



FH
[REDACTED]

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

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

FOP/142646

PRELIMINARY RECITALS

Pursuant to a petition filed July 25, 2012, under Wis. Admin. Code §HA 3.03, to review a decision by the Brown County Human Services in regard to FoodShare benefits (FS), a hearing was held on October 10, 2012, at the Division of Hearings and Appeals (DHA) at Madison, Wisconsin. At the request of petitioner, a hearing set for August 28, 2012 was rescheduled. Attorney Hooker sent an October 26, 2012 letter to DHA confirming that Attorney Flanigan had stipulated to the accuracy of the “dollar amounts” for the Medical Assistance, FoodShare, and Child Cared Overpayments to be respectively \$29,342.49 (MA), \$16,287 (FS), and \$51,693.92 (CC). At the request of the parties, the record was held open for the Department’s initial brief, the Petitioner’s Responsive brief and the Department’s Reply brief to be submitted to DHA and the other party. Both parties timely submitted both of their briefs to DHA which are received into the hearing record. At the end of the hearing, both parties stipulated that all Department and Petitioner Exhibits are received into the hearing record without any objection.

The issue for determination is whether the county agency was correctly seeking recovery of FoodShare (FS) overpayments to the petitioner during the total period of April 1, 2006 through May 31, 2012 in the total amount of \$16,287, due to petitioner’s failure to timely report to the county agency her accurate household composition ([REDACTED] [REDACTED]) and Mr. [REDACTED]’s earned income which should have been included in her FS eligibility and benefit determinations.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

Attorney Elizabeth Kremer Flanigan
Hanaway Ross Law Firm
345 South Jefferson Street
Green Bay, WI 54301-4522

Respondent:

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

By: Attorney Kristine M. Hooker
 Deputy Corporation counsel
 305 E. Walnut Street
 P.O. Box 23600
 Green Bay, WI 54305-3600

ADMINISTRATIVE LAW JUDGE:
 Gary M. Wolkstein
 Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Brown County who resides with her two children.
2. The petitioner has two children in common with her boyfriend, [REDACTED].
3. Prior to April, 2006, petitioner applied for FoodShare, Medical Assistance and Child Care benefits as a single parent with her two children.
4. The petitioner received FoodShare (FS) benefits for the entire period of April, 2006 through May, 2012.
5. During the initial application process and during every biannual review between April, 2006 and March, 2012, petitioner maintained both orally and in writing that she lived alone with her two minor children and claimed that their father, [REDACTED], resided with his mother, [REDACTED]. See Exhibits 4.
6. During the overpayment period, [REDACTED] paid no monthly rent to his mother and has no lease or any other contract with his mother as a rental agreement. Testimony of [REDACTED].
7. During his hearing testimony, [REDACTED] admitted that he drives without a license and admits that he know that such driving is illegal. He also admitted that he lied to Sargent Jossart both verbally and in his Statement. See Exhibit 2A.
8. The petitioner met [REDACTED] in 2002, she confirmed that from September, 2003 to September, 2004 she lived with Mr. [REDACTED] in Green Bay during which time their first child was born.
9. Petitioner alleged that due to “incompatibility” with [REDACTED], he moved back in with his mother ([REDACTED]) at [REDACTED]. Despite the alleged incompatibility, petitioner and Mr. [REDACTED] had a second child together during 2005.
10. During 2008, Mr. [REDACTED] signed as co-applicant petitioner’s application for a rental lease at [REDACTED]. The landlord was [REDACTED].
11. During an April 22, 2012 interview, Mr. [REDACTED] told officer Jossart that petitioner lived with her boyfriend ([REDACTED]) at [REDACTED].
12. In his April 19, 2012 signed Statement to Brown County Sheriff’s Department Sargent Jossart, [REDACTED] stated the following in pertinent part: “. . . I drive a green Dodge Caravan which is registered to my fiancé [REDACTED]. I work at [REDACTED] out in Oneida and have been there 6 1/2 years. [REDACTED] and I have been together almost 9 years. **We’ve lived together the whole time we’ve been together and we have a daughter whose 8 years old and a son whose** 4. . . .” (Emphasis added) See Exhibit 1, page 9.
13. During about April, 2009, petitioner moved to [REDACTED]. Mr. [REDACTED] again signed as co-applicant petitioner’s application for a rental lease at that location. Her new landlord was Mr. [REDACTED].

