



FH
[REDACTED]

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

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

FTI/156247

PRELIMINARY RECITALS

Pursuant to a petition filed March 20, 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 23, 2014, at Milwaukee, Wisconsin.

The issue for determination is whether the 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: No Appearance

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 Milwaukee County.
2. Petitioner's mother was a FS recipient. Petitioner was named on the case and was an adult during the overpayment period.
3. The Department determined an overpayment of FS on the case and sent notices to petitioner at the case address.

4. Petitioner lived at the mother's home during the overpayment period. Petitioner was listed on the case as a resident in the home on applications and renewals going back years.
5. Various overpayment notices, Dunning notices, and repayment agreements were sent to petitioner at the [REDACTED] address between February 2011 and October 2012.
6. A tax intercept notice was sent to petitioner on 12/14/12 at [REDACTED] [REDACTED] in [REDACTED].
7. Petitioner filed a request for hearing on March 24, 2014 after her 2013 taxes were intercepted.

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 December 2012, to her at her last known address of record with the Department. Petitioner testified that she does not know whether she received this. But, petitioner was on her mother's FS case at this address for a period of years prior to this notice. Petitioner was an adult at the time of the overpayment period which is the basis for the agency's claim of liability.

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* (2nd 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.2nd 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). At hearing, petitioner did not rebut the presumption of proper mailing and delivery. Petitioner did not establish that her residence or mailing address was different or that the agency erred in any way by mailing documents to her at her mother's address. I note that petitioner's mother testified that she often would not give petitioner her mail and would just "put it aside." Both petitioner and her mother testified, without any specificity regarding dates, that petitioner lived there but was in and out – sometimes staying other places. First, I find it a bit unbelievable that a benefit recipient would treat official mail from the state or county agency so casually. I also have a difficult time believing that none of the various overpayment notices, Dunning notices, or repayment agreements were ever received by petitioner. This mail was not going into a void – it was being delivered to petitioner and her mother's home. Finally, I note that the record reflects that petitioner's mother collected FS in petitioner's name for years even though the mother indicates that there were periods when petitioner was not in this home. This admission reflects poorly on petitioner's mother's credibility. I am not persuaded by petitioner or her mother that she did not receive the December 2012 tax intercept notice. This appeal is untimely as the request for hearing was received more than a year after the tax intercept notice.

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 a year 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 5th day of May, 2014

\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 May 5, 2014.

██████████ Enrollment Services
Public Assistance Collection Unit