Assembly

Record of Committee Proceedings

Committee on Children and Families

Senate Bill 123

Relating to: the fair hearing process under Wisconsin works.

By Senators Moore, Robson, George, Rosenzweig, Plache, Darling and Risser; cosponsored by Representatives Jeskewitz, Plale, Turner, Seratti, Schooff, Owens, Plouff, Coggs, Spillner, Miller, Olsen, Young, Richards, Gunderson, Morris-Tatum, Riley, Black, Pocan, Bock, Ryba, La Fave, J. Lehman and Hasenohrl.

February 8, 2000 Referred to committee on Children and Families.

February 22, 2000 **PUBLIC HEARING HELD**

Present: (10) Representatives Ladwig, Jeskewitz, Kreibich, Freese, Grothman, Kestell, Miller, Coggs, Colon and Sinicki.

Absent: (0) None.

Appearances for

- State Representative Sue Jeskewitz, 24th Assembly District
- Anne L. NeLeo, Legal Action of Wisconsin
- Jean Verber, Woman in Poverty
- Carol Medaris, Wisconsin Council on Children and Families
- Ramon Wegner, Community Advocates

Appearances against

- Dianne Reynolds, Department of Workforce Development
- Sherwood Zink, Department of Workforce Development
- Kimberly Coleman, YW Works

Appearances for Information Only

- None.

Registrations for

- Dennis Boyer, AFSCME
- Sally Phelps, League of Women Voters
- Mickey Beil, Milwaukee Public Schools
- Jon Janowski, Hunger Task Force of Milwaukee
- John Stocks, Wisconsin Education Association Council and Wisconsin Federation of Teachers

- Rev. Sue Moline Larson, Lutheran Office for Public Policy in Wisconsin
- State Senator Fred Risser, 26th Senate District
- Marc Herstand, National Association of Social Workers
- Kathy Markeland, Wisconsin Catholic Conference
- State Senator Alberta Darling, 8th Senate District
- Kelly Bablitch; Office of Senator Gwen Moore, 4th Senate District
- Marjorie Morgan, Archdiocese of Milwaukee
- Dismas Becker, Wisconsin Coalition of Marriage and Family Therapists, Professional Counselors, and Social Workers
- Leslie McAllister, National Association of Social Workers

Registrations against

- None.

March 30, 2000 **Failed to concur in pursuant to Senate Joint Resolution 1.**

Janine Hale
Committee Clerk

TO: Members of the Committee on Children and Families

FROM: Jean Verber and Anne Hazelwood, Coordinators
Milwaukee Women and Poverty Program

RE: SB 123

Thank you for the opportunity to speak in support of SB 123. We believe this is one of the most important bills with the capacity to ensure a fair and balanced resolution to concerns of W-2 mothers.

In any public transaction, especially where monetary issues are at stake, it is one of our prized democratic values, as well as good business sense and a sign of good faith, to have in place a process for an objective, fair review of differences or grievances.

The current in-house W-2 agency appeal process does not assure this objectivity. Many participants have lost faith in this form of recourse because the process seems bent in the direction of the agency's advantage. Furthermore, the prospect of losing benefits until a decision is rendered already rules on the side of the agency and places a financial burden on the family who risks not being able to pay rent and thus be evicted. Some are discouraged from initiating the process because of this.

A fair hearing process will be one of the most valuable assets for the W-2 program since it will guarantee exercise of a basic right of participants to be heard by a third party while continuing to receive benefits until a decision is rendered. Given the many challenges of the program, this is a small contribution to the struggle to make W-2 work better for all involved.

On behalf of women who would like to be here to personally speak in support of the legislation, we urge support for SB 123. With so many issues having the potential of impacting a whole family, SB 123 can provide a well-tested process for resolving issues of concern in a fair, objective, and timely manner. Whatever funds are expended to make this process a reality will have immeasurable value in meeting the goal of W-2 and economic advantages of the families involved.

2/22/00

TESTIMONY ON SB 123 AND
SENATE SUBSTITUTE AMENDMENT
LRB-0164/1

REQUIRING A FAIR HEARING PROCESS UNDER THE W-2 PROGRAM

Assembly Committee on Children and Families

February 22, 2000

Good morning, Chairperson Ladwig and committee members. I am Dianne Reynolds, Work Programs Section Chief, from the Division of Economic Support, Department of Workforce Development. With me today is Sherwood Zink, department legal counsel, who has been advising the division on the implementation of the W-2 dispute resolution process.

The Department is testifying in opposition to Senate Bill 123 because it rewards frivolous disputes; it creates delays in resolving disputes; and it is unnecessarily costly. The bill is simply inconsistent with the more fair expedited processes in use under W-2, and would not correct any known problems in the W-2 dispute resolution process. In fact, we believe that the changes proposed would have unintended extensive adverse consequences on W-2 participants.

Substitute Amendment 1 to SB 123 would repeal the current Wisconsin Works (W-2) expedited fact-finding process and recreate the old cumbersome fact-finding by fair hearing, similar to the one failed under the Aid to Families with Dependent Children (AFDC) program. The bill also creates a new entitlement, at least for the time it would take for a hearing and a decision, by continuing benefits without work responsibility. This is a return to the old process that was the cornerstone of AFDC cash assistance.

Background

"Fair hearings" are named after a federal hearing requirement in the old AFDC program that was intended to preserve the status quo in disputes until the State, by Administrative Law Judges (ALJs), could reassess, from scratch, the AFDC recipient's circumstances and redetermine benefits. Consequently, whenever a local agency determined that an AFDC recipient's benefit should be reduced or ended, there was a great incentive for the recipient to request a hearing so as to continue receiving benefits even when they knew that they were not entitled to them. In fact, it was the practice of legal advocates to advise their clients to do so, even when they knew the client had no case. The result was a huge docket of hearings with "no-shows." The result was delay for those with real disputes.

The new system requires immediate action by W-2 agencies to review their action, correct it when appropriate, and make a factual record for the participant's use if the participant is still not satisfied and wants an ALJ to review the case. Not only does every participant receive repeated explanations of their rights and how to pursue them from both the State and from their W-2 agency, but the W-2 agencies have a great incentive to be accurate and make a complete record so as to avoid State findings of error through the State's case monitoring.

There is no evidence that this W-2 dispute resolution process is unfair, and in fact, it combines the best elements of speedy local agency fact-finding and corrective action, with the safeguards of Administrative Law Judge reviews of local agency actions.

W-2 Program Impact

We believe that SB 123 would weaken the work-first philosophy of W-2 and could serve as an incentive for dispute. The W-2 dispute resolution process accommodates resolution of disputes speedily and in the way that they would be resolved in the real work world. It lets the parties to the disagreement have the first try at resolution, and, only if they can't, does an independent review become necessary. This bill would take any dispute directly to a more formal hearing without requiring the two parties affected to make immediate efforts to resolve disputes and with a disincentive for the participant to make any effort to resolve the dispute. Yet, during the time that participants would wait for a fair hearing, their "clocks" would continue to run without their benefiting from the many other services available under W-2.

A basic tenet of the W-2 program is to provide a significant amount of autonomy and responsibility to the local agencies in order that they can be most effective in helping W-2 families. Local agencies are most likely to have the

personal relationships and knowledge of family circumstances to be in the best position possible to make an accurate assessment of a situation that prompted a fact finding process. Our fact finding process currently allows local collaboration between the petitioner, the independent fact finder and, the Financial and Employment Planner (commonly referred to as the FEP) to informally resolve issues that may be affecting participation or eligibility. To reinstate the fair hearing process would put local agencies in a position where they would have little incentive to take responsibility to find out what the dispute is about and to take corrective action to address the petitioner's problem. Just as was true in the old days of AFDC, there would be no incentive or requirement for the W-2 agency to immediately address the issues causing the participant's concern.

Restoration of the fair hearing process would also create an unnecessary delay in the decision-making process. This delay would then have the potential to alienate participants from the agency and indeed the program that is trying to help them while they are waiting for resolution. Additionally, a decision is more readily accepted, regardless of the outcome, if the decision is made in an expedient manner. A fact finding review as conducted by the agency is just that – an expedient process that prevents participants from feeling as though they have been lost in the shuffle. Our records indicate that the entire process, from date of request to fact finding decision, takes place within 13 business days. The average amount of time a fair hearing takes is four months. This delay can create a feeling of alienation as well as place an individual under undue financial hardship.

For example, if a person was put in an incorrect placement, such as a W-2 T when they should have been in a CSJ, it would take four months for the person to be reassigned in the correct placement for the higher benefit amount.

Worse yet, if an applicant is found ineligible for W-2 or eligible for case management services only. Although this bill calls for continued benefits, if an applicant had never been determined W-2 eligible and assessed for placement on the W-2 ladder, there would be no benefits to continue. It would take at least four months until the person could be assessed, placed on the appropriate rung of the ladder and begin receiving cash assistance.

The Senate Substitute Amendment proposes that retroactive benefits be awarded to applicants who are incorrectly denied the opportunity to participate in W-2. This has a severe consequence in and of itself. Awarding retroactive benefits to applicants would tick the participant's 60-month Temporary Assistance for Needy Families (TANF) clock and the 24-month employment position clock. There is a 60-month lifetime limit on TANF eligibility and a 24-month limit on participation in any one W-2 employment position. In other words, a participant who receives four months of retroactive payments will lose four months of prospective eligibility for services under the W-2 program such as work experience, education and training, and transportation. Also, since appeals would take longer to resolve, a participant is likely to experience delays in receiving supportive services such as domestic abuse counseling. The current law provides for prospective rather than retroactive relief for eligibility and placement decisions to maximize the services that will be available to a participant. The change to retroactive payments will result in fewer services for a participant who "wins" an appeal.

Additionally, the fiscal impact of this bill must be considered. The bill changes the responsibility for review hearings from W-2 agencies to DWD without making any corresponding fiscal or staff changes. In the final quarter of 1999, in Milwaukee alone, there were 280 fact finding requests submitted. Based on this number alone, it would not be possible for the Department to take over the hearing function without an impact in these areas. In relation, there is very little hope that one could expect a department run-appeal system to equal the 13 working day time period it currently takes for issues to be resolved through local agency fact findings.

In considering the fiscal impact, the financial consequences to the taxpayer should not be ignored. The financial consequences to the taxpayer can stem from the legislation's mandate that petitioners cannot have their benefits suspended, reduced or discontinued until after a fair hearing decision has been made. If it is found that the agency's decision was correct, the agency's recovery options on behalf of the taxpayer are limited to reduction of future benefits or tax intercept (neither of which has proven very effective).

Additionally, this bill reduces the Department's ability to combat program fraud and abuse. If, for example, the agency has evidence and reason to believe that a person receiving benefits lives in another state or fails to declare income, the Department has no recourse to discontinue those benefits until after a fair hearing is held under this bill. This would create two injustices: First, a person would have received W-2 benefits that they should not have; and, second, resources would have been diverted from eligible Wisconsin residents.

Statistics Showing Success

On the other hand, the W-2 dispute process currently allows and indeed encourages local collaboration between the petitioner and the agency to informally resolve issues that may be affecting participation or eligibility <u>even before</u> the fact finding process. Our statistics show that this is often the case.

In 1999, approximately 157 issues were resolved prior to the matter going to a fact finding. Of the approximately 324 fact findings that were conducted statewide, 54% upheld the agency's decision and 46% overturned the agency's decision. Clear indication is that the Fact Finder is remaining independent of the agency in their decision making.

From September 1997, when W-2 began, to September 1999, the Department received 156 requests for a Departmental level review of a W-2 agency's decision.

Oversight

One of the reasons given for SB 123 was a concern that agencies may have a financial reason to withhold benefits. Under the current process, there is no incentive for the agency to delay the decision-making process. In fact, there are a number of disincentives, here are a few:

- The adverse affect on the performance bonus structure under the 2000-2001 W-2 and Related Programs contract;
- The financial penalties an agency may incur from failing to serve participants; and
- The negative public impact of an agency knowingly and willingly delaying the process, in other words, sheer embarrassment.

Rather, under the current fact finding process, either the agency or the petitioner may request that the Department review the agency decision and the Department has made a policy decision to grant every request for review of a fact finding decision. This decision was made to help in state monitoring of the fact finding process and to give local agencies and participants an informal arena where they can request further guidance from the state on fact finding issues.

All evidence indicates that the current dispute process under W-2 is working fairly and it is working quickly. To change it at this point would be detrimental to the existence of the W-2 program without improving the process of dispute resolution and would be harmful to participants. Repeal of the W-2 dispute resolution process would also be detrimental to the interests of both the people receiving W-2 services as well as those who are applying for W-2. And, we believe that to revert to a fair hearing process would be inconsistent with the basic intent of W-2 legislation. It would limit the ability of the local agencies to informally and quickly address a participant's needs and concerns, and would move the philosophy of W-2 backward in terms of promoting individual responsibility and making best use of time limited benefits to address barriers to employment.

However, if the committee approves this proposal, we believe the language in the bill needs to be amended to ensure that dispute resolution through the fair hearing process is timely, thus reducing the incentive for frivolous appeals. Additionally, the language needs to be amended so that the process is less costly. For example, we believe that that there would need to be time limits for the hearing process in order to avoid the inordinate delays experienced under the old AFDC fair hearing process. We also know that automatic payment of benefits upon demand for a hearing means that people who know that their claim has no merit will file solely to get benefits continued. We believe that if benefits continue upon filing, they must end if a participant does not follow-through, such as when they fail to appear for hearing. In the event the committee decides to approve a return to fair hearings as a dispute resolution mechanism for W-2, we would be pleased to work on corrective amending language with Committee staff.

Thank you. We would be happy to respond to questions you may have.

The League of Women Voters of Wisconsin, Inc.

