DHA-15 (R10/97)

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

DECISION

WWW/157576

PRELIMINARY RECITALS

Pursuant to Wis. Stat., §49.152(1), petitioner filed a request for a Wisconsin Works (W-2) fact finding review with UMOS, a W-2 agency, on April 24, 2014. A fact finding review was held and a fact finding decision was issued on approximately May 8, 2014 (the decision is not dated).

Petitioner timely appealed to the department from the fact finding decision on May 10, 2014. See Wis. Stat. §49.152(2)(b), (c). The fact finding file was received by the Division on June 5, 2014. Petitioner filed a letter dated June 10, 2014 detailing her position; it was received on June 17, 2014.

The issue for determination is whether petitioner was overpaid W-2 benefits due to agency error.

PARTIES IN INTEREST:
Petitioner:

[redacted]

Wisconsin Department of Children and Families
201 East Washington Avenue, Second Floor
Madison WI 53703-2866
By: Laurie Moss, FEP
UMOS
2701 S. Chase Avenue
Milwaukee, WI 53214

FACT FINDER: Thomas Prete

ADMINISTRATIVE LAW JUDGE:
Brian C. Schneider
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES #[redacted]) is a resident of Milwaukee County.
2. In 2013 petitioner was enrolled in W-2 in a Community Service Job (CSJ). She thus was eligible to receive monthly W-2 payments.

3. On May 6, 2013, petitioner obtained employment. She reported it and then verified it on May 16, 2013.

4. The W-2 worker did not get the report. She thus did not end petitioner's CSJ placement until May 29, 2013. Petitioner was issued a W-2 payment for the period up to May 29, 2013.

5. By a notice dated April 22, 2014, the agency informed petitioner that she was overpaid $511 in W-2 for the period May 6 through June 30, 2013, claim no. [redacted]. Petitioner sought a fact finding, and while it was pending the agency determined that the claim should have begun as of May 16, 2013, the start of the next reporting period after the job was obtained. Accordingly the claim was reduced to $294, the amount of the W-2 payment for the period May 16 to May 29, 2013. The fact finder upheld that amount, and petitioner filed for this review.

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 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 file and decision.

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. RECOVERY OF THE OVERPAYMENT

Under state law a W-2 agency must recover any overpayment from a recipient. Wis. Admin. Code, §DCF 101.23(2). The recovery must occur even if the overpayment was caused by agency error. §DCF 101.23(1)(g); W-2 Manual, §10.3.1.

To receive a W-2 payment a recipient who is not incapacitated in some way must be in a CSJ. However, if a person obtains employment of at least 30 hours per week the CSJ ends and the person is placed in case management only with no monthly W-2 payment. Manual, §7.3.1. In this case petitioner began employment of at least 30 hours per week on May 6, 2013. She reported and verified the employment, but her W-2 worker missed the report for some reason. As a result the agency determined that petitioner should have been removed from her CSJ position beginning May 16, 2013, which is the beginning of the monthly reporting cycle for W-2. Thus the payment petitioner received for the period May 16 through May 29 was an overpayment that she should not have received.

I note that the agency initially sought recovery of the overpayment beginning May 6, but after petitioner filed for the fact finding the agency determined that the overpayment should have started May 16 at the beginning of the next reporting period, so petitioner did have a partial positive result of her appeal. Beyond that result, however, I can see no basis for overruling the fact finder's determination. Petitioner clearly should not have received a W-2 payment for the period beginning May 16, 2013, and thus even though petitioner did nothing wrong and the error was by the agency, the overpayment still must be recovered. Petitioner argues that she cannot afford to repay the amount, but another way to look at it is as an interest-free loan that can be repaid in small monthly amounts.

CONCLUSIONS OF LAW

The agency correctly determined that petitioner was overpaid W-2 totaling $294 for the W-2 reporting period after she started employment of more than 30 hours per week in May, 2013.

NOW, THEREFORE, it is **ORDERED**

That the petition for review herein be and the same is hereby dismissed.

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 no more than 30 days after the date of this hearing decision. 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, this20th day of
June, 2014

\sBrian C. Schneider
Administrative Law Judge
Division of Hearings and Appeals

State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: http://dha.state.wi.us

The preceding decision was sent to the following parties on June 20, 2014.

Wisconsin Works (W-2)