DIVISION OF HEARINGS & APPEALS

In the Matter of:

Children's Fantasy Child Care & Preschool Academy

PROPOSED ORDER & DECISION

DHA Case No. ML-10-0047

PRELIMINARY RECITALS

The petitioning group child care facility, by Angelia Jamerson, a group child care licensee, filed an appeal on January 25, 2010, under Wis. Stat. §48.72, Wis. Stat. § 227.42, et. seq., and Wis. Admin. Code §DCF 251.10(a) with the Division of Hearings & Appeals contesting the decision of the Wisconsin Department of Children and Families on January 20, 2010, to revoke the petitioner's group child care license, as set forth in a Notice of Revocation of Group Child Care License of that date. A hearing is currently pending and set for June 8, 2010.

Prior to the hearing, a written Motion to Dismiss the action was filed by the Department of Children and Families (DCF) (respondent) on May 18, 2010, requesting that the Division of Hearings & Appeals dismiss the petitioner's appeal contesting the Department's revocation action. The motion by the Department asserted that the instant appeal should be dismissed by the Division of Hearings & Appeals because the petitioner is barred from holding a group child care license due to a past conviction under Wis. Stat. § 48.685. The petitioner's attorney immediately filed pleadings in Opposition to Motion to Dismiss on May 19, 2010, and the motion is accordingly ripe for review.

Petitioner:

Children's Fantasy Child Care & Preschool Academy
c/o Angelia Jamerson
2919 West Fond Du Lac Avenue
Milwaukee, WI 53210

Represented By:

Legal Action of Wisconsin, Inc.
By: Jill Kastner, Attorney
230 W. Wells Street, Room 800
Milwaukee, WI 53203

Respondent:

Wisconsin Department of Children and Families
By: Nicole Bjork, Attorney
201 E. Washington Avenue
Room 209G
Madison, WI 53703

Administrative Law Judge:

Kenneth D. Duren, Attorney
Division of Hearings & Appeals

FINDINGS OF FACT

1. The petitioner is a group child care center doing business in Milwaukee, Wisconsin under grant of license by the Wisconsin Department of Children and Families to Angelia Jamerson, licensee and operator.

2. On January 20, 2010, the Department of Children and Families issued a Notice of Revocation of Group Child Care License (hereafter, "NOR") to the petitioner/licensee, informing her that her group child care license was revoked for two grounds enumerated therein. See, Motion to Dismiss, attachment A.

3. One of the two grounds for revocation enumerated in the NOR was stated as follows:

> Effective February 1, 2010, pursuant to ss. 48.685(5)(br)5., Wis. Stats., in pertinent parts, the Department may not license or continue the license of a person if the Department knows that the person has been convicted of a serious crime, or, for purposes of licensing a person to operated a day care center under s. 48.65, has committed an offense involving fraudulent activity as a participant in the Wisconsin Works program under ss. 49.141 to 49.161, including as a recipient of a child care subsidy under s. 49.155, or as a recipient of aid to families with dependent children under s. 49.19, medical assistance under subch. IV of ch. 49, food stamps benefits under the food stamp program under 7 USC 2011 to 2036, supplemental security income payments under s. 49.77, payments for the support of children of supplemental security income recipients under s. 49.775, or health care benefits under the Badger Care health care program under s. 49.665; and, no person who has committed these offenses may be permitted to demonstrate that he or she has been rehabilitated.
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> > Angelia Jamerson (aka Zollicoffer), licensee, has committed an offense involving fraudulent activity related to the receipt of public assistance monies and been convicted of a felony in violation of Wisconsin Statutes 49.12 and 49.127. Said offense and conviction will bar Angelia Jamerson from licensure under 48.65, Stats., and serve as additional grounds for the revocation of her license.

See, Motion to Dismiss, attachment A.

4. On January 25, 2010, the petitioner filed an appeal with the Division of Hearings & Appeals contesting the revocation of her group child care license on both grounds enumerated in the NOR.

5. On May 18, 2010, the Department filed a Motion to Dismiss asserting that the instant appeal should be dismissed because the Department is barred by law from licensing or continuing to license the petitioner to operate a group child care center.

6. On May 19, 2010, the petitioner, by Attorney Jill Kastner, filed an Opposition to Motion to

Dismiss.

7. On August 12, 1991, the petitioner, then known as Angelia Leanetta Zollicoffer, was convicted by the Milwaukee County Circuit Court of two felony counts of "PUBLIC ASSISTANCE VIOLATIONS", including a violation of statutes then codified as Wis. Stat. §§ 49.12(1) and (6) and Wis. Stat. § 49.127(2m)(8)(a)2; and she was sentenced to a term of 4 years of probation on each charge, running concurrently. See, Motion to Dismiss, attachment B.

8. On or about March 24, 2009, the petitioner submitted a Background Information Disclosure (BID) form DHS Form No. F-82064) to the Department of Children and Families disclosing that she had had pending charges or convictions against her for "Public Assistance Violations" on "July 2, 1991". See, Motion to Dismiss, attachment C.

DISCUSSION

The Department's designated administrative law judge is empowered by statute to make intermediate rulings during the pendency of a contested case. See, Wis. Stat. § 227.44(6)(a). Unless precluded by law, such intermediate rulings may include disposition of the contested case by stipulation, agreed settlement, consent orders, or default orders. Wis. Stat. § 227.44(5). More importantly here, in the context of a motion to dismiss, administrative law judges have the authority to "dispose of procedural requests or similar matters..."; and to "...Take other action authorized by agency rule consistent with this chapter." Wis. Stat. §§ 227.46(1)(g) & (i). Finally, it is the long-standing policy of the Division of Hearings & Appeals - Work & Family Services Unit, formerly known as the Office of Administrative Hearings, that the Department's administrative law judges do not possess equitable powers. See, Wisconsin Socialist Workers 1976 Campaign Committee v.McCann, 433 F.Supp. 540, 545 (E.D. Wis.1977). This office must limit its review to the matters provided under law as set forth in statutes, federal regulations, and administrative code provisions.

Pursuant to this authority to make intermediate and dispositive rulings, I will rule on the respondent's motion to dismiss the action.

The respondent Department's legal counsel asserts that the Division of Hearings & Appeals must dismiss the petitioner's appeal because the petitioner is barred by past convictions for public assistance fraud from hold a group child care license under a new law effective February 1, 2010. See, Wis. Stat. § 48.685.

Wis. Stat. § 48.685 states, in the parts relevant here, as follows:

> (a) Notwithstanding s. 111.335, and except as provided in par. (ad) and sub. (5), the department may not license, or continue or renew the license of, a person to operate an entity, the department in a county having a population of 500,000 or more, a county department, or an agency contracted with under s. 48.651 (2) may not certify a child care provider under s. 48.651, a county department or a child welfare agency may not license, or renew the license of, a foster home or treatment foster home under s. 48.62, and a school board may not contract with a person under s. 120.13 (14), if the department, county department, contracted agency, child welfare agency, or school board knows or should have known any of the following:

Wis. Stat. § 48.685(4m)(a).

> 1. That the person has been convicted of a serious crime or, if the person is an applicant for issuance or continuation of a license to operate a child care center or for initial certification under s. 48.651 or for renewal of that certification or if the person is proposing to contract with a school board under s. 120.13 (14) or to renew a contract under that subsection, that the person has been convicted of a serious crime or adjudicated delinquent on or after his or her 12th birthday for committing a serious crime or that the person is the subject of a pending criminal charge or delinquency petition alleging that the person has committed a serious crime on or after his or her 12th birthday.

Wis. Stat. § 48.685(4m)(a)1.

> (br) For purposes of licensing a person to operate a day [child] care center under s. 48.65, certifying a day [child] care provider under s. 48.651, or contracting with a person under s. 120.13 (14) to operate a day [child] care center or of permitting a person to be a nonclient resident or caregiver specified in sub. (1) (ag) 1. a. of a day [child] care center or day [child] care provider, no person who has been convicted or adjudicated delinquent on or after his or her 12th birthday for committing any of the following offenses or who is the subject of a pending criminal charge or delinquency petition alleging that the person has committed any of the following offenses on or after his or her 12th birthday may be permitted to demonstrate that he or she has been rehabilitated:
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> ****(Note: subsections 1-4 omitted here.)
>
> 5. An offense involving fraudulent activity as a participant in the Wisconsin Works program under ss. 49.141 to 49.161, including as a recipient of a child care subsidy under s. 49.155, or as a recipient of aid to families with dependent children under s. 49.19, medical assistance under subch. IV of ch. 49, food stamps benefits under the food stamp program under 7 USC 2011 to 2036, supplemental security income payments under s. 49.77, payments for the support of children of supplemental security income recipients under s. 49.775, or health care benefits under the Badger Care health care program under s. 49.665.

Wis. Stat. § 48.685(5)(br)5.

In effect, the Department is asserting that the instant appeal is moot because even if the petitioner prevailed at the hearing on all cited ground or grounds for revocation, this change in law prevents her from prevailing as a matter of law.

The petitioner's legal counsel counters in opposition that the due process clause of the United States Constitution prohibits the deprivation of a licensure interest prior to expiration of that license without proof of misconduct, citing *Baer v. Wauwatosa*, 716 F.2d 117, 1122 (7th Cir. 1983). She asserted that a conviction under Wis. Stat. § 49.12 at the time required only an "intent to secure public assistance", not any intent to make a misrepresentation or knowledge of the need to report, i.e., "…a conviction under Wis. Stat. 49.12 requires no showing of fraud." Attorney Kastner also argued that because the conviction did not require proof of fraud, the conviction alone cannot stand as the basis for a revocation, and rather, there must be a factual determination that the petitioner's conduct twenty years ago was fraud. See, Opposition to Motion

to Dismiss, at pp. 2-3. Finally, Attorney Kastner asserts that Wis. Admin. Code §DHS 250.11(11)(b) provides that a hearing can only be denied (or implicitly, dismissed) if the petitioner consents to an extension of the hearing date, withdraws the request in writing, stipulates to an informal resolution, or abandons the hearing request. See, Opposition to Motion to Dismiss, at p. 3. Under this analysis, Kastner goes so far as to state "Instead, the law is clear that Ms. Jamerson is entitled to have her appeal heard and only she can dismiss the appeal." Ibid, at p. 4.

The Department asserts in the Motion to Dismiss as follows:

> In 1991, WI Stat §49.12(1) states that, "Any person who, with intent to secure public assistance under this chapter, whether for himself or herself or for some other person, willfully makes any false representations may, if the value of the assistance so secured does not exceed $300, be required to forfeit not more than $1,000…" A conviction under this statute requires intent to willfully make false representations. To willfully make a false representation under the chapter related to government payments, such as food stamps, clearly establishes fraudulent activity. Intent to willfully make false representation is required for a conviction under this statute. Therefore, Ms. Jamerson was found to have such intent to willfully make false statements to obtain government assistance.
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> Furthermore, the 1991 WI Stat. §49.12(6) states, "Where a person is originally eligible for assistance and receives any income or assets or both thereafter and fails to notify the officer or agency granting such assistance of the receipt of such assets within 10 days after such receipt and continues to receive aid, such failure to so notify the proper officer or agency of receipt of such assets or income or both shall be considered a ***fraud*** and the penalties in subs. (1) shall apply." Emphasis added. Ms. Jamerson was convicted of a statute related to receiving food stamps and the statute that she was convicted of states that any conviction shall be considered a fraud. If the conviction is a fraud, then Ms. Jamerson was most certainly convicted of a fraudulent activity related to the food stamps program. The statute is clear and cannot be construed any other way.

Motion to Dismiss, at pp. 3-4.

I have researched and reviewed the statutes, in the form prevailing at time of arrest on July 2, 1991, and conviction on August 12, 1991. The relevant sections appear as follows:

> **49.12 Penalties; evidence.**
> **(1)** Any person who, with intent to secure public assistance under this chapter, whether for himself or herself or for some other person, willfully makes any false representations may, if the value of such assistance so secured does not exceed $100, be fined not more than $250 or imprisoned not more than 6 months or both, if the value of such assistance exceeds $100 but does not exceed $500, be fined not more than $500 or imprisoned not more than one year or both, if the value of such assistance exceeds $500, be fined not more than $500 or imprisoned not more than 5 years or both, and if the value of such assistance exceeds $2,500, be punished as prescribed under s. 943.20 (3) (c) .
>
> *****(Note: subsections (2) – (6) irrelevant here are omitted.)*****
>
> **(6)** Where a person is originally eligible for assistance and receives any income or assets

> or both thereafter and fails to notify the officer or agency granting such assistance of the receipt of such assets within 10 days after such receipt and continues to receive aid, such failure to so notify the proper officer or agency of receipt of such assets or income or both shall be considered a fraud and the penalties in sub. (1) shall apply.
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> Wis. Stat. § 49.127(2)
>
> *****(Note: subsection (1) omitted.)*****
>
> **(2)** No person may misstate or conceal facts in a food stamp program application or report of income, assets or household circumstances with intent to secure or continue to receive food stamp program benefits.
>
> And finally, Wis. Stat. § 49.127(2m) stated:
>
> **(2m)** No person may knowingly fail to report changes in income, assets or other facts as required under 7 USC 2015 (c) (1) or regulations issued under that provision.

The conviction under Wis. Stat. § 49.127(2m) is recounted in the Department of Justice Crime Information Bureau report in the Motion to Dismiss, attachment B, to be a conviction for "Wis. Stat. § 49.127(2m)(8)(a)2". However, subsec. (8)(a)2 was a separate subsection of Wis. Stat. § 49.127, i.e., the penalty applicable to the conviction under Wis. Stat. § 49.127(2m).

In any event, the motion to dismiss is not premised upon the conviction under Wis. Stat. § 49.127(2m). Rather, the Department asserts that the conviction of record under Wis. Stat. §§ 49.12(1), (6), does constitute "involving fraudulent activity as a participant" and recipient of Food Stamps benefits and bars the grant or continuation of any child care license, group child care or otherwise, by this petitioner, under Wis. Stat. § 48.685(5)(br)5.

The conviction is a matter of legal and historical record. My review of the law convinces me that this conviction for violation of Wis. Stat. §§ 49.12(1), (6), as the law existed and was enacted in the1989 – 1990 session of the Wisconsin Legislature and prevailing as law in August, 1991, did as a matter of law constitute fraudulent activity by the petitioner as a Food Stamp recipient and participant, and was exactly the type of historical criminal background that the Legislature intended to bar from holding, or continuing to hold, a child care license of any kind when it enacted Wis. Stat. § 48.685(5)(br)5. This conclusion renders a hearing on the revocation on this, or any other, ground, moot as a matter of fact and law. The petitioner is prohibited from holding a group child care license because of this past conviction.

As noted above, administrative law judges are creatures of Wisconsin statutes. We do not possess the powers of a court of equity. Nor do the Division's administrative law judges have the power to reach questions of constitutional law, as asserted by the petitioner here. Administrative agencies only have those powers specifically delegated to them. Wisconsin Socialist Workers 1976 Campaign Committee v. McCann, 433 F. Supp. 540, 545 (D.C. Wis. 1977). It is the longstanding policy of the Division of Hearings & Appeals that there has been no delegation of authority to ALJs to address constitutional issues, and there is no authority for a "taking" or due process defense to a child care license revocation action. Finally, the mere assertion that only the petitioner can dismiss her own appeal under Wis. Admin. Code §DHS 250.11(11)(b) is clearly absurd on its face. Rather, the administrative law judge does possess the authority to make dispositive rulings on a motion to dismiss, as here. See, Wis. Stat. §§ 227.46(1)(g) & (i); see also,

68 Op. Atty. Gen. 30.

Accordingly, the Department's motion to dismiss the instant appeal must be, and is, granted.

CONCLUSIONS OF LAW

That the petition for review herein of the revocation of the petitioner's group child care license is moot as a matter of fact and law because Wis. Stat. § 48.685(5)(br)5 bars the Department of Children and Families from licensing or continuing to license the petitioner.

NOW, THEREFORE, IT IS

ORDERED,

That the petitioner's appeal herein be, and the same hereby is, dismissed, if and only if, this Proposed Order & Decision is adopted in a Final Decision by the Secretary of the Department of Children and Families.

NOTICE TO RECIPIENTS OF THIS DECISION:

This is a Proposed Decision of the Division of Hearings and Appeals. IT IS NOT A FINAL DECISION AND SHOULD NOT BE IMPLEMENTED AS SUCH.

If you wish to comment or object to this Proposed Decision, you may do so in writing. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your comments and objections to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy to the other parties named in the original decision as "PARTIES IN INTEREST."

All comments and objections must be received no later than 15 days after the date of this decision. Following completion of the 15-day comment period, the entire hearing record together with the Proposed Decision and the parties' objections and argument will be referred to the Secretary of the Department of Children and Families for final decision-making. The process relating to Proposed Decision is described in Wis. Stat. § 227.46(2).

Dated this ___th day of May, 2010.

_____

Kenneth D. Duren, Administrative Law Judge
DIVISION OF HEARINGS AND APPEALS
05/21/10/kdd