



RICK SNYDER  
GOVERNOR

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

SHELLY EDGERTON  
DIRECTOR

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

Date Mailed: September 4, 2018  
MAHS Docket No.: 18-003638  
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 scheduled for August 30, 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 Derrick Gentry, 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 [REDACTED] 2010, Respondent was convicted of "Controlled Substance – Possession (narcotic or Cocaine) Less Than 25 Grams (Attempt)" under MCL 333.7403(2)(a)(v). (Exhibit A, pp. 68-70)

2. On [REDACTED] 2014, Respondent was convicted of “CONTR SUB DEL LESS 50 GRAM” under MCL 333.7401(2)(a)(iv). (Exhibit A, pp. 71-72)
3. On October 7, 2015, Respondent submitted to MDHHS a signed electronic 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 of a drug felony more than once. Boilerplate language stated that Respondent’s signature was certification, under penalties of perjury, that all reported information was accurate. (Exhibit A, pp. 11-38)
4. On September 7, 2016, Respondent submitted to MDHHS an electronic 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 of a drug felony more than once. (Exhibit A, pp. 39-67)
5. From November 2015 through September 2016, Respondent received \$ [REDACTED] in FAP benefits. (Exhibit A, pp. 73-75) Respondent’s eligibility was based on a one-person FAP group.
6. On April 10, 2018, MDHHS requested a hearing to establish that Respondent received an OI of \$ [REDACTED] in FAP benefits from November 2015 through September 2016 and to establish an IPV disqualification of two years against Respondent. (Exhibit A, p. 1)
7. As of the date of hearing, Respondent had one previous IPV disqualification. (Exhibit A, p. 76)

### **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 OI of \$ [REDACTED] in FAP benefits from November 2015 through September 2016 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.<sup>1</sup>

For FAP benefits, people 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 offenses occurred after August 22, 1996. BEM 203 (October 2015), pp. 1-2.<sup>2</sup>

MDHHS alleged that Respondent was convicted of two felonies which disqualified him from receiving FAP benefits from November 2015 through September 2016. Respondent's first alleged drug felony conviction occurred on November 29, 2010, for the attempted crime under MCL 333.7403(2)(a)(v) which states that such crimes are felonies and punishable up to 4 years. Attempts of crimes requires consideration of MCL 333.7403(2)(a)(v) which states the following:

Any person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act towards the commission of such offense, but shall fail in the perpetration, or shall be intercepted or prevented in the execution of the same, when no express provision is made by law for the punishment of such attempt, shall be punished as follows...

3. If the offense so attempted to be committed is punishable by imprisonment in the state prison for a term less than 5 years, or imprisonment in the county jail or by fine, the offender convicted of such attempt **shall be guilty of a misdemeanor** [emphasis added], punishable by imprisonment in the state prison or reformatory not more than 2 years or in any county jail not more than 1 year or by a fine not to exceed 1,000 dollars; but in no case shall the imprisonment exceed 1/2 of the greatest punishment which might have been inflicted if the offense so attempted had been committed.

As Respondent was convicted of the attempted crime with a maximum penalty of less than 5 years, MCL 750.92 dictates that the corresponding penalty is a misdemeanor. Under Michigan law, crimes are either felonies or misdemeanors. MCL 750.6. Because Respondent's conviction dated [REDACTED], 2010, was a misdemeanor, by definition, it cannot be a felony. Thus, Respondent's conviction of the attempt crime under MCL 7403(2)(a)(v) is not a controlled substance felony.

MDHHS only presented evidence of one other controlled substance felony by Respondent. Given the evidence, Respondent did not commit multiple controlled substance felonies. Without multiple controlled substance felonies, Respondent cannot

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<sup>1</sup> See also 7 CFR 273.18(c)(1)(ii) for the corresponding federal regulations.

<sup>2</sup> See also 7 CFR 273.11(m) for the corresponding federal regulations.

be disqualified from receiving FAP benefits. Without disqualification of FAP benefits, an OI cannot be established. Thus, MDHHS failed to establish a basis for recoupment against Respondent. MDHHS further alleged that Respondent committed an IPV.

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 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.<sup>3</sup>

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. 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>4</sup>

MDHHS presented multiple applications from Respondent in which Respondent reported having no past drug felonies. Given Respondent's drug felony conviction dated [REDACTED] 2014, Respondent's applications were misreportings of information. For purposes of this decision, it will be assumed that Respondent intentionally provided MDHHS with inaccurate information concerning past drug felonies.

Respondent may have intentionally given MDHHS misinformation, however, an OI as a result of the misinformation was not established. Without an OI, there cannot be an incorrect benefit determination. Without an incorrect benefit determination, there is no IPV or corresponding penalty. Thus, MDHHS failed to establish a basis to impose an IPV disqualification against Respondent.

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<sup>3</sup> See also 7 CFR 253.8 for the corresponding federal regulations.

<sup>4</sup> See also 7 CFR 253.8 (b) for the corresponding federal regulations.

**DECISION AND ORDER**

The administrative law judge, based upon the above findings of fact and conclusions of law, finds that MDHHS failed to establish a basis for recoupment of \$ [REDACTED] in allegedly over-issued FAP benefits from November 2015 through September 2016. MDHHS further failed to establish a basis to impose a two-year IPV disqualification against Respondent. The MDHHS requests to establish an overissuance and a disqualification period against Respondent are **DENIED**.

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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

**DHHS**

Denise McCoggle  
MDHHS-Wayne-15-Hearings

**Petitioner**

MDHHS-OIG-Hearings

**Respondent**

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

M Shumaker  
Policy Recoupment  
C Gardocki  
MAHS