



GRETCHEN WHITMER
GOVERNOR

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

ORLENE HAWKS
DIRECTOR

[REDACTED]
[REDACTED]
[REDACTED]

Date Mailed: February 13, 2020
MOAHR Docket No.: 19-010787
Agency No.: [REDACTED]
Petitioner: OIG
Respondent: [REDACTED]

ADMINISTRATIVE LAW JUDGE: John Markey

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 Title 7 of the Code of Federal Regulation (CFR), particularly 7 CFR 273.16. After due notice, a telephone hearing was held on February 10, 2020 from Detroit, Michigan. The Department was represented by Daniel Beck, Regulation Agent of the Office of Inspector General (OIG). Respondent appeared and represented herself. During the hearing, a 151-page packet of documents was offered and admitted into evidence as Exhibit A, pp. 1-151.

ISSUES

1. Did Respondent traffic Food Assistance Program (FAP) benefits that the Department is entitled to recoup?
2. Did the Department establish, by clear and convincing evidence, that Respondent committed an Intentional Program Violation (IPV) with respect to FAP?
3. Should Respondent be disqualified from receiving FAP 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. Respondent filed with the Department an application for FAP benefits on [REDACTED], 2016. Exhibit A, pp. 88-129.
2. As part of the application process, Respondent was provided with and required to acknowledge understanding of the rights and responsibilities with respect to the FAP. Exhibit A, p. 111.

3. The rights and responsibilities information included a pamphlet that advised Respondent that trading or selling FAP benefits was considered FAP trafficking and that such action violated the law and if proven, would result in criminal and/or civil penalties, including disqualification from the program. Exhibit A, p. 118-120.
4. Respondent did not have a mental or physical impairment that would limit her understanding or ability to fulfill her obligations regarding her FAP benefits. Exhibit A, p. 100.
5. Respondent's household of seven was approved for and received monthly FAP benefits from the Department during all times relevant to this matter. Exhibit A, pp. 130-133.
6. At some point, the United States Food and Nutrition Service (FNS) conducted an investigation of a store named [REDACTED]. At the conclusion of the investigation, FNS issued to [REDACTED] an October 25, 2018 letter informing the store that it was permanently disqualified from FAP as a result of FNS' finding that the store had engaged in FAP trafficking. Exhibit A, pp. 11-42.
7. As a result of FNS' finding that GPS engaged in widespread FAP trafficking, the Department conducted an investigation into some of the clients who made purchases at the stores.
8. From December 14, 2016 through July 19, 2018, Respondent made 52 purchases at [REDACTED]. Thirty-four of those 52 purchases were flagged by the Department as fraudulent due to meeting the Department's criteria for trafficking at that particular store. Exhibit A, pp. 43-46.
9. On [REDACTED] 2019, the Department's OIG filed a hearing request to establish that Respondent committed an IPV by engaging in 34 fraudulent transactions at [REDACTED] from December 14, 2016 through July 19, 2018, totaling \$[REDACTED]. The Department seeks an order requiring Respondent to repay the amount allegedly trafficked. Exhibit A, pp. 1-8; 43-46.
10. The Department's OIG indicates that the time period it is considering the fraud period is December 14, 2016 through July 19, 2018. Exhibit A, pp. 1-8.
11. The Department alleges that Respondent trafficking in FAP benefits in the amount of \$[REDACTED] Exhibit A, pp. 1-8.
12. Respondent has previously been found to have committed an IPV with respect to FAP on two separate occasions. Thus, this was Respondent's third alleged IPV, and the OIG requested Respondent be disqualified from receiving FAP benefits for life. Exhibit A, pp. 1-8.

13. Respondent appeared at the hearing and disagreed vehemently with the Department's allegations.
14. The Notice of Hearing sent to Respondent's most recent address on file was not returned 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.

The Department has alleged that 34 of Respondent's purchases at [REDACTED] from December 14, 2016 through July 19, 2018 were instances of trafficking. The Department is seeking an order finding Respondent committed an IPV with respect to FAP and requiring Respondent to repay the amount allegedly trafficked in addition to a lifetime ban on receipt of FAP benefits as a result of a third IPV.

Intentional Program Violation

An IPV is suspected for a client who is alleged to have trafficked FAP benefits. BAM 720 (May 2014), p. 2. Trafficking is defined as actually or attempting to buy, sell, or steal FAP benefits for cash or consideration other than eligible food. BAM 700 (May 2014), p. 2; 7 CFR 271.2.

An IPV requires that the Department establish by clear and convincing evidence that the client has trafficked FAP benefits. BAM 720, p. 1; see also 7 CFR 273.16(e)(6). Clear and convincing evidence is evidence which is so clear, direct, weighty, and convincing that it enables a firm belief as to the truth of the allegations sought to be established. *In re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995) (citing *In re Jobes*, 108 NJ 394 (1987)).

In this case, the Department failed to meet its burden. After an investigation, FNS determined that [REDACTED] engaged in wide-ranging fraud with respect to accepting and redeeming FAP benefits. The investigation showed that [REDACTED] had limited food inventory, no carts, and operated out of a night window or plastic barrier. The Department established that Respondent made 34 EBT transactions at the store from

December 14, 2016 through July 19, 2018 that met the Department's criteria for a suspected fraudulent transaction.

First, the approximately \$25 threshold amount for a purchase to be considered fraudulent by the Department was completely unreasonable to apply to Respondent's case. Respondent had at least seven people in her FAP group. It is hard to imagine being able to purchase any amount of snacks or foods for seven people for less than \$25, regardless of the store. With seven people and a \$25 threshold, the Department is essentially saying that it suspects fraud because each household member expended an average of at least \$3.57 on a family's single trip to a party store. That is not a reasonable conclusion even absent Respondent's testimony.

Additionally, Respondent credibly testified that she only purchased eligible food products at [REDACTED] and the Department had no direct evidence to contradict Respondent's claims. Respondent's credible and consistent testimony combined with the weak theory of the case to begin with were sufficient to prevent the forming of a firm belief that Respondent, in fact, engaged in FAP trafficking. Accordingly, the Department failed to establish by clear and convincing evidence that Respondent engaged in unlawful FAP trafficking.

Disqualification

A client who is found to have committed an IPV by a court or hearing decision is disqualified from receiving program benefits. BAM 720, pp. 15-16; 7 CFR 273.16(b). In general, Clients are disqualified for standard disqualification periods of one year for the first IPV, two years for the second IPV, and lifetime for the third IPV. BAM 720, p. 16.

In this case, there is no IPV related to FAP benefits. Thus, Respondent is not subject to a disqualification.

Repayment

The amount the Department is entitled to recoup and/or collect for trafficking-related IPV is the value of the trafficked benefits as determined by: (1) a court decision; (2) the individual's admission; or (3) 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. BAM 720, p. 8; 7 CFR 273.18(c)(2). In this case, there was no IPV or trafficking. Thus, the Department is not entitled to recoup and/or collect 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 failed to establish by clear and convincing evidence that Respondent committed an IPV with respect to FAP.
2. Respondent is not subject to disqualification from receiving FAP benefits.

IT IS ORDERED that the Department must delete the alleged \$ [REDACTED] FAP overissuance from Respondent's case.

IT IS FURTHER ORDERED that Respondent is not disqualified from receiving FAP benefits.

JM/tm



John Markey
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

DHHS

LaClair Winbush
17455 Grand River
Detroit, MI
48227

Petitioner

OIG
PO Box 30062
Lansing, MI
48909-7562

Respondent

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

cc: IPV-Recoupment Mailbox
L. Bengel