



FH
[REDACTED]

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

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

FOO/152614

PRELIMINARY RECITALS

Pursuant to a petition filed October 07, 2013, under Wis. Admin. Code § HA 3.03(1), to review a decision by the Rock County Department of Social Services in regard to FoodShare benefits (FS), a hearing was held on November 6, 2013, at Janesville, Wisconsin. Later that day, the county agency contacted this ALJ and asked to present additional evidence. A second hearing was scheduled for further proceedings. At the time of the second hearing, a critical witness for the agency was involved in a traffic related incident and was unavailable. The hearing was cancelled. Consent was not granted by petitioner for an extension of time limits and the additional hearing and evidence could not occur.

The issue for determination is whether the agency established that it was correct to terminate FS enrollment effective September 1, 2013.

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, Room 651
Madison, Wisconsin 53703

By: Mary Donahue

Rock County Department of Social Services
1900 Center Avenue
PO Box 1649
Janesville, WI 53546

ADMINISTRATIVE LAW JUDGE:

John P. Tedesco
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Rock County.
2. On August 6, 2013, the Department sent notice to petitioner informing her that she would be terminated from the FS program because she was a student and did not meet the requirements for student to receive FS.
3. Petitioner appealed.

DISCUSSION

A person who is enrolled at least half time in higher education is ineligible for FS unless he meets a specific exemption criterion. 7 C.F.R. §273.5(a); FS Handbook, Appendix 3.15.1. The exemption criteria are found at 7 C.F.R. §273.5(b). A student in higher education can be exempt if he is:

- (1) Under age 18 or over age 49;
- (2) Physically or mentally unfit for gainful employment;
- (3) Receiving Aid to Families with Dependent Children (AFDC);
- (4) Enrolled as a result of participation in the AFDC work program or its successor;
- (5) Employed a minimum of 20 hours per week, or if self-employed, receiving weekly earnings at least equal to the Federal minimum wage multiplied by 20 hours;
- (6) Participating in a state or federally financed work study program during the school year;
- (7) Participating in on-the-job training;
- (8) Responsible for the care of a dependent household member under age 6;
- (9) Responsible for a dependent household member between 6 and 12 if child care is unavailable;
- (10) A single parent responsible for a dependent child under age 12.
- (11) Assigned or placed in the school by or in compliance with a work program, including the Food Stamp Employment and Training (FSET) Program.

See also the FS Handbook, App. 3.15.1. The Handbook provisions differ from the federal regulation in that Wisconsin Works (W-2) eligibility replaces AFDC as described in no. 3 above, and there is an additional exemption for a person placed in school through the Workforce Investment Act.

At the hearing, the agency did not present evidence relating to petitioner's status as a student. I am not sure how they expected to win this particular issue without that. I presume their position is that she had previously been exempt from this student bar as she had been understood to be caring for her child in her home this earning an exception under #8, #9, or #10 above.

At the time of the hearing, the evidence presented by the agency focused on whether petitioner is or was actually caring for her child, or whether the child is living (or was living) with petitioner's father. The evidence to support the agency's position was the result of an investigation by LaTasha Hillery, a private investigator for O'Brien and Associates. Hillery testified that she spoke with Thomas Wright (the child's father) on July 25, 2013. Hillery testified that Wright told her that the child had been living with petitioner's father for a year and a half. Hillery also testified that she spoke with petitioner that same day and that she admitted her daughter has been living with her father for a year and a half. This was all Hillery presented in her report and was the basis for her conclusion that the child had not lived with petitioner for the year and a half prior to the investigation. The agency presented no additional evidence to corroborate the reported statements.

At hearing, petitioner and her father testified and denied saying the statement attributed to them. They both asserted that Hillery fabricated the statements about the child living with petitioner's father. The

agency did not present Wright as a witness. The agency presented no other evidence to corroborate the reported statements made by petitioner, Wright, and petitioner's father.

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. This 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.

But, under Wis. Stat. 908.04(1)(b) a party admission is excluded from the definition of hearsay. But, it is only petitioner's statement that would be excluded from the hearsay definition. Petitioner's father's alleged statement and Wright's alleged statement could only be, at most, hearsay used as corroboration to support petitioner's statement. And, thus, this matter simply comes down to a determination of the credibility of the investigator's claim that these three individuals provided these statements compared with the claim of petitioner and her father that they gave no such statements.

One particular thing happened during the hearing that causes me to initially question the veracity of the investigator: the issue arose as to whether Hillery ever actually interviewed petitioner's father. Hillery claimed that she visited his home and spoke with him. Petitioner's father denied that Hillery ever spoke with him in person. Hillery described that they spoke in the kitchen of the home – the only detail she could provide was that the kitchen had wooden cabinets in it. Hillery (appearing only on the telephone) stated that she could not describe petitioner's father. She stated that she does "thousands of investigations...I don't write down what everybody looks like." But, later in the hearing when asked if she could confirm that petitioner's father's voice she was hearing over her telephone was consistent with the voice of the man she met with on June 26, Hillery stated that she it was. I find it incredible that Hillery could not describe the home in any detail, and explicitly stated she could not remember a person's physical description due to the thousands of interviews she conducts, but testified that a person's voice was the same as a person she interviewed more than three months earlier. Perhaps this is true, but in such an extremely close case this oddity cause me pause in reaching a conclusion that petitioner and her father are both lying while under oath and that the agency has met its burden.

I note that I often consider demeanor of the witness in making a determination of credibility as well. In this hearing I found both petitioner and Hillery to be at least somewhat disrespectful and argumentative.

Finally, the absolute minimal work that Hillery did on this case does not help the Department. I fully understand that Hillery claims she obtained admissions. Why try to get more? Well, the reason to try to get more is exactly because the scenario in which the agency finds itself right now in foreseeable. Did Hillery think that the petitioner would not ask for a hearing? Or that she would come to the hearing and admit that she has been lying all along? The agency cannot simply expect a petitioner to prove its case for it. Hillery gathered no evidence to help the agency in light of the fact that the petitioner was hardly likely to come to a hearing and roll over. This investigation reflects minimal effort and thought and cannot carry the day when public benefits to needy individuals are at stake. If there was wrongdoing, it is up to the agency and its investigator to prove it.

Should the agency develop evidence to more fully support a future action against petitioner, it may take such action and provide appropriate appeal rights.

CONCLUSIONS OF LAW

The agency did not meet its burden to establish that the termination of FS was correct.

THEREFORE, it is

ORDERED

That this matter is remanded to the Department and its county agent with instructions to restore FS eligibility and provide appropriate supplement retroactive to September 1, 2013. These actions must be completed within 10 days 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, Room 651, 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 6th day of December, 2013

\sJohn P. Tedesco
Administrative Law Judge
Division of Hearings and Appeals



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The preceding decision was sent to the following parties on December 6, 2013.

Rock County Department of Social Services
Division of Health Care Access and Accountability