



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]

DECISION

FOP/145299

PRELIMINARY RECITALS

Pursuant to a petition filed November 16, 2012, under Wis. Admin. Code, §HA 3.03, to review a decision by Columbia County Health & Human Services to recover FoodShare benefits (FS), a hearing was held on December 19, 2012, at Portage, Wisconsin.

The issue for determination is whether the agency correctly determined an FS overpayment. It is noted that individuals' initials are utilized throughout the decision for confidentiality reasons.

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: Jeanette Gessner
Columbia County Health & Human Services
P.O. Box 136
Portage, WI 53901

ADMINISTRATIVE LAW JUDGE:

Brian C. Schneider
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Columbia County.
2. Since 2008 petitioner has lived with her now 15-year-old son in a home owned by E.T. E.T. is not the older son's father. On February 25, 2012, petitioner gave birth to N.T. Although she reported the birth of the child she did not clearly report that his father was in the home.

3. In August, 2012, petitioner did a review. In the review she noted that E.T. was N.T.'s father and was in the home. The agency requested E.T.'s employment information, which was not provided. The agency then closed FS effective September 1 because information was not provided.
4. If E.T. had been included in the household, it would have been ineligible for FS due to his income.
5. On August 23, 2012, petitioner reported that E.T. left the home on that date. The agency then reopened FS for a three-person household and issued \$526 FS for September. The agency also requested that O'Brien and Associates investigate the situation.
6. On September 2, 2012, the investigator went to the home. A number of people were present doing work on the home. E.T. was present and told the investigator that he lived in the home.
7. The county then closed FS effective October 1, 2012.
8. By notices dated October 18, 2012, the agency informed petitioner that she was overpaid \$2,656 in FS during the period January 1, 2010 through September 30, 2012, claim nos. [REDACTED], [REDACTED], and [REDACTED]. The claims were created by O'Brien and Associates staff; O'Brien staff members are not state merit employees.

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.

To determine an overpayment, the agency must determine the correct amount of FS that the household should have received and subtract the amount that the household actually received. 7 C.F.R. §273.18(c)(1)(ii).

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.

Under the federal law, because both petitioner and E.T. lived with their child in common as of the child's birth, they had to be included together in the FS household. Because E.T. was not added to the case timely, petitioner was overpaid FS beginning April 1, 2012. The reason that the overpayment began April 1 was because, with 10 days to report the child's birth, E.T. should have been added in the next benefit month after the end of the 10 days.

Petitioner was not overpaid for any months prior to that date. There was no requirement that E.T. be on her FS case unless he purchased and prepared meals with petitioner. I note that petitioner disclosed E.T.'s presence prior to the birth of the child, and that she was granted FS without him (the problem after the child's birth was not that E.T.'s presence in the home was undisclosed, but that petitioner did not make clear that he was the father).

Thus the only part of the overpayment that I will uphold is for the period April 1 through September 30, 2012. Petitioner acknowledges the claim through August 31 but argues that September FS were not overpaid because E.T. left the home August 23. I find that the September claim was correct, however. E.T. himself told the investigator that he lived in the home that he owned. Petitioner argues that statement to be hearsay, but I find that it is reliable as being supported by other evidence (in particular E.T.'s presence at the home that day, that he owns the home, that petitioner acknowledged E.T.'s statement during the hearing, and that no alternative, verifiable residence was provided), and that it in essence is a statement against his own interest. While a statement against interest typically can be used only if the person is unavailable to testify under Wis. Stat., §908.045(4), in this case neither side called E.T. as a witness nor explained his absence. Added to his ownership of the home and presence when the investigator arrived, I conclude that his presence, at least for September, 2012 FS benefits, was sufficiently established.

The final issue raised by petitioner is that the FS overpayment claim is invalid because it was not done by state merit employees. 7 C.F.R. §272.4(a)(2) provides that non-State agency employees shall not conduct certification interviews or certify food stamp applicants. She further cites 7 C.F.R. §272.3(a) to argue that establishing claims is part of the certification process. It is not clear, however, that the mandate of §272.4(a)(2) requires state employees to do overpayment claims. §272.3(a) mandates that the state prepare guideline manuals that should include certification procedures including making claims. The section is not necessarily a mandatory definition of certification. Clearly the common definition of certify is to make someone eligible, and it can be argued that interviewing a person and making her eligible are the primary actions that must be done by state employees under §272.4(a).

Furthermore, even if the intent of §272.4(a) is that state employees must process overpayment claims, there is nothing in the code that suggests that failure to utilize state employees invalidates overpayment claims issued by non-state employees. The penalty for violating the rule might be a sanction by the federal department against the state department; it is not at all obvious that the violation automatically invalidates the claim.

Although O'Brien & Associates processed the claim, it did so under the supervision and authority of agency employees who in the end have the final word on the claim. In this case agency employees reviewed the claim and accepted it. Petitioner did not contest the accuracy of the calculations; she contested only the conclusions concerning E. T.'s place of residence in September, 2012.

Finally, invalidating the claim would only serve to put off the inevitable. If the claim was invalidated the state merit employees could simply redo the claim and reissue it. Since petitioner has had a full hearing on the claim, such an action would be redundant. I do note that I am aware of proposed decisions on this issue that are before the department secretary; if those decision conclude that O'Brien & Associates claims are invalid, this issue can be reopened by petitioner.

CONCLUSIONS OF LAW

1. Petitioner was overpaid FS from April, 2012 through September, 2012 because the father of her younger child was living in the home during that period but was not included in the FS household.
2. Petitioner was not overpaid FS prior to April, 2012 because there was no requirement that E.T. be included in her FS household prior to April, 2012.
3. Although the overpayment was calculated by non-state merit employees, that action does not invalidate the claim.

THEREFORE, it is

ORDERED

That the matter be remanded to the agency with instructions to rescind overpayment claim nos. [REDACTED], [REDACTED], and [REDACTED], and to amend claim no. [REDACTED] to cover only the period April 1, 2012 through September 30, 2012, which will change the adjusted claim amount to \$686. The agency shall take the action within 10 days of this decision. In all other respects the petition for review 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 7th 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 7, 2013.

Columbia County Health & Human Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
ham@legalaction.org