



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

REHEARING DECISION

CCO/151206

PRELIMINARY RECITALS

Pursuant to a petition filed August 06, 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 limited rehearing hearing was held on May 07, 2014, at Milwaukee, Wisconsin.

A decision regarding the initial hearing in the above-captioned case was issued on February 7, 2014. Department legal counsel, Attorney [REDACTED] [REDACTED] submitted a February 13, 2014 Request for Rehearing or Reconsideration to the Division of Hearings and Appeals (DHA) based upon alleged material errors of law and fact (ALJ mistakenly concluded that the earlier overpayment of June 3, 2012 to December 31, 2012 would be addressed during petitioner's IPV hearing in [REDACTED], and thus did not decide whether the Department was correct to seek that overpayment). After reviewing the Rehearing request, this ALJ concluded there was sufficient merit to the request to schedule a rehearing to address the legal and factual issues specifically contained in that February 13, 2014 request, and to provide the petitioner with an opportunity to ask questions and to respond to the Department's rehearing request.

The petitioner was informed in writing that if she decides she does not want to participate in the limited rehearing (or does not appear for the scheduled rehearing), this ALJ will issue a rehearing decision based upon the current hearing record, Mr. [REDACTED]'s rehearing/reconsideration request, and any supplemental testimony or evidence presented by Mr. [REDACTED] at the May 7, 2014 rehearing. If new evidence is submitted by Mr. [REDACTED], the petitioner will be sent that new evidence, and petitioner will be provided an opportunity to submit to DHA her written response.

Attorney [REDACTED] appeared for that May 7, 2014 rehearing with his Departmental witness, child care subsidy worker, [REDACTED] [REDACTED], who testified. However, petitioner failed to appear for that rehearing and did not provide any good cause for such failure to appear. Mr. [REDACTED] timely submitted his brief to DHA (and to the petitioner) which was received into the hearing record. The petitioner failed to submit any response to the Department's brief even by the date of this rehearing decision.

The limited issue for determination in this rehearing is whether the Department was correctly seeking recovery of a child care (CC) overpayment of \$11,423.30 in Claim # [REDACTED] from the period of June 3, 2012 through December 31, 2012 in addition to the recovery of another CC overpayment of \$8,149.39 in Claim # [REDACTED] from the period of January 6, 2013 through June 30, 2013 (which was addressed in the previous decision in this case), due to failure to timely report accurate household composition ([REDACTED] [REDACTED] in petitioner's home) and Mr. [REDACTED]'s earned income resulting in household income above the income eligibility limit for a child care household of five.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

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

By: Attorney [REDACTED] [REDACTED] (recently substituted by Attorney Nancy
Wettersten)

Office of Legal Counsel
Department of Children And Families
201 East Washington Avenue, Room G200
Madison, WI 53708-8916

ADMINISTRATIVE LAW JUDGE:

Gary M. Wolkstein
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County who resided with her three children.
2. The petitioner has the same three children in common with her boyfriend, [REDACTED] [REDACTED].
3. The petitioner received Child Care (CC) benefits for her three children for the entire period of June 3, 2012 to December 31, 2012 and January 6, 2013 to June 30, 2013.
4. Petitioner's hearing before Judge David Fleming in a separate miscellaneous appeal addressed only the issue of whether petitioner committed an Intentional Program Violation (IPV) in DHA Case No. [REDACTED].
5. The instant rehearing case addresses both the child care overpayment for the period of June 3, 2012 to December 31, 2012 in the amount of \$11,423.30 in addition to the period of January 6, 2013 to June 30, 2013 in the overpayment amount of \$8,149.39.
6. The county agency only budgeted petitioner's monthly earned income of \$3,401 not only during the period of January 6, 2013 to June 30, 2013 but also during the period of June 3, 2012 to December 31, 2012 (without including Mr. [REDACTED]'s earned income), and was determined below the income eligibility limit for a household of four based only upon petitioner's income. See Exhibit R-8, p. 19-23.
7. During about May, 2012, petitioner and [REDACTED] [REDACTED] purchased a home together.
8. During biannual reviews of July 21, 2012, January 3, 2013 and June 17, 2013, petitioner maintained both orally and in writing that she lived alone with her three minor children and

claimed that their father, [REDACTED] [REDACTED], resided with his mother. Mr. [REDACTED] has no apartment or other residence of his own.

9. The petitioner is a student at [REDACTED] College and is also employed.
10. On June 5, 2012, Mr. [REDACTED] registered to vote and listed the petitioner's home address as his own. See Exhibit R-5.
11. Mr. [REDACTED] listed his home address as the petitioner's with his employer, [REDACTED] [REDACTED]. See Exhibit R-5, p1.
12. On March 25, 2013, Mr. [REDACTED] listed the petitioner's address as his own with the Milwaukee County Circuit Court. See Exhibit R-5, p. 22.
13. The petitioner's home was listed was listed in Mr. [REDACTED]'s name both with the Milwaukee Office of the City Treasurer and at the website assessments.milwaukee.gov. See Exhibit R-5, p. 29-30.
14. During February, 2013, the Department began receiving information that suggested [REDACTED] [REDACTED] might be a member of petitioner's child care household, had been residing with petitioner since at least June 5, 2012, and that his income had not been timely reported to the county agency. See Exhibit R-1, p.5.
15. On July 23, 2013, the Department sent written Notices of Child Care (CC) Overissuance to petitioner and separately to Mr. [REDACTED] in Claim # [REDACTED] informing each of them that she/he was overissued \$11,423.30 in CC benefits from June 3, 2012 through December 31, 2012, due to petitioner's failure to report accurate household members (her boyfriend, [REDACTED] [REDACTED] in the home) and Mr. [REDACTED]'s earned income resulting in household income above the CC income eligibility limits for a two parent household. See Exhibit R-2.
16. On July 23, 2013, the Department sent written Notices of Child Care (CC) Overissuance to petitioner and separately to Mr. [REDACTED] in Claim # [REDACTED] informing each of them that she/he was overissued \$8,149.39 in CC benefits from January 6, 2013 to June 30, 2013, due to petitioner's failure to report accurate household members (her boyfriend, [REDACTED] [REDACTED] in the home) and Mr. [REDACTED]'s earned income resulting in household income above the CC income eligibility limits for a two parent household. See Exhibit R-2.
17. The petitioner timely appealed the child care overpayments to the Division of Hearings and Appeals (DHA). However, Mr. [REDACTED] did not appeal his child care overpayments.
18. [REDACTED] [REDACTED] has been employed by [REDACTED] [REDACTED] and his wages were on the State Wage Record. See Exhibit R-5, p. 1-4, 6. State wage records confirmed his earned income during the entire CC overpayment period of January 6, 2013 to June 30, 2013.
19. [REDACTED] [REDACTED]'s earned income was not included in determining petitioner's CC eligibility and benefits for the CC overpayment period of June 3, 2012 through December 31, 2012 or January 6, 2013 to June 30, 2013 creating petitioner's CC overpayment for those periods.
20. The CC gross income limit for a household of five was \$4,502 (for June, 2012 through January, 2013) and then increased to \$4,595 as of February, 2013 during the child care overpayment period of January 6, 2013 to June 30, 2013. See Exhibit R-2, p.5-10.
21. During the child care overpayment periods, the petitioner's gross household income (including Mr. [REDACTED]'s income) was the following: a) June, 2012 - \$5,034.15; b) July, 2012 - \$5,133.38; c) August, 2012 - \$5,624.10; d) September, 2012 - \$5,467.85; e) October, 2012 - \$5,462.19; f) November, 2012 - \$5,795.98; g) December, 2012 - \$5,683.93; h) January, 2013 - \$5,449.62; i) February, 2013 - \$5,437.47; j) March, 2013 - \$5,962.56; k) April, 2013 - \$5,562.59; l) May, 2013 - \$5,394.14; and m) June, 2013 - \$5,428.36. See Exhibit R-2.

