



FH

[REDACTED]

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

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION
Case #: MOP - 174400

PRELIMINARY RECITALS

Pursuant to a petition filed on May 17, 2016, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Racine County Department of Human Services regarding Medical Assistance (MA), a hearing was held on October 13, 2016, at Milwaukee, Wisconsin.

NOTE: This matter was originally schedule for hearing on June 14, 2016. The Petitioner asked to reschedule the hearing so he could obtain legal representation.

The matter was then rescheduled to June 21, 2016. The Petitioner did retain counsel and on July 15, 2016, [REDACTED] submitted a written request for an adjournment so he could prepare for the hearing.

There were some difficulties finding a mutually agreeable hearing date, but [REDACTED] indicated that his client was waiving all applicable time limit and confirmed this in writing, via e-mail on July 18, 2016. On July 19, 2016, a phone conference took place, at which time [REDACTED] and [REDACTED] agreed to October 13, 2016 as a hearing date.

As indicated above, the hearing took place on October 13, 2016, as scheduled. [REDACTED] again affirmed that his client was waiving all applicable time limits.

The issue for determination is whether the agency correctly determined the Petitioner was overpaid BadgerCare+ benefits in the amount of \$1,528.83, for the period of March 1, 2010 to February 28, 2011; \$2,967.19, for the period of March 1, 2011 to February 28, 2012; \$1,923.36 for the period of March 1, 2012 to November 30, 2012, and \$1,887.54 for the period of August 1, 2013 to February 28, 2014.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651

Madison, WI 53703

By: [REDACTED]
Racine County Corporation Counsel
730 Wisconsin Ave., 10th Floor
Racine, WI 53403

ADMINISTRATIVE LAW JUDGE:
Mayumi M. Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Milwaukee County.
2. The primary person, who applied for the benefits in question is Petitioner's former mistress, hereinafter referred to as [REDACTED], CARES # [REDACTED]. (See Respondent's Exhibit T)
3. Between March 1, 2010 and February 28, 2014, [REDACTED] did not report the Petitioner in her household. (Stipulation of the Parties)
4. During this time, [REDACTED] had one child from a previous relationship, in addition to three children in common with Petitioner. (Stipulation of the Parties; Respondent's Exhibit O)
5. The first child born to [REDACTED] and Petitioner was born in 2005; the second child was born in July 2009 and the last child born to [REDACTED] and Petitioner, was born in May / June 2010. (Petitioner's Exhibit C; Respondent's Exhibit T; Testimony of [REDACTED], Petitioner's friend; Testimony of Petitioner's wife.)
6. Petitioner signed a lease with [REDACTED] for an apartment in Greendale, for a one year term, beginning April 1, 2009. (Testimony of Petitioner; Respondent's Exhibit B)
7. The Petitioner signed leases for two additional apartments with [REDACTED] one April 1, 2010 for an apartment in Germantown, and one October 1, 2012, for an apartment in Waterford. (Testimony of Petitioner; Petitioner Exhibits D and U)
8. [REDACTED] would not have been able to lease the second apartment without the Petitioner, due to her bad credit. (Testimony of [REDACTED], landlord of the Waterford apartment; Testimony of Petitioner)
9. Petitioner has owned a home in Milwaukee with his wife, since 2005. (Petitioner's Exhibits A and B)
10. Petitioner was with the same employer from July 7, 2009 through May 22, 2015 and listed the Milwaukee address with his employer. (Respondent's Exhibit K)
11. During the time in question, the Petitioner paid [REDACTED] child support for the three children. (Stipulation of the Parties)
12. The address on Petitioner's driver's license is the address of his home in Milwaukee. (Testimony of [REDACTED])
13. Petitioner is registered to vote at his home in Milwaukee. (Testimony of Petitioner)
14. On April 8, 2016, the agency sent the Petitioner four automated BadgerCare+ Overpayment Notices:

Claim [REDACTED], in the amount of \$2,537.07, for the period of March 1, 2010 to February 28, 2011

Claim [REDACTED], in the amount of \$4,034.43, for the period of March 1, 2011 to February 29, 2012

Claim [REDACTED], in the amount of \$2,564.48 for the period of March 1, 2012 to November 30, 2012.

