



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

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

FOP/151868

PRELIMINARY RECITALS

Pursuant to a petition filed September 05, 2013, under Wis. Admin. Code §HA 3.03, to review a decision by the La Crosse County Department of Human Services in regard to FoodShare benefits (FS), a hearing was held on October 21, 2013, at Viroqua, Wisconsin.

The issue for determination is whether the Department met its burden of establishing the \$2,333 FoodShare overissuance set forth in claims Nos. [REDACTED] and [REDACTED].

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

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

By: Tom Miller

La Crosse County Department of Human Services
300 N. 4th Street
PO Box 4002
La Crosse, WI 54601

ADMINISTRATIVE LAW JUDGE:

John P. Tedesco
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Vernon County.
2. O'Brien and Associates private investigators conducted an investigation into the residence of [REDACTED], an acquaintance/significant other of petitioner.

3. The investigator concluded that [REDACTED] had lived with petitioner while petitioner was receiving FS.
4. On August 12, 2013, the Department issued two FS Overissuance Notifications. The first was for the amount of \$1,732 for the period from 5/1/12 to 12/31/12; the second was for the amount of \$601 for the period from 4/1/13 to 5/31/13.
5. Petitioner filed a timely appeal.

DISCUSSION

The Department witnesses testified that this overpayment was calculated due to [REDACTED] [REDACTED] being part of the FS household, though petitioner did not report this. The Department alleges that [REDACTED] was living in the home and earning income that would have reduced the FS allotment for the household. It follows, according to the Department, that petitioner then received more FS than she was otherwise entitled to receive.

This case raises recurring issues that this Division has seen in FS overissuance appeals that have been the result of investigation by O'Brien and Associates private investigators. The first is one relating to the presentation of hearsay evidence through the contract investigator and his/her investigative report; the second is the fact that the Department determines an overpayment based on what is very clearly evidence that bears little or no weight at all.

HEARSAY

As for the hearsay issue, it has become almost automatic for me to cite *Gehin* and *Williams* in any FS overissuance case in which O'Brien and Associates private investigators has conducted the investigation. I do not know if anyone at the counties or the Department has read any of the numerous decisions in which I cite these cases. 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. I am hopeful that if I continue to point this out, as I have repeatedly for nearly two years, someone at the Department or O'Brien and Associates private investigators will understand that this is important. Indeed, it is the law of the State of Wisconsin as set forth by the Supreme Court of this state. An ALJ does not have discretion to disregard it.

In this case, the only witnesses were investigators from O'Brien and Associates. Mr. [REDACTED] testified that he spoke with petitioner's various neighbors and they gave varying statements that led the investigator to conclude that [REDACTED] was living in the home. None of the neighbors testified to their observations or the meaning of their statements. The investigator's paraphrasing of the statements of these neighbors is hearsay. It is hearsay that petitioner disputes. At the time of the hearing, the Department did not offer any other evidence to corroborate these assertions. The case ultimately fails due to the absence of weight of the presented evidence.

WEIGHT OF EVIDENCE

First of all, the Department has the burden to prove the basis for, and the correct calculation of the overpayment. Hearsay is often interrelated with weight of evidence. Hearsay, by its nature, is a statement of a person outside of the hearing. Most often in cases such as this one, the hearsay is offered because the witness does not actually appear for the hearing. This means that the ALJ cannot hear the words of the witness with the purportedly relevant and probative evidence. The ALJ cannot determine whether the witness may have some bias against either party making fabrication or “spinning” a possibility, or likelihood. Neither the opposing party nor the ALJ can ask questions to clarify the assertions of the hearsay. For example, when a neighbor reportedly stated that the [REDACTED] lived with petitioner, what was the neighbor’s interpretation of “lived with”? Does this mean he sleeps there every night and has all his belongings there and picks the kids up from school and eats every meal with the family? Or did the son interpret “lived with” as simply sleeping there once a week or so? No one can know for the purposes of this hearing because the only information from the neighbors was the paraphrasing by the investigator which necessarily is reported through the investigator’s own filter. It is impossible for the ALJ to know what the investigator failed to mention in his/her report, or what he/she has focused on for persuasive purposes.

The other information relied upon by the O’Brien investigators was various data in government databases. At times in the past, [REDACTED] has apparently provided petitioner’s address as a home address or mailing address. The agency offered a WI Department of Transportation screen print showing the petitioner’s address as “primary address” for [REDACTED]. The page was printed from the DOT website on October 18, 2013. Similarly, a motor vehicle registration page was printed from DOT which reflects a registration application received on September 18, 2013 for a 2003 Mitsubishi registered at petitioner’s address. The agency also offered printouts from the Wisconsin circuit court system indicating that petitioner provided petitioner’s home address when a criminal case was filed against him in January 2012 and in a debtor/creditor matter initiated in October 2011. The documents carry little to no weight relating to where petitioner was living and eating his meals during the overpayment period. But the overissuance periods are from May 2012 to December 2012 and from April 2013 to May 2013.

The few other documents offered, as well as the agency’s reference to the child support office’s notation in a case comment on a database entry relating to an ambiguous post on either petitioner’s or [REDACTED]’s Facebook page (unclear), carry no persuasive value in this case.

This was one of the thinnest cases I have ever seen, of any sort. As I have stated before, the Department’s continual election to simply present hearsay evidence in these cases is a risk it must (and apparently does) accept. I wonder how the overissuance determination was made with only the information gathered and produced by the investigators in this case. I do not know if this is a shortcoming of the Department, the county, or O’Brien and Associates private investigators. But, the fact that these cases continually proceed to a hearing before an ALJ with no improvement or any apparent effort to prove the case with meaningful evidence is perplexing.

CONCLUSIONS OF LAW

The Department failed to meet its burden to establish the overissuances.

THEREFORE, it is

ORDERED

That this matter is remanded to the Department and its county agency with instructions to reverse the overissuance determinations in claims Nos. [REDACTED] and [REDACTED], that it cease all collection

efforts, and that it return any funds already recouped, if any, from petitioner in satisfaction of these claims. These actions must be completed within 10 days.

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 30th day of October, 2013

\sJohn P. Tedesco
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 30, 2013.

La Crosse County Department of Human Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability