STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

DECISION

FTI/159287

The attached proposed decision of the hearing examiner dated September 3, 2014, is modified as follows and, as such, is hereby adopted as the final order of the Department.

PRELIMINARY RECITALS

Pursuant to a petition filed July 21, 2014, under Wis. Admin. Code, §§HA 3.03(1), (3), to review a decision by the Dane County Dept. of Human Services in regard to FoodShare benefits (FS), a hearing was held on August 27, 2014, by telephone.

The issue for determination is whether petitioner can appeal the failure to compromise an FS overpayment.

PARTIES IN INTEREST:

Petitioner:

[redacted]

Petitioner's Representative:

[redacted]

Respondent:

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

By: [redacted]
Dane County Dept. of Human Services
1819 Aberg Avenue
Madison, WI 53704-6343

ADMINISTRATIVE LAW JUDGE:
Brian C. Schneider
Division of Hearings and Appeals

FINDINGS OF FACT

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

2. In April, 2012, the agency established an FS overpayment of $1,846 against petitioner resulting from agency error, claim no. [redacted] Petitioner and his wife were listed as liable individuals. They did not appeal and do not contest the claim. They no longer receive FS.

3. In September, 2012, petitioner requested that the county agency waive or compromise the claim. The agency did not respond. On April 17, 2014, petitioner again requested that the county waive or compromise his claim. Division Administrator [redacted] responded by e-mail that she was seeking guidance from the Department concerning the request, but no further response was forthcoming.

4. Petitioner filed this appeal on August 22, 2014. He asks that the Division of Hearings and Appeals order the agency to consider waiving or compromising the claim.

DISCUSSION

7 C.F.R. §273.18(e)(7) provides:

> *Compromising claims.* (i) As a State agency, you may compromise a claim or any portion of a claim if it can be reasonably determined that a household's economic circumstances dictate that the claim will not be paid in three years.
>
> (ii) You may use the full amount of the claim (including any amount compromised) to offset benefits in accordance with §273.17 [concerning unpaid or underpaid benefits not relevant to this case].
>
> (iii) You may reinstate any compromised portion of a claim if the claim becomes delinquent.

In fair hearing decision no. FOP-139263, dated July 3, 2012, ALJ Gary Wolkstein ordered Milwaukee Enrollment Services to consider an overpaid FS recipient's request to compromise or waive the claim against her. Then, in proposed decision no. FOP-142952, dated October 23, 2012, ALJ Peter McCombs considered the issue again and concluded that the Department had no obligation to act on requests by FS recipients or former recipients to compromise claims, and that it was in the Department's discretion to refuse to compromise all claims. The proposed decision was adopted by the Department's Deputy Secretary on May 17, 2013. The Department has since taken no action to reverse or clarify that decision. On January 27, 2014, Milwaukee County Circuit Court Judge Jeffery A. Cohen reversed the decision in FOP-142952 and ordered the Department to consider the petitioner's request to waive or compromise her claim.

Neither ALJ Wolkstein nor ALJ McCombs considered the threshold issue of whether the Division of Hearings and Appeals has jurisdiction to consider an appeal requesting that a claim be waived or compromised. I raised the issue, however, when I noted that the petitioner in this case cited no specific authority for bringing this appeal, citing only the general appeal language of Wis. Stat., §227.42(1) and Wis. Admin. Code, §HA 3.03. After reviewing federal and state law concerning appeal rights, I conclude that the Division of Hearings and Appeals does not have jurisdiction over this appeal concerning the Department's exercise of its discretion whether to compromise the claim or not.

Rights under FoodShare Law

I turn first to determine if there is a hearing right given in FoodShare law. I conclude there is not.

7 CFR § 273.18 controls the process to be used in collecting FoodShare claims. If the claim was not already established at a fair hearing then the agency is to provide a "one-time notice of adverse action." § 273.18(e)(3)(iii). That notice explains how the overpayment was determined, the collection activity that will occur, that the individual has a right to a fair hearing related to that claim and that the agency may reduce the claim. Any compromise decision would occur after this 'one-time' notice. The fair hearing subsection at § 273.18(e)(6) provides specifically that a hearing official's sole responsibility is

to determine whether a claim exists. It says nothing about the official considering whether a claim should be waived or compromised despite the very next subsection being the one raised in this case. Clearly, if the federal authorities intended an FS recipient or former recipient to be able to appeal the issue of a waiver or compromise of a claim, such an appeal right could have been written into subsection (6).

