



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION

FOO/173248

PRELIMINARY RECITALS

Pursuant to a petition filed March 30, 2016, under Wis. Admin. Code § HA 3.03(1), to review a decision by the Manitowoc County Department of Human Services in regard to FoodShare benefits (FS), a hearing was held on May 12, 2016, at Manitowoc, Wisconsin.

The issue for determination is whether the agency properly determined that the Petitioner's children should not be included in his FS group.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:



Respondent:

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

By: [Redacted]

Manitowoc County Department of Human Services
3733 Dewey Street
Manitowoc, WI 54221-1177

ADMINISTRATIVE LAW JUDGE:

Debra Bursinger
Division of Hearings and Appeals

FINDINGS OF FACT

- 1. Petitioner (CARES # [Redacted]) is a resident of Manitowoc County.
2. Petitioner and his ex-wife [Redacted] were divorced in or about 2011. They have two minor children.
3. [Redacted] applied for FS benefits on December 21, 2011 for herself and her two minor children. On July 31, 2012, [Redacted]'s FS case was closed due to [Redacted] no longer being eligible for benefits.

4. On July 31, 2015, the Petitioner submitted an application for FS benefits. He reported a household size of three, consisting of himself and his two minor daughters. He reported that he has joint custody and 50/50 placement of his daughters. Petitioner was advised by the agency that a copy of the court order regarding his daughter’s placement is needed as verification.
5. On August 3, 2015 and August 12, 2015, the agency issued a Notice of Proof Needed requesting verification of the Petitioner’s household composition, child support payments and employment. The due date for the information was August 31, 2015.
6. On August 18, 2015, the agency issued a Notice of Decision to the Petitioner informing him that he would receive \$511/month in FS benefits effective August 1, 2015. This was based on a household size of three and \$0 in household income.
7. On August 20, 2015, the agency received a copy of the Petitioner’s marital settlement agreement. The original agreement from 2011 states that the parties have joint legal custody of the two children. It further gives primary physical placement of the children to their mother with the Petitioner “having reasonable periods of physical placement.” On August 24, 2015, the agency received an order dated June 22, 2015 revising physical placement provisions of the marital settlement agreement. According to the order, placement of the children with the Petitioner is as follows:

- A. Father will have placement on Mondays. Father will have overnight placement.
- B. On Tuesdays, Father will have placement until 7:30 p.m. during the school year and 8:30 p.m. when school is not in session. He will be responsible for getting the children to their extracurricular activities.
- C. Alternating weekends, Father will have placement from Friday to Sunday until 7:30 p.m. during the school year and until 8:30 p.m. when school is not in session. Father will be responsible for weekend transportation.
- D. Additionally, with the exceptions of holiday placement, Father will have placement Monday, Tuesday, Thursday and Friday. Mother will drop the children off at school, if school is in session, or at Father’s residence if school is not in session and pick up the children from Father’s residence when her workday ends on Thursdays and her scheduled Fridays.
- E. At all other times the children will be placed with their Mother.

Based on this order, physical placement/custody of the children with the Petitioner is as follows when school is in session:

Week 1

- Mondays 7 a.m. – Tuesdays, 7:30 p.m. 36.5 hours
- Thursdays 7 a.m. – 7:30 p.m. 12.5 hours
- Fridays 7 a.m. – 7:30 p.m. 12.5 hours
- Total Week 1 61.5 hours/168 hours in a week

Week 2

- Mondays 7 a.m. – Tuesdays, 7:30 p.m. 36.5 hours
- Thursdays 7 a.m. – 7:30 p.m. 12.5 hours
- Fridays 7 a.m. – Sundays 8:00 p.m. 61.0 hours
- Total Week 2 110.0 hours/168 hours in a week

During the summer months, the Petitioner has the children an additional 2 hours during Week 1 (Tuesdays and Fridays until 8:30 p.m.) and an additional 1.5 hours during Week 2 (Tuesdays and Sundays until 8:30 p.m.).

