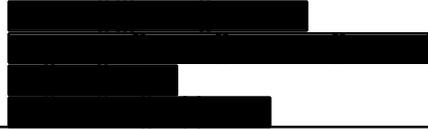




STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION

FTI/164191

PRELIMINARY RECITALS

Pursuant to a petition filed February 23, 2015, under Wis. Stat. § 49.85(4), and Wis. Admin. Code §§ HA 3.03(1), (3), to review a decision by the Ozaukee County Department of Social Services in regard to FoodShare benefits (FS), a hearing was held on March 24, 2015, at Milwaukee, Wisconsin.

The issues for determination are: 1) Whether the Petitioner's appeal of the underlying overpayment is untimely, 2) If the appeal is timely, whether the agency correctly determined the Petitioner was overpaid \$797.00 for the period of April 1, 2014 through September 8, 2014 and 3) Whether the agency correctly implemented a tax intercept.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:



Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703
By: Pahoua Vang, Economic Support Specialist
Ozaukee County Department of Social Services
121 W. Main Street
PO Box 994
Port Washington, WI 53074-0994

ADMINISTRATIVE LAW JUDGE:

Mayumi M. Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

- 1. Petitioner (CARES # [redacted]) is a resident of Milwaukee County.

2. The Petitioner was arrested on February 10, 2014 and he remained in custody until on or about September 9, 2014. (Testimony of Petitioner; Testimony of Ms. Vang; Exhibit 2)
3. On August 27, 2014, the Department of Corrections contacted the agency to let them know that the Petitioner had been in custody for longer than 30-days, so the Petitioner's case was closed effective October 1, 2014. (Exhibit 19)
4. On September 15, 2014, Ms. Vang contacted the Department of Corrections to verify the Petitioner's dates of custody. (Testimony of Ms. Vang, Exhibit 2)
5. On September 16, 2014, the agency issued a FoodShare Overpayment Notice, claim # [REDACTED], indicating that between April 1, 2014 and September 30, 2014, the Petitioner had been overpaid benefits in the amount of \$797.00. This notice was mailed to the Petitioner at his address in Waubeka. (Exhibit 6)
6. The exact overpayment period ran from April 1, 2014 through September 8, 2014. (Testimony of Ms. Vang)
7. The Petitioner was arrested again for a Violation of Probation/Parole on or about September 18, 2014. (Testimony of Petitioner)
8. The Petitioner remained in custody; his community supervision was revoked and he was transported from the [REDACTED] [REDACTED] [REDACTED] to the [REDACTED] [REDACTED] [REDACTED] [REDACTED] in January 2015. (Testimony of Petitioner)
9. On October 2, 2014, the agency sent the Petitioner a repayment agreement at his address in Waubeka. (Exhibit 7)
10. On November 4, 2014, December 2, 2014 and January 5, 2015, the agency sent the Petitioner dunning notices (reminders) concerning the overpayment. The notices were sent to the Petitioner at his address in Waubeka. (Exhibits 8-10)
11. On February 12, 2015, the December 2, 2014 notice was returned to the agency. (Exhibit 11)
12. Upon receipt of the returned mail, the agency made an effort to locate the Petitioner and found him at the [REDACTED] (Exhibit 19; Testimony of Ms. Vang)
13. On February 13, 2015, the agency sent Petitioner another copy of the overpayment notice, but not the returned dunning notice from December 2014. (Exhibit 13)
14. Also on February 13, 2015, the Public Assistance Collections Unit sent the Petitioner a notice advising him that it would be intercepting any State tax returns to which he might be entitled. (Exhibit 18)
15. The Petitioner filed a request for fair hearing that was received by the Division of Hearings and Appeals on February 23, 2015. (Exhibit 1)
16. In his hearing request, the Petitioner asked that any outstanding balance on his EBT card be applied to the overpayment. The agency complied with his request and \$734.13 was applied to the overpayment, leaving a balance of \$62.87. (Exhibit 2, Exhibit 15 and Exhibit 16)

DISCUSSION

Timeliness of Petitioner's Appeal of the Overpayment

A hearing officer can only hear cases on the merits if there is jurisdiction to do so. There is no jurisdiction if a hearing request is untimely. An appeal of a negative action concerning FoodShare must be filed within 90 days of the date of that action. 7 C.F.R., § 273.15(g). A negative action can be the denial of an application, the reduction of benefits, or as in this case, the recovery of an overpayment.

The agency sent the Petitioner an overpayment notice in September 2014. However, it was sent to his address in Waubeka, two days before he returned to custody on September 19, 2014. As such, it is not likely the Petitioner received the overpayment notice in September 2014. Accordingly, it is found that Petitioner's appeal of the underlying overpayment is timely.

