



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION

CCO/149726

PRELIMINARY RECITALS

Pursuant to a petition filed June 03, 2013, under Wis. Admin. Code § HA 3.03, to review a decision by the Menominee County Department of Human Services in regard to Child Care, a telephonic hearing was held on July 10, 2013, at Keshena, Wisconsin. At the request of the parties, the record was held open until August 19, 2013 for the submission of briefs by the petitioner and the county agency's corporation counsel, Attorney [redacted]. Mr. [redacted] timely submitted his brief to DHA which is received into the hearing record. The petitioner did not submit any brief to DHA.

The issues for determination are: a) whether the county agency was correctly pursuing a child care overpayment against the petitioner for the period of April 22, 2012 to November 9, 2012, due to her partner's (Mr. [redacted]) income not meeting the minimum wage threshold of \$623.50 per month for 20 hours per week to be an "approved activity" for child care eligibility; and b) whether the county agency is incorrectly pursuing a child care overpayment against the petitioner for the period of November 9, 2012 to March 2, 2013, due to petitioner establishing good cause due to petitioner caring for Mr. [redacted] during his serious health conditions.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:



Petitioner's Representative:

None

Respondent:

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

By: Attorney [redacted] J. [redacted], corporation counsel for
Menominee County Department of Human Services
444 Reid Street, Suite 200
P.O. Box 5637
De Pere, WI 54115

ADMINISTRATIVE LAW JUDGE:

Gary M. Wolkstein
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner (CARES # [REDACTED]) is a resident of Menominee County who resides with her partner, [REDACTED] [REDACTED], and three minor children. [REDACTED] [REDACTED] was the father of some of the children in the home.
2. The petitioner was granted Kinship Care for those three children who were placed in her home or for which she was appointed as guardian.
3. The petitioner's children received child care benefits during the period of April 22, 2012 to March 2, 2013.
4. The petitioner was and was employed at the [REDACTED] [REDACTED] [REDACTED] [REDACTED] during the overpayment period in question.
5. Since about 2007, [REDACTED] [REDACTED] has been self-employed as a seasonal landscaper in the spring and fall of each year. In the winter months, he plowed and did snow removal along with logging work.
6. Prior to its administrative dissolution on June 12, 2012, [REDACTED] [REDACTED] was the "partner" in [REDACTED] [REDACTED].
7. Mr. [REDACTED]' 2011 tax return schedule 1065 indicated a total gross income of \$15,255. However, after significant deductions, [REDACTED] [REDACTED] had a loss of \$4,019 for the year 2011. Exhibit 3.
8. The Menominee County agency sent an April 18, 2013 Child Care overpayment notice to the petitioner stating that she received a total child care overpayment of \$12,736.40 during the period of April 22, 2012 to March 2, 2013, due to agency error in determining her childcare eligibility.
9. The basis for the child care overpayment was that for a two parent household Mr. [REDACTED] was not in an approved child care activity because he reported a loss in his self-employment income.
10. On November 9, 2012, Mr. [REDACTED] suffered a brain hemorrhage that required prolonged hospitalization and subsequent nursing home care. Mr. [REDACTED] left the nursing home on January 17, 2013 and returned home with the petitioner. The petitioner has taken care of [REDACTED] on a full time basis starting on November 9, 2012 and continuing at least to August, 2013.
11. The petitioner took care of [REDACTED] under Family Medical Leave from her employment at the [REDACTED] [REDACTED] from November 13, 2012 until February 1, 2013. The [REDACTED] [REDACTED] then approved 60 days of discretionary leave (until April 2, 2013) after her FMLA leave due to the necessity of caring for Mr. [REDACTED]' health conditions.
12. In his August 2, 2013 respondent brief, Attorney [REDACTED] correctly stated that there should be no child care overpayment from November 18, 2012 to March 2, 2013 because [REDACTED] [REDACTED] was unable to care for the children due to his disability and health conditions per DCF 201.04(2g)(d), Wis. Adm. Code and petitioner was eligible for childcare benefits because her absence from employment was due to "good cause" (family medical leave and employer leave) to care for [REDACTED] per DCF 201.04(2m)(5)(a)(3), Wis. Adm. Code.

**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 THE PERIOD OF APRIL 22, 2012 TO NOVEMBER 9, 2012 BECAUSE HER PARTNER, ██████████ ██████████, WAS NOT ENGAGED IN APPROVED ACTIVITIES AS HE DID NOT MEET THE MONTHLY MINIMUM WAGE REQUIREMENT FOR CHILD CARE ELIGIBILITY.

