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STATE OF WISCONSIN CIRCUIT COURT WINNEBAGO COUNTY
CATHY S. LEVERICH,

Petitioner,
vs.

PETITIONER'S REPLY
MEMORANDUM

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

Case No. 94-CV-784

RECEIVED
NATIONAL OFFICE OF CHILDREN
FOR LEGAL SERVICES

Respondent.

Petitioner is seeking relief **from** an alleged overpayment of Aid to **Families with** Dependent Children benefits. This memorandum will briefly address arguments raised in respondent's memorandum. The pertinent facts are outlined in the petitioner's initial memorandum and will be raised at relevant points in this reply memorandum.

In respondent's brief, DHSS has been so anxious to refute petitioner's claim for equitable estoppel that it has again failed to recognize the controlling significance of the fact that the asset in question was not an available asset under AFDC law. The DHSS memorandum continues this error, and it is too late for DHSS to rectify it now. Once again, it must be emphasized that there are four separate and independent grounds for reversal of the DHSS decision. These arguments are: 1) there was no overpayment of benefits because the petitioner was not aware that the life insurance had any cash value, thus making it an unavailable asset; 2) there was no overpayment because the cash value of the life insurance policy was an unavailable asset pursuant to the Court order in petitioner's divorce judgment; 3) if there was an overpayment, DHSS should be estopped from recovering the overpayment **from** the petitioner because it would be inequitable; and 4) DHSS failed to provide adequate notice of the overpayment. The third and fourth grounds need not be reached if the cash value of the life insurance is found to have been an unavailable asset, because there would be no overpayment.

I. DHSS CONCEDES THAT PETITIONER WAS NOT AWARE OF THE ASSET.

DHSS' failure to recognize the significance of the petitioner's lack of awareness of the cash value of the life insurance is illustrated by the meagerness of its argument, including the lack of **caselaw**. Basically, its discussion is the following two sentences:

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.

(Resp. brief at p. 10, last **para.**) It is well recognized that an asset is not available if a person is not aware of its value, and that, if not available, it does not **affect** a person's eligibility,

and cannot result in an overpayment. (See pet. brief at pp. 9-13 and **resp.** brief at pp. 6 and 10). The factors discussed by DHSS are irrelevant to whether or not this asset was available, although it explains why the petitioner was not aware of the cash value of this policy. These factors deal with the equitable estoppel argument, not the availability argument.

In this case, it is undisputed that the petitioner did not know that the life insurance policy had a cash **value**.**[FTNOTE1]** Even DHSS agrees that the petitioner was not aware that the life insurance policy had a cash value. (See attached to pet. memorandum, Decision, App. A-4 and Rehearing Denial, App. B-1). Since the respondent has found that the petitioner was not aware of the existence of this potential source of income, it was never actually available and therefore there has been no overpayment.

II. DHSS' CONCLUSION THAT REMOVING THE CASH VALUE OF THE LIFE INSURANCE DOES NOT AFFECT THE POLICY'S VALUE IS INCORRECT.

In its discussion of this argument, DHSS simply reiterated the hearing examiner's incorrect conclusion that "By removing the cash value which is accruing, the petitioner is not in any way affecting the face value of the policy." (**Resp.'s** brief at p. 11, first paragraph). As stated in the petitioner's memorandum (pp. 13 - 14) this conclusion is incorrect. Once again, if the cash value of the life insurance was not available for this independent reason, then there is no overpayment.

III. RESPONDENT SHOULD BE ESTOPPED TO ASSERT AGAINST OR TO ATTEMPT TO COLLECT THE ALLEGED OVERPAYMENT OF AFDC.

The bulk of respondent's brief deals with this third, additional ground for reversal of **DHSS's** decision. (**Resp.'s** brief at pp. 8-10). The parties agree with the elements of estoppel in cases involving government action or inaction. However, DHSS argues for a per se rule barring equitable estoppel defenses for all recipients of AFDC, regardless of circumstances, and questions some of the elements.

