FH
[redacted]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

DECISION

FOP/152013

PRELIMINARY RECITALS

Pursuant to a petition filed September 09, 2013, under Wis. Admin. Code §HA 3.03, to review a decision by the Trempealeau County Department of Social Services in regard to FoodShare benefits (FS), a telephone hearing was held on October 09, 2013.

The issue for determination is whether the respondent has established an overpayment of FS benefits to the petitioner.

There appeared at that time the following persons:

PARTIES IN INTEREST:
Petitioner:

[redacted]

Petitioner's Representative:

Attorney Christopher B. Gierhart
108 West Main Street
Arcadia, WI 54612

Respondent:

Department of Health Services
1 West Wilson Street
Madison, Wisconsin 53703
By: Tom Miller
Trempealeau County Department of Social Services
36245 Main St.
PO Box 67
Whitehall, WI 54773-0067

ADMINISTRATIVE LAW JUDGE:
Peter McCombs
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [redacted]) is a resident of Trempealeau County.
2. Petitioner lives with his girlfriend, MT; petitioner has lived with MT in a home owned by petitioner since at least September, 2010.

3. The County established the following Claims against petitioner for an alleged overpayment of FS:

Claim no. [redacted]	4/1/12 – 3/31/13	$6,117.00
Claim no. [redacted]	4/1/10 – 9/30/10	$2,690.00
Claim no. [redacted]	4/1/13 – 6/30/13	$1,578.00
Claim no. [redacted]	10/15/10 – 3/31/11	$3,246.00
Claim no. [redacted]	4/5/11 – 3/31/12	$6,038.00

4. The basis of the overpayment claims identified in Finding of Fact #2, above, is that petitioner and MT were part of the same FS household during the time periods of the alleged overpayments and petitioner had income that put the household over the FS income limits. Exhibit 2.

5. Petitioner and MT have no children in common; MT has 2 minor children of her own.

DISCUSSION

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) (2007); See also, *FoodShare Wisconsin Handbook* ["FWH"] 7.3.1.2. All FS overpayments, regardless of fault, must be collected. 7 C.F.R. § 273.18(a) (2007); See also, FWH 7.3.1.1.

The County argues that MT's household income exceeded the FS income limit during the time periods in question because petitioner was a member of MT's household food group and he had income that put the household over the FS program limit. Petitioner concedes that he and MT live together, but denies that he has ever been a part of MT's assistance group. Petitioner and MT asserted in respective sworn affidavits that they have never purchased food together for home consumption. Exhibit 3.

There is no dispute concerning the living arrangements of petitioner and MT. They admit that they have lived together since September of 2010, which would cover four of the five time periods noted in Finding of Fact 3, above. However, even when MT lived with petitioner, petitioner's income would count when determining MT's FS eligibility only if MT and petitioner were part of the same FS household. 7 C.F.R. § 273.9(intro.) (2007). There is a legal definition for what constitutes an FS household: One or more persons who live in the same household and purchase and prepare food together for home consumption. 7 C.F.R. § 273.1 (2007); See also, FWH 3.3.1.1. The income of a non-household member is not budgeted as income for the household. FWH 4.3.1.

It is true that persons who live together with minor children they have in common are, by definition, part of the same FS household. 7 C.F.R. § 273.1(b)(1) (2007); See also, FWH 3.3.1.2. However, petitioner and MT have no children in common.

With certain special exceptions not applicable here, two unrelated adults that do not have a child in common and who live together are part of the same FS household only if either: (1) they purchase food and prepare meals together for home consumption; or, (2) there is a child living with the adults and the child is under the parental control of both adults (or the child is the child of one if the adults and also under the parental control of the other adult). 7 C.F.R. §§ 273.1(a) & (b)(1)(iii) (2007); FWH 3.3.1. The respondent has not suggested that (2) exists here, i.e., the respondent has made no assertion that the minor children are under

the control of both adults. That leaves the sole remaining issue: whether petitioner and MT purchase food and prepare meals together for home consumption. The record is very thin in this respect.

The respondent's documentary evidence in the record concerning whether petitioner and MT customarily purchase food and prepare meals together consists of (1) an investigation report from O'Brien & Associates, which concludes that MT and her two children have lived with petitioner for approximately 3 years, and (2) an electronic Case Comment dated May 15, 2013. Exhibit 2.

I note that nowhere in the Investigative Report is there any information even alleging that the parties purchase and prepare food together. The Investigative Report only concludes that petitioner and MT live together.

The electronic Case Comment at issue indicates:

> I phoned and spoke with [petitioner] and his girlfriend [MT]. [MT] and her children…have lived with [petitioner] in his mobile home…since 9/2009. [Petitioner] and [MT] stated they are boyfriend and girlfriend and are part of the same food unit.

Id.

The electronic Case Comment allegations cited above were completely denied by petitioner and MT in testimony at hearing and via their submitted affidavits. The record does not disclose how the author of the case comment came to understand that MT moved in with the petitioner in September, 2009 (as opposed to the 9/2010 date proffered by petitioner and MT at hearing).

The petitioner and MT have also disputed ever stating to the author of the case comment that they are part of the same food unit. I must agree that it does seem unlikely that petitioner and/or MT would use the phrase "food unit," as is attributed to them by the case comment author.

In testimony at hearing, the respondent's representative testified that MT told her verbally that she and petitioner eat together. Petitioner and MT countered this argument by clarifying that the reference to "eating together" pertains solely to petitioner taking MT and her children out to dinner on the weekends. Petitioner and MT both credibly testified that they do not customarily purchase food and prepare meals together. petitioner testified that he works the night shift, and only sees petitioner on the weekends. Due to his work schedule, he normally wakes and has breakfast at his parents' home next door around 11:00-noon. Work begins at 3:00. He will often have fast food or convenience store food while at work, and then he grabs dinner on his way home from work, which is very late in the evening. MT corroborated this testimony, stating that the only time that they eat together is on the weekends when they go out to dinner.

The respondent has not established by a preponderance of the evidence that petitioner and MT customarily purchase food and prepare meals together. The evidence offered by the respondent is questionable, and it was specifically and credibly refuted by the petitioner and MT. Therefore, based on the evidence in the record of this matter, it cannot be concluded that petitioner was part of MT's FS household during the time period in question. It follows that the alleged overpayments cannot stand and must be reversed.

CONCLUSIONS OF LAW

1. Petitioner was part of MT's FS household, as MT and petitioner do not customarily purchase food and prepare meals together.

2. For the reasons discussed above, the following FS Overpayment Claims may not be established against petitioner:

Claim no. [redacted]	4/1/12 – 3/31/13	6,117.00
Claim no. [redacted]	4/1/10 – 9/30/10	2,690.00
Claim no. [redacted]	4/1/13 – 6/30/13	1,578.00
Claim no. [redacted]	10/15/10 – 3/31/11	3,246.00
Claim no. [redacted]	4/5/11 – 3/31/12	6,038.00

NOW, THEREFORE, it is **ORDERED**

That this matter shall be remanded to the respondent, and the respondent shall rescind the following FS Overpayment Claims:

Claim no. [redacted]	4/1/12 – 3/31/13	6,117.00
Claim no. [redacted]	4/1/10 – 9/30/10	2,690.00
Claim no. [redacted]	4/1/13 – 6/30/13	1,578.00
Claim no. [redacted]	10/15/10 – 3/31/11	3,246.00
Claim no. [redacted]	4/5/11 – 3/31/12	6,038.00

All actions required by this Order shall be completed within 10 days following issuance 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 11th day of November, 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 November 11, 2013.

Trempealeau County Department of Soc Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
cgierhart@kkblawoffice.com