



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

In the Matter of

██████ | ██████
██████████████
██████████████████

DECISION

FOO/150779

PRELIMINARY RECITALS

Pursuant to a petition filed July 22, 2013, under Wis. Admin. Code § HA 3.03(1), 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 issue for determination is whether the county agency correctly discontinued the petitioner's FS effective April 1, 2013, because she failed to verify mandatory information.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

██████ | ██████
██████████████
██████████████████

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 # ██████████) is a resident of Winnebago County; her on-going FS benefits terminated effective April 1, 2013.

2. 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.
3. The investigator conducted an investigation and prepared a written report concluding that TR did live with the petitioner, and reported same to the agency.
4. On July 22, 2013, the petitioner filed an appeal with the Division of Hearings & Appeals.

DISCUSSION

This case was heard in conjunction with two overpayment matters concerning the petitioner. The termination of FS benefits was arguably based upon the respondent's determination that petitioner and TR were living in the same household. The respondent has not submitted as an exhibit any notice to the petitioner terminating her FS enrollment.

Household composition and household earnings are mandatory items of verification. *FoodShare Wisconsin Handbook* §§ 1.2.3, 1.2.4 & 1.2.5. Composition, when questionable, may also be verified. *Ibid.* The agency must provide a written verification request to the participant providing for at least a 10 day deadline to verify the requested information. *FoodShare Wisconsin Handbook* § 1.2.1. That occurred here. See, Exhibit #1, at pp. 7-8. Failure to verify within the deadline may be extended if the participant communicates to the agency that she is having difficulty verifying or the verification sought is not within her control, and requests assistance. *FoodShare Wisconsin Handbook* § 1.2.1.3. However, when no verification is received within the deadline, then the agency may discontinue benefits. See, also, *FoodShare Wisconsin Handbook* § 6.3.1.

In addition to lacking any notices in the instant record, I also note that the record is devoid of any verification requests.

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 █████ lived together including property tax records and court records. In addition to that documentary evidence, the respondent's investigator testified that it reached its conclusions based 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. This evidence constitutes hearsay because the person making the statements was not subject to questioning. They 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 rules of evidence generally do not apply to administrative hearings. Wis. Stat. § 227.45. Nevertheless, administrative decisions cannot be based solely upon uncorroborated hearsay. *Village of Menomonee Falls v. DNR*, 140 Wis. 2d 579 (Ct. App. 1987). Our state supreme court reinforced this principle in *Gehin v. Wisconsin Group Insurance Board*, 2005 WI 16, a decision that overturned a finding based upon un-testified to medical records that were contradicted by petitioner's sworn testimony. The court's rationale is 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.

The investigative report's findings certainly raise a reasonable suspicion, but a suspicion, regardless of how well founded, is not proof. Without these neighbors' presence at the hearing, no one could question them about the statements attributed to them in the written report. The respondent argues that one or more of the neighbors expressed concerns about testifying, due to having to socially interact with petitioner

and/or TR. Additional concerns were apparently related to concerns that TR's, purportedly a retired police officer, could cause problems for a certain neighbor who is also a police officer. While such reluctance may be understandable, if not rationally founded, it does nothing to lessen the respondent's burden of proof here.

Fair hearings are somewhat informal, but they are adversarial proceedings. While the agency's representatives are not lawyers, they are expected to have some basic knowledge of what is required to prove their case. It is a well-established principle that a moving party generally has the burden of proof, especially in administrative proceedings. *State v. Hanson*, 295 N.W.2d 209, 98 Wis. 2d 80 (Wis. App. 1980). The court in *Hanson* stated that the policy behind this principle is to assign the burden to the party seeking to change a present state of affairs. By seeking to end the petitioner's benefits, the agency is the moving party. The Department acknowledged the principle laid down in *Hanson* in *Final Decision ATI-40/87198* where Deputy Secretary Richard Lorang ruled on August 17, 1995, that in any fair hearing concerning the propriety of an agency action, the county or state agency has the burden of proof to establish that the action it took was proper given the facts of the case.

If the witnesses in the investigative report had testified, the agency may have had enough evidence to prove that TR was part of petitioner's household. But they did not. Without them, the agency's proof consists solely of uncorroborated hearsay that is contradicted by the petitioner's sworn testimony.¹ Under these circumstances, my skepticism amounts to speculation, which does not provide a sufficient legal basis to find that TR lived with petitioner. Because there is insufficient evidence to contradict the petitioner's testimony concerning her living arrangements, the agency cannot establish proper grounds for terminating petitioner's FS in April, 2013.

CONCLUSIONS OF LAW

The county agency has not proven by the preponderance of the credible admissible evidence that it correctly terminated petitioner's FS benefits due to her failure to report actual household composition.

THEREFORE, it is

ORDERED

That this matter is remanded to the county agency with instructions that within 10 days of the date of this decision it shall initiate the process to review petitioner's case and re-determine petitioner's eligibility for FS benefits as of April 1, 2013. Petitioner's obligation to comply with verification requests from the respondent shall not be limited by 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

¹ I note that the statement of one witness regarding the purchase of petitioner's residence has been, to a certain extent, corroborated. However, that sole corroboration does not provide any substantive evidence as to the issue of petitioner's household composition.

"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

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The preceding decision was sent to the following parties on October 21, 2013.

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