



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]

DECISION

FOP/144427

PRELIMINARY RECITALS

Pursuant to a petition filed October 09, 2012, under Wis. Admin. Code §HA 3.03, to review a decision by the La Crosse County Department of Human Services in regard to FoodShare benefits (FS), a telephone hearing was held on November 21, 2012.

The issue for determination is whether the respondent correctly determined an overissuance of FS benefits to petitioner from July 1, 2011 through June 30, 2012.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]

Respondent:

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

By: Bob Uebele

La Crosse County Department of Human Services
300 N. 4th Street
PO Box 4002
La Crosse, WI 54601

ADMINISTRATIVE LAW JUDGE:

Peter McCombs

Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Wood County.
2. The petitioner received FS as a household of four persons (self, spouse and two minor children) from at least July 1, 2011 through June 30, 2012.

3. On October 1, 2012, a *Notification of FS Overissuance* and worksheets were sent to the petitioner, advising that he had been overpaid \$8,016.00 in FS for the July 1, 2011 through June 30, 2012, period (claim # [REDACTED]). Exhibit 3. The overpayment was due to non-client error.
4. The petitioner receives taxable interest income, which was erroneously excluded from petitioner's FS budget at the time of initial application.
5. The case came up for an annual review in May, 2012, at which time the county agency noted its error in excluding the taxable interest income. See, Exhibit 3.
6. The overpayment was subsequently calculated and notification of the overpayment was issued.

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. Trafficking is defined in 7 CFR 271.2.

(2) This claim is a Federal debt subject to this and other regulations governing Federal debts. The State agency must establish and collect any claim by following these regulations.

(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 similar to recent national rates of collection. If you do not meet these standards, you must take corrective action to correct any deficiencies in the plan.

(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;
- (ii) A person connected to the household, such as an authorized representative, who actually traffics or otherwise causes an overpayment or trafficking.

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

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

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

(3) Agency error (AE) claim any claim for an overpayment caused by an action or failure to take action by the State agency.

(c) Calculating the claim amount — (1) Claims not related to trafficking.

- (i) As a State agency, you must calculate a claim back to at least twelve months prior to when you become aware of the overpayment for an IPV claim, the claim must be calculated back to the month the act of IPV first occurred for all claims, don't include any amounts that occurred more than six years before you became aware of the overpayment.

(ii) The actual steps for calculating a claim are ...

(A) determine the correct amount of benefits for each month that a household received an overpayment

(B) do not apply the earned income deduction to that part of any earned income that the household failed to report in a timely manner when this

act is the basis for the claim the claim is an AE claim apply the earned income deduction.

(C) subtract the correct amount of benefits from the benefits actually received. The answer is the amount of the overpayment this answer is zero or negative dispose of the claim referral.

(D) reduce the overpayment amount by any EBT benefits expunged from the household's EBT benefit account in accordance with your own procedures. The difference is the amount of the claim you are not aware of any expunged benefits the amount of the overpayment calculated in paragraph (c)(1)(ii)(C) of this section is the amount of the claim.

...

(e) Initiating collection action and managing claims— (1) Applicability. State agencies must begin collection action on all claims ...

7 C.F.R. §273.18(a)-(c) and (e). See also, in accord, *FS Wisconsin Handbook (FSWH)*, 7.3.1 (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. The agency may look back six years to collect on client error cases, and one year from the month of discovery to collect on agency error cases. *Id.*, FSWH § 7.3.1.

II. FS OVERISSUANCE DURING THE JULY 1, 2011, THROUGH JUNE 30, 2012, PERIOD.

Petitioner testified at hearing that he did not have experience with public assistance programs, and that he only intended to seek medical assistance when he first met with his case worker. He explained that he provided all requested income information to the agency at the time that he applied, and that he trusted the agency to correctly determine his budget thereafter. He indicated, and the record before me bears this out, that his case worker advised him to apply for FS benefits, as his income would make his household applicable. Case Comments dated June 7, 2011, reflect that,

Face to face interview for BC [BadgerCare] ... All income reported was taxable interest, he sold the rental units in 2010 so did not count income on Schedule E. The 4797 reflected income, per 4.3.3.3 Capital Gains...when self-employment is terminated and the business is sold, the sale of property essential to self-employment is considered an asset and therefore excluded. Updated unearned income (interest income) to reflect zero/ ran agec/ confirmed new fs [FoodShare] amount. ...

Exhibit 3, p. 5. Following an annual review of petitioner's case in May of 2012, the county agency was concerned that petitioner's interest income should have been counted originally, and it contacted the Department of Health Services for guidance. At hearing, the respondent submitted email correspondence by and between Tom Miller, Supervisor of the Western Region for Economic Assistance Consortium, and Rebecca David, an employee of the Department of Health Services. Exhibit 3, p. 16. In an email dated October 8, 2012, Ms. David wrote:

... I have looked at the case and into ECF, 2011 taxes as well as 2012 taxes both have Interest Income listed for the Household. Interest Income is included for the Food Share budget (FSH 4.3.4.2 #2). ...

When you are referring to FSH 4.3.3.3, this is specifically for Capital and Ordinary Gains, 4797 from taxes and line 14 on the 1040 individual income tax return, when self-employment is terminated and the business is sold, the sale of the essential property is considered an asset and therefore excluded.

Id. Ms. David was not called as a witness at the hearing, and was therefore not available for questioning on her opinion. I find this notable, in light of the fact that the petitioner's case worker initially found that petitioner's taxable interest income arose from the termination of self-employment and sale of the business; as such the sale of property essential to self-employment was considered an asset and therefore excluded. Ms. David subsequently contradicted that by finding that this interest income should be included. However, her email does not expand upon this opinion or otherwise fully explain why her opinion is correct and the county worker was not. Specifically, neither the email nor the record reveals the nature of the unearned interest income. Does the interest income pertain to the sale of the business and/or business assets? Does the interest pertain to the sale of petitioner's business via an installment contract? If so, are the payments on that contract interest-only, or does a portion of those payments apply to principal? If so, what affect would that have on the inclusion of all, or only a portion, of the interest income to petitioner's unearned income?

I am concerned that the agency's evidence of Ms. David's opinion is hearsay because the person making the statements was not subject to questioning. While the rules of evidence generally do not apply to administrative hearings, administrative decisions cannot be based solely upon uncorroborated hearsay. *See, Wis. Stat. § 227.45, Village of Menomonee Falls v. DNR*, 140 Wis. 2d 579 (Ct. App. 1987). Our state supreme court reinforced this principle in *Gehin v. Wisconsin Group Insurance Board*, 2005 WI 16, a decision that overturned a finding based upon untestified to medical records that were contradicted by petitioner's sworn testimony. The court's rationale is that "the purpose of allowing the admission of hearsay evidence is to free administrative agencies from technical evidentiary rules, but at the same time this flexibility does not go so far as to justify administrative findings that are not based on evidence having rational probative force." *Id.* at ¶54.

Reviewing the remaining evidence for rational probative force reveals further problems with the respondent's case. The FS overpayment worksheets are intended to illustrate the calculation of the overpayment alleged by the respondent. Unfortunately, the worksheets are incomplete. Commencing with September, 2011, and continuing through June, 2012, no "corrected" unearned income is included in the worksheets' "CORR BUDGET" monthly columns. Yet, the "CORR BUDGET" monthly columns reflect "0.00" at line 19, Allotment Amount, and \$668.00 at line 22, Total Benefit Amount. This results in a calculation of an overpayment where line 19 is subtracted from line 22. Where there is no indication of a corrected budget figure for unearned income purposes, it is impossible to verify from this form whether or not petitioner's income exceeded the Gross or Net Income Limits for a four person household; nor does it provide any evidence sustaining the respondent's overpayment calculations. If I divide petitioner's 2011 gross income (line 22 of his 2011 1040 federal tax form) by 12 months, the monthly gross is approximately \$3,270.00. This does not exceed the gross income limits indicated by the worksheets.¹

The overpayment worksheets do include Unearned Income figures in the monthly "CORR BUDGET" columns for the months of July and August of 2011. No testimony was provided as to why corrected budget figures were not extended past August. The July and August 2011 corrected budget column calculations determine petitioner's household net income to exceed the net income limit, and therefore render petitioner ineligible for FS benefits. No other months' net income calculations were completed, and as such the worksheets do not verify the correct amount of benefits for each month that a household received an overpayment, as required by 7 C.F.R. §273.18(c)(ii)(A). Respondent submitted a written summary, which stated, in part:

The household received \$668 per month from July 1, 2012 to June 30, 2012 (12 months).
The total benefits for these 12 months was \$8,016.

¹ The gross income limit for July, 2011-September, 2011 is specified as \$3,676.00; the gross income limit for October 2011, through June, 2012 is specified as \$3,726.00.

... The Agency incorrectly disregarded the client's taxable income of \$3,197 per month. If the agency had correctly included this income, FoodShare would have been denied for the entire 12 months.

Exhibit 3, p. 4. Unfortunately, I do not know who authored this summary, though Mr. Uebele testified to its accuracy. However, even taken at face value, it does not constitute probative evidence confirming that the agency's calculations are correct. It is a summary of the agency's position, no more, no less. At a basic level, \$668 times 12 equals \$8,016. That simple equation does not constitute proof that the agency got its calculations right.

As a result of the foregoing, I am unable to conclude that the county agency has proven that it has properly and correctly established an FS overissuance to petitioner in this matter. While I do have the skeletal calculations concerning July and August of 2011, I find that the respondent has failed to demonstrate that it has correctly determined that the interest income here or any part thereof, must be included in petitioner's household budget, and has further failed to demonstrate that it properly calculated an FS overissuance in the instant matter.

CONCLUSIONS OF LAW

1. The respondent has failed to establish that it correctly determined that the petitioner's unearned interest income, or any part thereof, must be included in petitioner's household budget.
2. The respondent has failed to prove that it properly calculated an FS overissuance in the instant matter.

THEREFORE, it is

ORDERED

That this matter be remanded to the respondent to rescind the overpayment assessed per Claim No. [REDACTED] in the amount of \$8,016.00. This action shall be completed within 10 days following issuance of the Decision.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found 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 served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Madison,
Wisconsin, this 29th day of November, 2012

\sPeter McCombs
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 November 29, 2012.

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