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Statement before the Assembly Committee on Children and Families in Support of SB 123

February 22, 2000

Since its founding 80 years ago, the League of Women Voters has held that governmental agencies should be accountable to the public for their policies and actions. We believe that the fair hearing process is one of the means by which agencies are held accountable, since it provides a means for citizens, who feel that they have been aggrieved by an agency, to be heard by an unbiased entity. It has been used successfully for many years in many areas of governmental activity, including the old welfare system.

We support SB 123 because it establishes the right of W-2 participants to be heard if they believe that the W-2 agency has, for whatever reason, made a decision which they believe is mistaken or discriminatory or unfair. It does not make W-2 participation an entitlement, but establishes a means to require the agency to justify its decisions if a client feels they are wrong. By requiring that justification, the state and the public have a means of judging how well the agency is performing. In addition, W-2 clients have the assurance that they have recourse when they feel unfairly treated.

We also believe that the benefit provisions are desirable, since the W-2 participant should not be punished by lost benefits for what is proven to be a poor decision by the agency.

The League lobbied for these provisions in the original W-2 bill. We urge the committee to recommend SB 123 for passage by the Assembly to correct a real deficiency in the W-2 program.

LWVWI Legislative Committee Contact: Sally Phelps, 251-4834

WISCONSIN CATHOLIC CONFERENCE

TESTIMONY IN SUPPORT OF SENATE BILL 123
(Fair Hearings Process Under Wisconsin Works)
Submitted by John Huebscher, Executive Director
February 22, 2000

On behalf of the Wisconsin Catholic Conference, the public policy voice of Wisconsin's Roman Catholic bishops, I speak in support of this bill to create a fair hearing process for families adversely affected by decisions of county W-2 agencies.

This bill should be enacted for several reasons.

First, we are talking about decisions with serious consequences. The benefits provided by W-2, be they in the form of grants or other supportive services, are essential to a family's survival. Hence a decision to deny or suspend assistance has serious effects. Since most of those affected by W-2 will be children, these decisions are especially critical. An adequate review process is essential to maintaining the justice of the system.

Secondly, there must be consistency of treatment for families in W-2, wherever they may live. The local flexibility given agencies to provide "family specific" case management services are a strength of W-2. But there must be some common standard for determining eligibility and compliance with program requirements. A fair hearing process, which holds local decision makers accountable and provides a common benchmark for such decisions, is a must.

Those are arguments based on values and principles. But there are more empirical reasons to support this bill.

We noted recently that several counties with the highest unemployment rates had very low W-2 caseloads. One county reported no W-2 cases at all. This is difficult to explain, especially in light of the fact that higher joblessness has generally been accompanied by other unfavorable economic conditions. Those numbers support the concern that families are not receiving help they need and warrants a guarantee of a fair hearing for families who believe the system has not dealt fairly with them.

This concern is further underscored by findings from a WCC-sponsored study of families participating in W-2 in Community Service Jobs and Transitional placements. While many of the respondents said the program was helping them, a sizeable majority felt they were not receiving the support they needed from W-2 caseworkers. This finding adds to the likelihood that some agencies are not providing the help families genuinely need.

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Third, let me cite the experience of Catholic Charities in the Superior diocese.

Shortly after the beginning of W-2, Catholic Charities of the Superior diocese entered into a contract with Douglas County to provide services to W-2 transitional placements. By mutual agreement the contract was not renewed and the contractual relationship came to an end in March of 1999.

While there was more than one reason for this, a difference in philosophy was one of the major ones. Catholic Charities staff believed that on a number of occasions poor families who were eligible for services were told by the county W-2 agency that they did not need the services. Over time, the staff at Catholic Charities became more uncomfortable with its inability to serve people who were in need of help at a time when there were ample funds to do so.

We believe this experience underscores the need for some form of fair hearing or review when W-2 agencies deny or withhold services to these needy families.

Finally, DWD's own fiscal note projects that only one-third of the rulings appealed in a fair hearing process would be upheld, leaving the implications that two-thirds of the appeals would be decided in favor of the family.

Consider how you would react to such a situation.

How long would legislators tolerate a system in which only one-third of the findings of the Ethics Board were upheld when reviewed by a court or other agency? How long would taxpayers tolerate a Department of Revenue in which two-thirds of its decisions regarding tax liabilities were overturned on appeal? Poor people are created by the same God as the rest of us and have the same claim to due process the rest of us would demand. Basic justice requires that a system exist to allow poor families to challenge erroneous decisions that may harm them.

Whenever welfare reform is discussed, we hear a lot about personal responsibility and accountability. These virtues should be expected of the W-2 agencies as well as the families in the program. Senate Bill 123 can help provide such accountability. Your support for the bill will be appreciated.

State Senator
GWENDOLYNNE MOORE

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Memorandum

Re: Testimony on Senate Bill 123,
The Fair Hearing Bill

To: Assembly Committee on Children and Families

From: Senator Gwendolynne S. Moore
4th Senate District

Date: February 22, 2000

I want to thank members of the Assembly Committee on Children and Families, and Chairperson Ladwig in particular, for agreeing to hold a public hearing on Senate Bill 123 today.

Unfortunately, due to scheduling conflicts, I am unable to attend today's hearing.

However, the primary Assembly author of Senate Bill 123, and the Vice-Chair of this committee, will be testifying before you today in favor of the bill. In addition, I am submitting this written testimony.

I am proud to be the primary Senate author of Senate Bill 123, which would establish a fair hearing process under the Wisconsin Works (W-2) program.

In addition, I am particularly encouraged by the strong bi-partisan support that has emerged for this legislation. The Senate Substitute Amendment to Senate Bill 123 passed out of the Senate Committee on Human Services and Aging on a 4 to 1 vote, and passed out of the State Senate on a voice vote.

For your benefit, Representative Jeskewitz has a copy of the Legislative Council Memo prepared by Laura Rose, Senior Staff Attorney, that details the changes contained in the Senate Substitute Amendment to Senate Bill 123.

Passing this legislation is simply the right thing to do.

As the proponents of Wisconsin Works (W-2) repeatedly state, W-2 is a work in progress.

Therefore, I believe it behooves legislators, and administrators of the program, to critically evaluate W-2 and consider what is working and what isn't working in the program.

When we discover aspects that aren't working in the program, it is incumbent upon us to work together to do what we can to fix the faults in the system.

I believe that the current dispute resolution process, otherwise known as the 'fact-finding' procedure, available to W-2 participants isn't working.

Under the current dispute resolution process, an individual must first petition a W-2 agency and ask them to remedy any mistake the agency made in handling the case.

By asking W-2 agencies to police their own misconduct we are basically asking "the fox to watch the hen house."

Senate Bill 123 would allow an individual, who believes the W-2 Agency made an error in handling her case, the opportunity to petition the Department of Workforce Development (DWD) directly for a fair hearing on the grievance.

In addition, Senate Bill 123 would allow families to continue receiving benefits while their petition was pending a decision from DWD. By allowing families to receive continued benefits during an appeal, we can prevent rule-abiding families from eviction, hunger, and crisis.

Why we need to pass Senate Bill 123:

- DWD's own fiscal analysis of SB 123 estimates that in 2/3 of the cases appealed to the Department, the W-2 Agency would be wrong! Therefore, in 2/3 of the cases the individual appealing would be in the right.

- The fact finding process is neither simple nor client-friendly as DWD may argue. In fact, we know that at least one private agency in Milwaukee, Employment Solutions, has hired lawyers to represent the agency at their fact-findings. This process is intimidating for clients. Under current practice, we are pitting attorneys up against people who the W-2 Agencies in Milwaukee have identified as having less than 5th grade reading and math skills.

- The Senate Substitute amendment contains clarifying language that the creation of a fair hearing process under W-2 does not create an entitlement to benefits and services. Receiving benefits pending a decision is about due process rather than entitlement.

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June 10, 1999

Senator Judy Robson, Chairperson
Senate Committee on Human Services and Aging
State Capitol
Madison, Wisconsin 53701

Dear Senator Robson and Committee Members:

This letter is written in support of Senate Bill 123 and to supplement the testimony presented at the May 19, 1999 hearing.

Currently, state law allows an individual whose application for a W-2 component is not acted upon with reasonable promptness, whose application is denied, whose benefits are modified or canceled or calculated incorrectly, or who believes the employment position they have been placed in is inappropriate to request review by the W-2 agency. §49.152 Wis. Stats. If the W-2 applicant or participant disagrees with the W-2 agency's decision she or he can appeal that decision to the department and, in most cases, the department can choose whether or not to review the decision of the W-2 agency.[1] As will be discussed herein, there is no provision for continuing benefits for persons as they wait for a decision. For new applicants and persons denied assistance or placed in an inappropriate work category there is no retroactive relief.

The W-2 policy manual provides instructions to the W-2 agencies regarding the factfinding process. The manual instructs agencies to notify the individual requesting a factfinding within three work days of their request of the date of the factfinding appointment. A factfinding meeting must be offered within five working days of the mailing of the notice of appointment, and decisions are to be issued within five working days after the review is held. It can take three weeks or longer to receive the decision from the date of request. If successful, it takes an additional 7 to 10 days to

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[1] Currently, department practice is to accept every case for review. The statute, however, does not require the department to do so.

Legal Action has now handled factfindings, as well as state appeals, in all the W-2 agencies in Milwaukee and the counties of Racine, Kenosha, Rock, Dane, Dodge and Jefferson. Based on our experience, the current system needs to be changed because:

1. it is cumbersome and confusing for participants,
2. it intimidates unrepresented participants,
3. it does not speedily resolve issues,
4. it lacks continuing benefits which directly harms participants even if they are successful in their appeals,
5. it provides no remedy for applicants or participants denied or placed inappropriately, and
6. it lacks consistency and uniformity.

In its presentation at the May 19th hearing, DWD argued that the current system should be maintained because the W-2 agencies are in the best position to respond quickly to issues, that the agencies would lose needed flexibility if the system is changed, and that participants would lose the incentive to resolve participation issues and would not receive the services they need in a timely manner. After being involved in the fair hearing process for many years, and now the factfinding process, I strongly disagree.

DWD's position is based on mistaken assumptions about the current structure of W-2 and the factfinding process. DWD describes a system where the FEP listens to the participant and either on his or her own or with the help of the factfinder resolves immediate issues and helps the participant deal with her barriers to participation. Although some FEP's have such a give and take relationship with their clients, this it is the rare exception, not the rule. The current factfinding process is an adversary system which discourages any face-to-face discussion between the participant and the FEP.

Generally FEP's tell participants what to do, there is little discussion about the participant's, or her family's problems, needs or abilities. The factfinding process reflects this. It is often antagonistic, and other than resolving payment disputes, it is virtually useless is resolving ongoing issues. Many FEP's berate participants for

requesting a factfinding and the relationship between the two further deteriorates. FEP's are not held accountable for any failures on their part. There appears to be no incentive to come to a mutual understanding with the participant and provide assistance.

A recent case is illustrative. This office was representing a participant who had repeated sanctions. The participant missed assignments because her daughter was in and out of the hospital. She was sanctioned because she turned in her excuses late. The participant was also facing eviction because she had not been able to pay her rent due to the sanctions. The FEP stated her position, offered no alternatives and, after the factfinding, was prepared to simply walk out of the room without even speaking with the participant, even though the underlying issues remained unresolved. It was not until I insisted that a supervisor be contacted that someone spoke with her. Even then, she was sanctioned for the next two months and we were forced to request two more factfindings.

This case is not exceptional. In the last 6 months we have had to request two or more factfindings for 23 participants. Again, although payments were made, the issues causing the sanctions were not dealt with, and, despite our requests, the participants received little or no assistance. In one case I requested a factfinding concerning two months of sanction. The agency agreed to issue the payments. I also requested, on behalf of my client who has an extremely low reading level and a history of alcohol abuse, that she receive a full evaluation and referral to appropriate services. It took over a month and my repeated requests to receive services. In the interim, I requested a second factfinding because of a third sanction.

Obviously, what is needed is a system that encourages informal resolution of disputes and offers a mechanism for fair and neutral oversight. Before the establishment of the W-2 factfinding process, many fair hearings were resolved in pre-hearings, an effective method of mediation. If SB123 were adopted, pre-hearing resolution of issues would likely happen in many cases. W-2 participants have, and would continue to have, the incentive to resolve issues quickly. As advocates this is the course we pursue. There is no benefit to delaying resolution. Agencies would have the same incentive to quickly resolve issues.

Contrary to DWD claims, the W-2 agencies' discretion and flexibility would not be compromised. There is nothing in SB123 which would prevent them from maintaining a mediation system for resolving disputes. In fact, based on my experience it is likely that a return to the state fair hearing process would make the agencies more responsive. Instead of the current paper review, the agencies would be face-to-face with a state hearing officer and be held accountable for their actions. This would encourage mediation.

State fair hearings would also promote fairness, consistency and uniformity, something the system now lacks. State hearing examiners are independent state attorneys who are well-versed in public assistance programs. They bring to the system years of experience and their knowledge of the law and policies. They travel statewide and hold hearings in Milwaukee County three days per week on food stamps, Medical Assistance and other issues. Most of the hearings in Milwaukee County are held in the W-2 agencies. The role of the hearing office is to both resolve individual cases and to ensure that the rules and policies of the various programs are interpreted properly and applied uniformly throughout the state. In the past, both this office and the counties have often looked to the hearing office for guidance on policies that are unclear or in conflict with state law.

The W-2 factfinders lack these abilities. They operate in isolation and without the benefit of each other's knowledge and decisions. The only state hearing decisions they see are those reversing their own decisions. They are not familiar with the law and, thus, cannot ensure that it is followed. Even in the two W-2 agencies that use attorneys, the attorneys take the position that they do not have the authority to look beyond the state handbook to the actual administrative rules and state law. The result is a hodgepodge of decisions that lack consistency. Each agency operates on its own, applying policy as it sees fit.