Because § 273.18(a)(2) states that a claim under that section is a federal debt subject to the regulations governing federal debts, I reviewed the Treasury provisions. 31 CFR § 902 sets the standards permitting compromise of claims, but there is no mention of a hearing right in that part of other parts under the debt collection regulations concerning compromise decisions. In fact, the collection procedures in 31 CFR Part 5 do not require formal evidentiary hearings for more impacting actions than a compromise decision such as administrative offsets against tax and other payments. For all of the above reasons I conclude that the FoodShare claims process does not intend to provide a hearing right to Petitioner.

Petitioner argues that 7 CFR § 273.15 provides the right to fair hearing to challenge a compromise decision. I disagree that the general right to a hearing at subsec. (a) to dispute an action "which affects the participation of the household in the Program" applies when there is a specific section in the regulations controlling the claims process. Moreover, the claims process establishes claims against households that no longer participate in FoodShare. Because § 273.15 would clearly not apply to these households, it is a further indication that the claims process does not fall under this general fair hearings requirement.

Due Process Right

I next consider whether the right to due process guarantees Petitioner a right to a hearing as to a compromise decision. I conclude it does not.

To assert a right to procedural due process a person must have a constitutionally protected property or liberty interest that is affected by government action. *Estate of Gonwa v. DHFS,* 265 Wis. 2d 913 (2003). There is no property when the permission to possess certain property is vested in an official's discretion rather than the application of concrete rules. *Escobar v. Landwehr and JCRAR*, 837 F.Supp. 284 (W.D. Wisconsin 1993). "To have a liberty or property interest in some benefit, a person must have a legitimate claim of entitlement, which means an entitlement established by rule; hope for a favorable exercise of administrative discretion does not qualify." *Portillo-Rendon v. Holder,* 662 F.3d 815 (7th Cir 2011). The decision to compromise a FoodShare claim is surely discretionary. § 273.18(7)(i) states that '[a]s a state agency, you may compromise a claim or any portion of a claim. . . "The regulation provides no structure channeling that exercise of discretion other than to have "reasonably determined" that the claim will not be paid in three years given the household's economic circumstances. In fact, the case cited by Petitioner resolves the issue as to FoodShare. *Bliek v. Palmer*[1] stated:

> We note that the plaintiffs do not have a protected property interest in the actual overissuances of food stamps, because the protected property interest is only in the benefits the recipient is "qualified to receive." *Atkins v. Parker,* 472 U.S. 115, 128, 105 S.Ct. 2520, 2528, 86 L.Ed.2d 81 (1985). Likewise, there is no protected property interest in the plaintiffs' expectation of a settlement or an adjustment by the state, for the state's settlement authority for its claim is purely discretionary and gratuitous. *See Schneider,* 27 F.3d at 1333.
>
> 916 F. Supp. 1475 (N.D. Iowa 1996) [fn. 3]

[1] The sole focus of *Bliek* was whether a food stamp recipient had a right to be notified of a state's settlement power. It did not deal with what, if any, rights attach once that power is exercised.

Petitioner may hope that the Respondent will compromise his debt, but he cannot expect it. That is not a property interest.

Rights under Wisconsin law

Wis. Stat. § 49.793 covers recovery of FoodShare benefits and states that "recovery shall be made in accordance with 7 USC 2022." As discussed earlier, the regulations promulgated under that statute do not provide Petitioner with a hearing right. Chapter DHS 2 of the Wisconsin Administrative Code which interprets the recovery provisions in Chapters 48 and 49 must defer to the federal collection process. Even if not, § DHS 2 is unhelpful to Petitioner's position. Tellingly, § DHS 2.06 provides an administrative appeal only to recovery activities under § DHS 2.04 and not to the waiver of recoveries under § DHS 2.05.

