



STATE OF WISCONSIN

In the Matter of

(petitioner)

DECISION

MED-20/86354

The proposed decision of the hearing examiner dated October 9, 2007 is hereby adopted as the final order of the Department.

REQUEST FOR A REHEARING

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 rehearing. You may also ask for a rehearing 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 as "PARTIES IN INTEREST" in the proposed decision. Your request must explain what mistake the examiner 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 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 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 Wisconsin Department of Health and Family Services. Appeals must be served on the Office of the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 650, P.O. Box 7850, Madison, WI 53707-7850.

The appeal must also be served on the other "PARTIES IN INTEREST" named in the proposed decision. The process for Court appeals is in Wisconsin Statutes §§ 227.52 and 227.53.

Given under my hand at the City of Madison,
Wisconsin, this __15TH__ day of
__November_____, 2007.

/s Karen E. Timberlake
Karen E. Timberlake, Deputy Secretary
Department of Health and Family Services



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

In the Matter of

(petitioner)

PROPOSED
DECISION

MED-20/86354

PRELIMINARY RECITALS

Pursuant to a petition filed August 6, 2007, under Wis. Stat. § 49.45(5) and Wis. Admin. Code § HFS 2.06, to review a decision by the Fond du Lac County Department of Social Services in regards to Medical Assistance overpayments, a hearing was held on September 25, 2007 in Fond du Lac, Wisconsin. At the request of the petitioner, the record was held open for 10 days for the submission of additional information, which has been received.

The issue for determination is whether the petitioner was overpaid MA of \$3,936.35 occurring during the time period of October 1, 2004 through December 31, 2006.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioners:

(petitioner)

Represented By:
Kue Vang, Paralegal
Legal Action of Wisconsin, Inc.
404 N. Main Street, Suite 702
Oshkosh, WI 54901-4957

Wisconsin Department of Health and Family Services
Division of Health Care Financing
1 West Wilson Street
Room 250
P.O. Box 309
Madison, Wisconsin 53707-0309

BY: Kathy Carpenter, SSP
Fond du Lac County Department of Social Services
87 Vincent Street
P.O. Box 1196
Fond du Lac, Wisconsin 54936-1196

ADMINISTRATIVE LAW JUDGE:

Kenneth D. Duren

Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES #: xxxxxxxxxx) is resident of Fond du Lac County, Wisconsin. She was the casehead of an assistance group of 5 persons in the period of October, 2004 through December, 2006, which included her husband (petitioner's spouse), and their three then-minor children.
2. The County established 3 MA overpayment claims against petitioner in the total amount of \$3,936.35 occurring during the time period October 1, 2004, through December 31, 2006, alleging the couple under-reported their actual income.
3. The County sent a computer-generated notice to petitioner entitled "Notice of Repayment Agreement For Medical Assistance Overpayment" dated April 16, 2007; that notice did not identify the months for which the MA benefits were allegedly overpaid.
4. The petitioner appealed that negative action in a predecessor case known as MED-20/84422, filed on April 23, 2007.
5. On July 6, 2007, Administrative Law Judge Sean Maloney issued a final Decision in MED-20/84422 directing the county agency to rescind the overpayment action of April 16, 2007, because the Notice of that date did not include monthly computations as specified in Wis. Admin. Code § HFS 2.04(6)(a)(1), and the action was void due to the notice defect.
6. Subsequently, the county agency again reviewed the petitioner's case and on or about August 2, 2007, again issued a Notice And Repayment Agreement For Medical Assistance Overpayment informing the petitioner and her husband, (petitioner's spouse), that the agency had determined that they had been overpaid MA in the total of \$5,090.79, including \$3,936.35 between October 1, 2004 and December 31, 2006, (and a prior pre-existing overpayment of \$1,154.44 in the period of March – July, 2002 (Claim #5900212455)). The agency also issued a manually generated Medical Assistance Overpayment Worksheet to the petitioner demonstrating the monthly computations of the overpayments arising in the October 1, 2004 – December 31, 2006, time period, and showing their actual monthly household income in this period. See, Exhibit #8.
7. During the period of October, 2004, through November, 2005, the petitioner had reported that the household's gross monthly income from earnings was \$2,440. During the period of December, 2005, through August, 2006, the petitioner had reported that the household's gross monthly income from earnings was \$3,402.12. During the period of November & December, 2006, the petitioner had reported that the household's gross monthly income from earnings was \$2,280 in each month. See, Exhibit #8.
8. The petitioner's household's actual gross monthly income exceeded the income reported during every month in the period of October 1, 2004, through December 31, 2006, except January, 2006, in the amounts listed in the "Actual" column in Exhibit #8, incorporated by reference here. See, Exhibit #8; see also, Exhibit #7.
9. On August 6, 2007, the petitioner again filed an appeal with the Division of Hearings & Appeals again contesting the correctness of the overpayment determination of August 2, 2007.
10. At no point in time during the appeal process or the hearing did the petitioner in any way contest the mathematical correctness of the agency computations of household income or MA eligibility for any months between October 1, 2004 – December 31, 2006, or for any prior pre-existing claim for March – July, 2002.

DISCUSSION

The Department of Health & Family Services may recover any overpayment of medical assistance that occurs because of the following:

1. A misstatement or omission of fact by a person supplying information in an application for benefits under this subchapter or s. 49.665 [BadgerCare].
2. The failure of a Medical Assistance or Badger Care recipient or any other person responsible for giving information on the recipient's behalf to report the receipt of income or assets in an amount that would have affected the recipient's eligibility for benefits.
3. The failure of a Medical Assistance or Badger Care recipient or any other person responsible for giving information on the recipient's behalf to report any change in the recipient's financial or nonfinancial situation or eligibility characteristics that would have affected the recipient's eligibility for benefits or the recipient's cost-sharing requirements.

Wis. Stat. § 49.497(1); see also *Medical Eligibility Handbook*, 6.2.1.1.; BEM/DWS Operations Memo, No: 05-39, (09/29/2005).

The county agency made a prima facie showing of the notice, worksheets and primary documentation of the household's actual income that demonstrated that the overpayment determination appealed, that concerning October, 2004 – December, 2006, was accurately computed. And the petitioner never contested the accuracy of the computations.

Rather, the petitioner asserts a novel legal defense predicated upon a relatively recent change in Wisconsin law regulating the recovery of specified classes of overpayments. See, Wis. Admin. Code § HFS 2, generally (Wis. Admin. Register, eff. June, 2006). The Code now provides for some limitation on recovery of "...payments made under chs. 48 and 49, Stats., or other benefit programs *that provide financial assistance to individuals.*" See, Wis. Admin. Code § HFS 2.03(3)(eff. date: June, 2006) (Italics added for emphasis). The Code states further, as follows:

- (b) The recovery period for incorrectly paid benefits shall be limited to one year prior to the date that the overpayment is discovered.

Wis. Admin. Code § HFS 2.04(b).

Representative Yang asserts that this language means that the county agency here may only recover up to one year prior to the discovery of the overpayment.

I have reviewed Wis. Admin. Code § HFS 2.04(b) very carefully. I can only conclude that the petitioner's argument has no merit.

The title of the Code provision where this section is found is "RECOUPMENT OF BENEFIT OVERPAYMENTS". The initial section fully states the specific benefit classes that this Code provision was authorized to regulate. It states as follows:

HFS 2.01 Authority and purpose. This chapter is promulgated under ss. 48.57(3m)(h) and (3n)(h), 48.62(6), 48.975(4m), 49.847 and 227.11(2)(a), Stats., to establish procedures for the recovery of incorrectly paid benefits. This chapter interprets ss. 16.51(4), 48.57(3m) and (3n), 48.62, 48.975, 49.77, 49.775, 49.847, and 49.85, Stats., and other statutes concerning benefits programs.

Wis. Admin. Code §HFS 2.01.

Wis. Stat. § 16.51(4) controls payments made for juvenile corrections expenses. Wis. Stat. § 48.57(3m) controls Kinship Care cash Benefits. Wis. Stat. § 48.57(3n) controls Long Term Kinship Care cash benefits. Wis. Stat. § 48.62 controls foster care cash payments. Wis. Stat. § 49.975 controls adoption assistance cash payments. Wis. Stat. § 49.77 controls State Supplemental SSI cash benefits. Wis. Stat. § 49.775 controls Caretaker Supplement cash benefits. Wis. Stat. § 49.85 controls the payment of public assistance loans. The remaining section listed above, is Wis. Stat. § 49.847(1), which states as follows:

49.847 Recovery of incorrect payments under certain public assistance programs. (1)

Subject to ss. 49.497(1) and 49.793(1), the department of health and family services, or a county or elected governing body of a federally recognized American Indian tribe or band acting on behalf of the department may recover benefits incorrectly paid under any of the programs administered by the department under this chapter.

See, Wis. Stat. § 49.847(1) (effective July 27, 2005, 2005 Act 25 § 96); see also, Cross Reference contained in foot note to § 49.847 to see also ch. HFS 2 of the Wisconsin Administrative Code; Wis. Admin. Code § HFS 2.01, et. seq. (CR 03-085, Wisconsin Administrative Register, June 2006 No. 606, effective July 1, 2006).

Wis. Stat. § 49.793(1) is the statutory authorization for the recovery of overpayments of Food Stamps in Wisconsin. As quoted in the first paragraph of the DISCUSSION, above, Wis. Stat. § 49.497(1) is the Wisconsin Legislature's specific statutory authorization for the recovery of incorrect Medical Assistance and/or MA-BadgerCare payments. Historically speaking, the Department has been recovering overpayments of FS and MA under these two statutes, and their predecessor statutes, for at least a decade. And in fact, no *recoupment* (as distinguished from cash recovery of overpayments) of overpaid MA is authorized to be taken from ongoing MA benefits, and this has never occurred, in this case or historically at large in Wisconsin.

The recoveries allowable under Wis. Admin. Code § HFS 2.04 are all *recoupments* from benefit programs otherwise administered by the Department of Health & Family Services. That is why the title of the Code provision is **“RECOUPMENT OF BENEFIT OVERPAYMENTS”**. “Recoupment” is the present tense administrative seizure of benefit funds otherwise due to a public assistance recipient to defray an existing overpayment of prior benefits. Recoupment is one means of “recovery” of overpaid assistance. Other means are, for example, voluntary payments, state income tax refund interception, federal income tax refund interception, and lien imposition. I have reviewed the history of the promulgation of Clearinghouse Rule 03-085, which became Wis. Admin. Code §HFS 2.,01, et. seq. The “plain language analysis” proffered by the Secretary of the Department of Health & Family Services at the time of proposal of the rule language that became §HFS 2.,01, et .seq., was that “The Department proposes to create a new chapter of administrative rules, HFS 2, that addresses recoupment of overpayments made to recipients of benefits paid under chs. 48 and 49, Stats.” The Department goes on to assert that the rule was drafted in the wake of a 1999 court case, *Mack v. DHFS*, in which the Wisconsin Court of Appeals found that while the Department had the right to recover erroneous payments of public assistance, that it needed a duly promulgated rule to actually employ a recoupment process, i.e., to validly “take” repayment from ongoing benefits otherwise due to the recipient. The *Mack* case concerned the Department’s efforts to recoup overpaid SSI State Supplement benefits under Wis. Stat. §49.77 directly from ongoing benefits of the same type that Mack was receiving. The Department went on to note that the proposed HFS 2 would also include the “administrative recoupment” of similar such benefit payments like kinship care payments, foster care payments, adoption assistance payments, as authorized under recent changes under 2005 Wisconsin Act 25. Finally, the Department noted in the analysis that the rule was proposed on September 12, 2003, and that subsequently, the Legislature enacted Wis. Stat. § 49.847 that gives legislative authority to recover benefits incorrectly paid under programs administered under Wis. Stats. Chapters 48 & 49 through *administrative recoupment*. See, PROPOSED ORDER OF THE DEPARTMENT OF HEALTH AND FAMILY SERVICES CREATING RULES, Clearinghouse Rule 03-085; (“An order affecting ch. HFS 2, relating to recoupment of program benefit overpayments from program recipients. Effective 7-1-06.”), describing the final Rule published in the Wisconsin Administrative Register, adopted June 30, 2006 (CR-03-085), as can be seen online at <http://nxt.legis.state.wi.us/nxt/gateway.dll?f=templates&fn=default.htm&vid=I:Default&d=register&jd=top>; and see, Wis. Admin. Code § HFS 2.01, et. seq. (Effective June, 2006.) If the person continues to receive the benefit, recoupment may be effectuated. If the person no longer continues to receive the benefit, then the Department is to send a Notice of Intent to Recover requesting the person voluntarily repay the benefit overpaid. See, Wis. Admin. Code § HFS 2.04(4)(a).

Furthermore, Wis. Stat. § 49.847(1) as quoted in full above, specifically provides that the right of recovery outlined in that section is clearly subject to Wis. Stat. § 49.497(1).

The recovery of overpayments of MA and/or BadgerCare is specifically authorized by Wis. Stat. §49.497(1). Such recoveries are not encompassed within the Code provision which allows recoupment of a variety of overpayments,

by administrative means, from the benefits identified in Wis. Admin. Code § HFS 2.01. The notice requirements and rules contained in the Code provision only apply to recoupment recovery actions in the listed benefit programs.

In addition, Wis. Stat. §49.497(1) is a specific statute that applies to a specific subset of recovery, i.e., MA and/or MA-BadgerCare. Conversely, Wis. Admin. Code § HFS 2.01, et. seq. is a catchall law of general application to the recoupment of benefits from listed classes of other cash benefits paid by the Department.

It is well-established in Wisconsin caselaw that when a subject matter is affected by a statute of general application as well as one of specific application, generally, the more specific controls. State v. Amato, 126 Wis. 2d 212, 217 (Ct.App. 1985).

Here, the subject matter is the agency's MA overpayment determination. The more specific law, Wis. Stat. § 49.497, controls the agency's actions in seeking this recovery.

As ALJ Maloney has said in a prior decision:

“One axiom of statutory construction is that statutes are to be given the interpretation which follows from the language used. *State v. Gavigan*, 122 Wis.2d 389 (Ct.App. 1984).” Cited with approval in Circuit Court decision *reviewing Tina M. Gernon v. Wisconsin Department of Social Services* 86-CV-776(1986) – Book XIV, Part 2, Timeliness of Appeal.

“An administrative agency has only those powers which are expressly conferred or can be fairly implied from the statutes under which it operates.” [citation omitted] *Oneida County v. Converse*, 180 Wis.2d 120, 125, 508 N.W.2d 416 (1993). “No proposition of law is better established than that administrative agencies have only such powers as are expressly granted to them or necessarily implied and any power sought to be exercised must be found within the four corners of the statute under which the agency proceeds.” *American Brass Co. v. State Board of Health*, 245 Wis. 440, 448(1944).....

ALJ Maloney citing with approval in DHA Case No. FOS-53/44877 (October 24, 2000).

In addition, the intent of the Legislature is most clearly and completely expressed within the four corners of the first in time MA recovery authorizational statute, Wis. Stat. § 49.497 (Eff. date, July 31, 1981). A duly-promulgated rule, like Wis. Admin. Code § HFS Chapter 2, is a law drafted by an agency to effectuate some allowed statutory purpose, reviewed by a committee of the Legislature, and approved in said process, i.e., “duly promulgated”. And here, the agency's intent in proposing said rule was clearly to provide for administrative recoupment of other DHFS-administered benefit programs (exclusive of MA and FS) in any event. Where a rule is in conflict with a statute, it must yield to the superior form of the statement of the express will of the Legislature, the most specific statute.

The determination that the petitioner was overpaid MA and/or BadgerCare by the county agency at issue here is not subject to the Code requirement that recoupment recovery actions be limited to one year prior to the discovery of the overpayment found at Wis. Admin. Code § HFS 2.04(b). Rather, the only fair implication from this duly promulgated rule is that retroactive time limitation only applies to other benefit program recovery efforts taken by recoupment, not the simple determination that a MA and/or BadgerCare overpayment under Wis. Stat. §49.497 exists, as presented here. This Proposed Decision is issued so that the Secretary may review this important issue and resolve the inherent inconsistency presented by this case vis á vis ALJ Maloney's prior decision in MED-20/84422, that previously concluded that Wis. Admin. Code §HFS Chapter 2.01, et. seq., applies to MA/BC recovery actions. I can only conclude that it does not apply to MA recovery actions under Wis. Stat. §49.497.

MA is never recouped by administrative means. Rather, the MA overpayment statute directs that if an overpaid person does not agree to repay the sum, then the Department may bring a civil action to enforce the liability or seek an order to compel payment of the liability. See, Wis. Stat. § 49.497(1m)(a). This has included the authority to seek state income tax refund intercept actions to recover the public assistance debt. See, Wis. Stat. § 49.85(1); see also, *Medicaid Eligibility Handbook*, App. § 6.2.3.1

The petitioner's argument is misplaced and incorrect. The petitioner has not raised any other credible defense, and did not attack the computation of the overpayment otherwise. Accordingly, I must conclude that the agency has acted correctly, and the determination that the petitioner was overpaid total amount of \$3,936.35 occurring during the time period October 1, 2004 through December 31, 2006, must be sustained. See, Findings of Fact Nos. #8, #7 & #6; and see, Exhibits Nos. 7 & 8.

CONCLUSIONS OF LAW

- 1) Wis. Stat. § 49.497 fully controls and encompasses the Department's affirmative right under law to seek recovery of any and all overpayments of MA and/or MA-BadgerCare falling within the criteria set forth at Wis. Stat. § 49.497(1)(a).
- 2) Wis. Admin. Code § HFS 2.01, et. seq., only applies to the recovery of overpayments of public assistance benefits (excluding Food Stamps and Medical Assistance programs) that are otherwise administered by the Department of Health & Family Services, using administrative recoupment procedures.
- 3) The county agency correctly determined that the petitioner was overissued \$3,936.35 of MA and/or MA BadgerCare occurring during the time period October 1, 2004 through December 31, 2006, due to client error in under-reporting actual household income in this time period.
- 4) The county agency previously determined that the petitioner was overpaid \$1,154 in MA and/or MA BadgerCare benefits, by Notice generated on September 3, 2003; did not appeal that prior determination at any prior time nor in the instant appeal; and jurisdiction is not present to review that overpayment.

NOW, THEREFORE, it is

ORDERED

That the petition for review herein be, and the same hereby is, dismissed, *if and only* if, this Proposed Decision is adopted by the Secretary of the Department of Health & Family Services in a Final Decision, *if* she so adopts it.

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 Health & Family Services for final decision-making.

The process relating to Proposed Decision is described in WI Stat. § 227.46(2).

Given under my hand at the City of Madison,
Wisconsin, this 9TH day of
OCTOBER, 2007.

Kenneth D. Duren
Administrative Law Judge
Division of Hearings and Appeals
1219/KDD