



FH
[REDACTED]

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

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

FOO/148411

PRELIMINARY RECITALS

Pursuant to a petition filed March 29, 2013, under Wis. Admin. Code § HA 3.03(1), to review a decision by the Washington County Department of Social Services in regard to FoodShare benefits (FS), a hearing was held on April 25, 2013, at West Bend, Wisconsin.

The issue for determination is whether the agency properly denied the Petitioner's application for FS benefits.

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: Julie Williamson

Washington County Department of Social Services
333 E. Washington Street
Suite 3100
West Bend, WI 53095

ADMINISTRATIVE LAW JUDGE:

Debra Bursinger
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Washington County.
2. On March 12, 2013, the Petitioner applied for FS benefits for herself and 2 minor children. Petitioner has gross earned income of \$3,894.16/month and a mortgage of \$1,440/month.

3. On March 20, 2013, the agency issued a Notice of Decision to the Petitioner informing her that her application for FS benefits was denied due to household income exceeding the program limit. It further informed her that the two minor children could not be included in her household because they are receiving benefits as part of their father's FS case.
4. The Petitioner and her children's father GB divorced in 2011. GB has had a FS case with the two minor children since October 11, 2012.
5. On December 6, 2011, a Temporary Order was issued by the Washington County Circuit Court in which it ordered that the Petitioner and GB had joint legal custody of the children and that Petitioner and GB had primary physical placement of the children.
6. On June 7, 2012, a Temporary Order and Stipulation was issued by the Washington County Circuit Court ordering GB to pay \$200/month in child support.
7. On February 15, 2013, a Partial Marital Settlement Agreement on Custody and Placement was executed by the Petitioner and GB. The agreement gives joint legal custody to the Petitioner and GB. The agreement also has a regular placement schedule for the children. It provides for physical placement of the children with GB as follows:
 - a. April 1 – November 31: From April 1 until November 31st of the calendar year, the Respondent [GB] shall have overnight placement every Monday from 5:00 PM until the following Tuesday at 8:00AM. The Respondent shall also have placement on every other weekend starting on Friday at 5:00 PM until his Monday overnight placement ceases the following Tuesday at 8:00AM. The Petitioner shall have placement at all other times.
 - b. January – March 31, December 1 – 31: From January 1st until March 31st and December 1st through the 31st of the calendar year, the Respondent shall have overnight placement every Monday and Tuesday starting at 5:00 PM on Monday until the following Wednesday at 8:00AM. The Respondent shall also have placement on every other weekend starting on Friday at 5:00PM until his Monday and Tuesday overnight placement ceases on Wednesday at 8:00AM. The Petitioner shall have placement at all other times.
8. On March 29, 2013, the Petitioner filed an appeal with the Division of Hearings and Appeals.

DISCUSSION

The Petitioner contends that the agency erred by declining to add her children into her FS group when making a determination of her eligibility for FS benefits. 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 her two minor children live with and are under her “parental control”, for at least half of the time. The court orders make it clear that the Petitioner has had at least 50% physical placement of the children since December 6, 2011. I note that the December 6, 2011 order does not clearly indicate the percentage of physical placement but does give both parties primary physical placement. Thus, the children potentially could be included in her FS household under §273.1(b)(1)(ii) above.

The issue here 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. Given that the court has ordered joint legal custody of the children, both Petitioner and GB are exercising parental control. 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?
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, un rebutted, that she performs more of the “parental control” functions than her ex-husband for the children. The court order of February 15, 2013 supports her testimony as it is clear that she is the primary caretaker with primary physical placement of the children in her home. Prior to the issuance of the February 15, 2013 court order, it was not completely clear what the physical placement arrangement was but it is clear from that order that the Petitioner is the primary caretaker. Thus, the issue of which parent applied first for FS benefits does not come into play here.

I conclude that the agency should make a determination of the Petitioner’s eligibility for FS benefits based on a household size of three. It appears that the Petitioner’s gross household income may still exceed program limits. However, there was not sufficient information presented at the hearing for me to verify the agency properly counted the Petitioner’s monthly income. Therefore, I am remanding this to the agency to make a determination of the Petitioner’s eligibility based on a household size of three. If the Petitioner is eligible for FS benefits, the children should be removed from GB’s household and added to the Petitioner’s household for purposes of FS benefits.

CONCLUSIONS OF LAW

The Petitioner is the primary caretaker of her two minor children; therefore, the agency must make a determination of the Petitioner’s eligibility for FS benefits based on a household that includes her two minor children.

THEREFORE, it is

ORDERED

That this matter is remanded to the agency to make a determination of the Petitioner’s eligibility for FS benefits based on a household size of three. The agency shall issue a new Notice of Decision to the Petitioner. If the Petitioner is eligible for FS benefits, the Petitioner’s children shall be removed from GB’s household and added to the Petitioner’s household for purposes of FS benefits. These 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 Milwaukee,
Wisconsin, this 23rd day of May, 2013

\sDebra Bursinger
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 May 23, 2013.

Washington County Department of Social Services
Division of Health Care Access and Accountability