

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 3, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-2492

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

GUADALUPE FERNANDEZ,

PETITIONER-APPELLANT,

v.

WISCONSIN DEPARTMENT OF
WORKFORCE DEVELOPMENT,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
JACQUELINE D. SCHELLINGER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. Guadalupe Fernandez appeals from an order denying her petition for review of a decision of an Administrative Law Judge (ALJ), dismissing her appeal of a state tax intercept for overpayment of food stamps, finding it was untimely. We affirm.

I. BACKGROUND.

Guadalupe Fernandez received food stamps in the early 1980's. In 1983, the issuing agency overpaid Fernandez \$627 in food stamps. The agency determined that the overpayment was their mistake. By 1987, the state recouped \$200 of the overpayment from Fernandez's existing food stamp grant and, in 1990, the state ceased taking payment from Fernandez's food stamp grant because she no longer received food stamps.

In 1993, the state legislature created a tax intercept program allowing the Department of Health and Social Services (now Department of Workforce Development) to certify a person's name for state tax offset for payment of debts owed to the state, including overpayment of food stamps. Fernandez's food stamp debt was then \$427. At the same time, Congress passed legislation authorizing federal tax offset to also collect food stamp overpayments; in other words, a similar tax intercept program for federal taxes.

On October 9, 1995, the Department of Health and Social Services sent notice of a state tax intercept to Fernandez regarding the food stamp overpayment from 1983. The notice included the following:

Wisconsin Statutes sections 46.254¹ and 71.93² authorize this Department to certify the above amount to the Department of Revenue for setoff against your state tax refund. We intend to certify this amount for such setoff

¹ Renumbered 49.85 and amended by 1995 Wis. Act 27, §§ 2143 - 2157, effective July 1, 1996.

² Section 71.93, STATS., is entitled "Setoffs for other state agencies" and provides definitions. Section 71.93(1)(a)4 defines "debt" as "an amount that the department of industry, labor and job development may recover under s. 49.125 ... if the department of industry, labor and job development has certified the amount under s. 49.85."

unless you pay the claim within 30 days of the date of this notice or make other repayment arrangements acceptable to us. To arrange to pay this claim, or if you have any questions regarding this claim, please contact

CENTRAL RECOVERIES

P.O. BOX 7935

MADISON WI 53707-7935

1-800-943-9499

You may appeal this action by requesting a contested case hearing under section 227.44 of the Wisconsin Statutes. To do so you should file your request within 30 days of the date of this notice and your statement of why you do not owe the amount shown above to:

OFFICE OF ADMINISTRATIVE HEARINGS

P.O. BOX 7875

MADISON WI 53707-7875

(Underline in original, emphasis added.) Pursuant to federal law, the Wisconsin Department of Health and Social Services also issued a notice to Fernandez of a federal tax intercept on October 1, 1995 for the same food stamp debt. This notice directed Fernandez to pay the claim voluntarily or direct questions to Central Recoveries, at the same address and phone number as above. Regarding an appeal to this tax intercept, the notice stated:

You are entitled to request a review of the intended collection action. Such a request must be written, must be submitted to the address provided in this notice and must contain your social security number. If we receive your request for review within 60 days of the date of this notice, we will not refer your claim for offset while your review is pending.

Fernandez requested a hearing in writing on November 22, 1995, regarding the state tax intercept, to the Office of Administrative Hearings, two

weeks after the thirty-day time period allowed.³ Nevertheless, a hearing was held before the ALJ in May 1996. At the conclusion, the ALJ dismissed the appeal for lack of timeliness. Thus, the state was allowed to recover the \$427 that Fernandez owed. Fernandez requested a re-hearing, which was denied. She then appealed to the circuit court, which affirmed the ALJ's dismissal.

STANDARD OF REVIEW

In a review of an administrative agency decision under Chapter 227, the court of appeals reviews the decision of the agency, not that of the circuit court. *Currie v. DILHR*, 210 Wis.2d 380, 386, 565 N.W.2d 253, 256 (Ct. App. 1997). In reviewing the agency's decision, the court "may not substitute its own judgment in evaluating the weight or credibility of the evidence." *Princess House, Inc. v. DILHR*, 111 Wis.2d 46, 54, 330 N.W.2d 169, 173 (1983). Further, if there is "relevant, credible, and probative evidence upon which reasonable persons could rely to reach a conclusion, the finding must be upheld." *Id.* at 54, 330 N.W.2d at 173-74.

DISCUSSION

Fernandez agrees that an overpayment was made to her in the form of food stamps, that she received notice of the overpayment in 1983, and that previously she voluntarily repaid a portion of it. She contends, however, that because the state and federal tax intercepts arrived so close in time to each other and the notices highly resemble each other, they were confusing. Fernandez argues that the variety of addresses contained in the notices together made it

³ She made no attempts to appeal the federal tax intercept.

difficult to know where to send an appeal. Fernandez further claims that because the federal tax intercept gave her sixty days to appeal, her state tax intercept appeal should be considered. We disagree. As noted, the state intercept notice at issue allows thirty days to appeal the state tax intercept.

The address to mail a request for a hearing is plainly on the notice, and a telephone number is provided for further inquiries. The state tax intercept sent to Fernandez was dated October 9, 1995. Fernandez did not file her written request for appeal until November 22, 1995, fourteen days after the statutory time period to request a hearing. *See* § 49.85(3)(a)2, STATS.⁴ Fernandez never appealed the federal tax intercept; therefore, the sixty-day time limit is of no consequence. Contrary to Fernandez's argument that she was confused and uncertain where to file her appeal, she was clearly informed of the correct address for state tax intercept appeals, but she did not appeal in a timely fashion.

Fernandez next claims that because her husband made a telephone inquiry regarding the payment in response to receiving the tax intercept notices, this constituted a request for an appeal. Fernandez's husband apparently called the Milwaukee Department of Social Services seeking an explanation of the notice.

⁴ Section 49.85(3)(a)(2), STATS., reads:

NOTICE REQUIREMENTS. (a) At least 30 days before certification of an amount, the department of health and family services shall send a notice to the last-known address of the person from whom that department intends to recover the amount. The notice shall ...

....

2. Inform the person that he or she may appeal the determination of the department ... to certify the amount by requesting a hearing ... within 30 days after the date of the letter and inform the person of the manner in which he or she may request a hearing.

This contact, Fernandez argues, constitutes notice to the Department of Workforce Development that she wished to appeal the state tax intercept. We disagree.

The requirements are clear on the face of the notice. The notice indicated that inquiries must be directed to the Central Recoveries Unit of the State Department of Health and Social Services, and appeal requests are to be sent in writing to the Office of Administrative Hearings. The ALJ determined that “attempts by [Fernandez] and her husband to investigate the overpayment claim do not change the requirements for the filing of an appeal. They could have timely filed the appeal to preserve their right to a hearing and then investigated the merits of the overpayment claim.” Further, when Fernandez sought a rehearing, the Department replied that “a contact to the county agency or Central Recoveries to inquire about the reasons for the claim is not tantamount to a request for a hearing.” We agree.

Fernandez further argues that the notice of the state tax intercept does not meet due process requirements under federal statutes and federal case law.⁵ Fernandez claims that the notice itself did not contain enough detailed information to comport with due process. To support this, Fernandez relies both on case law based on *Goldberg v. Kelly*, 397 U.S. 254 (1970), and federal

⁵ To support this claim, Fernandez relies on arguments appropriate for a *federal* tax intercept, but not a state tax intercept in Wisconsin. Fernandez’s claims and arguments with respect to the federal tax intercept notice she was also sent were not considered by the ALJ or the circuit court, and will not be considered here because she did not appeal the federal tax intercept. Had she done so, the proper venue to review federal intercept appeals is the Food and Nutrition Service of the U.S. Department of Agriculture, under 7 C.F.R. § 273.18(g)(5)(v)(C)(3). Her arguments with regard to the federal tax intercept are intermingled with her arguments with regard to the state tax intercept. Since we find that adequate notice was given and it comports with due process, we do not address her other arguments. See *State v. Lettice*, 205 Wis.2d 347, 355 n.2, 556 N.W.2d 376, 379 n.2 (Ct. App. 1996) (“Because [this] issue disposes of the appeal, we do not reach the merits”).

regulations. While the majority of these cases note that due process must be afforded before benefits are reduced or terminated, and the federal regulations also require adequate notice, both apply to actions to reduce or terminate benefits and a tax intercept is neither. Rather, a tax intercept is a form of repayment without regard to reduction or termination of benefits. Although Fernandez points to some cases involving tax intercepts, they are not persuasive. All of the cases are federal cases reviewing either federal law or other state law, thus rendering them inapplicable here. In any event, as we have already noted, all of the information necessary to commence an appeal was in the notice.

The standard of whether this notice satisfies due process is “reasonableness.” *Schopper v. Gehring*, 210 Wis.2d 208, 214, 565 N.W.2d 187, 190 (Ct. App. 1997). The notice in this case stated that Fernandez had been informed previously of the overpayment and that the Department of Health and Social Services was planning to intercept her tax refund to pay the \$427 owed. The notice also informed Fernandez that she had thirty days to appeal and included the address to which the request for appeal must be sent. The notice provided a telephone number and additional address where inquiries could be made. Given these facts, we conclude that adequate and reasonable notice was given to Fernandez. She was informed of the overpayment and of how much she owed, as well as where to direct inquiries, how to appeal, and the amount of time within which to do so. The notice also complied with § 49.85, STATS., which states, pertinent to the notice, that the state is required to inform an individual when an amount of money is being certified as owed to the state; that the notice must say that the person may appeal within thirty days; and that the notice must include a provision explaining the manner in which an appeal must be made. This information was all contained in the notice.

Fernandez failed to comply with the requirement that she advise the Office of Administrative Hearings within thirty days of the date of the letter informing her of the state tax intercept if she wished to appeal, and the letter was adequate notice of the state tax intercept. We, therefore, affirm.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

