



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Redact
Redact
Redact

DECISION

FOP/163789

PRELIMINARY RECITALS

Pursuant to a petition filed February 09, 2015, under Wis. Admin. Code §HA 3.03, to review a decision by Milwaukee Enrollment Services (MES) in regard to FoodShare benefits (FS), a telephonic hearing was held on March 25, 2015, at Milwaukee, Wisconsin. The record was initially held open until April 20, 2015 for the submission of consecutive closing arguments to the Division of Hearings and Appeals (DHA). However, the record has been extended due to evidence that MES did not receive petitioner's initial closing argument until about April 16, 2015. As a result, MES' closing argument of April 22, 2015 is conditionally received into the hearing record. Attorney Redact's April 23, 2015 objection that the agency's April 22, 2015 closing argument argued new "facts" not already in evidence is sustained. MES' written argument will only be accepted into the record in so far as the written argument applies to facts established during the hearing or in the exhibits received into the hearing record (for example, not including allegations of future child care overpayment actions).

The issue for determination is whether Milwaukee Enrollment Services (MES) is correctly seeking recovery of a total FoodShare (FS) overpayment of \$4,282 resulting from \$4,070 during the period of October 24, 2013 to September 30, 2014, and also \$212 for the period of October, 2014, due to client error to fail to report her employment earned income commissions or overtime pay.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

Redact
Redact
Redact

Petitioner's Representative:

Attorney Redact
Redact
Redact
Redact

Respondent:

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

By: Redact, income maintenance advanced worker
Milwaukee Enrollment Services
1220 W Vliet St, Room 106
Milwaukee, WI 53205

ADMINISTRATIVE LAW JUDGE:

Gary M. Wolkstein
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # Redact) is a resident of Milwaukee County.
2. The petitioner received FoodShare (FS) for a group of three during the period of October 24, 2013 through December, 2014.
3. During the period after petitioner's October 24, 2013 telephone renewal, petitioner submitted an employer verification of earnings form (EVR) and three pay stubs from her employer, Redact. The November 4, 2013 employment EVR form indicates that petitioner works 30 hours per week at \$10.92 per hour and also works overtime with varying hours earning \$16.38 per hour. That form also indicates that petitioner earns "commissions" with payouts that vary.
4. Based upon the employment verification form and her three paystubs, petitioner did report not only her base pay of \$10.92 per hour, but also her overtime pay and that she received earned commissions.
5. Milwaukee Enrollment services (MES) mistakenly budgeted only \$655.20 every other week based upon 30 hours per week at \$10.92 per hour instead of including petitioner's reported overtime pay on her paystubs or that she received "commission" income during that period.
6. MES sent a November 7, 2013 Notice of Decision to the petitioner using only the petitioner's base pay to calculate her FS benefits.
7. MES was unable to provide any evidence to establish that it requested any additional verification, pay stubs, or information from petitioner to determine the petitioner's average amount of her overtime hours or earned commissions.
8. MES worker became "aware" of petitioner's possible overpayment by receiving a September 25, 2014 email from DCF alleging fraud that petitioner did not accurately report her total household income.
9. MES issued a September 26, 2014 Notice of decision to the petitioner stating that her FS benefits would discontinue effective November 1, 2014.
10. During the entire FS overpayment period of November, 2013 through September, 2014, the petitioner's gross household monthly income was above the FS gross income limit of \$3,256 for a FS group of three.
11. MES sent January 13, 2015 FS Overpayment Notices to the petitioner stating that she received an overpayment of \$4,070 during the period of October 24, 2013 to September 30, 2014, and also received an overpayment of \$212 for the period of October, 2014, due to petitioner failing to report all her earned income as client error.
12. During the March 25, 2015 hearing, petitioner did not contest the agency's determination or calculation of her household income during the FS overpayment period, but only argued her FS overpayment was due to agency and not client error.

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. FoodShare Wisconsin Handbook, 7.3.2.1. Overpayments due to “client error” may be recovered for up to six years after discovery. *Id.*

As decided in prior cases before the Division of Hearings and Appeals (DHA), “discovery” was not the date of referral of a likely overpayment for investigation; discovery was the date when the agency actually determined an overpayment of a fixed amount occurred, and sent a notice to the FS recipient. Overpayments due to client error may be recovered for up to 6 years prior to discovery. However, an April 4, 2012 BPS/DFS Operations Memo No. 12-20 (effective 4-4-2012), indicates the Department has received clarification from the Food and Nutrition Service (FNS) regarding the definitions of ‘aware’ and ‘discover’ and how the policy should be applied. The form of that clarification is not described. i.e., whether it was a phone call, letter, rule change reflected in the Federal Register or something else. Under the new policy the “discovery” date is not the county agency’s January 13, 2015 FS Overpayment Notices, but instead the “the date that the ESS became **aware** of the potential that an overissuance may exist.” In this case, that specific date appears to be September 25, 2014 when an MES worker received an email from DCF alleging fraud that petitioner did not accurately report her total income creating an overpayment resulting in a September 25, 2014 “awareness” or “discovery” date. See Finding of Fact #8 above.

