



FH
[REDACTED]

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

In the Matter of

[REDACTED]

DECISION

CCO/156535

PRELIMINARY RECITALS

Pursuant to a petition filed March 31, 2014, under Wis. Admin. Code § HA 3.03, to review a decision by the Milwaukee Early Care Administration - MECA in regard to Child Care, a hearing was held on May 20, 2014, at Milwaukee, Wisconsin.

The issue for determination is whether the agency correctly determined that Petitioner was overpaid child care benefits and if so whether it determined the correct amount of the overpayment.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]

Petitioner's Representative:

Attorney Patricia DeLessio
230 West Wells Street, Room 800
Milwaukee, WI 53203

Respondent:

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

By: Joseph McCleer

Milwaukee Early Care Administration - MECA
Department of Children And Families
1220 W. Vliet St. 2nd Floor, 200 East
Milwaukee, WI 53205

ADMINISTRATIVE LAW JUDGE:

David D. Fleming
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County.
2. Petitioner was sent a manually generated child care overpayment notice, dated March 6, 2014 and a computer generated overpayment notice dated March 7, 2014. Both indicated that Petitioner and spouse had been overissued child care benefits in the amount of \$1098.26 during the period from November 3, 2013 through February 28, 2014 (claim # [REDACTED]).

3. The agency alleges this overpayment occurred as a result of client error. There are two components - that Petitioner was not either not in an approved activity or was being sanctioned by the W2 program but continued to use child care during these time periods.
4. Petitioner was working but employment ended on October 28, 2013.
5. Petitioner was a W2 program participant and, with the end of her private sector employment, was required by the W2 program to perform job search per an Employability Plan dated December 2, 2013. Some job search logs submitted by Petitioner were deemed invalid by W2 program because verification of internet search activities was missing from some logs. This was later corrected, at least to some extent, and the logs accepted by the W2 agency as valid. This led to a reduction in the amount of the alleged overissuance from \$1098.26 to \$651.86. The amount of that overissuance breaks down as follows: \$158.00 for November 2013, \$421.86 for December 2013 and \$72.00 for January 2014.

DISCUSSION

The Wisconsin Statutes, at §49.195(3), state the following:

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 the Wisconsin Statutes, at §49.155; thus they are within the purview of §49.195(3). Recovery of child care overpayments also is mandated by the *Wisconsin Administrative Code*. *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 or whose error caused the overpayment. *Wis. Admin. Code, § DCF 101.23(1)(g)*. All overpayments, regardless of whose error caused the overpayment, are to be recovered. *Also see, Wisconsin Shares Child Care Assistance Manual (Manual), §2.3.1*.

Generally speaking, to successfully establish an overpayment claim, the county agency needs to present: a copy of a notice and overpayment computations that was sent to the recipient; primary documentation proving the misstatement, omission, or failure occurred and caused child care to be granted for which the client was not otherwise eligible; documentation of the benefits actually paid; and Case Comments corroborating the facts and timeline of the original reporting, subsequent discovery, client contacts, referral, and determination. The agency must establish by the “preponderance of the evidence” in the record that it correctly determined the client was overpaid. This legal standard of review means, simply, that “it is more likely than not” that the overpayment occurred. It is the lowest legal standard in use in courts or tribunals.

The recipient may then offer any documents or testimony that rebuts any part of the agency claim. The agency, likewise, may then choose to submit other documents or testimony to address and attempt to rebut the defenses raised by the recipient.

All parents and persons acting in place of a parent must be participating in an approved activity in order to receive child care assistance. *Wisconsin Shares Child Care Assistance Manual, §1.4.8*. The questions here involve the reliability of the W2 records and the reliance upon those records for the purpose of determining that there is an overpayment here.

Petitioner objects to some W2 records as hearsay given that the only testimony produced at the hearing was from one child care staffer and Petitioner; thus the case notes in the Exhibits offered by the agency are subject to this objection.

