



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: October 16, 2019
MOAHR Docket No.: 19-004678
Agency No.: [REDACTED]
Petitioner: OIG
Respondent: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Christian Gardocki

**HEARING DECISION FOR
INTENTIONAL PROGRAM VIOLATION AND RECIPIENT CLAIM**

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, an in-person hearing was held on October 8, 2019, from Hamtramck, Michigan. The Michigan Department of Health and Human Services (MDHHS) was represented by Marie Walters, regulation agent with the Office of Inspector General. Respondent appeared and was unrepresented.

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.

The second issue is whether MDHHS established a recipient claim due to Respondent's alleged trafficking of Food Assistance Program (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. As of December 2015, Respondent was an ongoing FAP recipient.
2. From December 17, 2015, through December 19, 2015, Respondent's Bridge card was used four times at [REDACTED] of Hamtramck, Michigan,

(hereinafter "Store") for transactions totaling \$172.74. Respondent's transactions included the following. Which were alleged by MDHHS to involve trafficking:

<u>Date</u>	<u>Amount</u>	
December 17, 2015	\$69.00	
December 17, 2015	\$19.88	
December 19, 2015	\$54.19	
December 19, 2015	\$29.67	Exhibit A, p. 40. ¹

3. On or near March 18, 2018, Food and Nutrition Service (FNS) performed an on-site investigation of Store. Investigative findings included the following: Store was approximately 3,000 square feet; Store did not use optical scanners at checkout; Store operated through a plastic barrier; Store offered no shopping cart to customers; Store offered no shopping baskets to customers; Store had no unusual pricing structure; Store had no deli area for preparing hot foods; and Store did not sell meat bundles or seafood specials. Exhibit A, pp. 23-39.
4. On April 25, 2018, FNS sent Store's owner correspondence stating that Store's electronic benefit transfer (EBT) transactions from September 2017 through February 2018 demonstrated "clear and repetitive patterns of unusual, irregular, and inexplicable activity for your type of firm." Evidence cited by FNS against Store included transactions from individual EBT accounts within "a set time period" and "excessively large purchase transactions." Exhibit A, pp. 14-16. A list of suspected "excessively large" trafficking transactions from Store that were at least \$24.79 and various transactions that occurred across a two-day period. Exhibit A, pp. 17-22.
5. On May 22, 2018, following an opportunity for Store's owner to respond to the allegations, FNS informed Store that it was "permanently disqualified" from accepting EBT transactions under Sections 278.6(c) and 278.6(e)(1) of Supplemental Nutrition Assistance Program (SNAP) regulations. Exhibit A, pp. 12-13.
6. On [REDACTED], 2019, MDHHS requested a hearing to establish a recipient claim of \$172.74 due to allegedly trafficked FAP benefits. MDHHS also sought to impose a one-year disqualification period against Respondent. Exhibit A, pp. 1-2.
7. As of the date of hearing, Respondent had no 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

¹ None of respondent's transactions at Store were alleged by FNS as transactions in which Store trafficked FAP benefits.

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 requested a hearing to establish that Respondent committed an IPV. MDHHS' Hearing Summary and an unsigned Intentional Program Violation Repayment Agreement (Exhibit A, pp. 7-8) alleged that Respondent trafficked \$172.74 in FAP benefits at Store.

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).

Acts that violate SNAP regulations include trafficking. Trafficking means the buying, selling, stealing, or otherwise effecting an exchange of SNAP 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. 7 CFR 271.2.

An IPV requires clear and convincing evidence which demonstrates that the household member(s) committed, and intended to commit, an IPV. 7 CFR 273.16(e)(6). Clear and convincing evidence must be strong enough to cause a clear and firm belief that the proposition is true; it is more than proving that the proposition is probably true. 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).

MDHHS alleged that Respondent trafficked FAP benefits by exchanging FAP benefits for cash and/or items not authorized to be purchased with an EBT card. The simplified argument against Respondent is as follows:

- Store was established by administrative proceedings to have engaged in FAP trafficking, in part, based on EBT transactions suspicious for trafficking;
- Respondent had EBT transactions at Store which were consistent with Store's involvement in trafficking;
- Therefore, Respondent trafficked FAP benefits.

MDHHS presented various documents from FNS' investigation of Store concerning trafficking. FNS' investigation included an inventory of Store's EBT-eligible items, specific EBT transactions at Store which FNS suspected to involve trafficking, and FNS correspondence concerning the investigation of Store. The documents verified that Store was permanently disqualified from accepting EBT transactions due to transactions

consistent with FAP trafficking. Additionally, MDHHS presented written affidavits from Store's customers who reported that Store allowed use of Bridge Cards for toiletries, tobacco products, and liquor; Store maintained notes on Bridge Cards; and Store would double the cost of non-food items purchased with a Bridge Card. MDHHS alleged that Respondent's transaction history at Store was consistent with trafficking FAP benefits.

FNS cited "excessively large" transactions at Store as suspicious for trafficking. Such transactions would be particularly unusual for Store which operated through a plastic barrier, did not optically scan items for quick and accurate pricing, and did not offer shopping carts or baskets to customers. A list of Store's transactions which FNS determined suspicious for trafficking included EBT transactions \$24.79 and higher. Exhibit A, pp. 20-22. Of Respondent's transactions at Store, three of four were for at least \$24.79.

FNS also cited transactions at Store "within a set time period" as suspicious for trafficking. Evidence did not definitively establish what time period that FNS considered as suspicious but a corresponding list of suspicious transactions at Store listed transactions occurring within a 2-day period. Respondent's two transactions at Store on December 17, 2015, totaled \$88.88 and were separated by only nine minutes. Exhibit A, p. 40. Respondent's two transactions at Store on December 19, 2015, totaled \$83.86 and were separated by only eight minutes. *Id.* Technically, Respondent's combined transactions are not consistent with trafficking transactions against Store because Respondent did not have EBT transactions within a 2-day period exceeding \$100. Nevertheless, Respondent's EBT transactions at Store were suspicious as they neared \$100 over a 2-day period and exceeded \$100 over a 3-day period.

Respondent testified that he never entered Store and denied ever trafficking FAP benefits. Respondent also testified that perhaps his son trafficked FAP benefits; it was not disputed that Petitioner's son was disqualified due to trafficking FAP benefits at Store. Petitioner also testified that perhaps his then-girlfriend or neighbor trafficked FAP benefits.² Respondent's testimony was not corroborated by any documentation. With respect to the lack of corroboration, it is acknowledged that reasonable persons would not save grocery receipts from four years earlier. Thus, Respondent's lack of corroboration is not particularly insightful into whether he trafficked FAP benefits.

Respondent's suspicious transactions at Store occurred over a single 3-day period. If Respondent was the victim of fraud, suspicious transactions would be expected to be limited to a single period. The short timeframe of alleged trafficking is consistent with Respondent's claim that he did not commit fraud.

None of the FAP transactions cited by FNS as trafficking by Store were Respondent's. FNS' investigation of Store only went back to September 2017. Respondent's alleged transactions at Store occurred over 20 months earlier. Establishing that Respondent's transactions at Store were fraudulent based on Store's subsequent transactions

² Petitioner testified that his girlfriend and neighbor would sometimes shop for him. In shopping for Petitioner, Petitioner would provide them his Bridge Card and personal identification number.

requires acceptance of many facts that were not established: Store's limited food inventory was unchanged, Store's involvement in trafficking was unchanged, and Store's transactions consistent with trafficking were unchanged. Such scenarios are plausible but the lack of certainty lessens the allegations of trafficking by Respondent.

Based on the evidence, MDHHS did not establish that Respondent clearly and convincingly trafficked \$172.74 in FAP benefits at Store. Thus, MDHHS failed to establish an IPV by Respondent.

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.

Without a finding that Respondent committed an IPV, an IPV disqualification cannot follow. Thus, MDHHS is denied its request to establish a 1-year disqualification against Respondent.

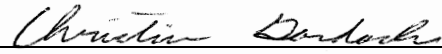
MDHHS further sought to establish a recipient claim against Respondent. A recipient claim is an amount owed because of benefits that are overpaid or benefits that are trafficked. 7 CFR 273.18(a)(1). Federal regulations mandate state agencies to establish and collect such claims. 7 CFR 273.18(a)(2). Claims arising from trafficking-related offenses will be the value of the trafficked benefits. 7 CFR 273.18(c)(2).

It was already found that MDHHS did not establish that Respondent trafficked FAP benefits at Store. Without such a finding, a recipient claim for trafficking cannot follow. Thus, MDHHS is denied its request for a recipient claim.

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 committed an IPV based on FAP benefit trafficking. It is further found that MDHHS failed to establish a recipient claim against Respondent for \$172.74 in trafficked FAP benefits. The MDHHS requests to establish a recipient claim and a 1-year disqualification against Respondent are **DENIED**.

CG/cg



Christian Gardocki
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 (via electronic mail)

Keisha Koger-Roper
MDHHS-Wayne-55-Hearings
L Bengel
Policy Recoupment

Petitioner (via electronic mail)

MDHHS-OIG-Hearings

Respondent (via first class mail)

[REDACTED]
[REDACTED]
[REDACTED]