



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION

FTI/155074

PRELIMINARY RECITALS

Pursuant to a petition filed January 28, 2014, under Wis. Stat. § 49.85(4), and Wis. Admin. Code §§ HA 3.03(1), (3), to review a decision by the Milwaukee Enrollment Services in regard to FoodShare benefits (FS), a hearing was held on April 03, 2014, at Milwaukee, Wisconsin. The record was held open 25 days for submission of additional records by Petitioner.

The issues for determination are whether Petitioner’s appeal is timely as to a notice of FoodShare overissuance, whether the agency has demonstrated that Petitioner was overpaid FoodShare and whether the Department correctly sought to intercept the Petitioner’s tax refund to collect an overissuance of FoodShare benefits.

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: Jose Silvestre

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

ADMINISTRATIVE LAW JUDGE:

David D. Fleming
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # ) is a resident of Milwaukee County.
2. Petitioner filed this appeal to contest an August 2013 notice of FoodShare overissuance and a January 14, 2014 tax intercept notice.
3. Petitioner did not have an open FoodShare case at any time relevant here; rather, the overpayment alleged is for the FoodShare household headed by the father of Petitioner’s child.

4. Petitioner was sent a Notification of FoodShare Overissuance in the first part of 2013 that indicated that she was liable for a \$3156.00 FoodShare overissuance for the time period of July 1, 2012 through December 31, 2012 due to non-client error. She timely appealed – Division of Hearings and Appeals case # FOP-150055. Prior to the hearing scheduled for that matter the agency withdrew the overpayment and Petitioner withdrew her appeal. The address reported by Petitioner on that appeal was the above address. The Division of Hearings and Appeals issued a Decision on August 7, 2013 that indicated that Petitioner had withdrawn appeal # FOP-150055. The address for Petitioner on that Decision is the above address. The Decision was sent to the agency.
5. The agency issued two Notifications of FoodShare Overissuance that collectively indicated that Petitioner was liable for a total FoodShare overissuance of \$10,716.00. One was dated August 13, 2013 (claim # [REDACTED]) and indicated Petitioner was liable for an overpayment of \$4404.00 for the time period from January 1, 2011 through December 31, 2011. The other was dated August 14, 2013 (claim # [REDACTED]) and indicated Petitioner was liable for an overpayment of \$6312.00 for the time period from January 1, 2012 through December 31, 2012. Both indicate that the alleged overissuance was the result of the client error of failing to report income. Again, Petitioner did not have an open FoodShare case at any time relevant here; the overpayment alleged is for the FoodShare household headed by the father of Petitioner’s child. The agency sent these notices to Petitioner’s prior address on [REDACTED] in Milwaukee. Petitioner moved from that address in March 2013.
6. Petitioner was sent a tax intercept notice dated January 17, 2014 that informed Petitioner that her tax refunds were subject to intercept to repay the \$10,716.00 overpayment of FoodShare benefits. That was sent to Petitioner at the [REDACTED] address. It was forwarded to Petitioner and she timely appealed.

DISCUSSION

The Division of Hearings and Appeals can only make a decision on the merits of a matter if there is jurisdiction to do so. There is no jurisdiction if a hearing request is untimely. An appeal of a negative action concerning FoodShare must be filed within 90 days of the date of that action. *7 CFR, §273.15(g)*. This presumes, however, that a petitioner has been provided with an adequate and timely notice. Here the agency had Petitioner’s above address as part of the hearing resolved in mid - 2013. It did not, however, send the new overpayment determination to that address. I cannot, therefore, conclude that Petitioner received any notice of the new overpayment determination making this appeal timely as to that issue.

A State is required to recover all FoodShare overpayments. An overpayment occurs when a FoodShare household receives more FoodShare than it is entitled to receive. *7 C.F.R. §273.18(a)*. The Federal FoodShare regulations provide that the agency shall establish a claim against a FoodShare household that was overpaid, even if the overpayment was caused by agency error. *7 C.F.R. §273.18(a)(2)*. All adult members of the household are liable for an overpayment. *FoodShare Eligibility Handbook, Appendix 7.3.1.2; also see 7 C.F.R. §273.18(a)(4)*.

The FoodShare program requires that parents and children under age 19 be included in the same household for FoodShare purposes if they live together.

3.3.1.3 Relationship Rules

7 CFR 273.1(b)(1)

The following individuals must be included in the same food unit, even if they do not purchase and prepare meals together:

1. Spouses and spouses,
2. Biological (unless no longer a parent because of adoption), adoptive, or step-parents and their children under the age of 22, **and**

3. Adults and minor children under the age of 18 years over whom they are exercising parental control.

FSH, §3.3.1.3.

This follows Federal law:

§273.1 Household concept.

...

(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.

...

7 Code of Federal Regulations §273.1(b).

The question here is whether Petitioner and the father (MLM) of her child were in the same household. The only evidence available for the hearing as to proof of that living arrangement was testimony from the agency worker that the father of Petitioner's child had reported that Petitioner was his landlord at the N [REDACTED] address and he was paying rent to her. The document reporting that was provided to Division of Hearings and Appeals after the hearing. It is dated December 19-20, 2011, titled Rental Statement and states that Petitioner is the landlord for her then address on [REDACTED] and that MLM was paying her rent in the amount of \$250.00 per month. A case note dated January 16, 2013 indicates a conversation between an agency staffer and MLM in which he states that he paid Petitioner for a room.