The Overpayment Determination

The federal regulation concerning FoodShare overpayments requires the State agency to take action to establish a claim against any household that received an overissuance of FoodShare 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 (FSH)*, App. §7.3.2.1. As such, it does not matter whose error caused the overpayment; it must be recouped.

It is undisputed that the Petitioner was incarcerated in a county jail from February 10, 2014 through September 8, 2014.

The FoodShare Handbook discusses the effects of incarceration on FoodShare eligibility:

3.2.1.2.2 Incarceration and Huber Law Prisoners

An individual who is incarcerated for more than 30 days is ineligible for FoodShare unless they meet all the Huber criteria listed below.

Huber law prisoners who are released from confinement for the purpose of caring for members of their family, and who purchase and prepare meals with their family members can still be included in the FS Unit and may be eligible for FoodShare benefits. The prisoner must meet all financial and non-financial eligibility requirements.

A Huber Law prisoner is caring for his/her family if s/he meets all the following criteria:

1. Intends to return home after his or her confinement.
2. Continues to exercise care and control of his or her children.
3. Continues to plan for the support and care of his or her children.
4. Is released to attend to the needs of his/her family and to purchase or prepare meals with his/her family.

Clearly, the Petitioner was incarcerated for more than 30-days. There is no assertion and no evidence that the Petitioner was granted Huber Release to care for his family. As such, the Petitioner was not eligible for benefits.

It is undisputed that the Petitioner was the recipient of SSI benefits and was therefore, considered a disabled household. It is also undisputed that the Petitioner did not have any earned income. Consequently, he was required to report any changes within ten days. *FoodShare Wisconsin Handbook (FSH) §6.1.1.1* The agency then had 10-days to act on that change. FSH §6.1.3

So, if the Petitioner was incarcerated on February 10, 2014, he would have had until February 20, 2014 to report the change. The agency would have had until March 2, 2014 to act on the change. Wisconsin issues benefits on a calendar month cycle and notices of adverse action must be mailed 10 days before the effective date of action. FSH §§3.4.1 and 6.3.1 Consequently, agency action on March 2, 2014, would have caused the Petitioner’s benefits to close April 1, 2014.

Based upon the foregoing, it is found that the agency correctly determined that the Petitioner was overpaid benefits beginning April 1, 2014. The Department of Corrections reported to the agency that the Petitioner was released on September 9, 2014, so the agency correctly ended the overpayment on September 8, 2014¹.

The Petitioner argues that it is unfair to impose a reporting requirement upon him, because he is in custody and has no ability to make a collect call to the agency to report his incarceration. However, the Petitioner could have written a letter to the agency or he could have had a third party call the agency on his behalf to contact the agency. Indeed, the Petitioner was on community supervision at the time and could have had his probation/parole agent call the agency on his behalf. Indeed, an agent did take the initiative to contact the agency in August 2014. (See Exhibit 19)

Calculation of the Overpayment

The Petitioner disputes the agency's calculation of his benefits, because in June 2014, the benefits increased to \$189 per month, when he used to receive \$90.00 per month.

Federal regulations prohibit SSI payments to most prisoners. (see the Social Security Website, <http://www.ssa.gov/reentry/#a0=0>) The Petitioner testified that, at some point, his SSI benefits ended. Social Security Information is auto populated through a data exchange. As such, it is more likely than not, that the Petitioner's FoodShare benefits increased in June 2014, when his SSI benefits ended. Keep in mind, that in June 2014, the agency was not aware of the Petitioner's incarceration. Indeed, it did not become aware of the Petitioner's incarceration until the end of August 2014. (See Exhibit 19)

Reviewing the overpayment worksheets attached to Exhibit 6, the Petitioner's application for benefits dated October 22, 2013 and the notice of decision issued on November 12, 2013, I can find no error in the agency's overpayment calculation. (See Exhibits 3, 4 and 6)

Liability for the Overpayment

The Petitioner argues that his parents should be held liable for the overpayment, because he lived with them and because his mother used his FoodShare benefits, while he was incarcerated, without his permission.

7 CFR §273.18 (a)(4) states, The following are responsible for paying a claim:

- (i) Each person who was an adult member of the household when the overpayment or trafficking occurred;
- (ii) A person connected to the household, such as an authorized representative, who actually traffics or otherwise causes an overpayment or trafficking.

This is reflected in section of 7.3.1.2 of the FoodShare Wisconsin Handbook, which indicates, "all adult or emancipated minors that were included in the household or should have been included in the household at the time of the overpayment occurred, are liable for repayment of the overissuance of FoodShare benefits..."