8. On August 21, 2015, the agency issued a Notice of Decision to the Petitioner informing him that his FS benefits would decrease from \$511/month to \$123/month effective October 1, 2015. This was based on a household size of one, unemployment compensation benefits of \$370/week, and \$700/month for mortgage expenses.
9. On October 2, 2015, the agency issued a Notice of Decision to the Petitioner informing him that his FS benefits would increase from \$128/month to \$194/month effective November 1, 2015. This is based on a household size of one, \$0 in household income and \$700/month for mortgage expenses.
10. On October 7, 2015, ■ applied for FS benefits for herself and the two children. She was approved to receive FS benefits for herself and the two minor children beginning October, 2015.
11. On November 6, 2015, Petitioner filed an appeal with the Division of Hearings and Appeals regarding the agency's determination not to place the children in his household for purposes of FS benefits. That case was designated as DHA Case No. FOO/169897. A hearing was held on December 8, 2015. On December 29, 2015, DHA issued a decision ordering the children to be included in the Petitioner's household for purposes of FS benefits.
12. The agency added the two children to the Petitioner's FS group.
13. On January 19, 2016, the agency issued a Notice of Decision to ■ informing her that effective February 1, 2016 her FS benefits would be discontinued due to the children being removed from her FS group.
14. On January 20, 2016, ■ filed an appeal with the Division of Hearings and Appeals regarding the removal of the children from her FS group. That case was designated as DHA Case No. FOO/171498. A hearing was held on February 18, 2016. On March 15, 2016, DHA issued a decision ordering the matter to be remanded to the agency to conduct an analysis according to the Wisconsin FS Handbook to determine the proper FS group for the two children.
15. On March 16, 2016, the agency contacted both the Petitioner and ■ to conduct interviews in accordance with the Wisconsin FS Handbook.
16. Based on the information it obtained, the agency determined the children should be in ■'s FS group.
17. Each parent claims one child as a dependent for tax purposes, per their agreement.
18. On March 24, 2016, the agency issued a Notice of Decision to the Petitioner informing him that his FS benefits would be decreased due to his children being removed from his FS case and added to ■'s FS group.
19. On March 30, 2016, the Petitioner filed an appeal with the Division of Hearings and Appeals.

DISCUSSION

The issue in this case is whether the Petitioner's and ■'s two children should be included in the Petitioner's FS group or ■'s FS group. Federal FS regulations state that a household is composed of a "group of individuals who live together and customarily purchase food and prepare meals together for home consumption." See 7 C.F.R. §273.1(a). This definition does not solve the problem posed by this case because the two children live with, and eat with, both of their divorced parents. The only other relevant instruction offered by the federal regulation is found in 7 C.F.R. § 273.1(c) which allows state agencies to create policies that answer questions relevant to household composition:

For situations that are not clearly addressed by the provisions of paragraphs (a) and (b) of this section, the State agency may apply its own policy for determining when an individual is a separate household or a member of another household if the policy is applied fairly, equitably and consistently throughout the State.

Wisconsin developed the following policy in its FS Handbook:

3.2.1.1 Joint or Shared Physical Custody of Children

Children are included in the household where they reside when they are under the care and control of a parent or other caretaker in that household. There may be situations when the residence of a child is not easily determined. There are many methods that can be used to determine the child's residence. If the residence of a child is questionable, court documents can be used to determine if there is a primary caretaker designated. It may be a situation of joint custody and a 50-50 custody split. If one parent is not designated as primary caretaker, the parents can be asked to decide. Individuals can only be included in one food unit.

