



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION
Case #: FOP - 210863

PRELIMINARY RECITALS

Pursuant to a petition filed on October 25, 2023, under Wis. Admin. Code §HA 3.03, to review a decision by the Waukesha County Health and Human Services regarding a determination that the petitioner was overpaid FoodShare benefits (FS), a hearing was held on December 19, 2023, by telephone. A hearing set for November 28, 2023, was rescheduled at the petitioner's request. At the request of both parties, the record was held open for 10 days for the submission of additional information.

The issue for determination is whether the petitioner's appeal contesting the two FoodShare Overpayment determinations of August 24, 2022 (totaling \$7,419) is precluded by the doctrine of claim or issue preclusion.

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: Nancy Garcia, Recovery Specialist
Waukesha County Health and Human Services
514 Riverview Avenue
Waukesha, WI 53188

ADMINISTRATIVE LAW JUDGE:

Kenneth D. Duren
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County. He was a FoodShare (FS) household member of record during at least the period of October 2021 – March 2022.
2. On June 22, 2022, the Waukesha County agency, as petitioner, filed a FoodShare Wisconsin Intentional Program Violation administrative hearing request (in DHA Case No. FOF-205555) with the Division of Hearings & Appeals, against [REDACTED] as respondent, asserting that he had committed an intentional program violation of federal and or state regulations; and seeking his disqualification from FS eligibility for one year as a sanction.
3. On August 16, 2022, Administrative Law Judge Jason Grace conducted an administrative disqualification hearing in DHA Case No. FOF-205555; the agency representative appeared and the respondent, [REDACTED], did not. The hearing was held without the respondent pursuant to federal regulations.
4. On August 18, 2022, ALJ Grace issued a final decision in DHA Case No. FOF-205555 concluding that [REDACTED] “...violated, and intended to violate, FS program rules by intentionally misrepresenting, withholding, or providing false information to the agency about his residence and household composition, contrary to 7 C.F.R. §273.16(c) and Wis. Stat. § 946.92(2).” The sanction was sustained, and [REDACTED] was disqualified from receiving FS for one year.
5. On or about August 24, 2022, the county agency issued two of FoodShare Overpayment Notice(s) to petitioner. The notices stated that Petitioner received a (combined) total \$7,419.00 in FS benefits that he was not eligible to receive and was therefore required to repay. The Notice(s) informed the petitioner that the reason for the overpayments was because of his MISREPRESENTATION OF OR FAILURE TO REPORT EARNED INCOME due to INTENTIONAL PROGRAM VIOLATION” AND that if he disagreed with that determination, he could file an appeal with the Division of Hearings and Appeal but that any such appeal must be filed by November 22, 2022. See, file in DHA Case No. FTI-207879, (e-file folder transmittal Nos. 207879_FOO056387917 and 207879_FOO056387920.)
6. The agency also issued two essentially duplicate NOTICE OF FOODSHARE OVERISSUANCE documents to the petitioner for the same total FS overpayment claim of \$7,419, on August 22, 2022; and a manual letter dated August 23, 2022, with a FOODSHARE WISCONSIN OVERISSUANCE CALCULATOR set of worksheets demonstrating the two overpayment computations that totaled \$7,419 for FS Claims [REDACTED] (\$3,324) and [REDACTED] (\$4,095) dated August 22, 2023. The notices informed the petitioner that he had been determined to have been overissued FS due to an Intentional Program Violation, because he had misled the agency and concealed facts about his living arrangement. See, Exhibit A, attached letter notice with worksheets, and attached notices.
7. On January 13, 2023, the Department, by its debt collection agents, issued a notice of tax intercept to petitioner for the outstanding FS debt of \$7,419. The notice further informed the petitioner that if he disagreed with the tax intercept, he could file an appeal with the Division of Hearings and Appeals but that any such appeal must be filed within 30 days.
8. On March 7, 2023, the petitioner filed an appeal of the two August 24, 2022, FoodShare Overpayment Notice(s) and the January 13, 2023, tax intercept notice. The petitioner’s hearing for those matters was set for March 29, 2023, under DHA Case Nos. FTI-207879 and FOO-207880; the undersigned administrative law judge presiding on that date for both cases. The petitioner failed to appear for that hearing on those two cases.

