



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION
Case #: FOP - 199454

PRELIMINARY RECITALS

Pursuant to a petition filed on July 22, 2020, under Wis. Admin. Code §HA 3.03, to review a FoodShare (FS) overpayment determination by the Department of Health Services, Office of Inspector General (“the agency”), a hearing was held on September 9, 2020, by telephone. An appeal of a related Medical Assistance / BadgerCare Plus overpayment (DHA Case No. MOP-199455) was heard at the same time. A separate written decision for each appeal. The hearing was first scheduled to occur on August 11, 2020. To accommodate a conflict with Petitioner’s work schedule and at her request, the hearing was postponed.

The hearing record was held open until September 11, 2020 to allow Petitioner and Respondent to submit documentation referenced during testimony. Petitioner timely submitted a copy of a “Supplemental Final Judgment of Modification and All Outstanding Pleadings / Order Vacating Income Withholding Order” issued by the Orange County, Florida Circuit Court on June 21, 2019. Respondent offered the same document as evidence during the hearing at which time it was marked and received as Exhibit R-5A. Respondent timely submitted an undated single-page typewritten note purporting to be from Petitioner and a single page from the agency’s electronic case file. Those two pages are marked together as Exhibit R-6.

The issues for determination are whether Petitioner’s appeal is timely and, if so, whether the agency properly determined that she was overpaid \$3,442 in FoodShare (FS) benefits for the time period February 1, 2018 through February 29, 2020 (claim #s [REDACTED], [REDACTED], and [REDACTED]) due to client error.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services

1 West Wilson Street, Room 651
Madison, WI 53703

By: [REDACTED]
Office of Inspector General
P.O. Box 8938
Madison, WI 53708-8938

ADMINISTRATIVE LAW JUDGE:
Teresa A. Perez
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County who received FS benefits as the primary person in a four-member FS household from at least January 2018 through February 2020.
2. Petitioner's son, M.H. [REDACTED], has been living in Florida with his father since January 2018 and in March 2018, it was determined that M.H. would remain living with his father in Florida. Exhibit R-5 and Petitioner's Testimony.
3. On January 29, 2018, Petitioner filed an on-line application for FoodShare, Family Planning Services, and BadgerCare Plus. At that time, she reported that she resided in Milwaukee with three minor children: TT (d.o.b. [REDACTED]); MH (d.o.b. [REDACTED]); and G.H. (d.o.b. [REDACTED]). She signed that application thereby certifying the accuracy of the information provided. Exhibit R-3a.
4. On March 4, 2019, Petitioner filed an on-line renewal for FoodShare and Wisconsin Shares Child Care. At that time, she reported that TT, MH, and GH all remained living in her home. She signed that renewal thereby certifying the accuracy of the information provided. On March 8, 2019, the agency posted a summary of the information it had on file regarding Petitioner, including her household composition, to Petitioner's ACCESS account and instructed her to notify the agency to report any inaccuracies. That summary indicated that she resided with TT, MH, and GH. Exhibits R-3b, R-3c, and R-4a.
5. On September 9, 2019, Petitioner completed an on-line six month report form (SMRF) to continue receiving FS. At that time, she indicated that she continued to reside with TT, MH, and GH. She signed that SMRF thereby certifying the accuracy of the information provided. Exhibit R-3d.
6. On October 6, 2019, Petitioner completed another on-line application for FS. On October 9, 2019, she completed a FS interview by telephone. On October 9, 2019, the agency posted a summary of the information it had on file regarding Petitioner, including her household composition, to Petitioner's ACCESS account and instructed her to notify the agency to report any inaccuracies. That summary indicated that she resided with TT, MH, and GH. Exhibits R-3e, R-3f, R-2a, and R-4a.
7. By notices dated May 1, 2018 and March 14, 2019, and October 9, 2019, the agency informed Petitioner of her reporting requirements including the requirement that she report if any household member had a change in address or change in where they were staying. Each of these notices listed M.H. as a household member. Exhibits R-4c, 4d, and 4e.
8. In February 2020, the agency received documentation relevant to MH's residence. Exhibit R-5.

