



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

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

FOO/149096

PRELIMINARY RECITALS

Pursuant to a petition filed April 30, 2013, under Wis. Admin. Code § HA 3.03(1), to review a decision by the Milwaukee Enrollment Services in regard to FoodShare benefits (FS), a hearing was scheduled for May 21, 2013. Following a request to reschedule this matter by the petitioner, a hearing was ultimately held on June 25, 2013, at Milwaukee, Wisconsin.

The issue for determination is whether respondent correctly calculated petitioner's income.

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: Lee Yang
Milwaukee Enrollment Services
1220 W Vliet St
Milwaukee, WI 53205

ADMINISTRATIVE LAW JUDGE:

Peter McCombs (telephonically)
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County.
2. Petitioner's FS case was pended on March 26, 2013, due to respondent's determination of a wage discrepancy. Petitioner timely complied with respondent's subsequent verification request, and respondent determined that, at that time, petitioner's household income exceeded program limits.

3. On April 16, 2013 and April 25, 2013, respondent notified petitioner in writing that his FS benefits would terminate on May 1, 2013, due to income in excess of program limits. Exhibit 5. On April 29, 2013, respondent provided written notice indicating that revised income verifications established eligibility for FS benefits in the amount of \$126.00 as of May 1, 2013.
4. Petitioner's pay stub for the period ending April 7, 2013 indicated cash and credit card tips in the amount of \$1,215.29; the paystub for the period ending April 21, 2013, 2013 indicated cash and credit card tips in the amount of \$1,321.54. Exhibit 5.

DISCUSSION

In determining the amount of FS to be issued each month, the county must budget all income of the FS household, including all earned income. 7 C.F.R. § 273.9(b). From the gross household income, the following permissible deductions as discussed in the *FoodShare Handbook (FS Handbook)*, §4.6 are allowed: (1) standard deduction - which currently is \$214 per month for a household of 6 or more; (2) earned income deduction - which equals 20% of the household's total earned income; (3) medical expense deduction – for medical expenses exceeding \$35 in a month for an elderly or disabled person; (4) dependent care deduction for child care expenses; and (5) shelter expenses deduction - the deduction is equal to the excess expense above 50% of net income remaining after other deductions. The *FS Handbook* can be viewed online at <http://www.emhandbooks.wi.gov/fsh/>.

The Handbook also discusses what earned income should be counted. In the case of how the petitioner receives her earned income, the county followed its policies correctly. It states, “[c]ount the following sources of income as earnings in the month received: Wages, tips, or salaries, including but not limited to hourly wages and piecework. *FS Handbook*, §4.3.2.1.

Petitioner contends that the respondent is counting income that he does not receive. Petitioner testified that he has to “tip out” a total of 15% of his biweekly tip total; i.e., he has to pay 15% of his tips earned to the bussing and bartending staff. Petitioner provided a letter from his employer affirming this contention. See, Exhibit 1. The issue, then, is whether or not the amount that petitioner has to tip out should be deducted or disregarded when determining his household income.

The respondent testified that it looks at *gross* income when determining household income, in accordance with *FS Handbook* § 4.3.2. As such, tax payments, insurance co-payments and other such payroll deductions are not factored by the respondent when determining household income for FS purposes. The petitioner's tip out does not fall under any of the five permissible deductions. *FS Handbook* § 4.6.

In addition to the possible deductions, FS policy also allows for certain income to be disregarded:

4.3.2.2 Disregarded Earned Income

“*Disregard*” means “do not count.” When you are calculating the total amount of income a person has received, you should exempt or exclude any of the following kinds of income:

Disregard the following sources of income:

1. Wages withheld as a general practice by an employer (even if in violation of law) until actually received by the employee
2. Earned Income Tax Credit (EITC) payments
3. Earned income of any person 17 years or younger, who is a food unit member under parental control of an adult food unit member and is enrolled in an elementary, high school, technical school, or university. This includes GED classes, and home schools recognized or supervised by the state or local board of education. Disregard the income

until the month following the month in which the person turns 18 years of age. These provisions apply to semester and vacation breaks provided the student plans to return to school following the break.

