



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION

FOP/154113

PRELIMINARY RECITALS

Pursuant to a petition filed December 11, 2013, under Wis. Admin. Code § HA 3.03, to review a decision by the Wood County Human Services - WI Rapids in regard to FoodShare benefits (FS), a hearing was held on February 20, 2014, at Hayward, Wisconsin. A hearing scheduled for January 23, 2014, was rescheduled at the petitioner's request.

The issue for determination is whether the county agency correctly determined that the petitioner's household received more FoodShare than it was entitled to because the petitioner's child was incorrectly included as part of that household.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:



Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: Beulah Garcia

Wood County Human Services - WI Rapids
320 West Grand Avenue
PO Box 8095
Wisconsin Rapids, WI 54495-8095

ADMINISTRATIVE LAW JUDGE:

Michael D. O'Brien
Division of Hearings and Appeals

FINDINGS OF FACT

- 1. The petitioner (CARES # [redacted]) is a resident of Sawyer County.

2. On November 9, 2013, the county agency notified the petitioner that it sought to recover \$1,975 in FoodShare provided to his household from October 2012 until June 2013.
3. The petitioner has two children from a previous marriage. Until September 2012, his children resided with him half of the time. Since September 2012, they have resided with him three weekends a month during the school year. When he has the children he picks them up at 6:30 p.m. on Friday and returns them to their mother at 6:30 p.m. on Sunday. The children are in school five days a week.
4. The petitioner and his former wife agreed that each parent could claim one child as part of his or her household for FoodShare purposes. The petitioner claimed one of two children as part of his FoodShare household from September 2012 until September 2013.
5. The petitioner's FoodShare household has included him and his wife since they were married in September 2012.
6. The petitioner's household had earned income of \$1,880.17 in December 2012, \$1,588.54 in January 2013, \$1,771.80 in February 2013, \$1,594.44 in both March and April 2013, \$1,553.49 in May 2013, and \$1,145.85 in June 2013.
7. The petitioner's household received \$1,374 in monthly unearned income from October through December 2012 and \$1,393 in monthly unearned income from January through June 2013.
8. The petitioner's shelter expenses, including a \$444 standard utility allowance, were \$658 per month from October 2012 through June 2013.
9. The petitioner's household received \$296 in FoodShare from October through December 2012, \$309 from January through March 2013, and \$89 from April through June 2013.

DISCUSSION

Federal regulations require state agencies to "establish a claim against any household that has received more [FoodShare] benefits than it is entitled to receive." 7 CFR § 273.18(a). This regulation requires the agency to recover all FoodShare overpayments regardless of whose error caused the overpayment. The amount of a FoodShare allotment depends upon net income and the number of persons in the household. The county agency contends two errors were made in calculating the petitioner's FoodShare benefits. First, one of his two children was counted as part of his household without living primarily with him and, second, his spouse began working in October but he did not report her income on time.

One cannot be considered part of more than one household in the same month. 7 CFR § 273.3(a). The federal rules provide no clear answer to what happens when a child lives with both parents. The rules do allow state agencies to create a policy where federal rules do not clearly address which parent's household the child is considered a part of, provided "the policy is applied fairly, equitably and consistently throughout the State." 7 C.F.R. § 273.1(c). Wisconsin's policy, which is found in the *FoodShare Wisconsin Handbook*, § 3.2.1.1, provides the following guidance in these situations:

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.

The petitioner had been receiving FoodShare for several years. He and his former wife had two children, and they agreed that each parent could claim one child for FoodShare purposes. The petitioner was

remarried in September 2012, the month he had his annual review of his FoodShare benefits, and his new wife was added to his case. He continued to claim one of the two children. At his next annual review, in September 2013, he reported that his children were only living with him three weekends a month during the school year. When asked at his review how long that arrangement had been in place, he indicated that it had begun in September 2012. Based upon this, the agency contends he should not have claimed his child.

