



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Collins Blossoming Baby

PROPOSED
DECISION

ML-10-0017

On December 29, 2009, the petitioner filed a hearing request pursuant to Wis. Stat. § 227.44. The petitioner contests the authorization/payment refusal action reflected in a notice issued by the Wisconsin Department of Children and Families (Department) on December 11, 2009. Following a prehearing conference, a hearing was conducted on May 12, 2010, at Milwaukee, Wisconsin.

There appeared at that time and place, the following persons:

PARTIES IN INTEREST:

Petitioner:

Collins Blossoming Baby, by
Attorney Aaron Foley
McDermott, Foley, Johnson & Wilson, LLP
P. O. Box 11946
Milwaukee, WI 53211-1955

Respondent:

Department of Children and Families, by
Attorney Elaine Richmond
Department of Children and Families (Department)
MECA
1220 West Vliet Street
Milwaukee, WI 53205

Administrative Law Judge:

Joseph A. Nowick
Division of Hearings and Appeals

FINDINGS OF FACT

1. Collins Blossoming Baby is a licensed family child care center located in Milwaukee County, Wisconsin. Johnny Brown is the licensee (hereafter, petitioner) and is married to De Angelo Collins.
2. On December 11, 2009, the Milwaukee County Department of Health and Human Services (Department) issued a letter to the petitioner. That letter declared that the Department had determined that the petitioner had received an overpayment of Wisconsin Shares funding in the amount of \$18,369.36. The letter also stated that the petitioner was suspended from the Wisconsin Shares Program for six months. Both of the actions were based on alleged violations of the provisions of the Wisconsin Shares program. The petitioner then appealed to this Division.

3. On April 14, 2010, the Wisconsin Department of Children and Families (Department) issued a letter to the petitioner. That letter declared that the Department had determined that the petitioner had received an overpayment of Wisconsin Shares funding in the amount of \$36,509.09 for the period from January 4, 2009 through July 11, 2009. The basis for this action was the alleged violations of the Wisconsin Shares Program including inaccurate records, over reporting of hours of care provided and caring for a number of children in excess of licensing standards. During the time period in question, the petitioner received at least \$36,509.09 in Wisconsin Shares payments.
4. The alleged overpayment is based on the Department's calculations on the compilation of the sign-in /sign-out (SISO) sheets and the records the petitioner submitted for payment from the Wisconsin Shares program. See Exhibit #R3. The information from the SISO sheets is entered manually into a computer program designed by Jayme Chapman, and Department auditor, and then compared to the payment records that are already in the computer.
5. The accumulated data from Exhibit #R3 is used to calculate any violations of the Wisconsin Shares provisions in Exhibit #R4. The overpayment that is determined is based on those discrepancies. The total negative adjustments are listed in Exhibit #R5 by week and by child.
6. The over reported hours are based on the hours that the provider reported but the child was not actually in care. The over maximum number of children for the facility was not based on age of the children but just whether the petitioner had more than 8 children at the same time.
7. Most of the children for whom the petitioner was providing care were enrollment-based.
8. On certain days in the overpayment period, the petitioner did receive Shares payments for hours of care that she did not provide due to the submission of inaccurate records. She also exceeded the maximum number of children (eight) allowed by the family child care center licensing code.

DISCUSSION

In an administrative hearing concerning the correctness of the county agency action to determine that the instant provider was overpaid Child Care Benefits, the burden of persuasion (also called the "burden of going forward") that the overpayment occurred rests on the Department. If DCF presents sufficient evidence to establish a *prima facie* case of overpayment, the burden of producing evidence to counter DCF's evidence shifts to petitioner. The petitioner bears the ultimate burden of persuasion, i.e., the burden of proof. See, In re Olsten Health Services, DHA Case No. 98-DHA-065 (DHFS April 6, 2000) (Final Interim Decision by the Secretary). See, Kenneth Culp Davis, Administrative Law Treatise, Vol. 3 § 16.9 (2nd Ed. 1980).

Appeals of actions taken against child care providers are allowed pursuant to the Wisconsin Administrative Code § DCF 201.07. § DCF 201.07(1)(e) provides that a child care provider can appeal, among other actions, collection of overpayments including that determination of the amount of the overpayments. The Department is seeking to recover is now \$36,509.09 in Wisconsin Shares payments.