Petitioner testified that during the time period involved here she was employed by the [REDACTED] and travelled extensively throughout the State training medical staff in the use of an electronic medical record system. When she was traveling she permitted the father of the child to live in her home and permitted him to bring a son from another relationship with him. She did not want her child to be living in some less than optimal settings with the father when she was gone. She testified that she is not in a relationship with the father of her child, that he has another girlfriend and lives from place to place when not providing child care for their child while she travels.

Further, Petitioner submitted a sworn affidavit from MLM post hearing. That states that he did not live with Petitioner but watched his children at her home when she traveled as she did not like some of the environments that he would stay at if not at her home. It states that a question from an agency representative about going out to eat with his girlfriend was answered 'yes' but that his girlfriend was not Petitioner herein. Finally, it states that the money he paid Petitioner was for child expenses.

Thus, Petitioner contends that she and MLM should not be included in the same household and she has no liability for a FoodShare overpayment. Indeed, this is an argument that there was no overpayment as the whole overpayment is based on including Petitioner and MLM in the same household and then including her income in the eligibility determination calculation. The Division of Hearings and Appeals does not, however, have an appeal from MLM contesting this overpayment.

There is nothing in the record here to support the agency claim that Petitioner and MLM were in the same household until the December 19-20, 2011 Rental Statement. As of that date, however, there is a clear statement that MLM was in the same household as that of Petitioner. Correctly reported, that would have affected FoodShare eligibility and allotment calculations effective February 1, 2012. *See FSH, §6.1.3.6.*

Though there is Petitioner testimony and MLM's sworn statement that the Rental Statement mischaracterizes their arrangement and that the money he was paying her was for child expenses, this is not believable. Petitioner struck me as being too intelligent to have made such an error with the very formal and detailed Rental Statement. Further, I note that FoodShare policy during the time period

involved here permitted a child support deduction in the FoodShare allotment calculation even if not court ordered. Hence, the only reason for the Rental Statement would be to provide a shelter deduction for FoodShare. See *FSH, §4.6.5.1, release # 08-02 as to the deductibility of child support without a court order*. The case note entry in January 2013, while hearsay, is corroborated by the December 2011 Rental Statement.

I am, therefore, concluding that there is a FoodShare overissuance from the period from February 1, 2012 through December 31, 2012.

Once an overpayment is established, tax intercept is used to collect an overissuance that is delinquent as to an overpayment:

7.3.2.10 Tax Intercept

The State of Wisconsin Public Assistance Collections Unit uses tax intercept from both state and federal tax refunds to recover overpayments from anyone who has become delinquent in repayment of an overissuance.

To use tax intercept, the person must have received three or more dunning notices and the debt must be:

1. Valid and legally enforceable.
2. State: All error types.
Federal: All error types.
3. State: At least \$20.
Federal: At least \$25.
4. State: At least 30 days from notification of overissuance.
Federal: Not more than 10 years past due from notification date except in fraud cases.
There is no delinquency period for fraud.
5. Free from any current appeals.
6. Incurred by someone who has not filed bankruptcy, nor has their [spouse](#).

FSH, §7.3.2.10.

I am, therefore, reversing this tax intercept. There has been no opportunity for Petitioner to contest the alleged overpayment or make payment arrangements or decline to make them so as to meet the criteria necessary for the tax intercept.

CONCLUSIONS OF LAW

1. That Petitioner's January 28, 2014 appeal is timely with respect to the August 13 and 14, 2013 notices of FoodShare overissuance as those notices were sent to the wrong address and the agency had actual notice of the correct address.
2. That the available evidence does not demonstrate that there is a basis for claim # [REDACTED] (\$4404.00) thus it must be reversed.
3. That the available evidence does demonstrate by a preponderance of the evidence that Petitioner and MLM were in the same household December 19-20, 2011 through December 31, 2012; properly reported this would have affected FoodShare benefits for February 1, 2012 through December 31, 2012; thus claim # [REDACTED] is sustained except for the month of January 2012.
4. That Petitioner has not yet become delinquent with respect to the sustained portion of the alleged overpayment thus the Department may not yet certify an amount due to the for tax intercept.

NOW, THEREFORE, it is

ORDERED

That this matter is remanded to the agency and Department with instructions to rescind claim # [REDACTED] (\$4404), to rescind the January 14, 2014 tax intercept and to adjust claim # [REDACTED] by removing the month of January 2012 from that claim. These steps must be taken within 10 days of this Order. The agency may again utilize a tax intercept notice for the adjusted claim # [REDACTED] (or the new claim # for that amount if the agency and/or Department must assign a new claim number after the adjustment) if the criteria noted at *FSH*, §7.3.2.10 are later met.

In all other respects, this 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 Milwaukee,
Wisconsin, this 23rd day of May, 2014

\sDavid D. Fleming
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 May 23, 2014.

Milwaukee Enrollment Services
Public Assistance Collection Unit