The Department's Child Care Assistance Manual, at Chapter 3, p. 33, directs as follows:

**Authorizations for self-employment are only allowed to the extent that they support employment that produces monthly-adjusted self-employment income equivalent to at least the state minimum wage.**

(Emphasis added). Based upon that policy section, the county agency authorized the petitioner for child care each week for her children. That authorization resulted in the instant child care overpayment during the period of April 22, 2012 to November 9, 2012, due to Mr. ██████████'s income below the minimum wage threshold of \$623 per month for 20 hours of child care.

Chapter 3, also indicates that

Agencies will determine adjusted self-employment income by entering gross receipts and subtract allowable expenses. Depreciation is not an allowable expense. **If the expenses exceed the gross receipts, the self-employment income will be zero.** Those additional expenses, which exceed the gross receipts, will not be subtracted from other earned income in the household.

Child Care Manual, § 1.6.17.

In this case, Mr. ██████████ was not generating self-employment income that was anywhere close to the minimum as his 2011 tax return indicated a loss for that year, and as such she was not eligible for Child Care benefits. See Finding of Fact #7.

During the July 10, 2013 hearing and its documents, the Department established that it was correctly seeking a child care overpayment from the petitioner for the period of April 22, 2012 to November 9, 2012, due to petitioner's self-employment income was not equivalent to at least the State minimum wage.

The petitioner was unable to refute with any reliable evidence that the county agency has inaccurately calculated the petitioner's total income or incorrectly calculated the child care overpayment amount during that period.

### 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 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).

The child care manual also makes it clear that recovery of incorrect benefits is required even when there might be some administrative error. Thus, the agency may establish the overpayment claim as alleged against the petitioner during the period of April 22, 2012 to November 9, 2012.

However, as explained very thoroughly discussed in the Respondent's brief, Corporation Counsel ██████'s August 2, 2013 brief, there should be no child care overpayment penalty from November 18, 2012 to March 2, 2013 because petitioner and ██████ ██████ were both eligible to receive child care payments. See Finding of Fact # 10 - #12 above. However, the record is unclear whether or not the county agency stipulated that there was no overpayment during the period of November 9, 2012 (brain hemorrhage date) and November 18, 2013 (date which was confirmed by Attorney ██████ in his brief), therefore I confirm that petitioner and Mr. ██████ were both eligible for child care during the entire period of November 9, 2012 to March 3, 2013 and there is no overpayment during that period.

In any case, the petitioner argues that it is unfair that the county agency is seeking to recover the child care overpayment because the overpayment was not her fault. However, the applicable overpayment law and rules clearly require recovery of the overpayment, regardless of fault. Accordingly, based upon the above, I conclude that the county agency is correctly seeking repayment of a child care overpayment to the petitioner during the period of April 22, 2012 to November 9, 2012, because ██████ ██████ (petitioner's partner) was not engaged in approved child care activities because his self-employment income was less than the state minimum wage. However, the county agency is incorrectly pursuing a child care overpayment against the petitioner for the period of November 9, 2012 to March 2, 2013, because ██████ ██████ was unable to care for the children due to his disability and health conditions, and petitioner was eligible for childcare benefits because her absence from employment was due to "good cause" (family medical leave and employer leave) to care for ██████.

#### CONCLUSIONS OF LAW

1. The county agency is correctly seeking repayment of a child care overpayment to the petitioner during the period of April 22, 2012 to November 9, 2012, because ██████ ██████ (petitioner's partner) was not engaged in approved child care activities because his self-employment income was less than the state minimum wage.
2. The county agency is incorrectly pursuing a child care overpayment against the petitioner for the period of November 9, 2012 to March 2, 2013, because ██████ ██████ was unable to care for the children due to his disability and health conditions per DCF 201.04(2g)(d), Wis. Adm. Code and petitioner was eligible for childcare benefits because her absence from employment was due to "good cause" (family medical leave and employer leave) to care for ██████ per DCF 201.04(2m)(5)(a)(3), Wis. Adm. Code.

**THEREFORE, it is**

**ORDERED**

The matter is remanded to the county agency with instructions to: a) re-calculate the petitioner's child care overpayment solely for the period of April 22, 2012 to November 9, 2012 and b) issue a new child care overpayment notice to the petitioner solely for that period; c) the county agency must remove and cease any child care overpayment action against the petitioner during the period of November 9, 2012 to March 2, 2013, within 10 days of the date of this Decision. In all other respects, 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 8th day of November, 2013

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\sGary M. Wolkstein  
Administrative Law Judge  
Division of Hearings and Appeals



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

Brian [REDACTED] 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 November 8, 2013.

Menominee County Department of Human Services  
Public Assistance Collection Unit  
Child Care Fraud  
[tbouressa@stellpfluglaw.com](mailto:tbouressa@stellpfluglaw.com)