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[REDACTED]

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

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In the Matter of

[REDACTED]

DECISION

WWW/143182

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**PRELIMINARY RECITALS**

Pursuant to a petition filed August 14, 2012, under Wis. Stat. §49.152(1), to review a decision by the Wisconsin Works (W-2) in regard to a W2 fact finding hearing held on August 9, 2012, at Milwaukee, Wisconsin. The fact finding file was received by the Division on September 4, 2012. The fact finding recording was received by the Division on October 1, 2012.

The issues for determination are 1) whether petitioner had good cause for missing her fact finding review appointment of July 24, 2012 and 2) whether the W-2 agency correctly determined that the petitioner's W-2 payment be reduced for August 2012.

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]

Respondent:

Wisconsin Department of Workforce Development  
PO Box 7946  
Madison, WI 53707-7946

By: Alfonzo Lewis

Maximus -Central  
4030 North 29th Street  
Milwaukee, WI 53216

FACT FINDER: Thomas Prete

ADMINISTRATIVE LAW JUDGE:

Kelly Cochran  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County.
2. On April 17, 2012, petitioner was placed in a Community Service Job (CSJ).
3. On May 1, 2012 petitioner met with her W-2 worker, Mr. Lewis, at Maximus. At that time petitioner reported that she, her husband, and her two children were living with relatives, but were looking for permanent housing. Petitioner also requested child care benefits to complete her W-2 activities. Mr. Lewis advised petitioner to apply for child care benefits with Milwaukee County. Petitioner also reported at that time that her infant child had died earlier that year due to co-sleeping and that child welfare was therefore involved with her family.
4. On May 1, 2012 an Employability Plan (EP) was developed for petitioner. The weekly activities required under the EP included work experience orientation, 9 hours of employment search, 1 hour of employment counseling, and 4 hours for GED. Petitioner was assigned to St. Vincent De Paul for 20 hours weekly to begin on May 14, 2012.
5. On May 1, 2012 petitioner signed off on the "Call In Policy and Expectations" for Maximus W -2 participants.
6. On May 4, 2012 petitioner completed the work experience orientation.
7. On May 24, 2012 petitioner requested her W-2 payment be transferred electronically to her bank account.
8. On June 1, 2012 petitioner called the W-2 agency requesting information on the status of her W-2 payment.
9. On June 12, 2012 a child welfare agency, Integrated Family Services (IFS), faxed a letter to Mr. Lewis explaining that petitioner had been involved with Intensive In-Home Services since February 2012 and that she was also working with Safety Services to find housing. The letter also stated that petitioner had missed two weeks of W-2 activities prior, due to looking for housing/being homeless.
10. On June 15, 2012 petitioner came into the W-2 agency to discuss her W-2 payment reductions. At that time she reported that she did not have stable housing and was unable to attend assigned W-2 activities.
11. On June 19, 2012 the W-2 agency issued a notice to petitioner stating that it found that she had not participated in her assigned W-2 activities for the period of 5-16-12 through 6-15-12. She was required to provide good cause for missing those activities by 6-28-12. The effect of having nonparticipation hours for that time period would impact petitioner's July W -2 payment.
12. On July 10, 2012 the W-2 agency issued a notice to petitioner stating that it found that she had not participated in her assigned W-2 activities for the period of 6-16-12 through 7-15-12. She was required to provide good cause for missing those activities by 7-27-12. The effect of having nonparticipation hours for that time period would impact petitioner's August W -2 payment.
13. On July 16, 2012 petitioner requested a Fact Finding Review for the July W-2 sanction/reduction in payment.
14. On July 16, 2012 the W-2 agency issued a Fact Finding Review Appointment Notice to petitioner. The letter was sent certified mail and stated that the appointment was set for July 24, 2012 at 10:30 a.m. The agency's Case Comments state that petitioner was also hand -delivered this appointment notice.
15. On July 24, 2012 petitioner failed to show for her Fact Finding Review regarding her July W-2 payment reductions. The case was dismissed as abandoned.

16. On July 27, 2012 petitioner met with her W-2 worker regarding the missed Fact Finding Review. Petitioner claimed to have not received the notice identified in Finding #13. The W-2 worker determined that she did not have good cause for missing the Fact Finding Review because the notice had been issued properly to her correct address of record and that the U.S. Postal Service tracking for certified mail showed the notice properly delivered to her on July 18, 2012 at 3:17 p.m.
17. On July 31, 2012 petitioner filed a Request for a W-2 Fact Finding Review regarding her payment reductions for July and August.
18. On August 1, 2012 the W-2 agency issued a Fact Finding Review Appointment Notice to petitioner. The letter was sent certified mail and stated that the appointment was set for August 9, 2012 at 9:45 a.m.
19. On August 9, 2012 the petitioner attended her Fact Finding Review.
20. On August 16, 2012 the Fact Finder issued his decision. Only the August W-2 payment reduction was addressed as the July payment reduction issue had been abandoned at the July 24 Fact Finding and petitioner had not been given good cause for missing it. As to the August payment, the Fact Finder upheld the agency's decision to reduce that payment.
21. On August 17, 2012 the petitioner requested a departmental review of the fact finding decisions from July 24 and August 9, 2012.

## DISCUSSION

W-2 is Wisconsin's public assistance work program, and is outlined at Wis. Stat. §§49.141 -.161. It supplanted the prior federal-state cash payment program, Aid to Families with Dependent Children (AFDC), described at Wis. Stat. §49.19.

### **I. Status of fact finding record.**

The first task of a departmental reviewer, such as this hearing examiner, is to determine whether the fact finding record is sufficient for review. If it is not sufficient, the examiner may remand the matter back to the fact finder, conduct a new hearing (either in person or telephonically), or otherwise augment the record. See Wis. Stat. §49.152(2)(d). In the instant case, the paper record is adequate for the examiner to make sense of the case, and a supplementary hearing was not necessary. The findings of fact above are based on the fact finder's decision, the recording of the hearing, and the fact finder's file.

### **II. Standard of review.**

A threshold analytical question is whether the departmental reviewer is reviewing this matter *de novo* or with some unspecified judicial standard of review. This entire due process function is subject to Wisconsin's administrative procedure act, Chapter 227, Wis. Stats., because this type of case satisfies all four prongs of the contested case hearing right test at Wis. Stat. §227.42(1). The Department has also made a public declaration that the entire review process at Wis. Stat. §49.152 is subject to Ch. 227's requirements in the document, Public Hearing Comment & Agency Response, Rule Number : DWD 12, p. 14. Based on the foregoing, the Division of Hearings and Appeals has concluded that the W-2 process function is subject to Ch. 227 requirements.

Having concluded that Ch. 227 applies to the W-2 process function, the Division also concluded that the departmental reviewer must engage in a *de novo* look at the fact finder's decision. In Reinke v. Personnel Board, 53 Wis. 2d 123, 191 N.W.2d 833 (1971), the Wisconsin Supreme Court instructed state agency adjudicators to make *de novo* determinations, relying on the greater weight of the credible evidence, in administrative hearings. The Court specifically rejected the use of a judicial review ( *e.g.*, "substantial

evidence” test) standard by the state agency, “unless expressly otherwise provided by statute.” *Id.*, pp. 134-136. There is no judicial review standard articulated in either the W-2 statute or promulgated rule. The only standard articulation undertaken by the Department is that the examiner’s action is “a limited review of the record and the decision of the fact finder.” See *W-2 Manual*, §12.3.1, available at <http://dcf.wisconsin.gov/w2/manual/default.htm>. This is not an articulated judicial review standard, and it is not legally binding on the examiner here.

### **III. Whether petitioner had good cause for missing her July 24 Fact Finding Review.**

When a petitioner abandons a Fact Finding review request, the W-2 agency must deny the petition or refuse to grant relief. Abandonment occurs if the petitioner fails to appear in person or by a representative at a scheduled review without good cause. Wis. Stat., §49.152(2)(a)2; Wis. Adm. Code, §DWD 101.22(2)(a)2; *W-2 Manual*, §12.2.6, available online at <http://dcf.wisconsin.gov/w2/manual/default.htm>. “Good Cause” includes circumstances beyond the control of the petitioner. Wis. Adm. Code, §DWD 101.20(1)(o).

For the July 24 Fact Finding Review, petitioner did not appear at the appointed time, and the W-2 agency issued a decision dismissing her Fact Finding Review Request as abandoned. I conclude that the W-2 agency fact finder correctly dismissed the petitioner’s appeal as abandoned and that the W-2 agency correctly determined that petitioner did not establish any good cause for missing the fact finding. The preponderance of the evidence supports a finding that the notice was properly mailed, but that petitioner did not pick up her mail. The W-2 agency’s responsibility in this instance provides that:

The agency must notify the petitioner of the scheduled Fact Finding Review appointment within 3 working days after the date the request for Review is received by the agency. The agency must use the Fact Finding Review Appointment Notice form (10782) to notify the individual of the time, place and date of the scheduled Fact Finding Review. The agency must give the petitioner reasonable notice of the scheduled Fact Finding Review and must hold the Review within 8 working days of receiving the request.

See *W-2 Manual*, §12.2.5.1. On July 16, 2012 the W-2 agency issued a Fact Finding Review Appointment Notice to petitioner. The letter was sent certified mail and stated that the appointment was set for July 24, 2012 at 10:30 a.m. The U.S. Postal Service tracking for this certified mail showed the notice properly delivered to her on July 18, 2012 at 3:17 p.m. The agency’s Case Comments state that petitioner was also hand-delivered this appointment notice. The evidence before me does not establish good cause or a circumstance beyond a person's control. The agency has met its burden.

### **IV. Whether the W-2 agency correctly determined that the petitioner’s W-2 payment be reduced for August 2012.**

Community Service Job (CSJ) participants must participate in all assigned work training activities or education and training activities outlined in the EP. Payments for CSJ participants who fail to participate in assigned activities are reduced by \$5.00 per hour for hours missed without good cause. See *W-2 Manual*, §11.1.1.1. Accordingly, on July 10, 2012 the W-2 agency issued a notice to petitioner stating that it found that she had not participated in her assigned W-2 activities for the period of 6-16-12 through 7-15-12. She was required to provide good cause for missing those activities by 7-27-12. The effect of having nonparticipation hours for that time period would reduce petitioner’s August W -2 payment. It is unclear how the notice was generated prior to the end of the period the agency alleged she was not participating, but regardless, it was undisputed that the agency changed her assigned activity under her EP effective 7-6-12 to only include applying for child care and finding a provider, therefore no payment would be issued for that timeframe and thereafter in any event.

The *W-2 Manual* provides the following good cause reasons for failing to comply with the W-2 assigned activities:

1. Any required court appearance including a required court appearance for a victim of domestic abuse.
2. Inability to obtain child care that is necessary for the W-2 participant to participate or accept employment, but is unavailable and the W-2 agency was unable to provide or refer for alternate child care arrangements.
3. Lack of transportation with no reasonable alternative, as determined by the FEP. In determining the reasonableness of transportation alternatives, FEPs should consider factors such as the length of commute, participant safety and cost of transportation in relationship to income.
4. Participant or W-2 Group member's illness, injury or disability or incapacity. It is expected that a participant will need to remain home occasionally to care for an ill child who has to miss school or daycare or a participant will need to miss an assigned activity due to an unexpected illness or a documented chronic illness, e.g., chronic asthma, panic attacks, disabled child, child with behavioral problems, etc.
5. Accommodations identified in a formal assessment but the accommodations are not available to complete the assigned activity.
6. Conflict with another assigned W-2 activity or job search attempts.
7. Inclement weather that impedes transportation or travel.
8. School emergency.
9. Domestic violence issues as defined in Wisconsin Administrative Rule DCF 101.15(3).
10. Death in immediate family. (See 11.2.2.2)
11. Observance of a religious holiday.
12. Routine medical or school appointments, which cannot be scheduled at times other than during assigned activities.
13. Child's school holiday with the exception of summer break.
14. Any day that the worksite or training site is closed due to a site-specific holiday, e.g., days closed surrounding Christmas, closure the day after Thanksgiving, etc.
15. Other circumstances beyond the control of the participant, but only as determined by the FEP.

*W-2 Manual* §11.2.2.

Petitioner's first argument for missing these activities was that she did not have stable housing. On June 15, 2012 petitioner came into the W-2 agency to discuss her W-2 payment reductions. At that time she reported that she did not have stable housing and was unable to attend assigned W-2 activities. Petitioner's argument was that she moved into her new residence on June 5, but when she came in on June 15 she reported the instability in her housing because she was in the process of being "put out" by the landlord because she had not paid all of her rent. Even if I believed that a landlord was evicting someone 10 days after they moved in, it does not explain why she could not complete her activities that next day and following weeks, which could have provided her with payment for completed activities. The collateral evidence also shows inconsistencies. Petitioner testified that she worked at her CSJ for about 3 weeks. If it was to begin May 14, 2012, then she would have worked the entire last three weeks of May. However, the letter from IFS dated June 12, 2012 states she missed her CSJ the previous two weeks due to housing issues, which would have potentially excused only the last week of May and the

first week of June. However, she moved into her house as of June 5, so it is unclear why housing was an issue for that first week of June. It also unclear why she waited until the middle of June to report this housing issue to her FEP. She argued that she could not contact her FEP to report missed activities because she did not have access to a phone; yet, she was able to contact the agency by phone regarding the transfer of the W-2 funds into her bank account on June 1, 2012.

Petitioner also argued that she missed the W-2 activities for the period of 6-16-12 through 7-15-12 because she did not have child care. Petitioner had been instructed to apply for child care on May 1, 2012 but did not do so. She stated that she did not need the child care in May because she was living with her husband at that time who could watch the kids. It wasn't until June when she moved into the new apartment without him that she began to need child care. She never reported this issue to her FEP until July 6, 2012, at which time the FEP changed her assigned activity under her EP to only include applying for child care and finding a provider. The agency denied good cause for this issue as she had been referred to apply with Milwaukee County for child care on May 1. The *W-2 Manual* states the following:

An inability to obtain child care must be based on the following reasons:

1. Formal child care is not available within a reasonable distance from the parent's home or work site. Formal child care is considered available if there is at least one licensed or certified child care facility with space available for the child. The certified or licensed child care facility, including a W-2 agency with certified or licensed on-site child care, must not be considered available if there is documentation that the facility would be harmful to the health or safety of the child. Reasonable distance means no more than 60 minutes travel time one-way, using available transportation, from the parent's home to the child care provider's location to the parent's work site. Travel time may be extended up to 90 minutes one-way if there is a good placement opportunity for the participant AND the participant is willing to enter into this arrangement.

and,

2. Informal child care by a relative or under other arrangements is unavailable or unsuitable. Informal child care is defined as an arrangement in which the child care provider is neither licensed nor certified. (See Child Care Policy Manual, Chapter 1) Informal child care arrangements may be used by any W-2 participant; however, a participant cannot be required to use informal child care.

If the participant fails to demonstrate an inability to obtain child care, he or she may face payment reductions for non-participation.

An inability to obtain appropriate child care may be indicative of a shortage of child care providers in the community (including sick child care, evening and weekend care, culturally competent child care, and care for disabled children) and W-2 agency management should be alerted to the problem. Each W-2 Community Steering Committee is responsible for working with participants, employers, child care providers and the community to identify child care needs, improve access to child care and expand availability of child care.

*W-2 Manual*, §11.2.2.1.2 (emphasis added). Here the agency determined that petitioner failed to demonstrate an inability to obtain child care under this policy and denied good cause. I agree.

Petitioner also claimed that because she was involved with safety services, she could not participate in her assigned activities from 6-16-12 through 7-15-12. The evidence shows that she had a meeting once per

week with a social worker for parenting services at least in part to secure stable housing before her case with them would close. Presumably if her issues with housing were so substantial, and IFS wrote in that June 12, 2012 letter that she missed her CSJ the previous two weeks due to housing issues, she could have gotten IFS to explain any ongoing issues that would prevent her from completing her activities *after* June 12. On July 10, 2012 the W-2 agency issued a notice to petitioner stating that it found that she had not participated in her assigned W-2 activities for the period of 6-16-12 through 7-15-12. She was required to provide good cause for missing those activities by 7-27-12. She provided nothing to show why safety services had somehow interfered with her assigned activities.

I also add that petitioner stated that when it “got warm” during the summer, she got sick, and also could not complete her assigned activities. Even if this is true, and there is no collateral evidence to support her claim, on May 1, 2012 petitioner signed off on the “Call In Policy and Expectations” for Maximus W-2 participants. If she were sick, she agreed per that policy to call her FEP before she was to start her CSJ and to bring in a medical excuse. She did neither.

The W-2 agency’s reduction of payment for August 2012 must be affirmed under these facts.

**CONCLUSIONS OF LAW**

1. The W-2 agency correctly concluded that petitioner abandoned her July 24, 2012 fact finding without good cause.
2. The W-2 agency correctly determined that the petitioner’s W -2 payment be reduced for August 2012.

**THEREFORE, it is**

**ORDERED**

That the petition for review herein is dismissed.

**REQUEST FOR A REHEARING**

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found 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 appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Children and Families. After filing the appeal with the appropriate court, it must be served on the Secretary of that

Department, either personally or by certified mail. The address of the Department is: 201 East Washington Avenue, Second Floor, Madison, Wisconsin 53703-2866. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,  
Wisconsin, this 4th day of October, 2012

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Kelly Cochrane  
Administrative Law Judge  
Division of Hearings and Appeals

c: Wisconsin Works (W-2) – email



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The preceding decision was sent to the following parties on October 4, 2012.

Wisconsin Works (W-2)