

## DIVISION OF HEARINGS & APPEALS

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In the Matter of:

Peanuts Family Childcare and Learning Center

**ORDER**  
DHA Case No. ML-09-0313

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### PRELIMINARY RECITALS

The petitioning family child care facility, by Caprice Williams, a family child care licensee, filed an appeal on September 25, 2009, under Wis. Admin. Code §DCF 201.07(1)(e) with the Division of Hearings & Appeals contesting the decision of the Wisconsin Department of Children and Families on September 18, 2009, to refuse to pay the child care provider, as set forth in a Letter Notice of that date. A hearing was set for January 8, 2010.

Prior to the hearing, a written motion was filed on December 23, 2009, by the Department of Children and Families (DCF) requesting that the Division of Hearings & Appeals dismiss the petitioner's appeal contesting the Department's action to refuse to pay Wisconsin Shares payments to the petitioning child care provider. The motion by the Department asserted that jurisdiction is not present for the Division of Hearings & Appeals because review is precluded by operation of law.

The hearing set for January 8, 2010, was adjourned and the petitioner was given until February 5, 2010, to file a response in opposition to the Department's motion to dismiss. On February 5, 2010, licensee Caprice Williams did so.

Petitioner:

Peanuts Family Childcare and Learning  
Center  
c/o Caprice Williams  
3427 N. 17th Street  
Milwaukee, WI 53206

Respondent:

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

Administrative Law Judge:

Kenneth D. Duren, Attorney  
Division of Hearings & Appeals

## 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). 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. Stats. §§ 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 Department's legal counsel asserts that the Division of Hearings & Appeals does not possess jurisdiction to review the instant appeal under the doctrines of "issue preclusion" or "claim preclusion". The Department asserts that the petitioner had a prior appeal heard before the Division, and in fact by this administrative law judge, and the adverse decision in that prior child care revocation action decided the same issue between the same parties with a final judgment on the merits.

In short, the petitioner responds that the use of the doctrines of issue or claim preclusion to bar her instant hearing request is unfair because she tried to do the right thing when the Department, by its agents, initially found that she was overpaid Wisconsin Shares funds due to inaccurate reporting of child attendance. That is, she reached an agreement to repay the overpayment in full.

### *Background*

The petitioner appealed the original overpayment determination in a prior case, DHA Case No. ML-09-0053, contesting the overpayment. Subsequently, she reached an agreement with the county agency in May, 2009, and conceded that she had been overpaid the entire overpayment alleged of \$44,863.85, for the period of December 2, 2007 – June 14, 2008. She agreed to repay this sum and to accept a county agency imposed suspension of further child care authorizations for six months. As a result, ML-09-0053 was dismissed on June 9, 2009, as voluntarily withdrawn by the child care provider, without reaching the merits of the overpayment determination at a hearing.

However, almost concurrent with the overpayment appeal, the Department had also acted on March 13, 2009, to revoke the petitioner's family child care license, and she also appealed to contest that *separate* action on March 25, 2009, *in a second administrative appeal* in DHA Case No. ML-09-0079. Subsequently, a final Decision, after a hearing, was issued in ML-09-0079 on October 23, 2009. I also presided over this second appeal as the assigned administrative law judge. The final Decision in ML-09-0079 fully sustained the Department's action of March 13, 2009, to revoke the petitioner's child care license. The Decision stated the following:

Based on the evidence in this record, I must find that the Department has met its burden of proof demonstrating that it is more likely than not the petitioner violated statutes and rules because she did not accurately report attendance and claim payments at the very minimum.

No more is required to sustain the license revocation. See, Wis. Stat. § 48.715(4)(b); and see, Wis. Admin. Code §DCF 250.11(8)(a)7. In addition, I find that the Department has sufficiently demonstrated that the petitioner lacks the insight and acumen in child care business operations and the need for accurate attendance reporting to show that the petitioner is not qualified at this time to be licensed to operate a family child care center. I am persuaded that the Department correctly revoked this license based upon its determination that the petitioner's lack of judgment, insight, and rational planning render her not fit and qualified to provide a safe and secure environment for minors placed in her care. Persons licensed to operate a family child care center must be responsible, mature individuals who are fit and qualified. See Wis. Admin. Code §DCF 250.11(2)(c). I must conclude that the petitioner was unable to rebut the Department's case by showing that she is such a person at this time on the second ground for revocation either.

The revocation of the petitioner's family child care license is sustained on both state grounds. See, Exhibit R-1.

*Peanuts Family Childcare and Learning Center*, DHA Case No. ML-09-0079 (Wis. Div. Hearings Appeals October 23, 2009)(DCF), at p. 6.

One month prior to the hearing and decision in DHA Case No. ML-09-0079, on September 18, 2009, the Department took a third action against this provider and refused to pay Wisconsin Shares funds to the petitioning child care provider by Letter Notice dated, asserting that the Department had "reasonable suspicion" that she had violated provisions of the Wisconsin Shares Program. The petitioner filed a *third* appeal contesting the refusal to pay in the instant action, DHA Case No. ML-09-0313. It was filed on September 25, 2009.

Wis. Stat. § 49.155(7) provides that the Department "...may refuse to pay a child care provider for child care provided under this section if..." the Department "...reasonably suspects that the person has violated any provision under the program under this section or any rule promulgated under this section." See, Wis. Stat. §49.155(7)(a)4; (Effective date, July 1, 2009); and see, Department's Motion to Dismiss, Attachment C.

#### *Preclusion doctrines*

Claim preclusion (formerly known as *res judicata*) requires a final judgment in a prior proceeding between the same parties as to all matters which were litigated or might have been litigated. The parties must be the same, the causes of action the same, and there must be a judgment on the merits. If both suits arise from the same transaction, incident or factual situation, claim preclusion generally bars the second suit. *Northern States Power Co. v. Bugher*, 189 Wis.2d 541, 550-554, 525 N.W.2d 723 (1995).

As this court recently explained, under claim preclusion " ' a final judgment is conclusive in all subsequent actions between the same parties [or their privies] as to all matters which were litigated or which might have been litigated in the former proceedings.'" *Lindas v. Cady*, 183 Wis. 2d 547, 558, 515 N.W. 2d 458, 463 (1994) (quoting *DePratt v. West Bend Mutual Ins.Co.*, 113 Wis. 2d 306, 310, 334 N.W.2d 883, 885 (1983). Further, claim preclusion is "designed to draw a line between the meritorious claim on the one hand and the vexatious, repetitious and needless claim on the other hand." *Purter v. Heckler*, 771 F.2d 682, 689-90(3<sup>rd</sup> Cir. 1985).

*Northern States Power Co. v. Bugher*, 189 Wis.2d 541, at 550, 525 N.W.2d 723 (1995).

Issue preclusion (formerly known as collateral estoppel) requires that the issue of law or fact to be precluded to have been actually litigated and decided in a prior action. *Northern States Power Co. v. Bugher*, 189 Wis.2d 541, 550-551, 525 N.W.2d 723 (1995).

Issue preclusion refers to the effect of a judgment in foreclosing relitigation in a subsequent action of an issue of law or fact that has been actually litigated and decided in a prior action.

*Id.* At 689 n.5. Unlike claim preclusion, an identity of the parties is not required in issue preclusion. Issue preclusion is a narrower doctrine than claim preclusion and requires courts to conduct a “fundamental fairness” analysis before applying the doctrine.

*Northern States Power Co. v. Bugher*, 189 Wis.2d 541, at 550-551, 525 N.W.2d 723 (1995).

The doctrine of claim preclusion does not apply here. The petitioner could not have litigated the “refusal to pay” cause of action in that prior hearing. The revocation action and appeal occurred six months prior to the refusal to pay action, even if the hearing date was still pending in the revocation. Neither party ever sought to consolidate the refusal to pay appeal in the revocation hearing. It is a different cause of action, or claim. Issue preclusion does apply however. The primary issue of fact in the instant “refusal to pay” appeal was whether the Department had reasonable suspicion to find that the petitioner violated program rules and regulations. The revocation appeal hearing fully addressed the factual issue and established that she did violate program rules and regulations because she did not report accurate attendance days and hours. In fact, the petitioner admitted this was so in the hearing in ML-09-0079, and again in her Response in Opposition to Motion Dismiss Letter of February 5, 2010.

More than a reasonable suspicion that program rules were violated exists. The prior Decision affirms that based on the preponderance of the hearing evidence in the prior hearing Wisconsin Shares program violations *occurred*. That factual underlying issue is dispositive here, and fatal to the petitioner’s articulated appeal and argument. No more is required under law for the Department to choose to refuse to pay Wisconsin Shares to the provider under Wis. Stat. § 49.155(7)(a)4. The issue of whether she violated program rules and regulations has been decided, and she is precluded from a repetitive review of that series of transactions in another administrative hearing. As such, there is no remaining material issue of fact to be litigated.

Accordingly, the Department's motion to dismiss the appeal must be, and is, granted. The doctrine of issue preclusion bars this claim.

#### **ORDER**

**NOW THEREFORE, IT IS ORDERED**, that petitioner's appeal herein be, and the same hereby is, dismissed for lack of jurisdiction.

#### **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 that 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 twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. 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 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 Office of the Secretary of that Department, either personally or by certified mail. The address of the Department is: 201 East Washington Avenue, 2nd Floor, Madison, Wisconsin, 53703.

The appeal must also be served on the other “PARTIES IN INTEREST” named in this decision. The process for appeals to circuit court is in Wisconsin Statutes §§ 227.52 and 227.53.

Dated this \_\_\_th day of February, 2010.

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Kenneth D. Duren, Administrative Law Judge  
DIVISION OF HEARINGS AND APPEALS  
02/11/10/kdd