



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[Redacted]
Redact

DECISION

FTI/163781

PRELIMINARY RECITALS

Pursuant to a petition filed February 9, 2015, 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 the certification of an overpayment of FoodShare benefits (FS) for state income tax refund intercept, a hearing was held on February 25, 2015, at Milwaukee, Wisconsin. At the request of the Department, the record was held open for 10 days for the submission of additional information; no additional information was received.

The issue for determination is whether the county agency correctly certified a FS overpayment of \$3,508 for state income tax refund intercept.

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: [Redacted], Senior HSPC
Milwaukee Enrollment Services
1220 W Vliet St, Room 106
Milwaukee, WI 53205

ADMINISTRATIVE LAW JUDGE:

Kenneth D. Duren, Assistant Administrator
Division of Hearings and Appeals

FINDINGS OF FACT

- 1. Petitioner (CARES # [Redacted]) is a resident of Milwaukee County. She was receiving FS as the casehead of FS household of a size unknown on this record during the period of March – November, 2013.

2. On or about November 4, 2013, the Department requested earned income verification from the petitioner by November 14, 2013. See, Exhibit #2.
3. It appears from Case Comments for December 12, 2014, that the Department did not receive timely verification and rather, simply determined that on December 12, 2014, that the petitioner had been overpaid FS of \$3,508 in the period of March – November, 2014. See, Exhibit #2.
4. On or about December 13, 2013, the Department apparently issued a Notification of Overpayment to the petitioner informing her that she had been overpaid \$3,508 of FS in the time period described in Finding of Fact No. 1, above, allegedly due to failure to report increased earned income. The agency was unable to produce a copy of the Notification or any supporting Worksheets demonstrating the computation of the overpayment alleged at the hearing; and the petitioner denied receipt of either. The record was held open for 10 days for the agency to submit this information but no such additional documentation has been received. See, Exhibit #2, Case Comments.
5. On January 3, 2014, the Department issued a Repayment Agreement For FoodShare Overissuance to the petitioner at her then current valid (and present day) residence address, informing her that she owed the Department \$3,508 of FS overpayments for the period of March – November, 2013. The petitioner denies receipt of this document at any time. See, Exhibit #6.
6. On January 16, 2014, the Department recouped \$34 from the petitioner's ongoing FS allotment for February 2, 2014, and applied the recover to the \$3,508 FS overissuance debt, leaving a balance due of \$3,474. See, Exhibit #3, p.3. The agency did not produce any Notice that informed the petitioner of the reduction due to the recoupment, and the petitioner denied receiving any such notice or in any way being aware of the \$34 recoupment.
7. On March 4, 2014, the Department issued a second Repayment Agreement For FoodShare Overissuance to the petitioner at her then current valid (and present day) residence address, informing her that she owed the Department \$3,474 of FS overpayments for the period of March – November, 2013. The petitioner denies receipt of this document at any time. See, Exhibit #6.
8. Also on March 4, 2014, the Department issued the first of three dunning letters to the petitioner at her then current valid (and present day) residence address, informing her that she owed the Department \$3,474 of FS overpayments, and demanding that she make arrangements to repay it and/or an agreement with the Department to repay this sum. The petitioner denies receipt of this dunning letter. See, Exhibit #5, p.1
9. Subsequent similar dunning letters were mailed to the petitioner on April 2, 2014, and May 2, 2014, at her then current valid (and present day) residence address, and with each again informing her that she owed the Department \$3,474 of FS overpayments, and demanding that she make arrangements to repay it and/or an agreement with the Department to repay this sum. The petitioner denies receipt of each of these dunning letters. See, Exhibit #5, pp. 2-3.
10. On June 13, 2014, the Department of Children and Families issued a state tax refund intercept notice to the petitioner at her then current valid (and present day) residence address, informing her that \$3,474 in past due public assistance debts for FS overpayment occurring in March-November, 2013, may be intercepted from her state income tax or homestead credit refund. The petitioner denies receipt of this dunning letter. See, Exhibit #7.
11. On February 3, 2015, the Department received a state income tax refund intercept payment from the petitioner via intercept by the Wisconsin Department of Revenue of \$3,232. The petitioner admits that she was notified of this intercept and avers that this is the first time she became aware of the FS overissuance claim of record against her.
12. On February 9, 2015, the petitioner first filed an appeal with the Division of Hearings & Appeals contesting the state income tax refund intercept certification of June 13, 2014, taken against her FS case; and the FS overissuance determination of December 13, 2013.

