



FH
[REDACTED]

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

In the Matter of

[REDACTED]

DECISION

FOO/145493

PRELIMINARY RECITALS

Pursuant to a petition filed November 21, 2012, under Wis. Admin. Code § HA 3.03(1), to review a decision by the Winnebago County Department of Human Services in regard to FoodShare benefits (FS), a hearing was held on January 23, 2013, at Oshkosh, Wisconsin. Post-hearing the record was held open to allow petitioner and respondent to submit additional supporting documentation. Documents were timely received from both parties.

The issue for determination is whether the county agency correctly discontinued the petitioner's FS benefits due to failure to timely provide verification of living arrangements of his minor daughters.

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 53 703

By: Janet Hertzberg

Winnebago County Department of Human Services
220 Washington Ave.
PO Box 2187
Oshkosh, WI 54903-2187

ADMINISTRATIVE LAW JUDGE:

Peter McCombs (telephonically)
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Winnebago County.

2. The county agency seeks to end the petitioner's FS benefits because it contends that he (1) failed to timely provide verification of the living arrangements with his minor children and (2) he does not have physical placement of his minor children 50% of the time.
3. The petitioner and SB have joint custody of their twin daughters. Petitioner's daughters stay ed with him at least every other day, commencing in the afternoon and staying with him through the next morning. His daughters stayed with their maternal grandmother, TB, when not staying with petitioner. Exhibit 5. He presently has physical placement of his children 50% of the time. Exhibit 2 and Exhibit 5.
4. There is no court order regarding the present placement of petitioner's minor children.

DISCUSSION

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). The generic household definition requires that household members "live together" and "purchase and prepare" meals together. This definition does not solve the problem posed by this case, because the child lives with, and eats with, both of his parents.

The only other relevant instruction offered by the federal regulation is in 7 C.F.R. §273.1(c) and is an authorization to the state agencies to create policies to answer questions pertinent to household composition issues:

(c) *Unregulated situations.* For situations that are not clearly addressed by the provisions of paragraphs (a) and (b) of this section, the State agency may apply its own policy for determining when an individual is a separate household or a member of another household if the policy is applied fairly, equitably and consistently throughout the State.

In Wisconsin, the state agency has developed policy standards to determine FS household composition in cases involving children in joint custody. The policy is clear in requiring that the child cannot be a member of more than one FS group in the same month. See the FoodShare Wisconsin Handbook, §3.4.1. State policy also determines the assignment of a joint custody child to a specific household:

Children are included in the household where they reside when they are under the care and control of a parent a person's biological, step, or adoptive mother or father regardless of age. Parenthood doesn't have to be verified or other caretaker in that household. There may be situations when the residence of a child a person's biological, step, or adopted son or daughter, regardless of age, is not easily determined. There are many methods that can be used to determine the child's residence. If the residence of a child is questionable, court documents can be used to determine if there is a primary caretaker designated. It may be a situation of joint custody and a 50-50 custody split. If one parent is not designated as primary caretaker, the parents can be asked to decide. Individuals can only be included in one food unit.

If the parents can not or will not decide, compare the parents' activities and responsibilities against the following list and determine which one is exercising more control than the other:

1. If the parents reside in different school districts, where does the child attend school? Who selected the school?
2. Who assists the child with homework or school-related tasks?
3. Are there tuition costs for the child's education? If so, who pays those costs?
4. If the child is enrolled in day care, who arranges for and pays these costs?
5. Who is responsible for taking the child to and from school and/or day care?
6. Which parent is listed as the contact for emergencies at the child's school or day care provider?
7. Who arranges medical and dental care for the child? Who selects the physician and dentist?
8. Who maintains the child's medical records?
9. Who initiates decisions regarding the child's future?
10. Who responds to medical or law enforcement emergencies involving the child?
11. Who spends money on food or clothing for the child when the child visits the absent parent?
12. Who disciplines the child?
13. Who plays with the child and arranges for entertainment?
14. Are more of the child's toys, clothing, etc. kept at one parent's home than the other's?

Only one parent can receive FS for a child. If you still can not determine which food unit the child should be in, the caretaker that first applies would be eligible. Use the best information available to make your decision, and document in case comments the basis of your determination. If you still can not determine which food unit the child should be in, call the CARES Client Assistance for Reemployment and Economic Support call center.

FoodShare Wisconsin Handbook, §3.2.1.1.

It is a well-established principle that a moving party generally has the burden of proof, especially in an administrative proceeding. *State v. Hanson*, 295 N.W.2d 209, 98 Wis. 2d 80 (Wis. App. 1980). The court in *Hanson* stated that the policy behind this principle is to assign the burden to the party seeking to change a present state of affairs.

