



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION ON REMAND
Case #: FOS - 193182

PRELIMINARY RECITALS

Pursuant to a petition filed on March 28, 2019, under Wis. Stat. § 48.64(4), and Wis. Admin. Code § DCF 56.10(1), to review a decision by the Children's Hospital of WI Community Services regarding Foster Care, a hearing was held on November 18, 2020, by telephone. A hearing was initially held in this matter on June 26, 2019. On August 16, 2019, a decision was issued, remanding the case back to the agency to rescind the notice of revocation at issue in this matter. On September 5, 2019, the agency submitted a rehearing request in order to provide supplemental evidence. On September 20, 2019, a decision was issued denying the rehearing request as such requests can only be granted if the evidence was not available at the time of the initial hearing. The agency then filed an appeal with the Circuit Court. In Circuit Court, on January 3, 2020, the agency filed a motion for leave to present additional evidence to the Division of Hearings and Appeals. The Department of Children and Families, acting as the respondent, did not object to that motion. On January 14, 2020, Milwaukee County Circuit Court Judge Paul R. Van Grunsven granted the motion since there was no objection, and the case was remanded to the Division of Hearings and Appeals to allow the agency the opportunity to provide supplemental evidence. The case was then set for hearing on March 9, 2020. However, Petitioner's attorney noted at the start of that hearing that he was unaware of the motion to remand for supplemental evidence that was filed in Circuit Court, and that if he had been aware, he would have objected. Petitioner's attorney then asked for the matter to be held in abeyance so that he could file a motion to vacate the Circuit Court order remanding the case to the Division of Hearings and Appeals. Petitioner's motion was partially granted and the case was reopened in Circuit Court. On September 16, 2020, Judge Van Grunsven granted the agency's motion for leave to present additional evidence and the case was remanded to the Division of Hearings and Appeals again to allow the agency the opportunity to present supplemental evidence. A hearing was set for November 5, 2020, but was rescheduled per the agency's request due to witness unavailability on that date. The hearing was then set for and ultimately held on November 18, 2020.

The issue for determination is whether the agency correctly revoked Petitioner's foster care license.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

Department of Children and Families
201 West Washington Avenue
Madison, WI 53703

By: [REDACTED]
Children's Hospital of WI Community Services
620 S 76th Street, Suite 120
Milwaukee, WI 53214

ADMINISTRATIVE LAW JUDGE:
Nicole Bjork
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Racine County and held a foster care license.
2. On March 22, 2019, the agency sent Petitioner a notice stating that her foster care license was being revoked for violations of DCF 56.05(1)(a)2 and DCF 56.05(1)(g)1, 2 and 9. The agency further detailed that it was informed on March 18, 2019 that Petitioner contacted a non-emergency police department due to her foster child being out of control. The agency then alleged that Petitioner informed the police during that contact that an individual named [REDACTED] [REDACTED] was her boyfriend and residing in the home. The agency contends that Petitioner's failure to inform it that Mr. [REDACTED] resided in the home triggered the DCF violations that caused the revocation. The agency further found that Mr. [REDACTED] has a criminal record, which was also required to be reported to the agency if he resided with Petitioner.
3. Petitioner and Mr. [REDACTED] both deny that that they are in a relationship or that he resided in Petitioner's home. They were previously in a relationship, but not during the foster care license period. Petitioner testified that she has a boyfriend, but that is not Mr. [REDACTED]. Both Petitioner and Mr. [REDACTED] testified that he spent time at Petitioner's home because he rented a garage space from Petitioner, using it as a work space.
4. The responding officer in the March 18, 2019 incident, [REDACTED] [REDACTED], testified during the hearing. Officer [REDACTED] testified that he was relying on the report he completed after the incident in order to testify regarding his conversations with Petitioner as he no longer recalled the exact conversations.
5. Officer [REDACTED] testified that after he responded to the call, he spoke with both Petitioner and the foster child involved in the incident. They informed him that an individual named [REDACTED] had also witnessed the incident, but had left the house. Officer [REDACTED]'s report notes that Petitioner stated [REDACTED] was not her boyfriend, just a friend, and that he left to go back to his house. Officer [REDACTED] then asked to speak with [REDACTED]. Petitioner provided [REDACTED]'s phone number and Officer [REDACTED] called [REDACTED]. During the call, [REDACTED] explained what he witnessed between Petitioner and the child. Officer [REDACTED] then asked [REDACTED] for his last name and birthdate. Officer [REDACTED] then "ran the name" through the system and became suspicious because the name didn't match any name in the database. During a call back to [REDACTED], Officer [REDACTED] was informed that [REDACTED] provided an alternate name. Officer [REDACTED] was ultimately able to procure [REDACTED]'s legal name of [REDACTED] and discovered Mr. [REDACTED]'s criminal record. Officer [REDACTED] then became suspicious that Mr. [REDACTED] resided in Petitioner's home. Specifically, Officer [REDACTED] noted that in a criminal photograph of Mr. [REDACTED], he had a "[REDACTED]" tattoo on his neck, which is Petitioner's name, and that Petitioner was involved in a domestic dispute with Mr. [REDACTED].

6. The police report authored by Officer [REDACTED] on March 18, 2019 noted that after Officer [REDACTED] discovered Mr. [REDACTED]'s true identity, he asked Petitioner a second time if Mr. [REDACTED] was her boyfriend and resided with her. Again, per the police report, Petitioner denied that Mr. [REDACTED] was her boyfriend or that he resided with her. Officer [REDACTED] then asked Petitioner about the vehicle Mr. [REDACTED] was driving that day and discovered that he drove Petitioner's vehicle home. At that point, Officer [REDACTED] testified that he believed Mr. [REDACTED] was residing with Petitioner and he questioned Petitioner again. Officer [REDACTED] does not recall the details of that conversation but his report states:

I told her that I believed she and [REDACTED] were in a relationship together, and that she was trying to stick up for him because she loved him. I told her that I believed she did not want CPS to find out [REDACTED] had been staying there, and that it would prevent her from receiving permanent placement of _____ and _____ who were the two other foster children at the residence. (Peticioner) stated that it was true, and just did not know what to do. After this, we left the residence.
7. During his testimony, Officer [REDACTED] was asked exactly what "it" meant in his police report when he stated that Petitioner, "stated that it was true," because Officer [REDACTED]'s report had paraphrased numerous statements prior to noting Petitioner's response of "it" was true. Officer [REDACTED] was asked if "it" meant simply that Petitioner was in love with Mr. [REDACTED], or if "it" meant that all of the statements he had paraphrased in the report were true. Officer [REDACTED] could not answer that question and testified that it could have meant that Petitioner was only in love with Mr. [REDACTED] or it could have meant that she was affirming all of his prior statements. He could not answer the question definitively.
8. Petitioner denies ever informing Officer [REDACTED] that Mr. [REDACTED] resided in the home or that she was in a relationship with him because they were not. Petitioner admitted that she had a previous dispute with Mr. [REDACTED] at her residence but that was regarding his use of her garage space that he was renting.
9. Petitioner testified that the police officers walked through her entire home and did not note any adult male belongings in the home, which would be present if Mr. [REDACTED] resided in the home. Officer [REDACTED] testified that he did not recall seeing any adult male items in the home, but that he didn't go into drawers or anything of that nature.

DISCUSSION

The Wisconsin Administrative Code, Chapter DCF 56, sets out the duties of a foster parent. The licensee must be familiar with the Wisconsin Administrative Code, Chapter DCF 56, and must comply with its requirements. Wis. Adm. Code, §DCF 56.05(1)(c). Violation of administrative provisions may be grounds for revoking the foster home license. Wis. Stat., §48.715(4)(d). The agency contends that Petitioner violated §DCF 56.05(1)(a)2 and §DCF 56.05(1)(g)1, 2, and 9, which are noted here:

DCF 56.05 Licensee Qualifications. (1) Personal Requirements and Background

(a) *General.*

...
2. The applicant or licensee shall give truthful and sufficient information to enable the licensing agency to verify whether or not he or she meets the requirements of subd. 1. Giving false information or withholding relevant information shall constitute grounds for denial of revocation of the license....

...

(g) *Reporting background changes.* An applicant or licensee shall immediately notify the licensing agency if any of the following applies to the applicant, licensee, or a nonclient resident in the home:

1. The person has been convicted of any crime.
2. The person is the subject of a pending criminal charge.
- ...
9. A person begins residing, or is expected to reside, in the foster home.

The agency's revocation is solely based on the violation of the above two rules. The agency contends that Mr. ██████ resided in Petitioner's home and that Petitioner failed to report him in the home. If he did reside in the home, then Petitioner would have violated both of regulations noted above by failing to report him in the home. However, both Petitioner and Mr. ██████ deny that he resided in the home. Thus, in order to establish that Petitioner's license was correctly revoked, the agency must first prove that Mr. ██████ even resided in the home.

The agency bears the burden of establishing by the preponderance of the evidence that Mr. ██████ resided in the home. Wis. Admin Code, §HA 1.17(1). The only evidence that the agency presented to establish that Mr. ██████ resided in the home was a March 18, 2019 police report, testimony from the officer that completed the March 18, 2019 report, a June 8, 2018 police report, and printouts from the Wisconsin Circuit Court Access website.

The agency representative testified that the agency was informed on March 13, 2019 that Petitioner called a non-emergency police department because her foster child was out of control. This police contact resulted in a police report being created, which the agency obtained a copy of. The agency believed the report implied that Petitioner stated that Mr. ██████ resided in the home and was her boyfriend. Based on that report, the agency then conducted a circuit court access search and noted that that Mr. ██████ was involved in several cases and those cases list Mr. ██████'s address as Petitioner's address. Further, the agency obtained a second police report from June 18, 2018 involving a domestic dispute between Mr. ██████ and Petitioner.

The agency representative testified that the revocation was based solely on the information obtained in the reports and circuit court website information. The police officer that authored the June 18, 2018 report did not testify at the hearing, making the report hearsay. Hearsay is admissible in administrative proceedings. However, an administrative law judge cannot decide a case based solely on hearsay. *See Gehin v. Wisconsin Group Insurance Board*, 278 Wis.2d 111, 134 (2005). In this case, hearsay is the least problematic factor regarding the June 18, 2018 police report. That report actually corroborates Petitioner and Mr. ██████'s assertions that they were in a relationship in the past but not currently together and that he resided elsewhere. It further confirms that Mr. ██████ rented garage space. The report notes that the officer was called to Petitioner's home due to a report of adults yelling at each other and states:

(Petitioner) informed me she had lived with ██████ for an extended period in the past. She had been dating him on and off for over 20 years. She stated that the male party, ██████, was at the residence working in the garage on a vehicle when he became agitated and wanted to get into the house. (Petitioner) advised that she locked the doors due to the

time of night. [REDACTED] used a house key to get into the residence and began shouting at (Petitioner).

Exhibit 3, June 8, 2018 Police Report.

The officer then noted in his report, “When I asked where [REDACTED] may have left, she stated he stays at a house on [REDACTED] in Caledonia but did not know the address.” Exhibit 3, page 2.

Thus, the June 18, 2018 police report relied upon by the agency does not establish that Petitioner and Mr. [REDACTED] were in a relationship or that they resided together. In fact, the report establishes the opposite.

With respect to the printouts from the Wisconsin Circuit Court Access website, the only evidence established from those printouts is that the documents list Petitioner’s address as his own. No evidence was presented regarding where the information was obtained to list that address, such as if a last known address was used or if Mr. [REDACTED] provided that information himself. Further, even if Mr. [REDACTED] had provided Petitioner’s address as his own, an individual uses certain addresses for a plethora of reasons. Providing an address is not definitive proof of residency. Additionally, Mr. [REDACTED] denied providing Petitioner’s address as his own. In any event, whether he used Petitioner’s address as his own or not, using the address of another, while suspicious, is not proof of residency.

The agency further provided a March 18, 2019 police report that indicated Mr. [REDACTED] resided with Petitioner and the officer that created that report did testify at hearing. This evidence is the most notable evidence presented by the agency regarding Mr. [REDACTED]’s residency. The responding officer, Officer [REDACTED], testified that he responded to a call at Petitioner’s home regarding one of her foster children acting out. During the course of his investigation, Officer [REDACTED] asked if anyone else had witnessed the incident between Petitioner and the foster child. Officer [REDACTED] was told that Mr. [REDACTED], who was no longer in the home, had witnessed the incident. Petitioner provided an alternate name for Mr. [REDACTED], but provided the correct phone number to reach him. Officer [REDACTED] then asked what Petitioner’s relationship was to Mr. [REDACTED] and if he resided in the home. Petitioner informed him that she was only friends with Mr. [REDACTED] and that he did not reside in the home. Petitioner further stated that Mr. [REDACTED] left her house to “go home.”

Officer [REDACTED] then called and spoke with Mr. [REDACTED]. Mr. [REDACTED] initially provided an alternate name. Officer [REDACTED] then performed a database search of the name Mr. [REDACTED] provided and ultimately determined that Mr. [REDACTED] did not provide an accurate name. Officer [REDACTED] further discovered that Mr. [REDACTED] had outstanding warrants and a criminal history. While Mr. [REDACTED]’s actions are not condoned, this information has no bearing on his residency. He may have lied about his name because he knew about the outstanding warrants, but the fact that he provided a false name is irrelevant in this case with respect to his residency.

Officer [REDACTED] further testified that he then saw a picture of Mr. [REDACTED] in the database, after discovering his actual name, and that the picture showed a man with “[REDACTED]” tattooed across his neck, which is Petitioner’s name. Officer [REDACTED] then questioned Petitioner again about her relationship with Mr. [REDACTED]. For a second time, Petitioner denied that Mr. [REDACTED] was her boyfriend. Officer [REDACTED] then asked Petitioner about the vehicle Mr. [REDACTED] drove home. Through that questioning, he discovered that Mr. [REDACTED] drove Petitioner’s vehicle home. Because of the “[REDACTED]” tattoo, the fact that Mr. [REDACTED] was driving Petitioner’s vehicle and

because Mr. [REDACTED] was previously involved in a domestic dispute with Petitioner, Officer [REDACTED] believed that Mr. [REDACTED] actually resided in Petitioner's home.

Officer [REDACTED] then asked Petitioner a third time about her relationship with Mr. [REDACTED] and his residence. Officer [REDACTED] testified that he can no longer recall the specifics of this conversation due to the amount of time that has passed. However, he would rely on the report he completed immediately after that conversation. The report states:

I told her that I believed she and [REDACTED] were in a relationship together, and that she was trying to stick up for him because she loved him. I told her that I believed she did not want CPS to find out [REDACTED] had been staying there, and that it would prevent her from receiving permanent placement of _____ and _____ who were the two other foster children at the residence. (Petitioner) stated that it was true, and just did not know what to do. After this, we left the residence.

Exhibit 2.

Officer [REDACTED] was asked during the hearing what he meant when he wrote that Petitioner, "stated that it was true." Officer [REDACTED]'s report appears to paraphrase an entire conversation with him reporting the numerous questions he asked followed by a general response. Did "it" mean Petitioner was affirmatively answering the entirety of the paragraph of questions he paraphrased? Or did "it" simply mean she admitted that some part of the officer's questions may have been true, such as that she still loved Mr. [REDACTED]? Officer [REDACTED] testified that he could not say for certain what he meant when he wrote, "it was true," if that meant every single question he previously asked was true or if Petitioner's response was only to one question or part of one question.

