FH
[redacted]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

DECISION

FOP/146006

PRELIMINARY RECITALS

Pursuant to a petition filed December 18, 2012, under Wis. Admin. Code §HA 3.03, to review a decision by the Milwaukee Enrollment Services in regard to FoodShare benefits (FS), a hearing was held on January 15, 2013, at Milwaukee, Wisconsin.

The issue for determination is whether the Department met its burden to prove overissuance of FS in claims numbered [redacted] and [redacted] for the total amount of $5,415.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:
Petitioner:

[redacted]

Petitioner's Representative:

Attorney Patricia DeLessio
230 West Wells Street, Room 800
Milwaukee, WI 53203

Respondent:

Department of Health Services
1 West Wilson Street
Madison, Wisconsin 53703
By: Mary Hartung
Milwaukee Enrollment Services
1220 W Vliet St
Milwaukee, WI 53205

ADMINISTRATIVE LAW JUDGE:
John P. Tedesco
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [redacted]) is a resident of Milwaukee County.

2. On October 1, 2012, the Department issued Notifications of FS Overissuance in the following claims: [redacted], [redacted], [redacted], [redacted], and [redacted]. The total overissuance sought was $5,415.

3. Petitioner filed a timely appeal.

DISCUSSION

Persons who are fleeing felons and/or probation/parole violators are not eligible to receive FS benefits. A fleeing felon is defined in the FS Handbook as "a person who is *fleeing to avoid prosecution* or custody/ confinement after a felony conviction." FS Handbook § 3.18.1. A probation and parole violator is defined as "a person who is in violation of conditions of probation or parole imposed by state or federal law." FSH § 3.18.1.

The Department asserts that petitioner was in violation of her probation and was, thus, ineligible for FS. It then deems all payments while in violation as an overpayment.

Department policy on this issue is set forth for Department agents in BEPS/DFS Operations Memo No. 12-46 (August 22, 2012):

> *...if an agency becomes aware of a felony conviction or probation/parole violation through a data base, media or through other sources, the agency must take action to deny or terminate FS benefits when both of the following conditions are met:*
>
> > *1. The individual is intentionally fleeing to avoid being arrested, and*
> > *2. Law enforcement is actively pursuing the individual.*

First, in this case, the Department presented no evidence that petitioner was ever intentionally fleeing or that she was being pursued by law enforcement. The case fails for this reason alone. The Department has the burden of proving the requirements establishing ineligibility. It did not.

Additionally, the Department's entire case rests on what the county representative was told by a DOC worker and on a document submitted on the day of the hearing (see exhibit #2). The document is on DOC letterhead but is unsigned. It purports to represent changes in status of petitioner during her period of supervision. Frankly, it is unclear what is demonstrates. It would have been helpful to have an agent from DOC testify regarding this. That would also have overcome the main problem with this document. It is hearsay. It also purports to illustrate that petitioner was a violator of her supervision. Petitioner disputes this allegation.

In circumstances such as these, when hearsay evidence is in dispute and 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. The Department did not produce a witness to testify that petitioner was a violator. Nor did it produce any non-hearsay evidence. The only evidence was Mr. [redacted]'s statement that he was told this from someone at DOC, and the document. I cannot find, on this hearsay, that petitioner was a violator of her supervision.

CONCLUSIONS OF LAW

The Department erred in determining the overissuance of FS in the amount of $5,415.

THEREFORE, it is **ORDERED**

That this matter is remanded to the Department and its county agent with instructions to reverse the overpayment determinations in claims [redacted], [redacted], [redacted], [redacted], and [redacted]. The Department must also cease any collection activities stemming from these overissuance determinations. These actions must be completed within 10 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 February, 2013

_____

\sJohn P. Tedesco
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 February 6, 2013.

Milwaukee Enrollment Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
pdl@legalaction.org