



FH
[REDACTED]

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

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

FOP/150361

PRELIMINARY RECITALS

Pursuant to a petition filed June 28, 2013, under Wis. Admin. Code §HA 3.03, to review a decision by the Winnebago County Department of Human Services in regard to FoodShare benefits (FS), a hearing was held on September 04, 2013, at Oshkosh, Wisconsin. The record was held open for a period of 10 days to allow for the submission of further documentation, and a period of 20 days to allow for the parties to submit written summations. Additional documentation was received from the respondent on September 20, 2013. Summations were received from the respondent and from petitioner on September 12, 2013, and September 24, 2013, respectively.

The issue for determination is whether the county agency correctly determined that the petitioner was overpaid \$8,271.00 in FoodShare benefits between June, 2009, to March, 2013, due to a failure to report accurate household members and income.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

Attorney Kirsten Navarrette
404 N Main St #702
Oshkosh, WI 54901

Respondent:

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

By: Leslie Vosters

Winnebago County Department of Human Services
220 Washington Ave.
PO Box 2187
Oshkosh, WI 54903-2187

ADMINISTRATIVE LAW JUDGE:

Peter McCombs
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Winnebago County.
2. In August of 2009, petitioner and TR purchased a home in [REDACTED], Wisconsin. Exhibit 6. Petitioner and TR have a child-in-common.
3. Electronic Case Comments dated December 2, 2009, reflect that petitioner informed the respondent that TR was living with her. Exhibit 5.
4. Electronic Case Comments dated May 21, 2012, corroborate petitioner’s testimony that she moved out of the [REDACTED] house in May of 2012. *Id.*
5. On or about February 28, 2013, the respondent referred the petitioner’s case to a private investigator for investigation of household composition and earnings, i.e., a review of whether TR was living with the petitioner and their child-in-common. *Id.*
6. The investigator conducted an investigation and prepared a written report concluding that TR lived with the petitioner since June, 2009, and reported same to the agency. Exhibit 8.¹
7. By notice dated May 30, 2013, the investigative agency informed petitioner that she was overpaid \$8,271.00 in FS during the period of June 1, 2009, through March 31, 2013:

| | | | |
|-----------|------------|---------------------|------------|
| Claim No. | [REDACTED] | 6/01/2009-5/31/2010 | \$1,666.00 |
| Claim No. | [REDACTED] | 6/01/2010-3/31/2011 | \$3,546.00 |
| Claim No. | [REDACTED] | 6/01/2011-4/30/2012 | \$ 479.00 |
| Claim No. | [REDACTED] | 6/01/2012-3/31/2013 | \$2,580.00 |

Id.

8. On July 22, 2013, the petitioner filed an appeal with the Division of Hearings & Appeals.

DISCUSSION

The federal regulation concerning FS overpayments requires the State agency to take action to establish a claim against any household that received an overissuance of FS due to an intentional program violation, an inadvertent household error (also known as a “client error”), or an agency error (also known as a “non-client error”). 7 C.F.R. § 273.18(b), emphasis added; see also FoodShare Wisconsin Handbook, App. § 7.3.2.1. Generally speaking, whose “fault” caused the overpayment is not at issue if the overpayment occurred within the 12 months prior to discovery by the agency. See, 7 C.F.R. § 273.18(b); see also, FoodShare Wisconsin Handbook, § 7.3.2.1.

In a Fair Hearing concerning the propriety of an overpayment determination, the county agency has the burden of proof to establish that the action taken by the county was proper given the facts of the case. An overpayment occurs when an FS household receives more FS than it is entitled to receive. The petitioner must then rebut the county agency's case and establish facts sufficient to overcome the county agency's evidence of correct action.

The agency’s case rests primarily upon a report by O’Brien and Associates, a private investigation company. The respondent presented documentary evidence supporting its assertion that petitioner and [REDACTED] lived together, including property tax records and court records. In addition to that documentary evidence, the respondent’s investigator testified as to its investigative report, stating that it had reached its

¹ Exhibit 8, which includes notices to the petitioner, as well as the investigative reports prepared by respondent’s investigator, was not provided until post-hearing.

conclusions based, in part, on statements taken from neighbors who claimed that petitioner and TR had resided together at the dwelling for the past few years. In its conclusion, the investigative report finds that petitioner and TR have lived together since June of 2009. None of the neighbors testified at hearing. Such evidence constitutes hearsay because the person making the statements was not subject to questioning by petitioner. These witness statements, recorded in writing by the investigator, do not meet the regularly kept records exception to the hearsay rule because they were made in anticipation of litigation. Wis. Stat. § 908.03(6).