The only noteworthy evidence in this case to indicate that Mr. [REDACTED] resided in Petitioner's home is this third conversation between Petitioner and Officer [REDACTED]. During the first two conversations about Petitioner's relationship with Mr. [REDACTED] and his residency, Petitioner denied that he was her boyfriend or that he resided with her. Petitioner did state that he was an ex-boyfriend and had maintained that stance during two separate instances of questioning by Officer [REDACTED]. Only during the third round did the report note that Petitioner responded that "it was true" in response to numerous questions paraphrased by Officer [REDACTED]. Though no one, not even Officer [REDACTED], can state what "it" means.

In contrast, Petitioner and Mr. [REDACTED] both testified at the hearing and both denied that he resided in the home. Both stated that they were previously in a relationship, but were no longer together. Both testified that Mr. [REDACTED] still went to Petitioner's home because he rented a garage space from Petitioner and used it as a work space. Mr. [REDACTED] further testified that he did not know why the court documents list Petitioner's address as his own, because he would not have given out that address since he did not reside there. Additionally, Petitioner testified that the police officers walked through her home during the March 2019 incident and no one noted any belongings to indicate that an adult male resided in the home. Officer [REDACTED] confirmed that he walked through the home but testified that he didn't look in drawers or anything of that nature.

Upon considering all of the evidence in this case, the preponderance of the evidence establishes that Mr. ██████ did not reside in the home. Furthermore, on judicial review, the decision of an administrative law judge (“ALJ”) must be supported by substantial evidence. See *Gehin v. Wisconsin Group Insurance Board*, 2005 WI 16, ¶ 51, 278 Wis. 2d 111, 134 (2005); Wis. Stat. § 227.57(6). Substantial evidence is “that quantity and quality of evidence which a reasonable man could accept as adequate to support a conclusion.” *Gehin*, 2005 WI at ¶ 48, 278 Wis. 2d at 132-133 (Internal citations omitted). More importantly, uncorroborated hearsay alone (including hearsay reports that are controverted by in-person testimony) does not constitute substantial evidence to support an administrative tribunal’s decision. See *Gehin*, 2005 WI at ¶ 110, 278 Wis. 2d at 159.

Cases involving allegations of an unreported adult residing in the home are not novel to the Division of Hearings and Appeals. Such cases occur frequently and are notoriously difficult for an agency to prove due to the inadequate evidence provided. While those DHA cases are not binding precedent, they are persuasive. One ALJ recently noted, “(W)hile an abundance of records indicate that _____ and Petitioner identified the same address, I do not agree that such information is sufficient to corroborate the...conclusion that this evidence also demonstrates that they were living together.” *DHA Case No. FOP-199729*, page 3, (Wis. Div. Hearings & Appeals December 23, 2020) (DHS). A second ALJ recently echoed that decision stating, “The fact that numerous records show his address as Petitioner’s does not show me that he was actually living there.” *DHA Case No. FOP-196009*, page 3, (Wis. Div. Hearings & Appeals January 2, 2020) (DHS). In that case, the unreported adult was actually the Petitioner’s husband, who was frequently in the home, but the Petitioner testified that they were separated and lived apart.

Further, in another case, a third ALJ found, “The Department’s suspicion that Petitioner and _____ resided together during the alleged...period was...not unfounded. The agency must however do more than demonstrate that it had good cause to conduct an investigation.” *DHA Case No. FOP-198156*, page 4, (Wis. Div. Hearings & Appeals May 28, 2020) (DHS). As a fourth ALJ noted in a different case, “In the end, the Department has not met its burden of proof. The Division’s administrative law judges do not deal in assumptions derived from suspicious information, but in evidentiary proof. Even were I to find otherwise on that point, I would also find the testimony of the four family members corroborating the residency questions....adequately rebutted the agency case, even with their many inconsistencies and misreports.” *DHA Case No. FOP-196017*, page 8, (Wis. Div. Hearings & Appeals February 13, 2020) (DHS). See also, *DHA Case No. FOP-199210*, (Wis. Div. Hearings & Appeals October 8, 2020) (DHS); and *DHA Case No. FOP-199303*, (Wis. Div. Hearings & Appeals September 24, 2020) (DHS).

