FH
[redacted]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

DECISION

MOP/150778

PRELIMINARY RECITALS

Pursuant to a petition filed July 22, 2013, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Winnebago County Department of Human Services in regard to Medical Assistance, a hearing was held on September 04, 2013, at Oshkosh, Wisconsin.

The issue for determination is whether the county agency correctly determined that the petitioner was overpaid $9,186.12 in Medical Assistance (MA) benefits between November 1, 2011 and April 30, 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]

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 9,186.12 in MA benefits between November 1, 2011 and March 31, 2011:

Claim No.	[redacted]	11/01/2011-4/30/2012	$ 877.00
Claim No.	[redacted]	6/01/2012-4/30/2013	$1,612.00
Claim No.	[redacted]	11/01/2011-4/30/2012	$2,468.00
Claim No.	[redacted]	6/01/2012-3/31/2013	$4,228.00

Id.

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

DISCUSSION

MA overpayment recovery is authorized by Wis. Stat., §49.497(1):

> (a) The department may recover any payment made incorrectly for benefits provided under this subchapter or s. 49.665 if the incorrect payment results from any 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.
>
> 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.

See also the department's BC+ Handbook, § 28.2. The overpayment must be caused by the client's error. **Overpayments caused by agency error are not recoverable**.

[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.

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 a MA household receives more MA benefits 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 Tyler 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 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] or claim no. [redacted], which cover the time periods of June 1, 2012 – April 30, 2013, and June 1, 2012 – April 30, 2013, respectively.

The petitioner also argues that any error in MA issuance is the fault of the respondent, and therefore it is not recoverable. I agree that the respondent has not established client error here, though that is not to say that petitioner doesn't have certain obligations to meet as a recipient of MA benefits. However, the respondent bears the burden here of proving by a preponderance of the evidence that the petitioner's error caused the overpayment.

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. The record is completely lacking in providing documentation of notices or requests for verification. A mere verbal request is not a department sanctioned verification request. Therefore, I find that the error in continuing to issue MA benefits to petitioner without proper verification would belong to the respondent. Overissuance caused by agency error is not recoverable.

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 MA due to petitioner's error. 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 instant MA overpayment must be reversed on this record.

CONCLUSIONS OF LAW

The county agency incorrectly determined that the petitioner's MA household was overissued $9,186.12 in Medical Assistance (MA) benefits between November 1, 2011 and April 30, 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 MA overissuance claim nos.:

Claim No.	[redacted]	11/01/2011-4/30/2012	$ 877.00,
Claim No.	[redacted]	6/01/2012-4/30/2013	$1,612.00,
Claim No.	[redacted]	11/01/2011-4/30/2012	$2,468.00, and
Claim No.	[redacted]	6/01/2012-3/31/2013	$4,228.00,

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