A. DHSS' Conclusion That Equitable Estoppel Can Never Be Asserted Against The State Is Incorrect.

First, DHSS suggests that equitable estoppel is never available as a defense to attempted recovery of an alleged overpayment, even in appropriate circumstances. DHSS primarily relies on the federal regulation regarding collection of overpayments. The regulation provides that the state "must take all reasonable steps necessary to promptly correct any overpayment." 45 CFR sec. **233.20(a)(13)(i)**. The federal regulation imposes a duty on DHSS to take all reasonable steps to recoup overpayments. However, neither federal nor Wisconsin authorities prohibit the application of equitable estoppel in an appropriate case. Neither federal nor state authorities suggest abrogation of any defenses, including reasonable defenses such as equitable estoppel.

In fact, as discussed in petitioner's brief (pp. **15-16**), fairness and equity are factors hearing examiners are specifically required to consider in AFDC hearings. See e.g. P.W.P.A. **20.18(3)**, Wisc.Admin.Code. See also 42 U.S.C. Sec. 602(a)(4) (entitling recipients to a fair

hearing). Consistent with the state regulations, federal regulations **governing** fair hearings in the AFDC program require the agency to ensure that the parties have the right to establish all pertinent facts and circumstances and to advance any arguments without undue interference. 45 CFR Sec. **205.10(a)(13)(iv)** and (v).

For these reasons, the “anti-equity” argument advanced by DHSS has been rejected by many courts in and out of Wisconsin, including another Winnebago County Circuit Court Judge. (See cases cited in pet. brief at pp. 16-17.)

DHSS also suggests that if equitable estoppel is an available defense in petitioner’s case, then “equitable estoppel would apply to all overpayment cases where there is agency error.” (**Resp.’s** brief at p.9, paragraph 2). This is simply untrue. Instead, the law already requires that special additional elements must be considered before the government can be estopped. (See pet. brief at pp. 14-15.) Moreover, not all agency errors result in the type of inequity present in the petitioner’s case.

It should also be noted that DHSS cites only one case in support of its argument, *Lyng v. Payne*, 476 U.S. 926,936 (1986). However, *Lyng* is inapplicable for several reasons. First of all, no equitable estoppel claim was made in the case and the Supreme Court specifically stated that *Lyng* was not an equitable estoppel case. In fact, the issue in the case involved appropriate remedies pursuant to the federal Administrative Procedure Act. *Id* at 937. In addition, after the quote in respondent’s brief, which respondent admits was merely in dicta, the Supreme Court went on to say that “We reject, however, plaintiffs suggestion that any remedy that can be analogized to an equitable estoppel is necessarily invalid.” *Id* at 936.

Furthermore, the Supreme Court has not stated that there can never be an appropriate case of equitable estoppel against the federal government, instead it has focused on the elements and whether or not they have been met in a specific case. Indeed, this implicitly recognizes that equitable estoppel is available in appropriate circumstances. In any event, federal law on estoppel against the federal government differs **from** Wisconsin law on estoppel against the state. Next, petitioner will turn to what respondent does have to say about the specific elements of estoppel. Thus, in short, federal law is inapplicable.

B. All The Elements Of Equitable Estoppel Are Present In This Case.

First of all, the primary element disputed by DHSS is government action or inaction. (**Resp.** brief at p. 9, **para.** 2.) By failing to address the other factors, DHSS should be deemed to have conceded that petitioner has proven the other factors.

Basically, DHSS claims that petitioner relied on the insurance company, Woodman’s, not the government. This is a serious mischaracterization of petitioner’s arguments and the facts. As discussed fully in petitioner’s brief (pp. **18-20**), the petitioner relied on the specific statements to her by many caseworkers, over a period of four years, that her insurance did not have a cash value, and thus did not **affect** her benefits. She also relied on **DHSS’s** explicit determination on several occasions by several different workers, that the life insurance policy had no cash value, and thus did not **affect** her benefits. But for this, there would be no alleged overpayment. Obviously, her non-receipt of the **Woodman** statement prevented her from

becoming aware that the policy did have a cash value.^[FTNOTE2] But the damage had already been done by DHSS. Her non-receipt of the **Woodman** statement would not have mattered if DHSS had not already repeatedly misinformed her. Therefore, the petitioner did rely on government action to her detriment.

