FH
[redacted]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

DECISION

FTI/148145

PRELIMINARY RECITALS

Pursuant to a petition filed March 18, 2013, under Wis. Stat. § 49.85(4), and Wis. Admin. Code §§ HA 3.03(1), (3), to review a decision by the Winnebago County Department of Human Services ["County"] in regard to FoodShare benefits ["FS"], a Hearing was held via telephone on April 23, 2013.

The issue for determination is whether the following Claim may be established against petitioner for alleged overpayments of FS: Claim # [redacted] for the time period October 22, 2010 to March 31, 2011 with a total outstanding balance of $1,431.00.

There appeared at that time via telephone the following persons:

PARTIES IN INTEREST:
Petitioner:

[redacted]

Respondent:

Department of Health Services
1 West Wilson Street
Madison, Wisconsin 53703
By: Leslie Vosters, Fair Hearing Coordinator
Winnebago County Department of Human Services
220 Washington Ave.
PO Box 2187
Oshkosh, WI 54903-2187

OTHER PERSON PRESENT:
[redacted], petitioner's mother

ADMINISTRATIVE LAW JUDGE:
Sean P. Maloney
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Green Lake County.
2. The County has established the following alleged FS overpayment against petitioner: Claim # [redacted] for the time period October 22, 2010 to March 31, 2011 with a total outstanding balance of $1,431.00.
3. The State of Wisconsin mailed a written notice, entitled *Important Notice About Your State Tax Refund And Credits* dated December 16, 2011, to petitioner at the address of his ex-wife; the written notice stated that petitioner's Wisconsin State Tax Refund may be intercepted to repay the FS overpayments identified in *Findings of Fact* #2, above; the written notice also notified petitioner of his appeal rights, including the 30-day time limit for requesting a Hearing; petitioner never received that notice.
4. The County contends that petitioner is liable for the overpayment listed in *Finding of Fact* #2, above because he was an adult and lived with his ex-wife during the time period in question and was thus part of his ex-wife's FS household (CARES #: [redacted]) during that time period; the County contends that petitioner's ex-wife was overpaid FS during that time period.
5. Petitioner did not live with his ex-wife during the time period of the alleged overpayment listed in *Finding of Fact* #2, above.

DISCUSSION

The state shall, at least annually, certify to the Department of Revenue amounts that it has determined it may recover resulting from overpayment of Food Stamps ["FS"], overpayment of Aid to Families with Dependent Children ["AFDC"], overpayment of Wisconsin Works benefits ["W-2"], and overpayment of Medical Assistance ["MA"]. Wis. Stat. § 49.85(2) (2011-12).

The state must notify the person of several things, including that it intends to certify the overpayment to the Department of Revenue for setoff from his/her state income tax refund and that the person may appeal the decision by requesting a Hearing. Wis. Stat. § 49.85(3) (2011-12).

The Hearing right is described as follows:

> "If a person has requested a hearing under this subsection, the [state] shall hold a contested case hearing under s. 227.44, except that the [state] may limit the scope of the hearing to exclude issues that were presented at a prior hearing or that could have been presented at a prior opportunity for hearing."
>
> Wis. Stat. § 49.85(4) (2011-12).

The evidence in the record of this matter is not sufficient to conclude that petitioner ever had a prior Hearing, or a prior opportunity for a Hearing, concerning the FS overpayment alleged here. The County worker testified that a notice, dated August 5, 2011, of the alleged FS overpayment was sent to petitioner but no such notice is found in the record of this matter. The County worker stated a copy of the notice would be sent to the Division of Hearings and Appeals ["DHA"] -- but none was ever received. Further,

petitioner testified that he never received any such notice and his testimony is credible. Therefore, the above quoted statutory language does not limit the scope of the issues to be considered here.

