



GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

ORLENE HAWKS
DIRECTOR

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Date Mailed: January 17, 2020
MOAHR Docket No.: 19-008659
Agency No.: ██████████
Petitioner: OIG
Respondent: ██████████

ADMINISTRATIVE LAW JUDGE: Zainab A. Baydoun

HEARING DECISION FOR INTENTIONAL PROGRAM VIOLATION

Upon the request for a hearing by the Department of Health and Human Services (Department), 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 December 16, 2019, from ██████████ Michigan. The Department was represented by Philip Giuliani, Regulation Agent of the Office of Inspector General (OIG). Respondent did not appear at the hearing, and it was held in Respondent's absence pursuant to 7 CFR 273.16(e), Mich Admin Code R 400.3130(5), or Mich Admin Code R 400.3178(5).

ISSUES

1. Did the Department establish, by clear and convincing evidence, that Respondent committed an Intentional Program Violation (IPV) of the Food Assistance Program (FAP)?
2. Should Respondent be disqualified from receiving FAP benefits?
3. Did the Department establish that Respondent trafficked FAP benefits that it is entitled to recoup and/or collect?

FINDINGS OF FACT

The Administrative Law Judge, based on the competent, material, and substantial evidence on the whole record, finds as material fact:

1. The Department's OIG filed a hearing request on or around July 30, 2019, alleging that Respondent committed an IPV.

2. Respondent was a recipient of FAP benefits issued by the Department.
3. Respondent was aware of the responsibility to use his FAP benefits for lawful purchases and the Department had no reason to believe that Respondent had a physical or mental impairment that would limit his understanding or ability to fulfill this requirement.
4. The Department's OIG indicates that the time period it is considering the fraud period is September 14, 2013 to June 11, 2014 (fraud period).
5. During the fraud period, Respondent redeemed his FAP benefits at [REDACTED] (Store).
6. The United States Department of Agriculture (USDA) notified Store that, based on its investigation, it concluded that Store had trafficked FAP benefits and in February 2019, Store was permanently disqualified from redeeming FAP benefits.
7. The Department alleges that during the fraud period, Respondent trafficked \$989.36 in FAP benefits issued by the State of Michigan at Store.
8. Respondent did not have an Authorized Representative (AR) assigned to his FAP case with the Department and did not report his electronic benefit transfer (EBT) card lost or stolen during the fraud period.
9. This was Respondent's first alleged FAP IPV and the Department has requested that Respondent be disqualified from receiving FAP benefits for 12 months.
10. A Notice of Hearing was mailed to Respondent at his last known address and was not returned by the US Postal Service as undeliverable.

CONCLUSIONS OF LAW

Department policies are contained in the Department of Health and Human Services Bridges Administrative Manual (BAM), Bridges Eligibility Manual (BEM), Adult Services Manual (ASM), and Reference Tables Manual (RFT).

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. The Department (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 to .3015.

Intentional Program Violation

Effective October 1, 2014, the Department's OIG requests IPV hearings for cases involving alleged fraud of FAP benefits in excess of \$500. BAM 720 (October 2017), p. 5. An IPV occurs when a recipient of Department benefits intentionally (1) made a false or misleading statement, or misrepresented, concealed or withheld facts; or (2) committed any act that constitutes a violation FAP, FAP federal regulations, or any State statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FAP benefits or electronic benefit transfer (EBT) cards. 7 CFR 273.16(c). An IPV is also suspected for a client who is alleged to have trafficked FAP benefits. BAM 720, p. 1. Trafficking includes "buying, selling . . . or otherwise effecting an exchange of [FAP] benefits issued and accessed via [EBT] cards, card numbers and personal identification numbers (PINs) . . . for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone" or the attempt of such actions. 7 CFR 271.2. To establish an IPV by trafficking, the Department must present clear and convincing evidence that the household member committed, and intended to commit, an intentional program violation. 7 CFR 273.16(e)(6).

In this case, the Department alleges that Respondent committed an IPV because he trafficked \$989.36 of his FAP benefits at Store. The Department presented evidence that in February 2019, Store was found by the USDA to have trafficked FAP benefits and had its authorization to accept FAP benefits permanently revoked. An investigation conducted from February 2017 to February 2019 found that Store had completed a large number of transactions ending in the same-cents value, that multiple transactions from individual benefit accounts were completed within a set time period, and that the Store conducted EBT transactions that were large based on the observed store characteristics and recorded food stock. To support a trafficking case against Respondent, the Department must establish, by clear and convincing evidence, that *Respondent* engaged in trafficking when he used his FAP benefits at Store.