Wis. Admin. Code, HA 3.03 also does not mention a right to appeal whether a claim should be waived or compromised. It grants contested case hearings for a myriad of agency actions but the only specific reference to the issue of claim collection is at § HA 3.03(3) which limits a former recipient's appeal primarily to a "determination that he or she has been overpaid benefits" and the amount owing.

Last I look at Wis. Stat. 227.42. It is true that the statute, at § 227.42(1)(a), protects the substantial interests of a person which is a broader protection than under the due process clause. *Milwaukee Metropolitan Sewerage Dist v. Wisconsin DNR*, 126 Wis. 2d 63 (1985). However, without diminishing Petitioner's circumstances, her interest is no more substantial than that of a faculty member who was not tenured after seven years of probationary contracts. The court found that the faculty member "merely has a 'unilateral expectation' of becoming tenured not a 'substantial interest.'" *Coe v. Board of Regents of University of Wisconsin System*, 140 Wis. 2d 261 (Ct of App, 1987). I find that Petitioner's interest is not intended to fall within § 227.42(1)(a).

To have a § 227.42 hearing right Petitioner would also need to show that there is no evidence of legislative intent that the interest is not to be protected. The Wisconsin legislature has done nothing but defer to the federal collection process. As discussed above, that federal process provides specific appeal rights as to the establishment of claims but not to a discretionary decision whether to compromise them. That is indicative of intent. As the *Coe* court reasoned:

> There is no evidence that the legislature intended to protect Coe's interest in becoming tenured. Sec. 227.064(1)(b), Stats. (1981-82) The legislature requires a hearing when a tenured faculty member is dismissed or when a probationary faculty member is dismissed prior to the expiration of a contract. Sec. 36.13(5), Stats. (1981-82). "Under the general rule of statutory construction, expression 'unius est exclusion alterius,' the express mention of one matter excludes other similar matters not mentioned." [Cite omitted] Having specified in sec. 36.13(5) when a hearing is required, the legislature intended to deny nonrenewed probationary faculty members a hearing. Coe has not satisfied sec. 227.064(1)(b).
>
> *Id.*, at 273.

Under this analysis, I conclude that § 227.42 does not afford Petitioner a right to a hearing to challenge a decision whether or not to compromise his FoodShare claim.

Having found no right to a hearing regarding a compromise decision, I conclude that there is no jurisdiction to issue an order to the Department that it must consider a waiver or compromise of petitioner's claim.

CONCLUSIONS OF LAW

The Division of Hearings and Appeals does not have jurisdiction over the issue of waiver/compromise of an FS overpayment claim.

THEREFORE, it is **ORDERED**

That the petition for review herein be and the same 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, WI, 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 request (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 27 day of January, 2016.

Thomas J. Engels, Deputy Secretary
Department of Health Services

FH [redacted]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

PROPOSED DECISION

FTI/159287

PRELIMINARY RECITALS

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Petitioner's Representative:

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Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703
By: [redacted]
Dane County Dept. of Human Services
1819 Aberg Avenue
Madison, WI 53704-6343

ADMINISTRATIVE LAW JUDGE:
Brian C. Schneider
Division of Hearings and Appeals

FINDINGS OF FACT

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

2. In April, 2012, the agency established an FS overpayment of $1,846 against petitioner resulting from agency error, claim no. [redacted] Petitioner and his wife were listed as liable individuals. They did not appeal and do not contest the claim. They no longer receive FS.

3. In September, 2012, petitioner requested that the county agency waive or compromise the claim. The agency did not respond. On April 17, 2014, petitioner again requested that the county waive or compromise his claim. Division Administrator [redacted] responded by e-mail that she was seeking guidance from the Department concerning the request, but no further response was forthcoming.

4. Petitioner filed this appeal on August 22, 2014. He asks that the Division of Hearings and Appeals order the agency to consider waiving or compromising the claim.

DISCUSSION

7 C.F.R. §273.18(e)(7) provides:

> *Compromising claims.* (i) As a State agency, you may compromise a claim or any portion of a claim if it can be reasonably determined that a household's economic circumstances dictate that the claim will not be paid in three years.
> (ii) You may use the full amount of the claim (including any amount compromised) to offset benefits in accordance with §273.17 [concerning unpaid or underpaid benefits not relevant to this case].
> (iii) You may reinstate any compromised portion of a claim if the claim becomes delinquent.

