



FH  
[REDACTED]

**STATE OF WISCONSIN  
Division of Hearings and Appeals**

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In the Matter of

[REDACTED]  
[REDACTED]  
[REDACTED]

DECISION  
[REDACTED]

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**PRELIMINARY RECITALS**

Pursuant to a petition filed October 22, 2015, under Wis. Admin. Code §HA 3.03, to review a decision by the Dane County Department of Human Services in regard to FoodShare benefits (FS), a hearing was held on February 16, 2016, by telephone. Hearings set for November 24, 2015, January 4, 2016, and February 3, 2016, were rescheduled at the petitioner's request.

[This decision is the same as Mr. Sullivan's wife's decision, FOP/169562.]

The issue for determination is whether the Department correctly determined that the petitioner was overpaid FS from June 2013 through May 31, 2015.

There appeared at that time the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]  
[REDACTED]  
[REDACTED]

Respondent:

Department of Health Services  
1 West Wilson Street, Room 651  
Madison, Wisconsin 53703

By: [REDACTED], Overpayment Spec.  
Dane County Department of Human Services  
1819 Aberg Avenue  
Suite D  
Madison, WI 53704-6343

**ADMINISTRATIVE LAW JUDGE:**

Nancy J. Gagnon  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner (CARES # [REDACTED]) is a resident of Sauk County.

1. Prior to May 2013, the petitioner's household resided in Utah. On May 26, 2013, the petitioner's wife applied online for FS as a Wisconsin resident. She claimed a household of six persons: herself, the petitioner/husband, the child C.S., and three other children. The only income reported was the husband's income at [REDACTED]. The household was found to be eligible, and FS benefits began.

Household size

2. In August 2013, per court order, the child C.S.'s placement was changed to be 100 percent with her mother in Nevada, with the exception of holiday breaks. C.S. was no longer a household member beginning with September 2013. Per the order, she was to spend a summer break with the petitioner/husband from June 14, 2014 to the commencement of school that fall (date unspecified). The petitioner reported to the Department in September 2013 that C.S. was no longer in the household.
3. In November 2015, the petitioner's wife signed off on an electronic Six Month Review Form, which had pre-populated C.S.'s name as a household member. The petitioner's wife asserts that she telephoned the Department's Call Center to question the child's inclusion before signing off, and was told that the Department had all necessary paperwork for understanding the child's status. The petitioner's wife signed off on additional periodic review forms in April and November 2014, which showed C.S. as a household member.

Husband's income

4. The petitioner/husband's [REDACTED] income did not make the household ineligible at the time of the 2013 application. The Department's July 2, 2013 eligibility notice advised the petitioner to report within 10 days of the following month if the household monthly gross income exceeded \$3,356, as this would affect benefits. *See*, Exhibit 2E. The household income did exceed \$3,356 in June 2013, due to the husband's increased earnings (\$4,253 in June). They did not report the increased income at any time in 2013. The petitioner/husband's gross earnings exceeded the reporting threshold every month from June through December 2013. *E.g.*, \$4,625 in July, \$4,437 in August, \$4,784 in September, \$5,058 in October, \$3,600 in November and \$4,219 in December, 2013. This higher income meant that the household's monthly \$349 FS allotment was too high, thereby creating an overpayment.
5. The husband grossed the following amounts from [REDACTED] in 2014: \$4,863.17 in January, \$2,574.51 in February, \$2,955.67 in March, \$3,137.88 in April, and \$3,025.58 in May. He changed jobs and began employment with [REDACTED]. His gross wages from [REDACTED] were \$412.64 in May \$3,831.20 in June, \$3,189.41 in July, \$3,417.03 in August, \$3,725.42 in September, \$3,780.31 in October, \$4,417.16 in November, and \$3,438.32 in December.
- In 2015, his gross [REDACTED] wages were \$3,601.92 in January, \$4,467.85 in February, \$5,363.76 in March, \$4,747.10 in April and \$4,440.68 in May.
6. The petitioner and his spouse rented out a house in Utah after moving to Wisconsin. Per their tax return transcript, gross 2013 rent receipts were \$18,000, with deductible expenses being \$22,322, of which depreciation comprised \$10,371. For FS calculation purposes, depreciation is added back in to countable income. This means that for 2013, the net rental property income was \$6,049 annually/\$504 monthly for FS purposes.

Self-employment

7. The petitioner's wife had a self-employment enterprise, [REDACTED] (also d/b/a/ [REDACTED]) in Utah. She ended the business upon moving to Wisconsin in May 2013. Her Utah LLC registration for [REDACTED] expired in July 2013. She began a new self-employment business, [REDACTED] in November 2013. She did not begin profitable activity with her business in Wisconsin until 2014.

