



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Daddy Duckies Children Education Center

DECISION ON
MOTION TO DISMISS

ML-09-0489

A petition was filed December 7, 2009, to review a decision by the Department of Children & Families (DCF) submitted a Motion to Dismiss, asserting petitioner's appeal was untimely and therefore the Division of Hearings & Appeals (DHA) did not have jurisdiction to consider the merits of the appeal.

Based upon the above, a timeline was established for the parties to respond to the Motion to Dismiss.

The issue for determination is whether petitioner's appeal of a Notice of Revocation of Family Child Care License is timely.

PARTIES IN INTEREST:

Petitioner:

Adrienne Moncree
Daddy Duckies Children Education Center
3139 North 26th Street
Milwaukee, WI 53206

Respondent:

Department of Children and Families
By: Attorney Nicole Bjork
Office of Legal Counsel
201 East Washington Avenue, 2nd Floor
Madison, WI 53703

Administrative Law Judge:

Kenneth P. Adler
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is the owner of a family child care center located in Milwaukee, Wisconsin.
2. On 11/17/09 the Dept. of Children & Families (DCF) issued a Notice of Revocation of Family Child Care License (Notice). The Notice was issued via certified and regular mail to petitioner's correct address of 3139 North 26th Street, Milwaukee.
3. The 11/17/09 Notice clearly stated as follows:

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 hearing must be sent to the Division of Hearings & Appeals, Department of Administration, 5005 University Avenue, Suite 201, P.O. Box 7875, Madison, Wisconsin 53707-7875, with a copy to this office [Dept. of Children & Families] at the above address.

4. Petitioner did not claim the 11/17/09 Notice send via certified letter and it was returned to DCF on 1/04/10.
5. The 11/17/09 Notice mailed to petitioner via regular mail was not returned to DCF as undeliverable.
6. In order to be considered timely, petitioner's appeal of the 11/17/09 Notice must have been received by the Division of Hearings & Appeals (DHA) on or before 11/27/09.
7. On 12/07/09 DHA received an undated letter from petitioner, postmarked 12/04/09 stating:

Attn: Lucy:

This is an official notice of appeal and a request for a fair hearing according to 227.44 Wis. Stats.
...
* In response to the action to start revocation process on my business.
8. Petitioner's appeal of the 11/17/09 Notice of Revocation of Family Child Care License was not timely filed with DHA.

DISCUSSION

There are no disputed facts in this matter. The Department issued a Notice of Revocation of Family Child Care License (Notice) on November 17, 2009 via both certified and regular mail to petitioner's correct address. Petitioner's appeal of that Notice was not received by DHA until December 7, 2009.

Pursuant to Wis. Admin. Code DCF 250.11 (8) an individual has ten (10) days in which to file an appeal of a license revocation action. Failure to file an appeal within that timeframe deprives the Division of Hearings & Appeals of jurisdiction to hear the appeal and decide the case on the merits.

Petitioner's response to the Motion to Dismiss asserts:

In response to the motion to dismiss case ML-09-0489 the cases are combined per my request made to Mr. Adler. Also, I've corresponded with Ms. Lucy Mucks on several occasions. Ms. Mucks informed me of the receipt of the first and second letter of appeal, in this matter. Lucy requested that I resubmit my letter of appeal. I did that. The letter that you submitted as proof of late submission was the resubmitted letter. Please refer to the first letter of appeal on the matter.

The initial request was on time therefore Administrative Law Judge Kenneth P. Adler does have jurisdiction to consider the merits of my appeal.

It appears petitioner may be confusing correspondence submitted for this revocation action (ML-09-0489) with correspondence submitted with her payment refusal cases currently pending (ML-09-0435, ML-10-0008).

On November 7, 2009 DCF sent a notice of payment refusal to petitioner stating it was suspending all payments to her facility effective November 7, 2009. Petitioner timely appealed that notice on November 12, 2009 and the case was processed by DHA and assigned case number ML-09-0435.

On December 22, 2009 DCF sent another notice of payment refusal, again stating it was suspending all payments to petitioner's center effective November 7, 2009, but including details as to *why* DCF was suspending payments. Petitioner timely appealed that notice on January 11, 2010 and the case was processed by DHA and assigned case number ML-10-0008.

Based upon the fact the actions taken by DCF in both the November 7, 2009 and December 22, 2009 notices were the same, DHA suggested combining the two appeals as ML-09-0435. Therefore, ML-09-0435 addresses both the November 7th and December 22nd letters.

Petitioner's response to the Motion to Dismiss, asserting she had submitted an earlier letter is likely referencing her correspondence related to ML-09-0435. However, DHA does not have any "earlier" correspondence from petitioner regarding ML-09-0489 – the only correspondence DHA received from petitioner was the undated letter postmarked December 4, 2009 and received by DHA on December 7, 2009. Petitioner has submitted no documentation to verify she submitted an earlier request for hearing *on the revocation notice*.

A final potential area of confusion may be the timelines for filing appeals. While clearly stated in all correspondence issued by DCF, the timelines for filing appeals of license revocations and payment refusals are different. The timeline for filing an appeal of a license revocation is ten days. The timeline for filing an appeal of a payment refusal is 30 days. The issue in this appeal is the license revocation action and whether petitioner appealed that action within the ten day timeline.

Regardless of the potential confusion experienced by petitioner, it does not change the fact the appeal request was not received within the ten day timeframe and is therefore untimely. As correctly noted by DCF in its brief, an untimely appeal deprives DHA of jurisdiction. While petitioner may understandably find this result harsh, administrative law judges cannot exercise powers of fairness and must apply the law as written. See, *Wisconsin Socialist Workers 1976 Campaign Committee v. McCann*, 433 F.Supp. 540, 545 (E.D. Wis.1977). There are no exceptions to timely filing hearing requests.

CONCLUSIONS OF LAW

As petitioner's appeal of a license revocation was not timely filed pursuant to directives at Wis. Admin. Code DCF 250.11(8), DHA does not have jurisdiction to hold a Hearing concerning the merits of the revocation action.

NOW, THEREFORE, it is ORDERED

That petitioner's appeal is dismissed.

REQUEST FOR A REHEARING

This is a final 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 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 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 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.

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

Kenneth P. Adler
Administrative Law Judge
Division of Hearings and Appeals