

☞ **03hr_JCR-AR_Misc_pt30**



☞ Details: Complaints

(FORM UPDATED: 08/11/2010)

WISCONSIN STATE LEGISLATURE ... PUBLIC HEARING - COMMITTEE RECORDS

2003-04

(session year)

Joint

(Assembly, Senate or Joint)

Committee for Review of Administrative Rules...

COMMITTEE NOTICES ...

- Committee Reports ... **CR**
- Executive Sessions ... **ES**
- Public Hearings ... **PH**

INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
- Clearinghouse Rules ... **CRule** (w/Record of Comm. Proceedings)
- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)
(**ab** = Assembly Bill) (**ar** = Assembly Resolution) (**ajr** = Assembly Joint Resolution)
(**sb** = Senate Bill) (**sr** = Senate Resolution) (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

* Contents organized for archiving by: Stefanie Rose (LRB) (August 2012)

MICHA'EL S. JOHNSON,

Plaintiff,

v.

Case No. 03-CV-0958

JON E. LITSCHER, GERALD
BERGE, JOHN SHARPE,
TIM HAINES, LINDA H. TRIPP,
VICKIE SHARPE, and
GARY BOUGHTON,

Defendants.

AFFIDAVIT OF PATRICK VANDER SANDEN

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

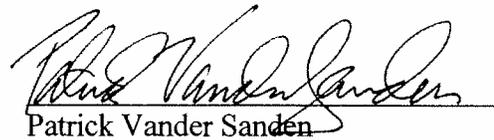
PATRICK VANDER SANDEN, being first duly sworn, on oath deposes and states as follows:

1. I am employed by the State of Wisconsin as a Policy Director for State Senator Joseph Leibham. I have held this position since January 6, 2003.
2. Senator Joseph Leibham is Co-Chairs for the Joint Committee for Review of Administrative Rules and has been since January 6, 2003.
3. As Policy Director for Senator Leibham, I am also a Committee Clerk for the Joint Committee for Review of Administrative Rules. If someone were to serve a legal action on the Joint Committee for Review of Administrative Rules, they must serve either Joseph Leibham or State Representative Glenn Grothman, the other Co-Chair of the committee. It is a regular

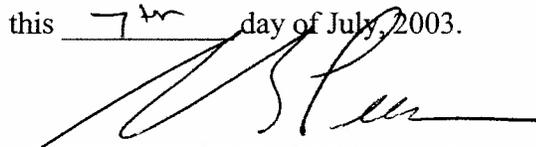
part of my duties as Committee Clerk to accept service of legal actions on behalf of Co-Chair Senator Joseph Leibham.

4. I make this affidavit on the basis of my personal knowledge and a review of the regularly conducted business records of my office, of which I am a custodian.

5. I have examined the regularly conducted business records of my office and I have ascertained that Senator Joseph Leibham, as one of the Co-Chairs for the Joint Committee for Review of Administrative Rules, has not been served with the above-captioned legal action, nor was Senator Joseph Leibham served with the legal action of *Micha'el S. Johnson et al. v. Litscher et al.*, Grant County Case No. 01-CV-0329.


Patrick Vander Sanden

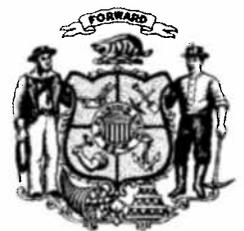
Subscribed and sworn to before me
this 7th day of July, 2003.


Notary Public, State of Wisconsin
My Commission: June 20, 2004





WISCONSIN STATE LEGISLATURE



STATE OF WISCONSIN

CIRCUIT COURT
DANE COUNTY
BRANCH — 04 MAR -8 AM 9:36

JAMES METZ, D.V.M.
113 North Spring Street
Beaver Dam, WI 53916

DANE COUNTY, WI

Plaintiff,

Case No. **04CV0706**
Case Code: 30701 Declaratory Judgment

v.

VETERINARY EXAMINING BOARD,
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708-8935

Defendant.

THIS IS AN AUTHENTICATED COPY OF THE
ORIGINAL DOCUMENT FILED WITH THE DANE
COUNTY CLERK OF CIRCUIT COURT.

