



FH

[REDACTED]

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

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In the Matter of

[REDACTED]  
[REDACTED]  
[REDACTED]

DECISION

CCO/142643

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**PRELIMINARY RECITALS**

Pursuant to a petition filed July 25, 2012, under Wis. Admin. Code § HA 3.03, to review a decision by the Brown County Human Services in regard to Child Care, a hearing was held on October 10, 2012, at Madison, Wisconsin. At the request of petitioner, a hearing set for August 28, 2012 was rescheduled. Attorney Hooker sent an October 26, 2012 letter to DHA confirming that Attorney Flanigan had stipulated to the accuracy of the “dollar amounts” for the Medical Assistance, FoodShare, and Child Cared Overpayments to be respectively \$29,342.49 (MA), \$16,287 (FS), and **\$51,693.92 (CC)**. At the request of the parties, the record was held open for the Department’s initial brief, the Petitioner’s Responsive brief and the Department’s Reply brief to be submitted to DHA and the other party. Both parties timely submitted both of their briefs to DHA which are received into the hearing record. At the end of the hearing, both parties stipulated that all Department and Petitioner Exhibits are received into the hearing record without any objection.

The issue for determination is whether the county agency was correctly seeking recovery of Child Care (CC) overpayments to the petitioner during the total period of April 1, 2006 through April 30, 2012 in the total amount of \$51,693.92, due to petitioner’s failure to timely report to the county agency her accurate household composition ([REDACTED] [REDACTED]) and Mr. [REDACTED]’s earned income which should have been included in her CC eligibility and benefit determinations.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]  
[REDACTED]  
[REDACTED]

Petitioner's Representative:

Attorney Elizabeth Kremer Flanigan  
Hanaway Ross Law Firm  
345 South Jefferson Street  
Green Bay, WI 54301-4522

Respondent:

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

By: Attorney Elizabeth Kremer Flanigan  
Brown County Human Services  
Economic Support-2nd Floor  
111 N. Jefferson St.  
Green Bay, WI 54301

ADMINISTRATIVE LAW JUDGE:  
 Gary M. Wolkstein  
 Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner (CARES # [REDACTED]) is a resident of Brown County who resides with her two children.
2. The petitioner has two children in common with her boyfriend, [REDACTED] R. [REDACTED].
3. Prior to April, 2006, petitioner applied for Child Care, FoodShare, and Medical Assistance benefits as a single parent with her two children.
4. The petitioner received Child Care (CC) benefits for her two children for the entire period of April, 2006 through April, 2012.
5. During the initial application process and during every biannual review between April, 2006 and March, 2012, petitioner maintained both orally and in writing that she lived alone with her two minor children and claimed that their father, [REDACTED] [REDACTED], resided with his mother, [REDACTED] [REDACTED]. See Exhibits 4.
6. During the overpayment period, [REDACTED] [REDACTED] paid no monthly rent to his mother and has no lease or any other contract with his mother as a rental agreement. Testimony of [REDACTED] [REDACTED].
7. During his hearing testimony, [REDACTED] [REDACTED] admitted that he drives without a license and admits that he know that such driving is illegal. He also admitted that he lied to Sargent Jossart both verbally and in his Statement. See Exhibit 2A.
8. The petitioner met [REDACTED] in 2002, she confirmed that from September, 2003 to September, 2004 she lived with Mr. [REDACTED] in Green Bay during which time their first child was born.
9. Petitioner alleged that due to “incompatibility” with [REDACTED] [REDACTED], he moved back in with his mother ([REDACTED] [REDACTED]) at [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]. Despite the alleged incompatibility, petitioner and Mr. [REDACTED] had a second child together during 2005.
10. During 2008, Mr. [REDACTED] signed as co-applicant petitioner’s application for a rental lease at [REDACTED] [REDACTED]. The landlord was [REDACTED] [REDACTED].
11. During an April 22, 2012 interview, Mr. [REDACTED] told officer Jossart that petitioner lived with her boyfriend ([REDACTED] [REDACTED]) at [REDACTED] [REDACTED].
12. In his April 19, 2012 signed Statement to Brown County Sheriff’s Department Sargent Jossart, [REDACTED] [REDACTED] stated the following in pertinent part: “. . . I drive a green Dodge Caravan which is registered to my fiancé [REDACTED] [REDACTED]. I work at [REDACTED] [REDACTED] out in Oneida and have been there 6 1/2 years. [REDACTED] and I have been together almost 9 years. **We’ve lived together the whole time we’ve been together and we have a daughter whose 8 years old and a son whose 4. . . .**” (Emphasis added) See Exhibit 1, page 9.
13. During about April, 2009, petitioner moved to [REDACTED] [REDACTED]. Mr. [REDACTED] again signed as co-applicant petitioner’s application for a rental lease at that location. Her new landlord was Mr. [REDACTED] [REDACTED].
14. Mr. [REDACTED] [REDACTED] told Sargent Monica Jossart that “Ms. [REDACTED] requested to be the only one listed on the lease even though her boyfriend would be staying with her too.” See Incident Report, p5.
15. Mr. [REDACTED] lived with the petitioner during the period she resided at [REDACTED] [REDACTED].

16. In October, 2010, petitioner purchased her own home at [REDACTED] with a \$3,000 loan from her father. Mr. [REDACTED] performed yard work, spent time with their children, and did odd jobs around the house.
17. Mr. [REDACTED]'s Dodge minivan vehicle was registered at the petitioner's address.
18. In his April 19, 2012 statement to Officer Jossart, he confided that he alleged that he earlier lied to the officer due to his criminal past and his fear of being wrongfully accused of theft.
19. Due to a 2012 county fraud hotline tip, the county agency began investigating that the father of petitioner's two children ([REDACTED] [REDACTED]) had been residing with petitioner for the past six years, and that his income had not been timely reported to the county agency.
20. On July 12, 2012, the county agency sent a written Notification of Child Care (CC) Overissuance to petitioner informing that she was overissued \$5,023 in CC benefits from April 1, 2006 to March 31, 2007, due to petitioner's failure to report accurate household members (her boyfriend, [REDACTED] [REDACTED]) in the home) and Mr. [REDACTED]'s earned income resulting in household income above the CC income eligibility limits.
21. On July 12, 2012, the county agency sent a written Notification of Child Care (CC) Overissuance to petitioner informing that she was overissued \$2,131 in CC benefits from April 1, 2007 to September 30, 2007, due to petitioner's failure to report accurate household members (her boyfriend, [REDACTED] [REDACTED]) in the home) and Mr. [REDACTED]'s earned income resulting in household income above the CC income eligibility limits.
22. On July 12, 2012, the county agency sent a written Notification of Child Care (CC) Overissuance to petitioner informing that she was overissued \$14,460.98 in CC benefits from December 1, 2007 to November 30, 2008, due to petitioner's failure to report accurate household members (her boyfriend, [REDACTED] [REDACTED]) in the home) and Mr. [REDACTED]'s earned income resulting in household income above the CC income eligibility limits.
23. On July 12, 2012, the county agency sent a written Notification of Child Care (CC) Overissuance to petitioner informing that she was overissued \$12,689.42 in CC benefits from December 1, 2008 to November 30, 2009, due to petitioner's failure to report accurate household members (her boyfriend, [REDACTED] [REDACTED]) in the home) and Mr. [REDACTED]'s earned income resulting in household income above the CC income eligibility limits.
24. On July 12, 2012, the county agency sent a written Notification of Child Care (CC) Overissuance to petitioner informing that she was overissued \$9,798.84 in CC benefits from December 1, 2009 to November 30, 2010, due to petitioner's failure to report accurate household members (her boyfriend, [REDACTED] [REDACTED]) in the home) and Mr. [REDACTED]'s earned income resulting in household income above the CC income eligibility limits.
25. On July 12, 2012, the county agency sent a written Notification of Child Care (CC) Overissuance to petitioner informing that she was overissued \$548 in CC benefits from December 1, 2010 to December 31, 2010, due to petitioner's failure to report accurate household members (her boyfriend, [REDACTED] [REDACTED]) in the home) and Mr. [REDACTED]'s earned income resulting in household income above the CC income eligibility limits.
26. On July 12, 2012, the county agency sent a written Notification of Child Care (CC) Overissuance to petitioner informing that she was overissued \$6,567.53 in CC benefits from April 1, 2011 to January 31, 2012, due to petitioner's failure to report accurate household members (her boyfriend, [REDACTED] [REDACTED]) in the home) and Mr. [REDACTED]'s earned income resulting in household income above the CC income eligibility limits.
27. On July 12, 2012, the county agency sent a written Notification of Child Care (CC) Overissuance to petitioner informing that she was overissued \$475.15 in CC benefits from March 1, 2012 to April 30, 2012, due to petitioner's failure to report accurate household members (her boyfriend,

██████████) in the home) and Mr. ██████████'s earned income resulting in household income above the CC income eligibility limits.

28. ██████████ has been employed by ██████████, Inc. since March 1, 2006. He has worked 40 hours per week and his current pay rate is \$16 per hour.
29. State wage records confirmed ██████████'s earned income for ██████████, Inc. during the entire CC overpayment period of April 1, 2006 through April 30, 2012.
30. ██████████'s earned income was not included in determining petitioner's CC eligibility and benefits for the entire CC overpayment period of April 1, 2006 through April 30, 2012 creating petitioner's CC overpayment.
31. The CC gross income limit for a household of three was the following: a) \$2,767 from April 2006 through September, 2006; b) \$2,862 from March, 2007 through September, 2007. The CC gross income limit for a household of four was the following: a) \$3,442 from December, 2007 through February, 2008; b) \$3,533 from March, 2008 through February, 2009; c) \$3,675 from March, 2009 through December, 2010; d) \$3,725 from April, 2011 through January, 2012; and e) \$3,842 from March, 2012 through April, 2012. See Exhibit 3.
32. The petitioner's monthly household income (total household income including ██████████'s earned income) was above the CC gross income eligibility limits for the entire CC overpayment period.
33. The county agency discontinued the petitioner's CC case effective June 1, 2012.

## DISCUSSION

### I. JURISDICTION.

All child care funding distribution falls under the aegis of the Wisconsin Works (W-2) program, regardless of whether or not the applicant is actually a participant in W-2 activities. Wis. Stat § 49.155(1m). Prior to January 1, 2004, any parent desiring to contest child care assistance overpayments was required to request a fact-finding review from the issuing W-2 agency. Effective November 24, 2003, the Department of Workforce Development changed the process to provide recipients of such assistance a fair hearing from the Division of Hearings & Appeals. See, *DWD Operations Memo*, #03-66. See also, Wis Stat §49.195(3), § 49.152(2), & § 227.42, *et. seq.*; *Child Day Care Manual*, §2.5.0.

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. Adm. 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. Adm. Code, §DCF 101.23(1)(g).

II. THE PETITIONER WAS INELIGIBLE FOR CHILD CARE PAYMENTS DURING ALL THE PERIOD OF APRIL 1, 2006 THROUGH APRIL, 2012, DUE TO INCOME ABOVE THE CHILD CARE INCOME ELIGIBILITY LIMITS.

The Child Care Benefits program requires the use of the prospective budgeting test, which usually treats income by a multiplier to reflect estimated income for an average month that is 4.3 weeks long. *Wisconsin Shares Child Care Assistance Manual*, § 1.6.6. However, when income fluctuates, an average is to be used to arrive at monthly income. *Wisconsin Shares Child Care Assistance Manual*, § 1.6.7. The average to be used is not limited to one month under this policy. *Ibid.* The income limit for an ongoing case is **200% of the federal poverty level (“FPL”)**. The income limit for a new request case is 185% of the federal poverty level. Financial eligibility ends when a household exceeds this limit for two consecutive months. *Ibid.*, § 1.6.3. The gross income limit for petitioner’s household three or four is set forth in Finding of Fact # 31 above for the entire period of April, 2006 through April, 2012. *Wisconsin Shares Child Care Assistance Manual*, § 1.6.3. The petitioner’s household income was above the income limit for the entire overpayment period.

During the hearing and in its Exhibits, the county agency presented a well-documented case that it was correctly seeking from the petitioner a child care overpayment for the period of April, 2006 through April, 2012.

III. THE AUTHORITY TO ADMINISTRATIVELY RECOVER CHILDCARE OVERPAYMENTS

It makes no difference as to whether the overpayment was caused by the county agency or the client since the recovery of the overpayment is required, regardless of fault. Wis. Stat., §49.195(3), provides that the agency must determine if an overpayment has occurred under §49.155, and the agency must seek recovery of the overpayment. There is no exception for situations where the agency’s error caused the overpayment. As with welfare programs such as Food Stamps and the former Aid to Families with Dependent Children, an overpayment must generally be recovered even if it was caused by agency error.

This is also reflected in the applicable overpayment rule, Wisconsin Administrative Code §12.23(1)(g), (3)(a), which states in pertinent part:

**DWD 12.23 Recovery of overpayments. (1) DEFINITIONS.** In this section:

...

(g) “Overpayment” or “debt” means any benefit or payment received under s.49.148, 49.155, 49.157, or 49.19, Stats., in an amount greater than the amount that the individual, AFDC assistance group, or W-2 group was eligible to receive under applicable statutes and rules, regardless of the reason for the overpayment. An overpayment may be result of client error, administrative error, or intentional program violation.

...

(2) OVERPAYMENT DETERMINATION AND NOTICE. (a) A county ... shall determine whether an overpayment has been made under s.49.148, 49.155, 49.157, or 49.19, Stats., and if so, the amount of the overpayment. ...

(3) LIABILITY. (a) Liability shall extend to any parent, non-marital coparent, or stepparent whose family receives benefits under s.49.148, 49.155, 49.157 or 49.19, Stats., during the period that he or she is an adult member of the same household, but his or her liability is limited to such period. ...

**DCF 101.23 Recovery of overpayments. (1) DEFINITIONS.** In this section:

...  
 (g) "Overpayment" or "debt" means any benefit or payment received under s.49.148, 49.155, 49.157, or 49.19, Stats., in an amount greater than the amount that the individual, AFDC assistance group, or W-2 group was eligible to receive under applicable statutes and rules, regardless of the reason for the overpayment. An overpayment may be result of client error, administrative error, or intentional program violation.

The Child Care Manual states there are 3 types of overpayments:

### **2.3.1 Client Overpayments**

Agencies administering child care shall take all steps necessary to recoup or recover, from the parent, funds paid to the child care provider when the parent was not eligible for the level of benefits paid.

There are 3 types of overpayments:

1. **Client/Provider Error. The client or provider report incorrect information or fail to report information. Intentional Program Violation is not established.**
2. **Administrative Error.** Overpayment results from agency or system error. The agency commits an error or the system calculates an authorization or payment amount for more than the client was entitled. Can only recover 12 months prior to discovery of the overpayment. The original Overpayment Notice date is the date of discovery.
3. **Intentional Program Violation.** The client or provider willfully reports information or fail to report information in order to receive more benefits, and as a result is found guilty of IPV by the court, ...

(Emphasis added).

In this case, the county agency proved by the preponderance of the evidence that the basis for the overpayment was client error. The county agency correctly determined that [REDACTED] [REDACTED] was part of the petitioner's child care unit, and that his income had not been used to determine her CC eligibility which, in turn, gave rise to the CC overpayments during the period of April 1, 2006 through April, 30, 2012. The county representative indicated that petitioner and Mr. [REDACTED] were incorrectly awarded total CC benefits of \$51,693.92 because the total accurate income of petitioner and Mr. [REDACTED] would have placed the household over the gross income limit for all of the CC overpayment period.

During the October 10, 2012 hearing, the county agency clearly established with its three credible witnesses and its extensive exhibits that the petitioner received FoodShare, Medical Assistance, and Child Care overpayments. The county's third and last witness was Sargent Monica Jossart. Ms. Jossart is an experienced investigator whose testimony at the hearing was very convincing. She testified in significant detail about her investigation and interviews, and demonstrated a very good memory for even small details of her investigation. See Exhibit 1, 8 page, detailed investigation report. Sargent Jossart testified in detail regarding the many documents and statements which established that [REDACTED] [REDACTED] had been residing with the petitioner during the entire CC overpayment period of April 1, 2006 through April 30, 2012. See Exhibits 1 and 2.

In his statement to Sargent Jossart, ██████ admitted that he did reside with the petitioner during the entire overpayment period of April 1, 2006 through May 31, 2012. See Finding of Fact #12 and Exhibit 2A. He also admitted that he had read his statement and that he signed it. However, during the hearing,

██████ attempted with almost complete lack of credibility to “explain” why he had signed the Exhibit 2A Statement. In fact, ██████ admitted that he knew that lying to a police officer was a crime, but nevertheless contended that his signed statement (Ex 2A) was a lie because he was only attempting to establish an alibi for himself regarding a possible criminal charge.

During the hearing, the petitioner testified with many explanations and allegations for why she contended ██████ did not live with her during the overpayment periods in question. Her testimony was not credible, and she was unable to provide any reliable evidence to refute the county’s case. During the testimony of Mr. ██████ and his mother, they both at first alleged that ██████ had made some \$200 payments as rent payments. However, such testimony appeared entirely unconvincing as both admitted they had no receipts or documents whatsoever to confirm any rent payment by ██████ to his mother. Moreover, ██████’s mother admitted her bias under cross examination that she would do or say what was necessary to protect ██████ or the petitioner.

During the hearing and in her brief, Attorney Flanigan made a zealous effort to undermine the county’s case, and to attempt to establish some basis for why the county agency was incorrectly seeking recovery of the overpayments. In her brief, Ms. Flanigan inaccurately asserted that the county agency has a “clear and convincing” burden of proof to establish its overpayments against the petitioner. However, she failed to provide any legal authority for such incorrect assertion. Attorney Hooker correctly responded that the accurate standard of proof in overpayment cases is preponderance of the evidence. Hagerstein V. Wisconsin Department of Health and Family Services, 292 Wis. 2d 697,709, 715 N.W.2d 645, 651 (Ct. App. 2006). It appears that Ms. Flanigan mistakenly confused the standard of proof for these overpayment case with the higher standard of proof required in intentional program violation (IPV) cases.

In order for the county agency to establish that a CC recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit an intentional program violation.

"Clear and convincing evidence" is an intermediate standard of proof which is more than the "preponderance of the evidence" used in most civil cases and less than the "beyond a reasonable doubt" standard used in criminal cases. It is used in civil cases where a higher standard is required because the outcome could result in serious social consequences for, or harsh effects on an individual. See 32A C.J.S., Evidence §1023. While the terminology for this intermediate standard of proof varies from state to state, it is clear that it is what is required by the FS regulations. See Jackson v. State, 546 So.2d 745 (Fla. App. 2 Dist. 1989). However, the instant case is not an IPV case but an overpayment case. Therefore, the correct burden of proof is preponderance of the evidence.

Despite her attorney’s efforts, the petitioner’s case and witnesses failed to undermine the county’s overpayment cases. During the October 10, 2012 hearing, petitioner was unable to present any reliable evidence to refute or undermine in any significant way the county’s witnesses and substantial, reliable testimony or evidence that ██████ resided with the petitioner and their children during the entire CC overpayment period. Therefore, Mr. ██████’s earned income must be budgeted as income in determining petitioner’s FS eligibility and benefits. The petitioner’s corrected household’s total income was above the CC gross income limit for a household of three or four for the entire CC overpayment period thereby creating the FS overpayment during the entire period of April 1, 2006 through April, 2012, pursuant to the Wisconsin Shares Child Care Assistance Manual, § 1.6.3.

The petitioner did not contest that her household had received CC benefits during the period of April 1, 2006 through April, 2012. Furthermore, the petitioner was unable to offer any reliable evidence to refute the accuracy of the county agency's CC overpayment determinations. Nevertheless, petitioner contended that it was unfair that the county agency was seeking to recover the CC overpayment. However, controlling federal regulation requires establishment of a claim against a household for a CC overpayment regardless of whose error caused the overpayment to occur. Accordingly, for the above reasons, I must conclude that petitioner was overissued child care benefits during the period of April 1, 2006 through April 30, 2012 in the total amount of \$51,693.92, due to petitioner's failure to timely report to the county agency her accurate household composition (██████████) and Mr. ██████████'s earned income which should have been included in her CC eligibility and benefit determinations resulting in household income above the CC income eligibility limits.

### **CONCLUSIONS OF LAW**

The county agency was correctly seeking recovery of Child Care (CC) overpayments to the petitioner during the total period of April 1, 2006 through April 30, 2012 in the total amount of \$51,693.92, due to petitioner's failure to timely report to the county agency her accurate household composition (██████████) and Mr. ██████████'s earned income which should have been included in her CC eligibility and benefit determinations resulting in household income above the CC income eligibility limits.

**THEREFORE, it is**

**ORDERED**

The petition for review herein be and the same is hereby 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 served and 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, Madison, Wisconsin 53703. 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 Madison,  
Wisconsin, this 18th day of April, 2013

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\sGary M. Wolkstein  
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 April 18, 2013.

Brown County Human Services  
Public Assistance Collection Unit  
Child Care Fraud  
[elizabeth@hanaway.com](mailto:elizabeth@hanaway.com)