



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION

FOO/170647

PRELIMINARY RECITALS

Pursuant to a petition filed December 07, 2015, under Wis. Admin. Code § HA 3.03(1), to review a decision by the Brown County Human Services in regard to FoodShare benefits (FS), a hearing was held on January 04, 2016, at Green Bay, Wisconsin.

The issue for determination is whether the agency erred in its termination of FS for petitioner.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:



Respondent:

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

By: [Redacted]

Brown County Human Services
Economic Support-2nd Floor
111 N. Jefferson St.
Green Bay, WI 54301

ADMINISTRATIVE LAW JUDGE:

John P. Tedesco
Division of Hearings and Appeals

FINDINGS OF FACT

- 1. Petitioner (CARES # [Redacted]) is a resident of Brown County.
2. Petitioner received FS for herself, her husband ([Redacted]) and various children.
3. The agency conducted an investigation and determined that at least three of the children did not live with petitioner 50 percent of the time or more.

4. The agency determined that with a reduced household size the household income resulted in ineligibility for FS.
5. The agency sent notice terminating FS effective 1/1/16.
6. Petitioner appealed.
7. At hearing, petitioner disputed the findings of the agency regarding her children's living arrangements.

DISCUSSION

The agency terminated FS in this case because it determined, following an investigation, that the household composition and household income do not result in current eligibility. The termination relies on the agency's conclusion that some of the children claimed on the FS case actually live with the father some or all of the time. Additionally, the facts at the time of hearing are possibly not the same as when the decision was made by the agency. Detective ██████ conducted an investigation into the living arrangements of the family including the various five children. Detective ██████ spoke with various individuals including petitioner, the father of the children (██████), and one of the children (M.H.). The detective concluded that the parents have a lifestyle in which "the children are welcome in either of their homes and they have a lot going on in their lives. Based on conversations with ██████ and ██████, ██████ and ██████ are struggling to maintain their own residences which is resulting in sporadic living arrangements. I would recommend that any future living arrangements be verified from additional sources."

Notably, the petitioner explained that there is a valid court order for placement but neither the agency nor the petitioner provided the order as evidence. The detective had not reviewed the order prior to hearing and conceded that he had not known of a placement order until it was mentioned by petitioner.

Petitioner described a very fluid living arrangement confirming the detective's observation that the children feel free to live variously in both homes. She specifically denied the agency's conclusion that A.H., O.H., and E.H. live outside the home more than fifty percent of the time.

According to the FS Wisconsin Handbook:

3.2.1.1 Joint or Shared Physical Custody of Children

Children are included in the household where they reside when they are under the care and control of a *parent* or other caretaker in that household. There may be situations when the residence of a *child* is not easily determined. There are many methods that can be used to determine the child's residence. If the residence of a child is questionable, court documents can be used to determine if there is a primary caretaker designated. It may be a situation of joint custody and a 50-50 custody split. If one parent is not designated as primary caretaker, the parents can be asked to decide. Individuals can only be included in one food unit.

If the parents can not or will not decide, compare the parents' activities and responsibilities against the following list and determine which one is exercising more control than the other:

1. If the parents reside in different school districts, where does the child attend school? Who selected the school?
2. Who assists the child with homework or school-related tasks?
3. Are there tuition costs for the child's education? If so, who pays those costs?
4. If the child is enrolled in day care, who arranges for and pays these costs?
5. Who is responsible for taking the child to and from school and/or day care?

6. Which parent is listed as the contact for emergencies at the child's school or day care provider?
7. Who arranges medical and dental care for the child? Who selects the physician and dentist?
8. Who maintains the child's medical records?
9. Who initiates decisions regarding the child's future?
10. Who responds to medical or law enforcement emergencies involving the child?
11. Who spends money on food or clothing for the child when the child visits the absent parent?
12. Who disciplines the child?
13. Who plays with the child and arranges for entertainment?
14. Are more of the child's toys, clothing, etc. kept at one parent's home than the other's?

Only one parent can receive [FS](#) for a child. If you still can not determine which food unit the child should be in, the caretaker that first applies would be eligible.

This case ultimately must result in a hearsay analysis. [REDACTED] did not testify. M.H. did not testify. Both provided statements to the Detective which were relied upon at hearing. But, no cross-examination of these individuals was possible. In circumstances such as these, when the reliability and probative force of hearsay evidence is suspect and that hearsay evidence is to form the sole basis for a finding of fact, the Wisconsin Supreme Court has held that uncorroborated hearsay does not constitute substantial evidence upon which to base a finding of fact. *Gehin v. Wisconsin Group Ins. Bd.*, 2005 WI 16, ¶¶ 53-56 & 58, 278 Wis. 2d 111, 692 N.W.2d 572; See also, *Williams v. Housing Auth. of City of Milwaukee*, 2010 WI App 14, ¶¶ 14 & 19, 323 Wis. 2d 179, 187 & 189, 779 N.W.2d 185 ("[u]ncorroborated hearsay evidence, even if admissible, does not by itself constitute substantial evidence."). In these circumstances the Wisconsin Supreme Court has held that hearsay must be corroborated by nonhearsay evidence. *Gehin*, ¶¶ 82 & 92.

In a case like this in which the agency seeks to change the status quo, the burden is on the agency to justify the change and prove the facts underlying the change. At this point, the facts of the actual living arrangements are not at all clear. The court order may indeed be the most reliable evidence, or might at least be the most reasonable way to divide benefits to be paid to the two parents. But, no one provided the court order.

At this point, the agency may wish to conduct further investigation as was recommended by the detective in his report and as set forth in the rule cited and quoted above with all its various factors. Or, the agency may wish to review the court order. Another alternative would be for the agency to simply accept the fluidity of the living situation in which the children appear to feel comfortable and welcome in both parents' homes without the need for a rigid schedule. Perhaps in the absence of [REDACTED] battling for benefits now being paid to petitioner then the agency could just leave the status quo in recognition of the rule from the Handbook stating: "If you still can not determine which food unit the child should be in, the caretaker that first applies would be eligible."

It also appears that the agency did not submit any income records or calculations or FS budget screens. Even if I were able to conclude the accurate and present living arrangements of the children, I have no way of determining whether the group passes income tests. For this reason as well the agency has failed to meet its burden.

CONCLUSIONS OF LAW

The agency did not establish that any change in FS status was appropriate.

THEREFORE, it is ORDERED

That the matter is remanded to the agency with instruction to restore and reinstate FS retroactive to January 1, 2016. The agency must issue any appropriate supplement. These actions must be completed within 10 days of this decision.

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, Wisconsin 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 (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 21st day of January, 2016

\sJohn P. Tedesco
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on January 21, 2016.

Brown County Human Services
Division of Health Care Access and Accountability