13. The petitioner has had frequent mail delivery and mail theft problems as her present residence address.
14. The record was held open for 10 days for the agency to provide: primary documentation of the petitioner's actual income in the period of March – November, 2013 [from the "Work Number" agency report]; the Notification of FS Overissuance; the FS Overissuance Worksheets; the petitioner's KIDS child support database payment history for the March – November, 2013, period; and a copy of the petitioner's Social Security Income verification data. None of these documents were received by the Division during the open records period.

DISCUSSION

Wis. Stat., §49.85(2)(a), provides that the Department shall, at least annually, certify to the Department of Revenue the amounts that it has determined that it may recover resulting from overpayment of general relief benefits, overissuance of FS, and Medical Assistance payments made incorrectly.

The Department of Health Services must notify the person that it intends to certify the overpayment to the Department of Revenue for setoff from his/her state income tax refund and must inform the person that he/she may appeal the decision by requesting a hearing. Id. at §49.85(3)(a).

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

If a person has requested a hearing under this subsection, the department ... shall hold a contested case hearing under s. 227.44, except that the department ... 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.

The Department is required to recover all overpayments of public assistance benefits. An overpayment occurs when an FS household receives more FS than it is entitled to receive. 7 C.F.R. §273.18(a). The federal FS regulations provide that the agency shall establish a claim against an FS household that was overpaid, even if the overpayment was caused by agency error. 7 C.F.R. §273.18(a)(2).

The federal regulation concerning FS overpayments begins: "The State agency shall take action to establish a claim against any household that received an overissuance due to an inadvertent household or administrative error...." 7 C.F.R. §273.18(b). Once timely and adequate notice is given to the household, the household must appeal within 90 days of the negative action. 7 C.F.R. §273.15(g); see also Wis. Admin. Code, §HA 3.05(3)(b).

My first conclusion is that petitioner was not actually notified that she was liable for an overpayment because the evidence does not establish that she received the notice. I am fully cognizant that the petitioner here denies receipt of 6 variants of notices or letters properly addressed to her current residence that would have informed her that the agency wanted her to repay money overpaid. But she testified credibly that she had frequent mail delivery problems and stolen mail for some years at this residence, and that she had complained to postal authorities in the past. She testified in a clear and consistent manner that she had not received each or any of the notices and letters about the overpayment. No other evidence beyond these letters established that she ever contacted the agency to inquire or contest the overpayment determination of December 13, 2013. Then, when her refund was actually intercepted, she promptly appealed within mere days. To that evidence, the agency provided no rebuttal evidence. I reviewed the Case Comments in the record but found no real indicia that she contacted the agency to complain about an overpayment, recoupment, or tax intercept at any time before she actually had the tax intercept occur. At that point she immediately appealed. While a close issue, I am satisfied that she was truthful on this point, and no rebuttal has broken that conclusion.

Furthermore, while the separate tax intercept statute provides that a notice has to be sent only to the person's last known address, the statute is based upon the assumption that the person was notified about

the overpayment initially and either did not appeal or lost an appeal. I cannot conclude that a tax intercept notice sent to a last known address that was not received by petitioner deprives her of his right to appeal the merits of the overpayment when it cannot be established that she was actually notified of the overpayment when it originally was established.

Under these facts, I must conclude that petitioner is entitled to her “day in court”, i.e., a hearing on the merits of the large overpayment that led to the tax intercept action.

