



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION

CCO/172112

PRELIMINARY RECITALS

Pursuant to a petition filed February 18, 2016, under Wis. Admin. Code § HA 3.03, to review a decision by the Kenosha County Human Service Department in regard to Child Care (CC), a hearing was held on March 17, 2016, at Kenosha, Wisconsin. The record was held open post-hearing for the agency to submit additional information. The agency submitted information on March 18, 2016. The Petitioner responded to the additional information on May 8, 2016. The Petitioner's response was allowed into the record due to the agency failure to produce the complete overpayment calculations before or at the hearing and the fact that the overpayment spreadsheet was 77 pages in length. The record was closed on May 8, 2016.

The issue for determination is whether the agency properly seeks to recover an overissuance of child care benefits from the Petitioner in the amount of \$1,552.73 for the period of March 31, 2014 – December 31, 2014 (Claim # [redacted]) and \$2,832.05 for the period of January 1, 2015 – September 30, 2015 (Claim # [redacted]).

The issue for determination is whether the agency properly seeks to recover an overissuance of child care benefits from the Petitioner in the amount of \$1,552.73 for the period of March 31, 2014 – December 31, 2014 (Claim # [redacted]) and \$2,832.05 for the period of January 1, 2015 – September 30, 2015 (Claim # [redacted]).

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:



Respondent:

Department of Children and Families
201 East Washington Avenue, Room G200
Madison, Wisconsin 53703

By: [redacted]

Kenosha County Human Service Department
8600 Sheridan Road
Kenosha, WI 53143

ADMINISTRATIVE LAW JUDGE:
Debra Bursinger
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Kenosha County.
2. Petitioner and his wife became the court-ordered foster parents of one child, [REDACTED], on or about November 1, 2014. Prior to that, the Petitioner and his wife also received court-ordered Kinship care payments for [REDACTED].
3. In March, 2014, the Petitioner and his wife applied for child care benefits for [REDACTED]. On March 24, 2014, the agency issued a notice of child care eligibility to them. The notice informed them that they were approved to receive child care benefits for [REDACTED] beginning April 1, 2014. The notice informed them that they must report changes that could affect eligibility no later than 10 calendar days after the change. The notice also informed them that if they stopped working, they must report it to the agency.
4. On March 27, 2014, the Petitioner's wife signed and submitted a Child Care Schedule indicating her primary employment hours were Monday – Saturday, 7:30 a.m. - 3:30 p.m. and Petitioner's employment hours were Monday – Friday, 7 a.m. – 3:30 p.m.
5. On March 31, 2014, the agency issued a child care authorization notice informing the Petitioner and his wife that they were authorized for 42 hours/week (40 hours of child care plus 2 hours of travel time/week) of child care benefits for [REDACTED] for the period of April 6, 2014 – October 4, 2014. The notice also informed them that they must contact the agency if there is a change in the number of work hours or a change in the number of authorized hours of child care needed. It also notified them that they would be responsible for any overpayments that occur due to a failure to timely report changes or if adults in the household are not engaged in approved activities.
6. On September 24, 2014, the agency received an employer verification of earnings from the Petitioner's employer [REDACTED]. The verification reported that the Petitioner started employment on March 31, 2014, that his regular scheduled work hours were 40 hours/week with approximately 2 hours/week of overtime.
7. On October 2, 2014, the Petitioner's wife submitted a Child Care Schedule indicating her primary employment hours were 7:30 a.m. – 4 p.m. and Petitioner's employment hours were 7 a.m. – 4 p.m.
8. On October 6, 2014, the agency issued an authorization notice to the Petitioner and his wife informing them that they were authorized for 42 hours/week of child care benefits for [REDACTED] for the period of October 5, 2014 – April 4, 2015. The notice also informed them that they must contact the agency if there is a change in the number of work hours or a change in the number of authorized hours of child care needed. It also notified them that they would be responsible for any overpayments that occur due to a failure to timely report changes or if adults in the household are not engaged in approved activities.
9. On April 6, 2015, the agency conducted a phone interview with the Petitioner's wife and discussed the child care schedule. On April 9, 2015, the Petitioner's wife signed and submitted a Child Care Schedule indicating her primary employment hours were 7:30 a.m. – 4 p.m. and Petitioner's employment hours were 7 a.m. – 3:30 p.m.
10. On April 14, 2015, the agency issued a child care authorization notice to the Petitioner and his wife informing them that they were authorized for 43 hours/week of child care benefits for [REDACTED]. The notice also informed them that they must contact the agency if there is a change in the number of work hours or a change in the number of authorized hours of child care needed. It also

notified them that they would be responsible for any overpayments that occur due to a failure to timely report changes or if adults in the household are not engaged in approved activities.