JUDITH A. COLEMAN
CLERK OF CIRCUIT COURT

SUMMONS

THE STATE OF WISCONSIN

To each Defendant named above:

You are hereby notified that the Plaintiff named above has filed a lawsuit or other legal action against you. The Complaint, which is attached, states the nature and basis of the legal action.

Within 45 days of receiving this Summons, you must respond with a written answer, as that term is used in chapter 802 of the Wisconsin Statutes, to the Complaint. The Court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be filed with the Court, whose address is Clerk of Circuit Court, Dane County Courthouse, 210 Martin Luther King, Jr. Boulevard, Madison, Wisconsin 53709, with copies sent or delivered to attorneys for the plaintiff: Eric M. McLeod, Michael Best & Friedrich LLP, One South Pinckney Street, Suite 700, Post Office Box 1806, Madison, Wisconsin 53701-1806.

You may have an attorney help or represent you.

If you do not provide a proper answer within 45 days, the Court may grant judgment against you for the award of money or other legal action requested in the Complaint, and you may lose your right to object to anything that is or may be incorrect in the Complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Dated this 8th day of March, 2004.

MICHAEL BEST & FRIEDRICH LLP
Attorneys for Dr. James Metz, D.V.M.

By: 
Eric M. McLeod
State Bar No. 1021730

MICHAEL BEST & FRIEDRICH LLP
One South Pinckney Street, Suite 700
P.O. Box 1806
Madison, WI 53701-1806
Telephone: (608)257-3501

STATE OF WISCONSIN

CIRCUIT COURT
CIRCUIT COURT
DANE COUNTY
BRANCH — 04 MAR -8 AM 9:36

JAMES METZ, D.V.M.
113 North Spring Street
Beaver Dam, WI 53916,

DANE COUNTY, WI

Plaintiff

v.

Case No. **04CV0706**
Case Code: 30701 Declaratory Judgment

VETERINARY EXAMINING BOARD,
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708-8935

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ORIGINAL DOCUMENT FILED WITH THE DANE
COUNTY CLERK OF CIRCUIT COURT.

Defendant.

JUDITH A. COLEMAN
CLERK OF CIRCUIT COURT

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTION

Plaintiff James Metz, D.V.M., by his attorneys Michael Best & Friedrich LLP, and for his complaint against the Defendant, states and alleges as follows:

1. Plaintiff James Metz, D.V.M. (“Dr. Metz”) is an adult resident of the State of Wisconsin and a duly licensed doctor of veterinary medicine. Dr. Metz has a principal place of business at 1113 North Spring Street, Beaver Dam, Wisconsin.

2. Defendant Veterinary Examining Board (the “Board”), is an “agency” of the State of Wisconsin as defined in Wis. Stats. § 227.01. The Board exists pursuant to Chapter 453 of the Wisconsin Statutes for the purpose, among others, of enforcing the provisions of Chapter 453 and promulgating rules related to the practice of veterinary medicine and the licensure of veterinarians and veterinary technicians.

4. The Board has properly been named as a defendant in this action pursuant to Wis. Stats. § 227.40(1). Venue in this Court is proper pursuant to Wis. Stats. § 227.40(1).

BACKGROUND OF ACTION

4. This is an action for declaratory and injunctive relief brought pursuant to Wis. Stat. §§ 227.40(1) and 806.04. Dr. Metz seeks an Order from this Court declaring that Wis. Stat. § 453.02(8), which purports to set forth a definition for “veterinarian-client-patient-relationship” (“VCPR”) is unconstitutionally vague. Dr. Metz further asks for an Order declaring a policy of the Board, by which it seeks to interpret the VCPR definition and enforce against Dr. Metz various statutory and regulatory requirements pursuant to that interpretation, is void on the grounds that such policy has not been properly promulgated as a rule. Finally, Dr. Metz asks that this Court enjoin the Board from enforcing against him Wis. Stats. § 453.02(8) and the Board’s invalid rule interpreting that statute.

5. This action arises out of an investigation that began nearly seven years ago. On behalf of the Board, investigators and attorneys employed by the Wisconsin Department of Regulation and Licensing (“Department”) have engaged in a protracted effort to find a basis upon which to bring administrative claims against Dr. Metz. That seven-year investigation, with a case number of 97 VET 006, culminated in the Department’s filing of a complaint with the Board dated December 30, 2003. After seven years, the Department’s complaint raises allegations related to merely four of Dr. Metz’s clients.