FoodShare household composition rules are not as clear as medical assistance rules, where a child can be considered part of a household if he is there 40% of the time. Nevertheless, the child here was with the petitioner less than one-fifth of the time. The petitioner testified that he has the child during the school year from 6:30 p.m. on Friday and returns them to their mother at 6:30 p.m. on Sunday three weekends a month. Assuming there are four weeks in a month, this comes to 144 of the 976 hours in a four-week period, or slightly less than 15% of the time. (There are actually 4.3 weeks in the average month, which would further reduce this percentage.) Even if one allows that for approximately 40 hours a week when the child is at school neither of the parents has her, the petitioner has her less than 18% of the remaining time. Moreover, the child's mother is solely responsible for getting her to school. The petitioner's house simply is not the child's primary residence. Therefore, she cannot be counted as part of his household when determining his benefits. Any additional benefits he received because she was considered part of his household must be repaid.

I am aware that the petitioner considered the child part of his household because the most recent court order indicated that the placement schedule spelled out in that order "constitutes a 50/50 placement for all matters." See *Exhibit 2*. This appears to be an attempt to achieve by judicial fiat what does not exist in reality. Although the Division of Hearings and Appeals considers court orders concerning custody, those orders are only one piece of evidence. For example, if the order indicated that the parents would have the children on alternating weeks, but this order was ignored and one parent had the children only a few days a month, the DHA's decision would have to reflect the actual situation. The actual situation in the petitioner's matter is that he has his child much less than "50-50." I cannot ignore what the physical placement actually is. That said, I am aware that he faces a significant financial burden as a result of his reliance on the court order, but I lack any equitable powers that would allow me to consider the fairness of the situation. If he wishes to make an equitable argument based upon the "50-50" provision in the order, he must appeal to circuit court and convince a judge to find that he is entitled to claim the child for FoodShare purposes.

As for the second cause of the alleged overpayment, recipients must report a change of circumstances within 10 days. 7 CFR § 273.12(a)2. Agencies must act on those changes the month after the reported change is due. 7 CFR § 273.12(c)(2). Wisconsin has reduced the reporting requirements for FoodShare recipients so that most only have to report a change of income that increases that income to over 130% of the federal poverty level. *FoodShare Wisconsin Handbook*, § 6.1.1.2. A notice sent to the petitioner on September 6, 2012, informed him that the threshold requiring him to report an increase in income was \$1,920.83. *Exhibit 3*. The petitioner's household income exceeded this amount in October 2012, meaning he should have reported it by November 10, 2012, and it would have affected his benefits as of December 2012. Because it was not reported on time, the change in benefits did not occur until April 2013, contributing to the overpayment for four months.

The petitioner's household received \$296 in FoodShare from October through December 2013, \$309 from January through March 2014, and \$89 from April through June 2013. The agency contends his household should have received \$12 in October and November 2012, nothing from December 2012 through May 2013, and \$23 in June 2013. Its calculations are found in *Exhibit 1*. As noted, FoodShare benefits depend upon net income, which is determined after subtracting those deductions—and only those deductions—found in 7 CFR § 273.9(d) from gross income. The petitioner is entitled to the standard deduction, the earned income deduction equal to 20% of his household's earned income in the months someone was

working, and a shelter deduction equal to the amount that housing costs, including a standard utility allowance, exceed 50% of the net income remaining after all other deductions are subtracted from gross income. 7 CFR § 273.9(d)(1), (2), and (6)(ii). The calculation sheet provided by the agency demonstrates that it has allowed all of these deductions; I find no error in its calculation of net income. The amount of FoodShare it contends he is actually entitled to as a result of that net income is consistent with the amount allowed for a two-person household in the allotment tables found at *FoodShare Wisconsin Handbook*, § 8.1.2. Therefore, I uphold its finding that his household received \$1,975 more in FoodShare than it was entitled to. Because all FoodShare overpayments must be repaid, the petitioner must repay that amount.

CONCLUSIONS OF LAW

The petitioner must repay an overpayment of FoodShare that occurred because he did not report that his child no longer lived primarily with him and because he did not report an increase in household income.

THEREFORE, it is

ORDERED

The petitioner's appeal 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, 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 Madison,
Wisconsin, this 27th day of February, 2014

\sMichael D. O'Brien
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 27, 2014.

Wood County Human Services - WI Rapids
Public Assistance Collection Unit
Division of Health Care Access and Accountability