



RICK SNYDER  
GOVERNOR

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

SHELLY EDGERTON  
DIRECTOR

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Date Mailed: September 19, 2018  
MAHS Docket No.: 18-003554  
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 20, 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 Craig Baylis, regulation agent with the Office of Inspector General. Respondent did not appear for the hearing.

**ISSUES**

The first 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.

The second issue is whether MDHHS established that Respondent received an overissuance (OI) 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. On January 13, 2018, a \$ ██████████ purchase at ██████████ (hereinafter, "Store") was made using Respondent's Electronic Benefit Transfer (EBT) card. (Exhibit A,

- p. 13). Respondent's friend was seen leaving Store following the transaction (Exhibit A, p. 22)
2. On March 1, 2018, MDHHS received a complaint that Respondent trades FAP benefits for marijuana.
  3. On March 14, 2018, the testifying OIG agent interviewed Respondent concerning the EBT transaction dated January 13, 2018. Respondent reported that he routinely performs work for marijuana. Respondent also initially told OIG that he made the EBT transaction dated January 13, 2018; Respondent later told OIG that his friend might have been the one who performed the transaction. (Exhibit A, pp. 4-5)
  4. On March 16, 2018, MDHHS requested a hearing to establish recoupment for \$ [REDACTED] in FAP benefits based on trafficking, and to establish an IPV disqualification of one year against Respondent. (Exhibit A, pp. 1-2)
  5. As of the date of hearing, Respondent had no known previous IPV disqualifications.

### 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 may request a hearing to establish an intentional program violation, a disqualification, or a debt. BAM 600 (January 2018), p. 5. An IPV is suspected for a client who is alleged to have trafficked FAP benefits. BAM 720 (October 2017), p. 1. MDHHS defines trafficking as 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." BAM 700 (January 2018), p. 2. <sup>1</sup>

An IPV is suspected when there is **clear and convincing** 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. BAM 720 (October 2017), p. 1. Clear and convincing evidence is evidence

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<sup>1</sup> See 7 CFR 253.8(a) and 7 CFR 273.16(c) for the corresponding federal regulations

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. 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. BAM 725 (January 2016), p. 16.<sup>2</sup>

MDHHS requested a hearing to establish an IPV disqualification period against Respondent for trafficking FAP benefits. At the outset of the hearing, MDHHS requested a default judgment based on Respondent's absence from the hearing. To establish an IPV, MDHHS must establish by clear and convincing evidence that Respondent committed an IPV. The burden of proof to establish an IPV is with MDHHS. Respondent's absence from the hearing prevents him from rebutting evidence, however, MDHHS must still first prove that a basis for an IPV exists. MDHHS cannot meet their burden of proof merely by Respondent's absence from the hearing. Thus, MDHHS' request for default judgment is properly denied. The analysis will proceed to consider the presented evidence to determine if an IPV was established.

MDHHS presented Respondent's EBT expenditure history from January 13, 2017, to February 15, 2018 (Exhibit A, pp. 13-20). Respondent's history showed dozens of EBT transactions from many stores, but only two purchases from Store during the approximate 13-month period. MDHHS contended that Respondent's preference for stores other than Store supports a finding that the transaction dated January 13, 2018, involved trafficking. There is simply no basis to conclude that a person's frequency of shopping at a specific store is insightful evidence of trafficking.

An OI agent testified that he interviewed Respondent. Respondent allegedly stated that he has traded employment for marijuana. Trading employment for marijuana perhaps establishes that Respondent uses marijuana, but it is not insightful evidence of trading FAP benefits for marijuana.

The MDHHS allegation of trafficking was consistent with surveillance photos taken from the date of transaction. A photograph of the persons at the EBT transaction dated January 13, 2018, were not clear enough to make any inferences. MDHHS also presented a photo of a person leaving Store which resembled a person that OIG characterized as Respondent's friend. For purposes of this decision, it will be assumed that the photograph of Respondent's friend leaving Store definitively established that Respondent was not present for the EBT transaction. Even if Respondent's friend made the transaction and Respondent was not present, this is indirect evidence of trafficking.

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<sup>2</sup> See also 7 CFR 253.8(b) for the corresponding federal regulations.

Notably, neither federal regulations nor MDHHS policy prohibits a client from allowing another to use his/her EBT card.<sup>3</sup>

The OIG agent testified that trafficking was supported by Respondent's interview statements. For example, Respondent allegedly initially told the OI agent that he used his card while traveling to his parents' home. Respondent later told the OIG agent that his friend may have used the card at Store. The OIG agent described Respondent as visibly "flustered" (see Exhibit A, p. 5) when reminded of his inconsistent statements.

If MDHHS established clear and convincing trafficking by Respondent, Respondent's inconsistent statements would be deemed insufficient to rebut the claim of trafficking. Respondent's inconsistent statements and alleged visible fluster are not particularly insightful in establishing that trafficking occurred.

Given the evidence, there is a reasonable possibility that Respondent traded FAP benefits for marijuana. The modicum of presented circumstantial evidence is not found to amount to clear and convincing evidence that Respondent received marijuana (or other improper consideration) in exchange for FAP benefits. Thus, it is found that MDHHS failed to establish that Respondent committed an IPV justifying imposing a disqualification.

For FAP benefits, an overissuance is also the amount of benefits trafficked (stolen, traded, bought or sold) or attempted to be trafficked. BAM 700 (January 2018), pp. 1-2. The amount for trafficking-related IPV is the value of the trafficked benefits (attempted or actually trafficked) as determined by:

- The court decision.
- The individual's admission.
- Documentation used to establish the trafficking determination, such as an affidavit from a store owner or sworn testimony from a federal or state investigator of how much a client could have reasonably trafficked in that store. This can be established through circumstantial evidence.

BAM 720 (October 2017), p. 8.<sup>4</sup>

It has already been found that MDHHS failed to establish trafficking by Respondent. Without a finding of trafficking, a finding allowing recoupment based on benefit trafficking cannot follow. Thus, MDHHS will be denied their request to establish recoupment against Respondent.

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<sup>3</sup> MDHHS presented a publication (Exhibit A, pp. 34-49) which advises clients not to share their personal identification number for their EBT card. The advice from the publication is not evidence of what is barred by MDHHS or federal regulations.

<sup>4</sup> See 7 CFR 273.18(a) for the corresponding federal regulation.

**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 requests to establish an IPV disqualification and basis for recoupment of \$ [REDACTED] in FAP benefits are **DENIED**.

CG/

  
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**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

**Petitioner**

MDHHS-OIG-Hearings

**DHHS**

Sharon Reuther  
MDHHS-Owosso-Hearings

**Respondent**

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

M Shumaker  
Policy Recoupment  
C Gardocki  
MAHS