



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

WTI/148825

PRELIMINARY RECITALS

Pursuant to a petition filed April 18, 2013, under Wis. Stat. §§ 46.85 and 227.44Wis. Stat. § 49.85(4), to review a decision by the Wisconsin Works (W-2) to intercept the petitioner's income tax refund and apply it against a prior overpayment of W2, a telephone hearing was held on May 22, 2013, at Milwaukee, Wisconsin.

The issue for determination is whether the Department correctly sought to intercept the Petitioner's tax refund to collect overpayments of Wisconsin Works assistance to [REDACTED] [REDACTED] totaling \$13,716.60, between June, 2009 - January, 2011.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

Department of Children and Families
201 East Washington Avenue
Madison, Wisconsin 53703

By: Cynthia Martinez, Quality Assurance Manager
Wisconsin Works (W-2)
Ross Innovative Employment Solutions
6550 N. 76th Street
Milwaukee, WI 53223

ADMINISTRATIVE LAW JUDGE:

Kenneth D. Duren, Assistant Administrator
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County. He is the biological father of five minor children in common with [REDACTED] [REDACTED]

2. During the period of at least June, 2009 – January, 2011, [REDACTED] [REDACTED] and her children lived at [REDACTED] [REDACTED]; and [REDACTED] was receiving Wisconsin Works benefits in this period of time.
3. On or about January 30, 2012, the [REDACTED] case was referred to an agency investigative contractor, O'Brien & Associates, with a request to investigate whether [REDACTED] was residing with [REDACTED].
4. On or about February 14, 2012, Ken Kelly of O'Brien & Associates issued a two page investigative summary report concluding that from contacts made with the petitioner, [REDACTED] and several neighbors that [REDACTED] was residing with [REDACTED] and her children in the period of June, 2009 – January, 2011.
5. On or about February 25, 2012, the agency apparently determined that [REDACTED] was liable for four periods overpayments of W-2 assistance made to [REDACTED] as follows: (a) \$4,525 (June, 2010 – January, 2011); (b) \$2,226 (August 9 – December 31, 2011); (c) \$282 (July 19-31, 2011); and (d) \$6,583 (June, 2009 – May, 2010). These overpayments totaled \$13,258.
6. The record was held open for the agency to produce notices of decision and worksheets demonstrating the petitioner was informed of the overpayments, how computed, and his appeal rights; but none were produced, and none are in the record.
7. On April 12, 2013, the Department of Children and Families issued a state income tax refund certification for intercept notice to the petitioner informing him of the past due public assistance debt listed in Finding of Fact #5, above, and of his right to appeal within 30 days.
8. On April 18, 2013, the petitioner filed an appeal with the Division of Hearings & Appeals in DHA Case No. WTI-148825, contesting the tax intercept certification and denying any liability for the W-2 overpayments to [REDACTED].
9. [REDACTED] filed a separate appeal contesting the similar tax intercept certification action taken against her in DHA Case No. WTI-147992, currently pending before a different DHA administrative law judge.
10. The petitioner did not receive notice of the Wisconsin Works overpayments determined by the agency in February, 2012, or his liability for same, until he received the tax intercept notice of April 12, 2013.

DISCUSSION

The Department is required to recover all overpayments of Wisconsin Works benefits from liable individuals, including non-marital co-parents. See, Wis. Admin. Code §§DCF 101.23(2),(3). "Overpayment" generally means a financial assistance payment received by or for an assistance unit for the payment month which exceeds the amount for which that unit was eligible.

The Department may utilize tax intercept as a means of recovering the overpayment ("public assistance debt") from liable individuals. See, Wis. Stat. § 49.85(2)(b).

An appeal of a tax intercept is timely only if a hearing is requested within 30 days after the date of the tax intercept notice. Wis. Stat. §§ 49.85(3)(a)2 & (b)2. See also, Wis. Admin. Code § HA 3.05(3)(a). This appeal is clearly timely.

The tax intercept hearing right is described as follows:

"If a person has requested a hearing under this subsection, the [state] shall hold a contested case hearing under s. 227.44, except that the [state] may limit the scope of the hearing to exclude issues that were presented at a prior hearing or that could have been presented at a prior opportunity for hearing."

Wis. Stat. § 49.85(4)(b).

In most cases this would preclude a person from disputing the existence of the debt that triggered the tax intercept (in this case the alleged overpayments determined on February 15, 2012). This would be because the person already had a prior opportunity for a hearing to dispute the debt when the person first received notice of the debt. However, the record here does not contain any notice informing the petitioner of the alleged W-2 overpayments, nor how the overpayments were computed. The record was specifically held open for 10 days for the W-2 Agency to produce these notices of decision and worksheets, and it failed to do so. Therefore, I can only conclude that the instant petitioner did not have a prior opportunity for a hearing concerning the overpayments alleged owed by him, and, consequently, he may now dispute it.

The burden of proof is on the agency to establish by the preponderance of the evidence in the record that the petitioner was a co-parent living with the W-2 casehead and that the household was overpaid for the periods determined. The petitioner must then rebut the agency evidence and establish the overpayment was not correctly determined.

There is very little evidence in the record of this matter to support the agency claim that petitioner was living in the petitioner's household or that the overpayments were correctly calculated.