The basis for sustaining the alleged overpayment in this case is found in part in WI Admin Code Chapters DCF 201 and DCF 250 and provisions in the Child Care Assistance Manual (Manual). In addition, Final Decisions issued by the Department must also be considered. In §227.46(2), Wis. Stats, in some cases, the ALJ presiding over the hearing will prepare a proposed decision in a form that can be adopted as a final decision by the agency that administers the program in question. There is historical precedence that the DHA will follow final decisions by the Secretary of the Department when that process is used.

I turn now to the merits of the overpayment determination based upon the facts presented in the hearing record. The petitioner raised and discussed six arguments in Exhibit #8 as to why the Department's actions are incorrect. First, the petitioner argued that there is no overpayment for over reporting if a child is authorized on an enrollment basis as long as the child attended care for at least one hour.

The petitioner cites Wis. Admin. Code § DCF 201.04(5)(b), which states:

(b) A child care administrative agency shall take all reasonable steps necessary to recoup or recover from a provider any overpayments made for child care services for which the provider was responsible or overpayments caused by administrative error that benefited the provider. A provider shall be responsible for an overpayment if both of the following criteria are satisfied:

1. The overpayment benefited the provider by causing the provider to receive more child care assistance than otherwise would have been paid on the family's behalf under child care assistance program requirements.
2. The overpayment did not benefit the parent by causing the parent to pay less for child care expenses than the family otherwise would have been required to pay under child care assistance program requirements.

She also cites a portion of the Manual, Chapter 2, § 2.3.2:

2.3.2 Provider Overpayments

Agencies shall take all reasonable steps necessary to recoup or recover, from the provider, any overpayments made for child care services.

Recover an overpayment from a provider when they have received payment for care they did not provide or when operating outside of regulation:

1. The provider recorded incorrect hours of attendance which caused an overpayment. This applies to both enrollment and attendance based authorizations.

The petitioner argues that she did not receive more child care assistance than otherwise would have been paid on the family's behalf under child care assistance program requirements. Nor did she receive payment for care they did not provide or when operating outside of regulation

The petitioner did not include all of the pertinent language from the Manual, Chapter 2, § 2.3.2:

2.3.2 Provider Overpayments

Agencies shall take all reasonable steps necessary to recoup or recover, from the provider, any overpayments made for child care services.

Recover an overpayment from a provider when they have received payment for care they did not provide or when operating outside of regulation:

1. The provider recorded incorrect hours of attendance which caused an overpayment. This applies to both enrollment and attendance based authorizations.
2. Generally when the worker entered incorrect authorization or provider information or failed to act on reported information resulting in an authorization related overpayment.
3. The provider did not report to the local agency when a child stopped attending day care.

4. The provider was not properly regulated during the hours for which attendance was paid (e.g. license was suspended, had more children in care than the regulation allowed, care occurred at a location other than the authorized location, etc.).

Manual, Chapter 2, § 2.3.2, (Effective date, October 29, 2008)

The petitioner was in fact operating contrary to regulation. A provider must maintain records that show each child's specific arrival and departure times:

- (b) The licensee shall maintain a *current, accurate written record of the daily attendance* on a form prescribed by the department that includes the actual time of arrival and departure for each child for the length of time the child is enrolled in the program. (Emphasis added)

See WI Admin Code §DCF 250.04(6)(b). There is no qualifier in this code provision stating that it does not apply to enrollment based children.

Further, § 2.3.2 also makes it clear that it makes no difference if the incorrect hours of attendance were for a attendance-based or an enrollment-based child. If the requirement of accurate attendance only applied to attendance-based children, the Department could have just as well asked the provider in the reporting form to respond to the following yes/no question: Did the child attend your center at least one hour in the reporting week? That minimal information is not what the Department is seeking nor what the program envisions. The reason is that there is no other way of knowing whether the parent is actually utilizing the hours for which the provider is being paid. If the hours are less than what had been authorized, the Department may reduce the authorized hours. Thus, without actual attendance for an enrollment based child, the provider may be receiving an overpayment because she is being paid for care that is not being provided and would not have been authorized if the reporting had been accurate. The petitioner may argue that this line of reasoning is too speculative and that there is no proof that there were payments for hours that would not have been authorized. However, I find that this logic is compatible with the provision in the Manual in Chapter 2, § 2.2.3, which states that if a provider has been paid on the basis of questionable attendance reports that later prove to be false, the agency must recover the overpayment.

Finally, the Department has addressed this question in Final Decision ML-09-0256, issued May 3, 2010. In that case, the ALJ did not find the use of approximate times for the attendance of enrollment-based children to be a basis for an overpayment. The Department stated the following on page 4 of the decision:

I disagree with the administrative law judge's statement that such practice is irrelevant in an enrollment-based child care center. As a licensed child care provider, petitioner has an obligation to maintain accurate records of the children in her care. Specifically:

The licensee shall maintain a current, accurate written record of the daily attendance and date of birth of each child for the length of time the child is enrolled in the program. The actual time of arrival and departure for each child shall be recorded if hours of arrival and departure vary among children.

Wis. Admin Code DCF 251.04(6)(b). Maintaining precise records of when children arrive and depart at the center is essential for accountability and child safety. The attendance records in this case fail to provide an accurate written record of care provided at the Center.

The petitioner did not dispute the department's position that the hours reported for some enrollment-based children were incorrect. Thus, I do not accept the petitioner's argument that the related overpayment must be removed.

The petitioner's second argument is that the Department is seeking double overpayments. At the hearing, both parties reviewed portions of the "Negative Adjustment" portion of the Overpayment Analysis binder. The Department did not dispute that there were children who were listed twice in the same week for whom the petitioner received an overpayment. The Department did not object to recalculating the overpayment after removing those duplications for the entire overpayment period.

The petitioner's third argument is that Cora Smith is responsible for the overpayment that was the result of her actions. The Department in its Summary in the front of Exhibit R5 indicates that the petitioner reported that Ms. Smith brought her five children in for care during third shift. However, she actually was doing W-2/work activities during the day time. Because of this, all of the payments made to the petitioner for Ms. Smith's children were overpayments.

However, in reviewing several weeks in Exhibits R3 and R4 and cross referencing them to the Negative Adjustment pages in the back of R5, it is clear that not all of the Shares payments for Ms. Smith's children are being recouped. The total overpayment amount for each of Ms. Smith's children is based on the hours for which the petitioner was paid but the child was not in care plus the hours which each child was in the center when the total number of all children in care exceeded the licensing rules in Wis. Admin Code Chapter DCF 250. As such, I did not receive convincing testimony that the hours used by the Department to calculate the actual hours of the overpayment were incorrect. Thus, I will not remove this portion of the overpayment.

The petitioner's fourth argument is the Center was complicit in the "fraudulent activity" committed by Jovana Hunt. Ms. Hunt submitted false "Employment Verification of Earnings" form to the county agency that indicated she was employed by "Collins Enterprises". See Exhibit #R5. As discussed above, in an administrative hearing, the agency has the burden of proof to establish that a particular action taken was correct given the facts of the case. If the agency meets its burden, the petitioner must then rebut the agency's case and establish facts sufficient to overcome the evidence of correct action.

The department bases its determination that the petitioner knew of Ms. Hunt's deception because the name on the form is Collins Enterprises, the address listed is the address of the center, and the employer signature is by a "De Angelo Collins". I do not find that that the Department has met its burden of proof based on that amount of evidence. Even if I did, it is clear based on his driver's license in Exhibit #P3 that Mr. Collins did not actually sign the form as his signature is clearly different. Thus, even if I found that the Department actually met its burden, the petitioner has successfully rebutted it. I note that the petitioner argued that the entire amount for the over reported hours be removed and did not include the amount identified as a violation of the maximum overpayment. That is correct as that amount is part of the issue raised in the petitioner's sixth argument.

The petitioner's fifth argument is that the Department is wrong to seek recoupment of the Wisconsin Shares payments made for the care of three children, JA, JO, and JP. The petitioner maintains that all necessary records were submitted for these children. The records were submitted at the hearing (Exhibits P4 and P5). Mr. Chapman, who is a Department auditor, testified that theoretically the overpayment could be reduced if the Department accepted the records and used the information therein. Since I was not provided with the exact reasons why that information should not be utilized, I will order the Department to review the documents and determine whether it will adjust the overpayments for the three children in question and if so, the amount.