8. In 2014, the wife's self-employment business received gross self-employment receipts of \$54,622. Business expenses, other than depreciation, totaled \$49,338 (\$76,924-27,586 depreciation). For FS purposes, this left countable net self-employment income of \$5,284 annually/\$440.33 monthly in 2014.
9. From fall 2013 through September 2014, the gross income limit for a five-person household was \$4,596. If the household exceeded this limit, it was eligible for zero FS benefits. The gross income limit for a five-person household from October 2014 through September 2015 was \$4,652. In addition to the earnings and rental income referenced above, the household received child support of \$558 in December 2013, and \$583 monthly from January 2014 through June 2015.
10. On September 29, 2015, a *Foodshare Overpayment Notice* and worksheets were sent to the petitioner, advising that he had been overpaid \$15,552 in FS for the 6/1/13 – 5/31/15 period (claims [REDACTED] for \$5,910, [REDACTED] for \$9,642). Exhibit 16. The overpayment was due to client error.

## DISCUSSION

### I. AN FS OVERPAYMENT MUST BE RECOVERED, REGARDLESS OF FAULT.

If an FS overpayment occurred during the period described above, the agency must make an effort to recover it. An FS overpayment claim is defined as:

#### **273.18 Claims against households.**

(a) *General.* (1) A recipient claim is an amount owed because of:

- (i) ***Benefits that are overpaid*** or
- (ii) Benefits that are trafficked. ...

(3) As a State agency, you must develop a plan for establishing and collecting claims that provides orderly claims processing and results in claims collections ...

(4) The following are responsible for paying a claim:

(i) Each person who was an adult member of the household when the overpayment or trafficking occurred:

...

(b) *Types of claims.* There are three types of claims:

(1) An Intentional Program violation (IPV) claim is any claim for an overpayment or trafficking resulting from an individual committing an IPV. An IPV is defined in §273.16.

(2) An inadvertent household error claim is any claim for an overpayment resulting from a misunderstanding or unintended error on the part of the household.

(3) An agency error (AE) claim is any claim for an overpayment caused by an action or failure to take action by the State agency. The only exception is an overpayment caused by a household transacting an untampered expired Authorization to Participate (ATP) card .

(c) *Calculating the claim amount* – (1) *Claims not related to trafficking.* (i) As a State agency, you must go back to at least twelve months prior to when you become aware of the overpayment ...

(e) *Initiating collection actions and managing claims.*

[REDACTED]

(1) *Applicability.* State **agencies must begin collection action on all claims** unless the conditions under paragraph (g)(2) of this section apply..

7 C.F.R. §273.18(a)-(e). See also, in accord, *FS Wisconsin Handbook (FSWH)*, 7.3.1.1 (viewable at <http://www.emhandbooks.wisconsin.gov/fsh/fsh.htm>). The above is a long way of saying that when an overpayment occurs, even if caused by agency error, the overpayment must be collected. There is a one-year time limit, however, for how far back in time the agency may go if the overpayment was due to agency error.

## II. THE PETITIONER WAS OVERPAID FS FOR THE 8/1/13 – 5/31/15 PERIOD.

The first issue in this case is the determination of correct household size. The petitioner acknowledges that the child C.S. was not a household member from September 2013 forward. The agency apparently believes that the child was not in the household for June through August 2013. Because this is an overpayment case, the agency has the burden of establishing that the child was not in the household in the summer of 2013, and that burden has not been met. Thus, six was the correct number of household members from June through August 2013. Thereafter, the correct household size was five.

The petitioner's wife contends that she contacted the agency in September 2013, to report the change in the child C.S.'s status, and that the agency did not remove the child from the case. I am giving the petitioner the benefit of the doubt on this factual question, so leaving the household size at six until the next case review shall be considered agency error, on the household size question only. However, the petitioner continued to agree that the household size was six at the periodic case reviews in November 2013, April and November 2014, and again in 2015. Those repeated failures to correct the household size were not caused by the agency, so the household size/income limit should be adjusted to five effective with December 1, 2013. I did not believe the petitioner's wife's self-serving testimony that a Call Center representative told her to ignore the household size discrepancy in November 2013.

The Department's theory for beginning the FS overpayment with June 2013 appears to be based primarily on the false representation of household size theory (I accepted the wife's evidence that she closed her Utah business when moving here). Because I disagree with that theory for June – August 2013, the FS overpayment shall not start with the June or July 2013 benefits. The overpayment does begin with August 2013, however. The petitioner should have reported that the household income exceeded the reporting threshold in July, affecting August 2013 benefits. Also, the household began receiving rental property income at some point in the summer of 2013, which should have been reported.

