



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION

PTI/154367

PRELIMINARY RECITALS

Pursuant to a petition filed December 19, 2013, under Wis. Stat. § 227.42, Wis. Admin. Code §DCF 201.07(1) and Wis. Stat. § 49.85(4), to review a decision by the Wisconsin Department of Children and Families, by the Milwaukee Early Care Administration – MECA, in regard to state income tax intercept certification, a telephone hearing was held on February 26, 2014, at Milwaukee, Wisconsin.

The issue for determination is whether the Department correctly determined that the petitioner owes a child care public assistance debt that was certified for state income tax interception. A hearing set for January 22, 2014, was rescheduled at the petitioner’s request.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:



Respondent:

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

By: Nancy Wettersten, Assistant Legal Counsel
Milwaukee Early Care Administration - MECA
Department of Children And Families
1220 W. Vliet St. 2nd Floor, 200 East
Milwaukee, WI 53205

ADMINISTRATIVE LAW JUDGE:

Kenneth D. Duren, Assistant Administrator
Division of Hearings and Appeals

FINDINGS OF FACT

- 1. Petitioner (CARES # [redacted]) is a resident of Milwaukee County. She was employed and operating a licensed child care provider doing business in Milwaukee County in the period of May 1 – August 14, 2011, (as a co-owner, together with her adult son [redacted] [redacted] and a third adult individual) under grant of a license from the Department to a limited liability

corporation; and during this time period the child care LLC received at least \$39,544.26 in WI Shares reimbursements for child care payment claims it made to the Department.

2. The petitioner was one of three owners of a domestic limited liability corporation known as [REDACTED], LLC, as organized under Wisconsin law, and she was the registered agent of record for said limited liability corporation. She applied for the child day care license for the limited liability corporation, as applicant and licensee.
3. The petitioner was actively engaged in direct day-to-day operations at the day care in the period of May 1 – August 11, 2011; and occasionally executed checks for the operation.
4. In December, 2011, the Department issued a notice to the petitioner, in care of the LLC at the last known child care operational (business) address, informing her that the Department had determined that the LLC had been overpaid Wisconsin Shares child care funds of \$39,544.26 due to failures to report accurate hours of care and for caring for children in excess of licensing standards. The petitioner denies receipt of the overpayment notice at any time, and she did not appeal at that time.
5. On April 3, 2013, the Department issued a Child Care Provider Repayment Agreement to the LLC at its last operational address, but it never was executed by any representative of the LLC or returned.
6. On May 2<sup>nd</sup>, June 4<sup>th</sup> and July 3<sup>rd</sup>, 2013, dunning letters were sent to the child care LLC's last operating business address demanding that the provider repay the \$39,544.26 in child care overpaid. The petitioner denied receipt of any dunning letters or the repayment agreement.
7. None of the documents mailed to the child care LLC or the petitioner's residence as stated in Findings of Fact Nos. 4, 5 & 6, returned to the Department as undeliverable.
8. On December 13, 2013, the Department, by the Public Assistance Collections Unit, sent petitioner a notice, addressed to her at her residence, informing her that it intended to intercept her state income tax refund to recover the remaining amount due of \$39,544.26 arising from the WI Shares overpayment debt, and that more than one adult may be liable for such debt.
9. The petitioner received the tax intercept notice and filed an appeal on December 19, 2013, contesting the tax intercept certification determination and the underlying Child Care overpayment determination of December, 2011, for the first time.
10. The petitioner appeared at the hearing held on February 26, 2014, testified, and did not produce any evidence indicating that the mathematical computation of any of the child care overpayment sum was in error. Rather, she asserted that she should not be liable because the day care was owned and operated by a limited liability corporation; or in the alternative, all three owners should be equally responsible for equal portions of the debt owed to the Department.
11. The limited liability corporation concerned in Finding of Fact No. 2 above was dissolved on August 27, 2013. See, Exhibit R-4.

### DISCUSSION

Wis. Stat. § 49.85(2)(b), provides that the department shall, at least annually, certify to the Department of Revenue the amounts that it has determined that it may recover resulting from overpayments of care assistance.

The Department of Children and Families must notify the person that it intends to certify the overpayment to the Department of Revenue for setoff from his/her state income tax refund and must inform the person that he/she may appeal the decision by requesting a hearing. *Id.* at §49.85(3)(b).

The hearing right is described in Wis. Stat. § 49.85(4)(b), as follows:

If a person has requested a hearing under this subsection, the department ... shall hold a contested case hearing under s. 227.44, except that the department ... may limit the scope of the hearing to exclude issues that were presented at a prior hearing or that could have been presented at a prior opportunity for hearing.

The Department is required to recover all overpayments of public assistance benefits including those made to child care providers. Wis. Stat. § 49.195(3).

The petitioner raised no substantive defense to the overpayment determination, and did not contest the time period or the computation of the overpayment. Since I find her credible as to the non-receipt of the initial overpayment notice, her appeal is timely as to the overpayment. But that is of little help to her as she puts up no real defense to the overpayment on the merits. Based upon the agency records, the preponderance of the evidence clearly demonstrates that the child care LLC was overpaid \$39,544.26 in the tested time period.

However, the petitioner argues that she is not the debtor because the child care provider was an LLC. She argues that she should be shielded from liability, or at the very least, only be responsible for the one-third interest she held in the LLC.

Wis. Stat. § 49.155(7m) provides:

**(a)** The department shall by rule establish policies and procedures permitting the department to do all of the following if a child care provider submits false, misleading, or irregular information to the department or if a child care provider fails to comply with the terms of the program under this section and fails to provide to the satisfaction of the department an explanation for the noncompliance:

1. Recoup payments made to the child care provider.
2. Withhold payments to be made to the child care provider.
3. Impose a forfeiture on the child care provider.

