FH
[redacted]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

DECISION

FOP/150521

PRELIMINARY RECITALS

Pursuant to a petition filed July 06, 2013, under Wis. Admin. Code §HA 3.03, to review a decision by the [redacted] County Department of Human Services in regard to FoodShare benefits (FS), a telephonic hearing was held on August 12, 2013, at [redacted], Wisconsin. At the request of the parties, the record was held open for petitioner to submit new evidence to the county agency, for the county representative to review that new evidence and issue a reconsideration summary, and for a response by petitioner. Mr. Miller submitted a timely, detailed reconsideration to DHA and petitioner. Petitioner timely submitted her response to DHA. Both documents are received into the hearing record.

The issue for determination is whether the county agency correctly and accurately is pursuing a reduced FoodShare overpayment of $1,344 for the period of May 1, 2012 through April, 2013, due to changing the overpayment to non-client error based upon new evidence from petitioner.

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: Tom Miller, supervisor
[redacted] County Department of Human Services
300 N. 4th Street
PO Box 4002
[redacted], WI 54601

ADMINISTRATIVE LAW JUDGE:
Gary M. Wolkstein
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [redacted]) is a resident of [redacted] County who received FoodShare (FS) and BadgerCare (BC) Plus benefits for a household of two (petitioner and her son, DAW).
2. The petitioner is divorced from her husband [redacted] who is the father of DAW. See [redacted] Circuit Court No. [redacted].
3. During April, 2013, the county agency became aware that petitioner's child, DAW, was not residing with petitioner at least 50% of the time, but instead was residing the majority of the time with his father.
4. The petitioner's FS household had received FS benefits for two (instead of one).
5. The county agency sent a May 3, 2013 FS Overissuance Notices to the petitioner stating that petitioner was overpaid FS in the total amount of $7,236 during the period of December, 2008 through April, 2013, due allegedly to client error.
6. The petitioner was unable to establish with any reliable evidence that she has at least 50% custody and placement of DAW for FS eligibility benefit purposes per FoodShare Handbook, 3.2.1.1.
7. In his well-written August 16, 2013 reconsideration statement, supervisor Tom Miller stipulated that: a) the petitioner's FS overpayment was due to non-client error because the county agency had the Court Order stating the hours of petitioner's custody of her child but did not act upon that information until April, 2013; b) due to non-client error status, the petitioner's FS overpayment was reduced to $1,344 for the 12 month period of May 1, 2012 through April, 2013; and c) the petitioner's MA overpayment was changed to also be non-client error because the county agency had the Court Order stating the hours of petitioners' custody of her child but did not act upon that information until April, 2013. See above Preliminary Recitals.
8. The petitioner's response to the reconsideration was unable to establish with any reliable evidence that she had custody of her child more than 37.95% of the time or that the county agency had not correctly and accurately determined her reduced FS overpayment to be $1,344 for the period of May 1, 2012 through April, 2013 for a reduced FS household from 2 to 1 person.
9. The remaining amount of petitioner's FS overpayment was $1,344 as of August 16, 2013.

DISCUSSION

The specific FS policy regarding the placement situation in this case states:

> *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.
> . . . . .

> 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. . . .

FoodShare Wisconsin Handbook, App. § 3.2.1.1.

During the hearing, petitioner admitted that she did not have custody of her son at least 50% of the time for FS eligibility. In fact, petitioner admitted that she did not have custody of her son 40% of the time.

The federal regulation concerning FS overpayments requires the State agency to take action to establish a claim against any household that received an overissuance of FS due to an intentional program violation, an inadvertent household error (also known as a "client error"), or an agency error (also known as a "non-client error"). 7 C.F.R. § 273.18(b), see also FoodShare Wisconsin Handbook, Appendix 7.3.2. Generally speaking, whose "fault" caused the overpayment is not at issue if the overpayment occurred within the 12 months prior to discovery by the agency. See, 7 C.F.R. § 273.18(b); see also FoodShare Wisconsin Handbook, App. 7.3.1.9. However, **overpayments due to "agency error" may only be recovered for up to 12 months prior to discovery**. FoodShare Wisconsin Handbook, 7.3.2.1. Overpayments due to "client error" may be recovered for up to six years after discovery. *Id.*

As decided in prior cases before the Division of Hearings and Appeals, "discovery" was not the date of referral of a likely overpayment for investigation; discovery is the date when the agency actually determines an overpayment of a fixed amount occurred, and sends a notice to the FS recipient. Overpayments due to client error may be recovered for up to 6 years prior to discovery.

