



FH  
[REDACTED]

**STATE OF WISCONSIN  
Division of Hearings and Appeals**

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In the Matter of

[REDACTED]  
[REDACTED]  
[REDACTED]

DECISION

MOP/147432

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**PRELIMINARY RECITALS**

Pursuant to a petition filed February 14, 2013, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Sawyer County Human Services in regard to Medical Assistance, a hearing was held on March 20, 2013, at Hayward, Wisconsin.

The issue for determination is whether the petitioner must repay an alleged overpayment of medical assistance. .

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]  
[REDACTED]  
[REDACTED]

Respondent:

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

By: Beulah Garcia  
Sawyer County Human Services  
10610 Main Street  
PO Box 730  
Hayward, WI 54843

**ADMINISTRATIVE LAW JUDGE:**

Michael D. O'Brien  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. The petitioner (CARES # [REDACTED]) is a resident of Sawyer County.
2. The Department seeks to recover \$1,984.70 in medical assistance benefits provided to the petitioner from March through October 2012.

3. The agency has not established that the petitioner's daughter did not live with her from March through part of September 2012.
4. The agency presented no evidence concerning how much, if any, of the alleged overpayment occurred in October 2012.

### DISCUSSION

The department may recover any overpayment of medical assistance that occurs because of the following:

1. A misstatement or omission of fact by a person supplying information in an application for benefits under this subchapter or s. 49.665 [BadgerCare].
2. The failure of a Medical Assistance or Badger Care recipient or any other person responsible for giving information on the recipient's behalf to report the receipt of income or assets in an amount that would have affected the recipient's eligibility for benefits.
3. The failure of a Medical Assistance or Badger Care recipient or any other person responsible for giving information on the recipient's behalf to report any change in the recipient's financial or nonfinancial situation or eligibility characteristics that would have affected the recipient's eligibility for benefits or the recipient's cost-sharing requirements.

Wis. Stat. § 49.497(1).

As with most public assistance programs, medical assistance eligibility depends upon net income and the number of persons in the household. The county agency contends that the petitioner received \$1,984.70 more in medical assistance benefits than she was entitled to from March through October 2012 because she failed to report that her daughter had moved out of the house. The petitioner contends that her daughter did not move out until September 2012, when she moved in with the petitioner's sister in California.

The agency's evidence consists entirely of the information in a report by O'Brien and Associates. O'Brien's investigation consists of interviews of three persons identified only by their first names, a conversation with police officer the petitioner called to report harassment by O'Brien's investigator, and a short interview with the petitioner. Neither the investigator nor anyone he interviewed, other than the petitioner, testified at the hearing. Nor were any signed statements from any of these persons submitted into the record. A comment I made in *DHA Case No. FOP/134107* applies to O'Brien's report here:

This report certainly raises a reasonable suspicion., but a suspicion, regardless of how well founded, is not proof. O'Brien and Associates has written these reports for a number of county agencies, and I have repeatedly told the agencies' workers that this information is hearsay. It does not fall under the Wis. Stat. § 908.08(6) exception to the hearsay rule for records of regularly conducted activity because the reports are made in anticipation of litigation.

It is true that the rules of evidence generally do not apply to administrative hearings. Wis. Stat. § 227.45. Nevertheless, administrative decisions cannot be based solely upon uncorroborated hearsay. *Village of Menomonee Falls v. DNR*, 140 Wis. 2d 579 (Ct. App. 1987). Our state supreme court reinforced this principle in *Gehin v. Wisconsin Group Insurance Board*. 2005 WI 16, a decision that overturned a finding based upon untestified to medical records that were contradicted by petitioner's sworn testimony. The court's rationale is that "the purpose of allowing the admission of hearsay evidence is to free administrative agencies from technical evidentiary rules, but at the same time this flexibility does not go so far as to justify administrative findings that are not based on evidence having rational probative force." *Id.* at ¶54.

Without these neighbors' presence at the hearing, no one could question them about how clear their view was of the petitioner's premises, what times of the day they saw her without her child, how clear their memories were of how far back they saw her, and how they knew that the person they saw was her. Not even the investigator's interview with the petitioner is admissible because he did not testify.

The petitioner does admit that her child moved to California in September 2012 and started school out there. She should have reported this within 10 days, which would first have potentially affected her benefits in October 2012. *See Medicaid Eligibility Handbook*, § 12.1. However, the agency's evidence included only the total amount of the alleged overpayment and did not break it down into monthly totals. The agency has the burden of establishing not only that an overpayment occurred but also the amount of the overpayment. Because it submitted no evidence concerning how much, if any, additional benefits the petitioner received in October, it cannot recover any benefits provided to her that month. I note that she may have been entitled to all of the benefits she received in October, even without her daughter in the household, because she was pregnant at that time, which affects the level of one's benefits. *See BadgerCare Plus Handbook*, § 8.1.

### **CONCLUSIONS OF LAW**

The agency has not established by the preponderance of the credible evidence that the petitioner received more medical assistance than she was entitled to from March through October 2012.

**THEREFORE, it is**

**ORDERED**

That this matter is remanded to the county agency with instructions that within 10 days of the date of this decision it certify that it is no longer seeking to recover the medical assistance benefits the petitioner received from March through October 2012.

### **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 21st day of March, 2013

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\sMichael D. O'Brien  
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 March 21, 2013.

Sawyer County Human Services  
Public Assistance Collection Unit  
Division of Health Care Access and Accountability