A simple search of DHA decisions over the last year alone would produce dozens of cases with a similar fact pattern. The “unreported adult in the home” is not a new issue. The commonality in these cases is usually that the unreported individual used the petitioner’s address as his/her own in court filings or government documents. In some cases, there is a suspicious neighbor testifying, in others, such as this case, there is an investigator/officer acting on a “hunch.” And in each of those cases, the Division of Hearings and Appeals has consistently maintained that circumstances may lead an agency to investigate the residency of an unreported individual, but that the suspicious information (alone) is not enough to meet the agency’s burden when the petitioner provides testimony that controverts the documents presented and the suspicious “hunches.” This is well established at the Division of Hearings and Appeals and could have been easily discovered with the smallest amount of legal research.

In this case, as in most of the similar cases, enough suspicious information existed to warrant an agency investigation into Mr. ██████'s residency. The inconsistent information provided regarding Mr. ██████'s actual name and the address listed on his court documents were certainly suspicious. However, suspicious information is not enough to be considered substantial evidence – on judicial review under Wis. Stat. §227.57(6). Suspicion can be removed with a little investigation and logical explanations. Petitioner noted that no agency representative asked her for an explanation or spoke with her prior to revoking her license. Logical explanations existed in this case, if only the agency had asked. Ultimately, on these facts, I find that the agency failed to meet the preponderance of evidence (burden of proof). Furthermore, the record does not contain substantial evidence to support the agency's allegations.

The fact that Mr. ██████ had a "██████" tattoo is meaningless regarding whether he resided in Petitioner's home. The tattoo only means that at one point he decided to declare his love with a tattoo. Even if Mr. ██████ and Petitioner were currently madly in love and in a relationship, that would present insufficient proof as to where Mr. ██████ resides. Further, as noted in the countless DHA decisions, an address listed on court records is not proof of residency as there are a host of reasons why that might have occurred. Additionally, the fact that Mr. ██████ was driving Petitioner's vehicle on the date of the incident only proves that Mr. ██████ borrowed Petitioner's vehicle. The agency also relied on Officer ██████'s report. But that report noted that Petitioner denied Mr. ██████ resided with her twice before finally stating, "it's true," after Officer ██████ paraphrased an entire paragraph of questions in his report. What "it" means is difficult to decipher, even for Officer ██████.

In the end, it is the agency's burden to prove by the preponderance of the evidence that Mr. ██████ resided in Petitioner's home. And at best, the evidence proves that maybe Petitioner is still in love with Mr. ██████. The evidence does not meet the burden. Since the evidence does not establish that Mr. ██████ resided in Petitioner's home, the evidence does not establish that Petitioner violated the DCF rules that formed the basis of the revocation.

CONCLUSIONS OF LAW

The agency did not establish by the preponderance of the evidence that Petitioner violated the rules and, therefore, the agency incorrectly revoked Petitioner's foster care license.

THEREFORE, it is

ORDERED

That this matter is remanded to Children's Hospital of Wisconsin Community Services with instructions to rescind the March 22, 2019 notice revoking Petitioner's foster care license and to reinstate her foster care license. These actions shall be completed within 10 days 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, 4822 Madison Yards Way 5th Floor, 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.

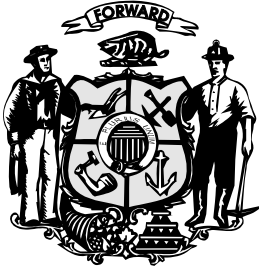
APPEAL TO COURT

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 Children and Families, 201 West Washington Avenue, **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 Milwaukee,
Wisconsin, this 11th day of February, 2021

\s _____
Nicole Bjork
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 February 11, 2021.

Children's Hospital of WI Community Services
DCF - Foster Care

[REDACTED]