



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[Redacted]
Redact

DECISION
FTI/163245

PRELIMINARY RECITALS

Pursuant to a petition filed January 16, 2015, under Wis. Stat. § 49.85(4), and Wis. Admin. Code §§ HA 3.03(1), (3), to review a decision by the Marathon County Department of Social Services in regard to FoodShare benefits (FS), a telephonic hearing was held on February 10, 2015, at Wausau, Wisconsin. During the hearing, both petitioner and her husband, [Redact Redact], agreed to consolidate the two appeals into this one hearing for FTI/163245 and FTI/163247. At the request of petitioner, the record was held open until February 18, 2015 for the submission of written closing arguments to DHA which are received into the hearing record.

The issues for determination are: a) whether the county agency is correctly and timely pursuing recovery of FoodShare (FS) overpayment of \$414 from petitioner from the period of December 11, 2011 to May 31, 2012, due to non-client error; and b) whether the Department is correctly seeking recovery of a January 16, 2015 \$414 FS tax intercept against the petitioner if petitioner's same underlying FS overpayment was incorrect.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[Redacted]
Redact

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: [Redact], ESS
Marathon County Department of Social Services
400 E. Thomas Street
Wausau, WI 54403

ADMINISTRATIVE LAW JUDGE:

Gary M. Wolkstein
Division of Hearings and Appeals

### FINDINGS OF FACT

1. Petitioner (CARES # Redact) is a resident of Marathon County who resided in a household of two with her husband, Redact.
2. The petitioner received FoodShare (FS) benefits for a household of two during the period of December 1, 2011 to May 31, 2012.
3. The petitioner timely and correctly reported her household income to the county agency during the period relevant to the determination of her FS benefits during the period of December, 2011 through May, 2012.
4. No timely overpayment action was taken by the county agency based upon a May, 2012 alleged state wage discrepancy regarding the petitioner's wages.
5. Due entirely to agency error, the agency worker incorrectly calculated the petitioner's self-employment income during the period of December 11, 2011 to May 31, 2012.
6. The county agency's discovery or "date of awareness" of the agency error of the petitioner's FS overpayment was more than **two (2) years** later, during July, 2014.
7. The county agency sent August 18, 2014 FoodShare (FS) overpayment notices to the petitioner and separately to her husband, Redact, regarding the FS overpayment of \$414, due to non-client error resulting from the agency's failure to budget petitioner's earned income during the period of December 1, 2011 to May 31, 2012.
8. Neither petitioner nor her husband received the August 18, 2014 FS overpayment notices, and thus petitioner's appeal in the instant case is timely to review the underlying FS overpayment issues.
9. The Department sent January 16, 2015 FoodShare (FS) tax intercept notices to the petitioner and her husband notifying them that the remaining unpaid FS overpayment of \$414 would be recovered through interception of their state or federal income taxes or credits.
10. The petitioner and her husband filed January 16, 2015 appeals with the Division of Hearings and Appeals (DHA) regarding the FS overpayment and tax intercept against petitioner and her husband.

### DISCUSSION

The federal regulation concerning FS overpayments requires the State agency to take action to establish a claim against any household that received an overissuance of FS due to an intentional program violation, an inadvertent household error (also known as a "client error"), or an agency error (also known as a "non-client error"). 7 C.F.R. § 273.18(b), see also, *FoodShare Wisconsin Handbook*, Appendix 7.3.2. Generally speaking, whose "fault" caused the overpayment is not at issue if the overpayment occurred within the 12 months prior to discovery by the agency. See, 7 C.F.R. § 273.18(b); see also, *FoodShare Wisconsin Handbook*, App. 7.3.1.9. However, **overpayments due to "agency error" may only be recovered for up to 12 months prior to discovery.** (Emphasis added). *FoodShare Wisconsin Handbook*, 7.3.2.1. Overpayments due to "client error" may be recovered for up to six years after discovery. *Id.*

In a fair hearing concerning the correctness of an overpayment of benefits, including the Food Share program, the burden of proof is on the agency. The agency must demonstrate a prima facie case establishing by the preponderance of the evidence that the overpayment occurred as determined, and must be recovered. The petitioner must then rebut the county agency's case and establish facts sufficient to overcome the county agency's evidence of correct action. The single most important evidence to do so is

the Notification of FS Overissuance and the Worksheets that demonstrate how the overpayment was computed.

As decided in prior cases before the Division of Hearings and Appeals, "discovery" was not the date of referral of a likely overpayment for investigation; discovery is the date when the agency actually determines an overpayment of a fixed amount occurred, and sends a notice to the FS recipient. Overpayments due to client error may be recovered for up to 6 years prior to discovery.

However, a BPS/DFS Operations Memo No. 12-20 (effective 4-4-2012), indicates that the "discovery" date is not the date of the agency's FS Overpayment Notice, but instead the "the date that the ESS [agency] became **aware** of the potential that an overissuance may exist." In this case, based upon the best available reliable, non-hearsay evidence or testimony during the February 10, 2015 hearing, the county agency became aware of a potential for an overissuance during July, 2014. Based upon this July, 2014 completion of "discovery" date regarding the December 1, 2011 to May 31, 2012 overpayment, the county agency may not recover that non-client error overpayment because the overpayment period was significantly more than 12 months prior to the completed discovery date. Thus, the alleged overpayment period of December 1, 2011 through May 31, 2012 was sought by the agency more than two (2) years later in its August 18, 2014 FS overpayment notices to the petitioner and her husband. Accordingly, based upon the above, I conclude that the county agency is incorrectly and untimely pursuing recovery of a FoodShare (FS) overpayment and FS tax intercept of \$414 from the same overpayment period of December 11, 2011 through May 31, 2012 because the county agency completed its "awareness" during July and August, 2014 and the overpayment is significantly more than 12 months prior to that "awareness" per FoodShare Wisconsin Handbook, 7.3.2.1.

### **CONCLUSIONS OF LAW**

1. The county agency is incorrectly and untimely pursuing recovery of FoodShare (FS) overpayment of \$414 from petitioner and her husband from the period of December 11, 2011 to May 31, 2012, due to non-client error because that FS overpayment is more than 12 months prior to that "awareness" per FoodShare Wisconsin Handbook, 7.3.2.1.
2. The Department is incorrectly seeking recovery of a January 16, 2015 \$414 FS tax intercept against the petitioner and her husband because the same underlying FS overpayment was incorrect, as explained in Conclusion of Law #1 above.

**THEREFORE, it is**

**ORDERED**

The matter is remanded to the county agency and the Department with instructions to take the necessary administrative action to rescind both the petitioner's and her husband's FS overpayment in the amount of \$414, and FS tax intercept in the amount of \$414 from the same underlying overpayment period of December 1, 2011 through May 31, 2012, within 10 days of the date 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 16th day of March, 2015

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\sGary M. Wolkstein  
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 16, 2015.

Marathon County Department of Social Services  
Public Assistance Collection Unit