9. On February 21, 2020, the agency mailed three *FoodShare Overpayment Notices* to Petitioner which stated, respectively, that Petitioner had been overpaid \$1,644 in FS benefits for the time period February 1, 2018 through January 31, 2019; \$1,656 for the time period February 1, 2019 through January 31, 2020; and \$142 for the time period February 1, 2010 through February 29, 2020. The notices further indicated that the overpayment had occurred due to client error; specifically, failing to report accurate household composition, and that Petitioner's deadline to request a hearing was May 21, 2020. Exhibit 6-b.
10. On March 3, 2020, Petitioner called the agency and stated that she wanted to file a fair hearing. The agency did not put that information onto a Request for Fair hearing form on her behalf or otherwise contact the Division of Hearings and Appeals regarding Petitioner's request. Exhibit R-2: CARES Case Comment 03/03/2020.
11. On July 22, 2020, the Division of Hearings and Appeals received a hearing request from Petitioner via e-mail. Exhibit P-1.

DISCUSSION

An appeal of a negative action concerning FoodShare benefits (FS) must be filed within **90** days of the date of that action. Wis. Admin. Code §HA 3.05(3)(a); 7 C.F.R., § 273.15(g). If the hearing request is not filed within that time period, the Division of Hearings and Appeals ("the division") must dismiss the request. Wis. Admin. Code §HA 3.05(4)(e).

According to the federal regulations governing FoodShare appeals, "a request for a hearing is defined as a clear expression, oral or written, by the household or its representative to the effect that it wishes to appeal a decision or that an opportunity to present its case to a higher authority is desired." 7 C.F.R. 273.15(h). Pursuant to applicable state regulation, a request for a fair hearing "may be made in writing or orally and may be made to the agency or the division. An oral request to the agency shall be reduced to writing by the agency and signed by the petitioner, except that a request involving only food stamps need not be signed.." Wis. Admin. Code §HA 3.05(2)(a). Consistent with state and federal regulation, state policy includes the following instructions specific to FS hearing requests:

Fair Hearing requests may be made verbally for FoodShare. If an agency receives a verbal request for a Fair Hearing for FS, the agency must assist the customer by entering the customer's verbal information about the appeal onto the Request for Fair Hearing form. When oral requests for hearings are made, the agency should Click on the Request for Fair Hearing form and print off the form. Fill the form out and immediately fax it to [the Division of Hearings and Appeals] at the fax number listed above. If the member is in the office and available to sign the form without delaying the submittal to DHA, request that they sign the completed form. If the member is not in the agency or readily available to sign the form, the completed form must be faxed to DHA without the member's signature. Document in case comments that the request has been sent.

Income Maintenance Manual (IMM) Release 11-01, §3.3.1.

In this case, the three overpayment determination notices were dated February 21, 2020 and the deadline to request a hearing was May 21, 2020. The agency argued that Petitioner's appeal was late because the Division of Hearings and Appeals (DHA) did not receive a written hearing request until July 22, 2020. Petitioner asserted that she mailed a hearing request to DHA in March 2020 and argued that the timing of her request was not relevant. She is incorrect. If the appeal was not filed within 90 days of the notice date, Wis. Admin. Code §HA 3.05(4)(e) requires DHA to dismiss the appeal without consideration of the substantive merits (i.e., without reviewing the overpayment determination). There is no documentary

evidence to support Petitioner's claim that she mailed DHA a hearing request in March 2020 and her testimony in that regard was not persuasive.

Although I do not credit Petitioner's testimony that she mailed a hearing request, the agency's CARES case comments, which were offered as evidence by the agency, include an entry documenting that on March 3, 2020, Petitioner told the agency that she wanted a hearing. Per that entry, Petitioner did not merely indicate displeasure or general disagreement with the overpayment or that she was considering filing a fair hearing request. Given that unequivocal statement by Petitioner, Wis. Admin. Code §HA 3.05(2)(a) and *Income Maintenance Manual*, Sec. 3.3.1 required the agency to complete a fair hearing request form and send it to DHA on Petitioner's behalf. That did not occur here. Because fair hearing requests regarding FoodShare may be made orally and do not require a signature and because there is clear evidence that Petitioner plainly requested a fair hearing during a telephone call with the agency prior to the expiration of the appeal period, I find that her appeal regarding the agency's assessment of FS overpayment claims is timely and will therefore consider the substantive merits of that appeal.

The federal regulations that govern the FS program require the agency to establish an overpayment claim against any household that received FS benefits to which it was not entitled regardless of whether that overpayment was due to inadvertent household error (also known as a "client error") or agency error (also known as a "non-client error"). 7 C.F.R. § 273.18(b); FoodShare Wisconsin Handbook ("FS Handbook"), § 7.3.2. However, overpayments due to "agency error" may only be recovered if the overpaid benefits were issued during the twelve months prior to the date the agency discovered the overpayment and overpayments due to "client error" may only be recovered if the overpaid benefits were issued during the six years prior to the date of discovery. *Id.* at § 7.3.2.1.

