firm”. Transactions noted to be suspicious included multiple transactions in unusually short time frames and “excessively large purchase transactions”. The letter referenced an attachment of specifically suspicious transaction though no attachment was presented. The letter informed Store of a right to respond to the charges.

MDHHS presented a letter from FNS to Store (Exhibit 1, pp. 29-30) dated April 19, 2016. The letter informed Store that it was “permanently disqualified” from receiving FAP benefits.

MDHHS presented various monthly reports of Store’s EBT transaction history (Exhibit A, pp. 31-61). The reports included comparisons of total monthly EBT transactions, average EBT transactions, and highest EBT transaction of stores in Store’s area and comparable to Store’s size. MDHHS testimony indicated that the reports were utilized by FNS to establish trafficking by Store. Of note, Store’s average and total EBT transactions from January 2014 more than doubled the average and total EBT transactions for each listed comparison store (see Exhibit A, p. 31).

Presented evidence 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, pp. 65-66). The history listed approximately 65 transactions between Respondent and Store from January 2014 through April 2016. MDHHS highlighted 13 transactions (as listed in the Findings of Fact) totaling \$ [REDACTED] and change; MDHHS alleged all highlighted transactions involved trafficking by Respondent.

Testimony from a regulation agent indicated that analytics of Store indicated that Store’s transactions of \$ [REDACTED] and higher were consistent with trafficking. The agent also testified that a higher threshold of \$ [REDACTED] was used to identify trafficking transactions at Store. The agent further testified that use of a higher threshold lessens the possibility of alleging that a legitimate transaction involved trafficking. Not all alleged trafficking transactions complied with MDHHS’ stated threshold.

Respondent had transactions at Store on May 18, 2015, for \$ [REDACTED] and \$ [REDACTED]. The transactions totaled only \$ [REDACTED]. It is very unusual that Respondent happened to have two transactions from the same date that both ended in amounts of \$ [REDACTED]. Of Respondent’s transactions at Store, eight were for transactions that ended in \$ [REDACTED]. The pattern is highly consistent with use of a pattern in attempting to disguise Respondent’s trafficking transactions.

MDHHS presented Respondent’s EBT transaction history (Exhibit A, pp. 66-84) from the alleged OI period. Respondent’s history listed dozens of EBT purchases by

Respondent at multiple stores including more traditional grocery stores. Respondent's history tended to verify that Respondent's EBT usage at Store was not because Respondent lacked access to other stores.

It is theoretically possible that none of Respondent's EBT transactions with Store involved trafficking. Respondent did not appear for the hearing to present any evidence of such a possibility.

Given Store's history of FAP trafficking, Respondent's suspicious EBT purchases at Store, and no evidence from Respondent to indicate that any of the suspicious EBT transactions were legitimate, it is found that Respondent clearly and convincingly established trafficking by Respondent totaling over \$[REDACTED]. Thus, it is found that Respondent committed an IPV.

The standard [IPV] disqualification period is used in all instances except when a court orders a different period. BAM 725 (January 2016), p. 16. [MDHHS is to] apply the following disqualification periods to recipients determined to have committed an IPV... one year for the first IPV... two years for the second IPV [, and] lifetime for the third IPV. *Id.*

MDHHS did not allege Respondent previously committed an IPV. Thus, an IPV disqualification period of one year is justified. 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 was already found that MDHHS established trafficking by Respondent in the amount of \$[REDACTED] and change. MDHHS testimony indicated that the amount of FAP benefits trafficked by Petitioner was rounded down (favorably for Respondent) to the nearest dollar thereby creating an OI amount of \$[REDACTED]. The amount is consistent with the amount alleged on the Intentional Program Violation Repayment Agreement sent to Respondent.

The purpose of the Intentional Program Violation Repayment Agreement is to give clients notice IPV allegations, OI amount, and a range of dates so an informed defense can be made. The alleged period of OI ranged through February 2016. The transaction dated March 17, 2016, fell after the OI period. Consideration was given to including the transaction dated March 17, 2016, as part of the OI because based on an assumption that Respondent's defense was not likely influenced by MDHHS alleging only an OI

period through February 2016. Ultimately, due process concerns are deemed too important to overlook based on an assumption. Thus, the OI established by MDHHS will not factor Respondent's transaction dated March 17, 2016, in the amount of \$ [REDACTED] the remaining OI established is \$ [REDACTED]

DECISION AND ORDER

The Administrative Law Judge, based upon the above findings of fact and conclusions of law, finds that MDHHS established that Respondent committed an IPV based on FAP benefit trafficking from January 2014 through February 2016. The MDHHS request to establish a one-year disqualification against Respondent is **APPROVED**.

The Administrative Law Judge, based upon the above findings of fact and conclusions of law, finds that MDHHS established an OI of \$ [REDACTED] against Respondent. The MDHHS request to establish an overissuance is **PARTIALLY APPROVED**.

The Administrative Law Judge, based upon the above findings of fact and conclusions of law, finds that MDHHS failed to establish an OI of \$ [REDACTED] against Respondent. The MDHHS request to establish an overissuance is **PARTIALLY DENIED**.

CG/



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]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]