



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

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

DECISION

FOP/154736

PRELIMINARY RECITALS

Pursuant to a petition filed January 10, 2014, under Wis. Admin. Code §HA 3.03, to review a decision by the Lafayette County Department of Human Services in regard to FoodShare benefits (FS), a hearing was held on March 20, 2014, at Darlington, Wisconsin.

The issue for determination is whether petitioner received an overpayment of FS benefits.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

Attorney Hal Menendez
31 South Mills Street
Madison, WI 53715

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: Janet Popp

Lafayette County Department of Human Services
627 Main Street
Darlington, WI 53530

ADMINISTRATIVE LAW JUDGE:

Peter McCombs
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Lafayette County.
2. The county agency seeks to recover \$2,465.00 in FoodShare provided to the petitioner's household from December, 2011, through November, 2013, because petitioner failed to verify that his mother was a member of his FS household.

3. On December 6, 2013, the respondent notified petitioner that it had established three overpayment claims for which he was liable:

	12/01/11-10/31/12	\$1,177.00
	11/01/12-04/30/12	\$ 594.00
	05/01/13-11/30/13	\$ 694.00.

Exhibits P-3, P-4, and P-5.

4. The county agency’s investigation and overpayment calculations were prepared by O’Brien & Associates. Exhibit R-1. No one from O’Brien & Associates appeared at the hearing.

DISCUSSION

Federal regulations require state agencies to “establish a claim against any household that has received more [FoodShare] benefits than it is entitled to receive.” 7 CFR § 273.18(a). This regulation requires the agency to recover all FoodShare overpayments regardless of whose error caused the overpayment. To ensure that eligibility decisions are based on accurate information, recipients must verify certain information. 7 CFR § 273(f)(1). Agencies must deny benefits to those who refuse to cooperate with completing the application process, which includes verification. 7 CFR § 273.2(d).

The petitioner’s mother relocated to Wisconsin from Texas in 2010, to help her mother care for her ill father. She still lives with her mother. Petitioner’s mother pays petitioner’s rent and utilities, and she testified that she lends him the use of her car. Petitioner is unemployed. Following his November, 2013, FS renewal, the respondent filed a Front End Verification, and a fraud investigation was conducted by O’Brien & Associates. The investigation concluded that petitioner and respondent have resided together for two years. As a result, an overpayment based upon a failure to report accurate household members was established.

The problem with the agency’s case is that it is entirely hearsay. It relied upon O’Brien & Associates, a private investigative firm, to develop the evidence, but no one from that firm appeared. The worker who did appear on the respondent’s behalf testified that O’Brien had concluded that an overpayment had occurred and had calculated the overpayment amount. 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 untestified 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 records developed by O’Brien & Associates do not fall into the business records exception to the hearsay rule because they were made in anticipation of litigation. Because the agency’s case rests solely upon uncorroborated hearsay, it cannot recover the alleged overpayment of FoodShare.

CONCLUSIONS OF LAW

There is no admissible evidence that the petitioner received an overpayment of FoodShare.

THEREFORE, it is

ORDERED

That this matter is remanded to the respondent with instructions to rescind the following FoodShare overpayment Claim Nos.:

	12/01/11-10/31/12	\$1,177.00
	11/01/12-04/30/12	\$ 594.00
	05/01/13-11/30/13	\$ 694.00.

The respondent shall immediately cease any and all actions to recover the amounts indicated under such claims. All actions required by this Order shall be completed within 10 days following issuance of this Decision.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or 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 filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 18th day of April, 2014

\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 April 18, 2014.

Lafayette County Department of Human Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
Attorney Hal Menendez