Similarly, the Wisconsin Administrative Code, §DHS 2.05 provides: "Recovery of incorrectly paid benefits may be waived when the recovery of the overpayment is considered to be against equity or when it causes undue hardship, or the recovery impedes efficient and effective administration of programs due to the small amount involved or the age of the account."

In fair hearing decision no. FOP-139263, dated July 3, 2012, ALJ Gary Wolkstein ordered Milwaukee Enrollment Services to consider an overpaid FS recipient's request to compromise or waive the claim against her. Then, in proposed decision no. FOP-142952, dated October 23, 2012, ALJ Peter McCombs considered the issue again and concluded that the Department had no obligation to act on requests by FS recipients or former recipients to compromise claims, and that it was in the Department's discretion to refuse to compromise all claims. The proposed decision was adopted by the Department's Deputy Secretary on May 17, 2013. The Department has since taken no action to reverse or clarify that decision. On January 27, 2014, Milwaukee County Circuit Court Judge Jeffery A. Cohen reversed the decision in FOP-142952 and ordered the Department to consider the petitioner's request to waive or compromise her claim.

Neither ALJ Wolkstein nor ALJ McCombs considered the threshold issue of whether the Division of Hearings and Appeals has jurisdiction to consider an appeal requesting that a claim be waived or compromised. I raised the issue, however, when I noted that the petitioner in this case cited no specific authority for bringing this appeal, citing only the general appeal language of Wis. Stat., §227.42(1) and Wis. Admin. Code, §HA 3.03. After reviewing federal and state law concerning appeal rights, I conclude that the Division of Hearings and Appeals does not have jurisdiction over this appeal and any other appeal by a former FS recipient requesting that the Department be ordered to consider the waiver or compromise of an FS claim. It is evident that both the federal and state authorities could have provided for an appeal of the issue and chose not to, and thus an appeal right cannot be created using a general catch-all appeal provision.

7 C.F.R. §273.15(a) provides: "*Availability of hearings.* Except as provided in §271.7(f), each State agency shall provide a fair hearing to any household aggrieved by any action of the State agency which

affects the participation of the household in the Program." §271.7 describes certain system-wide allotment reductions not at issue in this case.

Important to this case, 7 C.F.R. §273.18 describes the procedure for determining and collecting FS overpayments. After describing how overpayments are determined and how recipients are notified, 7 C.F.R. §273.18(e)(6) provides:

> *Fair hearings and claims.* (i) A claim awaiting a fair hearing decision must not be considered delinquent.
> (ii) If the hearing official determines that a claim does, in fact, exist against the household, the household must be re-notified of the claim. The language to be used in this notice is left up to the State agency. The demand for payment may be combined with the notice of the hearing decision. Delinquency must be based on the due date of this subsequent notice and not on the initial pre-hearing demand letter sent to the household.
> (iii) If the hearing official determines that a claim does not exist, the claim is disposed of in accordance with paragraph (e)(8) of this section.

The federal regulation provides specifically that a hearing official's sole responsibility is to determine whether a claim exists. It says nothing about the official considering whether a claim should be waived or compromised despite the very next subsection being the one raised in this case. Clearly, if the federal authorities intended an FS recipient or former recipient to be able to appeal the issue of a waiver or compromise of a claim, such an appeal right could have been written into the federal regulation. While it could be argued that a current recipient could claim that a failure to waive or compromise a claim "affects the participation of the household in the Program" as described in the general hearing right at 7 C.F.R. §273.15(a), a former recipient has no such argument.

Wis. Admin. Code, §HA 3.03 similarly does not mention a right to appeal whether a claim should be waived or compromised. Subsection (3) provides the following catch-all: "An applicant, recipient or former recipient may appeal any other adverse action or decision by an agency or department which affects their public assistance or social services benefits where a hearing is required by state or federal law or department policy." Nowhere in state or federal law or department policy is there a provision allowing FS recipients or former recipients to appeal whether a claim should be waived or compromised. In fact, state law implies just the opposite.