However, a recent April 4, 2012 BPS/DFS Operations Memo No. 12-20 (effective 4-4-2012), indicates that the "discovery" date is not the county agency's April 25, 2012 FS Overpayment Notice, but instead the "the date that the ESS became **aware** of the potential that an overissuance may exist." In this case, that date appears to be sometime during April, 2013 resulting in the same April, 2013 "awareness" or "discovery" date. Under the new policy the "discovery" date is not the county agency's May 3, 2013 FS Overpayment Notice, but instead the "the date that the ESS became **aware** of the potential that an overissuance may exist." (here April 2013):

> …
> The overissuance period for non-client errors begins with the day the ESS discovered or became aware of the potential for an overissuance, and extends backward:
> 1. Twelve months,
> 2. To the month the error was effective had the worker acted on the change timely, whichever is the most recent.
>
> It is essential that the date of awareness is documented in case comments. This date locks in the look back period and will not change regardless as to when the ESS calculates the overissuance amount.
>
> In order to meet the established timeliness requirements, overpayment claims must be completed before the last day of the quarter following the quarter in which the ESS discovered or became aware of an overissuance. This holds true for both client and agency errors. Overissuance claims must be established and recovered even if they are not completed within this timeframe. Overissuance claims must be established and recovered even if they are processed late; failing to complete a claim within the given timeframe does not void the overissuance.
> ...
> *Operations Memo, 12-20, at page 3.*

In a Fair Hearing concerning the propriety of an overpayment determination, the county agency has the burden of proof to establish that the action taken by the county was proper given the facts of the case. The petitioner must then rebut the county agency's case and establish facts sufficient to overcome the county agency's evidence of correct action.

During the August 12, 2013 hearing, there was insufficient evidence to determine accurately whether FS and BC overpayments were due to client or non-client errors and the resultant possible amount of overpayment(s). However, while the record was held open, the county agency did submit a detailed, clear reconsideration summary statement (with attachments) which confirmed the changes in the FS and BC overpayments. See Findings of Fact #7 above and the above Preliminary Recitals. During the hearing and in her written response to the county's submission, petitioner was unable to establish any error in the calculation of the reduced FS overpayment and reduced overpayment period. The county representative admitted that the FS overpayment was due to prior agency error with no fault by the petitioner. Overpayments due to "agency error" may only be recovered for up to 12 months prior to discovery. FoodShare Wisconsin Handbook, 7.3.2.1. Because the county discovered the petitioner's FS overpayment during April, 2013, the county may recover the FS overpayment retroactive for 12 months (or in this case for the period of May 1, 2012 through April, 2013).

During the hearing, petitioner appeared to be arguing that to seek recovery of the non-client overpayment was unfair because the FS overpayment was not petitioner's fault, as it was caused by agency error. The petitioner's contention is understandable. The petitioner also explained that it will be a financial hardship to repay the FS overpayments. However, since the May 1, 2012 through April, 2013 FS overpayment was created during the 12-month period, controlling federal regulation requires establishment of a claim against a household for a FS overpayment regardless **of whose error caused the overpayment to occur**: "The State agency shall establish a claim against any household that has received more food stamp benefits than it is entitled to receive . . . "7 C.F.R. § 273.18(a); see also FoodShare Wisconsin Handbook, 7.3.2.1. Accordingly, for the above reasons, the county agency is correctly seeking recovery of a FoodShare overpayment to the petitioner during the period of May 1, 2012 through April, 2013, due to county agency error to mistakenly fail to reduce the petitioner's FS household benefits from a group of 2 to 1 person per FoodShare Wisconsin Handbook, App. § 3.2.1.1.

CONCLUSIONS OF LAW

1. The county agency was incorrectly pursuing a May 3, 2013 FS Overissuance Notices to the petitioner stating that petitioner was overpaid FS in the total amount of $7,236 during the period of December, 2008 through April, 2013, due incorrectly to client error.

2. The county agency is correctly seeking recovery of a FoodShare overpayment in the amount of $1,344 to the petitioner during the period of May 1, 2012 through April, 2013, due to county agency error to mistakenly fail to reduce the petitioner's FS household from a group of 2 to 1 person per FoodShare Wisconsin Handbook, App. § 3.2.1.1.

THEREFORE, it is **ORDERED**

The matter is remanded to the county agency with instructions to amend the FS overpayment and only pursue the recovery of a FoodShare overpayment in the amount of $1,344 to the petitioner during the period of May 1, 2012 through April, 2013, 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 21st day of October, 2013

_____

\sGary M. Wolkstein
Administrative Law Judge
Division of Hearings and Appeals

State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
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 October 21, 2013.

[redacted] County Department of Human Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability