



STATE OF WISCONSIN  
Division of Hearings and Appeals

In the Matter of



DECISION

FOO/169897

**PRELIMINARY RECITALS**

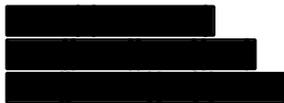
Pursuant to a petition filed November 06, 2015, under Wis. Admin. Code § HA 3.03(1), to review a decision by the Manitowoc County Department of Human Services in regard to FoodShare benefits (FS), a hearing was held on December 08, 2015, at Manitowoc, Wisconsin.

The issue for determination is whether the agency properly determined the Petitioner's FS benefits effective October 1, 2015.

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: Ann Luckow

Manitowoc County Department of Human Services  
3733 Dewey Street  
Manitowoc, WI 54221-1177

**ADMINISTRATIVE LAW JUDGE:**

Debra Bursinger  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner (CARES # ) is a resident of Manitowoc County.
2. On July 31, 2015, the Petitioner submitted an application for FS benefits. He reported a household size of three, consisting of himself and his two minor daughters. He reported that he

has joint custody and 50/50 placement of his daughters. Petitioner was advised by the agency that a copy of the court order regarding his daughter’s placement is needed as verification.

3. On August 3, 2015 and August 12, 2015, the agency issued a Notice of Proof Needed requesting verification of the Petitioner’s household composition, child support payments and employment. The due date for the information was August 31, 2015.
4. On August 18, 2015, the agency issued a Notice of Decision to the Petitioner informing him that he would receive \$511/month in FS benefits effective August 1, 2015. This was based on a household size of three and \$0 in household income.
5. On August 21, 2015, the agency issued a Notice of Decision to the Petitioner informing him that his FS benefits would decrease from \$511/month to \$123/month effective October 1, 2015. This was based on a household size of one, unemployment compensation benefits of \$370/week, and \$700/month for mortgage expenses.
6. On August 20, 2015, the agency received a copy of the Petitioner’s marital settlement agreement. The original agreement from 2011 states that the parties have joint legal custody of the two children. It further gives primary physical placement of the children to their mother with the Petitioner “having reasonable periods of physical placement.” On August 24, 2015, the agency received an order dated June 22, 2015 revising physical placement provisions of the marital settlement agreement. According to the order, placement of the children with the Petitioner is as follows:

Week 1

Mondays 7 a.m. – Tuesdays, 7:30 p.m.	36.5 hours
Thursdays 7 a.m. – 7:30 p.m.	12.5 hours
Fridays 7 a.m. – 7:30 p.m.	12.5 hours
Total Week 1	61.5 hours/168 hours in a week

Week 2

Mondays 7 a.m. – Tuesdays, 7:30 p.m.	36.5 hours
Thursdays 7 a.m. – 7:30 p.m.	12.5 hours
Fridays 7 a.m. – Sundays 8:00 p.m.	61.0 hours
Total Week 2	110.0 hours/168 hours in a week

7. On September 16, 2015, the agency issued a Notice of Decision to the Petitioner informing him that his FS benefits would decrease from \$511/month to \$194/month effective October 1, 2015. This was based on a household size of one, \$0 in gross household income, and \$700/month for mortgage expenses.
8. On September 18, 2015, the agency issued a Notice of Decision to the Petitioner informing him that his FS benefits would decrease from \$511/month to \$128/month effective October 1, 2015. This was based on a household size of one, unemployment compensation of \$370/week and \$700/month for mortgage expenses.
9. On October 2, 2015, the agency issued a Notice of Decision to the Petitioner informing him that his FS benefits would increase from \$128/month to \$194/month effective November 1, 2015. This is based on a household size of one, \$0 in household income and \$700/month for mortgage expenses.
10. On November 6, 2015, the Petitioner filed an appeal with the Division of Hearings and Appeals.

## DISCUSSION

The issue in this case is whether the Petitioner's household may include his two minor children for purposes of FS. Federal FS regulations state that a household is composed of a "group of individuals who live together and customarily purchase food and prepare meals together for home consumption." See 7 C.F.R. §273.1(a). This definition does not solve the problem posed by this case because the two children live with, and eat with, both of their divorced parents. The only other relevant instruction offered by the federal regulation is found in 7 C.F.R. § 273.1(c) which allows state agencies to create policies that answer questions relevant to household composition:

For situations that are not clearly addressed by the provisions of paragraphs (a) and (b) of this section, the State agency may apply its own policy for determining when an individual is a separate household or a member of another household if the policy is applied fairly, equitably and consistently throughout the State.

Wisconsin developed the following relevant policies in its FS Handbook:

### 3.2.1.1 Joint or Shared Physical Custody of Children

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.

In this case, only one parent, the Petitioner, has applied for FS benefits for the children. Therefore, it is not an issue of which parent should receive FS benefits for the children. Rather, the agency asserts that because the original 2011 marital settlement agreement states that the children's mother is the primary caretaker of the children, the children do not reside with the Petitioner and he cannot receive FS benefits for them.

The Petitioner testified that he provides for 50% of the needs of the children, including food, clothing, transportation. He stated that he was informed by the agency that because the children do not sleep at his home at least 50% of the time, he is not entitled to receive FS benefits for them. The Petitioner asserts that he has placement of the children at least 50% and believes he should be able to receive FS benefits to help feed them when they are at his home.

Based on the evidence presented, I conclude that the Petitioner has demonstrated that the children should be included in his FS group. While the original 2011 marital settlement agreement designated the children's mother as the primary caretaker, the revised placement schedule appears to revise that designation as well since the Petitioner actually has slightly more than 50% of physical placement of the children under the revised schedule. I note that the FS Handbook does not specify that one method of determining residency of the children must be used. Rather, it indicates that court documents may be one method of determining primary residence. In this case, I do not find that the 2011 court order is as compelling in determining the children's residence as is the revised placement schedule and the fact that the Petitioner is providing at least 50% of the children's needs as well as 50% of physical placement. Also, it has been my experience that most county agencies look at the percentage of time a parent has physical placement of a child in determining residence and generally find that having 50% or more of physical placement is sufficient to demonstrate residence with the parent.

I am remanding this matter back to the agency to re-determine the Petitioner's FS benefits effective October 1, 2015 based on a household size of three. I note that the agency will be required to issue a new notice to the Petitioner with its re-determination of benefits and the Petitioner will have new appeal rights if he does not agree with the new determination by the agency.

### CONCLUSIONS OF LAW

The Petitioner's household composition for purposes of FS benefits should include his two minor children. The agency must re-determine the Petitioner's FS benefits effective October 1, 2015 based on a household size of three.

**THEREFORE, it is**

### ORDERED

That this matter is remanded to the county agency to take all administrative steps necessary to re-determine the Petitioner's FS benefits effective October 1, 2015 based on a household size of three. The agency shall issue a new notice of decision to the Petitioner indicating the benefits to which he was entitled for each month beginning October, 2015 and continuing to the present. The notice shall provide new appeal rights for the Petitioner. In addition, the agency shall issue any FS supplement to which the Petitioner is entitled. These actions shall be completed as soon as possible but no later than 7 days from 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 Milwaukee,  
Wisconsin, this 29th day of December, 2015

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\sDebra Bursinger  
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 December 29, 2015.

Manitowoc County Department of Human Services  
Division of Health Care Access and Accountability