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**DISTRICT III**

May 18, 2021

To:

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You are hereby notified that the Court has entered the following opinion and order:

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2019AP2152

Donna Kikkert v. Secretary of the Department of Health Services  
(L. C. No. 2018CV104)

Before Stark, P.J., Hruz and Seidl, JJ.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Donna Kikkert, pro se, appeals from a circuit court order affirming an administrative law judge's (ALJ) determination that a Department of Health Services (DHS) decision to reduce Kikkert's monthly FoodShare benefits was appropriate. We conclude that the DHS's decision was consistent with applicable law, while Kikkert's additional arguments are beyond the scope of this court's review of the applicable agency decision. Based upon our review of the parties'

briefs and the appellate record, we conclude this appeal is appropriate for summary disposition, and we summarily affirm. *See* WIS. STAT. RULE 809.21 (2019-20).<sup>1</sup>

In March 2018, the DHS provided Kikkert with a notice that her monthly FoodShare benefits had been reduced from \$100 to \$15 because her daughter had moved away from the family home to attend college. Kikkert appealed the benefits reduction, and an administrative hearing was scheduled. The ALJ identified the issue at the hearing as the propriety of the reduction of Kikkert's FoodShare benefits, and Kikkert agreed with that statement of the issue.<sup>2</sup> A DHS representative explained at the hearing that because Kikkert's daughter had moved away to college, she was no longer eligible to be included as a member of the household's food unit for the purposes of determining Kikkert's FoodShare benefits. Kikkert did not dispute those facts. Kikkert's sole argument was that the benefits reduction would result in her and her daughter experiencing "food insecurity," and that the ALJ should "take the initiative of fixing this broken system."

The ALJ affirmed the DHS's decision in a written order, finding that the agency had properly excluded Kikkert's daughter from the benefits calculation because she had left the household to attend college. The ALJ confirmed that this outcome was mandated by the FoodShare rules, which require that members of the same food unit live in the same household.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

<sup>2</sup> An issue relating to Kikkert's daughter being eligible for BadgerCare was also a subject of the hearing, but Kikkert does not raise any arguments regarding that issue.

The ALJ further noted that § 3.2.1.2. of the Wisconsin FoodShare Handbook<sup>3</sup> explicitly excludes from the household calculation persons temporarily absent to attend school.

Kikkert sought judicial review of the ALJ's decision, making an additional argument on appeal that an overpayment determination made subsequent to the administrative hearing should be waived due to hardship. Kikkert also filed a motion requesting appointment of legal counsel, which the circuit court rejected under the rationale that because Kikkert's case was a civil one, there was no requirement to provide her with counsel.

The circuit court subsequently affirmed the ALJ's decision, confirming that the sole issue was whether the ALJ followed the law in affirming the DHS's decision to reduce Kikkert's FoodShare benefits. The court concluded that the ALJ had not misinterpreted the applicable law, which mandated a reduction of Kikkert's benefits based on the undisputed facts presented at the hearing. The court denied Kikkert's remaining argument regarding the hardship waiver of the order relating to the overpayment of benefits, finding it to be outside of the scope of its review because it related to events that took place after the administrative hearing and outside of the administrative record. Kikkert now appeals.

Judicial review of a decision by an administrative agency requires that this court review the decision of the agency, not that of the circuit court. *Town of Holland v. PSC*, 2018 WI App 38, ¶21, 382 Wis. 2d 799, 913 N.W.2d 914. The review is "confined to the record," except "in cases of alleged irregularities in procedure before the agency." WIS. STAT. § 227.57(1).

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<sup>3</sup> FoodShare Wisconsin Handbook (Wis. Dep't of Health Services Jan. 17, 2018), <http://www.emhandbooks.wisconsin.gov/fsh/fsh.htm>.

An agency’s findings of fact are reviewed by applying a “substantial evidence” standard, affording significant deference to the agency’s findings. *Milwaukee Symphony Orchestra, Inc. v. DOR*, 2010 WI 33, ¶31, 324 Wis. 2d 68, 781 N.W.2d 674. Substantial evidence does not mean a preponderance of the evidence; rather, it assesses whether, after considering all the evidence of record, reasonable minds could arrive at the conclusion reached by the trier of fact. *Id.* “[T]he weight and credibility of the evidence are for the agency, not the reviewing court, to determine.” *Id.* (citation omitted). Conversely, we do not give any deference to an agency’s interpretations of the law. WIS. STAT. § 227.57(11); *Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶3, 382 Wis. 2d 496, 914 N.W.2d 21.