The system also lacks an appearance of fairness. When a public assistance applicant or participant walks into a room with an independent examiner from the state, they rightfully believe that their side will be heard and the hearing will be "fair". The perception of W-2 participants is quite different. Most believe that they will not be heard. The factfinders are W-2 agency employees or contract agencies, a fact not lost

on recipients. Most factfinders have daily contact with the staff appearing at the factfindings. In some cases this results in reluctance to require the staff to produce needed documentation or evidence, or the failure to keep control and order at the factfinding. In other cases, the factfinder has investigated the case before the factfinding and, in some, they gather additional evidence from the agency's records or staff after the factfinding. This is clearly prejudicial to the participant. In addition, if the participant is not represented by an advocate, she is the only non-W-2 staff person in the room. This is an extremely uncomfortable situation, and discourages the participant from freely presenting her side of the story. In many cases the W-2 factfindings are significantly more antagonistic than the fair hearing process. This is clearly due to the absence of a neutral individual who is in control of the process.

DWD argues that issues are resolved faster under the current system than the former AFDC hearing process. This is not necessarily accurate. For example, in one case the petitioner's January and February W-2 benefits were at issue. The participant's case was closed because she missed a single review appointment, which she had called to reschedule. A factfinding was held on February 6, 1999. An unfavorable decision was issued by the W-2 agency on March 5, 1999. The case was appealed to the state and a final decision ordering corrected payments was issued on April 5, 1999. The payments owed were issued on April 22nd and April 28th, almost four months after the closure. In a second case, we requested review regarding a February payment. The factfinding was held on February 24, 1999, and a decision was issued on March 5, 1999 upholding the sanction. We appealed to the state and the state's decision reversing the sanction and ordering payment was issued on April 7, 1999. The payment owed was issued on April 16, 1999, two and a half months after the sanction was entered. Clearly there is no guarantee of a "speedy" resolution in the current system.[2]

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[2] DWD's concern about the delay in the process is interesting given their part in this process. In a number of W-2 cases the state hearing office has issued proposed decisions which must be reviewed by the Secretary's office before becoming final decisions. We have waited months and, in some cases continue to wait, for those decisions. The dates of the proposed decisions and the final decision, if issued, are as follows:

In its comments DWD claims that restoration of fair hearings would alienate participants and prevent them from getting the help they need. As discussed above, our experience is that this scenario more aptly describes the current system. There is little respect for participants; they are told what to do and when to do it. There is also little, if any, discussion and mutual resolution. DWD's comments reflect this. W-2 participants are likened to children who must be dealt with quickly. This view is degrading and demeaning. W-2 participants deserve to be treated with the respect due of us all and a fair system must be available to ensure that this happens. Many participants view the system as unfair and contrary to their best interests, a reflection perhaps on how they are treated.

DWD cites the low number of requests for factfindings and state appeals as an indication that the system is working. Again my opinion, based on our experience, is the opposite. The numbers cited by DWD indicate that most W-2 participants are requesting factfindings through this office. All but a handful of the state appeals were done by Legal Action. Applicants and participants are not as a routine matter

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	Proposed Decision	Final Decision
M.B.	August 3, 1998	April 19, 1999
S.K.	September 3, 1998	not issued
S.E.	September 22, 1998	not issued
S.O.	October 23, 1998	April 19, 1999
V.D.	November 3, 1998	June 4,1999
A.R.	November 6, 1998	April 19, 1999
S.E.	November 19, 1998	not issued
L.R.	November 30, 1998	April 19, 1999
T.W.	December 3, 1998	April 19, 1999
D.S.	December 23, 1998	not issued
C.E.	January 21, 1999	June 4, 1999
W.W.	January 21, 1999	June 4, 1999
D.S.	March 12, 1999	not issued
C.R.	March 29, 1999	not issued
S.T.	April 19, 1999	not issued

requesting factfindings on their own. When we ask why, most respond that they see no point.

Participants have told us that the current system is not like the fair hearing system and that they do not believe a factfinding would do any good. They are aware that it is the agency reviewing itself and not a real opportunity for independent review. Moreover, the two step process of state appeal is confusing and difficult for unrepresented individuals to pursue.[3] Unlike fair hearings, in which the majority of persons are unrepresented, the current process is simply not a system that participants see as accessible.[4] The current system is also duplicative. Participants seeking benefits need to request two different types of hearings from two different hearing authorities. For example, an individual who loses a job applies for W-2, food stamps and Medical Assistance. The application is denied or lost. A fair hearing must be requested on the food stamps and Medical Assistance but a factfinding must be requested on the W-2 denial. The applicant needs to fill out two different forms, file them in two different places, and appear at two different dates.

SB123 also authorizes continuing benefits for some W-2 participants. Continuing benefits would be available to those individuals who were receiving W-2 benefits, who were notified that their benefits were being reduced or terminated, and who requested a hearing prior to the effective date of the action.

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[3] In April, a client who represented herself at a factfinding, went back to the W-2 agency to ask about a state review. The agency treated her request as a request for another factfinding. She nearly missed the deadline (21 days) for requesting a department review.

[4] We also have concerns about how requests are handled when we are not involved. In a few cases clients have requested factfindings and then come to us for assistance. We have found that some agencies ignored the request or talked the participant out of proceeding. As soon as our representation was made known the matter was resolved; with the fair hearing system all requests are processed without delay.

The department argues that a return to continuing benefits is a return to an entitlement system. This is incorrect. An entitlement means that all persons who apply for benefits for a given program are entitled to receive them. AFDC was an entitlement. Food stamps and Medical Assistance continue to be. Programs like W-2, rent assistance and public housing are not. This does not mean, however, that benefits can be terminated without advance notice and an opportunity for a hearing. In the public housing context, a resident cannot be evicted unless he or she is given adequate advance notice and an opportunity for a hearing beforehand. This does not make public housing an entitlement. In fact, there is a lengthy waiting list for public housing. It simply recognizes that residents have a protected interest in their housing, and basic principles of fairness require that they be given the opportunity for a hearing before that interest is taken away.

W-2 participants who are receiving cash payments depend on those benefits to support themselves and their families. In sanction cases notices are generally mailed just a few days before the end of the month. Even if a factfinding is requested immediately, it may take two to three weeks, or longer, for a decision to be issued. Assuming a decision is favorable, benefits still must be generated, which can take another 5 to 7 working days. If the participant is not successful at the factfinding stage, a state appeal and resolution could take up to 30 days or longer. Clearly, this is enough time for a family to be evicted.

Finally, as the fiscal note indicates, fully two-thirds of the recipients appealing their cases are successful. Thus, the continuing benefits they receive are simply the benefits they are due. For the others, any benefits received in error can be recovered from future W-2 benefits, tax intercept or other collection methods.[5]

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[5] DWD raises concerns about the fraudulent receipt of benefits. There is no evidence of widespread fraud. If a recipient is receiving benefits fraudulently, or is not participating at all without a good reason, she will not win the hearing. Any overpaid benefits will be collected by DWD. DWD has an effective collection system which tracks recipients and former recipients and collects overpayments.

Retroactive relief is another important part of SB123. Currently, retroactive relief is expressly barred by §49.152. If a W-2 agency fails to process an application, or wrongfully denies a work position to an applicant, the only relief available to the individual is future placement in a work position. There is no back payment. We have clients who have been without income for two months or more, who are facing eviction, utility disconnection or who are homeless, who have been improperly denied assistance. Although we are eventually successful in securing future assistance for them, there is nothing to remedy the past mistake, to make up for the overdue rent, the eviction, and their hardship.[6] As one state hearing examiner stated, under this system, a W-2 agency could simply ignore requests for assistance until ordered to act by a state hearing examiner without consequences.[7]

Both the W-2 agencies and participants would be better served if SB123 were adopted. The W-2 agencies' role in the fair hearing process would be truly one of informal resolution. They would be relieved of the formal W-2 factfinding process, which some of them have clearly struggled with. The program and its participants would have the benefit of one system, promoting fairness and consistency. The W-2 agencies would retain their discretion, informal resolution would be encouraged, and the state hearing office would ensure that such discretion was exercised within the bounds of state law and rule.

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[6] For example, an applicant applies on March 6, 1999, is denied, requests a factfinding and on April 8, 1999 the factfinder orders a CSJ placement. Assuming a placement is made the next day the earliest that participant receives a payment is May 1st, and because of the payment schedule it is only a partial payment. If a state review was also required the process would take at least another month and there would be no payment until June at the earliest.

[7] A copy of this and two other decisions representing a failure to act are attached.

Your time and attention to this matter is appreciated. If you have any further questions regarding this issue please feel free to contact me.

Very truly yours,

Patricia DeLessio
Attorney at Law

PDL/eca

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]
Madison, WI 53711

DECISION

WWW-13/36269

The proposed decision of the hearing examiner dated October 23, 1998 is hereby adopted as the final order of the Department.

REQUEST FOR A REHEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing 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 examiner 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 twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. 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 thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one). The appeal must be served on the Wisconsin Department of Workforce Development, P.O. Box 7946, Madison, WI 53707-7946..

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of Madison, Wisconsin, this 19th day of April, 1999.

Orlando Canto, Deputy Secretary
Department of Workforce Development

[redacted]

DHA-15 (R10/97)

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]
Madison, WI 53711

PROPOSED DECISION

WWW-13/#36269

PRELIMINARY RECITALS

Pursuant to Wis. Stat. §49.152(1), the petitioner filed a request for a Wisconsin Works (W-2) fact finding review with the Dane County Dept. of Human Services, a W-2 agency, on May 19, 1998. A fact finding review was held by that agency and a fact finding decision was issued on August 19, 1998.

The petitioner timely appealed to the Department from the fact finding decision on September 2, 1998. See Wis. Stat. §49.152(2)(b), (c). The fact finding file was received by the Division on October 7, 1998.

The issue for determination is whether W-2 T payments can be backdated when an error in processing an application causes an invalid denial.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:
[redacted]
Madison, WI 53711

Petitioner's Representative:
Atty. Jack Longert
Legal Action Of Wisconsin, Inc.
P.O. Box 259686
Madison, WI 53725-9686

Wisconsin Department of Workforce Development
P.O. Box 7946
Madison, WI 53707-7946
By: Phoua Her, ESS
Dane County Dept. Of Human Services
1819 Aberg Avenue, Suite D
Madison, WI 53704
FACT FINDER: Mary Becker
Dane County Dept. of Human Services

EXAMINER:
Brian C. Schneider, Attorney
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner [redacted] resident of Dane County.

2. Petitioner requested W-2 on January 30, 1998. Because the child support office reported that the father of petitioner's children lived with petitioner, the worker sent an investigator to determine his residence. The investigator eventually concluded that there was insufficient evidence to conclude that the father lived with petitioner, but in the meantime, on February 27, 1998, a computer-generated notice informed petitioner that W-2 was "denied" because she "declined this type of aid." The worker did not process the application for W-2 further after receiving the investigator's report.

3. Although petitioner's appeal was made more than 45 days after the February 27 notice, the agency took jurisdiction over the appeal because the notice failed to apprise petitioner of her rights to request a fact finding hearing.

4. The agency eventually processed petitioner's request, and on June 23, 1998, petitioner was placed in the W-2 Transitional (W-2 T) tier as of that date.

5. The fact finder concluded that petitioner should have been placed in W-2 T as of her original request date of January 30 due to her physical condition; petitioner would not have been required to perform any activities other than caring for herself and her family. The fact finder did not backdate the W-2 T payments for the period January 30 through June 22, 1998, based upon her interpretation of W-2 policy.

DISCUSSION

W-2 is Wisconsin's public assistance work program, and is outlined at Wis. Stat. §§49.141-.161. It supplants the prior federal-state cash payment program, Aid to Families with Dependent Children (AFDC), described at Wis. Stat. §49.19. The petitioner disagrees with certain actions taken in changing her AFDC case over to W-2 status, and is not satisfied with the W-2 agency fact finder's decision reviewing her complaints.

I. STATUS OF FACT FINDING RECORD.

The first task of a departmental reviewer, such as this hearing examiner, is to determine whether the fact finding record is sufficient for review. If it is not sufficient, the examiner may remand the matter back to the fact finder, conduct a new hearing (either in person or telephonically), or otherwise augment the record. See Wis. Stat. §49.152(2)(d). In the instant case, the record is adequate for the examiner to make sense of the case, and a supplementary hearing was not necessary. The Findings of Fact above are based on the fact finder's decision, file (including exhibits submitted by the petitioner), and the exhibits attached to the petitioner's brief to this examiner.

II. STANDARD OF REVIEW.

A threshold analytical question is whether the departmental reviewer is reviewing this matter *de novo* or with some unspecified judicial standard of review. This entire due process function is subject to Wisconsin's administrative procedure act, Chapter 227, Wis. Stats., because this type of case satisfies all four prongs of the contested case hearing right test at Wis. Stat. §227.42(1). The Department has also made a public declaration that the entire review process at Wis. Stat. §49.152 is subject to Ch. 227's requirements in the document, Public Hearing Comment & Agency Response, Rule Number : DWD 12, p. 14:

> The Department considers that the proceedings under paragraph DWD 12.22(2)(a) will be subject to the provisions of s. 227.44-.49, Wisconsin Stats. The Department does not want to deny anyone the opportunity for a court hearing; however, it is expected that very few cases will lead to court.

Based on the foregoing, the Division of Hearings and Appeals has concluded that the W-2 process function is subject to Ch. 227 requirements.

Having concluded that Ch. 227 applies to the W-2 process function, the Division also concluded that the departmental reviewer must engage in a *de novo* look at the fact finder's decision. In Reinke v. Personnel board, 53 Wis. 2d 123, 191 N.W.2d 833 (1971), the Wisconsin Supreme Court instructed state agency adjudicators to make *de novo* determinations, relying on the greater weight of the credible evidence, in administrative hearings. The Court specifically rejected the use of a judicial review (e.g., "substantial evidence" test) standard by the state agency, "unless expressly otherwise provided by statute." Id., pp. 134-136. There is no judicial review standard articulated in either the W-2 statute or promulgated rule. The only standard articulation undertaken by the Department is that the examiner's action is "a limited review of the record and the decision of the fact finder." W-2 Policy Manual, Section IV, p.21. This is not an articulated judicial review standard, and it is not legally binding on the examiner here.

III. RETROACTIVITY OF W-2 T PAYMENTS.

The sole issue is whether W-2 policy prevents the backdating of W-2 payments when it is discovered that a person's application for W-2 was processed incorrectly. The fact finder grudgingly concluded that backdating could not occur.

Sec. 49.152, Stats, describes the W-2 review process. It originally was silent on the point of remedies, but was amended in 1997 to contain the following instructions:

> (3) REMEDIES. (a) If, following review under sub. (2), the Wisconsin works agency or the department determines that an individual, whose application for a Wisconsin works employment position was denied based on eligibility, was in fact eligible, or that the individual was placed in an inappropriate Wisconsin works employment position, the Wisconsin works agency shall place the individual in the first available Wisconsin works employment position that is appropriate for that individual, as determined by the Wisconsin works agency or the department. An individual who is placed in a Wisconsin works employment position under this paragraph is eligible for the benefit for that position under s. 49.148 beginning on the date on which the individual begins participation under s. 49.147.
>
> (b) If, following review under sub. (2), the Wisconsin works agency or the department determines that a participant's benefit was improperly modified or canceled, or was calculated incorrectly, the Wisconsin works agency shall restore the benefit to the level determined to be appropriate by the Wisconsin works agency or by the department retroactive to the date on which the benefit was first improperly modified or canceled or incorrectly calculated.

Subsection (3)(a) provides that the agency or the department may only provide prospective placement and W-2 cash assistance as of the date of placement, if upon fact finding review, it is found that an application was wrongly denied "based on eligibility" or the individual was wrongly placed in a W-2 employment position. Subsection (3)(b) provides for a retroactive remedy only for a participant whose benefit was improperly modified, canceled, or incorrectly computed.

The department's policy statement on the remedies available to a second level reviewer are described in the Wisconsin Works Manual, § 19.3.3, as follows:

> If following the Departmental Review, it is determined the W-2 agency *incorrectly denied an application for a W-2 employment position* or the employment position placement was

> inappropriate, DHA may direct the W-2 agency to place the individual in the first available employment position beginning on the date the individual begins participation. No retroactive cash payment for the period prior to participation shall be issued. If the Department determines that a W-2 cash payment was calculated, reduced, or terminated improperly, the W-2 agency shall restore the W-2 payment to the appropriate level retroactive to the date on which the payment was improperly calculated, reduced or terminated.

Emphasis added.

As noted in the fact finder's decision, the department's policy of denying retroactive payments provides an impetus for W-2 agencies to intentionally deny or fail to process applications (that did not happen here; it is undisputed that the worker unintentionally erred by failing to forward the application to the Financial and Employment Planner (FEP)). Nevertheless, I cannot deny the plain language of the statute, which provides only for prospective placement in cases of improper denial, and does not provide for retroactivity in cases of improper processing.

Petitioner argues that it is unfair to deny her retroactive payments when she was doing all along what she would have been required to do – care for herself and her family. It would be equally unfair, however, to give her retroactive payments when others would be denied. For example, if petitioner had been placed in a community service job in June, and should have been placed in one in January, she could not receive retroactive payments because she did not perform the community service during the retroactive period.

In this case, although a computer-generated notice stated that the application was denied, the notice simply used standard language for denial for all programs in which benefits are not requested. In other words, there was not necessarily an entry into the computer that petitioner "declined" W-2; because the worker did not enter that petitioner requested W-2, the computer automatically generated a notice saying that W-2 was declined.

An interesting scenario that follows is what would happen if the agency completely ignored the W-2 application, and the computer system did not spit out a denial notice after 30 days. The Manual, at §4.5.1, states that W-2 eligibility does not begin until W-2 activities begin, which is when verifications are completed and the FEP makes a placement. Under this scenario, the agency could simply ignore requests for W-2 and wait until a Department reviewer ordered placement. It appears that there would be no remedy for the client other than to accept the late placement. The W-2 agency's contract with the department could possibly be in jeopardy, but it does not appear that the department or the legislature anticipated a retroactive remedy for the client. However punitive the result is to a dependent client of the agency, it is the result mandated by the legislature and the department, and one which a hearing examiner has no authority to overturn.

Petitioner argues secondly that the actions of the agency deprived petitioner of her due process rights. It is a longstanding tenet that hearing examiners do not have authority to decide constitutional issues.

CONCLUSIONS OF LAW

Although the agency clearly erred in denying petitioner's request for W-2, the W-2 statute does not provide for retroactive payments when an error occurs in processing an application.

NOW, THEREFORE, it is

ORDERED

That the petition for review herein be and the same is hereby dismissed.

NOTICE TO RECIPIENTS OF THIS DECISION:

This is a Proposed Decision of the Division of Hearings and Appeals. IT IS NOT A FINAL DECISION AND SHOULD NOT BE IMPLMENTED AS SUCH.

If you wish to comment or object to this Proposed Decision, you may do so in writing. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your comments and objections to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy to the other parties named in the original decision as "PARTIES IN INTEREST."

All comments and objections must be received no later than 15 days after the date of this decision. Following completion of the 15-day comment period, the entire hearing record together with the Proposed Decision and the parties' objections and argument will be referred to the Secretary of the Department of Workforce Development for final decision-making.

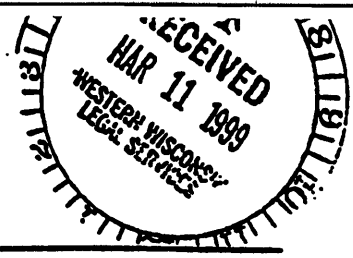
The process relating to Proposed Decision is described in Wis. Stat. §227.46(2).

Given under my hand at the City of Madison, Wisconsin, this 23rd day of October, 1998.

Brian C. Schneider, Attorney
Division of Hearings and Appeals
1022/bcs

cc:

STATE OF WISCONSIN
Division of Hearings and Appeals



In the Matter of

[redacted] 54743

DECISION

WWW-6/#38857

PRELIMINARY RECITALS

Pursuant to Wis. Stat. §49.152(1), petitioner requested a W-2 fact finding review with the Buffalo County Dept. of Health and Human Services, in its capacity as a Wisconsin Works (W-2) agency, on February 12, 1999. The agency refused to hold a fact finding review on the bases that petitioner refused W-2 and her request was untimely.

Petitioner appealed to the Department. Petitioner's file, along with a written explanation from the agency, was received by the Division on March 2, 1999.

The issue for determination is whether a remedy is available for petitioner's allegations that the agency failed to inform her of the availability of W-2.

PARTIES IN INTEREST:

Petitioner:

[redacted]

Petitioner's Representative:

Atty. Mary Lansing
Western Wisconsin Legal Services
205 5th Avenue South, Suite 300
PO Box 2617
La Crosse, WI 54601

Wisconsin Department of Workforce Development
P.O. Box 7946
Madison, WI 5707-7946
By: Written submission of Linda L. Taverna, ES Supervisor
Buffalo County DHHS
P.O. Box 517
Alma, WI 54610-0517

EXAMINER:
Brian C. Schneider, Attorney
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner ([redacted] is a resident of Buffalo County.

[redacted]

2. Petitioner applied for assistance at the county agency on April 22, 1998. Petitioner was informed of the availability of W-2. She was offered and was granted food stamps and medical assistance. A notice informed her of her food stamp and medical assistance eligibility. No notice was issued that mentioned W-2 in any manner.

3. In approximately August, 1998, petitioner discovered the availability of W-2 benefits. She requested, and soon was given, W-2 payments under the category W-2 transitional (W-2 T), which provides payments for persons unable to work, in petitioner's case because of her own physical disability. She thereafter began to receive monthly payments of $628.

4. Petitioner then requested W-2 T payments retroactive to her April, 1998 application. That request was denied, and subsequent requests for a fact finding review were denied because the agency considered petitioner's request to be untimely, and because petitioner had not requested W-2 in April, 1998.

DISCUSSION

There is no fact finding file in this case because no fact finding review was conducted. There is a legitimate issue of whether the Division of Hearings and Appeals has jurisdiction over this matter since the statute anticipates the Division deciding matters only after fact finding reviews have been conducted. Sec. 49.152(2)(b), Wis. Stats. However, I will not address that issue because I will dismiss the appeal on other grounds. Even assuming petitioner's allegations to be accurate, I conclude that there is no meaningful remedy available to her. The findings of fact are based upon petitioner's statement of facts and my review of the CARES computer notice history.

I note first that the agency incorrectly relied on a denial notice in concluding that petitioner's request for fact finding was untimely. I reviewed the notice history on the computer. The notice stating that W-2 was denied because petitioner "declined" the benefit was suppressed; that is, it was never sent. The only notice sent to petitioner described eligibility for food stamps and medical assistance.

W-2 is Wisconsin's public assistance work program, and is outlined at Wis. Stat. §§49.141-.161. It supplants the prior federal-state cash payment program, Aid to Families with Dependent Children (AFDC), described at Wis. Stat. §49.19.

Nothing in the W-2 statutes or the Wisconsin Administrative Code requires the agency to affirmatively recruit W-2 participants, or to inform persons making inquiries of the availability of W-2. Both sec. 49.141(4), Wis. Stats., and §DWD 12.06(5), Wis. Adm. Code, state that W-2 is not an entitlement program. The W-2 Manual, §§1.6.3.1 and 1.6.3.2, informs the agency that a person who makes an inquiry can be referred to other resources available in the community. While it may boggle the mind of a reasonable person that an agency would not suggest the availability of a program to someone who claims to be unable to work due to disability, there is nothing that mandates the agency to suggest W-2 eligibility.

Therefore, if I accept petitioner's statement of facts, that she did not affirmatively request W-2 because she was unaware of its availability, I must conclude that she has no entitlement to receive the benefit. Furthermore, even if I assume that the agency in effect "denied" W-2 by not informing petitioner of its availability, there is no authority to order retroactive payments.

Sec. 49.152, Stats, describes the W-2 review process. It originally was silent on the point of remedies, but was amended in 1997 to contain the following instructions:

(3) [illegible]

the department determines that an individual, whose application for a Wisconsin works employment position was denied based on eligibility, was in fact eligible, or that the individual was placed in an inappropriate Wisconsin works employment position, the Wisconsin works agency shall place the individual in the first available Wisconsin works employment position that is appropriate for that individual, as determined by the Wisconsin works agency or the department. An individual who is placed in a Wisconsin works employment position under this paragraph is eligible for the benefit for that position under s. 49.148 beginning on the date on which the individual begins participation under s. 49.147.

(b) If, following review under sub. (2), the Wisconsin works agency or the department determines that a participant's benefit was improperly modified or canceled, or was calculated incorrectly, the Wisconsin works agency shall restore the benefit to the level determined to be appropriate by the Wisconsin works agency or by the department retroactive to the date on which the benefit was first improperly modified or canceled or incorrectly calculated.

Subsection (3)(a) provides that the agency or the department may only provide prospective placement and W-2 cash assistance as of the date of placement, if upon fact finding review, it is found that an application was wrongly denied or the individual was wrongly placed in a W-2 employment position. Subsection (3)(b) provides for a retroactive remedy only for a participant whose benefit was improperly modified, canceled, or incorrectly computed.

The department's policy statement on the remedies available to a second level reviewer are described in the Wisconsin Works Manual, § 19.3.3, as follows:

> If following the Departmental Review, it is determined the W-2 agency *incorrectly denied an application for a W-2 employment position* or the employment position placement was inappropriate, DHA may direct the W-2 agency to place the individual in the first available employment position beginning on the date the individual begins participation. No retroactive cash payment for the period prior to participation shall be issued. If the Department determines that a W-2 cash payment was calculated, reduced, or terminated improperly, the W-2 agency shall restore the W-2 payment to the appropriate level retroactive to the date on which the payment was improperly calculated, reduced or terminated.

Emphasis added.

The department's policy of denying retroactive payments may very well provide an impetus for W-2 agencies to intentionally deny or fail to process applications. Nevertheless, I cannot deny the plain language of the statute, which provides only for prospective placement in cases of improper denial, and does not provide for retroactivity in cases of improper processing.

The Manual, at §4.5.1, states that W-2 eligibility does not begin until W-2 activities begin, which is when verifications are completed and the FEP makes a placement. Under this scenario, the agency could simply ignore requests for W-2 and wait until a Department reviewer ordered placement. It appears that there would be no remedy for the client other than to accept the late placement. The W-2 agency's contract with the department could possibly be in jeopardy, but neither the legislature nor the department anticipated a retroactive remedy for the client.

CONCLUSIONS OF LAW

1. There is no affirmative duty for a W-2 agency to offer W-2 to a person who does not request the services.
2. Even if the agency in effect denied W-2 to petitioner, by not offering it to her although she did not request it, there is no provision for retroactive relief; the remedy is to place her into a W-2 category as soon as possible and to begin benefits then.

NOW, THEREFORE, it is **ORDERED**

That the petition for review herein be and the same is hereby dismissed.

REQUEST FOR A NEW HEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing 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 examiner 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 twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. 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 thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one). The appeal must be served on the Wisconsin Department of Workforce Development, P.O. Box 7946, Madison, WI 53707-7946.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of Madison, Wisconsin, this 10th day of March, 1999.

