



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

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In the Matter of

DECISION

Nicole's Little Angels

ML-09-0373

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The above-named petitioner requested a hearing on October 20, 2009. Prior to conducting a hearing, the Department of Children and Families (DCF), as respondent, submitted a November 18, 2009 Motion to Dismiss to the Division of Hearings and Appeals (DHA) asserting petitioner's appeal was untimely. The petitioner submitted a response to DHA which was received on December 7, 2009.

The issue for determination is whether petitioner's appeal of the October 1, 2009 Revocation of her Family Child Care License was timely.

**PARTIES IN INTEREST:**

*Petitioner:*

Victoria Jones  
Nicole's Little Angels  
1713 North 38<sup>th</sup> Street  
Milwaukee, WI 53208-1817

*Respondent:*

Wisconsin Department of Children and Families

By: Attorney Debra Bursinger  
Office of Legal Counsel  
Department of Children and Families  
201 E. Washington Ave., Room G-209  
Madison, WI 53703

**ADMINISTRATIVE LAW JUDGE:**

Gary M. Wolkstein  
Division of Hearings and Appeals

## FINDINGS OF FACT

1. The Petitioner was licensed to operate Nicole’s Little Angels, a licensed Family Child Care facility located at 1713 N. 38<sup>th</sup> Street, Milwaukee, WI 53208, pursuant to s. 48.715.(4)(b), Wis. Stats. and DCF 250.11(8)(a)7, Wis. Adm. Code.
2. On October 1, 2009, the Department issued a Notice of Revocation of Family Child Care License to petitioner via certified mail and regular U.S. mail stating that the Department had determined that petitioner has committed substantial violations of the Wisconsin Statutes and Administrative Code DCF 250, and therefore is revoking her family child care license . See Exhibit A.
3. On October 2, 2009, the petitioner received the Notice of Revocation of Family Care License, as verified by documentation submitted by the department. See Exhibits A and B.
4. The Notice of Revocation of Family Child Care License clearly informed petitioner that “To appeal this action, you must send a written request for a hearing **within ten (10) days after the date you receive this notice.** The request for a hearing must be sent to the Division of Hearings and Appeals, Department of Administration, 5005 University Avenue, Suite 201, P.O. Box 7875, Madison, Wisconsin 53707-7875, with a copy to this office at the above address.” (emphasis added).
5. The 10<sup>th</sup> day for sending an appeal to the Division of Hearings & Appeals to contest the petitioner’s Notice of Revocation was October 12, 2009, but due to observance of Columbus Day, the appeal was due on October 13, 2009.
6. The petitioner’s appeal was dated October 13, 2009, but was not postmarked until October 19, 2009. Petitioner’s appeal was received at the Division of Hearings & Appeals on October 20, 2009. See Exhibits C and D.

## DISCUSSION

The Wisconsin Administrative Code, Chapter HA 1, governs the procedure and practice for contested cases before the Division of Hearings & Appeals.

**HA 1.01 Application of this chapter. (1) ADOPTION.** This chapter is adopted pursuant to ss. [15.03](#), [227.11\(2\)\(a\)](#) and [227.43](#), Stats. **(2) APPLICATION.** This chapter shall apply in all contested cases proceedings and hearings before the division of hearings and appeals under ch. 227, Stats., except as specifically provided otherwise. . . . Agencies for which the division conducts proceedings, including, but not limited to the departments of natural resources, health and family services, employee trust funds and justice, may have specific administrative code provisions or administrative decisions that govern the conduct of those proceedings. In the event of a conflict between this chapter and an agency administrative code provision or administrative decision, the agency administrative code provision or administrative decision is controlling.

**HA 1.03 Service of documents. . . (2) BY A PARTY.** Materials filed by a party with the division may be served personally or by first class, certified or registered

mail, inter-departmental mail or by facsimile transmission. All correspondence, papers or other materials filed by a party shall be served on the same date by that party on all other parties to the proceeding. Service is complete upon mailing. No affidavit of mailing, certification, or admission of service need be filed with the division. **(3) FILING DATE.** (a) *Materials mailed to the division shall be considered filed with the division on the date of the postmark.* Materials submitted by personal service or by inter-departmental mail shall be considered filed on the date they are received by the division. (emphasis added).

The Wisconsin statutes explain the appeal procedure for an individual who wishes to contest an action taken by the Department of Children and Families. Specifically, Wis. Stat. 48.72 provides as follows:

**48.72 Appeal procedure.** Except as provided in s. [48.715](#) (6) and (7), any person aggrieved by the department's refusal or failure to issue, renew or continue a license or by any action taken by the department under s. [48.715](#) has the right to an administrative hearing provided for contested cases in ch. 227. *To receive an administrative hearing under ch. 227, the aggrieved person shall send to the department a written request for a hearing under s. [227.44](#) within 10 days after the date of the department's refusal or failure to issue, renew or continue a license or the department's action taken under s. [48.715](#).* The department shall hold an administrative hearing under s. [227.44](#) within 30 days after receipt of the request for the administrative hearing unless the aggrieved person consents to an extension of that time period. Judicial review of the department's decision may be had as provided in ch. 227.

Finally, the Wisconsin Administrative Code, Chapter DCF 250, governs actions by the Dept. of Children and Families relating to Family Child Care Centers for children. Specifically, DCF 250.11 provides as follows:

**(6) APPEAL OF DECISION TO DENY OR REVOKE A LICENSE.** (a) Any person aggrieved by the department's decision to deny an initial license or the renewal of a license or to revoke a license may request a hearing on that decision under s. [227.42](#), Stats. The request for a hearing shall be in writing and submitted to the department of administration's division of hearings and appeals. **The request for a hearing shall be sent to the division of hearings and appeals within 10 days after the date of the notice under sub. (9).** A request for a hearing is considered filed upon its receipt by the division of hearings and appeals. A request for a hearing transmitted by facsimile to the division of hearings and appeals shall be considered filed on the date and time imprinted by the division's facsimile machine on the transmission report that accompanies the document. **Note:** A request for a hearing should be submitted to the Division of Hearings and Appeals, P.O. Box 7875, Madison, Wisconsin 53707, or should be delivered to the Division at 5005 University Ave., Room 201, Madison, WI.

(Emphasis added).

The department references Wis. Stat. 48.72 as support for its assertion petitioner's appeal was not timely filed with the Division of Hearings & Appeals as petitioner's appeal was not filed within 10 days of the date petitioner received the Notice of Revocation. As correctly explained

by the department, if the appeal is not timely filed, the Division of Hearings & Appeals does not have jurisdiction to review the merits of the appeal.

The Petitioner sent a response to the Department's Motion to Dismiss which was dated November 27, 2009, but was not received at DHA until December 7, 2009. In her response, Ms. Jones did not contest that her appeal was untimely, but offered two explanations for the late appeal. Petitioner explained that her uncle was hospitalized with a stroke and that she was upset and distracted by his serious illness. Furthermore, petitioner explained that she left the appeal letter with a family member who delayed in mailing the appeal letter to DHA.

I note that the notice alerting petitioner to its right to file an appeal *clearly* stated the appeal must be filed with the Division of Hearings & Appeals and provided the address for that appeal. See Finding of Fact #4 above. There was neither an ambiguous statute to interpret nor administrative code provision to research. The appeal address and timeframe were clearly stated.

I am certain that the petitioner feels that this result is unfair given her explanations for the late appeal. However, administrative law judges do not have the authority to bypass the clearly stated law and policy and base decisions on "fairness." "An administrative agency has only those powers which are expressly conferred or can be fairly implied from the statutes under which it operates." *Oneida County v. Converse*, 180 Wis.2d 120, 125, 508 N.W.2d 416 (1993). "Any reasonable doubt as to the existence of an implied power in an agency should be resolved against the exercise of such authority." *Kimberly-Clark Corp. v. PSC*, 110 Wis.2d 455, 462, 329 N.W.2d 143 (1983). See also *Village of Silver Lake v. Department of Revenue*, 87 Wis. 2d 463 (Ct. of Appeals, 1978).

I acknowledge the harshness of the result, for it denies the petitioner the opportunity for a hearing on the revocation of her family child care license. The cases are clear, however, that the statutory procedures must be strictly followed as seen in *Currier v. Wisconsin Dept. of Revenue*, 709 N.W.2d 520, 527, 288 Wis.2d 693, 693, 2006 WI App 12, 12 (Wis.App. Dec 14, 2005):

"To dismiss an appeal because it comes one day late may seem harsh. However, if statutory time limits to obtain appellate jurisdiction are to be meaningful they must be unbending." *Ryan v. DOR*, 68 Wis.2d 467, 472, 228 N.W.2d 357 (1975) (citation omitted). Strict compliance with the statutes is required. *Brachtl v. Wisconsin Dept. of Revenue*, 48 Wis.2d 184, 179 N.W.2d 921, (Wis. 1970) (holding that timely service is indispensable to trigger judicial review of the Commission's decision)

Based upon all of the above, I do not have jurisdiction to reach the merits of the appeal.

### **CONCLUSIONS OF LAW**

That petitioner's appeal to DHA was untimely pursuant to Wis. Stat. 48.72, HA 1.03(3) and DCF 250.11, Wis. Admin. Code, and therefore no jurisdiction exists to consider the merits of the petitioner's appeal.

**NOW, THEREFORE, it is ORDERED**

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

**REQUEST FOR A REHEARING**

This is a final administrative decision. You may petition for an administrative rehearing by submitting a specific written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. This request must be received by the Division within 20 days of the date of this Order. The process for requesting a rehearing petition is contained in Wisconsin Statutes § 227.49.

**APPEAL TO CIRCUIT 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 a 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, Second Floor, Madison, Wisconsin, 53703. 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, this 26<sup>th</sup> day of  
February, 2010.

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Gary M. Wolkstein  
Administrative Law Judge  
Division of Hearings and Appeals