If the parents cannot or will not decide, compare the parents' activities and responsibilities against the following list and determine which one is exercising more control than the other:

1. If the parents reside in different school districts, where does the child attend school?
Who selected the school?
2. Who assists the child with homework or school-related tasks?
3. Are there tuition costs for the child's education? If so, who pays those costs?
4. If the child is enrolled in day care, who arranges for and pays these costs?
5. Who is responsible for taking the child to and from school and/or day care?
6. Which parent is listed as the contact for emergencies at the child's school or day care provider?
7. Who arranges medical and dental care for the child? Who selects the physician and dentist?
8. Who maintains the child's medical records?
9. Who initiates decisions regarding the child's future?
10. Who responds to medical or law enforcement emergencies involving the child?
11. Who spends money on food or clothing for the child when the child visits the absent parent?
12. Who disciplines the child?
13. Who plays with the child and arranges for entertainment?
14. Are more of the child's toys, clothing, etc. kept at one parent's home than the other's?

Only one parent can receive FS for a child. If you still cannot determine which food unit the child should be in, the caretaker that first applies would be eligible. Use the best information available to make your decision, and document in case comments the basis of your determination.

FS Handbook, § 3.2.1.1.

The analysis that is required in Section 3.2.1.1 to be done by the agency to determine proper placement of children for FS purposes can be simplified as follows:

1. Use court documents to determine if a primary caretaker is designated. If there is a primary caretaker designated, the children are to be placed in the primary caretaker's FS group.
2. If no primary caretaker is designated in court documents, ask the parents to decide where the children are to be placed for FS purposes.

3. If the parents cannot or will not agree, compare the activities and responsibilities against the 14 questions listed in the policy to determine if one parent exercises more control. If there is sufficient evidence that one parent exercises more control, that parent is eligible to have the children placed in his/her FS group.
4. If the parents exercise equal control, the parent who applied first is the parent eligible to have the children placed in his/her FS group.

In this case, the court documents do not specifically designate a “primary caretaker” for the children. The documents do provide for a placement schedule for the children. There was extensive testimony regarding the placement schedule. In the end, the placement schedule and the testimony of the Petitioner and ■ demonstrate that custody and placement is essentially 50/50 between the two parents.

At the hearing, the Petitioner indicated that he was willing to split the children and have each parent with one child in the FS group. He noted that, for tax purposes, each parent claims one child as a dependent. Petitioner’s suggestion is reasonable. However, ■ indicated that she is not willing to consider this compromise.

It was undisputed that each parent claims one child as a dependent for tax purposes. In order to claim a child as a tax dependent under IRS rules, a parent must be providing more than 50% of that child’s support and the child must live with the parent more than 50% of the year. See IRS Publication #17 (2015). When, as part of the marital settlement agreement, the Petitioner and ■ decided that each would claim a child for tax purposes, they agreed that each parent was providing more than 50% support for one child and that each child was living with the parent claiming the child as a tax dependent more than 50% of the year.

Thus, although ■ may have refused to allow each parent to take one child for FS purposes when asked to do so, by agreeing to allow the Petitioner to claim one child as a tax dependent, she has already agreed that the Petitioner provides more than 50% of that child’s support and that the child lives with him more than 50% of the year. Therefore, I am remanding this matter to the agency to place the child that the Petitioner claims as a tax dependent in the Petitioner’s FS group and place the child that ■ claims as a tax dependent in ■’s FS group.

CONCLUSIONS OF LAW

The child that the Petitioner claims as a tax dependent should be included in the Petitioner’s FS group. The child that the Petitioner’s ex-wife ■ claims as a tax dependent should be included in ■’s FS group.

THEREFORE, it is

ORDERED

That this matter is remanded to the agency to take all administrative steps necessary to place the minor child that the Petitioner claims as a tax dependent in the Petitioner’s FS group in determining Petitioner’s eligibility and allotment of FS benefits. The agency shall further place the minor child that ■ claims as a tax dependent in her FS group in determining her eligibility and allotment of FS benefits. New notices of decision shall be issued to the Petitioner and ■ when the agency has made its new determinations. These actions shall be completed within 10 days of the date of this decision.

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.

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 Milwaukee,
Wisconsin, this 25th day of May, 2016

\sDebra Bursinger
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 May 25, 2016.

Manitowoc County Department of Human Services
Division of Health Care Access and Accountability