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STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 6

WINNEBAGO COUNTY

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CATHY S. LEVERICH,

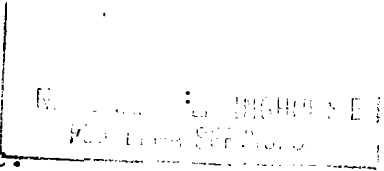
Petitioner,

v.

Case No. 94-CV-784

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

Respondent.



REPLY BRIEF OF RESPONDENT IN OPPOSITION
TO PETITION FOR JUDICIAL REVIEW

ARGUMENT

I. PRIOR AGENCY DECISIONS HAVE NO PRECEDENTIAL VALUE.

Petitioner places some reliance upon previous administrative decisions purportedly defining "actual availability" in similar contexts (petitioner's memorandum at 11-12). The department consistently has maintained and the courts have consistently held that final decisions of the department or its examiners are not of precedential value and thus are not binding on the department. Among other things, legislative acquiescence is not a factor because these administrative decisions are neither published nor readily known to anyone other than the participants in an individual action. However, the department does strive to be consistent in those decisions with variations hopefully setting forth the reasons therefor.

The doctrine of res judicata does not apply to the exercise of the power of an administrative agency. State ex rel. Schleck v.

Zoning Board of Appeals, 254 Wis. 42, 45, 35 N.W.2d 312 (1948). Any ruling made by an administrative agency relates only to the facts and conditions presented in the pending proceeding, and the agency is not bound by its prior determinations. Dairy Employees Ind. Union v. Wis. E. R. Board, 262 Wis. 280, 283, 55 N.W.2d 3 (1952). Res judicata does not even apply to a reopened proceeding because the further proceeding to reconsider is part of the original action. The doctrine only prohibits subsequent new actions between the same parties as to all matters that were litigated or that might have been litigated in former proceedings. Village of Prentice v. Wis. Transp. Comm., 123 Wis. 2d 113, 119, 365 N.W.2d 899 (Ct. App. 1985).

Many of these rules concerning the inapplicability of res judicata to administrative agencies are restated in Board of Regents v. Wisconsin Pers. Comm., 103 Wis. 2d 545, 552, 309 N.W.2d 366 (Ct. App. 1981). However, petitioner's possible reliance upon that case is misplaced both legally and factually.

The court observed that sec. 227.06(1), Stats. (now sec. 227.41(1)), requires internal consistency within a proceeding by binding the agency within that proceeding to its declaratory ruling. This is true because the statute then and now provides specifically that a declaratory ruling "shall bind the agency and all parties to the proceedings on the statement of facts alleged, unless it is altered or set aside by a court." There is no similar language in the statutes pertaining to contested cases, secs. 227.44 through 227.57, and this judicial review action is not a review of a declaratory ruling.

Finally, even if the longstanding denial of res iudicata effect to an administrative determination were to be to overhauled and modernized, the issue here is largely a question of law to which res iudicata principles would be inapplicable. Board of Regents v. Wisconsin Pers. Comm., 103 Wis. 2d at 552.

II. PETITIONER'S RELIANCE ON PREVIOUS COURT DECISIONS
IS EQUALLY MISPLACED.

Petitioner further claims that the department is required to consider and apply equitable principles under Wis. Admin. Code § PW-PA 20.18(3) and (6) (petitioner's memorandum at 15-16). Petitioner specifically places considerable reliance upon that portion of the rule which guarantees "equity of treatment" in the fair hearing process.

To provide equity of treatment in relation to public assistance laws and programs is to do nothing more than put applicants and recipients on an equal footing. As for the department's authority or that of the county agency as its agent to provide equitable relief, it must be remembered that any powers sought to be exercised by an administrative agency must be found within the four corners of the statute under which the agency proceeds. This test is not satisfied by casual reference to "equity of treatment" in general hearings provisions.