The Supreme Court vigorously reaffirmed this position in *Gehin v. Wisconsin Group Insurance Board*, 2005 WI 16, a decision that overturned a finding based upon bare medical records without supporting direct testimony that were contradicted by petitioner's sworn testimony. The court's rationale was 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. That decision upheld this principle even in some instances where the evidence met one of the exceptions to the hearsay rule:

Without deciding whether all or any parts of the written medical reports in the present case are admissible under a hearsay exception, we conclude that the court of appeals' reasoning that hearsay evidence is unreliable only when it does not fall within a hearsay exception confuses the admissibility of hearsay with the issue of the probative force to be accorded the hearsay evidence by an administrative agency decision-maker. Hearsay that is subject to an exception is still hearsay, and therefore the substantial evidence rule applies even to evidence admitted as an exception to the hearsay rule.

Id. at ¶89.

Thus, even when hearsay is allowed, it must be of the sort that is clearly reliable. And in any event, a finding of fact cannot be based on hearsay alone, i.e., uncorroborated by other non-hearsay evidence. In light of the *Gehin* decision, I cannot find the agency's conclusion that TR lived with petitioner specifically in the period of May, 2012, through March, 2013, to be more reliable than the sworn direct testimony of the live witnesses to the contrary. As such, the respondent has not successfully established Overpayment Claim No. [REDACTED], which covers the time period of June 1, 2012, to March 31, 2013.

In addition to contesting the respondent's evidence on the basis of hearsay, petitioner notes that the investigative report incorrectly concludes that petitioner and TR lived together since June of 2009; petitioner, and TR did not even close on the purchase of the [REDACTED] property until August 31, 2009. This certainly raises a question as to the validity of the overpayment period, which the respondent asserts began in June of 2009.

The petitioner also argues that any error in FS issuance is the fault of the respondent, and that the claimed overpayment period falls outside of the 12-month recovery period. The FoodShare Handbook provides that, "... The overpayment period for non-client errors begins with the month that the error is discovered and extends back 12 months or when the error was effective, whichever is most recent. *FoodShare Handbook* § 7.3.2.1. As decided in prior cases before the Division of Hearings and Appeals, "discovery" was not the date of referral of a likely overpayment for investigation; a BPS/DFS Operations Memo No. 12-20 (effective 4-4-2012), indicates that the "discovery" date is not the date of the agency's FS Overpayment Notice, but instead the "the date that the ESS [agency] became aware of the potential that an overissuance may exist." In this case, the earliest indication of the agency becoming aware of a potential for an overissuance was noted in Electronic Case Comments on November 16, 2012. I agree with the petitioner's contention that the discovery period would extend back one year from November 16, 2012, in the case of agency error.

The respondent has not established client error here. That is not to say that petitioner doesn't have certain obligations to meet as a recipient of FS benefits. However, the respondent bears the burden here of proving by a preponderance of the evidence that the petitioner's error caused the overpayment. The respondent has not done so. In its written summation the respondent argues that the petitioner had reviews in 2009, 2010, 2011, and 2012, wherein she could have reported accurate household information. She additionally submitted Six Month Report forms (SMRF) in 2010, 2011, and 2012, wherein she could have reported accurate household information. The respondent does not actually say so in its summation, but the implication is that she did not report accurate household information. Unfortunately, the respondent has provided no substantive evidence of the alleged failure to report. The record contains no applications, renewals or SMRFs that would verify this allegation. There was brief testimony attesting to SMRFs that did not include income information; but there was no corroborating documentation. For instance, the record does not disclose if no income was reported, or if some income was reported, nor whether TR was identified as living in the house? Did the various reports contain conflicting information? Notably, certain electronic case comments indicate that some of TR's income information was received and processed by the respondent.

I conclude that I must accept the petitioner's direct testimony over the multiple sources of hearsay evidence. Petitioner testified in a clear, consistent and generally credible manner that petitioner and TR lived together commencing in September, 2009. Respondent's electronic case comments dated December 2, 2009, reveal that petitioner informed the respondent that she and TR purchased a home together and that they had a baby together. Troublingly, the agency does not appear to have made any written effort to verify the petitioner's household composition and/or TR's income. A mere verbal request is not a department sanctioned verification request. Therefore, I find that the error in continuing to issue FS benefits to petitioner without proper verification would belong to the respondent.

