



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

FOO/147045

PRELIMINARY RECITALS

Pursuant to a petition filed January 29, 2013, 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 March 6, 2013, at Oshkosh, Wisconsin.

The issue for determination is whether the county agency correctly determined the petitioner's FS household size. Specifically, the issue is whether the county agency correctly declined to place the petitioner's child JK in her FS household effective December 1, 2012 (pursuant to a court order change from November 2012).

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

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

By: Sandy Schaefer, case mgr.

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

ADMINISTRATIVE LAW JUDGE:

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

FINDINGS OF FACT

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

2. The petitioner has an ongoing FS case. A FS fair hearing decision can only go back 90 days from the filing date with a remedy; thus this decision can only consider the benefits issued from November 1, 2012 forward. Per the October 19, 2012 notice issued for the petitioner's November 1, 2012, FS benefit: the petitioner was issued a \$124 FS allotment as a FS household of one person, receiving \$202 weekly in Unemployment Compensation (UC), and paying no child support out.

On October 31, 2012, the Department issued written notice to the petitioner advising that her FS allotment for her household of one person would increase to \$200 (the one-person maximum) effective December 1, 2012. The agency again budgeted \$202 in weekly UC, but subtracted child support being paid out from income. A \$200 allotment was also issued for January 2013.

3. On January 18, 2013, the county agency issued written notice to the petitioner advising that her FS for one person would be decreased to \$16 effective February 1, 2013. The basis for reduction was increased income of \$363 from UC weekly.
4. The petitioner is the mother of three children – CK, SK, and JK. She is divorced from the children's father, [REDACTED], effective November 2011. The parents have joint legal custody. The court order in place in the case since November 6, 2012, directs exactly a 50/50 split of placement time with the child JK. Specifically, he stays overnight with the petitioner on Tuesdays and Thursdays, and overnight with his dad on Mondays and Wednesdays. JK alternates between his parents every other weekend (Friday, Saturday, Sunday).
5. The child is not currently on another FS case (such as with his father).

DISCUSSION

The petitioner contends that the agency erred by declining to add her child JK into her FS group from November, 2012, forward. The federal FS rule on household composition reads 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.

(b) *Special household requirements.*--(1) Required household combinations. 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. A child must be considered to be under parental control for purposes of this provision if he or she is financially or otherwise dependent on a member of the household, unless State law

defines such a person as an adult.

(emphasis added)

7 C.F.R. §273.1(a),(b). See also, *FS Wisconsin Handbook (FSWH)*, § 3.3.1.2 - .3, viewable at www.emhandbooks.wisconsin.gov/fsh

The petitioner testified that the child JK lives with and is under her “parental control”, for at least half of the time, since November 6, 2012. When the November 6, 2012 court order, and an earlier order amendment from June 18, 2012, are read together, the petitioner’s assertion appears to be correct as of November 6, 2012. Thus, the child potentially could be included in her FS household under §273.1(b)(1)(ii) above.

The question presented is, which parent should be allowed to count the child as a member of his/her FS household? A parent must be exercising “parental control” to include a child in their FS group, but both parents are doing that here. *Id.*, 3.3.1.1. The specific policy direction for resolving such a “tie” placement situation reads as follows:

3.2.1.1 Joint or Shared Physical Custody of Children

Children are included in the household where they reside when they are under the care and control of a **parent** or other caretaker in that household. There may be situations when the residence of a **child** 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 cannot 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?
Who spends money on food or clothing for the child when the child visits the absent parent?
11. Who disciplines the child?
12. Who plays with the child and arranges for entertainment?
13. 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* call center.

Id., 3.2.1.1. The above policy is not unreasonable. The petitioner testified, unrebutted, that she performs more of the “parental control” functions than her ex-husband for the child JK. As the father does not currently have JK in his FS household, there appears to be no impediment to adding JK to her FS household from December 1, 2012, forward. Prior to the issuance of the clarifying November 6, 2012 court order, it was not completely clear what the placement arrangement was, and it certainly did not appear that the petitioner had JK 50 percent of the time prior to November 6, 2012.

CONCLUSIONS OF LAW

1. The child JK must be added to the petitioner’s FS household effective March 1, 2013.
2. The child JK shall be added to the petitioner’s FS household for the months of December 2012 through February 2013, if he was not already in another FS household during any of those months.

THEREFORE, it is

ORDERED

That the petition be remanded to the Department with instructions to recalculate the petitioner’s FS allotments from December 2012 through the present in accord with the Conclusions of Law above. This actions shall be taken 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 30th day of March, 2013

\sNancy J. Gagnon
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

David H. Schwarz
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on April 1, 2013.

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