



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: November 21, 2018  
MAHS Docket No.: 18-007247  
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 November 1, 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] 2001, Respondent was convicted of "Controlled Substance - Delivery/manufacture marijuana (attempt)" under MCL 333.7401(2)(d)(iii). (Exhibit A, pp. 12-13.)

2. On [REDACTED] 2002, Respondent was convicted of "Controlled Substance - Delivery/manufacture marijuana" under MCL 333.7401(2)(d)(iii). (Exhibit A, pp. 14-15.)
3. On December 18, 2013, Respondent submitted to MDHHS an application for Food Assistance Program (FAP) benefits. Respondent answered "No" in response to a question asking if he was convicted of a drug felony. Boilerplate language stated that the client's signature was certification, subject to penalties of perjury, that all provided information was true. (Exhibit A, pp. 16-45.)
4. On November 15, 2016, Respondent submitted to MDHHS an application for 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. Boilerplate language stated that the client's signature was certification, subject to penalties of perjury, that all provided information was true. (Exhibit A, pp. 46-73.)
5. From December 2013 through May 2015, Respondent received \$[REDACTED] in FAP benefits. (Exhibit A, pp. 74-76.) Respondent's eligibility was based on a 1-person FAP group.
6. On July 12, 2018, MDHHS requested a hearing to establish that Respondent received an OI of \$[REDACTED] in FAP benefits from December 2013 through May 2015 and to establish an IPV disqualification of 1 year against Respondent. (Exhibit A, pp. 1-2.)
7. 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 (RTM).

MDHHS' Hearing Summary and testimony alleged that Respondent OI of \$[REDACTED] in FAP benefits from December 2013 through May 2015 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. BAM 700 (January 2016), pp. 1-2. An overissuance is the amount of benefits issued to the client group in excess of what it was eligible to receive. *Id.* Recoupment is an MDHHS action to identify and recover a benefit overissuance. *Id.* Federal regulations refer to overissuances as “recipient claims” and mandate states to collect them. 7 CFR 273.18(a).

Federal regulations allow states to disqualify person convicted of multiple drug felonies. 7 CFR 273.11(m). FAP ineligibility is only limited to convictions based on behavior which occurred after August 22, 1996. *Id.* States can enact legislation to exempt themselves from disqualifying such individuals, but Michigan is not among those states as MDHHS prohibits persons with multiple drug felonies from receiving FAP benefits. *Id.* and BEM 203 (October 2015), pp. 1-2.

MDHHS alleged that Respondent was convicted of two felonies which disqualified him from receiving FAP benefits from December 2013 through May 2015. Respondent's first alleged drug felony conviction occurred on August 16, 2001, for the attempted crime under MCL 333.7401(2)(d)(iii) which states that such crimes are felonies and punishable up to 4 years. Attempted crimes requires consideration of MCL 750.92 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 an 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 (see MCL 750.6). Because Respondent's conviction dated August 16, 2001, was a misdemeanor, by definition, it cannot be a felony. Thus, Respondent's conviction of the attempt crime under MCL 333.7401(2)(d)(iii) 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 be disqualified from receiving FAP benefits and an OI cannot follow. Thus, MDHHS failed to establish a basis for recoupment against Respondent. MDHHS also alleged that the present case involves an IPV.

The types of recipient claims are those caused by agency error, unintentional recipient claims, and IPV. 7 CFR 273.18(b). An IPV shall consist of having intentionally:

- (1) Made a false or misleading statement, or misrepresented, concealed or withheld facts; or
- (2) Committed any act that constitutes a violation of SNAP, SNAP regulations, or any state statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of SNAP benefits or EBT cards. 7 CFR 273.16(c).

IPV is suspected when there is **clear and convincing** 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. BAM 720 (January 2016) p. 1. 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).

Individuals found to have committed an IPV shall be ineligible to receive FAP benefits. 7 CFR 273.16(b). The standard disqualification period is used in all instances except when a court orders a different period. IPV penalties are as follows: one year for the first IPV, two years for the second IPV, and lifetime for the third IPV. *Id.* and BAM 725 (January 2016), p. 16.

MDHHS presented multiple applications from Respondent in which Respondent reported having no past drug felonies. Given Respondent's drug felony conviction dated March 22, 2002, 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.

### **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 December 2013 through May 2015. 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**.

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  
Policy Recoupment  
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MAHS