



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]

PROPOSED DECISION

FOP/142952

PRELIMINARY RECITALS

Pursuant to a petition filed August 08, 2012, under Wis. Admin. Code §HA 3.03, to review a decision by the Milwaukee Enrollment Services in regard to FoodShare (FS) benefits, a hearing was scheduled to take place on September 18, 2012. Following petitioner's request that the hearing be rescheduled, a telephone hearing was held on October 10, 2012.

The issue for determination is whether Milwaukee Enrollment Services (respondent) erred when it established an overpayment claim and did not consider petitioner's request for compromise of that claim due to financial hardship.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]

Petitioner's Representative:

Attorney Patricia DeLessio
230 West Wells Street, Room 800
Milwaukee, WI 53203

Respondent:

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

By: Pamela Hazely
Milwaukee Enrollment Services
1220 W Vliet St
Milwaukee, WI 53205

ADMINISTRATIVE LAW JUDGE:

Peter McCombs
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County.
2. Petitioner received FS during the months of December, 2011, through August, 2012.
3. During the months of December, 2011, through August, 2012, petitioner was a full-time student at [REDACTED], and was working fewer than twenty hours per week.

4. Due to agency error, information regarding petitioner's hours of employment was incorrectly entered, resulting in a determination that petitioner was eligible for benefits. The error was discovered in July, 2012. On July 30, 2012, respondent informed petitioner that her FS benefits would end on September 1, 2012.
5. On July 31, 2012, respondent informed petitioner that she was overpaid \$1,612.00 in FS benefits from December 30, 2011, through August 31, 2012, due to agency error, as identified by overpayment Claim No. [REDACTED]

DISCUSSION

The Department is required to recover all FS overpayments. An overpayment occurs when an FS household receives more FS benefits than it is entitled to receive. 7 C.F.R. §273.18(c). 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(b)(3). All adult members of an FS household are liable for an overpayment. 7 C.F.R. §273.18(a)(4); FS Handbook, Appendix 7.3.1.2.

In a Fair Hearing concerning the propriety of an overpayment determination, the county agency has the burden of proof to establish that the action taken by the county was proper given the facts of the case. The petitioner must then rebut the county agency's case and establish facts sufficient to overcome the county agency's evidence of correct action.

As a general proposition, the federal FS rules declare that a person aged 18 to 49, who is enrolled in an institution of higher education, is ineligible to receive FS. This general prohibition is stated in Code of Federal Regulations:

§273.5 Students

- (a) Applicability. An individual who is enrolled at least half-time in an institution of higher education shall be ineligible to participate in the Food Stamp Program unless the individual qualifies for one of the exemptions contained in paragraph (b) of this section. An individual is considered to be enrolled in an institution of higher education if the individual is enrolled in a business, technical, trade or vocational school that normally requires a high school diploma or equivalency certificate for enrollment in the curriculum ...
- (b) Student Exemptions. To be eligible for the program, a student as defined in paragraph (a) of the section must meet at least one of the following criteria.
 - (1) Be age 17 or younger or age 50 or older;
 - (2) Be physically or mentally unfit;
 - (3) Be receiving Temporary Assistance for Needy Families under Title IV of the Social Security Act;
 - (4) Be enrolled as a result of participation in the Job Opportunities & Basic Skills program under Title IV ...
 - (5) Be employed for a minimum of 20 hours per week and be paid for such employment or, if self-employed, be employed for a minimum of 20 hours per week and receiving weekly earnings at least equal to the Federal minimum wage multiplied by 20 hours;
 - (6) Be participating in a State or federally financed work study program during the regular school year. ...
 - (7) Be participating in an on-the-job training program. ...
 - (8) Be responsible for the care of a dependent household member under the age of 6;
 - (9) Be responsible for the care of a dependent household member who has reached the age of 6 but is under age 12 when the State agency has determined that adequate child care is not available ...

- (10) Be a single parent enrolled in an institution of higher education on a full-time basis and be responsible for the care of a dependent child under age 12. ...
- (11) Be assigned ... an institution of higher education through or in compliance with the requirements of one of the programs identified in paragraphs (b)(11)(i) through (b)(11)(iv) of this section. [e.g., §236 program under the Trade Act of 1974].

7 C.F.R. §§ 273.5(a),(b). See in accord, the Wisconsin policy authority, FoodShare Wisconsin Handbook, 3.15.1.

The respondent established that it confirmed that the petitioner was enrolled in a four-year program at [REDACTED], she was not employed in a work study program, and she did not work at least 20 hours each week. The petitioner did not establish that she met any of the exceptions that would allow for FS eligibility despite her status as a full-time student. The respondent testified that agency error in processing correct information provided by the petitioner had led to the incorrect determination that petitioner was eligible for benefits.

The petitioner's original request for a fair hearing was postmarked August 8, 2012. At that time, the petitioner wrote that she was "...writing to appeal the decision of repayment." Exhibit 1. On October 9, 2012, petitioner's representative submitted correspondence and exhibits for use at hearing. She requested a determination that the overpayment claim be compromised, or, alternatively, a remand to the respondent requiring it to consider the petitioner's request for a compromise. Exhibit 3.

The petitioner did not present any evidence countering the respondent's determination of the overpayment, nor the calculation of that overpayment. Instead, the petitioner's argument focused on her request for a compromise of the amount of the overpayment. The petitioner presented evidence that she had requested a compromise of the claim, and that the respondent refused to consider that compromise prior to hearing.

On September 24, 2012, the petitioner submitted a written request to the respondent asking that it consider a compromise of the claimed overpayment. Exhibit 3. The petitioner again contacted the respondent, via email, on October 4, 2012, seeking an update on the status of the earlier compromise request. On October 5, 2012, the respondent emailed the petitioner indicating that:

...At this point the agency cannot determine if there would be an undue hardship. The hearing is scheduled for October 10th, and once a decision is made from that hearing the agency may consider an undue hardship, however there are strict policies in the Food Share Handbook regarding repayment agreements and undue hardships in regard to Food Share Overpayments.

Id.

In response, the respondent asserted that its position on compromising claims has been clear for over a decade. To that end, the respondent referred to an Operations Memo, dated February 11, 2002, announcing a "policy change about compromising overpayment claims for Food Stamps..." Exhibit 2. The memo succinctly concludes that, "[b]eginning February 1, 2002, no compromise of overpayment claims will be made." Id. In support of that policy position, the memo reasons that:

DWD is required by law to establish and collect overpayment claims, it is also required to submit delinquent debt to the Treasury Offset Program (TOP), and to the Department of Revenue (DOR) for collection. Many debts are paid in full after 3 years have elapsed. The idea of compromising a debt due to 3 years of non-payment is contrary to other regulations to which the state must adhere.

The act of compromise is in opposition to the already existing policies of the Public Assistance Collection Unit. Further, the act of compromise would be detrimental to program integrity issues and functions.

Id. Regulations require the collection of overpayment claims, but do not require that state agencies compromise those claims. See, 7 C.F.R. §273.18(c)(1)(i) and 7. C.F.R. §273.18(e)(7).

Established case law on the issue of compromising FS overpayment claims is sparse. The petitioner cited an Eighth Circuit case, which determined that federal regulations granted state agencies the authority to settle, adjust, compromise or deny overpayment claims. Bliek v. Palmer, 916 F. Supp. 1475 (N.D. Iowa 1996), aff'm 102 F.3d 1472 (8th Cir. 1997). Furthermore, that court ruled that due process required that notice of overpayment must include an explanation of a debtor's right to request settlement, adjustment or compromise of the claim. Id. Respondent's 2002 Operations Memo references this requirement, stating, "[a]lso, the initial demand letter for an FS overpayment reads: 'In cases of extreme hardship, the State of Wisconsin may choose to reduce any part of this debt.' " See, Operations Memo 02-08, dated February 11, 2002, at Exhibit 2.