In a fair hearing concerning the propriety of an overpayment determination, the agency has the burden of proof to establish that the action taken was proper given the facts of the case. To meet its burden, a preponderance of the evidence in the record must support the department's contentions. Generally speaking, to successfully establish an overpayment claim, the agency needs to present: a copy of a notice and overpayment computations that were sent to the recipient; primary documentation or other competent evidence proving the misstatement, omission, or failure occurred and caused the issuance of FoodShare benefits for which the client was not otherwise eligible; documentation of the benefits actually paid; Case Comments corroborating the facts and timeline of the original reporting, subsequent discovery, client contacts, etc. See, generally, 7 CFR §273.15 and §273.18; *FS Handbook* §7.3.1.8.

The agency's position is that Petitioner consistently reported M.H. as a member of the household while he was residing with his father in Florida; that this constitutes client error; and that, as a result of this client error, Petitioner's benefits were calculated based on an inaccurate household size. The agency provided copies of on-line applications and renewals filed by Petitioner from January 2018 through October 2019 as well as written case summaries sent to Petitioner following FS telephone interviews. Each of those documents list MH as a current household member. The agency also provided a copy of case comments maintained in its CARES database and argued that there is no entry documenting that Petitioner contacted the agency between eligibility reviews to report MH out of the house.

Petitioner did not contend that MH was in her household during the time period at issue. Rather, she testified that she repeatedly reported to the agency that MH was out of the household both by phone and through the ACCESS on-line system. She thus implicitly argued that any overpayment was the result of agency error and not client error and that she should not have to repay any overpaid benefits. As noted above, the agency may recoup overpayments for up to twelve months prior to the date it discovers an overpayment caused by agency error. Here, I find that the date of discovery was February 2020. Thus, if there is sufficient evidence to establish agency error, the agency could recoup for benefits issued no earlier than February 2019.

The absence of a CARES case comment is probative but not dispositive to the question of whether a benefit recipient contacted the agency between eligibility reviews to provide updates relevant to benefit eligibility. In other words, the absence of a case comment is relevant but may not be sufficient to prove a contention that an individual failed to timely and accurately make a required report. A petitioner's credible, first-hand testimony is sometimes sufficient to rebut the agency's case notes and to support a claim of accurate, timely reporting. I do not need to make that call here because the agency has offered more than the mere absence of a case note to prove its assertion that Petitioner did not accurately report MH out of the house. The agency offered multiple on-line applications and renewals on which Petitioner repeatedly confirmed that MH was a household member when he was, in fact, not residing with her. Petitioner denied having confirmed that information on those applications and renewals and surmised that there must be something wrong with the agency's on-line system that caused MH to remain on her case despite her efforts to remove him. Petitioner's speculation that the agency's on-line system malfunctioned each time she completed an application and eligibility renewal, in the absence of additional evidence, is not persuasive.

I find that the agency has established by a preponderance of the evidence in the hearing record that Petitioner inaccurately reported household composition multiple times and that her actions resulted in the State of Wisconsin issuing her more FS benefits than she was entitled to receive. Petitioner did not challenge the manner in which the agency calculated the overpayment calculation but the agency did include its overpayment calculation worksheet and I observed no errors.

CONCLUSIONS OF LAW

1. Petitioner's appeal was timely filed.
2. Petitioner was overpaid \$3,442 in FoodShare (FS) benefits for the time period February 1, 2018 through February 29, 2020 (claim #s [REDACTED], [REDACTED], and [REDACTED]) due to client error and is liable to repay that amount.

THEREFORE, it is

ORDERED

Petitioner's appeal is 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, 4822 Madison Yards Way, 5th Floor North, 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

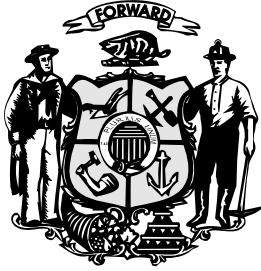
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of

Health Services, 1 West Wilson Street, Room 651, **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 16th day of October, 2020

\s _____
Teresa A. Perez
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 October 16, 2020.

Public Assistance Collection Unit
Public Assistance Collection Unit
Division of Health Care Access and Accountability