Hearsay is admissible in administrative hearings. *Wis. Stat. § 227.45(1)*. However, as the Wisconsin Supreme Court has stated, “[P]roperly admitted evidence may not necessarily constitute substantial evidence.” *Gehin v. Wisconsin Group Insurance Board*, 278 Wis. 2d 111, ¶ 52 (2005). In *Gehin*, the court held that uncorroborated medical records that were contradicted by the petitioner’s sworn testimony was not substantial evidence to support a decision to deny the petitioner coverage. *Id.* at ¶¶ 80-82. In short, I cannot use uncorroborated hearsay to decide a contested fact.

This does make the W2 records problematic because, ultimately, the hearsay rule exists to assure that decisions are made based upon reliable evidence. Here it is clear that Petitioner stopped working on October 28, 2013, a Monday. By Wisconsin Shares Child Care program rules this means that Petitioner’s child care would end on the following Saturday – November 2, 2013. See *Wisconsin Shares Child Care Manual*, §3.8.6. Thus use of child care without being in an approved activity after November 3, 2013 would generate an overpayment. That would include non participation in assigned W2 activities. *Id.*, §2.1.5.1.

Petitioner has a W2 Employability Plan that began on December 2, 2013 that required that Petitioner perform 30 hours per week of job search. She was not initially given credit for that job search, apparently because of missing internet search verification, but subsequently she was given credit back to January 15, 2014, hence the reduction in the amount of the overissuance. Beyond that, even if not excluded as hearsay, the case notes from the W2 agency are rather cursory. The notes refer to missing job search records from December 16, 2013 to January 15, 2014 and from January 16, 2014 to February 15, 2014. It is not clear what the story was with respect to December 2 through December 15, 2013 job search records. There is no way of knowing what records the W2 agency reviewed that led to the reversal of the sanctioned hours or if the correct period of time was corrected. On January 21, 2014 a full W2 benefit of \$653.00 was retroactively issued to Petitioner for the period from November 16 through December 15, 2013. It is not clear why, though I suspect that, as an ongoing W2 participant who was unemployed, Petitioner was entitled to the full benefit upon verification of eligibility for the payment. See *Wisconsin Works Manual*, §10.2.3 and §10.2.6; *Exhibit # C-6, pages 1-8*. But if that is the case and if Petitioner’s job search logs for December 2 through December 15 were problematic (as suggested by a 12/20/13 case note) why was a full benefit issued? Additionally, the case notes do not indicate when the W2 agency came into possession of that verification. As an observation here - I note that the child care agency does not know which of four W2 regions Petitioner was assigned to; thus there is no consideration given in the overpayment analysis as to the performance of a particular region vis a vis the other regions or consideration of the institutional knowledge a worker gains over time as to the operational reliability of a provider.

Again, the reason for the hearsay rule is to ensure reliability. I am not confident that the rather cursory and sometimes cryptic case notes of the W2 agency are reliable enough to support findings of fact. I am not, therefore, upholding the overpayment that is based on W2 case notes.

Nonetheless, it is clear that Petitioner took her children to child care after October 28, 2013 and there is no proof of any approved activity until December 2, 2013. Thus I am sustaining that portion of the overpayment that occurred in November 2013.

CONCLUSIONS OF LAW

1. That the evidence offered by the agency is sufficient to demonstrate by a preponderance of the evidence that Petitioner was overissued child care benefits for November 2013.
2. That there is insufficient evidence to support an overpayment of Shares benefits to Petitioner based on W 2 program sanctions during the time period at issue in this case.

THEREFORE, it is

ORDERED

That this matter is remanded to the agency with instructions to reverse that portion of the overpayment involved here that is attributable to W2 program sanctions within 10 days of the date of this decision.

In all other respects, this appeal is 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 Milwaukee,
Wisconsin, this 15th day of August, 2014

\sDavid D. Fleming
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, 2014.

Milwaukee Early Care Administration - MECA
Public Assistance Collection Unit
Child Care Fraud
Attorney Patricia DeLessio
Attorney Joseph McCleer