It is a well-established principle of administrative law that the authority of any agency hearing officer is restricted to the authority given to them by the legislation which creates the program under which they operate. The department consistently has taken the position that it is the agency which also has limited

powers, not just the hearing examiner. The department reads these three decisions, among others, as holding that this and other agencies are without authority to go outside its statutes and rules to "do equity." Neis v. Educ. Bd. of Randolph School, 128 Wis. 2d 309, 314, 381 N.W.2d 614 (Ct. App. 1985); Brown County v. H&SS Department, 103 Wis. 2d 37, 43, 307 N.W.2d 247 (1981); Browne v. Milwaukee Bd. of School Directors, 83 Wis. 2d 316, 333, 265 N.W.2d 559 (1978).

Furthermore, if the department through its secretary, deputy secretary, hearings director or examiners becomes an equitable forum, this might significantly increase the number of rehearing requests beyond the present scope of material errors of law or material errors of fact under sec. 227.49(3), Stats. It also might make uniformity in decisions nearly impossible to achieve. On judicial review, even though the decisions have no precedential value, courts understandably have little tolerance for decisions that go one way in some cases and a different way in seemingly similar cases, especially those involving statutory entitlements, without some demonstrable and significant error of law or error of fact.

Quite simply, hearing examiners in Wisconsin have no authority to grant relief based upon such equitable claims, and administrative agencies themselves have only those powers specifically delegated to them. Wis. Soc. Wkrs. 1976 Campaign Committee v. McCann, 433 F. Supp. 540, 545 (E.D. Wis. 1977). The fact that the Supreme Court of Wisconsin has required petitioners in administrative proceedings to raise all applicable issues before

the agency or risk having them considered waived on judicial review does not expand the authority or jurisdiction of the agency. While the court may have intended that such agencies consider all issues raised, an administrative agency and its hearing examiners would have no authority to declare unconstitutional any statute or rule under which the agency itself operates.

Similarly, petitioner cites no specific appellate authority in Wisconsin bestowing upon this agency or its examiners the power to grant the type of equitable relief she seeks. Although petitioner cites circuit court decisions holding it error for the department to refuse to consider an estoppel defense, other circuit courts in Wisconsin have reached the opposite conclusion. Furthermore, to say that a recipient is entitled to equitable treatment in relation to public assistance laws and that instances of inequitable treatment are to be speedily remedied by prompt execution of hearing decisions, all under Wis. Admin. Code § PW-PA 20.18 or 45 C.F.R. § 205.10(a)(13), is not the same as saying that the fair hearing process is meant to consider equitable arguments and to reach equitable results.

There is no statute within chapter 227 or elsewhere that explicitly spells out the authority of a hearing examiner to hear and decide equitable issues. This is not the type of subject matter that the Legislature would or should address by inference or implication. Unlike courts, administrative agencies and their examiners have no inherent powers.

At the same time petitioner is not without a remedy or meaningful relief in the appropriate case. Unlike administrative

agencies and hearing examiners, this court and all circuit courts in Wisconsin have the power to grant equitable relief where appropriate. Thus the department's refusal to hear and decide her equitable argument does not violate her right to due process. She is not being required to waive any legal or equitable defenses because of the department's position but instead is only required to raise the estoppel claim in a timely manner before the administrative agency in order to establish a record for review by the court on judicial review on the equitable issue.

Finally, claiming that her social workers were more experienced than she was with life insurance and cash values, petitioner repeatedly complains that she was erroneously told at various times by these workers that her life insurance policy had no cash value. County workers certainly have some obligation to help applicants and recipients satisfy application and review requirements. However, this does not totally replace some accountability on the petitioner's part to become aware of and report available assets. For example, while neither fault nor equity is a key factor in the recovery of grant overpayments under the authorities cited in the department's initial brief, Wis. Admin. Code § HSS 201.07 requires applicants, recipients or certain persons acting on their behalf to provide the agency, the department or its delegated agent full, correct and truthful information necessary for eligibility determination or redetermination and, furthermore, to report changes in income, resources or other circumstances which may affect eligibility within ten days of the change.

The department was not persuaded by petitioner's assertion and reassertion in the rehearing request of arguments as to unavailability of this asset. The state and county must take all reasonable steps necessary to promptly correct any and all overpayments regardless of fault. However, it has become all too fashionable to deflect any individual accountability toward the county workers and blame them for not being aware of and reporting the available assets of an applicant or recipient.

CONCLUSION

It again 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 9th day of January, 1995.

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