



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION

CCO/147993

PRELIMINARY RECITALS

Pursuant to a petition filed March 12, 2013, under Wis. Admin. Code § HA 3.03, to review a decision by the Wisconsin Department of Children and Families ["DCF"] in regard to Child Care ["CC"], a Hearing was held via telephone on June 11, 2013. The record of the June 11th Hearing was held open until July 16, 2013 of the submission of post-Hearing briefs. At petitioner's request Hearings scheduled for May 14, 2013 and April 16, 2013 were rescheduled.

The issue for determination is the following 4 Claims may be established against petitioner for alleged overpayments of Wisconsin Works ["W-2"] CC covering the time period August 16, 2009 to March 31, 2012 in the total amount of \$11,877.61 (after the June 11th Hearing DCF adjusted this amount downward to \$10,909.07):

- (I) Claim # [redacted] for the time period August 16, 2009 to March 31, 2010 in the amount of \$6,008.19 (after the June 11th Hearing DCF adjusted this amount downward to \$5,274.51);
(II) Claim # [redacted] for the time period September 5, 2010 to November 30, 2010 in the amount of \$846.32 (after the June 11th Hearing DCF adjusted this amount downward to \$611.46);
(III) Claim # [redacted] for the time period September 4, 2011 to October 30, 2011 in the amount of \$751.87; and,
(IV) Claim # [redacted] for the time period February 12, 2012 to March 31, 2012 in the amount of \$4,271.23.

There appeared at that time via telephone the following persons:

PARTIES IN INTEREST:

Petitioner:



Petitioner's Representative:

Attorney [redacted]
Legal Action of Wisconsin
[redacted]

Respondent:

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

By: Attorney Joseph McCleer  
Department of Children And Families  
State of Wisconsin  
Room G200  
201 East Washington Avenue  
P.O. Box 8916  
Madison, WI 53708-8916

OTHER PERSON PRESENT:

■■■■■ ■■■■■, Child Care Subsidy Specialist, Milwaukee Early Care Administration [“MECA”]

ADMINISTRATIVE LAW JUDGE:

Sean P. Maloney  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner (CARES # ■■■■■) is a resident of Milwaukee County.
2. DCF established the following 4 Claims against petitioner for alleged overpayments of W-2 CC covering the time period August 16, 2009 to March 31, 2012 in the total amount of \$11,877.61 (after the June 11<sup>th</sup> Hearing DCF adjusted this amount downward to \$10,909.07):
  - (I) Claim # ■■■■■ for the time period August 16, 2009 to March 31, 2010 in the amount of \$6,008.19 (after the June 11<sup>th</sup> Hearing DCF adjusted this amount downward to \$5,274.51);
  - (II) Claim # ■■■■■ for the time period September 5, 2010 to November 30, 2010 in the amount of \$846.32 (after the June 11<sup>th</sup> Hearing DCF adjusted this amount downward to \$611.46);
  - (III) Claim # ■■■■■ for the time period September 4, 2011 to October 30, 2011 in the amount of \$751.87; and,
  - (IV) Claim # ■■■■■ for the time period February 12, 2012 to March 31, 2012 in the amount of \$4,271.23.

Exhibit #R-1.

3. The basis for overpayment Claims (I), (II), and (II) is petitioner’s alleged non-participation in some of her assigned W-2 activities. *Department of Children & Families’ Closing Brief*, dated June 25, 2013 [“DCF Brief”], page 3; Exhibit #R-1.
4. The basis for overpayment Claim (IV) is the allegation that the father of petitioner’s children (adult male DBSR) lived with petitioner and was not in an approved activity. DCF Brief, page 3; Exhibit #R-1.

