



STATE OF WISCONSIN  
Division of Hearings and Appeals

In the Matter of



**DECISION**  
Case #: FOP - 175402

PRELIMINARY RECITALS

Pursuant to a petition filed on July 6, 2016, under Wis. Admin. Code §HA 3.03, to review a decision by the Marathon County Department of Social Services regarding FoodShare benefits (FS), a hearing was held on October 11, 2016, by telephone from Madison, Wisconsin. The record was held open until October 25, 2016, in order to allow the parties to submit written closing statements.

The issue for determination is whether petitioner was overissued FS benefits due to a failure to report that her ex-husband lived with her during the period of July, 2014, through January, 2015.

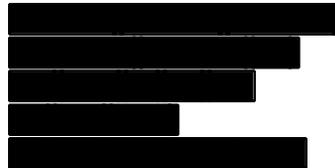
There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:



Petitioner's Representative:



Respondent:

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

By:   
Marathon County Department of Social Services  
400 E. Thomas Street  
 WI 54403

ADMINISTRATIVE LAW JUDGE:  
Peter McCombs  
Division of Hearings and Appeals

### FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Marathon County.
2. Petitioner received FS for herself and her minor child, VS, Jr, in Marathon County during at least the period of July, 2014, through January, 2015. In June of 2015, the county began an investigation concerning the residence of the child's father, VS. After the investigation the county concluded that the father (petitioner's ex-husband) lived with petitioner and their son at his [REDACTED] residence during the referenced time period. After obtaining his income information, the county informed petitioner by notice dated June 13, 2016, that she was overpaid \$2,128.00 in FS from July, 2014, through January, 2015, claim no. [REDACTED]
3. Petitioner was divorced in November 2014. The parties separated in August of 2013, following a domestic abuse incident. The petitioner had a domestic abuse injunction imposed on VS from August, 2013, though October, 2013. Petitioner reported her separation, and later her divorce, to the respondent.
4. VS, Jr, was enrolled in daycare in [REDACTED] until some time in late 2014, at which time VS, Jr, was enrolled in daycare in [REDACTED]. Since [REDACTED] is located approximately one hour from [REDACTED], petitioner would spend the night at her former in-law's home occasionally. On those occasions, she would drop off her son with VS in the morning, and VS would take him to daycare at noon. Petitioner would then pick him up at 6:00 pm.
5. At all times relevant hereto, petitioner resided in a home owned by her parents located in [REDACTED], Wisconsin, and worked in [REDACTED]; VS has resided at a residence owned by his mother (she does not reside there) in [REDACTED], and since 2005, VS has been employed by [REDACTED]. The [REDACTED] has locations in [REDACTED] and [REDACTED].

### DISCUSSION

The Department is required to recover all FS overpayments. An overpayment occurs when an FS household receives more FS than it is entitled to receive. 7 C.F.R. §273.18(c). The federal FS regulations provide that the agency shall establish a claim against an FS household that was overpaid, even if the overpayment was caused by agency error. 7 C.F.R. §273.18(b)(3). All adult members of an FS household are liable for an overpayment. 7 C.F.R. §273.18(a)(4); FS Handbook, Appendix 7.3.1.2.

To determine an overpayment, the agency must determine the correct amount of FS that the household should have received and subtract the amount that the household actually received. 7 C.F.R. §273.18(c)(1)(ii).

FS rules provide as follows:

The following individuals who live with others must be considered as customarily purchasing food and preparing meals with the others, even if they do not do so, and thus must be included in the same household, unless otherwise specified.

- (i) Spouses;
- (ii) A person under 22 years of age who is living with his or her natural or adoptive parent(s) or step-parent(s); and
- (iii) A child (other than a foster child) under 18 years of age who lives with and is under the parental control of a household member other than his or her parent.

7 C.F.R. §273.1(b)(1); see also FS Handbook, Appendix 3.3.1.2. Thus if a parent lives with his children, he must be included in the FS household. Important for this case is that the issue is not the relationship between the parents, but the relationship between parent and children.

The respondent asserts that it commenced its investigation after questioning petitioner's commute to [REDACTED] (a one hour drive from [REDACTED] each way) for daycare. An investigation was performed by KK of O'Brien and Associates. He testified that two of VS, Jr's daycare workers, as well as VS's neighbor confirmed that petitioner and VS live together in [REDACTED]. [REDACTED] investigative report included vehicle registration information that indicated that petitioner's vehicle is registered at her [REDACTED] address, and VS's vehicles are registered under his [REDACTED] address.

The respondent also presented testimony from VS, Jr's daycare providers. BH, administrator of the daycare, testified that she told KK that petitioner and VS resided in [REDACTED], but on cross examination conceded that she could not provide specific dates that she saw petitioner and VS as VS's home, but added that she saw them regularly. The other daycare worker, AS, testified that she was petitioner's car parked at VS's home at least once per week.

VS's neighbor, who purportedly stated that petitioner and VS had lived together for two years was not called as a witness. 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. An ALJ does not have discretion to disregard it. Arguably, the hearsay evidence of VS's neighbor could be construed to be corroborated by VS, Jr's daycare providers. However, I find the testimony by BH and AS to be weak at best, and neither of them testified to the length of time or even a specific time period during which petitioner was allegedly residing with VS.

Petitioner presented testimony of her mother, who stated that petitioner and her son reside in [REDACTED], and rent the lower level of her residence from her. She confirmed that VS resided there as well, until the August, 2013, domestic abuse incident. Petitioner testified that she and VS moved to her mother's home in 2009, when they lost their home to foreclosure. She stated that her inconvenient daycare situation is the result of attempts by her and VS to successfully co-parent their child. VS, Jr, was attending daycare in [REDACTED], but that ended when petitioner lost her job. She stated that her mother watched her child for a while, but she needed to find a new daycare when her mother obtained new employment. When she had difficulty locating a daycare near her residence, she decided to enroll her son in daycare in [REDACTED].

While I can understand that respondent questioning the living situation in light of the distances involved here, I cannot conclude that the determination that petitioner and VS resided together from July, 2014, though January, 2015, is correct. The evidence presented by the respondent presents more questions than it answers, and I found petitioner's testimony to be both credible and consistent. Petitioner's mailing address identified the [REDACTED] address and VS's mailing address identified the [REDACTED] address throughout the overpayment period. This is noted in the respondent's own records, as well as records obtained from the Department of Motor Vehicles and Marathon Circuit Court. The portions of the investigative report evidence that are not hearsay do not establish anything more than the fact that petitioner is often at the home of VS. Neither of the interviewed daycare workers testified that they were ever in VS's home; only that they saw petitioner at VS's home, walking the dogs, or parking her vehicle there. This corroborates petitioner's testimony that she would occasionally stay at her in-law's home, and drop her son at VS's home in the morning. Based upon the record before me, I am unable to conclude that

the respondent has established by a preponderance of the evidence, that petitioner and VS resided together between July, 2014 and January, 2015.

**CONCLUSIONS OF LAW**

The respondent has not established by a preponderance of the evidence, that petitioner and VS resided together between July, 2014 and January, 2015. As such, the respondent has not established that petitioner was overissued FS benefits during said time period.

**THEREFORE, it is ORDERED**

That this matter shall be remanded to the respondent to rescind overpayment claim no. [REDACTED], in the amount of \$2,128.00, no later than November 1, 2016.

**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, **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 26th day of October, 2016

\s \_\_\_\_\_  
Peter McCombs  
Administrative Law Judge  
Division of Hearings and Appeals



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The preceding decision was sent to the following parties on October 26, 2016.

Marathon County Department of Social Services  
Public Assistance Collection Unit  
Division of Health Care Access and Accountability

