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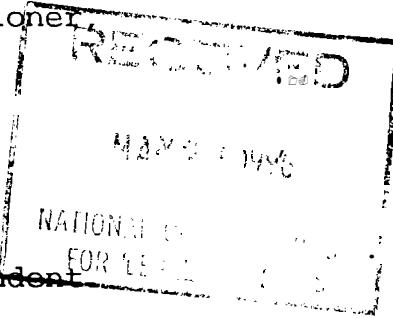
CATHY S. LEVERICH,

Petitioner

v.

DEPARTMENT OF HEALTH AND  
SOCIAL SERVICES FOR THE  
STATE OF WISCONSIN,

Respondent



Case No. 94-CV-784

1017264

BRIEF OF RESPONDENT IN OPPOSITION  
TO PETITION FOR JUDICIAL REVIEW

NATURE OF ACTION

This is an action commenced pursuant to secs. 227.52 and 227.53, Stats., to review an order of the Department of Health and Social Services (hereafter "department"), dated August 16, 1994, denying the request for rehearing of Cathy S. Leverich (hereafter "petitioner") and thus, in effect, affirming the hearing examiner's decision and order of June 29, 1994, which concluded that (1) based upon the cash value of petitioner's life insurance policy, she was ineligible to receive benefits during the period in question and (2) based upon the fact that petitioner was ineligible to receive benefits for the period in question, the county agency correctly seeks to recoup those benefits.

QUESTION INVOLVED

Did the county agency correctly seek to recoup an alleged AFDC overpayment?

## STATEMENT OF FACTS

Pursuant to a petition filed under sec. 49.50(8), Stats., to review a decision by the Winnebago County Department of Social Services to reduce Aid to Families with Dependent Children (AFDC), an administrative hearing was held on May 18, 1994. A hearing set for an earlier date was rescheduled at petitioner's request. The only issue for determination was whether the county agency correctly seeks to recoup an alleged AFDC overpayment.

Following the administrative hearing, the department through its hearing examiner made the following findings of fact in its decision and order of June 29, 1994 (copy attached):

1. The petitioner, whose social security number is 369-78-1641, is a divorced resident of Winnebago County who receives AFDC.

2. The petitioner is the owner of a basic universal life insurance policy through Woodman's Accident and Life Insurance Company.

3. When the petitioner applied for benefits in 1990, she provided a life insurance policy to verify asset information. The policy as provided by the petitioner stated both the cash and surrender values of her life insurance policy were \$0. Exhibit 2

4. Also at the time of application, the petitioner provided verification for an item which was subject to change, namely the cash surrender value of her life insurance policy. Exhibit 6

5. On May 6, 1993 the petitioner's life insurance company issued an annual statement. That statement indicated that as of the date of the letter, the petitioner's life insurance policy had a cash value of \$1,290.16 and policy surrender value of \$1,132.66. Exhibit 3

6. The petitioner and her former spouse entered into a Marital Settlement Agreement prior to the granting of their divorce. Section IV of that settlement specifically states that, for the benefit of their children, the parties are to maintain in full force, and

pay the premiums on all life insurance presently in existence. Exhibit 7

7. On January 21, 1994 the county agency sent an Insurance Inquiry to the petitioner's insurance company seeking information on the net cash surrender value of the petitioner's universal life policy. The inquiry was returned by the insurance company indicating the net cash surrender value of the petitioner's life insurance policy was \$1,319.12. Exhibit 2

8. On March 11, 1994 the county agency sent the petitioner a Notice of AFDC Overpayment. This notice indicated the petitioner had been overpaid benefits from June, 1993 to February, 1994. The reason for the overpayment was the allegation that the petitioner had failed to report the available cash value of her life insurance. Exhibit 5

9. A computerized notice of decision was also generated on March 11, 1994. This notice stated the petitioner's food stamps were increasing based upon the reduction of her AFDC grant. Exhibit 4

Citing appropriate authorities and addressing each of petitioner's contentions, the examiner thereafter reached the following conclusions of law:

1. That, based upon the cash surrender value of the petitioner's life insurance policy, she was ineligible to receive benefits during the period in question.

