



FH
[REDACTED]

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

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

FOP/148805

PRELIMINARY RECITALS

Pursuant to a petition filed April 18, 2013, under Wis. Admin. Code §HA 3.03, to review a decision by the Rock County Department of Social Services in regard to FoodShare (FS) benefits, a hearing was held on May 20, 2013, at Janesville, Wisconsin.

The issue for determination is whether the respondent established an overissuance FS benefits due to incorrect information provided by petitioner regarding household composition

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

Attorney Daniel S. Johnson
716 Wisconsin Street
PO Box 940
Lake Geneva, WI 53147

Respondent:

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

By: Pam Edmonds

Rock County Department of Social Services
1900 Center Avenue
PO Box 1649
Janesville, WI 53546

ADMINISTRATIVE LAW JUDGE:

Peter McCombs
Division of Hearings and Appeals

FINDINGS OF FACT

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

2. An investigator for O'Brien and Associates conducted an investigation regarding petitioner's household composition on and around November 4, 2012.
3. On June 17, 2012, the investigator concluded as part of a written report "The information gathered indicates that [BS] is in and out of the home and has been since [petitioner] moved into the unit. [Petitioner] would not provide any information that he lives in the home. [Petitioner] states that is not his residence because he is not on the lease." Exhibit 2.
4. Based on the belief that petitioner was not reporting accurate household composition, and that BS was living with petitioner, on February 22, 2013, the Department issued a Notification of FS Overissuance for the period from September 28, 2011 to October 31, 2011 in the amount of \$268.00 (Claim no. [REDACTED]).
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

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 this case, an investigator with O'Brien and Associates testified on behalf of the respondent. She testified that she spoke with petitioner and with two of petitioner's neighbors. While petitioner denied that BS lived in the home, the two neighbors reportedly stated that BS is there every day. Neither of the neighbors testified at hearing. The investigator's paraphrasing of the statements of these two is hearsay. It is hearsay that petitioner strongly disputes. At the time of the hearing, the Department did not offer any other evidence to corroborate these assertions. In fact, counsel for the petitioner noted that, according to the investigative report, the investigator had been informed by a neighbor that the police had been called to petitioner's home "several" times; the investigator never followed up to confirm this information or otherwise corroborate the information received. 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 neighbor reportedly stated that she sees BS

every day does this mean he sleeps there every night? Does he keep all his belongings there and eat every meal with the petitioner? Or did the neighbor intend to convey that he visits for an hours or so each day? No one can know for the purposes of this hearing because the only information from the neighbor 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 her report, or what she has focused on for persuasive purposes.

Even if the hearsay were corroborated, the Department's evidence will always be stronger if it can present the actual witnesses at the hearing. As myself and other ALJ's have noted in other overissuance matters, the Department's continual election to simply present hearsay evidence in these cases is a risk it must (and apparently does) accept.

I also note that while the Department endeavored to prove that BS 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 BS purchased and prepared food with the petitioner, is petitioner's spouse, is a parent of a children in the residence, etc.

In the end, the Department's evidence carries minimal weight. This is something that the Department should have recognized; obviously it elected to go forward on scant proof. The record does not establish that BS lived with petitioner during the overpayment period, or at any other time.

CONCLUSIONS OF LAW

The Department failed to meet its burden to show an overissuance of FS in the amount of \$268.00.

THEREFORE, it is

ORDERED

That this matter is remanded to the Department and its county agent to rescind and reverse petitioner's liability for FS overissuance claim number [REDACTED], and to cease any collection action against petitioner related to said claim. 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 5th day of June, 2013.

\sPeter McCombs
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 June 5, 2013.

Rock County Department of Social Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
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