



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION

CCO/154428

PRELIMINARY RECITALS

Pursuant to a petition filed December 27, 2013, under Wis. Admin. Code § HA 3.03, to review a decision by the Early Care Administration - MECA in regards to a determination that the petitioner was overpaid Child Care benefits, a hearing was held on March 6, 2014, at Wisconsin. A hearing set for January 22, 2014, was rescheduled at the petitioner's request. A hearing set for February 19, 2014, was rescheduled at the respondent's request. At the joint request of the parties, the record was held open for 10 days for the submission of additional information, i.e., a ForwardHealth screen snapshot.

The issue for determination is whether the Department correctly determined that the petitioner was overpaid \$4,366 in Child Care benefits because she lived in a two parent household and her husband was available to provide cares in the period of July 22 - December 31, 2012.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:



Petitioner's Representative:

Attorney Patricia DeLessio
230 West Wells Street Room 800
WI 53203

Respondent:

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

By: Attorney Joseph McCleer
Early Care Administration - MECA
Department of Children And Families
1220 W. Vliet St. 2nd Floor, 200 East
WI 53205

ADMINISTRATIVE LAW JUDGE:

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

PRELIMINARY RULINGS

The petitioner's counsel objected on hearsay grounds to Exhibits R-1 through R-7, and R-11. The objection is noted and over-ruled. The Exhibits are admitted. Rather, their hearsay nature goes to the content and the weight of the admissible evidence, which I shall consider in the ruling announced below.

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of [REDACTED] County. She was receiving Child Care benefits from the Department during the period of July 22 – December 31, 2012, in a total amount in this time period of \$4,366.62.
2. The petitioner's husband, [REDACTED], was unemployed during the period of at least July 22 – December 31, 2012.
3. On December 20, 2013, the Department issued a Child Care Client Overpayment Notice and Worksheets to the petitioner informing her that the agency had determined that she had been overpaid \$5,241.29 in Child Care benefits in the period of July 1 – December 31, 2012, due to a client error in reporting household composition, and a failure to report changes in work or approved activity hours. See, Exhibit R-2.
4. On December 27, 2013, the petitioner filed an appeal with the Division of Hearings & Appeals contesting the Department's overpayment determination of December 20, 2013.
5. On March 4, 2014, two days prior to the scheduled hearing date, the Department issued an amended Child Care Client Overpayment Notice and Worksheets, informing the petitioner that the overpayment determination had been reduced; and that the agency now found that she had been overpaid \$4,366 in Child Care benefits from July 22 – December 31, 2012, due to a client error in reporting household composition, and a failure to report changes in work or approved activity hours. See, Exhibit R-13.
6. [REDACTED] was not living with the petitioner during the period of July 22 – December 31, 2012.

DISCUSSION

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. Admin. 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. Admin. Code, §DCF 101.23(1)(g). Recovery must occur even if the error was made by the agency.

A parent is eligible for child care services if she needs the care to attend Wisconsin Works (W-2) approved school, to work, or to participate in W-2 activities. Wis. Stat. §49.155(1m)(a); W-2 Manual, §15.2.0. The agency shall recover child care payments if the authorized payments would have been less because the parent was absent from an approved activity while the child was in care. Child Day Care Manual, Chapter 2, §2.3.1.

There is no question that the county paid for child care services during the period in question. The Department asserts that child care was not necessary during the overpayment period because [REDACTED] was not working, living in the home, a co-parent of at least one child in the home, and therefore he was available to provide child care. If correct, that means that the petitioner was overpaid for the entire period. And the petitioner concedes that [REDACTED] was not working in the test period, and that he is the father of her youngest child, [REDACTED].

In the parlance of public assistance programs, this is a classic “father-in-the-home” controversy. The agency has produced a number of document based assertions, introduced through the Department’s witness, ██████████, Child Care Specialist Senior. The agency fraud referral notes that the “2 P HH FATHER OF THE CHILDREN ALSO LIST PP ADDRESS AS HIS ON HIS CASE 112652910...”. See, Exhibit #R-1, p. 2.

The documentation shows that ██████████ was listed on the petitioner’s subsidized housing apartment at ██████████, said lease term beginning on May 5, 2012, and continuing for at least a year thereafter. See, Exhibit R-4. ██████████ signed the lease as “Other Adult”, on April 26, 2012. He was listed in Section 12 of the lease as a household member. Ibid.

The agency also produced excerpted entries from social media site Facebook, indicating that at various times in the past few years the petitioner and ██████████ have portrayed themselves as husband and wife in an open media forum, but the excerpts do not clearly indicate the years of the comments so excerpted or clearly show when such years are listed, that the comments were made during the test period at issue here. See, Exhibit R-5.

Next, the agency shows that ██████████ used the petitioner’s apartment address to obtain a driver’s license with that address, as issued on August 5, 2011, again not during the overpayment period alleged. See, Exhibit R-5, at p. 8.

Likewise, a DOT driver’s abstract printed on December 18, 2013, demonstrates that ██████████ was using the petitioner’s newly purchased home address on ██████████ as his address of record. See, Exhibit R-5, at pp. 9 – 16.

Next, the Department produced a copy of an address listing with the county’s IV-D child support agency, showing that ██████████ had a listed address of ██████████, for July 28, 2011 – February 25, 2013, and then the ██████████ residence of the petitioner for five days subsequent, and again briefly in April and September, 2013, as well as the use of entries for a P.O. Box and a ██████████ address, each being used twice in 2013. See Exhibit R-5. At p. 20.

Finally, the Department produced Unemployment Compensation benefits records that demonstrated that when the report was run in December, 2013, ██████████ was using the petitioner’s ██████████ residence address as his address on file with that agency, and that he had reported to same to a new employer at job start in September, 2013. See, Exhibit R-5, at pp. 22 & 30.

Petitioner testified that she was working and needed child care to work. She also testified that her husband, ██████████, was not living with the family as they were estranged due to private issues between them. She testified that she provided the agency with her lease, and with a copy of an Affidavit of Nonresidence that she executed before a Notary Public on April 19, 2013, that was filed with the ██████████ County Circuit Court – Family Court Division, stating that she and her children live at ██████████, ██████████, WI ██████████ that the other parent (██████████) does not live with her and the child or children in common with her; that to the best of her knowledge he was residing then at ██████████, ██████████, WI; and that he had not lived with her since August, 2010. This oath was made and offered and contained information that giving false information to a government agency in a sworn affidavit can result in criminal prosecution for false swearing, a felony punishable by a fine not to exceed \$10,000 and/or jail not to exceed 6 years. See, Exhibit R-5, p.21.

The petitioner admitted that ██████████ was listed on her lease at ██████████ in the overpayment test period. She asserted that this was because they were estranged and the agent for her landlord told her that once he was removed from the lease it would take many months, maybe as long as a year, to add him back as an approved household member in the subsidy program; and that if he was living there without being on the lease, she could be subjected to eviction. She noted that ██████████ was not listed on the Warranty Deed for

her current [REDACTED] home as having any interest in her home. Rather, she owns it as sole Grantee. See, Exhibit R-4 at pp. 6-9.

The petitioner produced [REDACTED] [REDACTED] employee [REDACTED], who corroborated the petitioner's testimony about past discussions with the petitioner about the consequences of removing [REDACTED] and the difficulty to restore him to the lease if he was removed; and that it would take many months to accomplish. She admitted that she had suggested it may be best to leave him on the lease if the couple were estranged but had some intention to re-unite.

The petitioner produced [REDACTED] [REDACTED], a family friend, who testified generally that he owned a fire damaged property in [REDACTED] and that [REDACTED] had spent many weeks in the overpayment test period helping him try to fix the property and sleeping on site in the damaged property for at least a week continuously during about six weeks in the test period. He was not specific as to dates, but he was a generally credible witness in his demeanor, consistency of message and body language.