4. Reimbursements or flat allowances for job or training related expenses. Expenses may be for travel, daily allowance, dependent care, uniforms, and transportation to and from a job or training site, including travel expenses of migrant workers.
5. Reimbursements for a volunteer's out-of-pocket expenses incurred in the course of his/her volunteer activities.
6. Income from Title I of the Domestic Volunteers Services Act only when the volunteer received FS at the time s/he joined the Title I program. Interruptions in FS participation do not alter this disregard. Some individuals were receiving the disregard for a Title I program at the time of conversion to the Food Stamp Act of 1977. Continue the disregard for the same time frame they said they would volunteer for at the time of conversion. If these exceptions do not apply, count Title I income as earned income. Title I programs include:
 - a. AmeriCorps* VISTA
 - b. University Year for Action
 - c. Urban Crime Prevention Program
7. All Title II program income. These programs include:
 - a. Retired Seniors Volunteer Program (RSVP)
 - b. Foster Grandparents Program
 - c. Senior Companion Programs
8. Income from the Title V Senior Community Service Employment Program (SCSEP) of the Older Americans Act. Organizations that receive Title V include, but are not limited to, the:
 - a. Experience Works Program.
 - b. National Council on Aging.
 - c. National Council of Senior Citizens.
 - d. American Association of Retired Persons.
 - e. U.S. Forest Service.
 - f. National Council on Black Aging.
 - g. National Urban League.
 - h. National Association for Spanish Speaking Elderly.
9. WIA work experience: Any allowances, earnings (except On The Job Training) or payments to FS group members participating in WIA programs, including Jobs Corps and YouthBuild. Only count earnings from WIA On The Job Training when the earner is either:
 - a. At least 19 years old; or,
 - b. Less than 19 years but not under the parental control of a member of the same food unit. Note: see # 11 in 4.3.2.1 for WIA OJT.
10. On The Job Training payments from the JTPA Summer Youth Employment and Training Program.
11. Allowances, earnings, and payments to participants in the **National & Community Service Trust Act of 1993 (NCTSA)**. Programs included in this act are:

AmeriCorps Network of Programs - The network of programs developed to engage Americans in a year or two of national service in exchange for an education award of \$4,725 per year of completed service.

The AmeriCorps Network of Programs include:

- AmeriCorps*USA - for participants 17 years and older;

- AmeriCorps - for participants 18 years and older; and
- AmeriCorps*NCCC - for participants 16 to 24 years of age.

See number 6a in 4.3.2.2 above, to contrast with AmeriCorps*Vista which is different.

There is no longer an On the Job Training (OJT) component of AmeriCorps. All AmeriCorps income is exempt for FoodShare benefits.

AmeriCorps programs include:

- Serve-America - The program involves school aged youth in community service, recruits adult volunteers in the schools, and provides service training in elementary and secondary schools.
- Higher Education Innovative Projects - Institutions of higher education integrate service into the curriculum, develop teacher and volunteer training programs, and involve students in community service.
- American Conservation and Youth Service Corps -Teenagers and young adults receive job and skill training, living allowances and scholarships as they provide community service. Special corps members, such as senior citizens, may be included if they provide special skills to the program.
- National and Community Service Programs - Employees are age 17 or older and work full-time or part-time. They received education or housing benefits upon completing their term.

12. Work study by a student enrolled in an institution of higher learning.

13. Repayments - See 4.5.6.7 Earned Income Repayments.

14. 2010 Census temporary employment income. The income of permanent census workers is counted as earned income.

FS Handbook § 4.3.2.2.

The only item in this section which could apply here would be no. 1, “wages withheld as a general practice by an employer (even if in violation of law) until actually received by the employee.” My problem with assigning the tip out wages to this section is that it does not appear that these tip wages are, in fact, withheld. Nor does it appear that these wages would ever be received by the employee. Instead, the tip wages are paid out, and the petitioner then pays a portion to the bussing and bartending staff. Despite the fact that 15% of the tip wages are paid out, the full amount is reported as petitioner’s earned wages for tax purposes. As such, I conclude that the tipped out wages were correctly counted as part of the petitioner’s gross earned income.

