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GOVERNOR

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

SHELLY EDGERTON
DIRECTOR

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Date Mailed: September 5, 2018
MAHS Docket No.: 18-003278
Agency No.: ██████████
Petitioner: OIG
Respondent: ██████████

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 scheduled for August 15, 2018, from Detroit, Michigan. The hearing was held on the scheduled hearing date and at least 30 minutes after the scheduled hearing time. The Michigan Department of Health and Human Services (MDHHS) was represented by Jenna McClellan, regulation agent, with the Office of Inspector General. Respondent did not appear for the hearing.

ISSUES

The first issue is whether MDHHS established that Respondent received an overissuance (OI) of benefits.

The second issue is whether MDHHS established by clear and convincing evidence that Respondent committed an intentional program violation (IPV) which justifies imposing a disqualification against Respondent.

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 ██████████ 1996, Respondent was charged with "Controlled Substance Delivery/manufacture (narcotic or Cocaine) Less than 50 Gr (Attempt)". (Exhibit A, p. 42)

2. On [REDACTED] 1997, Respondent was convicted of the charge dated January 26, 1996, under MCL 333.7401(2)(a)(iv). (Exhibit A, p. 42)
3. On [REDACTED] 2016, Respondent was convicted of “Controlled Substance Delivery/manufacture (narcotic or Cocaine) Less than 50 Gr” under MCL 333.7401(2)(a)(iv). (Exhibit A, pp. 43-44)
4. On July 1, 2017, Respondent submitted to MDHHS an application for Food Assistance Program (FAP) benefits. Respondent answered “No” in response to questions asking if he was convicted of a drug felony and if he was convicted more than once. (Exhibit A, pp. 10-40)
5. From July 2017 through March 2018, Respondent received \$ [REDACTED] in FAP benefits. (Exhibit A, pp. 45-46.) Respondent’s eligibility was based on a one-person FAP group.
6. On March 27, 2018, MDHHS requested a hearing to establish that Respondent received an OI of \$ [REDACTED] in FAP benefits of from July 2017 through March 2018. MDHHS also requested a hearing to establish an IPV disqualification of one year against Respondent. (Exhibit A, p. 1)

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’ Hearing Summary and testimony alleged that Respondent received an OI totaling \$ [REDACTED] in FAP benefits based on Respondent’s history of drug felony convictions. MDHHS made similar or identical allegations in an Intentional Program Violation Repayment Agreement (Exhibit A, pp. 5-6) sent to Respondent as part of MDHHS’ prehearing procedures.

When a client group receives more benefits than it is entitled to receive, MDHHS must attempt to recoup the overissuance. An overissuance is the amount of benefits issued to the client group in excess of what it was eligible to receive. Recoupment is an MDHHS action to identify and recover a benefit overissuance. BAM 700 (January 2016), pp. 1-2.

For FAP benefits, persons convicted of certain crimes and probation or parole violators are not eligible for assistance. An individual convicted of a felony for the use,

possession, or distribution of controlled substances two or more times in separate periods will be permanently disqualified if both **convictions** occurred after August 22, 1996. BEM 203 (January 2018) p. 2. This was the policy current as of the date that MDHHS requested a hearing.

MDHHS presented court documents which verified that Respondent was convicted of multiple crimes involving controlled substances. The court documents listed statutes corresponding to the crimes for which Respondent was convicted; each controlled substance crime for which Respondent was convicted is a felony under Michigan law. Both convictions occurred after October 22, 1996. The evidence established that, given MDHHS policy current as of the month of hearing request, Respondent should have been disqualified from receiving FAP benefits. An OI cannot follow because MDHHS policy conflicted with federal regulations.

Immediately before October 2017, BEM 203 stated that multiple drug felonies justified disqualification if the “**offense** occurred after August 22, 1996”. The change in policy was the subject of a Decision of the Policy Hearing Authority under docket # 17-014280-RECON authored by the MDHHS Chief Deputy Director. The director held that federal law¹ which states that persons may not be disqualified for conduct that occurred before August 22, 1996, preempted BEM 203. The director ordered amendment of BEM 203 to comply with federal law. The order was functionally a retroactive amendment as MDHHS was ordered to issue supplements back to October 2017. Given the Decision of the Policy Hearing Authority under docket # 17-014280-RECON, BEM 203 is interpreted as authority for disqualification only when drug felony **offenses** occur after August 22, 1996.

In the present case, Respondent’s drug felony conviction dated December 18, 1997, corresponded with a charge dated January 26, 1996. It can be inferred that Respondent’s offense occurred before August 22, 1996, as his charge date was also before August 22, 1996. Thus, the offense cannot be factored as a drug felony against Respondent.

MDHHS provided evidence of only one drug felony with an offense date occurring before August 22, 1996. Thus, MDHHS did not establish that Respondent committed multiple drug felony offenses after August 22, 1996. Without such evidence, Respondent was not ineligible for FAP benefits based on drug felonies, and therefore, did not receive an OI of FAP benefits. Thus, MDHHS will be denied their request to establish an OI against Respondent. Respondent is also encouraged to reapply for FAP benefits if he is under the impression that he is disqualified from past drug felony convictions. MDHHS also alleged an IPV by Respondent.

An IPV is a benefit overissuance resulting from the willful withholding of information or other violation of law or regulation by the client or his authorized representative. Bridges

¹ Specifically, 21 USC 862a(d)(2)

Program Glossary (October 2015), p. 36. A suspected IPV means an OI exists for which all three of the following conditions exist:

- The client intentionally failed to report information or intentionally gave incomplete or inaccurate information needed to make a correct benefit determination, and
- The client was clearly and correctly instructed regarding his or her reporting responsibilities, and
- The client has no apparent physical or mental impairment that limits his or her understanding or ability to fulfill their reporting responsibilities.

BAM 720 (January 2016), p. 1; see also 7 CFR 253.8.

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).

The standard 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 presented Respondent's application from the outset of the alleged OI period. Respondent's denials of any past drug felonies were misreportings of information. Boilerplate language on MDHHS reporting documents states that the client's signature is certification, subject to perjury, that all reported information on the document was true. The language is consistent with MDHHS policy which states that clients must completely and truthfully answer all questions on forms and in interviews (see BAM 105 (October 2016), p. 8). The evidence was not indicative that Respondent did not or could not understand the clear and correct reporting requirements.

Though Respondent misreported his history of drug felonies, an OI did not result. Without an OI, an IPV cannot follow. Without an IPV, an IPV disqualification cannot follow. Thus, MDHHS will be denied their request to establish an IPV disqualification against Respondent.

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 received an OI of \$ [REDACTED] in FAP benefits for the period from July 2017 through March 2018. It is further found that MDHHS failed to establish that Respondent committed an IPV justifying imposing a disqualification period. The MDHHS requests to establish an overissuance and a disqualification period of one year against Respondent are **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) 763-0155; 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

LaClair Winbush
MDHHS-Wayne-31-Hearings

Petitioner

MDHHS-OIG-Hearings

Respondent

[REDACTED]
[REDACTED]
[REDACTED] MI [REDACTED]

M Shumaker
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C Gardocki
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