Wis. Admin. Code, §DHS 2.05 provides that recovery can be waived by the Department under certain conditions. The very next section, 2.06 provides appeal rights:

> **(1)** ADMINISTRATIVE REVIEW. An action taken under s. DHS 2.04 (1) or (2) is subject to review under ch. 227, Stats., and ch. HA 3.
> **(2)** REQUEST FOR HEARING ON RECOVERY ACTION.
> **(a)** If an individual or entity chooses to contest a proposed recovery under s. DHS 2.04, the individual or entity shall, within 45 calendar days after receipt of the notice of intent to recover, submit a written request for a hearing on the matter to the department of administration's division of hearings and appeals. The request shall briefly identify the basis for contesting the proposed recovery....

The legislature clearly had the opportunity to provide for a hearing under §DHS 2.05. It did not. Hearings are allowed only to contest the amount of the overpayment within 45 days of the notice of the overpayment.

The only other possible basis for a hearing right is under Wis. Stat., §227.42(1):

> In addition to any other right provided by law, any person filing a written request with an agency for hearing shall have the right to a hearing which shall be treated as a contested case if:
>
> **(a)** A substantial interest of the person is injured in fact or threatened with injury by agency action or inaction;
>
> **(b)** *There is no evidence of legislative intent that the interest is not to be protected;*
>
> **(c)** The injury to the person requesting a hearing is different in kind or degree from injury to the general public caused by the agency action or inaction; and
>
> **(d)** There is a dispute of material fact.

Italics added. It is evident from both the federal regulations and the Wisconsin Administrative Code that the right to demand waiver or compromise of a claim is not protected by the right to appeal. Both the federal authorities and the state legislature could have given FS recipients the right to appeal a waiver/compromise decision or lack of decision; they did not.

The reason why the authorities do not allow recipients to appeals these decisions is found in the administration of the FS program. A state agency is subject to liability and penalties if it does not run the program according to federal rules. See, for example, 7 C.F.R. §276.2. 7 C.F.R. §273.18(a)(3) provides: "As a State agency, you must develop a plan for establishing and collecting claims that provides orderly claims processing and results in claims collections similar to recent national rates of collection. If you do not meet these standards, you must take corrective action to correct any deficiencies in the plan." The waiver and compromise provision of §273.18(e)(7) is a means for the agency to reduce collection costs in light of the mandate to recover all FS overpayments. Because §273.18 provides nowhere that an overpaid recipient can request waiver or compromise, it is apparent that the provision is meant to be a process between the state agency and the federal agency. It is not meant as a "sword" to be utilized by recipients to get their claims reduced; it is meant as a "crutch" for the state agencies to avoid sanction by the federal agency for failing to collect claims sufficiently.

I conclude, therefore, that there is no jurisdiction to issue an order to the Department that it must consider a waiver or compromise of petitioner's claim. I note further that even if I had such jurisdiction, the conclusion by the Deputy Secretary in Decision no. FOP-142952 remains the Department's final word on the merits of the appeal. The Milwaukee County Circuit Court decision has no precedential authority over other similar claims.

CONCLUSIONS OF LAW

The Division of Hearings and Appeals does not have jurisdiction over the issue of waiver/compromise of an FS overpayment claim.

THEREFORE, it is **ORDERED**

That the petition for review herein be and the same is hereby dismissed.

NOTICE TO RECIPIENTS OF THIS DECISION:

This is a Proposed Decision of the Division of Hearings and Appeals. IT IS NOT A FINAL DECISION AND SHOULD NOT BE IMPLEMENTED AS SUCH.

If you wish to comment or object to this Proposed Decision, you may do so in writing. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your comments and objections to the Division of Hearings and Appeals, P.O. Box 7875,

Madison, WI 53707-7875. Send a copy to the other parties named in the original decision as "PARTIES IN INTEREST."

All comments and objections must be received no later than 15 days after the date of this decision. Following completion of the 15-day comment period, the entire hearing record together with the Proposed Decision and the parties' objections and argument will be referred to the Secretary of the Department of Health Services for final decision-making.

The process relating to Proposed Decision is described in Wis. Stat., §227.46(2).

Given under my hand at the City of Madison, Wisconsin, this 3rd day of September, 2014

Brian C. Schneider
Administrative Law Judge
Division of Hearings and Appeals