



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

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In the Matter of

PROPOSED DECISION

**Keys 2 the Future**

ML-09-0429

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PRELIMINARY RECITALS

On November 5, 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 October 2, 2009. Following a prehearing conference, a hearing was scheduled for February 24, 2010, at Milwaukee, Wisconsin. On January 25, 2010, the Department filed a Motion to Dismiss the petitioner's request for a hearing. The petitioner filed a response brief opposing the motion, a supporting affidavit, and a Motion to Enlarge Time on February 10, 2010. The Department then requested an opportunity to file a reply brief and that the prehearing schedule be suspended until a ruling on its motion is issued. The Department's request was granted and the February 24<sup>th</sup> hearing was cancelled. The Department filed reply brief and supporting affidavits on February 22, 2010.

PARTIES IN INTEREST:

Petitioner:

Keys 2 the Future, by

Attorney Sean D. Cooper  
S. D. Cooper Law Offices  
500 West Silver Spring Dr. - Ste. K-200  
Glendale, WI 53217

Respondent:

Department of Children and Families, by

Attorney Jennifer Wakerhauser  
Department of Children and Families  
201 East Washington Avenue, G200  
Madison, Wisconsin, 53703

Administrative Law Judge:

Mark J. Kaiser

Division of Hearings and Appeals

## FINDINGS OF FACT

1. Lakita Wells (the petitioner) is the operator of Keys 2 the Future, a licensed Family Child Care facility. On October 2, 2009, the Department issued a letter to the petitioner. The letter declared that the Department was refusing to make payments under the Wisconsin Shares child care subsidy program from October 3, 2009, forward to the petitioner “based on a reasonable suspicion that [she had] violated provisions of the Wisconsin Shares program.” (exh. “A” attached to the affidavit of Jim Bates)
2. The October 2, 2010 letter informed the petitioner that she had a right to appeal the decision and that if she wished to appeal that she must file a written request within thirty days of the effective date of the decision. The letter further advised the petitioner that she should send the appeal to the Division of Hearings and Appeals, Department of Administration, 5005 University Avenue, Suite 201, P.O. Box 7875, Madison, Wisconsin 53707-7875.
3. The deadline for filing an appeal with the Division of Hearings and Appeals (Division) in this matter was November 3, 2009 (thirty days after October 3, 2009). The petitioner’s appeal is dated and postmarked on November 5, 2009 (exh. “A” attached to the affidavit of Sandi Danowski).

## Discussion

The petitioners request for a hearing to review the Department’s suspension of Wisconsin Shares payments was filed pursuant to Wis. Admin. Code § DCF 201.07. Wis. Admin. Code § DCF 201.07 provides:

DCF 201.07 Provider appeal rights.

(1) A child care provider who contests any of the following actions may request a departmental review:

(a) Refusal to issue new child care authorizations.

(b) Revocation of existing child care authorizations.

(c) Refusal to issue payment to the provider.

(d) Determination of the provider's payment amount.

(e) Collection of an overpayment, including the determination of the amount of the overpayment, the determination of the amount of the overpayment still owed, or a decision under s. 49.85, Stats., to recover the overpayment by means of certification to the Wisconsin department of revenue. The provider may make only one request for appeal of the basis for the overpayment claim. Any subsequent appeals shall be limited to questions of prior payment of the debt that the department or agency is proceeding against or mistaken identity of the debtor.

(2) A request for a departmental review may be made by a child care provider or someone with legal authority to act on their behalf.

(3) A request for a departmental review shall be in writing and received at the address provided on the notice within 30 days from the date printed on the notice of action under sub. (1).

(4) Upon receipt of a timely request for departmental review, the department shall give the child care provider a contested case hearing under ch. 227, Stats.

(5) The department may contract with the division of hearings and appeals to conduct the review.

The Department's letter notifying the petitioner of the suspension of Wisconsin Shares payments (Notice of Suspension) was issued on October 2, 2009. Pursuant to Wis. Admin. Code § DCF 201.07(3), the petitioner's request for a hearing must have been received within thirty days of the Notice of Suspension. As found above, the petitioner's request for a hearing needed to be filed by November 3, 2009, and was not filed until November 5, 2009.<sup>1</sup>

The petitioner's request for hearing was not filed within thirty days of the Department's notice of suspension of payments. The first question that must be decided is what is the significance of the untimely request for hearing. The opinion in *Stern v. State of Wisconsin Department of Workforce Development*, 2006 WI App 193, includes a detailed discussion of the legal implication of an untimely request for an administrative hearing. *Stern* involves an administrative appeal to the WERC. The WERC dismissed the appeal. The statute under which the appeal was filed under was not specified; however, on judicial appeal, the parties agreed that the appeal was under Wis. Stat. § 230.44(1)(a). Pursuant to Wis. Stat. § 230.44(3), the deadline for filing appeals under Wis. Stat. § 230.44(1)(a) is thirty days after the effective date of the action being appealed. After determining that the appeal was filed after the deadline, the court commenced an analysis to decide whether the failure to file the appeal by the statutory time limit deprived the WERC of subject matter jurisdiction or competency to proceed.

For circuit courts, the distinction between subject matter jurisdiction and competency is "that subject matter jurisdiction is plenary and constitutionally-based and is not affected by statutes, whereas statutory requirements may affect a court's competency, depending on the nature of the requirement." *Stern*, at ¶24 With respect to administrative agencies, the court continued:

In contrast, the subject matter jurisdiction of administrative agencies-that is, their authority to hear certain subject matters in general-is conferred and specified by statute. [citation omitted] Nonetheless, the distinction between subject matter jurisdiction and competency with respect to administrative agencies is a meaningful one, and it parallels the counterpart distinction with respect to circuit courts. Statutes such as Wis. Stat. §§ 230.44(1) and 230.45(1), which establish the nature of the matters an administrative agency is authorized to hear, define subject matter jurisdiction, whereas statutory requirements that pertain to the invocation of that jurisdiction in individual cases, such as Wis. Stat. § 230.44(3), may affect an agency's competency to proceed.

*Stern*, at ¶24

In *Stern*, the court looked at the legislative history of Wis. Stat. § 230.44(3) and concluded that the thirty day filing deadline was analogous to a statutory statute of limitations for a circuit court. Because, the time limit was analogous to a statute of limitations, the court held that the failure to file the appeal by the deadline did not deprive the WERC of subject matter jurisdiction, but did deprive it of competency to proceed.

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<sup>1</sup> Pursuant to Wis. Admin. Code § HA 1.03(2), materials filed by mail are considered filed with the Division of Hearings and Appeals on the date the materials are postmarked.

The significance of the determination whether an untimely request for a hearing deprives an administrative agency of subject matter jurisdiction or competency is that if the administrative agency lacks subject matter jurisdiction, the matter must be dismissed. If the administrative agency lacks competency to proceed, a party may waive the lack of competency. The failure of a party to file a request for hearing within a statute of limitations is an affirmative defense. "It is well settled law that the affirmative defense of statute of limitations must be raised in a pleading, or by a motion, or be deemed waived." *Milwaukee Co. v. LIRC*, 113 Wis. 2d, 199, at 206, 335 N.W.2d 412 (Ct. App. 1983). The court in *Stern* ultimately remanded the matter to the circuit court with instructions to remand it to WERC for a determination whether the Department of Workforce Development had waived an objection to the competency of WERC.

Wis. Admin. Code § DCF 201.07 requires a provider that wishes to appeal a Department action to file a written appeal within thirty days of the Department's action. It is appropriate to treat this deadline as a statute of limitations. Accordingly, the petitioner's failure to file the request for a hearing within thirty days of the issuance of the Notice of Suspension does not deprive the Division of subject matter jurisdiction, but does deprive it of competency to proceed unless the Department waives the time limit defense. The Department raised the time limit defense in a motion filed prior to the scheduled hearing in this matter. The Department timely and properly raised the affirmative defense that the petitioner's request for a hearing was not timely. Because the request for a hearing was not timely, the Division does not have competency to proceed and the petitioner's request for hearing must be dismissed.

In its response brief, the petitioner contends her untimely request was based on excusable neglect and moves for an enlargement of time to file her appeal under Wis. Stat. § 801.15(2)(a). The excusable neglect alleged by the petitioner is that she believed the thirty day deadline was thirty business days, not thirty calendar days. The Notice of Suspension clearly states that an appeal must be filed within thirty days. The contention that this statement was construed as meaning thirty business days is not credible. Accordingly, there is no basis to find that the petitioner's failure to file a timely request for hearing is not based on excusable neglect. More importantly, it is generally understood that the Wis. Stat. § 801.15(2)(a) does not give a court the authority to enlarge the time to file a complaint (see for example *Pulchinski v. Strnad*, 88 Wis. 2d 423, 276 N.W.2d 781 (1978)). Therefore even if one assumes that the Division has the authority to issue an order under Wis. Stat. § 801.15(2)(a), it can not do so to extend the time for the petitioner to file a request for a hearing.

Dismissing the petitioner's request for a hearing because it was not timely filed is a harsh result. Wisconsin courts have frequently been presented with situations where the strict interpretation of a filing requirement would direct a harsh result upon one of the litigants. In these cases the courts have consistently come down on the side of enforcement of statutory filing requirements. *e.g., Gomez v. Labor and Industry Review Commission*, 153 Wis. 2d 686, 451 N.W.2d 475 (Wis. Ct. App. 1989). While strict enforcement of statutory filing deadlines may seem unduly harsh, strict construction is appropriate for policy reasons. Strict construction of the plain mandatory language helps "to maintain a simple orderly and uniform way of conducting legal business in our courts. Uniformity, consistency, and compliance with procedural rules are important aspects of the administration of justice." *519 Corp. v. DOT*, 92 Wis. 2d 276, at 288, 284 N.W.2d 643 (1979).

#### Rulings

1. The petitioner's Motion to Enlarge the Time for filing a request for hearing is DENIED.

2. The request for hearing filed on behalf of Lakita Wells was not timely. The Department has not waived the affirmative defense that the request for a hearing was not timely. Accordingly, the Division does have competency to proceed and the request for hearing must be and 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 6<sup>th</sup> day of  
April, 2010.

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Mark J. Kaiser  
Administrative Law Judge  
Division of Hearings and Appeals