DHSS suggests it would be inequitable to the government if this alleged overpayment were not collected because the petitioner somehow wrongfully applied for benefits. (**Resp.** brief at p. 12, the complete **para.**) Nothing in the record lends itself to this interpretation. The record only supports that all the wrongdoing was on the part of DHSS. Second, **DHSS's** argument is essentially that it would be inequitable to the government to not recoup this alleged overpayment. In the first place, if the government can be protected by equity, so can the petitioner. Rather than attempting to imply petitioner did something wrong here, it would have been wiser for DHSS to explain what kind of sense it makes to take **\$2,395.00** from the petitioner when the most this asset exceeded the \$1,000.00 limitation was by \$319.12. As discussed in petitioner's brief (pp. 22-26) the injustice against the petitioner far outweighs any public interest at stake.

Since DHSS failed to address the other elements, the Court is referred to the petitioner's brief demonstrating how the petitioner's reliance was reasonable and justifiable; that she relied to the severe detriment of herself and her family; and that the injustice against petitioner and her family far outweighs any public interest at stake. (Pet. brief at pp. 20-26.)

IV. THE RESPONDENT FAILED TO USE THE PROPER PROCEDURES.

Since this argument was adequately addressed in the petitioner's brief (**Pet.'s** brief at pp. 26-27), only a few points need to be raised. Firstly, the "county was not able to produce the computerized notice of decision **concerning** the recoupment action" (**Resp.'s** brief at p. 11), because, as DHSS admitted, there was none. Secondly, although petitioner does not concede that prejudice is necessary, petitioner was in fact prejudiced in this case. She was deprived of a portion of her April AFDC grant, when the AFDC grant is already set at a level insufficient to meet her family's needs. Her grant was reduced even though she had requested a timely hearing including continuing benefits. See *Goldberg v. Kelly*, 397 U.S. 254 (1970), and progeny (discussing the constitutional importance of due process).

CONCLUSION

In summary, contrary to DHSS' assertion, there is a legal and factual basis for all of petitioner's claims. DHSS has failed to recognize the significance of the claims, including their legal and factual basis. First, the decision ignores that the cash value of the life insurance was not an available asset because the petitioner was unaware of it, inconsistent with a line of the respondent's own decisions. Second, the decision incorrectly found that the life insurance was an available asset when in fact the divorce had ordered the petitioner to maintain the policy. Third, DHSS relies on a per se rule that equitable estoppel can never be applied against the government, in violation of several Wisconsin court decisions, and authorities from other jurisdictions. **The** decision also incorrectly found that equitable estoppel did not apply even though the petitioner relied on repeated statements by county workers and their expertise, that the life insurance policy had no cash value, and thus did not affect her benefits. Finally, the

decision incorrectly upheld the overpayment even though the agency admittedly failed to send proper notices, resulting in a wrongful reduction of her April AFDC grant.

For these reasons, the petitioner respectfully requests reversal of the June **29, 1994** decision of the Department of Health and Social Services or if necessary, a remand of the matter to DHSS for appropriate action.

Dated this day of January, 1995.

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FOOTNOTES:

FN1/. . **In** its discussion of the facts, DHSS implies that petitioner told her worker the policy had an "unknown cash value". (Respondent's brief at 5, citing Tr. 2.) However, as the record demonstrates, this is the worker's characterization, not the petitioner's testimony. See Tr. 8,1 1-13. In any event, DHSS is bound by the **finding** of the hearing examiner that petitioner was not aware of the cash value.

FN2/. . . As indicated earlier, the hearing examiner found petitioner did not receive the statement from Woodman's and DHSS did not appeal. For this reason, the respondent's implied questioning of the validity of petitioner's mail problems is irrelevant.