6. The claims contained in the Department’s complaint in 97 VET 006 are based principally upon allegations that Dr. Metz has prescribed veterinary prescription drugs to certain named clients without first establishing and/or maintaining a valid veterinarian-client-patient-relationship, or VCPR.

7. Wis. Stats. § 453.02(8) sets forth the definition of a “veterinarian-client-patient relationship” as follows:

"Veterinarian-client-patient relationship" means a relationship between a veterinarian, a client and the patient in which all of the following apply:

(a) The veterinarian has assumed the responsibility for making medical judgments regarding the health of the patient and the patient's need for medical treatment, and the client has agreed to accept those medical judgments and to follow the related instructions of the veterinarian.

(b) The veterinarian has sufficient knowledge of the patient to initiate a general or preliminary diagnosis of the medical condition of the patient because the veterinarian has recently examined the patient or has made medically appropriate and timely visits to the premises on which the patient is kept.

(c) The veterinarian is readily available for follow-up treatment of the patient if the patient has an adverse reaction to veterinary treatment.

8. Under Wis. Stat. § 453.03(1) the Board must "promulgate rules . . . establishing the scope of practice permitted for veterinarians . . . and shall review the rules at least once every 5 years to determine whether they are consistent with current practice."

9. However, at no time has the Board formally promulgated a rule defining either the scope of a valid VCPR or specifying what the Board considers to be the requirements for establishing and maintaining a valid VCPR. Furthermore, because the Board has never formally promulgated such a rule concerning the VCPR requirement, the Board has never reviewed any such rule to determine if it is consistent with current veterinary practice. Dr. Metz and veterinarians throughout the state of Wisconsin practice at their risk of enforcement by the Board where the Board has never defined via rulemaking how it interprets and intends to apply such key statutory elements of the VCPR as "recently examined," "medically appropriate and timely visits" and "readily available for follow-up treatment."

10. Although the Board has never promulgated a rule defining the parameters of the VCPR requirement, it has adopted a policy outside the scope of the administrative rule-making process related to the requirements for establishing and maintaining a valid VCPR. Although it

appears nowhere in Chapter 453 of the Wisconsin Statutes or the VEB administrative regulations, that policy has been communicated to Dr. Metz in an effort to limit the scope of his veterinary medical practice and define the requirements for establishing and maintaining a valid VCPR. The policy was developed by the Board without the attendant public notice, public comment, and debate among the regulated professionals and their customers required of administrative rulemaking. The Board has adopted a “we know it when we see it” approach to the VCPR and has refused to provide the regulated community, including Dr. Metz, with the limits and parameters of the VCPR prior to enforcement.

11. In the pending matter before the Board, the Department is attempting to prosecute its claims against Dr. Metz pursuant to standards which are a part of the Board’s VCPR policy. Those standards are not contained in the statutory provision that purports to set forth a definition of VCPR. Nor are those standards contained in any properly promulgated administrative rule of the Board.

First Cause of Action
Failure to Properly Promulgate Rule

12. Dr. Metz hereby restates those allegations contained in paragraphs 1 through 11, above, as if fully set forth herein and incorporates those allegations into this First Cause of Action.

13. The Board has used or attempted to generally apply a particular policy to enforce or administer Wis. Stat. § 453.02(8) without having properly promulgated that policy as an administrative rule under the Board’s rule-making powers and pursuant to Wis. Stat. Ch. 227, Subch. II.

14. The Board has conducted a lengthy investigation of Dr. Metz and has taken enforcement action against him pursuant to that policy.

15. The Board's attempt to enforce or administer Wis. Stat. § 453.02(8) pursuant to a policy which has not been properly promulgated as an administrative rule under Wis. Stat. Ch. 227, Subch. II, constitutes an invalid exercise of the Board's authority.

16. The Board's investigation and enforcement action against Dr. Metz, by which the Board is enforcing and administering Wis. Stat. § 453.02(8) pursuant to a policy which has not been properly promulgated as an administrative rule, interferes with, impairs and threatens to interfere with and impair the legal rights and privileges of Dr. Metz.

17. The Board's policy concerning the enforcement and administration of Wis. Stat. § 453.02(8) has not been properly promulgated as a rule under Wis. Stat. Ch. 227, Subch. II, and is therefore invalid under Wis. Stat. § 227.40(4)(a).

