



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

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In the Matter of

[REDACTED]  
[REDACTED]  
[REDACTED]

DECISION

FTI/155146

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**PRELIMINARY RECITALS**

Pursuant to a petition filed January 31, 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 March 05, 2014, at Milwaukee, Wisconsin.

The issue for determination is whether this is a timely appeal.

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

**ADMINISTRATIVE LAW JUDGE:**

John P. Tedesco  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner (CARES # [REDACTED]) is a resident of NA.
2. Petitioner was incarcerated in Louisiana in September 2011. Petitioner never informed the agency of his presence in Louisiana, his incarceration in Louisiana, or any change of address.
3. On June 13, 2012, the agency issued a Notification of FS Overissuance in the amount of \$2,374 for the period from 5/1/11 to 4/30/12. The notice was sent to [REDACTED] in Milwaukee.

The claim number was [REDACTED]. This was the last known address of petitioner and the address on record with the Department and the county agency with regard to FoodShare benefits. Petitioner never responded or appealed.

4. The Department issued a tax intercept notice on November 16, 2012. This notice was sent to the [REDACTED] St. address.
5. On January 31, 2014, petitioner requested a fair hearing.

### DISCUSSION

Wis. Stat. § 49.85, provides that the Department shall, at least annually, certify to the Department of Revenue amounts that it has determined that it may recover resulting from overpayments of public assistance, including Food Stamps (FS). See also, Wis. Stat. § 49.125; Wis. Stat. § 49.195(3); and, 7 U.S.C. § 2022.

The Department of Workforce Development must notify the person that it intends to certify the overpayment to the Wisconsin Department of Revenue for setoff from his/her state income tax refund, and must inform the person that s/he may appeal the decision by requesting a hearing. Wis. Stat. § 49.85 (4).

Wis. Stat. § 49.85(3)(b) provides that the DWD must give the person whose tax refund is to be intercepted at least 30 days written notice of the impending intercept by sending the required certification notice to his or her last known address. Wis. Stat. § 49.85(3)(b)(2) also requires that the notice issued inform the person subject to the intercept that he or she has *30 days from the date of the notice to appeal the certification action*. Wis. Stat. § 49.85(4)(b), provides for an appeal contesting the certification under Wis. Stat. § 227.44.

The hearing right is described in Wis. Stat. § 49.85(4)(b) as follows:

If a person has requested a hearing under this subsection, the department of workforce development shall hold a contested case hearing under s.227.44, except that the department of workforce development may limit the scope of the hearing to exclude issues that were presented at a prior hearing or that could have been presented at a prior opportunity for hearing.

Wis. Stat. § 49.85(4)(b).

In this case, the Department mailed a state income tax refund intercept notice to the petitioner concerning the FS overissuance claims in November 2012, to him at his last known address of record with the Department. He denied receipt.

The state income tax refund intercept statute requires mailing of the state income tax refund interception notification to the last known-address of the former benefits recipient, and no more. The testimony of the county agency representative is that the address used was the last-known address on record at the time of the interception notification. The petitioner's appeal was filed more than a year after the State issued the notice.

DHA has a long-standing policy with regard to the filing of an appeal that the pertinent time limit for filing the appeal is tolled where the county agency or the Department cannot demonstrate that a notice of the negative action taken was mailed to the correct address, and the petitioner has not received it. Where it is demonstrated by the evidence that the notice was correctly mailed, this fact creates a rebuttable presumption of delivery that a petitioner must overcome with evidence demonstrating that the notice was not actually received.

This interpretation is confirmed by Wisconsin caselaw.

It is well established that the mailing of a letter creates a presumption that the letter was delivered and received. See, Nack v. State, 189 Wis. 633, 636, 208 N.W. 487(1926), (citing Wigmore, *Evidence* 2d. ed.) § 2153; 1 Wigmore, *Evidence* (2<sup>nd</sup> ed.) § 95) Mullen v. Braatz, 179 Wis. 2d 749, 753, 508 N.W.2d 446(Ct.App.1993); Solberg v. Sec. Of Dept of Health & Human Services, 583 F.Supp. 1095, 1097 (E.D.Wis.1984); Hagner v. United States, 285 U.S. 427, 430, 52. S.Ct. 417, 418(1932).

\*\*\*(Portions of discussion not relevant here omitted).

This evidence raises a rebuttable presumption which merely shifts to the challenging party the burden of presenting credible evidence of non-receipt. United States v. Freeman, 402 F.Supp. 1080, 1082(E.D.Wis.1975). Such a presumption may not, however, be given conclusive effect without violating the due process clause. United States v. Bowen, 414 F.2<sup>nd</sup> 1268, 1273(3d.Cir.1969); Mullen v. Braatz, 179 Wis. 2d at 453. If the defendant denies receipt of the mailing, the presumption is spent and a question of fact is raised. (Examiner note: Citations omitted here.) The issue is then one of credibility for the factfinder. The factfinder may believe the denial of receipt, or the factfinder may disbelieve the denial of receipt.

State ex. Rel. Flores v. State, 183 Wis.2d 587, at 612-3 ((1994).

It is clear that from this record that petitioner was in Louisiana in late 2011 and never returned to Wisconsin. I believe that petitioner was incarcerated for some of this time. It is likely that he never received any of the overpayment notices, Dunning notices, Repayment Agreement, or the tax intercept notice. Petitioner, therefore, has not had a fair opportunity to be heard. With that said, if petitioner moved from the state and was incarcerated while still having an open FS case, he very likely was overissued benefits. But, on this record I cannot find that the amount sought is correct. It remains unclear to me whether the allegedly overissued FS allotments were spent from the Quest card account or if they remain in some FS limbo where the agency can reacquire them. Petitioner must have an opportunity to present a defense to the overpayment.

### CONCLUSIONS OF LAW

The tax intercept was issued in error because the petitioner never received the tax intercept notice or any of the related overpayment notices.

**NOW, THEREFORE, it is**

**ORDERED**

That this matter is remanded to the Department and its county agent with instructions to rescind and reverse the tax intercept and refund to petitioner any sums already recouped through such method. The Department shall also issue reopen the underlying overissuance case (claim number [REDACTED]) and issue a new Notification of FoodShare Overissuance to petitioner with new appeal rights to his current address reflected on this Decision. These actions shall be completed within 10 days of this Decision.

### **REQUEST FOR A REHEARING**

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or 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 filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,  
Wisconsin, this 25th day of March, 2014

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\sJohn P. Tedesco  
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 March 25, 2014.

Milwaukee Enrollment Services  
Public Assistance Collection Unit