



GRETCHEN WHITMER
GOVERNOR

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

ORLENE HAWKS
DIRECTOR



Date Mailed: March 24, 2020
MOAHR Docket No.: 20-001488
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Amanda M. T. Marler

HEARING DECISION

Following Petitioner's request for a hearing, this matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and 400.37; 7 CFR 273.15 to 273.18; 42 CFR 431.200 to 431.250; 42 CFR 438.400 to 438.424; 45 CFR 99.1 to 99.33; and 45 CFR 205.10; and Mich Admin Code, R 792.11002. After due notice, a telephone hearing was held on March 18, 2020 from Detroit, Michigan. The Petitioner was self-represented. The Department of Health and Human Services (Department) was represented by Holly Borkowski, Eligibility Specialist, and Tracy Upshaw, Recoupment Specialist.

ISSUE

Did the Department properly determine an Agency Error Overissuance (OI) of Petitioner's 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. Petitioner was a defendant in a case involving a felony-controlled substance charge in Macomb County Circuit Court under docket number [REDACTED].
2. On May 11, 1998, docket number [REDACTED] was dismissed per a plea agreement entered in docket number [REDACTED].
3. Petitioner was a defendant in a case involving felony-controlled substance charges in the Macomb County Circuit Court under docket number [REDACTED].
4. The full disposition of [REDACTED] is unclear based upon the records presented.

5. Petitioner was a defendant in a case involving felony-controlled substance charges in the Macomb County Circuit Court under docket number [REDACTED].
6. On October 21, 2002, docket number [REDACTED] was dismissed pursuant to a plea agreement made in [REDACTED].
7. On November 9, 2005, Petitioner pled guilty to a controlled substance offense in the Macomb County Circuit Court under docket number [REDACTED].
8. On January 4, 2019, Petitioner submitted a Redetermination to the Department on which she left blank the questions asking if she had any felony drug convictions or more than one felony drug conviction.
9. On January 4, 2020, Petitioner submitted a second Redetermination to the Department on which she again left blank the same questions.
10. On February 11, 2020, the Department issued a Notice of Overissuance to Petitioner informing her that due to an Agency Error, she had received an overissuance of FAP benefits for the period February 1, 2019 through January 31, 2020 in the amount of \$2,312.00 because she had been convicted of two or more drug related felonies.
11. On February 21, 2020, the Department received Petitioner's request for hearing disputing the determination of an overissuance.

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) [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-.3011.

In this case, Petitioner disputes the Department's determination of an Agency Error OI in the amount of \$2,312.00 for the period February 1, 2019 through January 31, 2020. Client error OIs exist when a client gives incorrect or incomplete information to the Department. BAM 715 (October 2017), p. 1. Agency error OIs are caused by incorrect actions, including delays or no action, by the Department. BAM 705 (October 2018), p. 1. The Department must attempt to recoup all FAP OIs greater than \$250.00. BAM 700 (October 2018), pp. 1, 10. Policy further provides that if upon a timely hearing request,

an administrative hearing decision upholds the Department's actions, the client must repay the OI. BAM 700, p. 3. In Agency Error OI cases, the Department can only establish an OI for the period beginning the first month when the benefit issuance exceeds the amount allowed by policy, or the 12 months before the date the Overissuance was referred to the Recoupment Specialist, whichever 12 month period is later. BAM 705, p. 5. Federal Regulations also provide that in calculating a claim amount, the State Agency must calculate a claim back to at least 12 months prior to when the Agency became aware of the overpayment, but may not include any amounts that occurred more than six years before the Agency became aware of the overpayment. 7 CFR 273.18(c)(1)(i).

The Department asserts that because Petitioner left the questions blank on her Redetermination, the Department was obligated to ask Petitioner whether she had any drug-related felony convictions during the interview process but failed to do so. As a result, because the Department believes Petitioner has two drug-related felony convictions and because the Department failed to question Petitioner about her drug conviction status at Redetermination, Petitioner received an Agency Error OI.

To determine whether the Department is correct about the overissuance, first there must be an evaluation of Petitioner's felony drug conviction status.

Clients have the right to contest a Department decision affecting eligibility or benefit levels, including termination of program benefits, when the client believes the decision is incorrect. BAM 600 (October 2018), pp. 1, 5. When a hearing request is filed, the matter is transferred to the Michigan Office of Administrative Hearings and Rules (MOAHR) for a hearing before an Administrative Law Judge. BAM 600, p. 1. In preparation for the hearing, the Department is required to send to MOAHR and the client a hearing summary. BAM 600, pp. 9-10, 24. The hearing summary is required to include a clear, concise statement of the case action taken, a chronological summary of events, and citations to relevant law and policy, amongst other things. BAM 600, p. 10. Additionally, a hearing packet must be prepared to send along with the hearing summary. BAM 600, p. 10. The completed hearing packet must include, at a minimum, the relevant Notice of Case Action and a copy of all documents the Department intends to offer to support its action. BAM 600, p. 10.

At the hearing, the Department representative and client are tasked with presenting their respective cases with reference to the documents provided in the hearing packet or otherwise properly served under the Michigan Administrative Rules. BAM 600, p. 37. After hearing the evidence, the Administrative Law Judge has the duty to review the evidence presented and based on that evidence, determine whether the Department met its burden of proving that the challenged actions were taken in compliance with law and Department policy. BAM 600, p. 39.

