



FH
[REDACTED]

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

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

PROPOSED DECISION
ON REHEARING

CCO/145434

PRELIMINARY RECITALS

Pursuant to a petition filed November 20, 2012, under Wis. Admin. Code, §HA 3.03, to review a decision by the Kenosha County Human Service Dept. to recover a child care overpayment, a hearing was held on February 5, 2013, by telephone. On February 27, 2013 a decision was issued by the administrative law judge upholding the overpayment. On March 16, 2013 the petitioner requested a rehearing, which was granted on March 19, 2013. A telephonic rehearing was held accordingly on April 22, 2013, at Kenosha, Wisconsin.

The issue for determination is whether the county agency correctly determined that the petitioner was overpaid \$5506.10 in Child Care (CC) benefits during the April 1, 2013-October 31, 2012, period.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

Attorney Patricia DeLessio
230 West Wells Street, Room 800
Milwaukee, WI 53203

Respondent:

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

By: Attorney Nancy Wettersten
Kenosha County Human Service Department
8600 Sheridan Road
Kenosha, WI 53143

ADMINISTRATIVE LAW JUDGE:

Kelly Cochrane
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Kenosha County.
2. The petitioner took her children to daycare from at least April 1, 2012 through October 31, 2012. The CC program paid \$5,506.10 in benefits to the daycare provider for this child's daycare services during this period.
3. In March 2012 petitioner timely reported and verified that she had gotten married on March 14, 2012.
4. On April 4, 2012 petitioner verified that both she and her husband were employed. For her husband an Employer Verification of Earnings form (EVFE) was submitted. That EVFE was completed by the employer, [REDACTED], and did not list a FEIN for this employer.
5. CC was authorized for petitioner effective April 1, 2012-June 9, 2012.
6. On June 14, 2012 CC was again authorized for petitioner from June 10-September 1, 2012.
7. In September 2012 during petitioner's six month review, the agency noticed that petitioner's husband's employer did not list a FEIN on his EVFE. The employer did not have a FEIN, and the CC case was closed.
8. Petitioner's husband was being paid cash by this employer, no wages were being reported to the state by the employer, and the employer was not paying into worker's compensation.
9. The county determined that petitioner was ineligible for child care for the period April 1, 2012 through October 31, 2012 because her husband was not in a qualifying activity. By a notice dated November 9, 2012, the agency informed petitioner that she was overpaid \$5,506.10 in child care during the period due to agency error, claim no. [REDACTED].

DISCUSSION**I. A RECIPIENT MUST REPAY A CC OVERPAYMENT, WITHOUT REGARD TO WHO (CLIENT/AGENCY) WAS AT FAULT IN CREATING THE OVERPAYMENT.**

The applicable overpayment rule requires recovery of the overpayment, regardless of whether it was the fault of the client or the agency. Wis. Admin. Code §DCF 201.04(5)(a); see also Wis. Stat. §49.195(3). Thus, even if the overpayment was caused by agency error, the agency may still establish an overpayment claim against the petitioner. There was no dispute that the county agency ever advised petitioner that her husband's employment/"approved activity" status was in jeopardy because the employer was not a "qualified employer" until after the two authorizations were made. In fact, she testified that the caseworker had initially told her not to worry about getting the FEIN for her husband's employer. The agency agreed that it was its own error in ever authorizing the CC without the FEIN for the husband. However, whether the agency warned of this problem (or not) is irrelevant to the overpayment liability determination, because fault is not an issue.

II. QUALIFIED EMPLOYER.

In this case, the petitioner does not contest that she took her children to day care during the identified period, and she does not quarrel with the agency's arithmetic in the overpayment calculation. Petitioner's argument is that the agency is acting contrary to state law, administrative code and policy.

The child care subsidy program's authorizing statute contains financial and nonfinancial eligibility criteria. If applicant parents do not meet the eligibility criteria, then CC cannot, or should not, be granted. The agency asserts that the lack of qualified employment/approved activity made petitioner ineligible for

the CC benefits. The pertinent portion of the statute setting out nonfinancial eligibility criteria reads as follows:

(1m) ELIGIBILITY. A Wisconsin works agency shall determine eligibility for a child care subsidy under this section. Under this section, an individual may receive a subsidy for child care for a child who has not attained the age of 13 ...if the individual meets all of the following conditions:

(a) The individual is a parent of a child who is under the age of 13 ...and *child care services for that child are needed in order for the individual to do any of the following:*

1. Meet the school attendance requirement under s. 49.26 (1) (ge).
- 1m. Obtain a high school diploma or participate in a course of study meeting the standards established by the state superintendent of public instruction for the granting of a declaration of equivalency of high school graduation, if the individual is not subject to the school attendance requirement under s. 49.26 (1) (ge) and at least one of the following conditions is met:
 - a. The individual is 18 or 19 years of age.
 - b. The individual has not yet attained the age of 18 years and the individual resides with his or her custodial parent or with a kinship care relative under s. 48.57 (3m) or with a long-term kinship care relative under s. 48.57 (3n) or is in a foster home licensed under s. 48.62, a subsidized guardianship home under s. 48.623, a group home, or an independent living arrangement supervised by an adult.
2. **Work in an unsubsidized job**, including training provided by an employer during the regular hours of employment.
3. Work in a Wisconsin works employment position, including participation in job search, orientation and training activities under s. 49.147 (2) (a) and in education or training activities under s. 49.147 (3) (am), (4) (am) or (5) (bm).
- 3m. Participate in a job search or work experience component of the food stamp employment and training program under s. 49.79 (9).
4. If the Wisconsin works agency determines that basic education would facilitate the individual's efforts to maintain employment, participate in basic education, including an English as a 2nd language course; literacy tutoring; or a course of study meeting the standards established by the state superintendent of public instruction under s. 115.29 (4) for the granting of a declaration of equivalency of high school graduation. An individual may receive aid under this subdivision for up to 2 years.
5. Participate in a course of study at a technical college, or participate in educational courses that provide an employment skill, as determined by the department, if the Wisconsin works agency determines that the course or courses would facilitate the individual's efforts to maintain employment. An individual may receive aid under this subdivision for up to 2 years.

Wis. Stat. §49.155(1m)(a)(**emphasis added**). See in accord, Wis. Admin. Code §DCF 201.04(2g)(d).

Neither section 49.141(1), section 49.155, nor Wisconsin Administrative Code Chapter 201 defines either “unsubsidized job” or “employer.” Another code chapter with some limited provisions regarding CC contains the following definition of “unsubsidized employment:”

DCF 101.03 Definitions. Unless otherwise provided, in this chapter:

...

(35) "Unsubsidized employment" means employment for which the Wisconsin works agency provides no wage subsidy to the employer including self-employment and entrepreneurial activities.

Wis. Admin. Code §DCF 101.03(35); see in accord Wis. Stat. §49.197(1). There was no dispute that petitioner's husband was working in an "unsubsidized job." However, notably absent from this definition is any requirement that the employer have a FEIN. I note at this point that a FEIN is defined by the IRS as follows:

EIN or Employer Identification Number is used by the IRS to identify you as a tax paying business entity, and many people think of an EIN as their business social security number. Like a social security number, an EIN is a unique nine-digit number assigned by the Internal Revenue Service to business entities (and in some cases individuals) operating in the United States for the purposes of identification.

See <https://irs-ein-number.com/>.

There was also no dispute that the agency was relying on its policy document when it determined that petitioner's husband's unsubsidized employment did not constitute an approved activity for CC purposes. See *Child Care Policy Manual (Manual)* available online at <http://dcf.wisconsin.gov/childcare/wishares/manual.htm>. This is the heart of the issue here. The *Manual* states that only two types of unsubsidized employment can create nonfinancial eligibility: (1) self-employment or (2) "working for a qualified employer who has a Federal Employer Identification Number (FEIN)." *Manual*, §1.5.3. There was no dispute that the husband was not self-employed and no dispute that the employer did not have a FEIN. The *Manual* then goes on to further define "qualified employers" and the requirement of the FEIN. See *Manual* at §1.5.3.1.

Although I believe that the *Manual's* treatment of employment by a qualified employer is a reasonable fleshing out of the statutory and code requirements, its application to this specific case is not reasonable. The evidence available in the instant case warrants an exception to the policy. The petitioner has been consistent in her verifications to the agency and did not attempt to hide her husband's employment or his payment for same made in cash. In fact, she testified that the caseworker had initially told her not to worry about getting the FEIN for her husband's employer. She further testified that if she had known that she would not qualify for the CC under this "qualified employer" definition, that she would not have taken her children to the day care. Yet, she was authorized twice for the benefit by the agency, admittedly at its own error. She cannot compel the employer to get an FEIN or to comply with the policy's requirements under the *Manual* at §1.5.3.1. It seems unfair to demand that she *repay* CC that she used while she and her husband were working, when the failure to comply with a technical policy requirements rests with the employer. Thus, I will instruct the agency to cease its collection efforts on this claim. Further, because I find that the agency's policy is limited by the statutory section of Wis. Stat. §49.155(1m)(a) cited above, this decision is being issued as a Proposed Decision pursuant to Wis. Admin. Code §HA 3.09(9)(b)1.

CONCLUSIONS OF LAW

1. The petitioner's husband was working in unsubsidized employment during the alleged overpayment period.
2. The Department shall cease collection efforts on claim # [REDACTED].

THEREFORE, it is

ORDERED

That the petition is remanded to the agency with instructions to cease collection efforts on CC claim # [REDACTED]. These actions are to be completed within 10 days of the date of the Secretary's Final Decision, if adopted therein.

NOTICE TO RECIPIENTS OF THIS DECISION:

This is a Proposed Decision of the Division of Hearings and Appeals. IT IS NOT A FINAL DECISION AND SHOULD NOT BE IMPLEMENTED AS SUCH. If you wish to comment or object to this Proposed Decision, you may do so in writing. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your comments and objections to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy to the other parties named in the original decision as 'PARTIES IN INTEREST.'

All comments and objections must be received no later than 15 days after the date of this decision. Following completion of the 15-day comment period, the entire hearing record together with the Proposed Decision and the parties' objections and argument will be referred to the Secretary of the for final decision-making.

The process relating to Proposed Decision is described in Wis. Stat. § 227.46(2).

Given under my hand at the City of Milwaukee,
Wisconsin, this 6th day of June, 2013

\sKelly Cochrane
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 June 6, 2013.

Kenosha County Human Service Department
Public Assistance Collection Unit
Child Care Fraud
pdl@legalaction.org
nancy.wettersten@wisconsin.gov