The agency provided a two page summary from the investigator. The investigator did not appear to testify. This document is replete with hearsay statements purportedly made by neighbors of the W-2 casehead, mostly to the effect that the petitioner was around her and their children a lot in these two years. *None* of these neighbors was produced to testify at the hearing or to be subjected to cross-examination by the petitioner. Likewise, the slim investigative summary makes reference to CCAP documents and IV-D records that show that the petitioner reported the [REDACTED] address as a mailing address, and that he paid child support to [REDACTED] of \$458 per month. But the only document provided in support of the investigator's conclusion was a one page extract from a small claims suit filed against the petitioner in September, 2011, listing him with the [REDACTED], which is the W-2 casehead's residence address.

The petitioner affirmatively denied that he was living with the W-2 casehead at any point during the W-2 overpayment periods determined by the agency. Rather, he reported living around with friends, his mother, and in his vehicle.

The evidence that he was paying child support undercuts the agency case, in part, rather than supports it. It gives rise to the inference that he *was* reporting to the child support agency that he lived elsewhere. If he were living with the biological mother of his children, he could assert that he was supporting them already. In addition, the agency has produced absolutely no primary evidence establishing the amounts of W-2 paid to the casehead, when, or how the overpayments purported to be owed by the petitioner were calculated. The lack of any notices or worksheets leaves the petitioner very much unable to meaningfully challenge the determination. Rather, apparently this tribunal is to accept the agency assertion as to the amount owed simply because an agency representative has asserted that "it is so". This won't do. In addition, Wis. Admin. Code §§DCF 101.23(2)(b),(c) clearly requires that the W-2 Agency must establish that such a notice was properly mailed to the alleged debtor, and that it inform him or her of the reason for the overpayment, the time periods in which the overpayments occurred, the amount of the overpayments, and the notice of the right to appeal the overpayment determinations.

Finally, 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. An ALJ does not have discretion to disregard it.

In this case, the only witness was the agency representative presenting the written summary from an investigator from O'Brien and Associates. The representative testified that the investigator spoke with petitioner, the W-2 casehead, the petitioner's mother, and some of the W-2 casehead's neighbors and from these conversations the investigator concluded that the petitioner lived in the w-2 casehead's home. The W-2 casehead did not testify. The neighbors did not testify. The petitioner's mother did not testify. The representative's summary of the investigator's paraphrasing of the statements of these interviewees is hearsay within hearsay. It is hearsay that petitioner disputes. At the time of the hearing, the Department offered very, very little other evidence to corroborate these assertions.

I am cognizant of the suspect and vague nature of the petitioner's denial of his residence with the W-2 casehead, and the 5 children in-common with this casehead. It is indeed apparent that he spends some time around the family. But mere suspicion is not a sufficient foundation upon which the government, with its awesome reach and power, can summarily conclude that a citizen owes the government a large debt of public assistance to be re-paid. Rather, this takes legal proof to establish.

The Department requested leave to submit additional documentation which was sent following the hearing. Ultimately, what was provided following the hearing could be seen as offering some extremely minimal corroboration. But, the case ultimately fails due to the absence of weight of the presented evidence. This agency has completely failed to establish by the preponderance of the evidence in this record that the petitioner lived in the W-2 household in the four time periods at issue, or that he is liable for any W-2 overpayments as a result. The burden here is on the State of Wisconsin to show both that petitioner has a W-2 overpayment debt and that a tax intercept may proceed. The State has failed to meet that burden. I must conclude, therefore, that petitioner is not liable for the four W-2 overpayment claims totaling \$13,716.60 as claimed by the State, and that no tax intercept may take place.

Nothing in this decision prevents the agency from pursuing recovery against the W-2 casehead. That issue is a separate hearing matter, which is pending before ALJ Sean Maloney.

CONCLUSIONS OF LAW

- 1) That the W-2 Agency has failed to establish by the preponderance of the evidence that the petitioner is liable for four W-2 overpayments (Claims Nos. [REDACTED]; [REDACTED]; [REDACTED]; and [REDACTED]) totaling \$13,716.60 (including lien/levy service attempt related costs) for any part of the period of June, 2009 – January, 2011.
- 2) That the petitioner's Wisconsin state income tax refund may not be intercepted to defray any of the claims identified in Conclusion of Law #1, above.

NOW, THEREFORE, it is

ORDERED

That this matter be REMANDED to the W-2 Agency and to the Wisconsin Department of Children and Families with instructions to: rescind Claims Nos. [REDACTED]; [REDACTED]; [REDACTED]; and [REDACTED], as to the petitioner's individual liability for these W-2 overpayment claims, and cease any and all recovery efforts directed at this petitioner, removing these claims from the CARES database as pertaining to him; and to reverse the state income tax refund certification of these four claims, inform the

Wisconsin Department of Revenue of this reversal, and cease all income tax intercept actions taken to date against this petitioner. These actions shall be completed within 10 days of the date of this decision.

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 Children and Families. 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: 201 East Washington Avenue, 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 10th day of June, 2013

\sKenneth D. Duren, Assistant Administrator
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Wayne J. Wiedenhoef, Acting 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 June 10, 2013.

Wisconsin Works (W-2)
Public Assistance Collection Unit