The fact of the matter is that the petitioner admits that she lived with TR from September, 2009, through May, 2012. The petitioner's testimony that she no longer resided with TR after May, 2012, is corroborated by Electronic Case Comments as well as the direct testimony of petitioner's mother. As such, I find that the respondent has not established any basis for Overpayment Claim no. [REDACTED], which covers the time period of June, 2012 through March 2013.

As this case involves agency error, the respondent's recovery period is limited to 12 months prior to the date of discovery of the overpayment. There are four overpayment claims, and, as petitioner argues, there may be four related discovery dates. The electronic case comment dated November 16, 2012, clearly identifies one instance of "discovery," and that discovery date, coupled with agency error, would appear to preclude recovery of overpayment claims [REDACTED], [REDACTED], and part of [REDACTED].

As a result of the overpayment claims precluded due to the determination of agency error, I must now determine the validity of those claims pertaining to the time period of November 16, 2011-November 16, 2012 (part of claim no. [REDACTED]). Petitioner argues that the claim involved with that period should be dismissed based upon a discovery date of June 15, 2013, the date that overpayments were processed. I do not concur that June 15, 2013, is the appropriate discovery date here. As noted above, discovery is the date that the agency became aware of the potential that an overissuance may exist. I find that the November 16, 2012, discovery date is more appropriate here.

That being said, regardless of the date of the claim, the respondent still had an obligation to establish its basic contention that petitioner's household received more FS than it was entitled to receive. At hearing, the petitioner contested the income figures attributed to TR. Respondent's representative testified that from October, 2011, onward, she relied upon certain wage reports, which were not included in the Investigative report, and do not appear to have been provided to the petitioner prior to hearing. A State Wage record was supplied with respondent's summation post-hearing, which does corroborate the earned

income attributed to TR in the income spreadsheet prepared by respondent. However, a second column of income assigned to TR under the heading "SEI" is not explained in any detail. Based on the record before me, I am simply unable to determine the validity of the income ascribed to TR. Without being able to determine the correct income for TR during the period of November 16, 2011-November 16, 2012, I conclude that the respondent has failed to establish an overpayment during this period. As such, the respondent has not established by a preponderance of the evidence the remainder of Overpayment Claim no. [REDACTED].

This is an extremely complicated and close case, but I am persuaded that the agency has not established by the preponderance of the evidence that petitioner received an overpayment of FS due to petitioner's error, or that the respondent has established that petitioner received an overpayment of FS due to agency error in the 12 month period prior to the agency's discovery of an overpayment. Essentially, there is only inconsequential non-hearsay corroboration of the assumption that the agency has drawn from the circumstantial hearsay evidence. It is true that the fact pattern creates a suspicion, but this mere suspicion alone is not enough. To do otherwise is to sustain a determination essentially based upon an assumption that it must be so. I decline to do so.

The county agency has not produced sufficient evidence to show by the preponderance of the evidence that the petitioner failed to correctly report her household composition and/or income in the period of June, 2009, to March, 2013. The instant FS overpayment must be reversed on this record.

CONCLUSIONS OF LAW

The county agency incorrectly determined that the petitioner's FS household was overissued \$8,271.00 of FS in the period of June, 2009, to March, 2013, due to her failure to report accurate household members and failure to report household income that must be budgeted to the household in this time period.

NOW, THEREFORE, it is ORDERED

That the matter is remanded to the county agency with instructions to rescind petitioner's liability for FS overissuance claim nos.:

| | | | |
|-----------|------------|---------------------|----------------|
| Claim No. | [REDACTED] | 6/01/2009-5/31/2010 | \$1,666.00, |
| Claim No. | [REDACTED] | 6/01/2010-3/31/2011 | \$3,546.00, |
| Claim No. | [REDACTED] | 6/01/2011-4/30/2012 | \$ 479.00, and |
| Claim No. | [REDACTED] | 6/01/2012-3/31/2013 | \$2,580.00, |

and cease all recovery efforts against petitioner based upon the overpayment determination of May 30, 2013. 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 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 October, 2013

\sPeter McCombs
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Brian Hayes, 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 October 21, 2013.

Winnebago County Department of Human Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
kln@legalaction.org