FH
[redacted]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

DECISION

CCO/147255

PRELIMINARY RECITALS

Pursuant to a petition filed February 12, 2013, under Wis. Admin. Code § HA 3.03, to review a decision by the Milwaukee Early Care Administration - MECA in regard to Child Care, a hearing was held on April 17, 2013, at Milwaukee, Wisconsin.

The issue for determination is whether the agency properly seeks to recoup $757.11 from the Petitioner for the period of May 6 – 31, 2012.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[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 Joseph McCleer
Milwaukee Early Care Administration - MECA
Department of Children And Families
1220 W. Vliet St. 2nd Floor, 200 East
Milwaukee, WI 53205

ADMINISTRATIVE LAW JUDGE:
Debra Bursinger
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [redacted]) is a resident of Milwaukee County.

2. During time periods relevant herein, the Petitioner was eligible for and receiving FoodShare (FS) benefits and BadgerCare (BC) benefits through the Department of Health Services (DHS) and child care benefits through the Department of Children and Families (DCF).

3. MM is the father of one of Petitioner's children.

4. MM received UC benefits of $194 on April 30, 2012, $37 on May 7, 2012 and $122 on May 17, 2012. He had no other income during the month of May, 2012. He was not employed during May, 2012. See Exhibit R-5.

5. On April 25, 2012, the Petitioner contacted the consortium and spoke with a DHS agency worker to ask how her benefits would be affected if MM is added to her case. She informed the agency that MM did not live with her currently but she anticipated that he might soon be homeless. The agency explained FS policy to the Petitioner. See Exhibit R-2.

6. On May 1, 2012, the Petitioner contacted the consortium and spoke with a DHS agency worker. She requested to add MM to her case. She submitted a change report. She reported MM is unemployed and that he receives unemployment compensation benefits of $276/week with a child support intercept of $82. See Exhibits R-2 and R-7.

7. On May 2, 2012, DCF issued a Notice of Eligibility Child Care to the Petitioner informing her that she was eligible for child care benefits effective May 1, 2012. The notice indicated that the Petitioner's approved activity is employment and MM's approved activities are employment skills training and work. It further notes MM's unearned income from unemployment compensation benefits is $1,186.80/month. With Petitioner's earned income of $2,610.96/month, the agency calculated household income of $3,797.78/month for May, 2012 which is under the gross income limit of $5,162. See Exhibit P-1.

8. On May 2, 2012, DHS issued a Notice of Decision to the Petitioner informing her that her FS benefits would decrease from $358/month to $89/month due to an increase in the household income. See Exhibit P-1.

9. On May 7, 2012, DCF issued a Child Care Authorization Information notice informing the Petitioner that effective April 1, 2012, the Petitioner had attendance-based authorizations for child care for 15 hours/week for three school-aged children and for 35 hours/week for one non-school-aged child. See Exhibits R-8.

10. On May 9, 2012, the Petitioner contacted the consortium and spoke with a DHS agency worker. She informed the agency that MM's unemployment benefits had been discontinued. See Exhibit R-2.

11. On May 29, 2012, DCF issued a Child Care Authorization Information notice informing the Petitioner that effective April 1, 2012, the Petitioner had attendance-based authorizations for child care for 15 hours/week for three school-aged children and for 35 hours/week for one non-school-aged child. See Exhibit P-1.

12. On May 31, 2012, a referral was submitted to DCF requesting full time authorizations for the summer for the three school-aged children. The agency processed the referral but was unable to complete the authorizations due to MM not being in an approved activity. The agency ended the Petitioner's authorizations effective June 2, 2012. See Exhibit R-2.

13. On June 4, 2012, DCF completed an overpayment referral. See Exhibit R-3.

14. On June 6, 2012, DCF issued a Notice of Eligibility Child Care informing the Petitioner that her child care eligibility would end on June 30, 2012. See Exhibit R-8.

15. On June 7, 2012, Petitioner called the consortium to remove MM from her case. She submitted a change report indicating that he left the home on June 6, 2012. See Exhibits R-2 and R-7.

16. On February 7, 2013, the agency issued a Child Care Overpayment Notice and worksheet to the Petitioner informing her of the agency's intent to recoup $757.11 for an overissuance of child care benefits for the period of May 6 – 31, 2012. See Exhibit R-1.

17. On February 12, 2013, the Petitioner filed an appeal with the Division of Hearings and Appeals.

DISCUSSION

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. Stats., § 49.155(1m).

In a Fair Hearing concerning the propriety of an overpayment determination, the agency has the burden of proof to establish that the action taken by it is proper given the facts of the case. If the agency meets its burden, the Petitioner must then rebut the agency's case and establish facts sufficient to overcome the agency's evidence of correct action.

The child care subsidy program's authorizing statute contains financial and nonfinancial eligibility criteria. If parents do not meet the eligibility criteria, then they are not eligible for child care (CC) benefits. Wis. Stats., §49.155(1m). In this case, the agency asserts that while MM was living in the Petitioner's household, he was not engaged in an approved activity, resulting in the Petitioner being ineligible for child care 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)[Learnfare, for minor parents].
>
> 1m. Obtain a high school diploma …
>
> 2. Work in an unsubsidized job …
>
> 3. Work in a Wisconsin works employment position …
>
> 3m. Participate in a job search or work experience component of the food stamp … program.
>
> 4. If the Wisconsin works agency determines that basic education would facilitate the individual's efforts to maintain employment, participate in basic education … An individual may receive aid under this subdivision for up to 2 years.
>
> 5. Participate in a course of study at a technical college... An individual may receive aid under this subdivision for up to 2 years.

Wis. Stat. §49.155(1m)(a). See also Wisconsin Shares Child Care Manual (Manual) at §1.4.8.

The Manual provides that: "In two parent families both parents in the AG (assistance group) including step parents and non-marital co-parents must be participating in approved activities. . ." Child Day Care Manual, §1.4.8.2.

The Manual defines child care family or family group as including any nonmarital coparent or any spouse of the individual who resides in the same household as the individual and any dependent children with respect to whom the spouse or nonmarital coparent is a custodial parent. Manual, §1.2.0.

In this case, there is no dispute between the parties that MM was not employed while he was living with the Petitioner. There is evidence that MM was engaged in job search and work training activities as part of receiving unemployment compensation benefits until those benefits ended. It is not clear from the evidence when exactly his benefits were discontinued. The Petitioner contacted the agency on May 9 to report that his UC benefits ended but the agency was unable to verify discontinuance of benefits at that time. The UC payment information submitted by the agency at the hearing indicates MM's last UC check was on May 17, 2012. Based on the evidence, I conclude that MM was engaged in an approved activity through May 17, 2012. According to the Wisconsin Shares Child Care Assistance Manual, if a change in an authorization will result in a decreased child care benefit, the current authorization must be ended effective on the upcoming Saturday. Shares Manual, §3.8.5. May 17, 2012 was a Thursday so the authorization should have ended on May 19, 2012. Therefore, I conclude the overpayment period should be May 20, 2012 – May 31, 2012.

The Petitioner asserts an equitable estoppel argument, contending that she relied to her detriment on information she received from a DHS agency worker that her child care benefits would not be affected by MM's inclusion in her household.

Case law in Wisconsin has recognized that the powers of administrative agencies are limited to those expressly granted by the legislature or necessarily implied by the statutes. DOR v. Hogan, 198 Wis. 2d 792, 816, 543 N.W.2d 825 (1995), provides in pertinent part:

> Few principles are as well established as the proposition that administrative agencies, as entities created by the legislature as part of the executive branch of government, have only such powers as are expressly granted to them by the legislature, or as may be necessarily implied from the applicable statutes...In determining the nature and scope of an agency's powers, its enabling statutes are to be 'strictly construed to preclude the exercise of a power not expressly granted,' and '[a]ny reasonable doubt as to the existence of an implied power should be resolved against [the agency].

The legislature has not expressly conferred equitable powers upon administrative agencies. Chapter 227, Wis. Stats., authorizes state agencies such as the Division of Hearings and Appeals to hold contested case hearings. It also empowers such agencies to make findings of fact and conclusions of law, and to decide cases based on the relevant facts and law. There is nothing in Chapter 227, Wis. Stats. that expressly authorizes agencies such as this one, to apply equitable principles such as the equitable estoppel claim raised in this case. Administrative agencies are required to accord "fair hearings" in the sense that they must accord due process with an even handed application of the law to the facts in similar cases. Neither the statutes nor case law clearly accord administrative agencies equitable powers. I conclude that I do not have the authority to exercise equitable powers.

The Petitioner argues that equitable estoppel may be asserted against administrative agencies under *Kamps vs. Wisconsin DOR*, 663 N.W. 2d 306. That court noted that equitable estoppel may be applied against an administrative agency; it also noted the heavy burden on a petitioner in doing so. However, while a circuit or appellate court may apply equitable estoppel against an administrative agency, there is no such authority given to the Division of Hearings and Appeals and administrative law judges.

CONCLUSIONS OF LAW

Based on the evidence, I conclude that the Petitioner was overissued child care benefits for the period of May 20 – 31, 2012 and the agency has the authority to recoup child care benefits issued to the Petitioner during that time period.

THEREFORE, it is **ORDERED**

That this matter is remanded to the agency to rescind its Child Care Overpayment Notice of February 7, 2013 and revise the overpayment period against the Petitioner to May 20 – 31, 2012. The agency shall issue a new Child Care Overpayment Notice to the Petitioner notifying her of the amount of the overissuance of child care benefits during that period. The agency may not seek to recoup benefits issued from May 6 – 19, 2012. These actions shall be taken within 10 days of the date 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 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 Milwaukee,
Wisconsin, this 11th day of June, 2013

\sDebra Bursinger
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 June 11, 2013.

Milwaukee Early Care Administration - MECA
Public Assistance Collection Unit
Child Care Fraud
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