Brian C. Schneider, Attorney
Division of Hearings and Appeals
0309/bcs

cc: Buffalo Co.
Mary Lansing, WWLS
Leonor Rosas DeLeon, DWD
Bill Goehring, DWD
Alice Wilkins, BES
Dave Schwarz, DHA
Lou Dunlap, DHA

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]
Milwaukee, WI 53205

DECISION

WWW-40/38465

PRELIMINARY RECITALS

Pursuant to Wis. Stat. § 49.152(1), the petitioner filed a request for a W-2 Fact Finding review with the MAXIMUS, a W-2 agency, on December 23, 1998. A Fact Finding review was held by that agency and a Fact Finding decision was issued on January 5, 1999.

The petitioner timely appealed to the Department from the Fact Finding decision on January 27, 1999. See Wis. Stat. §49.152(2)(b), (c). The Fact Finding file was received by the Division on February 5, 1999.

The issue for determination is whether the petitioner was correctly denied a Job Access Loan.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[redacted]
Milwaukee, WI 53205

Petitioner's Representative:

Patricia DeLessio
Legal Action Of Wisconsin
230 West Wells Street, Room 800
Milwaukee, WI 53205

Wisconsin Department of Workforce Development
P.O. Box 7946
Madison, WI 5707-7946
By: Zena Bland
Maximus
1304 South 70th Street, Mezzanine
West Allis, WI 53214
FACT FINDER: Sonya Johnson Dodd
MAXIMUS

EXAMINER:
Kenneth P. Adler, Attorney
Division of Hearings and Appeals

FINDINGS OF FACT

1. The petitioner ([redacted]) is a resident of Milwaukee County.

The request was for a $500 loan to assist with rental payments and the petitioner indicated she needed the loan to prevent eviction. She was an employee of the Milwaukee Public School system who was not paid during the summer months.

3. The W-2 agency provided no explanation for any action or inaction on the petitioner's Job Access Loan (JAL) application. The application form presents no mention of a denial and no notification of a denial was issued to the petitioner.

4. The petitioner was subsequently evicted from her apartment on some unknown date due to the inability to meet her rental obligations.

5. On or about November 2, 1998 the petitioner completed a Special Needs Request. In response to a question on the form asking why a JAL was not appropriate, "no ability to pay back" was designed as the reason. ***This is the only mention of the disposition of the JAL application.***

6. On November 6, 1998 the petitioner was issued a "special needs grant" in the amount of $371 to assist with her rent.

7. A Fact Finding was conducted on January 5, 1999.

8. On January 7, 1999 the Fact Finder issued a decision upholding the W-2 agency action. The decision explained the W-2 agency exercises sole discretion in determining and authorizing Job Access Loans. The decision did not address the fact no notification was issued to the petitioner.

DISCUSSION

W-2 is Wisconsin's public assistance work program, and is outlined at Wis. Stat. §§ 49.141-.161. It replaced the prior federal-state cash payment program, Aid to Families with Dependent Children (AFDC), described at Wis. Stat. §49.19. The petitioner disagrees with certain actions of the W-2 agency regarding its failure to process or notify her regarding her Job Access Loan application, and is not satisfied with the W-2 agency Fact Finder's decision reviewing her complaints.

I. STATUS OF FACT FINDING RECORD.

The first task of a departmental reviewer, such as this hearing examiner, is to determine whether the Fact Finding record is sufficient for review. If it is not sufficient, the examiner may remand the matter back to the Fact Finder, conduct a new hearing (either in person or telephonically), or otherwise augment the record. See Wis. Stat. §49.152(2)(d). In the instant case, the paper record is adequate for the examiner to make sense of the case, and a supplementary hearing was not necessary. The Findings of Fact above are based on the Fact Finder's decision, file and the exhibits attached to the petitioner's brief to this examiner. The W-2 agency failed to supply any tape recording of the Fact Finding.

II. STANDARD OF REVIEW.

A threshold analytical question is whether the departmental reviewer is reviewing this matter *de novo* or with some unspecified judicial standard of review. This entire due process function is subject to Wisconsin's administrative procedure act, Chapter 227, Wis. Stats., because this type of case satisfies all four prongs of the contested case hearing right test at Wis. Stat. §227.42(1). The Department has also made a public declaration that the entire review process at Wis. Stat. §49.152 is subject to Ch. 227's requirements in the document, Public Hearing Comment & Agency Response, Rule Number : DWD 12, p. 14:

> The Department considers that the proceedings under paragraph DWD 12.22(2)(a) will be subject to the provisions of s. 227.44-.49, Wisconsin Stats. The Department

does not want to deny anyone the opportunity ... hearing.
expected that very few cases will lead to court.

Based on the foregoing, I conclude that the W-2 process function is subject to Ch. 227 requirements.

Having concluded that Ch. 227 applies to the W-2 process function, I must also conclude that the departmental reviewer must engage in a *de novo* look at the Fact Finder's decision. In *Reinke v. Personnel Board*, 53 Wis. 2d 123, 191 N.W.2d 833 (1971), the Wisconsin Supreme Court instructed state agency adjudicators to make *de novo* determinations, relying on the greater weight of the credible evidence, in administrative hearings. The Court specifically rejected the use of a judicial review (e.g., "substantial evidence" test) standard by the state agency, "unless expressly otherwise provided by statute." Id., pp. 134-136. There is no judicial review standard articulated in either the W-2 statute or promulgated rule. The only standard articulated by the Department is that the examiner's action is "a limited review of the record and the decision of the fact finder." W-2 Policy Manual, Section IV, p.21. This is not an articulated judicial review standard, and it is not legally binding on the examiner here.

III. EXPLANATION OF A JOB ACCESS LOAN

Job Access Loans (JAL) are short-term, no interest loans designed to assist with emergency needs to support employment. The explanation of the process and circumstances surrounding these loans is detailed in state statute, administrative rule and departmental policy. See Wis. Stat. § 49.147(6), Wis. Admin. Code § DWD 12.17, W-2 Manual, section 13.1.0. W-2 agencies exercise sole discretion in determining and authorizing such loans. Wisconsin Works Manual (W-2 Manual), section 13.1.0.

An individual who meets the W-2 criteria is eligible for a JAL if the individual needs the loan to address an immediate and discrete financial crisis. Wis. Stat. § 49.147(6). Requesting assistance to help with a rental payment is specifically listed as an appropriate reason for seeking such a loan. W-2 Manual, section 13.3.0. BWI Operations Memo, 97-106.

The W-2 agency is responsible for drafting procedures which will expedite loan eligibility determinations and tailoring repayment agreements to meet an individual's specific circumstances. Wis. Admin. Code § DWD 12.17(2). Repayment may be made through in-kind services representing up to 75% of the loan amount. Wis. Stat. § 49.147(6)(b), Wis. Admin. Code § DWD 12.17(2)(d). Volunteer community work hours are given as an example of repayment in services. W-2 Manual, section 13.5.0.

Individuals who do not agree with the action taken on a JAL application may request a Fact Finding review by the W-2 agency. W-2 Manual, section 19.2.0. The person must file a written request for a Fact Finding with the W-2 agency within 45 days of the effective date of the decision. Id. at 19.2.1. The W-2 agency must review the case and make a final decision following the petition for review.

To clear any confusion regarding the W-2 agency's responsibilities concerning this issue, the contract between the W-2 agency and the State of Wisconsin requires the W-2 agency to administer the JAL program in conformity with the policies of the Department of Workforce Development. See Appendix N of W-2 Contract dated June 30, 1997.

IV. THE W-2 AGENCY HAS PRESENTED NO INFORMATION TO SHOW IT PROPERLY PROCESSED THE PETITIONER'S JOB ACCESS LOAN OR NOTIFIED HER OF THE DECISION TO DENY HER APPLICATION.

In this particular case the W-2 agency presented little information to explain its decision concerning the petitioner's JAL application. The only exhibit consists of the 4-page application dated September 23, 1998. The calculation page lists a variety of household expenses which are not correctly calculated and

there is a notation that "income minus expenses" results in a net budget of $621. However, there is no way to discern *why* or even *if* the application has been denied. The "Comments" section of the application, which clearly requires the agency to "list reasons for the denial," is blank. From the evidence presented, it is simply impossible to tell whether, in fact, the loan application review was even completed.

In addition, the W-2 agency did not issue any notice to the petitioner informing her the loan application had been denied and her right to appeal that decision. Perhaps that is the reason the Fact Finding decision did not conclude her request for Fact Finding was untimely, even though filed well past the 45 day timeframe for submitting such a request.

V. THE W-2 AGENCY WRONGFULLY FAILED TO PROCESS THE JOB ACCESS LOAN APPLICATION FROM THE PETITIONER IN SEPTEMBER, 1998.

I must agree with the petitioner's representative who argues that the W-2 agency has failed to follow state rules, failed to offer loans to eligible persons, failed to develop expedited eligibility determinations and payments, and failed to provide notice of its determination and the individual's right to request a Fact Finding if she disagrees with the notification.

The petitioner was wrongfully hindered by the W-2 agency in her efforts to seek a JAL through that agency. The agency provided no evidence to rebut the petitioner's assertion that she received no notification and had no information regarding the status of her application. And, as mentioned above, the agency was not able to present any persuasive evidence that it properly processed or in fact ever denied the petitioner's JAL application.

The W-2 agency's unfair and inappropriate conduct does not violate any express provision of the Wisconsin W-2 statute or administrative code; however, it does run afoul of other authorities. Specifically, the conduct is contrary to (1) *PRWORA*'s requirement of "fair and equitable treatment," (2) the Department's contract with the W-2 agency, and (3) the Department's rather minimal policy description of what is to occur when a person requests W-2 assistance. The policy description is as follows:

> W-2 is a time-limited employment assistance program. Eligible applicants may receive assistance to find employment, if unable to obtain and/or maintain unsubsidized employment. Persons have the right to complete an application for assistance and cannot be denied that opportunity. Those who are eligible for and need assistance will receive assistance. However, persons are not entitled to a cash payment or placement in a W-2 employment position as a property right under law.

W-2 Manual, 1.1.0 (1-1-98). Further, the introduction states that the W-2 agency's receptionist is to refer a W-2 applicant to a Resource Specialist "no later than the following working day," and that the Resource Specialist is to refer individuals who request a JAL to a Financial Employment Planner (FEP). Id. at 1.6.3.3. The FEP is responsible for determining eligibility for a JAL and is required to "[e]nsure that all data is entered into the CARES system in an accurate and timely fashion and that correct payments are issued in a timely manner." That did not occur in this case as there was no evidence the application was processed through the CARES system, and no notations concerning the denial are listed in the system except for the November notation concerning the Special Needs Request. See Finding of Fact #5.

The W-2 agency's conduct is also contrary to its contractual obligations with the Department for W-2 program administration. The June 30, 1997, contract states at Appendix N, Job Access Loans, that "[t]he W-2 agency will administer the Job Access Loan program in accordance with the Job Access Loan policy as provided in the Department's Policies and Procedures."

The "Department's Policies and Procedures" are found in the Wisconsin Administrative Code, W-2 Manual and Operations Memos. The citations to these authorities found in Section III above clearly indicate that the W-2 agency failed to follow the policy regarding the purpose for, and the reason to, providing a JAL. In addition, the explanation which was ultimately provided two months after the application was received appears to violate the directive that 75% of a JAL may be repaid through in-kind payments such as community service work.

The W-2 agency apparently did not follow the above guidelines when the petitioner sought the JAL in September, 1998. This contract violation appears to be a failure to serve the client per §17.1 of the contract. The contract language indicates that the Department views a failure to serve as a serious matter, because the contracting agency is potentially subject to a $5,000 penalty for such a failure to serve. If the Department's contract places significance upon such a failure, a Departmental reviewer should also view violations of the performance standards pertaining to applications as a substantial matter.

Finally, the W-2 agency's unfair treatment of the petitioner's application attempt is contrary to the *PRWORA* requirement of "fair and equitable treatment" of applicants and recipients. *PRWORA* does not provide specific directions for the application process for the federal block grant programs that replaced AFDC (such as W-2). *PRWORA* states that such block grant programs are not an entitlement. *PRWORA*, §401(b). Notwithstanding the "no entitlement" language in the act, a federal district court recently enjoined New York City's welfare reform efforts which included the turning away of persons trying to apply for the federal block grant cash assistance. The *Reynolds v. Guiliani* judge stated:

> Plaintiffs also have an overarching property interest in their continued receipt of food stamps, Medicaid and *cash assistance*. See Goldberg, 397 U.W. at 261-66, 90 S.Ct. at 1016-20; Dandridge v. Williams, 397 U.S. 471, 487, 90 S.Ct. 1153, 1162-63 (1970); Morel, 927 F.Supp. at 631-32. Plaintiffs' allegations concerning various practices at job centers, such as providing false or misleading information to applicants about their eligibility, arbitrarily denying benefits to eligible individuals, and failing to provide notice of hearing rights, state a viable due process claim under §1983.
>
> (emphasis added)

When a federal judge views an agency's behavior regarding wrongful benefit denial as being serious enough that there is a probability that a federal §1983 lawsuit (based on a civil rights violation, with the winning plaintiff collecting attorney's fees and, possibly, punitive damages) could succeed, I am also inclined to view the agency's conduct here as a violation of *PRWORA*'s directive for fair and equitable treatment.

VI. THE HEARING EXAMINER/DEPARTMENTAL REVIEWER IS UNABLE TO PROVIDE A REMEDY FOR THE W-2 AGENCY'S FAILURE TO TAKE A W-2 APPLICATION FROM THE PETITIONER.