5. For each of the 4 alleged overpayments detailed in *Findings of Fact #2*, above, DCF sent petitioner a written *Child Care (CC) Client Overpayment Notice* dated February 28, 2013; attached to each of those notices was a *Child Care Overpayment Worksheet*; those notices and the associated worksheets identified the amount of each of the alleged overpayments as follows: (I) \$6,008.19; (II) \$846.32; (III) \$751.87; and, (IV) \$4,271.23. Exhibit #R-1.
6. Claims (I), (II), and (II) depend on the number of petitioner's W-2 non-participation hours and were calculated by the same method: subtracting the eligible hours by the hours used or authorized, whichever is less. DCF Brief, pages 3-4 & 7; *Petitioner's Brief in Support of Petition for Review*, dated July 5, 2013 ["Pet. Brief"], page 1; Exhibits #R-5, #R-7 & #R-8.
7. For Claim (IV) no overpayment calculation was necessary; for Claim (IV) the entirety of the child care funds distributed to the child care provider for the benefit of petitioner's children is being collected as an overpayment. DCF Brief, pages 3 & 8.
8. At the time of the June 11, 2013 Hearing several errors were discovered in the calculation of the overpayments for Claims (I) and (II); in at least 8 instances identified at the June 11<sup>th</sup> Hearing an incorrect calculation was made because the *Hours Used* were subtracted from the *Eligible Hours*, rather than the other way around; DCF acknowledges these errors; at the time of the June 11<sup>th</sup> Hearing DCF corrected the errors and amended the alleged overpayment amounts for Claims (I) and (II) to be the following lower amounts: (I) \$5,547.33; and, (II) \$824.56. DCF Brief, pages 3-4 & 7; Pet. Brief, page 1; Exhibit #R-11.
9. Subsequent to the June 11<sup>th</sup> Hearing DCF discovered more overpayment calculation errors and again amended the alleged overpayment amounts for Claims (I) and (II) to yet lower amounts as follows: (I) \$5,274.51; and, (II) \$611.46. DCF Brief, pages 3-4.
10. DCF sent petitioner a corrected written *Child Care (CC) Client Overpayment Notice* dated June 25, 2013 for Claim (I) and for Claim (II); attached to each of those notices was a *Child Care Overpayment Worksheet*; for Claim (I) both the notice and the worksheet state that the overpayment amount is \$5,188.32 (instead of \$5,274.51). Exhibit #R-13 attached to DCF Brief; DCF Brief, page 5.
11. DCF determined petitioner's W-2 non-participation hours by referring to computer print-outs titled *Non-Participation History Listing*; the hours of non-participation on the *Non-Participation History Listing* do not always correspond correctly with the amount of petitioner's W-2 checks as reflected in *AFDC/W-2 Issuance History – Disbursement* computer printouts; this calls into question the correctness of both the *Non-Participation History Listing* and the *AFDC/W-2 Issuance History – Disbursement* print-outs. Pet. Brief, page 8 & Attachment A; DCF Brief, pages 4 & 7; Exhibit #R-7.
12. DCF determined the CC hours used by petitioner by referring to CSAW Utilization Listing pages which show the number of hours paid to the child care provider based on electronic reports made by the child care provider; sign-in and sign-in attendance records<sup>1</sup> detailing the actual arrival and departure time for each child were not consulted. DCF Brief, page 4; Exhibit #5.
13. DCF failed to present evidence of the CC hours used by petitioner for the months of January 2010, February 2010, March 2010, and most of November 2010. Exhibit #5.

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<sup>1</sup> Child Care providers are required to keep such records. See, Wis. Stat. 49.155(6m)(a) (2011-12); Wis. Admin. Code §§ 250.04(6)(b) & 251.04(6)(b)(February 2012); *Wisconsin Shares Child Care Assistance Manual* (5/3/12) ["CC Manual"], 2.2.4.2 & 2.2.4.3.

## DISCUSSION

The County or agency must determine whether an overpayment of W-2 CC has been made and, if so, the amount of the overpayment. Wis. Stat. § 49.195(3) (2011-12); See also, Wis. Admin. Code §§ DCF 101.23(2)(a) (February 2012) & 201.04(5)(a) (July 2013); *Wisconsin Shares Child Care Assistance Manual* (5/3/12) ["CC Manual"], 2.1.5. Even if the overpayment is partly or wholly due to agency error it must still be repaid. Wis. Admin. Code § DCF 101.23(3) (February 2012); and, Wis. Admin. Code § DCF 201.04(5)(a)1. (July 2013); CC Manual 2.1.5.1 & 2.5.1.2. A W-2 CC overpayment is any W-2 CC benefit or payment received in an amount greater than the amount the individual was eligible to receive under applicable statutes and rules, regardless of the reason for the overpayment {a W-2 CC overpayment may be the result of client error, administrative error, or an Intentional Program Violation ["IPV"]}. Wis. Admin. Code § DCF 101.23(1)(g) (February 2012); CC Manual 2.1.5.1. & 2.1.5.2.