2. That, based upon the fact the petitioner was ineligible to receive benefits for the period in question, the county agency correctly seeks to recoup those benefits.

For the reasons set forth therein, the department denied petitioner's request for rehearing in its final decision and order of August 16, 1994 (copy attached). The department essentially found that petitioner failed to establish the grounds necessary for granting a rehearing under sec. 227.49, Stats.

Petitioner now seeks judicial review and reversal of this final administrative decision. On November 9, 1994, the court served notice on respective counsel of a briefing schedule

requiring simultaneous service and filing of briefs on December 15, 1994, with reply briefs, if any, to be filed simultaneously on January 5, 1995. This notice further provides that the case will be decided upon the record, briefs filed and oral argument, if the parties wish to make such oral argument. As stated in the cover letter which accompanies the department's brief, the respondent does not desire oral argument and respectfully requests that such argument, if deemed necessary or desirable by the court or by petitioner's attorney, be conducted by telephone conference call as now permitted under sec. 807.13(1), Stats.

#### ARGUMENT

THE COUNTY AGENCY CORRECTLY SEEKS -TO RECOUP AN ALLEGED AFDC OVERPAYMENT.

A. The department's understanding of petitioner's claims.

One of the difficulties in preparing simultaneous briefs is that each party is somewhat required to **guess** what the other party will claim. In the present case, however, petitioner's claims appear to be thoroughly stated in the petition for review and also recited in the department's two administrative decisions.

Although facts will be recited at relevant points throughout the department's argument, a simplified version will be stated now merely for background. During a six-month review of her file on January 21, 1994, petitioner reported that she is the owner of a basic universal life insurance policy with an unknown cash value (Tr. 2). On February 11, 1994, the county agency received verification from the insurance company that the policy had a cash

value of \$1,319.12. At that time the county's economic support specialist called petitioner and explained the asset limit for AFDC and her options regarding the reduction of this asset (Tr. 4-5).

The insurance company representative informed the county worker on February 15, 1994, that the insurer began in May, 1993, to send annual statements to policy holders telling them about the cash value of any particular policy. The insurance representative verified that a statement was sent on May 5, 1993, to petitioner at her correct address and that the statement had not been returned to the insurance company. Apparently the cash surrender value had been building for quite some time (Tr. 3).

When the county worker phoned petitioner, Ms. Leverich indicated that she was going to take out a loan against the policy (Tr. 4-5). Petitioner informed the county that she lost the policy and was unaware that it had a cash value (Tr. 8, 12). On the subject of receipt of the notice, it was established at the hearing that petitioner at no time mentioned any mail problems to her worker. Apparently she received her food stamps and AFDC checks through the mail without any problem (Tr. 16-17).

Petitioner's AFDC overpayment due to excess assets covered a period from June, 1993, to February, 1994, when her assets were reduced to below the \$1,000 asset limit for the program. Recoupment of the overpayment was stopped pending the fair hearing decision.

Presumably petitioner continues to maintain that she fully disclosed this asset and at all times fully cooperated with verifying its existence and amount. She acknowledges that the cash

value of an insurance policy may be considered an asset in determining a family's eligibility for AFDC. Petition for review at 3, para. 14; see also Wis. Admin. Code § HSS 201.27. An otherwise eligible family is eligible to receive AFDC benefits if the value of their countable assets does not exceed \$1,000. Sec. 49.19(4)(bm), Stats.; 45 C.F.R. § 233.20(a)(3)(i)(A). Only available assets are considered in determining a family's eligibility. 45 C.F.R. § 233.20(a)(3)(i)(D).

Generally speaking, petitioner's claim no doubt consists of three challenges. These challenges pertain to equitable estoppel, unavailability of this asset and inadequate notice.

Ms. Leverich correctly states the elements of estoppel in cases involving government action or inaction. In order to establish such a claim, there must be (1) action or non-action which induces (2) reliance by another and (3) detriment to the one who relies. State v. City of Green Bay, 96 Wis. 2d 195, 210, 291 N.W.2d 508 (1980); Deoartment of Revenue v. Moebius Printing co., 89 Wis. 2d 610, 638, 279 N.W.2d 213 (1979). Even if the three elements are met, the court must balance the public interest at stake if the doctrine is applied against the injustice that would result if it is not. State v. City of Green Bay, 96 Wis. 2d at 210; City of Madison v. Lange, 140 Wis. 2d 1, 7, 408 N.W.2d 763 (Ct. App. 1987). Each element of the estoppel claim must be proven by clear and convincing evidence. Bank of Sun Prairie v. Opstein, 86 Wis. 2d 669, 680, 273 N.W.2d 279 (1979). Any failure to prove by clear and convincing evidence the reasonableness of the claimed reliance and any failure to prove that the claimed reliance

resulted in a detriment to the party dealing with the agency invalidates the entire estoppel claim.

Section 49.19(5)(e), Stats., provides that no aid may continue longer than 6 months without reinvestigation, except that the department may provide that in certain cases or groups of cases aid may continue up to 12 months without reinvestigation. Moreover, the county agency may conduct a reinvestigation of any case whenever there is reason to believe circumstances have changed. Petitioner contends that this requires the county agency to review all eligibility factors in an AFDC case at least once every 6 months, also correctly citing Wis. Admin. Code § HSS 201.09(3)(d) (petition for review at 3, **para. 13**). At each previous review, petitioner's family was determined to be eligible to receive AFDC, and petitioner was so informed. She now maintains, however, that she reasonably relied to her detriment on her workers' statements in this regard (petition for review at 8, **para. 37.c.**), specifically claiming that she was not informed that her family might ineligible if the actual cash value of the policy exceeded the amount stated in the policy (petition for review at 5, **para. 25**).

On the issue of availability, she claims that the cash value of the life insurance was not an available asset because she was not aware of it. She also claims that the June 29, 1994, administrative decision

incorrectly found that the life insurance was an available asset because taking out a loan on the cash value would not affect the face value of the policy, even though the loan reduced the value of the policy, e.g. the death benefits, in violation of the divorce agreement,

opening her up to possible contempt charges and possible violation of a court order.

Petition for review at 7-8.

On the notice issue, petitioner asserts that the county first notified her that her family had received an AFDC overpayment on March 11, 1994, by sending her a handwritten overpayment notice. This notice stated that she would be receiving a computer-generated notice with her appeal rights. The computer-generated notice and the repayment agreement never were sent to petitioner. Therefore, claiming that all the necessary information was not included in the notice that was sent, she apparently claims that her April AFDC grant was wrongly recouped. See generally petition for review at 6-8 and specifically paras. 31, 33-34 and 37.d.

B. Petitioner has failed to establish a sound legal and factual basis for her estoppel claim.

As the hearing examiner noted, the controlling federal regulation clearly requires recoupment of an AFDC overpayment regardless of whose error caused the overpayment to occur. 45 C.F.R. § 233.20(a)(13)(i) (1993) as herein material provides:

(13) Recovery of overpayments and correction of underpayments for AFDC. (i) . . . . Overpayment means a financial assistance payment received by or for an assistance unit for the payment month which exceeds the amount for which that unit was eligible. . . .

(A) The State must take all reasonable steps necessary to promptly correct any overpayment . . . .

(B) The State shall recover an overpayment from (1) the assistance unit which was overpaid, or (2) any assistance unit of which a member of the overpaid assistance unit has subsequently become a member, or

(3) any individual members of the overpaid assistance unit whether or not currently a recipient.

See also Wis. Admin. Code § HSS 201.30(3)(c).

Petitioner asserted at the hearing that she should not be punished for receiving AFDC during a period of time in which she believed she was entitled to such assistance. However, under the regulation quoted above, the county agency correctly sought recoupment in this case.

Counsel for petitioner incorrectly labels the issue as one of equitable estoppel. Equitable estoppel is available only when there is agency action or non-action which a person relies upon to their detriment. As the examiner noted, the failure to receive the notice from the insurance company was not an agency action which the petitioner relied upon to her detriment. Viewing it another way, petitioner's equitable argument amounts to saying that she relied upon the agency's continuing finding of eligibility. If this were the standard, equitable estoppel would apply to all overpayment cases where there is agency error. As the rehearing decision notes, this argument "is equivalent to saying that 'by finding me eligible in error, the agency estops itself from ever enforcing an overpayment claim.'" Again the intent of the federal regulation is unequivocally clear -- i.e., to recover benefits even where the overpayment is due to agency error.

In Lynn v. Payne, 476 U.S. 926, 936 (1986), the Court recognized in dicta that "[i]t may well be that some of the same concerns that limit the application of equitable estoppel against the Government bear on the appropriateness of awarding other remedies that have a close substantive resemblance to an estoppel."

One of those principles is that "an agency's power is no greater than that delegated to it by Congress." Lyng, 476 U.S. at 937. Thus, the Court in Lyng acknowledged, as it had many times earlier, that courts cannot order that governmental benefits be provided in contravention of the limitations established by Congress.

It should be noted that neither "fault" nor "equity" are key factors in the recovery of grant overpayments. See 42 U.S.C. § 602(a)22; 45 C.F.R. § 233.20(a)(13)(i); Wis. Admin. Code § HSS 201.30(3)(c). When a governmental agency discovers an error in the administration of a program such as AFDC, it is under an absolute duty to change such error. The entire AFDC program is purely statutory in nature with no equitable doctrines applicable.

C. The life insurance policy with a cash value was an available asset.

An asset is available (1) when actually available, (2) when the person has a legal interest in a liquidated sum or (3) when the person has the legal ability to make the sum available for support and maintenance. 45 C.F.R. § 233.20(a)(3)(i)(D). The department was not persuaded by petitioner's assertion and reassertion in the rehearing request of arguments as to unavailability of this asset.

The cash value already has been reduced by the loan. Thus, it clearly was available. As for petitioner's lack of awareness of this asset, even if it is conceded that this is true, the error here was that of the agency in not seeking verification. As argued earlier, overpayments must be recovered whether caused by recipient or agency error under the federal regulation and the state administrative rule.

Petitioner further argued that removing the cash value of her policy is a violation of her divorce settlement agreement which requires her to keep her life insurance policy in force and effect for the benefit of her children. The examiner did not find this argument persuasive. By removing the cash value which is accruing, the petitioner is not in any way affecting the face value of the policy. See examiner's decision at 3.

D. There was no inadequacy in the actual notice received by petitioner.

Finally, petitioner questions receipt of a computerized notice of decision informing her of the recoupment action. There is no dispute, however, that petitioner did receive the handwritten notice of decision. This decision informed her of the reduction of her grant and her right to contest this action of which she availed herself by requesting a fair hearing resulting in the two decisions now being challenged on judicial review. While the county was not able to produce the computerized notice of decision concerning the recoupment action, petitioner was not prejudiced as she received admittedly the handwritten notice informing her of the reduction of her grant and her right to appeal the issue. As petitioner in fact did subsequently timely appeal the action, she was not materially prejudiced by any notice inadequacy, established or not.

The issue in this case is whether the county took a correct action in attempting to seek a recoupment of alleged AFDC overpayments. The petitioner does not dispute that she was paid AFDC benefits during the period in question but rather that the

overpayment was not her fault and, therefore, it is unfair to make her pay it back.

Unfortunately there is no legal and/or factual basis for any of petitioner's claims of equitable estoppel, unavailability of this asset or inadequate notice. AFDC is a current needs program and is entirely statutory. The goal is to furnish financial assistance and other services to needy dependent children and their parents or relatives with whom they are living and to help such parents or relatives to obtain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection. 42 U.S.C. § 601. In the present case petitioner and her family received an AFDC grant to cover current needs which petitioner contended or implied, by applying for aid, could not be covered by the family's then available assets and income. Even in the absence of any intentional misrepresentation, where is the inequity in requiring repayment of these benefits from the funds which otherwise would have or could have been used during the months in question for petitioner's current needs?

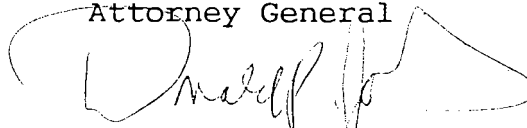
#### CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this court should refuse to reverse, vacate or modify upon any of the grounds or for any of the reasons set forth in the petition

the department's decisions and orders of June 29, 1994, and August 16, 1994, and thereby affirm said decisions and orders.

Dated this 19th day of December, 1994.

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