



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

DECISION

Smith, Chalunda

ML-10-0055

On January 29, 2010, 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 November 07, 2009. Prior to conducting a hearing scheduled for April 19, 2010, the Department of Children and Families (DCF), as respondent, submitted a March 11, 2010, 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 March 22, 2010.

The issue for determination is whether petitioner's appeal of the November 9, 2009, suspension of her Wisconsin Shares child care subsidy payments was timely.

PARTIES IN INTEREST:

Petitioner:

Smith, Chalunda, by

Chalunda Smith
4170 North Sherman Boulevard
Milwaukee, WI 53216

Respondent:

Department of Children and Families, by

Attorney Jennifer L. Wakerhauser
Department of Children and Families
Office of Legal Counsel
201 East Washington Avenue, 2nd Floor
Madison, Wisconsin, 53703

Administrative Law Judge:

Diane E. Norman
Division of Hearings and Appeals

FINDINGS OF FACT

1. The petitioner is licensed as a child care provider, located in Milwaukee County, Wisconsin. Some parents of the children in the petitioner's care are eligible for the Wisconsin Shares child care (CC) subsidy due to low income. On November 07, 2009, the Department issued a notice to the petitioner declaring that the Department was refusing to make CC payments to the petitioner effective November 08, 2009.
2. On November 07, 2009, the Department of Children and Families (Department) issued a letter to the petitioner. That letter declared that the Department was refusing to make CC payments from November 07, 2009, forward, "based on a reasonable suspicion that you have violated provisions of the Wisconsin Shares program." The violated provisions are not identified, and no factual allegations are made in the letter. The authorizing statute for the action Wis. Stat. §49.155(7)(a)4.
3. The notice of suspension of child care payments clearly informed petitioner that:

Pursuant to Wisconsin Administrative Code DCF 201.07(1), you have the right to appeal this decision. If you choose to appeal, please include a copy of this letter. You have **thirty (30) days** from the effective date of this decision to send a written request to: 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).

4. The 30th day for sending an appeal to the Division of Hearings and Appeals to contest the petitioner's suspension of Wisconsin Shares child care payments was December 7, 2009.
5. The petitioner's appeal was dated January 28, 2010, but was not received at the Division of Hearings and Appeals until January 29, 2010 by facsimile transmission (fax).

DISCUSSION

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

The appeal procedure for an individual who wishes to contest an action taken by the Department of Children and Families for suspension of Wisconsin Shares child care subsidy payments is found at Wis. Admin. Code, DCF § 201.07(3). This section provides that 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

The appeal in this matter was not timely filed with the Division of Hearings and Appeals as petitioner's appeal was not filed within 30 days from the date printed on the notice of suspension of Wisconsin Shares child care subsidy payments. As correctly explained by the department, if the appeal is not timely filed, the Division of Hearings and 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 received at DHA on March 22, 2010. In her response, Ms. Smith did not contest that her appeal was untimely, but offered an explanation for the late appeal. Petitioner explained that she sent her appeal to the DCF fax number on the notice letter. She didn't carefully read the letter that the appeal must be sent to DHA and not DCF. She said that she didn't realize her mistake until she spoke with someone from DCF and she resent her appeal to DHA after the 30 day appeal time.

I note that the notice alerting petitioner to her right to file an appeal *clearly* stated the appeal must be filed with the Division of Hearings and Appeals and provided the address for that appeal. 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 explanation 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 suspension of her Wisconsin Shares child care subsidy payments. 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. § 227.46 and Wis. Admin. Code, DCF § 201.07(3), and therefore no jurisdiction exists to consider the merits of the petitioner's appeal.

NOW, THEREFORE, it is

ORDERED

That the hearing scheduled for April 19, 2010, is hereby cancelled and that the petition for review herein be and the same is hereby 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 Wis. Stat. § 227.49. A copy of the statutes can be 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 March, 2010.

Diane E. Norman
Administrative Law Judge
Division of Hearings and Appeals