



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: March 30, 2021
MOAHR Docket No.: 20-006986
Agency No.: ██████████
Petitioner: OIG
Respondent: ██████████

ADMINISTRATIVE LAW JUDGE: Kevin Scully

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, and with Mich Admin Code, R 400.3130 and R 400.3178. After due notice, telephone hearing was held on March 3, 2021. The Department was represented by Joseph Adcock, 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 Respondent receive an overissuance (OI) of Food Assistance Program (FAP) benefits that the Department is entitled to recoup?
2. Did the Department establish by clear and convincing evidence that the Respondent committed an Intentional Program Violation (IPV)?
3. Should Respondent be disqualified from receiving 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. On an application for assistance dated ██████████ 2018, the Respondent acknowledged her duties and responsibilities including the duty to use Food Assistance Program (FAP) benefits in a manner consistent with the Food and Nutrition Act of 2008. Respondent did not have an apparent physical or mental impairment that would limit the understanding or ability to fulfill this requirement. Exhibit A, pp 23-82.

2. On May 9, 2018, Respondent's Food Assistance Program (FAP) benefits were used to make a \$350 purchase at a membership warehouse retailer. Exhibit A, p 16.
3. The \$350 purchase made on May 9, 2018, was made using a business membership account registered to the owner of a convenience store. Exhibit A, pp 12-15.
4. The convenience store owner whose account was used to make the May 9, 2018 purchase is a known trafficker of Food Assistance Program (FAP) benefits. Exhibit A, pp 8-11.
5. The items purchased on May 9, 2018, with Respondent's Food Assistance Program (FAP) benefits included large amounts of candy and beverages. Exhibit A, pp 13-14.
6. The Department's OIG filed a hearing request on August 13, 2020, to establish that Respondent committed an Intentional Program Violation (IPV). Exhibit A, p 3.
7. On August 13, 2020, the Department sent Respondent an Intentional Program Violation Repayment Agreement (DHS-4350) with notice of a \$350 overpayment. Exhibit A, pp 86-87.
8. On August 13, 2020, the Department sent Respondent a Request for Waiver of Disqualification Hearing (DHS-826). Exhibit A, pp 88-89.
9. This was Respondent's first established IPV.
10. The most recent notice of hearing was mailed to Respondent on January 27, 2021 to her 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), Department of Health and Human Services Bridges Eligibility Manual (BEM), Department of Health and Human Services Reference Tables Manual (RFT), and Department of Health and Human Services Emergency Relief Manual (ERM).

The Food Assistance Program (FAP) is funded under the federal Supplemental Nutrition Assistance Program (SNAP) established by the Food and Nutrition Act of 2008, as amended, 7 USC 2011 through 7 USC 2036a. It is implemented by the federal regulations contained in 7 CFR 273. The Department administers FAP pursuant to MCL 400.10 of the Social Welfare Act, MCL 400.1 *et seq*, and Mich Admin Code, R 400.3001 through 400.3011.

The Department's OIG requests IPV hearings for the following cases:

- FAP trafficking OIs that are not forwarded to the prosecutor.
- Prosecution of welfare fraud or FAP trafficking is declined by the prosecutor for a reason other than lack of evidence, and
 - the total OI amount for the FIP, SDA, CDC, MA and FAP programs is \$500 or more, or
 - the total OI amount is less than \$500, and
 - the group has a previous IPV, or
 - the alleged IPV involves FAP trafficking, or
 - the alleged fraud involves concurrent receipt of assistance (see BEM 222), or
 - the alleged fraud is committed by a state/government employee.

Department of Health and Human Services Bridges
Administrative Manual (BAM) 720 (October 1, 2017), pp 12-13.

When a client group receives more benefits than it is entitled to receive, the Department must attempt to recoup the overissuance. Department of Human Services Bridges Administrative Manual (BAM) 700 (October 1, 2018), p 1.

Federal regulations provide the following definition of intentional program violations:

Definition of intentional program violation. Intentional program violations 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).

Respondent acknowledged her duties and responsibilities, including the duty to use FAP benefits in a manner consistent with the Food and Nutrition Act of 2008, on an application for assistance dated January 10, 2018. Respondent did not have an apparent physical or mental impairment that would limit the understanding or ability to fulfill this requirement.

On May 9, 2018, Respondent's FAP benefits were used to make a \$350 purchase at a membership warehouse retailer. This purchase was made using a business account belonging to the owner of a convenience store. The owner of the convenience store is a known trafficker of FAP benefits. The Department alleges that Respondent transferred \$350 of food items purchased with her FAP benefits to a known trafficker of FAP benefits in exchange for cash or other consideration, which fits the definition of FAP trafficking. The trafficking of FAP benefits creates an overissuance in the amount of the benefits that were trafficked.