14. Mr. ██████ told Sargent Monica Jossart that “Ms. ██████ requested to be the only one listed on the lease even though her boyfriend would be staying with her too.” See Incident Report, p5.
15. Mr. ██████ lived with the petitioner during the period she resided at ██████.
16. In October, 2010, petitioner purchased her own home at ██████ with a \$3,000 loan from her father. Mr. ██████ performed yard work, spent time with their children, and did off jobs around the house.
17. Mr. ██████’s Dodge minivan vehicle was registered at the petitioner’s address.
18. In his April 19, 2012 statement to Officer Jossart, he confided that he alleged that he earlier lied to the officer due to his criminal past and his fear of being wrongfully accused of theft.
19. Due to a 2012 county fraud hotline tip, the county agency began investigating that the father of petitioner’s two children (█████ ██████) had been residing with petitioner for the past six years, and that his income had not been timely reported to the county agency.
20. On July 12, 2012, the county agency sent a written Notification of FS Overissuance to petitioner informing that she was overissued \$481.00 in FS benefits from April 1, 2006 to December 31, 2006, due to petitioner’s failure to report accurate household members (her boyfriend, ██████ ██████) in the home) and Mr. ██████’s earned income.
21. On July 12, 2012, the county agency sent a written Notification of FS Overissuance to petitioner informing that she was overissued \$1,440 in FS benefits from January 1, 2007 to December 31, 2007, due to petitioner’s failure to report accurate household members (her boyfriend, ██████ ██████) in the home) and Mr. ██████’s earned income.
22. On July 12, 2012, the county agency sent a written Notification of FS Overissuance to petitioner informing that she was overissued \$3,580 in FS benefits from January 1, 2008 to December 31, 2008, due to petitioner’s failure to report accurate household members (her boyfriend, ██████ ██████) in the home) and Mr. ██████’s earned income.
23. On July 12, 2012, the county agency sent a written Notification of FS Overissuance to petitioner informing that she was overissued \$3,443 in FS benefits from January 1, 2009 through December 31, 2009, due to petitioner’s failure to report accurate household members (her boyfriend, ██████ ██████) in the home) and Mr. ██████’s earned income.
24. On July 12, 2012, the county agency sent a written Notification of FS Overissuance to petitioner informing that she was overissued \$3,204 in FS benefits from January 1, 2010 to December 31, 2010, due to petitioner’s failure to report accurate household members (her boyfriend, ██████ ██████) in the home) and Mr. ██████’s earned income.
25. On July 12, 2012, the county agency sent a written Notification of FS Overissuance to petitioner informing that she was overissued \$3,061 in FS benefits from January 1, 2011 to December 31, 2011, due to petitioner’s failure to report accurate household members (her boyfriend, ██████ ██████) in the home) and Mr. ██████’s earned income.
26. On July 12, 2012, the county agency sent a written Notification of FS Overissuance to petitioner informing that she was overissued \$1,078 in FS benefits from January 1, 2012 to May 31, 2012, due to petitioner’s failure to report accurate household members (her boyfriend, ██████ ██████) in the home) and Mr. ██████’s earned income.
27. ██████ ██████ has been employed by ██████ ██████, Inc. since March 1, 2006. He has worked 40 hours per week and his current pay rate is \$16 per hour.
28. State wage records confirmed ██████ ██████’s earned income for ██████ ██████, Inc. during the entire FS overpayment period of April 1, 2006 through May 31, 2012.

