



FH
[REDACTED]

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

In the Matter of

[REDACTED]

DECISION

FOP/144888

PRELIMINARY RECITALS

Pursuant to a petition filed October 29, 2012, under Wis. Admin. Code, §HA 3.03, to review a decision by the Rock County Dept. of Social Services to recover FoodShare benefits (FS), a hearing was held on December 17, 2012, at Janesville, Wisconsin. A hearing set for November 20, 2012 was rescheduled at the petitioner's request. The record was held open 28 days for the parties to file written arguments.

The issue for determination is whether the father of petitioner's child lived with her after the child's birth. Note that individuals' initials are used for confidentiality purposes.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]

Petitioner's Representative:

Atty. Hal Menendez
Legal Action of Wisconsin, Inc.
31 South Mills Street
Madison, WI 53715

Respondent:

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

By: Atty. Jerome A. Long, Sherry Quirk
Rock County Dept. of Social Services
P. O Box 1649
Janesville, WI 53546

ADMINISTRATIVE LAW JUDGE:

Brian C. Schneider
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Rock County.
2. In 2012 petitioner received FS for herself and her sons K.C. and M.E.J. M.E.J. was born in February, 2012, and his father is M.E.S.

3. In the summer, 2012, the agency received a referral from the county child support agency that M.E.S. was living with petitioner. An investigation commenced, and following the investigation the agency determined that M.E.S. lived with petitioner and the children as of July 1, 2012. The agency obtained M.E.S.'s income information. By a notice dated September 7, 2012, the county informed petitioner that she was overpaid \$899 in FS from July 1 through August 31, 2012, claim no. [REDACTED]
4. Although M.E.S. was at petitioner's residence daily, his official residence was with his mother. M.E.S. was ordered to pay child support despite the allegation he lived with petitioner. M.E.S. did stay with petitioner temporarily in July after she had surgery.

DISCUSSION

The Department is required to recover all FS overpayments. An overpayment occurs when an FS household receives more FS 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.

The federal FS regulations define FS household composition as follows:

(a) *General household definition.* A household is composed of one of the following individuals or groups of individuals, unless otherwise specified in paragraph (b) of this section:

1. An individual living alone;
2. An individual living with others, but customarily purchasing food and preparing meals for home consumption separate and apart from others; or
3. A group of individuals who live together and customarily purchase food and prepare meals together for home consumption.

7 C.F.R. §273.1(a). FS rules provide further as follows:

The following individuals who live with others must be considered as customarily purchasing food and preparing meals with the others, even if they do not do so, and thus must be included in the same household, unless otherwise specified.

- (i) Spouses;
- (ii) A person under 22 years of age who is living with his or her natural or adoptive parent(s) or step-parent(s); and
- (iii) A child (other than a foster child) under 18 years of age who lives with and is under the parental control of a household member other than his or her parent.

7 C.F.R. §273.1(b)(1); see also FS Handbook, Appendix 3.3.1.2.

The best evidence before me is that M.E.S. is present at petitioner's residence daily. In addition, petitioner admitted that he stayed there temporarily after she had surgery in July.

At the hearing M.E.S.'s mother testified that his regular residence is with her in [REDACTED]. She disputed the statement in the investigator's report alleging that he regularly sleeps at petitioner's residence. Petitioner and her mother also testified that although he is at petitioner's residence regularly he stays with his mother. I note that the Rock County child support agency obtained a child support order against M.E.S.

despite the question of his residence. That supports petitioner's testimony that she told the court that they intended to live together, not that they were living together. In addition, M.E.S.'s employer shows the [REDACTED] address for him.

Based upon the evidence, I find that M.E.S. did not live with petitioner sufficiently to warrant him being a household member. At best he stayed with her temporarily in July, but they changed the arrangement after the investigation. They probably did so specifically for benefit purposes; not only does petitioner receive FS, BadgerCare, and child care, her rental subsidy does not allow for M.E.S. to live there.

The question then is whether a person who is acknowledged to be present daily, but who does not sleep in a residence or keep his belongings there, is living in the residence. I have to conclude that the answer is no. It is really a close call, and petitioner should be aware that this finding does not mean that the agency will stop looking into her residential situation, but I am satisfied that petitioner and M.E.S. have separate residences based upon the evidence before me.

Under old AFDC rules, a father could be included in a household even if he did not technically live there, as long as his child was not deprived by his absence. FS rules do not have a similar standard. To be included in an FS household, a person must live in the household. Petitioner and M.E.S. may have established a separation of convenience, but at this point they have done so successfully.

CONCLUSIONS OF LAW

The county erroneously concluded that petitioner was overpaid FS because the evidence does not support a conclusion that she and her son's father were living together other than temporarily.

THEREFORE, it is

ORDERED

That the matter be remanded to the county with instructions to rescind FS overpayment claim no. [REDACTED] and to cease recovery of it. The county shall do so within 10 days of this 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 17th day of January, 2013

\sBrian C. Schneider
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 January 17, 2013.

Rock County Department of Social Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
ham@legalaction.org