As noted, DCF is required to calculate the amount of any alleged overpayment. The evidence the record of this matter, as reflected in the above *Findings of Fact*, is that DCF has failed to correctly calculate the amount of the overpayment with respect to Claims (I), (II), and (III). Therefore, Claims (I), (II), and (III) cannot be sustained and must be reversed. Repeated calculation errors have been discovered, and have been acknowledged by DCF, with respect to Claims (I) and (II). Additionally, the amount of the alleged overpayment for Claim (I) remains uncertain (DCF Brief's \$5,274.51 whereas the notice and the worksheet state that it is \$5,188.32).

Claims (I), (II), and (II) were calculated by the same method and are all, therefore, subject to the same types of errors. Given the many errors already discovered, and in the absence of any specific assurances with regard to the Claim (III) calculation, it cannot be assumed that Claims (I) and (II) have no other errors or that Claim (II) was calculated correctly. This is especially true since the underlying information used to make the calculations for Claims (I), (II), and (II) is suspect (namely, petitioner's W-2 non-participation hours) and since DCF failed to even present evidence of the CC hours used by petitioner for the months of January 2010, February 2010, March 2010, and most of November 2010. Finally, it is noted that sign-in and sign-in attendance records were not consulted when determining the CC hours used by petitioner.

As to Claim (IV): In two-parent families both parents must meet all CC eligibility criteria.<sup>2</sup> Wis. Admin. Code § DCF 101.26(1) (February 2012); CC Manual 1.4.8.2. (October 2009); See also, Wis. Stat. § 49.155(1m)(d) (2011-12). By policy a *Family or Family Group* includes any nonmarital coparent or any spouse who resides in the same household. CC Manual 1.2.0.

A person is eligible for W-2 CC only if the person is participating in an approved activity. *Wisconsin Shares Child Care Assistance Manual* (05/03/12) ["CC Manual"] 1.4.8.; *Wisconsin Works Manual* ["W-2 Manual"] 15.2.0.; See also, Wis. Stat § 49.155(1m)(a) (2011-12); Wis. Admin. Code § DCF 101.26(1) (February 2012); Wis. Admin. Code § DCF 201.04(5)(a)2.b. (April 2012); CC Manual 1.5.0. The basis for overpayment Claim (IV) is the allegation that the father of petitioner's children (adult male DBSR) lived with petitioner and was not in an approved activity. Claim (IV) is for the time period February 12, 2012- to March 31, 2012.

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<sup>2</sup> The only exception to this two-parent family rule is if it is verified that one parent has a disability or health condition that makes that parent unable to participate in required activities and that parent is also unable to provide the child care necessary for the other parent to participate in required activities. Wis. Admin. Code § DCF 101.26(1) (February 2012); Manual 1.4.8.2. The parent's inability to participate in required activities and to provide child care must both be verified by a doctor, psychiatrist, or psychologist. Manual 1.4.8.2.

This matter must be decided by a preponderance of the credible evidence. Wis. Admin. Code § HA 3.09(4) (February 2013).

Evidence in the record of this matter that tends to show that DBSR lived with petitioner during the time period in question is as follows: DBSR's August 14, 2009 *Access* application for public benefits wherein he indicated he lived at petitioner's address; DBSR's October 9, 2009 *Access* application for public benefits wherein he indicated he lived at petitioner's address; a Milwaukee County Circuit Court Case with a filing date of September 7, 2011 that lists DBSR's address as being the same as petitioner's address;<sup>3</sup> a *Result of Investigation* report dated February 14, 2012 from O'Brien & Associates which is mostly hearsay but which concludes that DBSR has lived with petitioner and her children since at least 2009<sup>4</sup>; the fact that petitioner and DBSR have 5 children in common; petitioner's testimony that the gas and electric bill for her house were in DBSR's name; and, petitioner's testimony that DBSR's name, as well as her own name, was on her mailbox. Exhibits #R-4 (pp. 14), #R-6 (pp. 30-32 & 42-44) & #R-9.