The petitioner's sixth and final argument is that any overpayment based on overcapacity violations must be withdrawn because the center provided care in good faith that they were following the rules of the program. Preliminarily, in response to my question, Mr. Chapman testified that the overcapacity violations were based on whether the center had more than 8 children, which is the maximum under the license and Chapter 250 of the Wisconsin Administrative Code. Later, he testified that there was the potential that the violations of staff-child ratio requirements could be part of the overcapacity calculations. However, based on the entire answer that the Department did not deal with the number of staff at the center at a particular time, the overpayments were based only on the times when the center had more than 8 children.

Mr. Chapman also testified that when there was an overcapacity violation, every child that was present was considered an overpayment. This was addressed in Final Decision ML-09-0503, issued by the Department on April 26, 2010:

HFCCC was licensed to provide and consequently receive reimbursement for no more than eight children at any one time by the terms and condition of its license to operate. (Ex. R-2) During the time period involved here HFCCC on various days and during various hours had nine to thirteen children under its care. (Ex. R-13) Because HFCCC was authorized to be paid for no more than eight children, any number of children in excess of eight for which payment was received is a benefit and constitutes an overpayment. Notwithstanding the lack of a rule delineating what specific actions constitute an overpayment, DCF can enforce the explicit written parameters of the license it issues to a child care provider.

I reject the discussion and analysis in the proposed decision that determines that the Department (or taxpayers) should pay for the care of eight of the children in care at the center during times when the center was operating well above its license capacity. Operating above capacity creates quality of care and safety issues for all of the children at the center. The center was not lawfully providing care for *any* child when it operated outside the scope of its license and therefore it is not entitled to be paid for any of the care.

Because *none* of the children in the center received care consistent with licensing requirements, the center should not have submitted payment for that care. The Department is acting within its authority to recoup the overpayment for times when the center had more than the licensed number of children in care.

This decision is consistent with previous decisions issued by the Division of Hearings and Appeals. *See e.g.*, ML-08-0321; ML-09-0032. I see no need to depart from this line of reasoning and decision-making here.

Every licensed child care center in Wisconsin is given a copy of the pertinent administrative rules. When they apply for or renew a license, the Department asks the petitioner to sign a form that affirms that they know the applicable rules. (See Exhibit #R1.) Wis. Admin Code § DCF 250.05(4)(b) states that the maximum number of children that one provider may care for is specified in Table 250.05. That table is as follows:

Table DCF 250.05 Maximum Number of Children in Family Child Care per Provider			
Children Under 2 Years of Age	Children 2 Years of Age and Older	Maximum Number of Additional School-age Children In Care For Fewer Than 3 Hours a Day	Maximum Number of Children
0	8	0	8
1	7	0	8
2	5	1	8
3	2	3	8
4	0	2	6

The table is very straight forward. The petitioner testified that she was told something different by her licensor. I find that testimony to be self-serving and not persuasive. But even if true, I cannot ignore such clearly stated rules. Her argument is a matter of equity. Administrative Law Judges of the Division of Hearings & Appeals do not possess the powers of a court of equity. An ALJ does not possess any equitable powers but must apply the law as it is written. (See, *Final Decision*, OAH Case No. A-40/44630, [by Timothy F. Cullen, Secretary, DHSS] (Office of Administrative Hearings, n/k/a, Division of Hearings & Appeals- Work & Family Services Unit December 30, 1987)(DHSS); "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.2nd 120, 125, 508 N.W.2d 416 (1993).

I note that whether there is reasonable suspicion of violation of the Wisconsin Shares program was not an issue at this hearing but will be dealt with in case #ML-10-0121.

CONCLUSIONS OF LAW

The petitioner received an overpayment of Wisconsin Shares funds, although at a lower amount than alleged by the Department.

NOW, THEREFORE, it is ORDERED

That the petition be remanded to the Department to recalculate the overpayment by doing the following: Remove the duplicate overpayments for each child where they exist during the entire overpayment period; Remove the amount of the overpayment that is based on the over reported hours for the four children of Ms. Hunt; review documents P3 and P4 and determine whether it will adjust the overpayments for the three children in question; and send the petitioner a new notice that represents the new determination of overpayment within 14 days of the date of the final decision. In all other respects, the petition for review is hereby dismissed.

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).

Given under my hand at the City of
Madison, Wisconsin, this _____ day
of _____, 2010.

Joseph A. Nowick
Administrative Law Judge
Division of Hearings and Appeals