**(b)** The penalties under par. (a) may be imposed on any child care provider subject to this section. *Any officer, director, or employee of a child care provider that is a corporation, and any member, manager, or employee of a child care provider that is a limited liability company, who holds at least 20 percent of the ownership interest of the corporation or limited liability company and who has control or supervision of or responsibility for operating the child care business, including reporting for and receipt of payments under this section, may be found personally liable for such amounts, including overpayments made under this section, if the business, corporation, or limited liability company is unable to pay such amounts to the department.* Ownership interest of a corporation or limited liability company includes ownership or control, directly or indirectly, by legally enforceable means or otherwise, by the individual, by the individual's spouse or child, by the individual's parent if the individual is under age 18, or by a combination of 2 or more of them, and such ownership interest of a parent corporation or limited liability company of which the corporation or limited liability company unable to pay such amounts is a wholly owned subsidiary. The personal liability of the officers, directors, and employees of a corporation and of the members, managers, and employees of a limited liability company as provided in this paragraph is an independent obligation and survives dissolution, reorganization, bankruptcy, receivership, assignment for the benefit of creditors, judicially confirmed extension or composition, or any analogous situation of the corporation or limited liability company.

Italics added. Subsection (b) became effective on November 26, 2009. In a final decision in consolidated case Nos. PTI/132478 and PTI/133922 dated December 29, 2011, the Department's Executive Assistant concluded that the statute gave the Department the authority to impose personal liability on an LLC owner, with the key phrase being the one in italics. To read subsection (b) as applying only to the penalties provided in subsection (a) would render the personal liability provision meaningless, as those penalties would apply only to an ongoing business from which recoupments could be taken.

If petitioner thus is personally liable for the business overpayment, then the Department can utilize a tax intercept described in Wis. Stat. § 49.195(3).

The petitioner testified that she ran the day to day operations of the day care, but asserted that her son did the billing. She admitted that she had also signed a couple of checks when funds were needed. Implicitly, she is also asserting that she should not be liable because she claims not to have been doing the billing, that led to the errors, that caused the overpayments.

First, the petitioner applied for the license to operate the child care, and held it. Second, she operated the day care by managing the in and out of children in care all day long and exercising day to day supervision of the actual operation of the day care. Such administration includes the nitty-gritty business of recording when a child arrives and departs, which then forms the basis for claims to the Department for payment. She admits occasionally writing business checks as needed. Third, she asserted that her son was responsible for business operations, but she did not produce him to testify to support this contention. Fourth, she admitted that she owned the business in equal shares with two other owners, and thus had more than a 20% equitable interest in the business. Fifth, the failure of the petitioner to produce her son to corroborate her testimony by testifying at the hearing is appropriate for the imposition of the negative inference doctrine. When an individual asserts a fact is true, has access to a witness she alleges could support the fact asserted, and fails to produce this evidence at a hearing, it is appropriate to draw the negative inference that his testimony would have been contrary to this assertion. Sixth, the same logic and same negative inference applies to any evidence of the operation of the business by the adult son, rather than the petitioner, as she appears to assert. She produced *no documentary evidence nor any corroborating testimony*, like that of other employees, the third owner, a bank officer, or any of the hundreds of claim documents, payment documents and or sign in/sign out sheets (SISOs) produced in this time period that may have lent credence to her assertion.

What the petitioner's defense boils down to is her assertion that it is unfair for her alone to be subjected to this recovery by the Department. That, however, is an assumption on her part. The Department has every right to pursue the other two owners as well, and it could even be doing so right now. As LLC co-owners, they all appear to be liable for the subject debt. But I need not decide that here. Rather, the question for my decision is whether the petitioner is so liable. And I can only conclude that she is so liable. This argument is without merit.

It is the long-standing position of the Division of Hearings & Appeals that the Division's administrative law judges lack the authority to render a decision on constitutional or equitable arguments. See Wisconsin Socialist Workers 1976 Campaign Committee v. McCann, 433 F. Supp. 540, 545 (E.D. Wis.1977). I must conclude that the personal liability provision found in Wis. Stat. § 49.155(7m)(b) applies to petitioner as a co-owner of the LLC that was overpaid Wisconsin Shares funds.

Based on the statute and the prior Final Decision of the Department, I must conclude that the PACU had authority to utilize a tax intercept against petitioner individually for the unpaid claim. This does not mean that it may not also pursue the other liable parties, but the Department is allowed to pursue the petitioner for repayment. Nothing prevents her from filing a civil action against her partners for monetary damages for any loss she thinks she sustains as a result of the LLC's transgressions of WI Shares rules.

**CONCLUSIONS OF LAW**

- 1) That the use of the state income tax refund certification debt recovery mechanism against the members, managers or employees of a limited liability corporation child care provider is allowed under Wis. Stat., §49.155(7m)(b).
- 2) That the agency correctly determined the petitioner was liable for a child care overpayment of \$\$39,544.26 as a member, manager or employee of a limited liability corporation, and therefor correctly certified this debt to the Wisconsin Department of Revenue for collection by state tax intercept.

**THEREFORE, it is****ORDERED**

That 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 11th day of March, 2014

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\sKenneth D. Duren, Assistant Administrator  
Administrative Law Judge  
Division of Hearings and Appeals



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The preceding decision was sent to the following parties on March 11, 2014.

Milwaukee Early Care Administration - MECA  
Public Assistance Collection Unit  
Attorney Barbara Holzmann  
Attorney Nancy Wettersten