However, simply living with someone does not necessarily make them a part of your household for FoodShare purposes. The Federal FoodShare regulations define FoodShare household composition as follows:

¹ The agency calculated the overpayment, based upon the belief that the Petitioner was out of custody between from September 9, 2014 through September 30, 2014, and therefore eligible for benefits during this time. There is no dispute that the Petitioner was release on September 9, 2014 and was eligible for benefits at that time.

The Petitioner asserts he was in the community for ten days before being arrested on September 18, 2014; so he would have had until September 28th to report the change, which would have caused his benefits to end again November 1, 2014. As such, the discrepancy concerning when he was arrested does not affect the overpayment calculation. In either event, Petitioner's benefits ended October 1, 2014.

General household definition. (a) A household is composed of one of the following individuals or groups of individuals, unless otherwise specified in paragraph (b) of this section:

1. An individual living alone;
2. An individual living with others, but customarily purchasing food and preparing meals for home consumption separate and apart from others; or
3. A group of individuals who live together and customarily purchase food and prepare meals together for home consumption.

7 C.F.R. §273.1(a) See in accord, FSH, §§3.3.1.1; 3.3.1.2 and 3.3.1.3.

The Petitioner testified that even though he lived with his parents, they were not a part of his FoodShare case. In his October 22, 2013, application, the Petitioner did not include his parents in his household. (See Exhibit 3) Consequently, they would not be considered part of Petitioner's FoodShare household and would not be liable for the overpayment.² Even if they were found to be liable, based upon a failure to report the Petitioner's incarceration, liability for the overpayment is joint and several. *FSH, §7.3.1.2* This means, that each party is liable for 100% of the overpayment, so the agency can seek repayment from any or all parties. Thus, if the Petitioner and his parents were liable, the agency could seek repayment from just one of them, or it could seek repayment from all of them.

The Use of a Tax Intercept

The following criteria must be met, if the agency wishes to use a tax intercept to recover / recoup an overpayment.

- 1) A Notification of FoodShare Overissuance, a FoodShare Overissuance Worksheet and a repayment agreement must be issued to the household/recipient. *FoodShare Wisconsin Handbook, §7.3.1.8.*
- 2) If the recipient does not make a payment or misses a payment, a dunning notice must be issued. *Id.*
- 3) To use a tax intercept, the person must have received three or more dunning notices. *FoodShare Wisconsin Handbook §7.3.2.10 .*
- 4) To use a state tax intercept the debt must be:
 1. Valid and legally enforceable.
 2. At least \$20;
 3. State: At least 30 days from notification of Overissuance;
 4. Free from any current appeals.
 5. Incurred by someone who has not filed bankruptcy, nor has their spouse.

FoodShare Wisconsin Handbook §7.3.2.10 Tax Intercept

- 5) 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.* See also §49.85(3).

In the case at hand, the third dunning notice was returned to the agency. The agency did not reissue the third dunning notice to the correct address, so the Petitioner never received it. As such, the agency did not correctly

² However, if the Petitioner's mother really did steal his benefits / EBT card, she would be guilty of trafficking benefits under 7 CFR §271.2 and liable for repaying the benefits that she stole. However, that is an issue for an Administrative Disqualification Hearing concerning the Petitioner's mother and not appropriate for adjudication at this time. I will leave it to the discretion of the agency to decide whether it wishes to pursue such action against the Petitioner's mother.

implement the tax intercept. The agency will have to cease collection efforts using the tax intercept, until such time as it correctly serves upon the Petitioner a third dunning notice.

CONCLUSIONS OF LAW

1. The Petitioner's appeal of the underlying overpayment is timely.
2. The agency correctly determined that the Petitioner was overpaid FoodShare benefits in the amount of \$797.00 for the period of April 1, 2014 through September 8, 2014.
3. The agency did not correctly implement a tax intercept.

THEREFORE, it is

ORDERED

1. With regard to Petitioner's appeal of the underlying overpayment, the appeal is dismissed.
2. With regard to the tax intercept, the agency shall rescind the tax intercept notice issued on February 13, 2015. The agency shall then issue to the Petitioner, using the [REDACTED] address, a third dunning notice, reflecting an overpayment balance of \$62.87. The agency shall take all administrative steps necessary to complete these tasks within ten 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 Milwaukee,
Wisconsin, this 25th day of March, 2015.

\sMayumi M. Ishii
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 25, 2015.

Ozaukee County Department of Social Services
Public Assistance Collection Unit