...

The overissuance period for non-client errors begins with the day the ESS discovered or became aware of the potential for an overissuance, and extends backward:

1. Twelve months,
2. To the month the error was effective had the worker acted on the change timely, whichever is the most recent.

It is essential that the date of awareness is documented in case comments. This date locks in the look back period and will not change regardless as to when the ESS calculates the overissuance amount.

In order to meet the established timeliness requirements, overpayment claims must be completed before the last day of the quarter following the quarter in which the ESS discovered or became aware of an overissuance. This holds true for both client and agency errors. Overissuance claims must be established and recovered even if they are not completed within this timeframe. Overissuance claims must be established and recovered even if they are processed late; failing to complete a claim within the given timeframe does not void the overissuance.

...

Operations Memo, 12-20, at page 3.

In a Fair Hearing concerning the propriety of an overpayment determination, the county agency has the burden of proof to establish that the action taken by the county was proper given the facts of the case. The petitioner must then rebut the county agency's case and establish facts sufficient to overcome the county agency's evidence of correct action. During the March 25, 2015 hearing, the MES representative presented testimony and evidence to support that it was correctly pursuing a FS overpayment against the petitioner even though it inaccurately classified the overpayment as client rather than agency error. The record was

held open for closing arguments by the parties to DHA. See above Preliminary Recitals and above Findings of Fact. During the hearing, petitioner did not allege any error in the determination or calculation of the petitioner's FS overpayment.

The central issue remaining in dispute was whether the overpayment was due to agency or client error. Attorney [Redact] presented convincing testimony and evidence to establish that the petitioner did report that she earned overtime and commission income. See Findings of Fact #3 - #7 above. On page 2 of her closing argument, Ms. [Redact] argued correctly that: "Ms. [Redact] reported that she worked both overtime and earned commission. However, the agency used only her regular work hours, ignoring the other information provided. It failed to make any further inquiry to determine the average amount of Ms. [Redact]'s overtime and commissions. That is how and why the overpayments occurred." During the hearing and in its closing argument, MES was unable to provide any persuasive testimony or evidence to refute or undermine the petitioner's argument that the FS overpayments were due to agency error.

On a different issue in her closing argument, Ms. [Redact] indicated correctly that petitioner was entitled to the 20% earned income deduction from the full amount of her earned income if the error was due to agency error. However, Attorney [Redact] conceded that "based on her earnings during the overpayment period affording her the earned disregard does not affect the Food Share overpayment calculations." As a result, there is no dispute about the amount of the petitioner's FS overpayments in this case.

Since the FS overpayment was created during the 12-month period, controlling federal regulation requires establishment of a claim against a household for a FS overpayment regardless **of whose error caused the overpayment to occur**: "The State agency shall establish a claim against any household that has received more food stamp benefits than it is entitled to receive . . . "7 C.F.R. § 273.18(a); see also FoodShare Wisconsin Handbook, 7.3.2.1. Accordingly, for the above reasons, MES is correctly seeking recovery of a total FoodShare (FS) overpayment of \$4,282 resulting from \$4,070 during the period of October 24, 2013 to September 30, 2014, and also \$212 for the period of October, 2014, but due to the agency error to mistakenly ignore petitioner's reported overtime and commissions, and fail to make any further inquiry to determine the average amount of petitioner's overtime and commissions.

CONCLUSIONS OF LAW

Milwaukee Enrollment Services (MES) is correctly seeking recovery of a total FoodShare (FS) overpayment of \$4,282 resulting from \$4,070 during the period of October 24, 2013 to September 30, 2014, and also \$212 for the period of October, 2014, but due to agency and not client error regarding petitioner's reporting of her overtime pay or commissions.

THEREFORE, it is

ORDERED

The matter is remanded to Milwaukee Enrollment Services (MES) with instructions to change the classification of petitioner's FS overpayments during the period of October 24, 2013 through October, 2014 to be due to agency error (and not client error), within 10 days of the date of this Decision. In all other respects, the petition for review is hereby 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 28th day of May, 2015

\sGary M. Wolkstein
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin \DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on May 28, 2015.

Milwaukee Enrollment Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
Attorney Redact