



FH  
[REDACTED]

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

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In the Matter of

[REDACTED]  
[REDACTED]  
[REDACTED]

DECISION

FOP/154001

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**PRELIMINARY RECITALS**

Pursuant to a petition filed December 09, 2013, under Wis. Admin. Code §HA 3.03, to review a decision by the Milwaukee Enrollment Services in regard to FoodShare benefits (FS), a hearing was held on January 07, 2014, at Milwaukee, Wisconsin.

The issue for determination is whether the agency properly seeks to recover an overissuance of FS benefits to the Petitioner in the amount of \$1,769 for the period of December 1, 2011 – August 31, 2012 and \$2,344 for the period of September 1, 2012 – June 30, 2013.

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, Room 651  
Madison, Wisconsin 53703

By: Jose Sylvestre

Milwaukee Enrollment Services  
1220 W Vliet St, Room 106  
Milwaukee, WI 53205

**ADMINISTRATIVE LAW JUDGE:**

Debra Bursinger  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County.

2. On August 29, 2011, the agency received an employment verification for the Petitioner from his employer, [REDACTED], indicating a salary of \$325/week. The verification does not report any overtime or commissions.
3. On September 12, 2011, the agency issued a Notice of Decision to the Petitioner informing him that for September, 2011, he would receive FS of \$291 and effective October 1, 2011 he will receive FS benefits of \$292/month for a household of two. The notice indicated that the FS eligibility and allotment is based on earned income of \$1,397.50 from [REDACTED]. The notice also informed the Petitioner of the requirement to report to the agency if his gross income goes over \$1,594 and that failure to report such income may result in a recoupment of benefits.
4. On November 28, 2011, the Petitioner submitted a renewal application. He reported a household of two (Petitioner and his minor daughter). He reported earned income from [REDACTED], specifically a salary of \$315/week and bonus or commission of \$100/week.
5. On November 30, 2011, the agency issued a Notice of Action and Proof Needed to the Petitioner requesting proof of employment and earned income from [REDACTED]. Specifically, the notice requested the Petitioner submit pay stubs from the last 30 days and a completed employer verification form. The due date for the requested information was December 9, 2011.
6. On December 5, 2011, the Petitioner submitted two pay statements to the agency dated October 31, 2011 for the period of October 9, 2011 – October 22, 2011 and November 28, 2011 for the period of November 6, 2011 – November 19, 2011. The pay statement dated October 31, 2011 reports a commission of \$124.51 for the period and \$5522.85 for the year-to-date. It reports overtime of \$14.68 for the period and \$289.43 for the year-to-date. It reports regular wages of \$310 for the period and \$12,548 for the year-to-date. It further reports the Petitioner had paid vacation for the period of \$431.05 (representing one week). The pay statement dated November 28, 2011 reported commission of \$192.75 for the period and \$5950.56 for year-to-date, overtime of \$1.33 for the period and \$290.34 for year-to-date, regular wages of \$558 for the period and \$24,710 for the year-to-date and \$62 for sick pay for the period.
7. On December 6, 2011, the agency issued a Notice of Decision to the Petitioner informing him that his monthly FS benefit would decrease to \$221/month effective January 1, 2012 due to an increase in household income. It noted that this determination was based on gross monthly earned income of \$1,696.62. The notice also informed the Petitioner of the requirement to report to the agency if his gross household income exceeds \$2,451.66/month.
8. On January 23, 2012, the agency issued a FS Six Month Report Form (SMRF) to the Petitioner to be completed by February 5, 2012.
9. On February 28, 2012, the Petitioner submitted the SMRF to the agency. No changes were reported.
10. On March 2, 2012, the agency issued a Notice of Decision to the Petitioner informing him that effective March 1, 2012, he would receive monthly FS benefits of \$221 based on gross monthly household income of \$1,696.62. It informed the Petitioner of the requirement to report to the agency if his gross monthly income exceeds \$1,594.
11. On September 10, 2012, the Petitioner submitted a renewal application. He reported earned income from [REDACTED] of \$325/week. Petitioner also submitted two pay statements dated August 20, 2012 for the period of July 29, 2012 – August 11, 2012 and August 31, 2012 for the period of August 12, 2012 – August 25, 2012. The pay statement dated August 20, 2012 indicates the Petitioner received a commission of \$143.28 for the pay period and \$4900.85 for the year-to-date, regular wages of \$310 for the pay period and \$9,610 for the year-to-date, vacation of \$489.35 for the pay period and overtime of \$19.95 for the pay period and \$118.20 for year-to-date. The statement dated August 31, 2012 indicates Petitioner received a commission of 4310.02 for the pay period and \$5,231 for the year-to-date, regular wages of \$620 for the pay

period and \$10,230 for the year-to-date and overtime of \$45.05 for the pay period and \$163.25 for the year-to-date.