Policy and federal regulations provide that people convicted of certain crimes and probation or parole violators are not eligible for FAP. BEM 203 (May 2018), p. 1. Effective October 1, 2011, an individual convicted of a felony for the use, possession, or

distribution of controlled substances will be permanently disqualified from receipt of FAP if (i) the terms of probation or parole are violated, and the qualifying conviction occurred after August 22, 1996, or (ii) the individual was convicted two or more times and both offenses occurred after August 22, 1996. BEM 203, p. 2. The offense must be classified as a felony by the law of the State and have as an element the possession, use or distribution (which is defined as actual, constructive, or attempted delivery) of a controlled substance. 21 USC 862a(a); 21 USC 802(8) and (11); 1997 PA 109. The disqualification does not apply if the conviction is for conduct occurring on or before August 22, 1996. 21 USC 862a(d)(2).

In support of its case, the Department presented two sets of documents outlining Petitioner's alleged drug related felony convictions. The first document is an Internet Criminal History Access Tool (ICHAT) Report. The ICHAT Report specifically states on the first page:

The record result provided is based on a data match as explained on the ICHAT home page. The ICHAT system has limitations that may cause false positives or false negatives. Please review the results carefully and do not take adverse action based solely on this record...

The report then goes on to list offenses for which Petitioner was allegedly convicted.

In addition to the ICHAT Report, the Department provided four different Case Details sheets from the Macomb County Circuit Court. In chronological order, the docket numbers for these four case detail sheets are as follows: [REDACTED], [REDACTED], [REDACTED], and finally [REDACTED].

The Case Details sheet for the 1998 case states that on May 11, 1998, this case was dismissed pursuant to a prior plea agreement in docket number [REDACTED]. No information was presented on the 1997 case other than the ICHAT. Since the ICHAT report specifically states not to rely on the information in the report when taking adverse actions and the Department did not present any other reliable information about the 1997 conviction, it may not be considered for purposes of this decision towards the count of felony related drug convictions.

Turning to docket number [REDACTED], the Case Details sheet states that this case was also dismissed pursuant to a plea agreement in docket number [REDACTED]. The dismissal was effective November 21, 2002. Therefore, this case cannot count toward the felony drug conviction count.

The Department presented a Case Details sheet from Macomb County Circuit Court for [REDACTED]. However, the Case Details sheet lists only the charges against the Petitioner and does not show whether Petitioner was convicted of the charges listed, reduced, or modified charges. There simply is not enough information to determine

whether Petitioner pled guilty to a drug-related felony or some other offense. Therefore, this case cannot count towards the felony drug conviction count.

Finally, the Department presented a Case Details sheet for [REDACTED] from the Macomb County Circuit Court. This information sheet shows that Petitioner pled no contest to count one, but counts two and three were dismissed. According to the record, count one fell under MCL 333.7413(2) "Felony Controlled Substance-2nd Offense-Double Penalty." MCL 333.7413(2) provides:

An individual convicted of a second or subsequent offense under section 7410(2) or (3) must be punished, subject to subsection (3), by a term of imprisonment of not less than 5 years nor more than twice that authorized under section 7410(2) or (3) and, in addition, may be punished by a fine of not more than 3 times that authorized by section 7410(2) or (3); and is not eligible for probation or suspension of sentence during the term of imprisonment.

Nothing in the record, shows that Petitioner was convicted under MCL 333.7410(2) or (3). Section 7410(2) and (3) require that the individual either deliver or possess with an intent to deliver a schedule 1 or schedule 2 controlled substance within 1,000 feet of a school or library which can be punished by a term of imprisonment not less than 2 years or more than 60 years. MCL 333.7410(2) and (3). However, Section 7410 is not listed anywhere as a charge under which Petitioner was convicted. The ICHAT report completely contradicts the Case Details sheet and the statute and shows that Petitioner was convicted under MCL 333.7403(2)(a)(v). Section 7403(2)(a)(v) provides that a person who possesses a controlled substance analogue in an amount less than 25 grams is guilty of a felony. MCL 333.7403(2)(a)(v). Due to the numerous questions and discrepancies created by these records, this conviction cannot be used toward the felony drug conviction count.

While Petitioner admitted that she did "these things" on the record, it is unclear what "these things" are pursuant to the evidence presented and the law. While Petitioner may have pled guilty or been convicted of drug charges, the record is unclear whether these actions, charges, or convictions were felonies or misdemeanors. Furthermore, the evidence is unclear as to the elements of each crime. Without additional documentation, the Department has not met its burden of proof by a preponderance of the evidence that Petitioner has incurred two drug-related felony convictions pursuant to policy and federal regulations which occurred after August 22, 1996.

The Administrative Law Judge, based on the above Findings of Fact and Conclusions of Law, and for the reasons stated on the record, if any, finds that the Department did not meet its burden of proof by a preponderance of the evidence that it acted in accordance with Department policy when it calculated an Agency Error OI for the period February 1, 2019 through January 31, 2020 in the amount of \$2,312.00.

DECISION AND ORDER

Accordingly, the Department's decision is **REVERSED**.

THE DEPARTMENT IS ORDERED TO BEGIN DOING THE FOLLOWING, IN ACCORDANCE WITH DEPARTMENT POLICY AND CONSISTENT WITH THIS HEARING DECISION, WITHIN 10 DAYS OF THE DATE OF MAILING OF THIS DECISION AND ORDER:

1. Delete and cease recoupment of the alleged OI for the period February 1, 2019 through January 31, 2020 in the amount of \$2,312.00.



AMTM/tlf

Amanda M. T. Marler
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

Via Email:

MDHHS-Macomb-20-Hearings
MDHHS-Recoupment
D. Sweeney
M. Holden
MOAHR

Petitioner – Via First-Class Mail:

