



FH
[REDACTED]

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

In the Matter of

[REDACTED]

DECISION

MOP/145210

PRELIMINARY RECITALS

Pursuant to a petition filed November 10, 2012, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Brown County Human Services in regard to Medical Assistance, a hearing was held on December 18, 2012, at Green Bay, Wisconsin.

The issue for determination is whether the Department erred in its determination of a medical assistance overpayment in the amount of \$3,291.61 for the period from 11/1/10 to 10/31/12.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street
Madison, Wisconsin 53703

By: Diane Van Asten

Brown County Human Services
Economic Support-2nd Floor
111 N. Jefferson St.
Green Bay, WI 54301

ADMINISTRATIVE LAW JUDGE:

[REDACTED] P. Tedesco
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Brown County.
2. Petitioner was a recipient of medical assistance for her child between 11/1/10 and 10/31/12.

3. Petitioner lives in Green Bay. Petitioner's son lives with his father, [REDACTED] [REDACTED] most of the time in Sturgeon Bay and attends school in Sturgeon Bay.
4. On 10/17/12 petitioner signed a document stating that she does not have her child in her custody more than 25% of the time throughout the year. Petitioner signed this document at the urging of [REDACTED] [REDACTED] had misrepresented to her the purpose of the document by stating that he would need it to get some assistance of his own.
5. On the same day petitioner's ex-husband got petitioner to sign the document, he contacted the fraud hotline and reported her.
6. The Department determined, based on the fraud tip and the signed letter, that MA benefits paid over the period in question were overpaid and issued a notice to petitioner on 11/5/12 informing her of the overpayment.
7. Petitioner filed a timely appeal.

DISCUSSION

MA overpayment recovery is authorized by Wis. Stat., §49.497(1):

(a) The department may recover any payment made incorrectly for benefits provided under this subchapter or s. 49.665 if the incorrect payment results from any of the following:

1. A misstatement or omission of fact by a person supplying information in an application for benefits under this subchapter or s. 49.665.
2. The failure of a Medical Assistance or Badger Care recipient or any other person responsible for giving information on the recipient's behalf to report the receipt of income or assets in an amount that would have affected the recipient's eligibility for benefits.
3. The failure of a Medical Assistance or Badger Care recipient or any other person responsible for giving information on the recipient's behalf to report any change in the recipient's financial or nonfinancial situation or eligibility characteristics that would have affected the recipient's eligibility for benefits or the recipient's cost-sharing requirements.

See also the department's BC+ Handbook, Appendix 28.2. The overpayment must be caused by the client's error. Overpayments caused by agency error are not recoverable.

To be eligible for BadgerCare, a person must be under age 19, a custodial parent living with a child, or the spouse of a custodial parent. Wis. Adm. Code, §DHS 103.03(1)(f)1. The BC Plus Handbook, Appendix 2.2.1.2, provides as follows:

When the natural or adoptive parents of a child do not live together, and have joint placement arrangements for the child (through a mutually agreed upon arrangement or court order), only one parent can be determined eligible at a time unless there is reasonably equivalent placement. Reasonably equivalent placement means that the child is residing with each parent at least 40% of the time during a month.

If the child is not residing with both parents at least 40% of the time, only the parent with the greater percentage of the placement time may apply on behalf of the child and/or for him or herself as the caretaker relative of that child.

The county determined in October 2012 that petitioner did not live with her child 40% of the time. Petitioner conceded that this is the only issue in dispute and that if she did not live with her son 40% of the time then the overpayment is correctly calculated.

Thus, I must determine whether the Department has met its burden at the hearing to prove by a preponderance of the evidence that petitioner does not have her son with her 40% or more of the time.

The Department offered the letter from petitioner as evidence (see exhibit #1). It also offered letters from two schools that indicated the child lived with his father on 9/10/10 and on October 29, 2012. It is notable and curious that the father was not offered as a witness.

The signed letter is an odd thing. First of all, it does not state what time period its claims apply to. It is just the previous year? The previous six months? Petitioner states that her ex-husband came to her and explained that he wished to apply for benefits for himself and needed a statement from her. But, the ex-husband did not use the document to apply for benefits at that time. The best information in the record came from Ms. Van Asten who stated that ██████ called the fraud hotline and spoke with her. I must question why ██████ did not simply go through the normal process of applying for benefits if that was his objective. The only conclusion based on the record here is that ██████ acquired the letter through misrepresentation and intended to use it against petitioner for some personal reason. After all, he called the fraud hotline the same day.

Petitioner states that she did not actually count days but made a mere generalization regarding the time. She now states that the letter is not accurate. At hearing, she brought and submitted (see exhibit #2) a detailed list of all the days she picked up her son from school and brought him to her home for the night, all the vacation days, all the weekends when he was with her, all the summer breaks. She asserted that this adds up to more than 40% of the time. The Department did not offer a rebuttal of this assertion. ██████ was a critical witness. Did the Department think that the signed letter was enough to meet its burden? The letter was acquired under false pretenses by a person who had clearly premeditated intent to turn his child's mother in for a fraud investigation. What weight can I put in that document? None is the answer. Actual testimony in which I could have judged credibility and motive of ██████ would have been possibly persuasive. But, I cannot deem credible or accurate any statements such a man provided to the fraud hotline.

Of course, it occurred to me that petitioner's role in the drafting and signing of the letter in order to facilitate ██████'s application for benefits may have been a manipulation of the public benefits system. But, it is worth noting that Petitioner was present in person and provided some reasonable rebuttal to the minimal proof the Department offered. Her testimony was detailed and thorough. Her explanations were reasonable in stating that the child attends ██████ and lives with his father due to better quality schools, and that she would request days off from her employer in advance and was the parent responsible for picking up the child on any abbreviated school days or vacation days or other days when school was not in session. Her testimony was smooth and consistent and not halting. Her manner was appropriate and respectful, but firm in her position. She was credible. She also admitted that ██████ is not trustworthy and does not get along with her.

As for the letters from the schools, I understand them to list the address at which the child resided. Petitioner conceded that the child resided with the father most of the time. The letters do not offer any proof that petitioner had the child less than 40% of the time.

In an overpayment case, the Department has the burden. In this case, the minimal proof offered was insufficient. [REDACTED]'s testimony was critical to its effort to prove its case in light of the fact that petitioner provided reasonable explanation for the statements in the letter and that the Department had no way to rebut petitioner's claims that she had her son 40% of the time.

CONCLUSIONS OF LAW

The Department failed to establish that petitioner lived with her child less than 40% of the time from 11/1/10 to 10/31/12.

THEREFORE, it is ORDERED

This matter is remanded to the Department and its county agent with instructions to reverse the determination of overpayment and cease all collection of this sum from petitioner. This action must be completed within 10 days of this Decision.

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 Health Services. 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: 1 West Wilson Street, 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 25th day of January, 2013

\sJohn P. Tedesco
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin \DIVISION OF HEARINGS AND APPEALS

David H. Schwarz
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on January 25, 2013.

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