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[REDACTED]

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

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In the Matter of

[REDACTED]

DECISION

FOP/144487

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**PRELIMINARY RECITALS**

Pursuant to a petition filed October 17, 2012, under Wis. Admin. Code §HA 3.03, to review a decision by the Burnett County Department of Social Services in regard to FoodShare benefits (FS), a hearing was held on November 27, 2012, at Siren, Wisconsin.

The issue for determination is whether the petitioner must repay an alleged overpayment of FoodShare.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]

Respondent:

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

By: Carolyn Carroll

Burnett County Department of Social Services  
7410 County Road K, #280  
Siren, WI 54872

**ADMINISTRATIVE LAW JUDGE:**

Michael D. O'Brien

Division of Hearings and Appeals

**FINDINGS OF FACT**

1. The petitioner (CARES # [REDACTED]) is a resident of Burnett County.
2. The petitioner lives with her boyfriend. They have at least one child in common and purchase and prepare food together. There are a total of six persons in the household.

3. The county agency alleges that the petitioner and her boyfriend were overpaid \$2,188 in FoodShare from May through August 2012 because the income he received after returning to work in March 2012 was not counted when determining their benefits.
4. The petitioner's boyfriend earned a total of \$11,175 from March through August 2012 that the agency did not consider when determining their benefits. These wages varied throughout the period and included overtime.
5. The county agency assumed that the earned income was the same each month.
6. The county agency's worksheet indicates that the petitioner's boyfriend did not earn any money in July or August 2012.

### DISCUSSION

Federal regulations require state agencies to “establish a claim against any household that has received more [FoodShare] benefits than it is entitled to receive.” 7 CFR § 273.18(a). This regulation requires the agency to recover all FoodShare overpayments regardless of whose error caused the overpayment. The amount of a FoodShare allotment depends upon net income and the number of persons in the household. The county agency contends that the petitioner's household received \$2,188 more FoodShare than it was entitled to from May through August 2012 because the agency did not count income her boyfriend earned after returning to work in March 2012. He contends that he reported this to the Great Rivers Consortium two days after returning to work, which is believable because at the hearing he provided the phone number he called from his cell phone. Nevertheless, because the agency must recover all incorrectly paid benefits, this does not prevent its action.

Still, the agency must prove that it is entitled to recover the amount it says is due. Agencies are instructed when determining an overpayment to “[o]nly use the income and expenses reported or required to be reported for each month of the adjustment period.” *FoodShare Wisconsin Handbook*, § 7.3.2.1. The petitioner was required to report the change in income by the 10<sup>th</sup> day of the month following her boyfriend's return to work, which the preponderance of the credible evidence indicates that he did. *FoodShare Wisconsin Handbook*, § 6.1.1.2.; 7 CFR § 273.12. They would then have 10 more days to verify that income. *FoodShare Wisconsin Handbook*, § 1.2.1; 273.2(f). Changes that reduce benefits generally do not go into effect until the agency has had adequate time to process a negative notice. *FoodShare Wisconsin Handbook*, § 6.1.3.6.; 7 CFR 273.12(c)(2)(i).

When determining earned income, the agency must count “income only for the month in which it is received.” *FoodShare Wisconsin Handbook*, § 4.3.2. This is based on the simple premise that the less money a person has at any particular time, the less she can spend on food. When determining future benefits, the agency must always make an educated guess about a recipient's income based upon her past and current circumstances. When recovering an overpayment, it generally is no longer necessary to guess at what the recipient earned—assuming the agency can gather sufficient information about her income during the alleged overpayment period.

The total amount the petitioner's boyfriend earned during the relevant period is not in doubt, but the evidence the agency and its investigator, O'Brien & Associates, submitted at the hearing is insufficient to prove that she owed \$2,188. The only documentation was blurry and unreadable, and no one could explain how the agency determined the amount of the overpayment. After the hearing, the agency submitted worksheets prepared by O'Brien & Associates breaking down the overpayment month by month, but these too are deficient because they assume that the petitioner's boyfriend earned the same amount of money each month when the testimony indicated that inconsistent overtime caused his income to vary throughout the period. The inconsistency of his income is important because the agency determined that his average income made the petitioner ineligible during all four months of the overpayment period. This means that any additional income in any particular month would not lead to a

greater overpayment during that month but that less income might allow her to be eligible, which would lead to a smaller overpayment in that month. It does not appear that the agency or O'Brien & Associates made any attempt to obtain the monthly earned income figures.

Although the agency has not established that the petitioner owes \$2,188, it is clear that she owes something because her household income averaged about \$2,100 a month more than the agency used to determine her allotment. The agency's overpayment correctly determined that although her boyfriend began working in March, it cannot collect any overpayment until May because that is when her full allotment would have ended after considering the time needed to process a negative notice. But the overpayment should be based upon her household's actual income during the remaining months in question. It is unclear what that income was in May and June because of the average used by the agency. In July and August, the agency's own worksheet submitted after the hearing indicates that he did not earn any money, so their total household income returned to what it was before he became employed. This means that the household income was the same as that used to determine the benefits she actually received. As a result, she was not overpaid FoodShare in those months.

I am going to remand this matter to the agency with instructions to end its attempts to recover FoodShare provided in July and August 2012 and to redetermine the FoodShare overpayment for May and June 2012 using the petitioner's actual household income during this period. The petitioner must cooperate with the agency to ensure that it receives adequate documentation of her boyfriend's earned income. If the time he requires to document this income causes the agency to take more than 10 days to determine the new amount of the overpayment, she should request that the Division of Hearings and Appeals leave the record open by calling 715-836-4901,

### **CONCLUSIONS OF LAW**

1. The petitioner did not receive an overpayment of FoodShare in July and August 2012 because her household income was the same as the amount the agency used to determine his benefits.
2. The agency incorrectly determined the amount of the petitioner's FoodShare overpayment for May and June 2012 because it did not base that overpayment on her household's actual income.

**THEREFORE, it is**

### **ORDERED**

That this matter is remanded to the county agency with instructions that within 10 days of the date of this decision it end its attempts to recover FoodShare provided to the petitioner's household in July and August 2012 and that it redetermine the amount of the overpayment in May and June 2012 by calculating that overpayment based upon the petitioner's actual household income during those months. The petitioner shall cooperate with the agency in providing any documentation it requires to determine her actual income during those months. If she disagrees with the agency's calculations, she may file a new appeal, but she may not relitigate the underlying finding that she must repay benefits received as a result of the agency's error.

### **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 12th day of December, 2012

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\sMichael D. O'Brien  
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 December 12, 2012.

Burnett County Department of Social Services  
Public Assistance Collection Unit  
Division of Health Care Access and Accountability