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[REDACTED]

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

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In the Matter of

[REDACTED]

DECISION

FOP/145582

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**PRELIMINARY RECITALS**

Pursuant to a petition filed November 29, 2012, under Wis. Admin. Code §HA 3.03, to review a decision by the Milwaukee Enrollment Services in regard to FoodShare benefits (FS), a hearing was held on January 16, 2013, at Milwaukee, Wisconsin. A hearing set for December 26, 2012, was rescheduled at the petitioner's request.

The issue for determination is whether the Department correctly determined that the petitioner was overpaid FS from November 2011 through May 2012, due to being in parole violation status.

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 53703

By: Mary Hartung, IM-Advanced  
Milwaukee Enrollment Services  
1220 W Vliet St  
Milwaukee, WI 53205

**ADMINISTRATIVE LAW JUDGE:**

Nancy J. Gagnon (telephonically)  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County.
2. The petitioner received FS as a household of one person from at least November 1, 2011 through May 31, 2012.

3. The petitioner was convicted of possession of a firearm by a felon, a felony, on June 4, 2009. The judge ordered 18 months in prison, followed by a term of 18 months of extended supervision/parole. See, *CCAP*, case no. [REDACTED]
4. The petitioner was discharged from his extended supervision/parole on April 10, 2012.
5. The Wisconsin Department of Corrections document submitted into the hearing record does not show that a warrant was issued for the petitioner during his parole, which is an indication that he did not flee/abscond. See, Exhibit 2, produced by the petitioner. The petitioner resided with his mother at [REDACTED], during his parole.
6. On September 26, 2012, the Department of Health Services sent a *Notification of FS Overissuance* to the petitioner advising that he had been overpaid \$1,400 in FS for the 11/1/2011 through May 31, 2012 period, due to his status as a probation/parole violator. Exhibit 1.

### DISCUSSION

The Department argues that the petitioner was overpaid FS allotments from November 1, 2011 through May 31, 2012. The arithmetic of the Department's calculation is not in dispute. The Department's overpayment theory is that the petitioner was in violation of the terms of his parole throughout this period, and therefore was not eligible for the FS that he received.

The federal rule that declares probation violators to be ineligible for FS is as follows:

**§ 273.11 Action on households with special circumstances.**

... (n) *Fleeing felons and probation or parole violators.* **Individuals** who are fleeing to avoid prosecution or custody for a crime, or an attempt to commit a crime, that would be classified as a felony (or in the State of New Jersey, a high misdemeanor) or **who are violating a condition of probation or parole under a Federal or State law shall not be considered eligible** household members. The income and resources of the ineligible member shall be handled in accordance with (c)(1) of this section.

...

[emphasis added]

7 C.F.R. § 271.11(n). See in accord, *FoodShare Wisconsin Handbook (FSWH)*, § 3.18.1(2/3/12), online at <http://www.emhandbooks.wisconsin.gov/fsh/fsh.htm> .

For such a violator, the federal rule seems to direct the Department to find the person ineligible and exclude him/her from the household size determination (while still including his/her income):

...

(c) *Treatment of income and resources of certain nonhousehold members.* During the period of time that a household member cannot participate for the reasons addressed in this section, the eligibility and benefit level of any remaining household members shall be determined in accordance with the procedures outlined in this section.

(1) *Intentional Program violation, felony drug conviction, or fleeing felon disqualifications, and workfare or work requirement sanctions.* The eligibility and benefit level of any remaining household members of a household containing individuals determined ineligible because of a disqualification for an intentional Program violation, a felony drug conviction, their fleeing felon status, noncompliance with a work requirement of § 273.7, or imposition of a sanction while they were participating in a household disqualified because of failure to comply with workfare requirements shall be determined as follows:

(i) *Income, resources, and deductible expenses.* The income and resources of the ineligible household member(s) shall continue to count in their entirety, and the entire household's allowable earned income, standard, medical, dependent care, child support, and excess shelter deductions shall continue to apply to the remaining household members.

(ii) *Eligibility and benefit level.* The ineligible member shall not be included when determining the household's size for the purposes of:

(A) Assigning a benefit level to the household;

...

(v) The due date or time frame for repayment must be not later than 30 days after the date of the initial written notification or demand letter.

[*emphasis added*]

*Id.*, § 273.18(e)(3).

The petitioner was on parole during most of the overpayment period. However, the Department has not met its burden of showing that he was in violation of any of the terms of his parole. My Administrative Law Judge colleagues who perform parole revocation hearings tell me that documentation of violations is readily obtainable from a contemporaneous log kept by agents on a database, which can be printed out or transmitted electronically in minutes. That documentation was not presented here. Also, no copy of a warrant document was produced for the record.

Further, the Department's policy requirement for making a parolee ineligible requires a finding that the parolee was fleeing and that law enforcement was actively pursuing him/her:

However, if an agency becomes aware of a felony conviction or probation/parole violation through a data base, media or through other sources, the agency must take action to deny or terminate FS benefits when both of the following conditions are met:

1. The individual is intentionally fleeing to avoid being arrested, and
2. Law enforcement is actively pursuing the individual.

If an agency has reason to suspect that a person is deliberately fleeing active pursuit from law enforcement, the agency must contact the authorities to determine if law enforcement deems the legal infraction worth pursuing, or if a warrant was issued for a matter that is not being actively pursued.

*BEPS/DFS Operations Memo*, no. 12/-46, p.2, August 22, 2012. The Department has not met its burden, in the face of the petitioner's denial, that he was fleeing to avoid arrest. Thus, the overpayment cannot stand.

### CONCLUSIONS OF LAW

1. The Department cannot commence the requested FS overpayment recovery against the petitioner, as it has not met its burden of showing that the petitioner was fleeing to avoid arrest.

**THEREFORE, it is**

### ORDERED

That the petition is remanded to the Department with instructions to cease collections efforts on FS overpayment claims for the November 2011 through May 31, 2012 period within 10 days of the date 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 13th day of February, 2013

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\sNancy J. Gagnon  
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 13, 2013.

Milwaukee Enrollment Services  
Public Assistance Collection Unit  
Division of Health Care Access and Accountability