A household’s benefits under FoodShare—a federal program administered by the DHS that is designed to assist low-income households in purchasing food—are based on both household size and income. FoodShare Wisconsin Handbook § 1.1.4 (Jan. 17, 2018). Individuals who live in the same household, or who fall under certain relationship rules, are considered to be part of the same “food unit,” which is used to determine benefit eligibility. *Id.*, § 3.3.1.1. The rules establish that to be included in the benefits calculation, Kikkert’s daughter would need to live in, or only be temporarily absent from, Kikkert’s home. *Id.* The rules make clear that although some exemptions exist, being “temporarily absent to attend a school is not a reason to remain included in the food unit.” *Id.*, § 3.2.1.2; *see also id.*, § 3.15.1. These provisions follow the applicable federal law and regulations. *See* 7 U.S.C. § 2015(e) (2018) (disallowing the inclusion of students in a household, subject to certain exceptions, if the student is enrolled at least half-time in an institution of higher education); 7 C.F.R. §§ 273.1(b)(7)(i) and 273.5 (2019) (setting forth the applicable federal regulations).

Kikkert did not dispute at the administrative hearing or in her briefs on appeal that her daughter had moved away from Kikkert's home to attend college full-time. Wisconsin FoodShare Handbook § 3.2.1.2 plainly excludes students attending school full-time from being deemed "temporarily absent," and it prohibits continuing to include such students in their original household's food unit. Accordingly, the ALJ did not err in upholding the DHS's benefits decision. The DHS presented substantial, undisputed evidence that Kikkert's daughter lived away from home while attending college, and under the applicable law she was therefore excluded from the food unit for purposes of calculating Kikkert's benefits. Kikkert's benefits were properly reduced because the household composition was decreased by one member. Kikkert argued at the hearing that this change in benefits would lead to "food insecurity" for her family and that the ALJ should take the initiative to fix a system she perceived to be broken.<sup>4</sup> This request, however, is beyond the scope of the ALJ's authority, as the ALJ must follow governing federal law on program eligibility criteria, as cited above. *See* WIS. ADMIN. CODE §§ HA 3.08 and 3.09 (Oct. 2018) (prescribing an ALJ's authority in a benefits hearing, and providing no procedure or authority by which to make changes to statutory or administrative FoodShare criteria).

On appeal, Kikkert also points out that she lives in HUD-assisted housing. She asserts that because the annual certificate of compliance issued by HUD lists Kikkert's daughter as a resident of the household, HUD's residence determination should apply in determining Kikkert's FoodShare benefits. HUD and DHS, however, are distinct agencies with separate rules. As

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<sup>4</sup> We do recognize the significant impact that such a dramatic reduction in FoodShare benefits will have on Kikkert, and are sympathetic to the difficulties that she will likely face as a result. This, however, does not alter the fact that we are bound to adhere to the FoodShare rules in determining whether an administrative benefits' decision was appropriately made.

such, HUD's determination does not impact the FoodShare program's household criteria, which explicitly excludes Kikkert's daughter from being considered as a member of the home while she is away at college.

Kikkert's other arguments on appeal were not raised in the underlying administrative proceeding, and are not properly before this court. Judicial review of an administrative agency decision contemplates review of the record developed before the agency. *Bunker v. LIRC*, 2002 WI App 216, ¶15, 257 Wis. 2d 255, 650 N.W.2d 864. Kikkert focuses on a set of events that took place after the initial administrative proceeding. She argues that although she was overpaid benefits during the pendency of her initial appeal, for varying reasons she should not have to repay the excess amount. Because the determination that Kikkert was overpaid was made pursuant to a separate DHS decision issued after the administrative hearing at issue in this appeal, it is not in the administrative record in this case and is not properly before this court. We therefore decline to address Kikkert's claims that her Title II rights were violated by making her responsible for repaying the overpayment and that this court should be obligated to waive that repayment because of her poverty.

Finally, Kikkert argues the circuit court unjustly denied her motion to have counsel appointed for her, placing her at a disadvantage because she did not have legal counsel to guide her through the proceedings. We will sustain a circuit court's discretionary decision if it is "a decision which a reasonable judge or court could arrive at by the consideration of the relevant law, the facts, and a process of logical reasoning." *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). If necessary, we search the record for reasons to sustain a circuit court's discretionary decision. *See State v. Odom*, 2006 WI App 145, ¶8, 294 Wis. 2d 844, 720 N.W.2d 695.

In denying Kikkert's motion, the circuit court stated that it was not the practice of Lincoln County to appoint counsel in civil cases, and there was no statutory requirement obligating Lincoln County to do so. There is a presumption in civil cases that an indigent litigant has no right to appointed counsel in the absence of at least a potential deprivation of physical liberty. *Piper v. Popp*, 167 Wis. 2d 633, 646, 482 N.W.2d 353 (1992). Because this is a civil proceeding and Kikkert's physical liberty was not at risk, we have no basis on which to conclude that the court erred in denying her motion for the appointment of counsel.

Therefore,

IT IS ORDERED that the circuit court order is summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*