In a similarly non-controlling, yet instructive, case the Supreme Court of New Mexico recently addressed this issue as well. In a 2009 decision, that court reviewed the procedures for establishing an overpayment claim:

...If...the recipient requests a fair hearing, an administrative law judge will determine whether the agency can establish the overpayment claim. The only issue at the fair hearing is whether a claim exists:

...
If the fair hearing establishes the claim, then the state agency may consider whether to compromise the claim. 7. C.F.R. § 273.18(e)(7). The agency "may compromise a claim or any portion of a claim if it can be reasonably determined that a household's economic circumstances dictate that the claim will not be paid in three years." 7 C.F.R. §273.18(e)(7)(i). ...Whether the agency compromises a claim is discretionary, and once a claim has been reduced through a compromise, the state agency "may reinstate any compromised portion of a claim if the claim becomes delinquent." 7 C.F.R. §273.18(e)(7)(iii). Therefore, it is necessary that the agency establish a claim for the full amount of the overpayment before the compromise, because the agency must protect its right to pursue repayment beyond the compromised amount if the repayment becomes delinquent.

Waters-Haskins v. New Mexico Human Services Dept., 146 N.M. 391, 210 P.3d 817, 2009-NMSC-031 (2009). I find it notable that the courts in Bliek and Waters-Haskins, both documented the discretionary nature of compromise. The Code of Federal Regulations granted state agencies the authority to compromise, but did not *compel* them to do so. Whether or not a state agency even considers a compromise is a discretionary act. 7. C.F.R. §273.18(e)(7).

Petitioner argues that because the state agency has the authority to compromise claims, it must have a procedure to determine whether an overpayment claim will be compromised. I am not persuaded that there exists a requirement that the state agency establish such a procedure, nor that said establishment would logically follow from the grant of discretionary authority to consider a compromise. And, I further note that the respondent's Operations Memo specifically referred to the beneficial nature of a uniform policy regarding compromise; the respondent exercised its discretion and determined that it would not compromise overpayment claims. See, Operations Memo 02-08, dated February 11, 2002, at Exhibit 2.

The petitioner provided testimony regarding her assertion that the imposition of the overpayment debt would cause her undue financial hardship, but the Division of Hearings and Appeals does not have authority to compromise a debt due to hardship. While the respondent's established policy to never

compromise claims may run contrary to the spirit of the regulations permitting compromise, I do not find that the policy violates said regulations' grant of discretionary authority in that regard. The only other issue before me is whether the agency correctly established the claim, and in the absence of evidence to the contrary, I conclude that it did.

CONCLUSIONS OF LAW

1. The respondent correctly determined that petitioner was overpaid \$1,612.00 in FS benefits from December 30, 2011, through August 31, 2012, due to agency error, as identified by overpayment Claim No. [REDACTED]
2. The determination of whether or not to compromise an established overpayment is at the discretion of the respondent.

THEREFORE, it is

ORDERED

That the petition for review herein be and the same is hereby dismissed.

NOTICE TO RECIPIENTS OF THIS DECISION:

This is a Proposed Decision of the Division of Hearings and Appeals. IT IS NOT A FINAL DECISION AND SHOULD NOT BE IMPLMENTED AS SUCH.

If you wish to comment or object to this Proposed Decision, you may do so in writing. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your comments and objections to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy to the other parties named in the original decision as "PARTIES IN INTEREST."

All comments and objections must be received no later than 15 days after the date of this decision. Following completion of the 15-day comment period, the entire hearing record together with the Proposed Decision and the parties' objections and argument will be referred to the Secretary of the Department of Children and Families for final decision-making.

The process relating to Proposed Decisions is described in Wis. Stat. § 227.46(2).

Given under my hand at the City of Madison,
Wisconsin, this 23rd day of October, 2012

Peter 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 October 23, 2012.

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Public Assistance Collection Unit
Division of Health Care Access and Accountability
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