22. The petitioner's total monthly household income (household income including [REDACTED]'s earned income) was above the Child Care gross income eligibility limits for the entire CC overpayment periods as indicated in Finding of Fact #19 and #20 above.

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 PERIODS OF JUNE 3, 2012 THROUGH DECEMBER 31, 2012 and JANUARY 6, 2013 THROUGH JUNE 30, 2013, DUE TO INCOME ABOVE THE CHILD CARE INCOME ELIGIBILITY LIMITS.

The Child Care Benefits program requires the use of the prospective budgeting test, which usually treats income by a multiplier to reflect estimated income for an average month that is 4.3 weeks long. *Wisconsin Shares Child Care Assistance Manual*, § 1.6.6. However, when income fluctuates, an average is to be used to arrive at monthly income. *Wisconsin Shares Child Care Assistance Manual*, § 1.6.7. The average to be used is not limited to one month under this policy. *Ibid.* The income limit for an ongoing case is **200% of the federal poverty level ("FPL")**. The income limit for a new request case is 185% of the federal poverty level. Financial eligibility ends when a household exceeds this limit for two consecutive months. *Ibid.*, § 1.6.3. The gross income limit for petitioner's household of five is set forth in Finding of Fact #19 above for the entire period of January 6, 2013 through June 30, 2013. *Wisconsin Shares Child Care Assistance Manual*, § 1.6.3. The petitioner's household income was above the income limit for a household of five for the entire child care overpayment period.

During the hearing and in its Exhibits, the county agency presented a well-documented case that it was correctly seeking from the petitioner a child care overpayment for the periods of June 3, 2012 through December 31, 2012 and January 6, 2013 through June, 2013.

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 generally 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).

In this case, the county agency proved by the preponderance of the evidence that the basis for the overpayments was client error. The county agency correctly determined that [REDACTED] [REDACTED] was part of the petitioner's child care unit, and that his income had not been used to determine her CC eligibility which, in turn, gave rise to the CC overpayments during the periods of June 3, 2012 through December 31, 2012 and January 6, 2013 through June 30, 2013. The county representative indicated that petitioner and Mr. [REDACTED] were incorrectly awarded total CC benefits of \$11,423.30 and \$8,139.39 because the total accurate income of petitioner and Mr. [REDACTED] would have placed the household over the gross income limit for all of the CC overpayment period.

IV. JOINT AND SEVERAL LIABILITY.

When two adults and their minor child-in-common reside together, regulations require that they be treated as one Child Care (CC) household. *Manual*, §1.2.0, "Family" definition. In cases where an overpayment of Child Care Benefits may have occurred, the county agency is required to determine whether or not an overpayment has been made and to recover the overpayment from the household that received it, *Wis. Admin. Code* §DWD 12.23(2)(a). Liability for repayment is joint and several as to any parent or **non-marital co-parent** for the time that he or she is living in the household, *Wis. Admin. Code* §DWD 12.23(3). The agency is required to recover overpayments whether they are the result of client error, administrative error or intentional program violation, *Wis. Admin. Code* §DWD 12.23(1)(g). Mr. [REDACTED] is a non-marital co-parent of the three children with the petitioner. Therefore, the liability for the child care overpayment which benefited more than one person is **joint and several liability**, meaning that petitioner and Mr. [REDACTED] are both liable for the full amount, *Wis. Admin. Code* §DWD 12.23(3)(b) and *Wis. Admin. Code* §DWD 12.23(3)(a).

During the November 13, 2013 hearing (and the May 7, 2014 rehearing), the county agency clearly established with its witness [REDACTED] [REDACTED] its extensive exhibit notebook (Exhibits R-1 through R-9) that the petitioner and Mr. [REDACTED] received Child Care overpayments. During the hearing, the petitioner testified with explanations and allegations for why she contended [REDACTED] [REDACTED] did not live with her during the overpayment periods in question.

Her testimony during the hearing was not credible, and she was unable to provide any reliable evidence to refute the county's case. She alleged that [REDACTED] stayed with his mother and only "visited" his three children at her home. However, such testimony appeared entirely unconvincing as petitioner was unable to refute that petitioner or [REDACTED] had no receipts or documents whatsoever to confirm any rent payment by [REDACTED] to his mother. Furthermore, petitioner did not deny that she bought her house with Mr. [REDACTED]. See Finding of Fact #7 above. However, she attempted unconvincingly to allege that she only put the house in both their names to secure a lower mortgage interest rate. Petitioner did not dispute that [REDACTED] received his mail at her home and that he did register to vote from her address. Moreover, petitioner did not dispute at all the income limits or the income used by the county agency to calculate the child care overpayment amounts.

During the November 13, 2013 hearing, petitioner was unable to present any reliable evidence to refute or undermine in any significant way the county's substantial, reliable testimony or evidence that [REDACTED] [REDACTED] resided with the petitioner and their children during the entire CC overpayment period.

Therefore, Mr. [REDACTED]'s earned income must be budgeted as income in determining petitioner's CC eligibility and benefits. The petitioner's corrected household's total income was above the CC gross income limit for a household of five for the entire CC overpayment period of January 6, 2013 through June 30, 2013, thereby creating the CC overpayment during the entire period of January 6, 2013 through June, 2013, pursuant to the Wisconsin Shares Child Care Assistance Manual, § 1.6.3.

During the May 7, 2014 rehearing, Attorney [REDACTED] appeared for that May 7, 2014 rehearing with his Departmental witness, child care subsidy worker, [REDACTED] [REDACTED], who established with reliable evidence and testimony that the Department was also correctly seeking recovery of the CC overpayment to petitioner during the period of June 3, 2012 to December 31, 2012. However, petitioner failed to appear for that rehearing and did not provide any good cause for such failure to appear. Mr. [REDACTED] timely submitted his brief to DHA (and to the petitioner) which was received into the hearing record. The petitioner failed to submit any timely response to the Department's brief, and did not even submit any response by the date of this rehearing decision.

The petitioner did not contest that her household had received CC benefits during the periods of June 3, 2012 to December 31, 2012, and January 6, 2013 through June 30, 2013. Furthermore, the petitioner was unable to offer any reliable evidence to refute the accuracy of the county agency's CC overpayment determinations. Nevertheless, petitioner contended that it was unfair that the county agency was seeking to recover the CC overpayment. However, controlling federal regulation requires establishment of a claim against a household for a CC overpayment regardless of whose error caused the overpayment to occur. Accordingly, for the above reasons, I must conclude that petitioner was overissued child care benefits of \$11,423.30 during the period of June 3, 2012 through December 31, 2012 and \$8,149.39 during the period of January 6, 2013 to June 30, 2013, due to failure to timely report accurate household composition ([REDACTED] [REDACTED] in petitioner's home) and Mr. [REDACTED]'s earned income resulting in household income above the income eligibility limit during both overpayment period for a child care household of five.

CONCLUSIONS OF LAW

The Department is correctly seeking recovery of Child Care (CC) overpayments to the petitioner during the periods: a) June 3, 2012 through December 31, 2012 in the amount of \$11,423.30; and b) January 6, 2013 to June 30, 2013 in the amount of \$8,149.39 for a total overpayment of \$19,572.69, due to petitioner's failure to timely report accurate household composition ([REDACTED] [REDACTED] in petitioner's home) and Mr. [REDACTED]'s earned income which should have been included in her CC eligibility and benefit determinations resulting in household income above the income eligibility limit for a child care household of five.

THEREFORE, it is

ORDERED

The petition for review herein be and the same is hereby Dismissed.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or 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 filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Children and Families, 201 East Washington Avenue, Madison, Wisconsin 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 20th day of October, 2014

\sGary M. Wolkstein
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 October 20, 2014.

Milwaukee Early Care Administration - MECA
Public Assistance Collection Unit
Child Care Fraud
Attorney [REDACTED]