In §3.2.1.1 of the FS Handbook guidelines, the respondent is instructed that, if one parent is not designated as primary caretaker, the parents can be asked to decide. The petitioner has testified that he has at least 50/50 placement of his daughters, and that SB has been incarcerated and had other legal issues that have resulted in his placement time exceeding 50% at times. The petitioner has provided a statement purportedly signed by SB and petitioner, which acknowledges the 50/50 placement of their daughters. The petitioner has also provided a January 25, 2013, notarized statement from SB's mother, TB, which again acknowledges the 50/50 placement of the girls since approximately September, 2012. TB writes that petitioner used to take the girls during her 3rd shift work hours, and notes that "[h]e is now picking them up in the afternoon and taking them all day and over night. TB concludes, "[SB] has them at their primary residence... *the other half of the time*. Exhibit 5 (emphasis added). Both parents have decided on a 50% physical placement scheme, which should qualify petitioner non-financially for FS benefits.

Respondent counters that petitioner did not timely provide verification of the physical placement and did not have 50% physical placement. Electronic Case comments and email correspondence from [REDACTED]

██████████, was provided in support of these allegations.¹ Case comments reference the verification request, however I note that the record does not include any written notice. In the submitted email correspondence from Ms. ██████████ she writes that both SB and TB told her in October of 2012, that petitioner did not have the girls 50% of the time.²

The statements presented post-hearing by respondent and petitioner directly contradict one another. The respondent has the burden of proof, and I cannot find that it has demonstrated by a preponderance of the evidence that it (1) requested, in writing, verification of petitioner's daughters' custody arrangements, (2) provided the requisite number of days to provide the verification, or (3) assisted petitioner in obtaining the verification. See, FoodShare Wisconsin Handbook, §1.2.1, et. seq. The respondent has presented no testimony or copy of a verification request notice. Electronic Case Comments dated October 18, 2012, reference a telephone call from petitioner asking what kind of verification would be needed. This would imply that petitioner was aware of the need for verification, but it does not tell me whether the request for verification was in written form, as is required. Furthermore, the Case Comments do not state any deadline. Based upon this record I cannot find that petitioner failed to timely submit required verification.

All statements provided post-hearing leave much to be desired from an evidentiary standpoint. None of the authors of the statements participated in the hearing, and therefore their statements never faced scrutiny or questioning. I have signed statements from SB and TB that directly contradict the comments regarding the physical placement of the girls that were attributed to SB and TB in an email written by Ms. ██████████. See, Exhibit 6. I now have the unenviable task of weighting the evidence in a foundational vacuum.

Neither the statement of SB nor that of Ms. ██████████ is notarized; while I have no reason to believe that either of those statements was forged or invalid, I do note that the statement of TB is notarized. This added level of proof gives certain weight to the validity of TB's statement. It should be noted that TB's notarized statement is completely at odds with the comments attributed to TB by Ms. ██████████ and I am unable to determine if TB is telling the truth now, was telling the truth to Ms. ██████████ last fall, or if Ms. ██████████'s memory of TB's October statements is incorrect. I do feel comfortable in finding that TB's statement was, in fact, signed by TB. Furthermore, TB's statement completely corroborates petitioner's testimony at hearing regarding the times that he has physical placement of his daughters.

Simply put, I find that petitioner's evidence outweighs the evidence presented by the respondent. This was a very close case, and it is unfortunate that neither the respondent nor the petitioner presented TB, SB, and/or Ms. ██████████ as testifying witnesses. Respondent provided scant evidence to support its actions and/or conclusions here. As such, I conclude that respondent has failed to prove by a preponderance of the evidence that petitioner does not have physical placement of his minor daughters at least 50% of the time.

CONCLUSIONS OF LAW

1. Respondent has failed to demonstrate by a preponderance of the evidence that petitioner failed to provide requested verification in a timely fashion.

¹ Ms. ██████████'s relationship to this case is unclear, based upon the record. She did not testify at hearing. She noted in her email that she "...had an open case regarding the mother of the children, [SB] from 08/17/12 until 10/24/12." Exhibit 6.

² Ms. ██████████ also writes repeatedly that TB's home has children's toys and clothing present. Since petitioner has testified that the girls were staying with TB regularly, I find this information unremarkable. In similar fashion, claims attributed to SB of fraud by petitioner contained in Exhibit 6 completely unsubstantiated and constitute multiple levels of hearsay.

2. The petitioner's two minor daughters are part of his household for FoodShare purposes.

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 include the petitioner's two minor daughters in his FoodShare household and adjust his FoodShare allotment accordingly.

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 15th day of February, 2013

\sPeter 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 February 15, 2013.

Winnebago County Department of Human Services
Division of Health Care Access and Accountability