Claim [REDACTED], in the amount of \$2,516.72, for the period of August 1, 2013 to February 28, 2014.

The notices were sent to the Petitioner at an address on Edmund Street, which is not the home the Petitioner owns with his wife.

(Exhibit M2)

15. The Petitioner filed a request for fair hearing that was received by the Division of Hearings and Appeals on May 17, 2016. (Petitioner's Exhibit G)
16. On October 13, 2016, the agency issued a revised, manual, Medicaid/BadgerCare Overpayment notice, because it determined that the Petitioner was not liable for any overpayment of benefits incurred by the child [REDACTED] has in common with her ex-husband. The overpayment amounts were adjusted as follows:

\$1,528.83, for the period of March 1, 2010 to February 28, 2011
\$2,967.19, for the period of March 1, 2011 to February 29, 2012
\$1,923.36 for the period of March 1, 2012 to November 30, 2012.
\$1,887.54, for the period of August 1, 2013 to February 28, 2014.

(Per [REDACTED]; Revised Exhibit M1)

DISCUSSION

It is the county agency's contention that the Petitioner was living with [REDACTED] and their three children between March 1, 2010 and February 28, 2014, but [REDACTED] failed to report the Petitioner in her household. The agency further contends that Petitioner's income put the household over the income limit, so an overpayment of benefits occurred.

An "overpayment" occurs when BadgerCare+ benefits are paid for someone who was not eligible for them, or when BadgerCare+ payments are made in an incorrect amount. Some examples of how overpayments occur are concealing or not reporting income, failure to report a change in income, and/or providing misinformation at the time of [application](#) regarding any information that would affect eligibility. *Wis. Stat. § 49.497; BadgerCare+ Eligibility Handbook (BEH) § 28.1.*

The agency is required to initiate recovery of BC+ overpayments, if the incorrect payment resulted from applicant/member error; fraud/intentional program violation or member loss of an appeal. *BEH+ §28.2*

Per BEH+ §28.3, overpayments may not be recovered under the following circumstances:

1. The member reported the change timely, but the case could not be closed or the benefit reduced due to the 10-day notice requirement.
2. Agency error (keying error, math error, failure to act on a reported change, etc).
3. Normal prospective budgeting projections based on best available information.

Petitioner and his attorney do not dispute the fact that [REDACTED] did not report the Petitioner in the household between March 1, 2010 and February 28, 2014, nor do they dispute the calculation of [REDACTED]'s earned income and Petitioner's income. As such, if an overpayment occurred, because Petitioner's income put

the household over the applicable income limits, then the overpayment was caused by member error and is recoverable.

Liability for BadgerCare+ benefits paid for Petitioner's children

Wis. Admin. Code DHS 2.04 (1)(a) states that the agency “may seek recovery from the eligible individual or from the person or entity authorized to receive benefits on behalf of the eligible individual or both...” Given that the Petitioner is the biological father of the children in question, he would be authorized to receive benefits on behalf of the children.

Wis. Stats. §49.497(1)(b) states that, “the department’s right of recovery is against any Medical Assistance or Badger Care recipient to whom or on whose behalf the incorrect payment was made.” Wis. Stats. §49.471 (1)(j) defines recipient as “an individual receiving benefits under this section.”

BEH §28.4.4 states, “If a minor received BC+ in error, make the claim against the minor’s parent(s) or legally responsible relative, if the parent or legally responsible relative was living with the minor at the time of the overpayment.” *Emphasis added*

“Legally Responsible” is defined in Wis. Admin. Code §DHS101.03(93), as, “a spouse's liability for the support of a spouse or a parent's liability for the support of a child as specified in s. [49.90](#), Stats.”

Under Wis. Stats. 49.665(j), a provision of the BadgerCare program, “Parent” has the meaning given in s. 49.141(1)(j):

“Parent” means any of the following:

1. A biological parent
2. A person who has consented to the artificial insemination of his wife under s.891.40
3. A parent by adoption
4. A man adjudged in a judicial proceeding to be the biological father of a child if the child is a nonmarital child who is not adopted or whose parents do not subsequently intermarry under s.767.803

The Petitioner is the biological parent of three of [REDACTED]'s children; it is undisputed that he is legally responsible for the children and was, in fact, paying child support for the children. Thus, if he was living with [REDACTED] and his children, he would be liable for any overpayment of benefits issued to the children.

March 2010

The Petitioner does not dispute signing a lease for an apartment in Greendale with [REDACTED], which ran from April 1, 2009 through March 31, 2010. At the time the Petitioner signed the lease, [REDACTED] was pregnant with their second child, who was later born in July 2009. (See Petitioner’s Exhibit C)

The Petitioner testified that he signed the lease, because he wanted to make sure his kids had a good place to live and was concerned [REDACTED] would not be able to get the lease without him. Petitioner’s claim is corroborated by the testimony of the landlord of the Waterford apartment.

The county agency argues that if the Petitioner was just trying to secure the apartment, he could have just completed the “Guarantee” portion of the lease, rather than list himself as a tenant. [REDACTED] (hereinafter referred to as the Property Manager) testified that if someone is just guaranteeing payment of rent, that the “Guarantee” box would be completed, although the Property Manager was not present when the lease was signed and so, cannot say what was discussed at the time the lease was signed.

The Petitioner testified that when he signed the lease, no one explained what that box was for. Whoever signed the lease for ██████████ did not testify at the hearing, so there was no evidence to rebut the Petitioner's testimony.

Sometime around August/September 2009, Petitioner and ██████ had to have conceived their third child, barring unusual circumstances, since the birth of that child was reported on June 3, 2010. (See Respondent's Exhibit T) This is clear evidence that Petitioner and ██████ were having sex during the summer of 2009, but having sex with someone, is not the same as living with someone.

The Property Manager for the Greendale apartment testified that she moved into the complex of 13 buildings in June 2009 and that she recalls speaking with ██████ when the baby was born. She testified that she cleaned the hallway of the building regularly and that she recalls seeing the Petitioner's name on the mailbox. The Property Manager testified that she chatted with both Petitioner and ██████ on several occasions and that she remembers seeing the Petitioner around "a lot" outside.

The reliability of the Property Manager's testimony is questionable, given that this was seven years ago and the Petitioner would have been one person in a complex of 13 buildings, with 64 units. Even if the Property Manager's testimony were accepted as true, the Petitioner testified that he would visit with his children, often on the way to work. There is no evidence to refute Petitioner's claim, and visiting a place is not the same as living at that place.

The name on the mailbox would be curious, but it is not unusual for people to let others use their address as a mailing address, although the record contains no copies of any mail that was sent to the Petitioner at that address - no bills, nothing.

The agency has not presented sufficient reliable evidence to prove the Petitioner was living with ██████ between April 2009 and March 2010. Indeed, there is no evidence to rebut the testimony that Petitioner used the Milwaukee address on his driver's license, that he was responsible for paying property taxes on the Milwaukee residence, or that he was registered to vote out of the Milwaukee address. Further, it is undisputed that the Petitioner paid child support to ██████ during the time in question. Finally, the summons for the paternity case concerning Petitioner's second child that was filed on September 11, 2009, listed the Petitioner as living in Milwaukee, and it was served on him at the Milwaukee residence on October 3, 2009. (Petitioner's Exhibit E) If he was living with ██████, one would think she would have wanted the summons served upon the Petitioner at the Greendale address.

April 1, 2010 to October 1, 2012

The agency contends that the Petitioner and ██████ lived together at an address in Germantown from April 1, 2010 through October 1, 2012. The agency relies on a lease signed by the Petitioner. However, there is also documentation that the Petitioner has owned a home in Milwaukee with his wife since 2005 (again, ██████ was Petitioner's mistress, and is not his wife). (See Petitioner's Exhibits A and B)

The Petitioner does not dispute the fact that he signed the lease with ██████ for the apartment in Germantown (Respondent's Exhibit U), but asserts that he only did so, to make sure that his kids had a nice place to live and because he was concerned that ██████ would not be able to obtain the leases without him. The Petitioner's testimony regarding where he was actually living was a bit confusing to say the least, but he indicated that he would sometimes stay with his wife in Milwaukee, in the home they have owned since 2005, but due to his extramarital activities with ██████, there was some estrangement; he would stay with ██████ for short periods, until they had a falling out, and then he would stay with his brother, or

with his friends [REDACTED] (who is [REDACTED]'s ex-husband). [REDACTED] offered testimony corroborating Petitioner's claim.

The landlord for the Germantown apartment testified that he did not check on the property very often and could not say whether the Petitioner was really living there. The agency has provided no other evidence to establish where the Petitioner was living between June 2010 through October 1, 2012.

I note that Washington County Child Support Enforcement had the Petitioner's address as the Milwaukee address as of April 19, 2011 and that in February 2012, [REDACTED] petitioned the circuit court to forgive a small child support arrearage and in that petition, the Milwaukee address is listed as Petitioner's address. These would seem to indicate that the Petitioner was not living with [REDACTED] between April 2010 and October 2012. (See Petitioner's Exhibit F)

October 2012 to May 2013

For the Period of October 1, 2012 through November 30, 2012, the agency again produced a lease signed by the Petitioner and [REDACTED] for the apartment in Waterford. The Petitioner again testified that he signed the lease, because he did not think [REDACTED] would be able to get the apartment without his assistance.

The landlord for the Waterford apartment testified that he would not have rented the apartment to [REDACTED] alone, because he conducted a credit check and her credit was very poor. The landlord also testified that he did not go to his property in Waterford often, and could not say whether the Petitioner was really living there. The landlord testified that the Petitioner called him to see if he could break the lease, but could not recall when that was.

The agency provided police reports and testimony from the reporting officers regarding contacts they had with the Petitioner at the Waterford address. However, those encounters all took place between 2013 and 2015.

I do note that the police report in Respondent's Exhibit F, dated May 2013, indicates that [REDACTED] told police that the Petitioner and she had been living together on and off for three years, but it is unclear from the record what that means. [REDACTED] was not subpoenaed to the hearing to testify, and her statement can be interpreted to support the Petitioner's contention that he moved around between residences.

The agency has provided no other evidence to show that the Respondent was consistently living at the Waterford apartment with [REDACTED] between October 2012 and May 2013.

I note that the parties stipulated to the fact that the Petitioner was paying child support to [REDACTED] during the time in question, which begs the question of why he would do that, if he was living with [REDACTED].

In the absence of other corroborating evidence, such as testimony from neighbors, documentation from the KIDS database, voter registration information, driver's license information, department of transportation vehicle registration information, tax return / department of revenue information, Petitioner's facebook posts, etc, to further corroborate the claim that the Petitioner was living with [REDACTED], it is found that the agency has not met its burden to prove the Respondent was living with [REDACTED] between June 1, 2010 and November 30, 2012.

May 2013 to February 8, 2014

On May 24, 2013, Officer John Schanning responded to a call at the Waterford address. (Respondent's Exhibit F) Officer Schanning appeared at the hearing and identified his report. Officer Schanning testified that he could not recall anything beyond what is in the report and could not recall how he identified the Petitioner, but that he believes the Petitioner provided his name and address.

Officer Schanning provided credible testimony that the Petitioner identified the Waterford address as his home. As such, there is sufficient evidence that at least, as of May 2013, the Petitioner was living with [REDACTED] at the Waterford address, but it is unclear from the record for how long.

At least as of June 2, 2013, Washington County Child Support Enforcement, again, had Petitioner as being at the Milwaukee address. (Petitioner's Exhibit D)

There is a January 27, 2014 police report indicating that police went to the Waterford address, but Petitioner was not present at the time. (See Respondent's Exhibit G) It appears the Petitioner's Waterford address might have been transferred into this report from a prior report, so it is unclear whether the Petitioner was living in Waterford at this time.

The remaining police reports offered by Racine County are for incidents after the overpayment period and are not of much value in proving the Petitioner was living with [REDACTED] during the overpayment period ending February 28, 2014.

Officer [REDACTED] testified that he went to the Waterford residence on April 28, 2014. [REDACTED] testified that the Petitioner was present and that the Petitioner verbally identified himself. [REDACTED] testified that he then confirmed the address with [REDACTED]. [REDACTED] testified that [REDACTED] told him that the Petitioner and she had gone on a trip to Central Wisconsin and while they were away, their bicycles were stolen. [REDACTED] testified that he only saw the entryway of the residence and the garage, but did not see any children present.