Even though the agency's conduct regarding application was incorrect, I am precluded from providing a remedy to the petitioner as the state statute is silent on providing a remedy for the wrongful denial of a JAL:

> (3) REMEDIES. (a) If, following review under sub. (2), the Wisconsin works agency or the department determines that an individual, whose application for a Wisconsin works employment position was denied based on eligibility, was in fact eligible, or that the individual was placed in an inappropriate Wisconsin works employment position, the Wisconsin works agency shall

> place the individual in the first available Wisconsin works employment position that is appropriate for that individual, as determined by the Wisconsin works agency or the department. An individual who is placed in a Wisconsin works employment position under this paragraph is eligible for the benefit for that position under s.49.148 beginning on the date on which the individual begins participation under s.49.147.

Wis. Stat. §49.152(3)(a). The above only speaks to employment positions, and not JALs. However, an Update of W-2 Fact Finding Remedy Process Background Paper issued on January 16, 1998 provides the following concerning a JAL denial:

> If the Departmental Review decision overturns the agency's action of a denial or improper calculation of a Job Access Loan (JAL) due to an error in financial or nonfinancial eligibility determination, the agency may reexamine the JAL eligibility based on the new information.

The petitioner's representative, while admitting that the crisis which prompted the job access loan application has now passed, suggests that the W-2 be ordered to meet with the petitioner and assess her current needs to ascertain whether a job access loan may be appropriate at this time.

CONCLUSIONS OF LAW

1. The W-2 agency wrongfully failed to either to process her JAL application or provide an explanation for the denial of that September 23, 1998 application, in contravention of Department policy, its Department contract, and *PRWORA*.
2. Per Wis. Stat. §49.152(3)(a), the Departmental reviewer cannot provide the applicant petitioner with any relief for the JAL application inaction or denial.
3. The Fact Finding Decision's Conclusion that the agency correctly denied the application because the agency has sole discretion is incorrect because it is not supported by the preponderance of the credible evidence in the record.

NOW, THEREFORE, it is ORDERED

That the matter be remanded to the W-2 agency with instructions to meet with the petitioner and assess her current needs to ascertain whether a job access loan may be appropriate at this time. The meeting and assessment of her needs are to be conducted within fifteen (15) days of the date of this decision. If the application is denied at that time, the petitioner may request another Fact Finding regarding that denial.

REQUEST FOR A NEW HEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing 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 examiner 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 twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. 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 thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

Appeals for benefits concerning must be served on

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of Madison, Wisconsin, this 24th day of March, 1999.

Kenneth P. Adler, Attorney
Division of Hearings and Appeals
322/kpa

cc: Pat DeLessio, LAW-Milwaukee
Milwaukee Co. DHS
Maximus
Leonor Rosas DeLeon, DWD
Bill Goehring, DWD-Milwaukee
John Thiesenhusen, DES
Dave Schwarz, DHA
Lou Dunlap, DHA
Log Copy

THIS IS A CERTIFIED COPY OF THE FINDINGS AND DECISION MADE IN THIS MATTER AND FILED IN THE DIVISION OF HEARINGS AND APPEALS IN THE CITY OF MADISON, WISCONSIN.

Testimony for Hearing on Bill 123
2/22/00
Kimberly Coleman, (Region 1) YW Works Grievance Officer

Since the implementation of the W2 program, the Fact-finding process has come a long way. In the last two years, the regions have established expedient and streamlined dispute resolution processes. The region Fact-finders have worked closely together to assure customers receive fair and impartial reviews. Though the agencies have different process steps for customers to obtain a review, they have virtually synchronized results in their findings, and the process is not complicated to the customers. Even though the Fact-finders work for the W2 agencies, they in no way have been intimidated to not perform the duties expected of them. The Fact-finders take pride in knowing the agencies trust them to be professional and execute their programs without influence.

The timelines of the process seems to be what customers appreciate the most. Being able to virtually resolve their disputes, or at least have a decision rendered within a two-week period. Even when the Fact-finding outcomes are not in favor of the customers, they have had the availability of discretionary funding through Job Access Loans, Welfare to Work, and Hard Service Dollars, to assist with emergent needs.

Up-front mediation was incorporated to the Fact-finding process, to pre-resolve issues, and lower the number of Fact-findings. W2 agencies have established a good rapport with Legal Action of Wisconsin, and other legal representatives through the mediation process. This process is highly important in promoting a close relationship between customer and agency. The Financial Employment Planners, and customers, are much more at ease with an informal process, that still promotes pre-resolution whenever it can.

When the Fair Hearing process was in place, the biggest concern of the customers was the frustration in getting a timely hearing date. I recall many cases waiting 6-10 weeks before they obtained their hearing dates. The communication system in the Fair Hearing process between DHA and the agencies was not organized, and much confusion was caused for the customers in these cases.

The Fair Hearing process also continued benefits during an appeal. Customers were very much aware of this, and took efforts to file repeated appeals, and not appear to the hearings, knowing they would get their grants if they filed their appeals. I know this, because I was a Pre-Hearing Officer prior to implementation of W2, and attended all hearings for my agency, where I would hear these conversations among customers.

The large numbers of abandoned Fair Hearings left great amounts of monies for the agencies to recoup, if they were able to recoup or gain the monies back from the customers, especially when they left the system. The Fact-finding process has saved immensely on recoupment dollars, by not continuing benefits during the process. This has promoted customers to take the process more seriously, letting them know they must appear to defend their rights, if they want the program services they feel they deserve.

The monitoring process has yielded very positive outcomes for W2 Fact-finding. Monthly monitoring assures that the processes are in compliance, and meet all standards the customers are entitled to receive through dispute resolution.

In closing, I want to stress that Fact-finding is a successful appeal process, where customers can be heard, as well as resolve their disputes, in a positive and constructive manner.

Kimberly Coleman

YW Works for everyone

MEMORANDUM

TO: Rita Renner, Chief Operations Officer
CC: Nancy Jones, Director of Programs – Milwaukee Works
FROM: Kimberly Coleman, Grievance Officer/Complaints Coordinator/Transfer Coordinator
DATE: December 27, 1999

RE: 1999 Annual W2 Fact-Finding Report

Attached is the 1999 Annual W2 Fact-Finding Report.

- This year, we have had a total of 59 filed Fact-findings, and of these, 33 have attended.

  Of the completed Fact-findings, 11 were for the customer, 15 for the agency, 7 joint for customer and agency, 6 abandoned, 1 denied, 12 withdrawn, and 3 resolved without withdrawal.

  Two of the Fact-findings were appealed to DHA for Second Level Review. Both of these outcomes were in the agency's favor.

- The Mediation process played an important role with reducing our number of Fact- findings. We completed 34 Mediations. Of these, 9 were no call no show, 23 were resolved, and only 2 were unresolved with a filed Fact-finding.

- Filed Fact-findings that occur at OIC will appear on the tracking log, but are not counted in the YW Works office.

- We had no Job Center/Job Service Complaints this year.

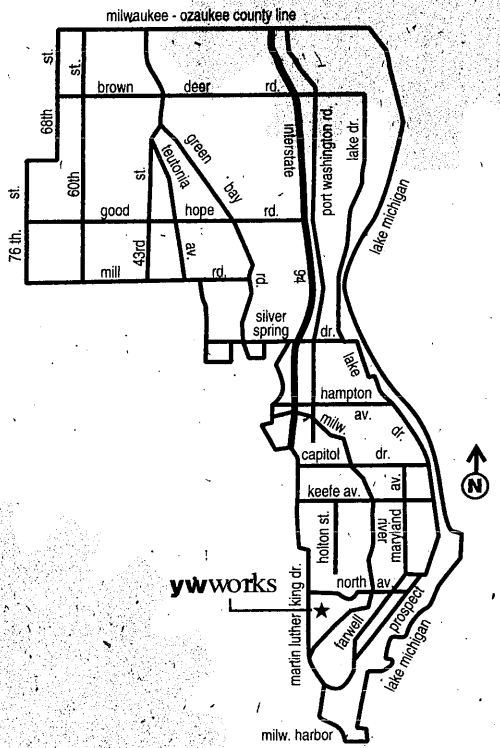
What if I disagree with a decision made by YW Works?

Your first step is to

talk with your Financial and Employment Planner (FEP). Your FEP can help answer any questions you may have about a decision. After talking with your FEP, if you wish to dispute a decision made by YW Works regarding your participation in W-2 (such as employment, child care, benefit levels or emergency assistance), you may file a written grievance.

ywworks *for everyone*

YWWorks empowers people to become **FULL PARTICIPANTS** in the economic mainstream of the **community** by linking industry with a **reliable, SKILLED** workforce and establishing **expectations** of **success** for everyone.



YW WORKS
7a.m. - 8p.m. Monday - Thursday
7a.m. - 5p.m. Friday
1915 N. Dr. Martin Luther King, Jr. Dr.
Milwaukee, WI 53212
phone: 414.374.9922 fax: 414.374.3688
resource line: 414.327.6760

W-2 Auxiliary Program Site
8a.m. - 5p.m. Monday - Friday
1818 N. Dr. Martin Luther King, Jr. Dr.
Milwaukee, WI 53212
phone: 414.374.4460 fax: 414.374.4490

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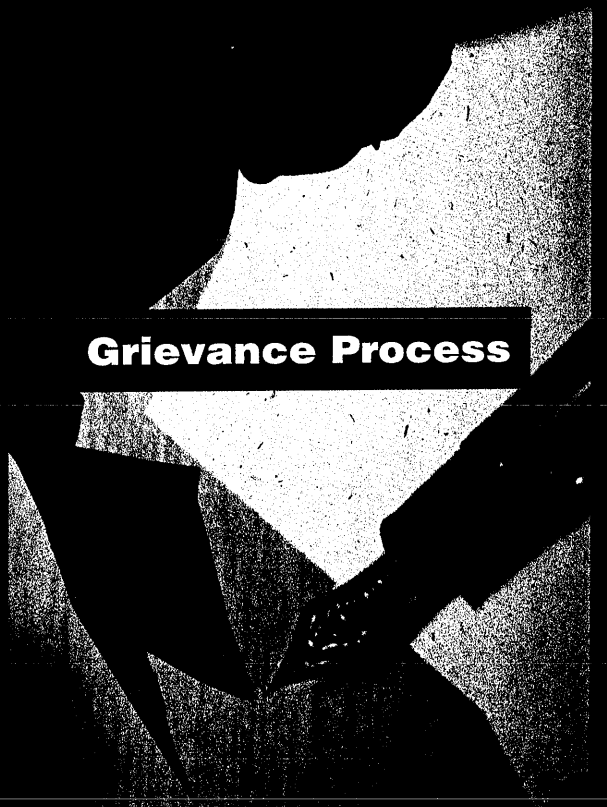


Grievance Process

ywworks *for everyone*

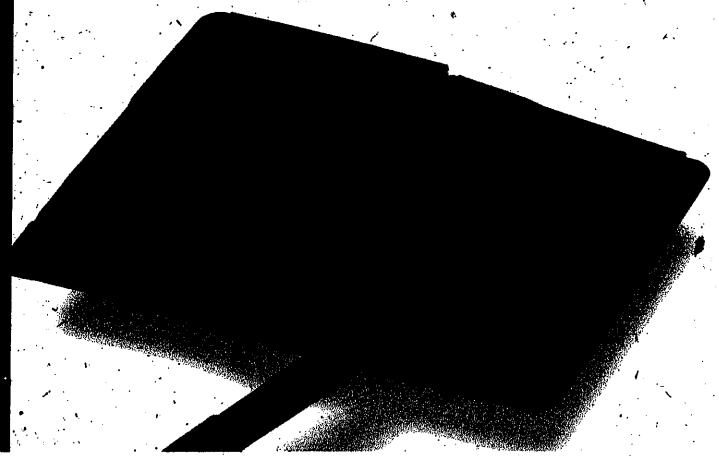
How do I file a grievance?

In order to file a grievance, you must first request a Fact Finding Review within 45 days of the decision you are disputing. The Fact Finding Review is an informal meeting designed to clarify the nature and impact of the decision in question.

You may obtain a Request for Fact Finding Review Form at the YW Works office. To receive the form, you will need to appear in person and provide a Notice of Decision (if available) and a form of identification that verifies your current street address. The following forms of identification are acceptable:

- county picture identification
- valid Wisconsin driver's license
- current utility bill
- Notice of Decision
- current postmarked mail

Once you have completed the Request for Fact Finding Review Form, submit it to the YW Works office located at 1915 N. Dr. Martin Luther King, Jr. Dr. You will be given a copy of the request and be notified of a meeting date to review your grievance within five work days.



What happens at a Fact Finding Review?

At the Fact Finding Review, you will have the opportunity to provide information related to the decision in question. You may bring any written information that you feel is relevant, as well as any individual/s you feel may provide assistance.

You must appear at the scheduled time and bring all necessary information in order for the Fact Finding Review to take place. A grievance is voided if you do not appear for your appointment without good cause.

Within five days of the Fact Finding Review, you will receive a written decision regarding your grievance.

What happens if I miss my Fact Finding Review appointment?

There are very few acceptable reasons for missing a scheduled Fact Finding Review, such as:

- family or medical emergencies,
- required court appearance, or
- YW Works is unable to provide or make a referral for necessary child care.

If you miss your Fact Finding Review for an acceptable reason, your appointment may be reschedule. If you fail to attend the Fact Finding Review for any other reasons, you may lose the right to schedule another meeting to address your grievance. All excuses for missing a Fact Finding Review will be verified by YW Works.

What if I disagree with the outcome of my Fact Finding Review?

If you are not satisfied with the decision rendered after the Fact Finding Review, you may request a Department of Workforce Development Division of Hearings and Appeals review within 14 days. Requests for Department of Workforce Development Division of Hearings and Appeals reviews must be submitted in writing. Mail your request to: Office of Administrative Hearings, P.O. Box 7875, Madison, WI 53707 or fax it to **608/264-9885**.