The Department has the burden of establishing by clear and convincing evidence that the Respondent committed an Intentional Program Violation (IPV). The clear and convincing evidence standard, which is the most demanding standard applied in civil cases, is established where there is evidence so clear, direct, and weighty and convincing that a conclusion can be drawn without hesitancy of the truth of the precise facts in issue. *Smith v Anonymous Joint Enterprise*, 487 Mich 102; 793 NW2d 533 (2010), reh den 488 Mich 860; 793 NW2d 559 (2010).

Clear and convincing proof is that which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the precise facts in issue. Evidence may be uncontroverted and yet not be clear and convincing. Conversely, evidence may be clear and convincing even if contradicted. *Id.*

Trafficking includes the buying, selling, or stealing or otherwise effecting an exchange of FAP 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. Trafficking also includes attempting to buy, sell, steal, or otherwise affect an exchange of FAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signatures, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone. BAM 700, p 2.

The hearing record does not contain any direct evidence, in the form of witness statements, video or photographic evidence, or admissions from the Respondent, that the Respondent trafficked in FAP benefits. Instead, the Department's case rests wholly on circumstantial evidence.

FAP trafficking is a fraudulent transfer of benefits that must be established by clear and convincing evidence and must never be presumed. Fraud may be established by circumstantial evidence and can be inferred from the evidence with facts which are inconsistent with an honest person. See *Foodland Distributors v Al-Naimi*, 220 Mich App 453 (1996), p 381.

The Department's representative presented as a knowledgeable witness who provided a credible account of an investigation into a large purchase using Respondent's FAP benefits made using the membership account of a known trafficker of FAP benefits. The \$350 purchase made on May 9, 2018, fits a known pattern of FAP trafficking where a convenience store owner exchanges cash for food products purchased with FAP benefits that can easily be resold at a convenience store. The items purchased on May 9, 2018, included food products such as candy and beverages that could easily be resold at a convenience store.

Respondent acknowledged the duties and responsibilities of receiving FAP benefits on January 10, 2018, including the duty to make purchases using FAP benefits in a manner authorized by the Food and Nutrition Act of 2008, as amended, 7 USC 2011 through 2036a. Respondent did not have an apparent physical or mental impairment that would limit the understanding or ability to fulfill this requirement. It is the Department's practice to provide pamphlet material to eligible FAP recipients advising them that they should not buy, trade, or sell unauthorized items or benefits using FAP benefits, and that if a violation were found to have occurred, the recipient would be sanctioned, would have to reimburse any benefits obtained illegally, would be disqualified from the FAP program, and could be referred for criminal prosecution. The hearing record supports a finding that Respondent was provided with notice that engaging in FAP trafficking would constitute an intentional program violation.

As there was no credible and persuasive explanation to the contrary, and inferring the Respondent's intent from the hearing record, this Administrative Law Judge finds that Respondent committed, and intended to commit FAP trafficking, which is an intentional program violation.

A court or hearing decision that finds a client committed IPV disqualifies that client from receiving program benefits. BAM 720, p. 15-16. A disqualified recipient remains a member of an active group if the recipient lives with them, and other eligible group members may continue to receive benefits. BAM 720, p. 16.

Clients who commit an IPV are disqualified for a standard disqualification period except when a court orders a different period, or except when the OI relates to MA. BAM 720, p. 13. Refusal to repay will not cause denial of current or future MA if the client is otherwise eligible. BAM 710 (January 1, 2018), p. 2. Clients are disqualified for periods of one year for the first IPV, two years for the second IPV, lifetime disqualification for the third IPV, and ten years for a FAP concurrent receipt of benefits. BAM 720, p. 16.

The record evidence indicates that this is Respondent's first established IPV violation.


The Department has established an Intentional Program Violation (IPV).

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 established by clear and convincing evidence that Respondent committed an IPV.
2. Respondent did receive an OI of Food Assistance Program (FAP) benefits in the amount of \$350.
3. The Department is ORDERED to initiate recoupment procedures for the amount of \$350 in accordance with Department policy.
4. It is FURTHER ORDERED that Respondent be disqualified from the Food Assistance Program (FAP) for a period of 12 months.

KS/nr



Kevin Scully
Administrative Law Judge
for Elizabeth Hertel, 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

Courtney Jenkins
22 Center Street
Ypsilanti, MI
48198

Washtenaw County DHHS- via electronic
mail

MDHHS- Recoupment- via electronic mail

L. Bengel- via electronic mail

Petitioner

OIG- via electronic mail
PO Box 30062
Lansing, MI
48909-7562

Respondent

██████████ - via first class mail
████████████████████
██████████ MI
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