Petitioner also contends that his income fluctuates, and as a result, the respondent has incorrectly determined his income. The *FS Handbook* directs the agency to use certain information to determine prospective income:

You may use income received during the last 30 days as an indicator of the income that is and will be available to the household during the certification period unless that income does not accurately reflect changes in income that have occurred or are anticipated to occur.

You may use statements from employers to verify prospective income.

FS Handbook, §1.2.4.2.

Since petitioner's income is considered hourly work, there are other options available to prospective budgeting, to wit:

Fluctuating Income

1. Fluctuating income due to varying hours less than 40 per week:

Use income received during the last 30 days as an indicator of the income that is and will be available to the household during the certification period unless that income does not accurately indicate changes in income that have occurred or are anticipated to occur.

Average the hours (Result) X (4.3) or (2.15) X rate of pay for monthly income average.

2. Fluctuating income due to frequent overtime of varying hours:

Average the previous gross income to appropriate conversion amounts.

Example 4: ■■■ works a regular 40-hour week at the chemical factory. She works mandatory overtime at time and a half almost every week. The overtime hours vary week to week depending on the orders. She is paid weekly. The 40 hours per week at \$7.50 per hour is converted to \$1290. ($40 \times \$7.50 \times 4.3 = \1290) In the 4 weeks prior to recertification she received 10, 0, 5, and 2 hours of overtime. The overtime hours are averaged. ($10+0+5+2=17/4=4.25$ per week) The overtime rate of $\$11.25 \times 4.25$ hours X 4.3 weeks = \$205.58. Prospective fluctuating income is $\$1290 + 205.58 = \1495.58 .

3. Fluctuating income due to regular hourly rate changes during a pay period:

Average the most recent gross income into weekly amounts:
(Result) X (4.3) = monthly income.

Example 5: ■■■ works at the corner diner. She is hired as a waitress, but she frequently fills in hours as a cook. The rate of pay varies for the two jobs, and the hours she works in either position are completely unpredictable. In the 6 weeks prior to certification, her wages and tips were \$212.30, \$139.35, \$116.18, \$78.49, \$234.96, and \$99.78. The caseworker determines that these 6 checks best represent ■■■'s current income. These wages are added together equaling \$881.06. Divided by the 6 weeks, the weekly average is \$146.84 times 4.3 weeks. The prospective average income is \$631.41.

4. Widely Fluctuating Income:

If income fluctuates to the extent that a 30-day period alone cannot provide an accurate indication of anticipated income, the agency and the household may use a longer period of past time if it will provide a more accurate indication of anticipated fluctuations in future income. To average widely fluctuating income, use the households anticipated income including fluctuations anticipated over the certification period. In any case, clearly document the reasoning for the prospective income estimate.

Averaging will take some judgment. Here are some things to consider:

- a. The time period used in the average and if any changes have occurred since the verified wages were earned and

- b. The most recent wages received must be included in the prospective determination.

...

FS Handbook, §8.3.4.5.

There was no evidence to show that the county erred in its calculations of petitioner’s household income based on the best available evidence it had to make its determination. In fact, during the testimony at hearing, the petitioner did not establish any error; respondent noted that it had immediately updated its determination upon receipt of further information. See, Exhibit 5, Notice dated April 29, 2013. As such, I must find that the county correctly determined petitioner’s household income.

Having had several years of experience in the restaurant business, and having had to tip out bussing staff and bartenders, I do empathize with petitioner’s situation. However, as an Administrative Law Judge I cannot rule as to what may seem fair. I do not possess equitable powers and therefore cannot deviate from what law and policy dictate. See Oneida County v. Converse, 180 Wis.2nd 120, 125, 508 N.W.2d 416 (1993).

CONCLUSIONS OF LAW

The county correctly determined petitioner's household income.

NOW, THEREFORE, it is **ORDERED**

That the petition for review herein be and the same is hereby dismissed.

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 2nd day of August, 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 August 2, 2013.

Milwaukee Enrollment Services
Division of Health Care Access and Accountability