Second Cause of Action
The VCPR Definition is Unconstitutionally Vague

18. Dr. Metz hereby restates those allegations contained in paragraphs 1 through 17, above, as if fully set forth herein and incorporates those allegations into this Second Cause of Action.

19. The Board has at no time promulgated a rule defining the scope of a valid VCPR or the requirements for establishing and maintaining a valid VCPR under Wis. Stat. § 453.02(8) but instead has sought to enforce the VCPR requirement pursuant to an invalid policy adopted without public notice or comment.

20. The Board has sought to enforce the VCPR requirement pursuant to an invalid policy because the VCPR definition set forth in Wis. Stat. § 453.02(8) fails to provide objective standards with which to do so.

21. The VCPR definition set forth in Wis. Stat. § 453.02(8) also lacks the requisite specificity needed to provide fair notice to those who wish to obey the law that their conduct falls within the proscribed area.

22. Wis. Stat. § 453.02(8) is void for vagueness under the due process provisions of the United States and Wisconsin constitutions. Wis. Stat. § 453.02(8) is void both on its face and as the Board has been applying and threatening to apply it to Dr. Metz.

Third Cause of Action
Injunction

23. Dr. Metz hereby restates those allegations contained in paragraphs 1 through 22, above, as if fully set forth herein and incorporates those allegations into this Third Cause of Action.

24. As alleged herein, the Board's efforts to enforce Wis. Stat. § 453.02(8), pursuant to its invalid policy and otherwise, have resulted in injury to the rights and interests of Dr. Metz and threaten to cause further injury to Dr. Metz and others.

25. Further efforts by the Board to enforce and threats to enforce Wis. Stat. § 453.02(8) against Dr. Metz will result in additional substantial injury to the rights and interests of Dr. Metz including his rights under the United States and Wisconsin constitutions.

26. The injury to Dr. Metz's rights and interests that has occurred and will occur in the future cannot be adequately compensated through legal remedies. Dr. Metz has no adequate remedy at law.

27. Dr. Metz is entitled to an injunction from this Court permanently enjoining the Board from (a) enforcing or seeking to enforce the Board's invalid VCPR policy against Dr. Metz by pursuing its pending enforcement action, or otherwise; (b) enforcing or seeking to enforce Wis. Stat. § 453.02(8) in the absence of a properly promulgated administrative rule

defining the scope of a valid VCPR or the requirements for establishing and maintaining a valid VCPR; and (c) seeking to condition any rights or privileges held or available to Dr. Metz upon what the Board considers to be compliance with the provisions of Wis. Stat. § 453.02(8) and/or the Board's invalid VCPR policy.

WHEREFORE, Plaintiff Dr. James Metz, D.V.M. demands judgment in his favor and against the Veterinary Examining Board, as follows:

A. For an Order declaring that the Board's policy concerning the enforcement and administration of Wis. Stat. § 453.02(8) has not been properly promulgated as a rule under Wis. Stat. Ch. 227, Subch. II, and is therefore invalid under Wis. Stat. § 227.40(4)(a).

B. For an Order declaring that Wis. Stat. § 453.02(8) is void for vagueness under the due process provisions of the United States and Wisconsin constitutions, both on its face and as the Board has been applying and threatening to apply it to Dr. Metz.

C. For an injunction permanently enjoining the Board from (a) enforcing or seeking to enforce the Board's invalid VCPR policy against Dr. Metz by pursuing its pending enforcement action, or otherwise; (b) enforcing or seeking to enforce Wis. Stat. § 453.02(8) in the absence of a properly promulgated administrative rule defining the scope of a valid VCPR or the requirements for establishing and maintaining a valid VCPR; and (c) seeking to condition any rights or privileges held or available to Dr. Metz upon what the Board considers to be compliance with the provisions of Wis. Stat. § 453.02(8) and/or the Board's invalid VCPR policy.

D. For the costs and attorney's fees incurred in this action to the full extent permitted by law.

E. For such further relief as the Court deems just equitable.

Dated this 8th day of March, 2004.

MICHAEL BEST & FRIEDRICH LLP
Attorneys for Dr. James Metz, D.V.M.