The gross income limit for a household of six in 2013 was \$5,266. To calculate the household's income, the [REDACTED] monthly earnings are multiplied by a factor of 1.075 (2.15 for biweekly checks, 4.3 for weekly checks). See, 7 C.F.R. §273.10(c)(2). Thus, household income for August was \$5,273 ( $\$4,437 \times 1.075 = \$4,769.78, + \$504 \text{ rent}$ ), so the household was ineligible for any FS. The household income for September was \$5,646.80 ( $\$4,784 \times 1.075 = \$5,142.80, + \$504 \text{ rent}$ ), so the household was ineligible for any FS. The household income for October was \$5,941.35 ( $5,058 \times 1.075 = \$5,437.35, + \$504 \text{ rent}$ ), so the household was ineligible for any FS. The household income for November 2013 was \$4,374 ( $3,600 \times 1.075 = \$3,870, + \$504$ ), so the household may have been eligible for some reduced amount of FS. By December 2013, the household size should have been five, with a gross income limit of \$4,596. The household income for December 2013 was \$5,039.43 ( $\$4,219 \times 1.075 = \$4,535.43, + \$504$ ), so the household was ineligible for any FS.

For 2014, the husband's earnings, plus \$440.33 average monthly self-employment, plus \$583 child support, put the household over the \$4,596 gross income limit for five persons in January, May, June, and August through December, 2014. These numbers do not even include rental property income. Although

the petitioner denies getting 2014 rental income, her 2014 tax return transcript indicates otherwise. That transcript shows rental income of \$19,200, with expenses of \$22,775 (of which depreciation was \$10,869), for net rental income for FS purposes of \$7,294 annually/\$607.83 monthly. When the \$607 rental income is added to the other household income, the household of five exceeds the \$4,596 gross income limit in February, March, April, and July 2014, as well. Thus, all FS benefits issued in 2014 were an overpayment.

For 2015, the gross income limit for a five-person household was \$4,652. The petitioner contends that the Utah rental property was sold in 2015, and there is no evidence to the contrary in the record. The agency has the burden of proof (preponderance of the credible evidence) in an overpayment case. The wife also contends that she ended her self-employment. The remaining household income was the husband's January earnings of \$3,872.06 ( $\$3,601.92 \times 1.075 = \$3872.06$ ) plus \$583 child support, for household income of \$4,466.06. This amount does not exceed the limit, so it is possible that the household may have been eligible for some amount of FS in January. The earnings plus child support did put the household over the gross income limit for February, March, April and May, 2015. The case closed effective June 1, 2015, due to excess income.

Because the overpayment was caused by client error, the agency is allowed to make this recovery effort, as modified in my Conclusions below.

The petitioner also challenged the Department's BadgerCare Plus overpayment determination. Because different rules apply, that decision will be issued separately.

### **CONCLUSIONS OF LAW**

1. The petitioner was not overpaid \$698 FS ( $\$349 \times 2$ ) from June 2013 through July 2013.
2. All FS benefits paid to the petitioner for August, September, October, and December 2013, were overpayments ( $\$349 + \$349 + \$354 + \$386$ ).
3. The petitioner was overpaid some amount of FS for November 2013, based on gross household income of \$4,374.
4. All FS benefits paid to the petitioner in 2014 were recoverable overpayments, caused by client error.
5. The petitioner was overpaid some amount of FS for January 2015, based on gross household income of \$4,466.06.
6. All FS benefits paid to the petitioner from February through May 2015 ( $\$827 \times 4$ ) were recoverable overpayments, caused by client error.

**THEREFORE, it is**

**ORDERED**

That the petition is remanded to the Department with instructions to (1) cease recovery efforts regarding FS for June and July 2013, and (2) re-calculate the amount of the petitioner's FS overpayments for November 2013 and January 2015, in accord with Conclusions #3 and #5 above. These actions shall be taken within 10 days of the date of this Decision. In all other respects, the petition is dismissed.

### **REQUEST FOR A REHEARING**

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

[REDACTED]

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

### **APPEAL TO COURT**

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,  
Wisconsin, this 8th day of March, 2016

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\sNancy J. Gagnon  
Administrative Law Judge  
Division of Hearings and Appeals



**State of Wisconsin \DIVISION OF HEARINGS AND APPEALS**

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The preceding decision was sent to the following parties on March 8, 2016.

Dane County Department of Human Services  
Public Assistance Collection Unit  
Division of Health Care Access and Accountability