



FH
[REDACTED]

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

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

FOO/151366

PRELIMINARY RECITALS

Pursuant to a petition filed August 16, 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 held on October 9, 2013, at Milwaukee, Wisconsin.

The issue for determination is whether the Department correctly denied the petitioner's FS application. Specifically, the question is whether household size was correctly determined during the application process.

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: Katherine May

Milwaukee Enrollment Services
1220 W Vliet St
Milwaukee, WI 53205

ADMINISTRATIVE LAW JUDGE:

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

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County.
2. The petitioner applied for FS on July 8, 2013. On her application, she listed her four minor children (NJ, MJ, ZJ, NeJ) as members of her household.

3. The petitioner is divorced from the children's father, █████ █████, who does not reside with her. They have joint custody of the children. Court-ordered placement (2007) of the children with the father occurs from 5:00 p.m on Thursdays through 5:00 p.m. on Sunday. This amount of placement is slightly less than 50 percent.
4. █████ █████ has included the four children in his FS household since June 1, 2011.
5. █████ █████ has discontinued *actual* visitation/placement of the three oldest children since March 2013. His placement time with the youngest child, NeJ, has become erratic since March 2013.
6. The petitioner has picked up the slack in the placement time with the children. She is exclusively paying for their food, household needs, school needs, and uniforms. Schools have her address for parental contact. She has documented that she is paying for their family health insurance coverage.
7. On July 26, 2013, the petitioner filed a motion in Milwaukee County Circuit Court (Case no. 06 PA 003953), to obtain sole legal custody and physical placement of the children. The motion alleges that the father has not seen the three oldest children since March. A court date has been set for December 12, 2013. See, Exhibit 7, motion document.

DISCUSSION

The petitioner contends that the agency erred by declining to transfer her children into her FS group when she applied in July 2013. Because the petitioner has income, the larger group size might have resulted in the opening of her FS case, rather than a denial due to excess income. 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 and her roommate credibly testified that the three oldest children live with and are under her “parental control” at all times, since March 2013. They also noted that the father’s placement time with the youngest child had become erratic. Thus, the three oldest children should be included in her FS household under §273.1(b)(1)(ii) above. The policy direction for placement 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.

... [omits criteria for deciding a 50-50 placement case]

Only one parent can receive **FS** for a child. If you still cannot 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 cannot determine which food unit the child should be in, call the **CARES** call center.

Id., 3.2.1.1.

Thus, under the code and policy, the oldest three children should be on the petitioner’s FS case at all times. Per her testimony, they live with and are primarily cared for by her. She produced receipts to corroborate her assertion that she is paying for the children’s food, clothing, and health insurance. The petitioner testified that the father has essentially abandoned the three oldest children. The petitioner has met her burden of showing that the three oldest children should be removed from the father’s FS case, and transferred to her FS case.

If the petitioner’s ex-husband had not already received FS for all of the children from July 2013 through October 2013, I would have ordered their addition to her case back to July 2013. However, the children were (inappropriately, due to his misrepresentation to the agency) on her ex-husband’s FS case during the July – October 2013 period.

Unfortunately for the petitioner, FS rules and policy do not allow a person to be in more than one FS group at a time:

A person cannot be a member of more than 1 food unit and 1 **FS** group in the same month except residents of shelters for battered women and children.

FSWH, 3.4.1. Therefore, I cannot provide a benefit remedy to the petitioner for her ex-husband’s wrongful receipt of FS for the children during the past months. However, I can and do order the agency to take a new FS application from the petitioner for November 2013 forward, and to remove the three oldest children from the father’s case beginning November 1, 2013. If the petitioner is successful in obtaining sole placement at her December court hearing, she should so advise the Department (so that the fourth child can be added to her case at that time).

CONCLUSIONS OF LAW

1. The petitioner has primary placement of her three oldest children.
2. The petitioner's ex-husband already had their children on his FS case from July through October, 2013; therefore, the petitioner could not also receive FS for these children during the same months.

THEREFORE, it is**ORDERED**

That the petition is *remanded* to the Department with instructions to:

- (1) Request a new FS application from the petitioner, and remove the petitioner's three oldest children from ██████'s FS case, within **10** days of the date of this Decision, and
- (2) Allow the petitioner to submit her new FS application to the Department within **20** days of the date of this Decision, and
- (3) If the new FS application is timely received, process the petitioner's new FS application (including the three oldest children) within **30** days of the date of this Decision.

In all other respects, the petition is 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 16th day of October, 2013

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



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Wayne J. Wiedenhoef, Acting 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 16, 2013.

Milwaukee Enrollment Services
Division of Health Care Access and Accountability