Evidence in the record of this matter that tends to show that DBSR did not live with petitioner during the time period in question is as follows: a *Case Comments* note dated April 6, 2012 made by a public benefits worker which states: "Also, rec'd ID from the children's father with his current address on it" [which was DBSR's mother's address, not petitioner's address (petitioner testified DBSR was living at least partly at his mother's home)]; the fact that petitioner appears to have always maintained that DBSR did not live with her during the time period in question; an *Employer Verification of Earnings* form dated February 13, 2013, but with an employment end date of February 4, 2012, listing DBSR's address as his mother's address; petitioner's testimony that the gas and electric bill for her house were in DBSR's name only because she did not have the money to get the gas and electric turned-on (this testimony is corroborated by a *Case Comment* dated October 21, 2009); petitioner's testimony that DBSR did not live with her and that she was unaware that DBSR was using her address to apply for public benefits;<sup>5</sup> and, petitioner's undisputed testimony that DBSR was paying her child support every month pursuant to a court order. Exhibit #R-2 (p. 5), #R-3 (p. 14), #R-4 (p. 9), #R-7 (p. 20). #R-9 (p. 1).

Finally, there is a January 23, 2013 *TransUnion* Credit Report showing the "Current Address" for DBSR, reported as of 5/06, not to be petitioner's address. It also shows a "Previous Address" for DBSR, reported as of 12/09, to be the same as petitioner's address. Exhibit #4 (p. 15). It is also noted that at the June 11<sup>th</sup> Hearing petitioner testified that DBSR's name is on the lease, not hers, because she has a prior eviction on her record -- but the February 14, 2012 investigative report states that petitioner's told the investigator that "[t]he lease is only in her name . . ." Exhibit #R-9 (p. 1).

The burden in this matter is on DCF to show by a preponderance of the credible evidence that DBSR lived with petitioner during the time period February 12, 2012- to March 31, 2012. DCF has failed to meet this burden. The evidence in the record of this matter is, at best, mixed and inconclusive. Therefore, Claim (IV) cannot be sustained and must be reversed.

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<sup>3</sup> It is noted that the dates of the 2 *Access* applications and the Milwaukee County Circuit Court Case are not within the time period of Claim (IV). The 2 *Access* applications are not even close to the same time period as Claim (IV).

<sup>4</sup> Another Administrative Law Judge ["ALJ"] recently considered this same investigative report and concluded that DCF failed to prove by a preponderance of the evidence that petitioner and DBSR lived together during the time period June 2009 to January 2011. He commented that the investigative report is "replete with hearsay statements" and noted that there was no testimony from anyone with personal knowledge of the contents of the report. See, DHA Case No. WTI/148825 (Wis. Div. Hearings & Appeals June 10, 2013).

<sup>5</sup> The weight given to petitioner's testimony is not as much as it would otherwise be since there is at least some evidence that she has engaged in deceptive activity in the past. See, Exhibit #7 (p. 158).

**CONCLUSIONS OF LAW**

For the reasons discussed above, the 4 Claims detailed in *Findings of Fact #2*, above, cannot be established against petitioner for alleged W-2 CC overpayments covering the time period August 16, 2009 to March 31, 2012 in the total amount of \$11,877.61 (later adjusted downward to \$10,909.07).

**THEREFORE, it is**

**ORDERED**

That this matter be REMANDED to the DCF, that the DCF not establish the 4 alleged W-2 CC overpayment Claims against petitioner that are detailed in *Findings of Fact #2*, above, and, with 10 days of the date of this *Decision*, take all administrative steps necessary to reverse those overpayment Claims.

**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 16th day of September, 2013

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\sSean P. Maloney  
Administrative Law Judge  
Division of Hearings and Appeals





**State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

Wayne J. Wiedenhoef, Acting Administrator  
Suite 201  
5005 University Avenue  
Madison, WI 53705-5400

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

The preceding decision was sent to the following parties on September 16, 2013.

Milwaukee Early Care Administration - MECA  
Public Assistance Collection Unit  
Child Care Fraud  
[pdl@legalaction.org](mailto:pdl@legalaction.org)  
[Joseph.McCleer@wisconsin.gov](mailto:Joseph.McCleer@wisconsin.gov)