The petitioner next produced her brother, [REDACTED] [REDACTED], who testified that he visited the petitioner and her children frequently at the [REDACTED] [REDACTED] apartment and her new home, and noted that [REDACTED] was not around very much or rarely, and if so, he recalled it being because of holidays or family occasions. He stated that he spent the night at his sister's home on occasion, and that [REDACTED] was not there on those nights. [REDACTED] generally corroborated that the petitioner and [REDACTED] were having marital difficulties and the relationship appeared strained.

The petitioner next produced [REDACTED] to testify. He corroborated her testimony that he did not live with her in the overpayment test period, though he admitted he had visited and occasionally had stayed the night. He testified that he had a P.O. Box because he had privacy concerns about special medications he needed, and that he did not want anyone else to know about. This testimony echoed the petitioner's testimony that [REDACTED] had some private concerns and issues related to their family relations. Upon direct examination by the administrative law judge, [REDACTED] admitted that the reason his wife and he were estranged, and why he moved out, was because he was HIV positive; had been so before he married her and had not disclosed it to her until after marriage and after the birth of their youngest child in common. At this moment in time, his wife's quiet sobbing generally corroborated the truthfulness of his testimony and the description of their mutual family tragedy. I found his testimony reluctantly given as he did not wish to shame himself or his wife, clear, consistent, corroborated by her, [REDACTED] and [REDACTED] on many points, and generally truthful. His body language not only did not demonstrate any effort to lie, but rather generally corroborated his truthfulness by the painful pathos of relating the arc of his recent life.

Finally, [REDACTED] testified that he was not receiving BC+ as a member of the petitioner's BC+ household during the overpayment test period, even though he had serious medical needs due to his condition. Attorney DeLessio asserted that this implied that he was not living with the petitioner because it would make no sense for a seriously ill man to eschew medical coverage if he could get it.

The Petitioner's testimony that [REDACTED] was not living with her in the overpayment period is indeed bolstered by the evidence that [REDACTED] was not individually eligible for BC+ as part of the petitioner's BC+ group in the test period (July 22 – December 31, 2012) or otherwise, even though the petitioner's children were eligible and he was potentially eligible if residing there. See, Exhibit R-14, BC+ ForwardHealth eligibility screen. Such eligibility would seem to be a very desirable benefit for a man receiving ongoing treatment for HIV.

The Department's entire case was based upon hearsay evidence derived from multiple records databases, with no witness produced providing direct oral testimony that places the spouse as a household member living with the petitioner in the period of July 22 – December 31, 2012, despite the clear inclusion of him in the rental lease for [REDACTED], until she moved into her new home in November, 2012. I need not digress

here into an analysis of the *Gehin* caselaw on the weight and effect of hearsay evidence in the face of direct testimony to the contrary. In any event, the petitioner has produced wide-ranging and credible testimony from four live witnesses of the estrangement of [REDACTED] and the petitioner, the serious marital difficulties causing the estrangement, and their mutually corroborative testimony that [REDACTED] was not living with the petitioner and children in the tested period. The rebuttal offered here simply overwhelms the Department's hearsay-based case in chief.

I conclude that petitioner's testimony is credible and supported by other evidence. I thus will order the overpayment to be rescinded.

CONCLUSIONS OF LAW

Petitioner's husband, [REDACTED], was estranged from his family and did not live in her residence during the period of at least July 22 – December 31, 2012; and thus the petitioner was not in a two parent household in that time period and was not overpaid Child Care benefits in this time period.

NOW, THEREFORE, it is ORDERED

That the matter be remanded to the county with instructions to rescind claim no. [REDACTED] against petitioner and to cease recovery of the claim. These actions shall be completed within 10 days of the date of this Decision.

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 18th day of March, 2014

\sKenneth D. Duren, Assistant Administrator
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 March 18, 2014.

██████████ Early Care Administration - MECA
Public Assistance Collection Unit
Child Care Fraud
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Attorney Joseph McCleer