



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

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In the Matter of

[REDACTED]  
[REDACTED]  
[REDACTED]

DECISION

WWW/151243

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**PRELIMINARY RECITALS**

Pursuant to Wis. Stat. §49.152(1), petitioner filed a request for a Wisconsin Works (W-2) fact finding review with Workforce Connections Inc., a W-2 agency. A fact finding review was held and a fact finding decision was issued on August 1, 2013.

Petitioner timely appealed to the department from the fact finding decision on August 9, 2013. See Wis. Stat. §49.152(2)(b), (c). The fact finding file was received by the Division on August 15, 2013.

The issue for determination is whether the agency allowed the petitioner to present a defense to the allegation that the father of her child was living in her home.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]  
[REDACTED]  
[REDACTED]

Represented by:

Atty. Bryan I. Pierce  
Carmichael & Quartemont, S.C.  
P.O. Box 725  
Tomah, WI 54660

Wisconsin Department of Children and Families  
201 East Washington Avenue, Second Floor  
Madison WI 53703-2866

By: Gina Brown, W-2 Program Manager  
Workforce Connections, Inc.  
120 E. Milwaukee St.  
Tomah, WI 54660

FACT FINDER: Carmin Trillo

ADMINISTRATIVE LAW JUDGE:

Brian C. Schneider  
Division of Hearings and Appeals

## FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Monroe County.
2. On July 1, 2013 the W-2 agency sent petitioner a notice informing her that she was overpaid \$2,956 in W-2 funds from December 26, 2012 through June 30, 2013, claim no. [REDACTED]. A second notice also informed her that she was overpaid \$2,956 from December 27, 2012 through June 30, 2013, claim no. [REDACTED].
3. Petitioner requested a fact finding review, which was held on June 25, 2013. Petitioner was not allowed to call witnesses or cross examine agency witnesses; it appears that petitioner herself was not allowed to testify although that is not clear from the transcript. The fact finder affirmed the agency action.

## DISCUSSION

W-2 is Wisconsin's public assistance work program, and is outlined at Wis. Stat. §§49.141-.161. It supplanted the prior federal-state cash payment program, Aid to Families with Dependent Children (AFDC), described at Wis. Stat. §49.19.

### **I. STATUS OF FACT FINDING RECORD**

The first task of a departmental reviewer, such as this hearing examiner, is to determine whether the fact finding record is sufficient for review. If it is not sufficient, the examiner may remand the matter back to the fact finder, conduct a new hearing (either in person or telephonically), or otherwise augment the record. See Wis. Stat. §49.152(2)(d). In the instant case, the paper record is adequate for the examiner to make sense of the case, and a supplementary hearing was not necessary. The findings of fact above are based on the fact finder's decision, the transcript of the hearing, and the fact finder's file.

### **II. STANDARD OF REVIEW**

A threshold analytical question is whether the departmental reviewer is reviewing this matter *de novo* or with some unspecified judicial standard of review. This entire due process function is subject to Wisconsin's administrative procedure act, Chapter 227, Wis. Stats., because this type of case satisfies all four prongs of the contested case hearing right test at Wis. Stat. §227.42(1). The Department has also made a public declaration that the entire review process at Wis. Stat. §49.152 is subject to Ch. 227's requirements in the document, Public Hearing Comment & Agency Response, Rule Number : DWD 12, p. 14:

The Department considers that the proceedings under paragraph DWD 12.22(2)(a) will be subject to the provisions of s. 227.44-.49, Wisconsin Stats. The Department does not want to deny anyone the opportunity for a court hearing; however, it is expected that very few cases will lead to court.

Based on the foregoing, the Division of Hearings and Appeals has concluded that the W-2 process function is subject to Ch. 227 requirements.

Having concluded that Ch. 227 applies to the W-2 process function, the Division also concluded that the departmental reviewer must engage in a *de novo* look at the fact finder's decision. In Reinke v. Personnel board, 53 Wis. 2d 123, 191 N.W.2d 833 (1971), the Wisconsin Supreme Court instructed state agency adjudicators to make *de novo* determinations, relying on the greater weight of the credible evidence, in administrative hearings. The Court specifically rejected the use of a judicial review (e.g., "substantial evidence" test) standard by the state agency, "unless expressly otherwise provided by statute." Id., pp.

134-136. There is no judicial review standard articulated in either the W-2 statute or promulgated rule. The only standard articulation undertaken by the Department is that the examiner's action is "a limited review of the record and the decision of the fact finder." See *W-2 Manual*, Chapter 19, § 19.3.0. This is not an articulated judicial review standard, and it is not legally binding on the examiner here.

### **III. REVIEW OF THE DECISION**

The case must be remanded to the fact finder for further proceedings. It is true that the W-2 Manual, §12.2.5.1, describes the fact finding as "an informal process to resolve disputes." However, the petitioner also is allowed to rebut the agency's evidence, and the fact finder must determine credibility based upon "testimony or evidence." Manual, §12.2.8. It is perhaps unfortunate that the Manual says testimony OR evidence since it appears that the fact finder reads the provision to mean that she can exclude testimony, but the simple fact is that there is no authority whatsoever to deny a petitioner the right to testify on her own behalf or to call witnesses. In addition nobody was sworn in so there is no assurance that the speakers were testifying to facts.

The case involves serious allegations of possible fraud with an overpayment claim in the thousands of dollars. It is the petitioner's only opportunity to rebut the claims. Once past the fact finding any review is done by paper review of the fact finding hearing. To blithely disallow the petitioner from presenting a defense flies in the face of due process.

Furthermore, the primary evidence against petitioner was the meeting between her and the investigator with the father of the child present. Petitioner's attorney stated that both individuals claim that the investigator "misconstrued" their statements, but the fact finder did not inquire into how the statements were misconstrued. Then in her decision she stated that the attorney failed to state how the statements were misconstrued and used that failure against petitioner in her decision. The position is called "fact finder" for a reason. It seems to me that a fact finder would be at least curious as to which statements were misconstrued and how. I would venture to say that, given that such misconstructions could be the crux of the case, due process demands that the fact finder would inquire into the question.

The matter is remanded to the agency with instructions to conduct a full fact finding, allowing the petitioner to call witnesses and question agency witnesses. Yes, it likely will take some time to do a full hearing, but sometimes that happens, particularly in cases involving allegations that a person misreported household members. I typically budget at least an hour for such cases but sometimes even longer based on the number of witnesses.

### **CONCLUSIONS OF LAW**

The agency did not provide the petitioner an opportunity to present a defense to the claimed overpayments.

**NOW, THEREFORE, it is ORDERED**

That the matter be remanded to the agency with instructions to conduct a new fact finding that will include the opportunity to call witnesses and to cross examine, and to issue a new decision based upon that hearing. If the petitioner disagrees with the new decision she can request a new departmental review with the Division of Hearings and Appeals.

### **REQUEST FOR A NEW HEARING**

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new

evidence which would change the decision. To ask for a new hearing, 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 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.

Your request for a new hearing must be received no later than 20 days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in Wisconsin Statutes § 227.49. A copy of the statutes can 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 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. Appeals must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is 201 E. Washington Avenue, Second Floor, Madison, WI 53703-2866.

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 Wisconsin Statutes, §§ 227.52 and 227.53.

Given under my hand at the city of  
Madison, Wisconsin, this 15th day of  
August, 2013

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Brian C. Schneider  
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 August 15, 2013.

Wisconsin Works (W-2)  
[bryan@carmichaellaw.com](mailto:bryan@carmichaellaw.com)