The County did send petitioner a notice, dated December 16, 2011, of the tax intercept. Normally, an appeal of a tax intercept is timely only if a Hearing is requested within 30 days after the date of the tax intercept notice. Wis. Stat. §§ 49.85(3)(a)2. & (b)2. (2011-12); See also, Wis. Admin. Code § HA 3.05(3)(a) (September 2001). A Hearing request that is not made within the allowed 30 days must be dismissed for lack of jurisdiction. Wis. Admin. Code § HA 3.05(4)(e) (September 2001). However, in this case petitioner never received the tax intercept notice because it was sent to his ex-wife's address. Petitioner's testimony is this regard is credible. It is true that the tax intercept notice is to be mailed to the last-known address of the person from whom the State intends to recovery the overpayment. Wis. Stat. §§ 49.85(3)(a)intro. & (b)intro. (2011-12). However, the County did not present any evidence to show that the address of petitioner's ex-wife was petitioner's last-known address. Further, both petitioner and his mother testified that petitioner had not lived with his ex-wife since November 2009. Their testimony is credible. Therefore, petitioner's appeal will not be dismissed as untimely filed.

The burden is on the County to show by a preponderance of the credible evidence that petitioner is liable for the FS overpayment alleged in *Finding of Fact* #2, above. See, Wis. Admin. Code § HA 3.09(4) (September 2001). The County has failed to do so. Therefore, petitioner cannot be held liable for the FS overpayment alleged in *Finding of Fact* #2, above.

The law provides that each person who was an adult member of the FS household when an overpayment occurred is responsible for paying the claim. 7 C.F.R. § 273.18(a)(4)(i) (2011); See also, *FoodShare Wisconsin Handbook* [FSWH"] 7.3.1.2. The County claims that petitioner is liable for the FS overpayment because he was an adult and lived with his ex-wife during the time period in question and was thus part of his ex-wife's FS household during that time period. However, the only evidence the County presented to support the claim that petitioner lived with his ex-wife during the time period in question was a copy of a print-out of a computer court record from 2010 involving petitioner and his ex-wife as defendants in a civil action. The computer court record indicates that they shared the same address. The computer court record is hearsay. See, Wis. Stat. § 908.01(2) (2011-12). On the other hand petitioner and his mother both testified credibly that in November 2009 petitioner left his ex-wife and moved in with his parents where he lived continuously until June 2012 when he got remarried to a different woman and moved out.

In circumstances such as these, when hearsay evidence is disputed by live testimony and that hearsay evidence is to form the sole basis for a finding of fact, the Wisconsin Supreme Court has indicated that uncorroborated hearsay does not constitute substantial evidence upon which to base a finding of fact. *Gehin v. Wisconsin Group Ins. Bd.,* 2005 WI 16, ¶¶ 53-56 & 58, 278 Wis. 2d 111, 692 N.W.2d 572. In these circumstances the Wisconsin Supreme Court has indicated that hearsay must be corroborated by nonhearsay evidence. *Gehin*, ¶¶ 82 & 92. There is no nonhearsay evidence in the record of this matter which corroborates the hearsay evidence.

Based on the evidence that is part of the record of this matter it must be concluded, by a preponderance of the credible evidence, that petitioner did not live with his ex-wife during the time period in question. Therefore, it must be concluded that petitioner is not liable for the alleged FS overpayment listed in *Finding of Fact* #2, above.

CONCLUSIONS OF LAW

For the reasons discussed above, petitioner is not liable for the alleged FS overpayment listed in *Finding of Fact* #2, above.

NOW, THEREFORE, it is **ORDERED**

That this matter be REMANDED to the County, and that: (1) the County not certify any amounts to the Department of Revenue for purposes of a tax intercept of petitioner's income tax refund regarding the alleged FS overpayment listed in *Finding of Fact* #2, above; (2) that the County not attempt to collect the alleged FS overpayment from petitioner by any other means; (3) that, within 10 days of the date of this *Decision*, the County delete petitioner as a liable person for the overpayment listed in *Finding of Fact* #2, above; and, (4) that, within 10 days of the date of this *Decision*, the County refund to petitioner any monies of petitioner (including any monies intercepted from petitioner's Wisconsin State Tax Refund) that were used to repay any part of the overpayment listed in *Finding of Fact* #2, above.

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 April, 2013

\sSean P. Maloney
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 April 30, 2013.

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