The Petitioner further testified that he did, in fact, go on a trip with [REDACTED], to central Wisconsin and that his bicycle was stolen from the garage. The Petitioner claimed that the only way he could take his kids to his cabin in Central Wisconsin was if [REDACTED] came along, so he was at the Waterford apartment to drop them off.

[REDACTED]'s testimony contradicts the Petitioner's claim that he was there to drop off the children and [REDACTED], since [REDACTED] testified that he did not observe any children present. The fact that the Petitioner was present without his children and the fact that he had a personal possession there, does lead one to question whether he was living in Waterford, but [REDACTED] testified that he really couldn't tell if the Petitioner was actually living there in April 2014.

Officer Michael Spiegel appeared at the hearing and testified that he responded to the Waterford address on August 10, 2014, to check on the welfare of the child [REDACTED] had from a previous relationship. [REDACTED] testified that when he arrived, the Petitioner was there, but [REDACTED] and [REDACTED]'s child were not present. [REDACTED] testified that the Petitioner identified himself and provided the Waterford address as his address. [REDACTED] testified that he ran the Petitioner's name through dispatch to check for outstanding warrants, of which there were none.

The Petitioner did not dispute the fact that he was present when [REDACTED] arrived on scene.

[REDACTED] gave credible testimony that the Petitioner verbally identified himself to the officer and provided the Waterford address as his residence. As such, it is found that the Petitioner was living in Waterford as of August 10, 2014, after the overpayment period.

Racine County submitted a June 19, 2015 report from [REDACTED] who testified that he likely identified the Petitioner with his driver's license and that the address on the license would have been the Milwaukee address. [REDACTED] testified that the Petitioner had come to the police station because [REDACTED] was

violating the terms of a custody and visitation agreement. [REDACTED] testified and documented in his police report that the Petitioner indicated that he had lived in Waterford with [REDACTED] for "some time", but that the relationship had since ended and he moved out. [REDACTED] testified that he did not ask the Petitioner to elaborate on what he meant, or when he lived with [REDACTED], or when he moved out.

So, in summary, we have the Petitioner living with [REDACTED] as of May 23, 2013 (after the overpayment period) and as of August 10, 2014 (after the overpayment period), but no clear evidence of how long they lived together before or after those dates.

In the absence of other corroborating evidence to fill in the blanks, such as testimony from neighbors, voter registration information, driver's license information, department of transportation vehicle registration information, tax return / department of revenue information, any mail or bills sent to the Petitioner at the Waterford apartment, bank statements sent/listing the Waterford address, Petitioner's Facebook posts, etc, to further corroborate the claim that the Petitioner was living with [REDACTED], it is found that the agency has not met its burden to prove the Respondent was living with [REDACTED] between May 2013 and February 2014. Indeed, Petitioner testified that he is registered to vote in Milwaukee; Washington County child support enforcement had the Petitioner listed as living in Milwaukee, and the Work Number printout shows the Petitioner was living in Milwaukee, and the Petitioner was paying child support to [REDACTED] during this time. Further, Petitioner's claim that he moved around is somewhat corroborated by the inconsistent address information in the record.

CONCLUSIONS OF LAW

The county agency has not met its burden to prove that it correctly determined the Petitioner was overpaid BadgerCare+ benefits in the amount of \$1,528.83, for the period of March 1, 2010 to February 28, 2011; \$2,967.19, for the period of March 1, 2011 to February 28, 2012; \$1,923.36 for the period of March 1, 2012 to November 30, 2012, and \$1,887.54 for the period of August 1, 2013 to February 28, 2014.

THEREFORE, it is

ORDERED

That within ten days of this decision, the agency remove the Petitioner as a liable party from overpayment claims [REDACTED], [REDACTED], [REDACTED], and [REDACTED].

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 Milwaukee,
Wisconsin, this 19th day of October, 2016

\s _____
Mayumi M. Ishii
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 October 19, 2016.

Racine County Department of Human Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability

[REDACTED]
[REDACTED]