11. On July 20, 2015, Petitioner's employment with █████ ended. This was not reported to the agency until September 14, 2015.
12. On September 19, 2015, child care authorizations for █████ were discontinued.
13. On or about October 27, 2015, the agency received an employer verification of earnings from the Petitioner's wife's employer, the US Postal Service. The employer reported the Petitioner's wife's start date as October 25, 1997, that she works 40 hours/week and her hours of employment are 8 a.m. – 4 p.m. Monday, Wednesday – Saturday.
14. On or about November 4, 2015, the agency received verification of the Petitioner's work schedule at █████ for the period of March 31, 2014 – July 20, 2015. █████ verified that he worked 40 hours/week. █████ verified that the Petitioner's husband worked the following shifts:

March, 2014	1st shift	7 a.m – 3 p.m.
June, 2014	3rd shift	11 p.m. – 7 a.m.
June, 2015	D shift	7 p.m. – 7 a.m.
15. On January 13, 2016, the agency issued a Child Care Overpayment Notice to the Petitioner informing him that the agency intends to recover an overissuance of child care benefits in the amount of \$1,552.73 for the period of March 31, 2014 – December 31, 2014 and \$2,832.05 for the period of January 1, 2015 – September 30, 2015 due to an intentional program violation in misrepresenting/failing to report earned income.
16. On February 18, 2016, the Petitioner filed an appeal with the Division of Hearings and Appeals.

DISCUSSION

Wis. Stat., §49.195(3), provides as follows:

A county, tribal governing body, Wisconsin works agency or the department shall determine whether an overpayment has been made under s. 49.19, 49.148, 49.155 or 49.157 and, if so, the amount of the overpayment.... Notwithstanding s. 49.96, the department shall promptly recover all overpayments made under s. 49.19, 49.148, 49.155 or 49.157 that have not already been received under s. 49.161 or 49.19(17) and shall promulgate rules establishing policies and procedures to administer this subsection.

Child care subsidies are authorized in Wis. Stat., §49.155, and thus they are within the parameters of §49.195(3). Recovery of child care overpayments also is mandated in the Wis. Admin. Code, §DCF 101.23. An overpayment is any payment received in an amount greater than the amount that the assistance group was eligible to receive, regardless of the reason for the overpayment. Wis. Admin. Code, §DCF 101.23(1)(g). Recovery must occur even if the error was made by the agency.

A parent is eligible for child care services if she needs the care to attend Wisconsin Works (W-2) approved school, to work, or to participate in W-2 activities. Wis. Stat., §49.155(1m)(a); Wisconsin Child Care Manual, §1.4.8. If both parents are in the household, both must be working or attending W-2 activities. Wis. Admin. Code, §DCF 101.26(1).

The child care manual states that the agency may authorize child care to allow a parent who works third shift to have sleep time as follows:

“The hours authorized for sleep time should be based on the parent’s need to sleep during daytime hours in order to remain employed. The local agency can negotiate with the parent for the amount of sleep time authorized per week.”

Child Care Manual, § 2.2.7.

In addition, the manual states that authorization workers are responsible for evaluating the needs for child care for all family or case types.

“Child care authorizations must be based on an assessment of:

- The number of hours of care each child in the family needs per week to enable the parent(s) to participate in the approved activities, including lunch and break times, and travel between the work activity and the child care location
 - Overlapping scheduled of two parent families
 - The appropriate type of authorization (attendance attendance-based or enrollment enrollment-based)
 - The length of time child care is needed (up to six months)
 - The copayment type
 - The child’s school schedule
 - Shared placement schedules
 - Any other factors that impact the need for child care
- ...”

Child Care Manual, § 2.2.2.

Overpayment period March 31, 2014 – June, 2014

The agency asserts that, during this period of time, the Petitioner’s wife did not accurately report her work schedule or the Petitioner’s work schedule. Based on the agency’s analysis, this resulted in the issuance of child care benefits to which the Petitioner and his wife were not entitled.

On March 27, 2014, the child care schedule completed by the Petitioner’s wife indicates that she was employed 7:30 a.m. – 3:30 p.m. and the Petitioner was employed 7 a.m. – 3:30 p.m. The evidence obtained by the agency demonstrates that the Petitioner’s wife’s work schedule was 8:00 a.m. – 4:00 p.m. and the Petitioner’s work schedule was 7 a.m. – 3 p.m. The agency argues that the earliest the Petitioner and his wife needed child care for ■ was 7:30 a.m. and the Petitioner should have been able to pick up ■ by 3:15 p.m. Therefore, the agency determined the Petitioner and his wife were out of compliance during this period whenever ■ was dropped off prior to 7:30 a.m. or picked up after 3:15 p.m.

The Petitioner’s wife testified that her husband often worked overtime. She is supported in this assertion by the employer verification of earnings submitted by the employer of her husband on April 24, 2014. The employer estimated that the Petitioner worked 40 regular hours/week and 2 overtime hours/week.

The initial burden of proof is on the agency in a child care overpayment case. The agency did get verification from the Petitioner’s employer that his regular shift during this time was 7 a.m. – 3 p.m. However, the agency did not get the actual hours worked to determine if he worked overtime on the days when ■ was picked up after 3:15 p.m. Because the agency’s own evidence supports the Petitioner’s wife’s assertion that her husband regularly worked overtime, I conclude the agency has not met its burden of proof to demonstrate that the Petitioner and his wife received more child care benefits than they were entitled to receive.

Overpayment period of July, 2014 – July 19, 2015

For this period of time, the agency's primary argument is that the Petitioner's wife failed to report that her husband's work hours changed to 3rd shift. As a result, the agency asserts, the Petitioner and his wife did not need as many child care hours because the Petitioner was available to take care of [REDACTED] for part of the time that Petitioner's wife was working.

The agency testified at the hearing that when determining whether there was an overissuance and calculating the amount of the overissuance, it applied a sleep allowance of 5 hours for the Petitioner because he worked third shift. The agency testified that this was a "standard" allowance. I note that the child care manual in §§ 2.2.2 and 2.2.7 does not provide any type of "standard" allowance but rather gives workers discretion with regard to the number of hours based on an analysis of the individual need in the case. The workers are to consider the factors in 2.2.2 and 2.2.7, specifically the "parent's need to sleep during daytime hours in order to remain employed." This requires an individual or case-by-case analysis that would include the type of work the parent engages in, how many hours he works/shift and any other factors that would impact a particular parent's need for sleep to remain employed.

When reviewing a discretionary determination, a reviewing decision maker must determine if the agency erroneously exercised its discretion. *Brookfield v. Milwaukee Sewerage Dist.*, 171 Wis. 2d 400, 423 (1992). This term replaced the prior term "abuse of discretion" in Wisconsin law. The standard of review, however, remains the same. An erroneous exercise of discretion is when a decision maker fails to apply the appropriate legal standard to the relevant facts. *Hedtcke v. Sentry Ins. Co.*, 109 Wis. 2d 461, 471, (1982). "The exercise of discretion must depend on facts that are of record or that are reasonably derived by inference from the record and the basis of the exercise of discretion should be set forth." *Howard v. Duersten*, 81 Wis. 2d 30, 305 (1977). Thus, if a discretionary action has a rational basis, it is not an erroneous use of discretion.

In this case, the agency has not demonstrated that it has properly exercised its discretion in determining the Petitioner's "need to sleep during daytime hours in order to remain employed." Instead, it applied what it alleges is a standard of 5 hours. There is no written policy presented to demonstrate that this is the standard and no analysis as to why this standard is appropriate to the Petitioner's case. The 5 hour allowance appears to be arbitrary with no rational basis articulated in general and no rational basis articulated specifically to the Petitioner's case.

Overpayment of July 20, 2015 – September 30, 2015

The Petitioner's wife conceded at the hearing that they received child care benefits for [REDACTED] that they were not entitled to receive during this period because the Petitioner was not working during this time. Throughout the hearing, the Petitioner's wife testified that she had misunderstood the child care benefit process as it applies to foster parents. She stated that she asked if child care benefits were "included" for foster parents because she had told the case manager they could not afford to foster [REDACTED] if child care benefits were not included. She acknowledged that the notices sent by the agency stated the reporting requirements regarding changes in work hours but believed those requirements were not applicable to foster parents. She testified that her husband engaged in job search activities during the time he was unemployed and they needed child care for [REDACTED] during that time. She stated she did not understand that they were not entitled to benefits and again reiterated her mistaken belief that, as foster parents, they were entitled to receive the child care benefits they used. She acknowledged that this was a misunderstanding on her part. I found the Petitioner's testimony to be credible with regard to her misunderstanding. However, as she concedes, this misunderstanding did result in an overissuance of child care benefits that she must repay for this period. The agency demonstrated in its evidence that the amount of the overpayment for the period of July 20, 2015 – September 30, 2015 is \$1,042.04.

In summary, based on the evidence and for the reasons stated above, I conclude that the agency does not properly seek to recover an overissuance of child care benefits from the Petitioner for the period of March 31, 2014 – December 31, 2014 and January 1, 2014 – July 19, 2014. Further, the agency may recover an overissuance of child care benefits for the period of July 20, 2014 – September 30, 2014.

CONCLUSIONS OF LAW

The agency does not properly seek to recover an overissuance of child care benefits for the period of March 31, 2014 – July 19, 2015. The agency properly seeks to recover an overissuance of child care benefits for the period of July 20, 2015 – September 30, 2015.

THEREFORE, it is

ORDERED

That this matter is remanded to the agency to take all administrative steps necessary to rescind Claim # [REDACTED] issued to the Petitioner and cease all actions to collect on said claim. Further, the agency is ordered to take all administrative steps necessary to revise Claim # [REDACTED] issued to the Petitioner by amending the overpayment period to July 20, 2015 – September 30, 2015 and amending the amount of the overpayment to \$1,042.04. The agency shall issue a new notice of overpayment for Claim # [REDACTED] with the amended overpayment period and amended amount of the overpayment. Because the Petitioner has exercised her right to a hearing with regard to the overpayment, she is not entitled to another appeal with regard to the amended overpayment period and amount. All of the agency actions herein ordered shall be completed within 10 days of the date 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 Children and Families, 201 East Washington Avenue, Room G200, 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 Milwaukee,
Wisconsin, this 14th day of June, 2016

\sDebra Bursinger
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 June 14, 2016.

Kenosha County Human Service Department
Public Assistance Collection Unit
Child Care Fraud