9. On April 3, 2023, the undersigned ALJ (Administrative Law Judge Kenneth Duren) issued final Decisions in DHA Case Nos. FTI-207879 and FOO-207880 dismissing both cases as abandoned since the petitioner did not appear for the hearings set on March 29, 2023. The decisions each stated that the petitioner could file a rehearing request, but that any such request must be received within 30 days of the date of the decision. (ALJ's Note: The rehearing request deadline is longer for FS abandonment appeals than the standard 20 days for FoodShare decisions on hearings actually held.)
10. No rehearing request was received from the petitioner contesting the final decisions in DHA Case Nos. FTI-207879 (FS Tax Intercept of FS Overissuance Claim for the two overissuances totaling \$7,419 arising on or about August 24, 2022) and FOO-207880 (contesting a FoodShare general eligibility issue); and the petitioner has not filed any action in any Wisconsin circuit court contesting the dismissal of either.
11. On June 5, 2023, the petitioner filed another appeal with the Division of Hearings and Appeals, in DHA Case No. FTI-208971. In that action the petitioner asserted that he was again seeking a hearing on the August 24, 2022, FS overpayment determinations (\$7,419) *and* the related tax intercept arising therefrom.
12. The hearing in FTI-208971 was held on July 12, 2023, and continued and completed by ALJ Grace on August 2, 2023; the petitioner attended by telephone on both dates.
13. On August 14, 2023 Administrative Law Judge Jason Grace issued a decision treating that the petitioner's new appeal in FTI-208971 as an untimely rehearing request on the final Decisions by ALJ Duren because he raised exactly the same two issues in the new appeal request as in the already decided decision, and the new request was not filed within 20 days of the April 3, 2023, final Decisions of ALJ Duren in DHA Case Nos. FTI-207879 and FOO-207880.
14. On September 6, 2023, the petitioner filed a rehearing request in FTI-208971.
15. On September 15, 2023, ALJ Grace issued an ORDER denying the petitioner's September 6, 2023, rehearing request in FTI-208971.
16. The petitioner did not subsequently file an appeal requesting judicial review of ALJ Grace's decision in FTI-208971 at any time thereafter prior to today's date.
17. On September 2, 2023, Petitioner filed a third appeal (FOO-210153) with the Division of Hearings and Appeals related to the August 24, 2022, overpayment notice; the January 13, 2023, tax intercept notice (FTI-207879; FOO-207880; and FTI-208971); and tangentially related to the FS-IPV case (FOF-205555, which was technically initially filed by the county agency.)
18. On November 1, 2023, Administrative Law Judge Nicole Bjork issued a final Decision in DHA FOO-210153 after a hearing, dismissing the petitioner's appeal contesting, again, the FoodShare overpayment determination of August 24, 2022, that he had been overpaid \$7,419 of FS for FS Claims [REDACTED] (\$3,324) and [REDACTED] (\$4,095). ALJ Bjork determined that the Division no longer possessed jurisdiction to review the overpayment.
19. On October 25, 2023, the petitioner again filed a fourth appeal with the Division of Hearings & Appeals in DHA Case No. FOP-210863 (i.e., the instant case) again contesting the determination of August 24, 2022, that he had been overpaid \$7,419 of FS for FS Claims [REDACTED] (\$3,324) and [REDACTED] (\$4,095).

DISCUSSION

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)*, §7.3.2.1. As such, it does not matter whose error caused the overpayment; it must be recouped. Petitioner filed this appeal, again, because he does not believe that he should be held liable for a FS overpayment established on August 24, 2022.

With regard to both the underlying overpayment(and the tax intercept action for that matter), petitioner’s instant appeal is barred as the matter has already been litigated. Claim preclusion (formerly known as “res judicata”) requires a final judgment on the merits in a prior proceeding. Issue preclusion (formerly known as “collateral estoppel”) requires that the issue of law or fact to be precluded to have been actually litigated and decided in a prior action. *Northern States Power Co. v. Bugher*, 189 Wis.2d 541, 550-551, 525 N.W.2d 723 (1995). Under claim preclusion, “a final judgment is conclusive in all subsequent actions between the same parties (or their privies) as to all matters which were litigated, or which might have been litigated in the former proceedings ... claim preclusion is designed to draw a line between the meritorious claim on the one hand and the vexatious, repetitious and needless claim on the other hand.” *Ibid.*, p. 550.

In addition, 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.* at § 49.85(3).

The tax intercept statute provides a hearing right as follows:

If a person has requested a hearing under this subsection, the department ... shall hold a contested case hearing under s. 227.44, except that the department ... may limit the scope of the hearing to exclude issues that were presented at a prior hearing or that could have been presented at a prior opportunity for hearing.

Wis. Stat. § 49.85(4)(b).

Petitioner had a prior opportunity to litigate the August 24, 2022, overpayment determination on the merits at the tax intercept hearing. He failed to do so by his own inaction, i.e., he chose not to appear for the hearing set in the matter on Marcy 29, 2023, when he had the opportunity to contest the tax interception certification and/or attempt to contest the underlying overpayment determination of August 24, 2022. See, final Decision in DHA Case No. FTI-207879 (April 3, 2023, Wis. Div. Hearings Appeals) (DHS).

Likewise, the record is replete with the delivery of the notices of the two FS overpayments in the period of August 22-24, 2022. In addition, these self-same overpayment notices were produced by the agency (and provided to the petitioner) in the case records for these prior cases. See, the case files for DHA Case Nos. FTI-207879; FOO-207880; FTI-208971; and FOO-210153.

The instant appeal claim is precluded by the result in DHA Case No. FTI-207879 at a minimum under both the doctrines of claim preclusion and issue preclusion. This matter has been decided in a final decision, and that result is binding as a matter of fact and law.

Petitioner did again testify that he was incarcerated for a time and, while he knew he missed the March 29, 2023, hearing, he had other pressing matters to handle, such as finding a job and housing. He noted that he was homeless. And see also, final Decision in FOO-210153, **DISCUSSION**, at p. 3. It is the long-standing position of the Division of Hearings & Appeals that the Division's hearing examiners lack the authority to render a decision on equitable arguments. *See, Wisconsin Socialist Workers 1976 Campaign Committee v. McCann*, 433 F.Supp. 540, 545 (E.D. Wis.1977).

This administrative law judge must limit his review to the law as set forth in statutes, federal regulations, and state rules. Further review of the matter of the August 24, 2022, overpayments totaling \$7,419 for FS Claims [REDACTED] (\$3,324) and [REDACTED] (\$4,095) is precluded by operation of law. The overpayment claims totaling \$7,419 are now established as a matter of legal record. The instant appeal must again be dismissed.

CONCLUSIONS OF LAW

1. The petitioner has had a prior opportunity to be heard on the merits of the FS overpayments of August 24, 2022.
2. The petition for review of the August 24, 2022, overpayments determinations against the petitioner totaling \$7,419 for FS Claims [REDACTED] (\$3,324) and [REDACTED] (\$4,095) is precluded by operation of law under the doctrines of claim preclusion and issue preclusion.

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, 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).

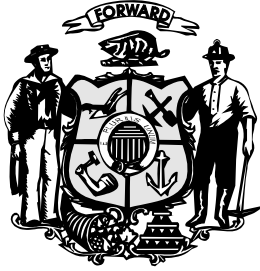
The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 5th day of January, 2024



\s _____

Kenneth D. Duren
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 January 5, 2024.

Waukesha County Health and Human Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability