



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]

DECISION

FOP/142827

PRELIMINARY RECITALS

Pursuant to a petition filed August 02, 2012, under Wis. Admin. Code §HA 3.03, to review a decision by the La Crosse County Department of Human Services in regard to FoodShare benefits (FS), a telephone hearing was held on November 02, 2012, at La Crosse, Wisconsin.

The issue for determination is whether the Department erred in finding that petitioner is liable for a \$783 FoodShare overissuance due to cohabitation with [REDACTED] [REDACTED] from 10/11/11 to 3/31/12.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]

Respondent:

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

By: Tom Miller

La Crosse County Department of Human Services
300 N. 4th Street
PO Box 4002
La Crosse, WI 54601

ADMINISTRATIVE LAW JUDGE:

John P. Tedesco
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of La Crosse County.

2. An investigator for O'Brien and Associates conducted an investigation on and around June 14, 2012.
3. On June 17, 2012, the investigator concluded as part of a written report "██████████ is in the home and has been for a year according to [petitioner's] son ██████████ and neighbor ██████████."
4. Based on the belief that petitioner was not reporting accurate household composition, and that ██████████ was living with petitioner, on July 19, 2012 the Department issued a Notification of FS Overissuance for the period from 10/1/11 to 3/31/12 in the amount of \$783.
5. Petitioner filed a timely request for hearing.

DISCUSSION

This case raises recurring issues that this Division has seen in FS overissuance appeals. The first is one relating to the presentation of hearsay evidence through the contract investigator and his/her investigative report; the second is the fact that the Department determines an overpayment based on what is very clearly evidence that bears little or no weight at all.

HEARSAY

As for the hearsay issue, it has become almost automatic for me to cite *Gehin* and *Williams* in any FS overissuance case in which O'Brien and Associates has conducted the investigation. I do not know if anyone at the counties or the Department has read any of the numerous decisions in which I cite these cases. 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. I am hopeful that if I continue to point this out, someone at the Department will understand that this is important. Indeed, it is the law of the State of Wisconsin as set forth by the Supreme Court of this state. An ALJ does not have discretion to disregard it.

In this case, the only witness was the investigator from O'Brien and Associates. He testified that he spoke with petitioner's son and her upstairs neighbor and both confirmed that petitioner's boyfriend lived in the home. The son did not testify. The neighbor did not testify. The investigator's paraphrasing of the statements of these two is hearsay. It is hearsay that petitioner disputes. At the time of the hearing, the Department did not offer any other evidence to corroborate these assertions. I noted to the Department representatives that the case was mere hearsay. The Department requested leave to submit additional documentation which was sent following the hearing. I should not have to inform the Department how to present a case or what evidence I need to rule in its favor. I am disinclined to allow this again under these circumstances. The Department of Health Services has attorneys, and each county has attorneys, any of whom can inform agency representatives how they should effort to prove their case at hearing. Ultimately, what was provided following the hearing could be seen as offering some very minimal corroboration. But, the case ultimately fails due to the absence of weight of the presented evidence.

WEIGHT OF EVIDENCE

First of all, the Department has the burden to prove the basis for, and the correct calculation of the overpayment. Hearsay is often interrelated with weight of evidence. Hearsay, by its nature, is a statement of a person outside of the hearing. Most often in cases such as this one, the hearsay is offered because the witness does not actually appear for the hearing. This means that the ALJ cannot hear the words of the witness with the purportedly relevant and probative evidence. The ALJ cannot determine whether the witness may have some bias against either party making fabrication or “spinning” a possibility, or likelihood. Neither the opposing party nor the ALJ can ask questions to clarify the assertions of the hearsay. For example, when petitioner’s son reportedly stated that the boyfriend “lived with” petitioner, what was the son’s interpretation of “lived with”? Does this mean he sleeps there every night and has all his belongings there and picks the kids up from school and eats every meal with the family? Or did the son interpret “lived with” as simply sleeping there once a week or so? No one can know for the purposes of this hearing because the only information from the son was the paraphrasing by the investigator which necessarily is reported through the investigator’s own filter. It is impossible for the ALJ to know what the investigator failed to mention in his/her report, or what he/she has focused on for persuasive purposes.

Even if the hearsay is corroborated, the Department’s evidence will always be stronger if it can present the actual witnesses at the hearing. As I have stated before, the Department’s continual election to simply present hearsay evidence in these cases is a risk it must (and apparently does) accept.

As an example of the deficiencies of this type of evidence presentation I point to the evidence in this specific case. The investigator from O’Brien and Associates, Mr. Xiong, testified consistently with his report that he went to petitioner’s home and spoke with her son who stated that “Uncle [REDACTED]’ had been living with them for about a year. Mr. Xiong then testified that he spoke with [REDACTED] the neighbor upstairs who stated that “[REDACTED] has been living with [REDACTED] [sic] for about a year.” That really was the extent of the probative statements made by these individuals. On questioning by this ALJ, petitioner explained that her son was merely 10 years old and is learning disabled. Had he come to the hearing, I cannot say that I would have allowed such a minor child to testify. Yet, the Department relies on the statement of this child as fully one half of the case against petitioner, including for its alleged time line of when Mr. [REDACTED] lived in the home. As for the other individual, [REDACTED], petitioner explained that there was a long and drawn out dislike between [REDACTED] and herself. Petitioner used the word “despise” in describing [REDACTED]’s position toward her family. Without [REDACTED] there, it was impossible to test this allegation. Given the paper-thin extent of the investigation (which is an interrelated deficiency seen in nearly every O’Brien report that I need not address), there was nothing that the Department could offer to rebut such a claim. In the end, the Department’s evidence carried minimal weight. This is something that the Department should have recognized. Obviously it elected to go forward on scant proof. But, I find the evidence woefully inadequate.¹

Finally, I must mention the investigator from O’Brien and Associates, Mr. Xiong, and his presentation of the son’s hearsay statement. I will not comment on the propriety of a state-contracted investigator making contact with and questioning, outside the presence of a responsible adult, a ten-year old child while conducting an investigation of that child’s own mother. But, I can comment on the manner in which that evidence was presented in this case. The investigative report refers to a

¹ I also note that while the Department endeavored to prove that [REDACTED] lived with petitioner, it did not present any evidence to establish that he is part of the FS food unit per FS Eligibility Handbook § 3.3.1. The investigation conducted by O’Brien and Associates did not provide any information that suggested that [REDACTED] purchased and prepared food with the family, is petitioner’s spouse, is a parent of one of the children in the residence, etc.

“young man” when mentioning petitioner’s son. Similarly, while testifying, Mr. Xiong made no reference to the son being a minor (let alone only 10 years old). It was only discovered upon my questioning of petitioner that the boy was ten years old. I stop short of suggesting that this was an intentional misrepresentation. But, seen in the light most favorable to Mr. Xiong, Mr. Xiong did not believe this fact was important enough to include in his report or his testimony. This was, at the very least, poor judgment by Mr. Xiong and a reflection of poor investigative report writing. In this case, I interpret this omission as a demonstration of Mr. Xiong’s interest in furthering an agenda and persuading (or winning the case) rather than reporting facts. What this has done in this case is result in my perception of a lack of candor and credibility on the part of Mr. Xiong.

CONCLUSIONS OF LAW

The Department failed to meet its burden to show an overissuance of FS in the amount of \$783.

THEREFORE, it is

ORDERED

That this matter is remanded to the Department and its county agent to rescind and reverse FS overissuance claim number [REDACTED] and to cease any collection action against petitioner. These actions must be completed within ten days.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found 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 served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Madison,
Wisconsin, this 6th day of November, 2012

John P. Tedesco
Administrative Law Judge
Division of Hearings and Appeals



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The preceding decision was sent to the following parties on November 6, 2012.

La Crosse County Department of Human Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability