



FH  
[REDACTED]

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

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In the Matter of

[REDACTED]  
[REDACTED]  
[REDACTED]

DECISION

FTI/155229

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**PRELIMINARY RECITALS**

Pursuant to a petition filed February 01, 2014, under Wis. Stat. § 49.85(4), and Wis. Admin. Code §§ HA 3.03(1), (3), to review a decision by the Jefferson County Department of Human Services in regard to FoodShare benefits (FS), a hearing was held on March 17, 2014, at Jefferson, Wisconsin.

The issue for determination is whether this appeal is timely.

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: Mary Wendt

Jefferson County Department of Human Services  
Workforce Development Center  
874 Collins Rd.  
Jefferson, WI 53549

**ADMINISTRATIVE LAW JUDGE:**

John P. Tedesco  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner (CARES # [REDACTED]) is a resident of Jefferson County.
2. Petitioner was sent a Notification of FS Overissuance to petitioner on July 5, 2012.

3. The agency sent Dunning notices to petitioner on 1/4/13, 5/8/13, and 9/13/13. Petitioner did not enter into a repayment agreement and did not file an appeal with the Division of Hearings and Appeals.
4. The Department sent a tax intercept notice to petitioner at [REDACTED] in [REDACTED], WI on 9/13/13. This was petitioner's correct mailing address on file with the agency. It was the residence of petitioner's parents where she received her mail at the time and until November 2013.
5. Petitioner checked mail at her parents' house every week during this period.
6. The notice indicated that an appeal needed to be filed with DHA within 30 days of the notice date which was 9/13/13.
7. Petitioner filed a request for hearing with DHA on February 4, 2014.

### 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 September 2013, to her at her last known address of record with the Department. Petitioner testified that she is not certain that she received this.

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).

The agency clearly followed the proper procedure and issued the tax intercept notice to the correct mailing address. Petitioner conceded that in September 2013 she was receiving mail at her parents. She checked the mail weekly. Petitioner is not certain that she received the tax intercept notice with the appeal deadline. But, this does not rebut the presumption of receipt. Petitioner has conceded that she knew about the debt and the previous action to pursue the overissuance. Petitioner did not appeal that action either. Other than petitioner's uncertainty, no evidence was presented which would lead me to conclude that she, in fact, did not receive it. The appeal is, therefore, untimely.

### **CONCLUSIONS OF LAW**

The appeal is untimely and petitioner failed to rebut the presumption of delivery and receipt of the tax intercept notice, and her appeal was filed more than four months after the notice.

**THEREFORE, it is**

**ORDERED**

That this matter is dismissed.

### **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 26th 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 26, 2014.

Jefferson County Department of Human Services  
Public Assistance Collection Unit