The Department contended that Respondent's FAP purchases at Store were trafficked because the store did not have the inventory or infrastructure to support the purchases that were being made. Specifically, according to the investigation report prepared relying on the information obtained from the USDA Food and Nutrition Service (FNS) during its March 15, 2018 onsite inspection and based on the photographs of the store taken during the investigation and presented at the hearing, the Department argued that Store was a gas station/convenience store that was approximately 1,200 square-foot in size, with limited supply of staple food stock, no hot food sold on site, no fresh meat bundles, no seafood, and no fruit or produce boxed bundles for sale. The Department maintained that Store had no food storage out of the public view, no storage coolers or freezers, no kitchen or food prep area, one checkout counter, one specialty cash register dedicated to lottery sales, one EBT point-of-sale device, no optical scanner, no shopping carts or baskets, limited counter space, and operated its sales through a plastic barrier with a turnstile preventing quick and large transactions from being completed. It was further alleged that Store had ineligible items for sale such as lottery

tickets, alcohol, gasoline, tobacco, and household supplies. The Department asserted that the Store had limited eligible food stock with smaller dollar values such as snack items, pop, juice, ice cream, candy, canned and dry good items, frozen products, dairy products, bread and prepared sandwiches in the cooler. The Department maintained that it was impractical that customers purchased large amounts of food, and the inventory could not support the higher-dollar and higher-volume transactions that were occurring in short amounts of time.

In support of its contention that Respondent trafficked his FAP benefits, the Department presented Respondent's FAP transaction history showing FAP purchases at Store by date, time, and amount, as well as a benefit summary inquiry showing that Respondent received FAP benefits issued by the State of Michigan during the fraud period. There was no evidence that Respondent had an AR on his FAP case. The Department asserted that it considered single purchases greater than \$24.06 and multiple or back-to-back transactions totaling more than \$24.06 as having been trafficked. A review of Respondent's FAP transaction history shows that from September 2013 to June 2014, he made purchases at Store in amounts greater than the threshold identified and that he had back-to-back transactions completed in total amounts greater than \$24.06. (Exhibit A, pp. 44-48.)

The Department asserted that Respondent trafficked his FAP benefits at Store from September 2013 to June 2014. However, the Department based this conclusion on the evidence obtained from FNS during an investigation conducted four years later in 2018 and 2019. While the Department presented evidence of the Store's infrastructure and inventory as of March 2018, there was no evidence presented related to the condition, inventory, layout, quality, or other characteristics of Store during the time period in which Respondent made purchases at Store in 2013 and 2014 that were alleged to have been trafficked. Upon review, the Department's evidence fails to rise to the level of providing clear and convincing evidence that from September 2013 to June 2014, Respondent's purchases at Store involved trafficking.

Therefore, under the facts presented and based on the totality of the record in this case, the Department has failed to establish, by clear and convincing evidence, that Respondent trafficked his FAP benefits.

Disqualification

A client who is found to have committed an IPV by a hearing decision is disqualified from receiving program benefits for one year for the first IPV, two years for the second IPV, and lifetime for the third IPV. 7 CFR 273.16(b)(1); BAM 720, p. 16. The Department has failed to establish by clear and convincing evidence that Respondent committed an IPV by trafficking his FAP benefits. Therefore, Respondent is **not** subject to a one-year disqualification from receipt of FAP benefits.

Recovery of Trafficked Benefits

The Department is entitled to recoup and/or collect from an individual the value of any benefits that are trafficked. 7 CFR 273.18(a)(1)(ii). The value of claims arising from trafficking-related offenses will be the value of the trafficked benefits as determined by the individual's admission, an adjudication, or documentation that forms the basis for the trafficking determination. 7 CFR 273.18(c)(2). BAM 720, p. 8.

As discussed above, the Department failed to present clear and convincing evidence to support its allegation that Respondent trafficked at Store. Therefore, the Department failed to establish that \$989.36 in FAP transactions at Store involved trafficking and is not entitled to recoup or collect that amount from Respondent.

DECISION AND ORDER

The Administrative Law Judge, based upon the above Findings of Fact and Conclusions of Law, and for the reasons stated on the record, if any, concludes that:

1. The Department **has not** established by clear and convincing evidence that Respondent committed an IPV.
2. Respondent **did not** receive an OI of FAP benefits in the amount of \$989.36.

The Department is ORDERED to delete the \$989.36 FAP OI, cease any recoupment and/or collection action, and supplement Respondent for any recouped and/or collected amounts.

ZB/jaf



Zainab A. Baydoun

Administrative Law Judge
for Robert Gordon, 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 Office of Administrative Hearings and Rules (MOAHR).

A party may request a rehearing or reconsideration of this Order if the request is received by MOAHR 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. MOAHR will not review any response to a request for rehearing/reconsideration.

A written request may be mailed or faxed to MOAHR. If submitted by fax, the written request must be faxed to (517) 763-0155; Attention: MOAHR Rehearing/Reconsideration Request.

If submitted by mail, the written request must be addressed as follows:

Michigan Office of Administrative Hearings and Rules
Reconsideration/Rehearing Request
P.O. Box 30639
Lansing, Michigan 48909-8139

Petitioner

MDHHS-OIG-Hearings

DHHS

Tara Roland [REDACTED]
MDHHS-[REDACTED]-Hearings
L Bengel
Policy Recoupment

Respondent

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