



FH  
[REDACTED]

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

---

In the Matter of

[REDACTED]  
[REDACTED]  
[REDACTED]

DECISION

CCO/150739

---

**PRELIMINARY RECITALS**

Pursuant to a petition filed July 18, 2013, under Wis. Admin. Code § HA 3.03, to review a decision by the Monroe County Department of Human Services in regard to Child Care, a telephone hearing was held on September 10, 2013. Post-hearing the petitioner submitted a Fact Finding Summary and Decision, dated September 10, 2013, which addressed much the same testimony and issues as are present in the instant matter. Respondent did not object to the submission of this document, and it has been added to the record.

The issue for determination is whether respondent has established an overpayment of Child Care benefits to petitioner.

There appeared at that time the following persons:

PARTIES IN INTEREST:  
Petitioner's Representative:

Attorney Bryan Pierce  
916 Oak Street  
P O Box 725  
Tomah, WI 54660

Petitioner:

[REDACTED]  
[REDACTED]  
[REDACTED]

Respondent:

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

By: Tom Miller

Monroe County Department of Human Services  
Community Services Bldg.  
14301 Cty Hwy B, Box 19  
Sparta, WI 54656-4509

ADMINISTRATIVE LAW JUDGE:  
Peter McCombs  
Division of Hearings and Appeals

### **FINDINGS OF FACT**

1. Petitioner (CARES # [REDACTED]) is a resident of Monroe County.
2. In the last week of May, 2013, petitioner's Wisconsin Works (W-2) agency received information that Mr. [REDACTED] had been living at petitioner's residence. The respondent referred the matter to O'Brien and Associates to investigate the allegation. The investigation concluded that petitioner and her husband had been living together since August of 2012.
3. On July 1, 2013, the county agency issued a Child Care Overpayment Notification to the petitioner informing her that the agency had determined she had been overpaid \$661.20 of Child Care benefits (Child Care Claim No. [REDACTED]) in the period of January 27, 2013, through March 31, 2013, due to client error, i.e., she had failed to report Mr. [REDACTED] was living in the household. The Notice also stated that the petitioner was liable for this overpayment. See, Exhibit 2.
4. On July 18, 2013, the petitioner timely filed an appeal with the Division of Hearings & Appeals contesting the Child Care overissuance determination described hereinabove.

### **DISCUSSION**

The department must recover all Child Care overpayments regardless of who is at fault. Wis. Stat. § 49.195(3). *See also*, Wis. Adm. Code, § DCF 101.23(1)(g), which holds that an overpayment is any payment received in an amount greater than the amount that the assistance group was eligible to receive, regardless of the reason for the overpayment. Child Care benefits are provided to W-2 participants who are working, in job training, in a job search under the FoodShare program, or in an approved technical school program. The county agency contends that the petitioner received Child Care payments that she was not entitled to because she failed to report that her estranged husband was residing in her home.

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. 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 representative provided a copy of the notices and worksheets showing the computation of the Child Care overpayments alleged. A representative of O'Brien and Associates testified as to the investigation that was conducted. He indicated that his investigation began on June 3, 2013, and concluded on June 5, 2013. He conducted searches of the Wisconsin Circuit Court Access system and the voter registration records; he interviewed petitioner's probation officer, her landlord, and petitioner and Mr. [REDACTED]. None of the witnesses identified in the investigative report appeared at hearing. I found the investigative report to be heavily circumstantial and its conclusions entirely unconvincing.

In rebuttal, the petitioner has provided her direct testimony that Mr. [REDACTED] was not living with her at any time in this test period. She provided documentary evidence of Mr. [REDACTED]'s June, 2013, Postal Service change of address notification indicating that he was moving *back* to her residence. Exhibit P-8. The respondent concedes that it was in possession of this information as well. She admitted that Mr. Robinette did in fact visit her home almost every other day, and that he worked third shift, but states that he did not reside there.

As noted, the agency did not provide any direct testimony from any party interviewed for the investigative report. In short, the majority of the county's case consists of hearsay evidence. "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted." Wis. Stat. §908.02(3). "A 'statement' is (a) an oral or written assertion...of a person, if it is intended by him as an assertion." Wis. Stat. §908.01(1).

The Wisconsin Supreme Court has ruled that hearsay is admissible in administrative proceedings. *Gehin v. Wisconsin Group Ins. Bd.*, 278 Wis. 2d 111, 133; see also, Wis. Stat. § 227.45. However, the Court has also ruled that administrative bodies should never base findings solely upon uncorroborated hearsay. *Ibid.* See also, *Village of Menomonee Falls v. DNR*, 140 Wis. 2d 579(Ct. App. 1987); and see, *Outagamie County v. Town of Brooklyn*, 18 Wis. 2d 303, 312(1962).

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 Mr. ██████ lived with petitioner specifically in the period of January 27, 2013, through March 31, 2013, based upon the limited investigation presented, more reliable than the sworn direct (and cross-examined) testimony of this live witness to the contrary.

In any event, the probative force of the agency's case does *not* establish that Mr. ██████ was actually living in the household in the tested period or that therefore petitioner is liable for the instant Child Care overpayment claim. I am persuaded that the agency has not established by the preponderance of the evidence that Mr. ██████ lived with petitioner during the time frame at issue, and the agency may not seek recovery from her for the debt on this record. Essentially, there is a lack of substantive 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 that Mr. ██████ lived with petitioner, 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.

I conclude that I must accept the petitioner's direct testimony over the multiple sources of hearsay evidence. She testified in a clear, consistent and generally credible manner that Mr. ██████ did not live with her in the Child Care overissuance test period. Rather, she asserted that Mr. ██████ visited her

residence to see his child regularly. And the agency evidence does not demonstrate that Mr. [REDACTED] was living with petitioner in the test period with any substantive direct evidence.

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 income in the period of January 27, 2013, through March 31, 2013. The instant Child Care overpayment must be reversed on this record.

### **CONCLUSIONS OF LAW**

The county agency incorrectly determined that the petitioner's household was overissued \$661.20 of Child Care benefits in the period of January 27, 2013, through March 31, 2013, due to her failure to report that Isaac [REDACTED] was living with her and that he had unreported earned income that must be budgeted to the household in this time period; the agency has not established by the preponderance of the evidence that Mr. [REDACTED] was residing with petitioner during this period of time.

**NOW, THEREFORE, it is ORDERED**

That the matter is remanded to the county agency with instructions to rescind Child Care overissuance Claim No. [REDACTED] (\$661.20 in the period of January 27, 2013, through March 31, 2013), and cease all recovery efforts based upon the overpayment determination of July 1, 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 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 4th day of October, 2013

---

\sPeter McCombs  
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](mailto:DHAmail@wisconsin.gov)  
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on October 4, 2013.

Monroe County Department of Human Services  
Public Assistance Collection Unit  
Child Care Fraud  
[bryan@carmichaellaw.com](mailto:bryan@carmichaellaw.com)