Fact Finding Review tips to remember

- Keep your appointment and be on time.
- Bring written documentation that is relevant to your grievance.
- Arrive early if you need to register your child/ren with on-site child care. Children and individuals not involved with your grievance may not attend the appointment.
- If you need to reschedule your appointment, call the YW Works office 24 hours ahead of the appointment time. You will need to provide written documentation of a scheduling conflict prior to obtaining a new appointment date.
- Your grievance may not be discussed with any YW Works staff, except the attending staff at your Fact Finding Review.

WISCONSIN COUNCIL ON CHILDREN and FAMILIES

"For these are all our children . . . we will all profit by, or pay for, whatever they become." James Baldwin

Assembly Committee on Children and Families

Testimony on SB 123: Fair Hearings
Carol W. Medaris
Wisconsin Council on Children and Families

February 23, 2000

Good afternoon. I am currently a project attorney with the Council, specializing in welfare reform issues. Prior to coming to the Council a few years ago, I was an attorney with Legal Action in its Madison office. During that time I represented hundreds of low-income families in fair hearings regarding their AFDC, food stamps, and medical assistance benefits. Since coming to the Council, although I no longer represent clients at hearings, I continue to work closely with advocates for low-income families who regularly represent participants in the fact-findings and second level appeals that characterize the current W-2 review system.

The Council appears in favor of SB 123 which would establish a one-step fair hearing process under the Division of Hearings and Appeals, provide for continuing benefits for recipients appealing reductions and terminations within 10 days, and extend retroactive benefits to applicants denied placement in a work program. This is similar to the system that existed under AFDC and continues in all food stamp and medical assistance appeals.

Passage of this bill would serve four purposes: ensure a fairer system, provide consistency among W-2 agencies, promote efficiency, and establish greater accountability.

1. The bill ensures fairness in several ways. First it provides for a more neutral hearing officer – one entirely removed from the initial decision-making agency. Secondly, it involves a more respectful setting for both petitioners and W-2 agency workers. The Council has heard from W-2 participants that fact-findings are often highly contentious meetings and can be overwhelming for participants trying to make their case on their own. In contrast, based upon my experience as a Legal Action attorney, hearings conducted by DHA hearing officers are respectful, orderly

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www.wccf.org

procedures in which welfare recipients are treated with care. Thirdly, the state's hearing examiners are attorneys who are very experienced in W-2 statutes and regulations as well as state policy.

In addition, fairness is served by the bill's provision for retroactive relief for applicants improperly denied benefits. Currently, applicants who receive denials, appeal them, and then win their cases following hearings, must first be placed in the first available work program and begin working in order to receive benefits. Then benefits are further delayed according to the program's regular benefit issuance procedures. The bill would make these applicants "whole" by providing them with assistance that they were improperly denied.

Finally, the provision for continuing benefits for those who appeal their benefit reductions and terminations within 10 days also promotes fairness. The Department in its fiscal note assumes that two/thirds of the fair hearing requests will be decided in participants' favor. (It appears that this assumption is based upon cases appealed under the old AFDC program.) That means that without a continuing benefit provision, 66% of the families appealing will be denied benefits they are due while they are awaiting a final decision in their case.

2. The bill provides consistency among W-2 agencies due to the fact that a single office conducts all hearings. Fair hearings have always embodied a "corrective" function by promoting consistent policy interpretation. Case-by-case decisions are kept on track with state statutes and rules, and once decisions on a certain issue are made, they may be communicated and followed in other W-2 agencies. For example, the issue of the kind of notice required to be given of agency decisions might be established at a fair hearing and then be applicable to other agencies, rather than requiring that the same issue be argued over and over at fact-findings at each W-2 agency. Such a system also helps to equalize the treatment of families and determinations of eligibility without regard to which side of the county line the family happens to live on.

3. The bill promotes efficiency by converting the appeal process from a two-step process to one step. Petitioners appeal once, notices of hearings go out once, there is one appointment for a hearing. Now the process must be repeated to obtain relief, especially in the more complicated cases.

It also promotes efficiency by providing the same hearing mechanism for W-2 cases as is provided for food stamps and medical assistance. This is so because many times the same question is involved in all three programs, for example the existence of an asset that may make a family

ineligible, or whether or not verification of an eligibility requirement was present. Currently in such a case, a petitioner would have to pursue an appeal through two separate processes simultaneously.

The Department claims that the two-step process is necessary to encourage resolution at the local level. That is simply not the case. Under the AFDC fair hearing process, many cases were settled after hearings were requested but before they were held. The Division of Hearings and Appeals typically notified agencies as soon as hearings were requested. At that time a file review would take place, and often negotiations followed which resolved the issue being appealed. Sometimes mistakes occur through simple misunderstandings, which should not necessitate any kind of formal review once discovered.

At one point, the state employed a "prehearing examiner" that reviewed nearly every case that was on appeal and often was able to resolve cases without a hearing. Earlier today there was testimony that at least some agencies are invoking a kind of 3-day prehearing process which is resolving some cases before the fact-finding even takes place. There are plenty of opportunities for review and resolution of cases in a fair hearing system prior to the formal hearing taking place. (It was suggested by Attorney Anne DeLeo earlier today that the fact-finding process made negotiation more difficult now than was the case under the fair hearing system.)

The Department also suggests that a fair hearing system is too time-consuming. In the first place, the 4 months suggested by the Department under the old system was the exception, rather than the rule. Federal law set 90 days as the outside limit for AFDC case decisions and 60 days for food stamps. In the second place, under the current system, those who must appeal to the second level must wait much longer for their cases to be resolved. (Advocates report that some cases are sent back to the local agency more than once for additional fact-finding before a final decision is rendered.) Finally, and pursuant to a suggestion made by the Department today, time limits could be set within which fair hearings must take place. Given the much lower case load currently existing, reducing the time from the former system should not be difficult.

4. The bill establishes greater accountability because agency workers know that questionable decisions may be appealed, and if so will be heard by state hearing examiners instead of one of their agency colleagues.

Even more important to accountability, however, is the provision in the bill for retroactive benefits. Currently, W-2 agencies have no reason to provide benefits in a timely fashion. In fact, there is an incentive to deny benefits

until they are ordered to provide them following a hearing. When the agency's initial decision proves mistaken, all that happens is that the agency must place the person in the first appropriate work program that becomes available. The W-2 agency thus saves money every time benefits are denied pending a decision. The bill would remove the disincentive to provide benefits initially.

(The Department states that an incentive not to deny benefits is provided by penalties established for "failure to serve." The standards for these penalties have never been clear and have never been invoked.)

Responding to some of the Department's other statements today, spokespersons argued against continuing benefits, saying they will result in overpayments of benefits to those who are not owed them, and will be difficult to collect. Overpayments anticipated in one-third of the cases must be balanced against two-thirds of the cases in which families' benefits are improperly cut off or reduced. These families are in extremely precarious financial situations. In addition, with so many more participants working now, and leaving the program to work, there will more often be tax returns out of which overpayments may be recovered.

The Department's spokespersons also raised the specter of participants requesting continuing benefits simply to keep their benefits going a little longer. Given the two-thirds success rate, and the reasonable assumption that many of the remaining one-third had at least arguable cases, this possibility would not seem to pose a serious threat.

The Department states that providing continuing benefits will lead to benefits paid for days not worked. Such a statement ignores the way such cases were handled prior to W-2. When participants filed timely appeals and requested continuing benefits, they were expected to continue their same work program as before until their cases were decided at hearings. There is no reason that same procedure could not be followed under W-2.

The Department also states that it would have no way of stopping benefits in cases of fraud. However, in my experience people who commit fraud – collecting benefits in more than one state or failing to report income, for example – and who are found out, are simply not going to request a fair hearing to try to get benefits reinstated. By doing so they invite additional attention and risk more substantial legal penalties. Continuing benefits simply do not pose a risk of increased losses due to fraud.

The Council urges your support of SB 123 for all of the above reasons, and most particularly to restore the "fair" to the current W-2 hearing process.

Tommy G. Thompson
Governor

Linda Stewart, Ph.D.
Secretary

State of Wisconsin
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February 29, 2000

The Honorable Bonnie Ladwig, Chairperson
Assembly Committee on Children and Families
113 West, State Capitol
Madison, WI 53708

Dear Chairperson Ladwig and Committee Members:

Thank you for the opportunity to testify on Senate Bill 123 before the Assembly Committee on Children and Families. We are submitting this letter as follow-up in addition to our testimony at the hearing.

Our testimony included data showing that in 1999, of the approximately 324 fact-finding decisions that were issued statewide, 54% upheld the W-2 agency's decision and 46% overturned the agency's decision.

The committee asked for data showing how many W-2 participants appealed a fact-finding decision for review by an Administrative Law Judge (ALJ) in the Division of Hearings and Appeals (DHA) at the Department of Administration. DHA, and not DWD, conducts all hearings on appeals of fact-finding decisions in the W-2 program. From September 1997 when W-2 began through December 1999, 564 fact-finding decisions were issued statewide. Of these decisions, the Fact Finder upheld the W-2 agency's decisions in 296 cases. There were 153 appeals (or 52% of the 296 W-2 agency decisions upheld) to DHA for a second-level review after the fact-finding decision. Please note that this number represents only those appeals for which DHA issued a final decision. DHA may dismiss an appeal and in some situations they may issue an interim decision or injunction which prohibits the W-2 agency from taking adverse action against a participant until the hearing is held. Appeals which result in either one of these actions by DHA are not included in the 153 appeals cited above. A general summary of fact-finding decisions is attached for your information.

There was some confusion regarding numbers used in the fiscal estimate prepared by DWD for SB123 in May of 1999. In the fiscal estimate under "Assumptions Used in Arriving at Fiscal Estimate" we attempted to estimate the fiscal impact of SB123 by using "assumptions" based on experience with the fair hearing process under the former AFDC program. At the time the fiscal estimate was prepared, and given the statutory timeline of five business days in which agencies must complete fiscal estimates, we were unable to get the number of decisions made by DHA that upheld the AFDC agency's original decision. Therefore, we assumed a random number, which was likely a conservative estimate, to calculate the costs of SB123 based on the number of fair hearings that were conducted in the AFDC program in SFY 1997. The fiscal estimate states in part:

> "The continuation and restoration of benefits required under this bill will have a significant fiscal impact on W-2 agencies. During SFY 1997 there were 2,930 AFDC related fair hearings. **Assuming** that there will be 50% of that number of hearings annually under this bill and, further **assuming** that one-third of the decisions made through the proposed fair hearing process uphold the W-2 agency's original decision and the participant is required to repay the restored benefits, the period of time for which benefits must be repaid is four months (also an assumption), and a 25% collection rate (also an assumption), the cost of unrecovered benefits would be $825,000. If the W-2 contracts remain fixed priced, with the W-2 agencies receiving a capped amount to manage the program, these costs may reduce the amount of funding available for other services, but would not result in an increase in state costs."

This paragraph in the fiscal estimate is where the "two-thirds" number comes from that was used by Representative Jeskewitz in her testimony on SB123. It is important to point out that our assumption that possibly one-third of the decisions made by ALJ's under the proposed fair hearing process does not equate to actual data obtained from results under the old AFDC fair hearing process. The one-third figure is simply an **assumption** used by the department to **estimate** the fiscal impact of SB123. At this time we do not have detailed data on the breakdown of decisions issued by DHA under the former AFDC hearing process. We are currently attempting to obtain further information.

In reviewing the merits of the W-2 Fact Finding process, we must not ignore the fact that 46% of W-2 agency decisions were overturned at the agency level, without appeal to DHA. This is a clear indicator that Fact Finders are remaining independent and unbiased in their decision-making and disputes the claim that the process is "the fox guarding the hen house."

Forty-six percent of agency decisions being overturned by Fact Finders brings out another important point. In cases where an error has been made by a W-2 agency and the Fact Finder corrects the error by overturning the decision, this is being done almost immediately without having to wait for a hearing to be scheduled or a lengthy delay in the issuance of benefits. Our records indicate that the entire fact-finding process takes place **within 13 business days. A fair hearing takes up to four months.**

You also heard testimony that within a fair hearing process there can be a step for a "pre-hearing conference" for attempts at mediation prior to the hearing. We would argue that the current fact-finding process and opportunity for review of a fact-finding decision by an ALJ accomplishes what a pre-hearing conference would accomplish and does it better. Fact-finding allows for an independent review of an agency action by bringing all parties to the table for a quick resolution, similar to what a "pre-hearing conference" would accomplish.

In addition to the concerns pointed out above, we urge you to consider the following points:

- SB123 would allow for a W-2 participant to receive benefits while not participating – they continue to receive benefits pending a fair hearing and would not be engaged in an employment position or receiving case management services. **Fact-finding allows for case management services to be resumed or initiated much sooner if appropriate.**
- Providing retroactive benefits for a non-entitlement program will "tick" a participant's 60-month TANF clock and the 24-month employment position clock; this means that they will **lose months of eligibility for services such as education and training, transportation, case management and work experience for the time retroactive benefits are paid** which is contrary to the work-first philosophy passed in the legislation authorizing W-2.
- The bill changes the responsibility for the dispute resolution process from W-2 agencies to DWD without making any corresponding fiscal changes or providing positions. In addition to the $350,000 in state costs estimated in the fiscal estimate for SB123, the department has determined that at least 1.0 FTE will be needed to administer the process.

I hope this information is helpful in clarifying our opposition to SB123. We respectfully urge the committee not to adopt SB123.

Sincerely,

Orlando Canto
Deputy Secretary

Cc: Assembly Children and Families Committee Members
Robert Blaine, DOA
Enclosure

Fact Finding Decisions
SUMMARY

Review Period	Agency Decisions Upheld	Agency Decisions Over-turned	Abandoned Cases	Withdrawn Cases	Resolved Cases Before Fact Finding
Oct – Dec 1999	59	43	46	85	72
July – Sept 1999	51	43	27	63	56
April – June 1999	32	20	20	62	24
Jan – March 1999	34	42	10	47	5
Sept – Dec 1998	54	35	15	15	7
June – Aug 1998*	32	16	-	5	17
March – May 1998*	16	19	-	6	1
Sept 1997 – Feb 1998	18	50	4	15	13

Summarized in the table above are fact finding decisions and actions. These decisions and actions have been placed into specific categories. Each category represents an outcome for either the W-2 agency or the W-2 participant who has requested fact finding. Each specific category should be interpreted as follows:

1. **Agency Decision Upheld**: The fact finding process up held or affirmed the earlier decision made by the W-2 agency whose adverse effect was the reason for fact finding review and decision.

2. **Agency Decision Overturned**: The original decision was overturned as improper or incorrect. In instances where an agency denied an application or placed someone in an inappropriate W-2 placement, the agency must place the person in the first available appropriate employment position at which time an individual would be eligible for payment as soon as they begin participating. No retroactive payment for the period prior to participation shall be issued. In instances where an agency calculates, reduces or terminates a payment incorrectly, the agency must reinstate the benefit retroactive to the date on which the payment was improperly calculated, reduced or terminated.

3. **Abandoned Cases**: These represent cases or original filings for fact finding review for which the participant who requested the review failed to show up on the day of fact finding review.

4. **Withdrawn Cases**: These are either cases that were withdrawn before fact finding because the W-2 participant has concluded that their original filing for fact finding lacked merit or simply did not wish to pursue the case any further.

5. **Resolved Cases**: These represent cases that the W-2 agency and the W-2 participant were able to come to an agreement thereby making any further fact finding review unnecessary.

***Note:** For the two periods, March to May, and June to August 1998, fact finding decisions were broadly summarized. This made it impossible to know completely for example, how many cases were overturned or upheld, etc.

WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

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DATE: June 4, 1999

TO: SENATOR JUDY ROBSON, CHAIRPERSON, AND MEMBERS, SENATE COMMITTEE ON HUMAN SERVICES AND AGING

FROM: Laura Rose, Senior Staff Attorney

SUBJECT: Fair Hearing Process Under Temporary Assistance to Needy Families Programs

This memorandum was prepared in response to a question raised by Senator Peggy Rosenzweig at the May 19, 1999 public hearing of the Senate Committee on Human Services and Aging. This question was raised in the context of the committee's public hearing on 1999 Senate Bill 123, relating to the fair hearing process under Wisconsin Works (W-2). Specifically, Senator Rosenzweig asked for information on fair hearing processes which may exist under the Temporary Assistance to Needy Families (TANF) programs in other states.

This memorandum provides background information on 1999 Senate Bill 123. It then describes the processes in seven other states for reviewing adverse decisions under TANF programs.

A. 1999 SENATE BILL 123

Under current law, an individual whose application for W-2 is not acted upon by the W-2 agency with reasonable promptness, or whose application is denied in whole or in part, whose benefit is modified or canceled, or who believes that the benefit was calculated incorrectly or that the employment position in which the individual is placed is inappropriate, may petition the W-2 agency for review of the action or decision. After the W-2 agency review of the petition, the Department of Workforce Development (DWD) may review the W-2 agency's decision if the applicant or participant or the W-2 agency petitions the DWD agency for review.

1999 Senate Bill 123 modifies this process. Under the bill, an individual whose application for W-2 is denied in whole or in part, whose benefit is modified or canceled, or who believes that the benefit was calculated incorrectly or that the employment position is inappropriate may petition DWD directly for a review of the action or decision of the W-2 agency.

If the W-2 participant requests a hearing before the effective date of the W-2 agency's action or within 10 days after the mailing of the notice of the action, whichever is later, the participant's benefits may not be suspended, reduced or discontinued, except under limited circumstances, until DWD renders a decision after the hearing.

In addition, under a proposed amendment to the bill (LRB-0416/1), in the event that an individual's application was improperly delayed or denied in whole or in part, the individual may be paid benefits retroactive to the date that the person's application was first improperly delayed or denied in whole or in part, the individual was first placed in an inappropriate W-2 employment position, or where the individual's benefit was first improperly modified or canceled or incorrectly calculated.

B. OTHER STATES' REVIEW OF ADVERSE ACTIONS UNDER TANF PROGRAMS

This part of the memorandum reviews the hearing processes under selected states' TANF programs. Most states appear to have retained fair hearing mechanisms similar to those that were in place under the Aid to Families with Dependent Children (AFDC) Program. (See Welfare Law Center, "Due Process and Fundamental Fairness in the Aftermath of Welfare Reform," *Welfare News*, September 1998.)

A review of several TANF state plans and state statutes governing appeal processes available under TANF reveals a general use of a state level fair hearing process in cases of TANF program adverse actions.

1. Minnesota

Minnesota's TANF program, the Minnesota Family Investment Program, provides for a fair hearing procedure. [Minn. Stats., s. 256J.40.]

Under this procedure, a request for a fair hearing must be submitted in writing to the county agency designated to implement the Family Investment Program or to the Minnesota Commissioner of Human Services. The request must be mailed within 30 days after the petitioner receives written notice of the agency's action or within 90 days of when a person shows good cause for not submitting the request within 30 days. Issues that may be appealed are: (a) the amount of the assistance payment; (b) a suspension, reduction, denial or termination of assistance; (c) the basis for an overpayment, the calculated amount of an overpayment and the level of recoupment; (d) the eligibility for an assistance payment; and (e) the use of protective or vendor payments.

A county agency may not reduce, suspend or terminate payment when an aggrieved participant requests a fair hearing prior to the effective date of the adverse action or within 10 days of the mailing of the notice of adverse action, whichever is later, unless the participant requests in writing not to receive continued assistance pending a hearing decision. Assistance paid pending a fair hearing which is subsequently determined to be improperly paid is subject to recovery. The commissioner's order is binding on a county agency.

Fair hearings must be conducted at a reasonable time and date by an impartial referee employed by the Minnesota Department of Human Services.

2. Massachusetts

The Massachusetts Department of Transitional Assistance administers the Massachusetts TANF program. Any person aggrieved by the failure of the Department of Transitional Assistance to render adequate aid or assistance under a program administered by the department, the failure of the department to approve or reject an application for aid or assistance within 45 days after receiving the application, the withdrawal of such aid or assistance, or coercive or otherwise improper conduct on the part of a social worker, has the right to a hearing, after due notice, upon appeal to the commissioner of the department. The division of hearings is located in the office of the deputy commissioner of the department. [Mass. Gen. Laws, ch. 18, s. 16.]

A hearing must be conducted by a referee at a location convenient to the appellant and must be conducted as an adjudicatory proceeding. A referee may subpoena witnesses, administer oaths, take testimony and secure the production of relevant books, papers, records and documents. The appellant has the right to confront and cross examine all adverse witnesses and to question and refute any testimony, evidence, materials or legal arguments. The decision of the referee shall be the decision of the department.

Decisions must be rendered and issued within 90 days after the date of the filing of the appeal. However, the referee must render and issue the decision within 45 days after the filing of the appeal when an aggrieved person appeals the rejection of an application for aid or assistance, or the failure to act on the application or the failure of the department to render assistance in an emergency or hardship situation.

When a timely request for a hearing is made because of termination or reduction of assistance, assistance must be continued during the period of the appeal. If the decision is adverse to the appellant, the assistance is terminated immediately upon issuance of the decision. If the assistance was terminated before a timely request for a hearing was made, assistance must be reinstated.

3. Washington

Washington's TANF program, the Work First Program, provides that applicants and recipients of assistance must be notified in writing of the Department of Social and Health Services' decisions regarding the type and amount of benefits available to them. Applicants and recipients may request, within 90 days of such notice, an administrative hearing with due process protections conducted by the independent Office of Administrative Hearings under Wash. Rev. Code, s. 78.08. The same appeals process applies also to recipients of other forms of public assistance, such as food stamps. The proceedings are governed by the administrative procedure act. [Wash. Rev. Code, s. 54.05.] In decisions which favor the applicant, assistance is paid from the date of the denial of the application for assistance, 30 days following the application for TANF or 45 days after the date of application for all other programs. In the case of a current recipient, assistance is paid from the effective date of the local community services office's decision.

4. Georgia

Under Georgia's TANF program, an applicant or a recipient for public assistance who is aggrieved by the action or inaction of the Department of Social Services, including any county department of children and family services, is entitled to a hearing. Hearings are conducted by the Office of State Administrative Hearings in accordance with the Georgia Administrative Procedure Act. [Georgia Code Ann., s. 49-4-13.]

Under Georgia Code Ann., s. 49-4-13 (b), an applicant for or a recipient of assistance under the TANF program is authorized to request and receive a hearing to challenge any denial, reduction or determination in assistance based upon any action of the department, including the county Department of Children and Family Services. This statute specifically provides that conferring this right to appeal does not create an entitlement of assistance for a recipient under the TANF program.

5. Florida

Under the Florida WAGES (Work And Gain Economic Self-Sufficiency) Program, if an application for public assistance is not acted upon within a reasonable time after filing the application or is denied in whole or in part, or if an assistance payment is modified or canceled, the applicant or recipient may appeal the decision to the Department of Children and Family Services. Florida Stats., s. 409.285 (3), authorizes the department to adopt rules to administer processes for hearings and appeals. This statute specifically provides that these rules for the TANF program appeals must be similar to the federal requirements for Medicaid programs.

6. Iowa

Iowa Code, s. 239B.16, establishes the appeal mechanism under Iowa's TANF program, the Family Investment Program. An applicant for or participant in the Family Investment Program who is aggrieved by a decision with regard to assistance may appeal to the Iowa Department of Human Services, which must request the Department of Inspections and Appeals to conduct the hearing. The Department of Inspections and Appeals' decision is subject to review by the Department of Human Services, after which judicial review may be sought.

The types of decisions subject to appeal are delay or denial of an application for assistance, or the modification, suspension or cancellation of benefits.

7. Ohio

Under the Ohio Works First Program, Ohio's TANF program, the Department of Human Services is required to provide a fair hearing under s. 5101.35, Ohio Rev. Code, to any applicant for, or participant or former participant of, the Ohio Works First Program who is aggrieved by a decision regarding the program. [s. 5101.80, Ohio Rev. Code.]

The appeals process set forth in s. 5101.35, Ohio Rev. Code, applies to state and local public and private agencies administering human services programs. The statute provides for a

state level hearing conducted by the Department of Human Services at the appellant's request. Departmental decisions may be appealed to the director of Human Services. This decision is subject to judicial review.

If you would like further information on the issues discussed in this memorandum, please do not hesitate to contact me at the Legislative Council Staff offices. My telephone number is 266-9791.

LR:tlu:rv;wu

WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

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DATE: January 21, 2000

TO: INTERESTED LEGISLATORS

FROM: Laura Rose, Senior Staff Attorney

SUBJECT: Senate Substitute Amendment 1 to 1999 Senate Bill 123, Relating to the Fair Hearing Process Under Wisconsin Works (W-2)

This memorandum describes Senate Substitute Amendment 1 to 1999 Senate Bill 123, relating to the fair hearing process under W-2. Senate Bill 123 was referred to the Senate Committee on Human Services and Aging, which took executive action on the bill on January 19, 1999. The committee recommended adoption of Senate Substitute Amendment 1 to the bill, and recommended passage, as amended, by a vote of Ayes, 4; Noes, 1.

Senate Substitute Amendment 1 modifies the review process under current law for W-2 actions and decisions. Under current law, an individual whose application for W-2 is denied in whole or in part, whose benefit is modified or canceled, or who believes that the benefit was calculated incorrectly or that an employment position in which the individual is placed is inappropriate, may petition the W-2 agency for review of the W-2 agency's action or decision affecting the individual. After the W-2 agency review of the petition, the Department of Workforce Development (DWD) may review the W-2 agency's decision if the applicant or participant or the W-2 agency petitions the DWD agency for review.

Under the substitute amendment, the individual ***may petition DWD directly*** for a review of the action or decision of the W-2 agency. The DWD, upon receipt of a timely petition, must give the applicant or participant reasonable notice and opportunity for a fair hearing. Notice of the hearing must be given to the participant or applicant. The DWD must issue its decision as soon as possible after the hearing and send a copy of the decision to the individual, the W-2 agency, and the county clerk if appropriate. The DWD's decision is final. If the individual withdraws or abandons the petition, or if the sole issue is an automatic grant adjustment or change in class of participants, the DWD must deny the petition.

Current law does not allow for a continuation of benefits pending a W-2 agency decision. Under the substitute amendment, if the W-2 participant requests a hearing before the effective

date of the W-2 agency's action or within 10 days after the mailing of the notice of the action, whichever is later, the ***participant's benefits may not be suspended, reduced or discontinued***, except under limited circumstances, until DWD renders a decision after the hearing.

Further, the substitute amendment provides that, in the event that an individual's application for W-2 was improperly delayed or denied in whole or in part, or a participant was placed in an inappropriate W-2 employment position, or the participant's benefits were improperly modified or canceled or incorrectly calculated, the individual ***may be paid benefits retroactive*** to the date that the person's application was first improperly delayed or denied in whole or in part, the individual was first placed in an inappropriate W-2 employment position, or the participant's benefits were first improperly modified or canceled or incorrectly calculated. Current law allows retroactive benefits only where the individual's benefits were first improperly modified or canceled or incorrectly calculated.

Finally, the substitute amendment states that the creation of a fair hearing process under W-2 ***does not create an entitlement*** to any services or benefits under W-2.

Please do not hesitate to contact me at the Legislative Council Staff offices if you have any questions on the substitute amendment. My telephone number is 266-9791.

LR:tlu:rv;wu