12. On September 11, 2012, the agency issued a Notice of Decision to the Petitioner informing him that he would receive \$215 in FS benefits for September 10 – 30, 2012 and \$312/month effective October 1, 2012 based on gross monthly earned income of \$1,333. The notice also informed the Petitioner of the requirement to report to the agency if his income exceeded \$1,640.
13. On January 21, 2013, the agency issued a FS SMRF to the Petitioner, due back to the agency by February 5, 2013.
14. On February 28, 2013, the Petitioner submitted the completed SMRF. He reported no changes.
15. On March 1, 2013, the agency issued a Notice of Proof Needed. It requested employment and earned income verification from [REDACTED] by March 11, 2013. Specifically, it requested pay stubs from the last 30 days and a completed employer verification form.
16. Petitioner submitted pay statements to the agency.
17. On March 4, 2013, the agency issued a Notice of Decision to the Petitioner informing him that he would receive \$252/month in FS benefits effective March 1, 2013 based on gross monthly earned income of \$1,580.68. It also informed him of the requirement to report to the agency if his gross monthly household income exceeded \$1,640.
18. On October 25, 2013, the agency issued Notifications of FS Overissuance and worksheets to the Petitioner informing him of the agency's intent to recover an overissuance of \$1,769 for the period of December 1, 2011 – August 31, 2012 and \$2,344 for the period of September 10, 2012 – June 30, 2013.

### DISCUSSION

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”).<sup>7</sup> C.F.R. § 273.18(b), see also, FoodShare Wisconsin Handbook, § 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, FS Handbook, § 7.3.1.9. However, overpayments due to “agency error” may only be recovered for up to 12 months prior to discovery. FS Handbook, § 7.3.2.1. Overpayments due to “client error” may be recovered for up to six years after discovery. Id.

The “discovery” date is “the date that the agency became aware of the potential that an overissuance may exist.” BPS/DFS Operations Memo No. 12-20 (effective 4-4-2012). In this case, the evidence in the case comments indicates that the agency became aware of a potential overpayment on July 18, 2013.

The agency alleges that this overpayment results from the Petitioner's failure to accurately report his earned income at the time of application and renewal as well as his failure to report income exceeding 130% federal poverty level (FPL). Specifically, the agency alleges the Petitioner did not report his commissions and his income was therefore not accurately budgeted in determining his eligibility and FS allotments. The Petitioner disputes the agency's contention that he did not report his commissions.

The evidence shows that the Petitioner submitted actual pay statements with his applications and renewals and that those pay statements clearly indicate that the Petitioner received commissions as well as overtime pay. He also did report he makes a commission in his November, 2011 renewal application. The pay statements demonstrate that the commissions fluctuate from pay period to pay period. The Petitioner testified that his commissions can fluctuate significantly depending on the time of the year. He also

testified that during the period of the overpayment, he transferred to a different retail store with higher volume so that his base salary decreased but his commissions increased. The agency's own evidence of the Petitioner's actual wages/commissions for each month during 2011, 2012 and 2013 demonstrate that the Petitioner's wages fluctuate significantly from month to month. In budgeting the Petitioner's income, the agency never took into consideration the Petitioner's fluctuating income. Instead the agency considered only the actual pay in the previous 30 days. This affected not only the Petitioner's monthly allotment but also his reporting requirement.

In determining the amount of FS to be issued each month, the FS regulations require the agency to budget all of the recipient's nonexempt income. 7 C.F.R. §273.9(b). From that income, certain deductions are allowed. Generally, the agency should use income from the last 30 days to determine prospective income *unless that income does not accurately represent anticipated future income*. FS Handbook, App. 1.2.4.2. If income fluctuates, the worker must determine a monthly average using prior months' income. Specifically, § 1.2.4.2 provides as follows:

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.

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 household's anticipated income including fluctuations anticipated over the certification period. In any case, make every attempt to accurately verify prospective income and clearly document the reasoning for the prospective income estimate.

I conclude that the overpayment in this case is not accurate because the agency failed to consider the Petitioner's fluctuating monthly income. This failure affected the Petitioner's monthly allotment as well as his reporting requirement. Because this was agency error and was discovered on or about July 18, 2013, the agency may only recover any overissuance that occurred within 12 months prior to the discovery.

I am remanding this matter to the agency to review the Petitioner's case for the 12 months prior to July 18, 2013. The agency must, in determining whether there was an overissuance, consider the Petitioner's fluctuating monthly income and the Petitioner's reporting requirements based on that income.

### **CONCLUSIONS OF LAW**

The agency erred in failing to consider Petitioner's fluctuating income when determining his monthly FS allotment, reporting requirements and overpayment. Because any overissuance that may have occurred is the result of the agency's failure to consider fluctuating income, the agency may recover only for any overissuance that occurred in the 12 months prior to July 18, 2013.

**THEREFORE, it is**

**ORDERED**

That this matter is remanded to the agency to take all administrative steps necessary to re-determine whether there was an overissuance of FS benefits to the Petitioner during the 12 months prior to July 18, 2013. In conducting its review, the agency must take into consideration the Petitioner's fluctuating monthly income. If the agency determines there is an overissuance, it shall issue a new Notification of FS Overissuance and worksheets to the Petitioner with new appeal rights for the Petitioner. The agency shall

cease any action to collect an overissuance of FS benefits to the Petitioner for the period of December 1, 2011 – July 17, 2012. These actions shall be completed as soon as possible but no later than 10 days from 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, Room 651, 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 4th day of February, 2014

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\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 February 4, 2014.

Milwaukee Enrollment Services  
Public Assistance Collection Unit  
Division of Health Care Access and Accountability