29. [REDACTED] [REDACTED]'s earned income was not included in determining petitioner's FS eligibility and benefits for the entire FS overpayment period of April 1, 2006 through May 31, 2012 creating petitioner's FS overpayment.
30. The FS gross income limit for a household of three was the following: a) \$2,682 from April 2006 through September, 2006; b) \$2,768 from October, 2006 through September, 2007. The FS gross income limit for a household of four was the following: a) \$3,442 from October, 2007 through September, 2008; b) \$3,534 from October, 2008 through September, 2009; c) \$3,676 from October, 2009 through September, 2011; and \$3,726 from October, 2011 through May, 2012.
31. The petitioner's monthly household income (total household income including [REDACTED] [REDACTED]'s earned income) was above the FS gross income eligibility limits for the entire FS overpayment period.
32. The county agency discontinued the petitioner's FS case effective June 1, 2012.

DISCUSSION

The Department is required to recover all overpayments of public assistance benefits. An overpayment occurs when an FS household receives more FS than it is entitled to receive. 7 C.F.R. §273.18(a). The federal FS regulations provide that the agency shall establish a claim against an FS household that was overpaid, even if the overpayment was caused by agency error. 7 C.F.R. §273.18(a)(2)(emphasis added).

Those regulations also provide, in relevant part, as follows:

- (a) Establishing claims against households. All adult household members shall be jointly and severally liable for the value of any overissuance of benefits to the household. The State Agency shall establish a claim against any household that has received more food stamp benefits than it is entitled to receive . . .

7 CFR § 273.18. The FS Handbook similarly provides that an adult is a person who is 18 years old or older and a member of the food unit at the time the overpayment occurred is liable for repayment of any overissued FS benefits. FS Handbook § 7.3.1.2. All nonexempt income must be budgeted in determining FS. 7 C.F.R. § 273.9(b). As a result, petitioner and [REDACTED] [REDACTED] were jointly and severally liable for this FS overpayment.

In this case, the county agency proved by the preponderance of the evidence that the basis for the overpayment was client error. The county agency correctly determined that [REDACTED] [REDACTED] was part of the petitioner's food unit, and that his income had not been used to determine her FS eligibility which, in turn, gave rise to the FS overpayments during the period of April 1, 2006 through May 31, 2012. The county representative indicated that petitioner and Mr. [REDACTED] were incorrectly awarded total FS benefits of \$16,287 because the total accurate income of petitioner and Mr. [REDACTED] would have placed the household over the gross income limit for all of the FS overpayment period.

During the October 10, 2012 hearing, the county agency clearly established with its three credible witnesses and its extensive exhibits that the petitioner received FoodShare, Medical Assistance, and Child Care overpayments. The county's third and last witness was Sargent Monica Jossart. Ms. Jossart is an experienced investigator whose testimony at the hearing was very convincing. She testified in significant detail about her investigation and interviews, and demonstrated a very good memory for even small details of her investigation. See Exhibit 1, 8 page, detailed investigation report. Sargent Jossart testified in detail regarding the many documents and statements which established that [REDACTED] [REDACTED] had been residing with the petitioner during the entire FS overpayment period of April 1, 2006 through May 31, 2012. See Exhibits 1 and 2.

In his statement to Sargent Jossart, [REDACTED] [REDACTED] admitted that he did reside with the petitioner during the entire overpayment period of April 1, 2006 through May 31, 2012. See Finding of Fact #12 and Exhibit 2A. He also admitted that he had read his statement and that he signed it. However, during the hearing, [REDACTED] attempted with almost complete lack of credibility to "explain" why he had signed the Exhibit 2A Statement. In fact, [REDACTED] admitted that he knew that lying to a police officer was a crime, but nevertheless contended that his signed statement (Ex 2A) was a lie because he was only attempting to establish an alibi for himself regarding a possible criminal charge.

During the hearing, the petitioner testified with many explanations and allegations for why she contended [REDACTED] did not live with her during the overpayment periods in question. Her testimony was not credible, and she was unable to provide any reliable evidence to refute the county's case. During the testimony of Mr. [REDACTED] and his mother, they both at first alleged that [REDACTED] had made some \$200 payments as rent payments. However, such testimony appeared entirely unconvincing as both admitted they had no receipts or documents whatsoever to confirm any rent payment by [REDACTED] to his mother. Moreover, [REDACTED]'s mother admitted her bias under cross examination that she would do or say what was necessary to protect [REDACTED] or the petitioner.