This determination need not be fatal to the agency’s recovery action. In fact, the agency should be able to stand by its evidence and establish a valid claim. When it cannot, then the fault lies not in the stars, as it were, but in the deficient evidence of correct action. This is not a game of legal “gotcha”. It is the longstanding policy of the Division that its assigned administrative law judges must act with judicial economy and consider the timeliness of an appeal and all underlying issues on the merits of the dispute at the hearing, so that there results a high probability of a final determination on the appeal without need to resort to a trailer follow-up hearing at additional delay and cost to the Department, petitioner, and the Division. The Department must always be prepared and able to demonstrate the validity of the overpayment in such a hearing. ALJs will always stand ready to hold the record open if needed to allow the agency to add to the record if some evidence is absent at the hearing time. **But that does not change the fact that the agency is always required to be able to present a case on the merits of the overpayment dispute.**

After concluding that the appeal must be considered timely, I turned in the hearing to the merits of the overpayment. The agency could not provide a copy of the original FS overissuance notice; the worksheets showing how it was computed; the primary documentation that would show what the petitioner’s income was in the tested period, such that a judge could review the accuracy of the overpayment computations; or KIDS or Social Security unearned income data spreadsheets demonstrating what unearned income the agency budgeted. Again, this was still not fatal to the agency case, as I held the record open for the agency for 10 days to provide me with a copy of this baseline data normally produced to support any such FS overissuance. No additional information has been submitted by the agency by CWW Tracker system, fax, or mail.

Based upon the evidence in this record, I can only conclude that the overpayment determination must be reversed and rescinded. The Department has not made a prima facie case supporting the overpayment. It has not provided a copy of the original Notice and Worksheets that would show the computation of the overpayments. Lacking these baseline documents, the overpayment cannot be reviewed for accuracy by the ALJ or contested meaningfully by the petitioner. When questioned at the hearing about the nature and amounts of the petitioner’s income, Department worker [Redact] indicated that the proof of the petitioner’s excessive income would be found in the Work Number commercial wage reporting database, the KIDS child support database and the Social Security benefits verification service database; but she did not have this baseline data available at the hearing. The record was held open for all five documents. None have been received; no explanation has been sent by the Department for this failure; and no request for an extension of the open record period has been received.

The Department is, has, and will always be, expected to produce exhibits demonstrating the merits of an underlying overpayment claim within the context of a state tax intercept certification hearing regardless of its belief that the hearing request is untimely. That determination is one left to the legal expertise of the presiding administrative law judge. Period. I cannot emphasize that any more clearly.

Here, my decision is that agency has not established a prima facie case supporting the overpayment and it must be reversed and rescinded. The agency is to refund all amounts recovered from the petitioner by recoupment and intercept, and to cease all recovery efforts. I took the opportunity to obtain from the

PACU copies of the payment history, and they show that petitioner paid \$3,232 on the claims through tax intercept and \$34 by recoupment. That money, \$3,266 en toto, must be refunded.

Finally, as a side note to the parties, nothing in this decision prevents the agency from pursuing recovery for overpaid FS in the future if it develops *new* evidence that supports a *new* overpayment determination. In that event, if the petitioner is again aggrieved, she must file a *new* appeal at that time.

CONCLUSIONS OF LAW

1. Prior to having her tax refund intercepted to recover an FS overpayment, petitioner did not have an opportunity for a hearing on the merits of the overpayment because the agency did not establish that she was actually notified of the claim or the tax intercept.
2. The Department has not established by the preponderance of the evidence in this record that the petitioner was overpaid FS from March – November, 2013, due to unreported income in excess of program limits because the agency could not produce the original notice, worksheets, or primary or secondary proof of her income in that period nor how it had computed the overpayment; FS overissuance Claim No. 7900394117, must be reversed and rescinded.
3. Any tax refunds intercepted, or other recovered funds, by the Department from petitioner since December 13, 2013 must be refunded to her.

THEREFORE, it is

ORDERED

That the matter be remanded to the county with instructions to: reverse and rescind FS Overissuance Claim No. 7900394117 (\$3,508 of FS in the period of March – November, 2013) in its entirety as a claim of record against the petitioner; cease all recovery efforts based upon this Claim No.; and take all actions necessary to effectuate a refund of the \$3,232 intercepted from her tax refund in 2015 and/or recouped (\$34) from her FS at any time prior. The agency shall complete these actions 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 13th day of March, 2015

\sKenneth D. Duren, Assistant Administrator
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 13, 2015.

Milwaukee Enrollment Services
Public Assistance Collection Unit