



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

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

FOO/157360

PRELIMINARY RECITALS

Pursuant to a petition filed May 05, 2014, under Wis. Admin. Code § HA 3.03(1), to review a decision by the La Crosse County Department of Human Services in regard to FoodShare benefits (FS), a hearing was held on June 10, 2014, at Black River Falls, Wisconsin.

The issue for determination is whether the petitioner is entitled to claim his children as part of his FoodShare household in May 2014.

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: Tom Miller

La Crosse County Department of Human Services
300 N. 4th Street
PO Box 4002
La Crosse, WI 54601

ADMINISTRATIVE LAW JUDGE:

Michael D. O'Brien
Division of Hearings and Appeals

FINDINGS OF FACT

1. The petitioner (CARES # [REDACTED]) is a resident of Jackson County.
2. The petitioner was an ongoing recipient of FoodShare benefits. His benefits were due for review by the end of April 2014, and he completed the review on April 30, 2014.

3. The petitioner's wife, who lives in a separate household, completed her FoodShare application before he completed his review. The county agency allowed her to claim their children as part of her household in May 2014.
4. Because the petitioner's wife was allowed to include their children in his household, he received \$145 in FoodShare in May 2014. His children were counted as part of his household in June 2014, and he received \$595 in FoodShare benefits that month.
5. The Jackson County Circuit Court issued a temporary order on August 28, 2013, in the petitioner's divorce proceedings that awarded him primary physical placement of his children. A guardian ad litem report filed on January 24, 2014, recommended that he and his wife have the children on alternating holidays and weekends, that she have them from 3:00 p.m. on Tuesday until 8:00 a.m. on Wednesday, and that he have them the remaining time.

DISCUSSION

The amount of FoodShare a household receives depends upon its size and net income. A person cannot be considered part of more than one household in any month. 7 CFR § 273.3(a). The petitioner and his wife are getting divorced and living in separate households. Their children had been considered part of his FoodShare household. FoodShare recipients are usually certified for 12 months. They must complete a review to be recertified and continue receiving benefits. *FoodShare Wisconsin Handbook*, § 2.2.1. The petitioner had to finish his review by the end of April 2014 to continue receiving benefits without a lapse. *Id.*, § 2.2.1.4. He completed his review on April 30. Before he completed his review, his wife applied for FoodShare benefits, requesting that their children be included in her household. The Department's computer automatically included the children in her household and removed them from the petitioner's for the month of May 2014. The children were returned to his FoodShare household in June 2014. He requests that he receive retroactive benefits to make up for the approximately \$450 reduction in his May benefits that occurred because his children were not part of his household.

Federal FoodShare 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.

If the parents cannot or will not decide, compare the parents' activities and responsibilities against the following list and determine which one is exercising more control than the other:

1. If the parents reside in different school districts, where does the child attend school? Who selected the school?
2. Who assists the child with homework or school-related tasks?
3. Are there tuition costs for the child's education? If so, who pays those costs?
4. If the child is enrolled in day care, who arranges for and pays these costs?
5. Who is responsible for taking the child to and from school and/or day care?

6. Which parent is listed as the contact for emergencies at the child's school or day care provider?
7. Who arranges medical and dental care for the child? Who selects the physician and dentist?
8. Who maintains the child's medical records?
9. Who initiates decisions regarding the child's future?
10. Who responds to medical or law enforcement emergencies involving the child?
11. Who spends money on food or clothing for the child when the child visits the absent parent?
12. Who disciplines the child?
13. Who plays with the child and arranges for entertainment?
14. Are more of the child's toys, clothing, etc. kept at one parent's home than the other's?

Only one parent can receive *FS* for a child. If you still cannot determine which food unit the child should be in, the caretaker that first applies would be eligible.

Although the petitioner had not yet completed his FoodShare review when his wife applied and had the children counted as part of her household, he remained an ongoing FoodShare recipient because his review was not late and there was no lapse in his benefits. As an ongoing FoodShare recipient, the agency should have compared his situation with his wife's when determining which of their households could include the children. A temporary order issued last August gave him primary placement. In January of this year, the guardian ad litem recommended that he and his wife have the children on alternating holidays and weekends, that she have them from 3:00 p.m. on Tuesday until 8:00 a.m. on Wednesday, and that he have them the remaining time. The record does not indicate that the divorce court has taken a final action, but the evidence before me clearly indicates that the petitioner has been his children's primary caretaker since at least last August. As such, his children should have been included in his household since then, including in May 2014. Moreover, even if he and his wife shared physical placement and responsibility equally—and they do not—his children should have remained in his household because he applied first.

Based upon this, the petitioner was entitled to claim his children as part of his household in May 2014 and must be issued a supplemental payment for that month. In making this decision, I am aware that the Department's computer automatically transferred the children to the household of the petitioner's wife, but he is not required to bear the consequences of an inadequately programmed computer.

CONCLUSIONS OF LAW

1. The petitioner was entitled to include his children in his household for FoodShare purposes in May 2014 because he was an ongoing recipient who was his children's primary caretaker.
2. The petitioner is entitled to a supplemental FoodShare payment for May 2014.

THEREFORE, it is

ORDERED

That this matter is remanded to the county agency with instructions that within 10 days of the date of this decision it take all steps necessary to ensure that the petitioner receive a supplement to his FoodShare allotment for May 2014 consistent with his children's inclusion in his household.

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 June, 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 June 26, 2014.

La Crosse County Department of Human Services
Division of Health Care Access and Accountability