During the hearing and in her brief, Attorney Flanigan made a zealous effort to undermine the county's case, and to attempt to establish some basis for why the county agency was incorrectly seeking recovery of the overpayments. In her brief, Ms. Flanigan inaccurately asserted that the county agency has a "clear and convincing" burden of proof to establish its overpayments against the petitioner. However, she failed to provide any legal authority for such incorrect assertion. Attorney Hooker correctly responded that the accurate standard of proof in overpayment cases is preponderance of the evidence. Hagerstein V. Wisconsin Department of Health and Family Services, 292 Wis. 2d 697,709, 715 N.W.2d 645, 651 (Ct. App. 2006). It appears that Ms. Flanigan mistakenly confused the standard of proof for these overpayment case with the higher standard of proof required in intentional program violation (IPV) cases.

In order for the county agency to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit an intentional program violation per 7 C.F.R. §273.16(e)(6).

"Clear and convincing evidence" is an intermediate standard of proof which is more than the "preponderance of the evidence" used in most civil cases and less than the "beyond a reasonable doubt" standard used in criminal cases. It is used in civil cases where a higher standard is required because the outcome could result in serious social consequences for, or harsh effects on an individual. See 32A C.J.S., Evidence §1023. While the terminology for this intermediate standard of proof varies from state to state, it is clear that it is what is required by the FS regulations. See Jackson v. State, 546 So.2d 745 (Fla. App. 2 Dist. 1989). However, the instant case is not an IPV case but an overpayment case. Therefore, the correct burden of proof is preponderance of the evidence.

Despite her attorney's efforts, the petitioner's case and witnesses failed to undermine the county's overpayment cases. During the October 10, 2012 hearing, petitioner was unable to present any reliable evidence to refute or undermine in any significant way the county's witnesses and substantial, reliable testimony or evidence that [REDACTED] [REDACTED] resided with the petitioner and their children during the entire FS overpayment period. Therefore, Mr. [REDACTED]'s earned income must be budgeted as income in determining petitioner's FS eligibility and benefits. The petitioner's corrected household's total income was above the FS gross income limit for a household of three or four for the entire FS overpayment period thereby creating the FS overpayment during the entire period of April 1, 2006 through May 31, 2012, pursuant to the FoodShare Handbook, sec. 8.1.2.

The petitioner did not contest that her FS household had received FS benefits during the period of April 1, 2006 through May 31, 2012. Furthermore, the petitioner was unable to offer any reliable evidence to refute the accuracy of the county agency's FS overpayment determinations. Nevertheless, petitioner contended that it was unfair that the county agency was seeking to recover the FS overpayment. However, controlling federal regulation requires establishment of a claim against a household for a FS overpayment regardless of whose error caused the overpayment to occur: "The State agency shall establish a claim against any household that has received more food stamp benefits than it is entitled to receive . . ." 7 C.F.R. § 273.18(a); see also FoodShare Wisconsin Handbook, Appendices 7.3.1.9 and 7.3.1.1. Accordingly, for the above reasons, I must conclude that petitioner was overissued during the total period of April 1, 2006 through May 31, 2012 in the total amount of \$16,287, due to petitioner's failure to timely report to the county agency her accurate household composition (██████████ and her boyfriend's earned income which should have been included in her FS eligibility and determination.

CONCLUSIONS OF LAW

The county agency was correctly seeking recovery of FoodShare (FS) overpayments to the petitioner during the total period of April 1, 2006 through May 31, 2012 in the total amount of \$16,287, due to petitioner's failure to timely report to the county agency her accurate household composition (██████████) and Mr. ██████████'s earned income which should have been included in her FS eligibility and benefit determinations.

THEREFORE, it is

ORDERED

The petition for review herein be and the same is hereby Dismissed.

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 April, 2013

\sGary M. Wolkstein
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 April 12, 2013.

Brown County Human Services
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Division of Health Care Access and Accountability
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