By: 
Eric M. McLeod
State Bar No. 1021730

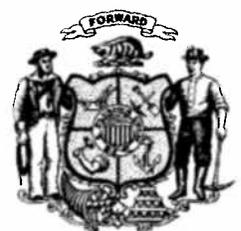
MICHAEL BEST & FRIEDRICH LLP
One South Pinckney Street
Post Office Box 1806
Madison, Wisconsin 53701-1806
Telephone: (608) 257-3501
Facsimile: (608) 283-2275

Q:\client\012413\0001\B0333153.1

Served this 24th day of March 2004
10:44 ^{AM} ~~PM~~ at the City of Madison
on Joint Committee for the Review
of Administrative Rules by leaving with
Patrick VanderSander
By: [Signature]
Title: Licensed Investigator



WISCONSIN STATE LEGISLATURE



STATE OF WISCONSIN

CIRCUIT COURT
COUNTY

SHEBOYGAN

CYNTHIA REJHOLEC on behalf of
DEREK REJHOLEC, a minor

CIRCUIT COURT BRANCH #4
TERENCE T BOURKE
615 N SIXTH STREET
SHEBOYGAN WI 53081

Petitioner,

**PETITION FOR REVIEW OF AN
ADMINISTRATIVE DECISION**

vs.

Case No: 04CV068
Case Code: 80607
SEP 17 P1:40
SHEBOYGAN COUNTY
WISCONSIN
DEREK REJHOLEC
FILED
CIRCUIT COURT

WISCONSIN DEPARTMENT
OF HEALTH AND FAMILY SERVICES,

Respondent.

Now comes the petitioner, Cynthia Rejholec on behalf of her minor child, Derek Rejholec, through her attorneys, Legal Action of Wisconsin, Inc., by Karen S. Roehl, and respectfully represents that:

1. Petitioner, a minor, and his mother, an adult, are residents of Sheboygan County.
2. Respondent Department of Health and Family Services (DHFS) is an agency of the State of Wisconsin.
3. Petitioner seeks review, pursuant to §227.52 Wis. Stats., of a decision of DHFS on the grounds that the decision contains errors of law, and is contrary to law.
4. A written proposed hearing decision was issued April 6, 2004, proposing that DHFS did not have the authority to promulgate HFS Ch. 79, Wis. Admin. Code, and that the Department does not have authority to recoup State SSI overpayments.

The Department objected to the proposed decision, while the petitioner agreed with the conclusion of the proposed decision.

5. A final written hearing decision denying the petitioner's claims was issued on July 12, 2004, and a decision denying petitioner's request for rehearing was issued on August 20, 2004.

5. Petitioner is aggrieved by the final decision of DHFS, which allows recoupment of an alleged overpayment of State Supplemental Security Income (SSI) benefits. A copy of said decision is attached hereto as Exhibit A. More specifically, and without limitation,

(a) DHFS actions are premature or not ripe because he has not yet received the federal Social Security Administration's final administrative decision (the Appeals Council has remanded his case for a new hearing which has not yet been rescheduled);

(b) DHFS actions are a violation of petitioner's due process rights;

(c) DHFS lacks statutory authority to recover the alleged overpayment [see Mack v. DHFS, 231 Wis.2d 644, 605 N.W.2d 651 (Ct. App. 1999)];

(d) any overpayment should be waived by DHFS;

(e) alternatively, Chapter HFS 79, Wis. Adm. Code, is deficient.

WHEREFORE, petitioner asks that this court:

1. Review the respondent's decision;
2. Order respondent to prepare a transcript of the administrative hearing in this matter, and forward a copy of said transcript to counsel for the petitioner at no charge;
3. Allow counsel for petitioner to submit written and oral argument on the questions involved herein;
4. Reverse the July 12, 2004, decision (rehearing denied August 20, 2004); and,
5. Grant petitioner such further relief as the Court deems proper.

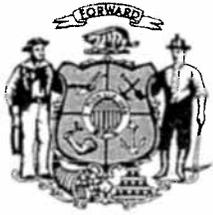
Dated this 17th day of September, 2004.



Karen S. Roehl, State Bar #1001508
Attorney for Petitioner

Legal Action of Wisconsin, Inc.
404 North Main Street, #702
Oshkosh, WI 54901

920.233.6521



State of Wisconsin DIVISION OF HEARINGS AND APPEALS

David H. Schwarz, Administrator
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
E-mail: dha.mail@dha.state.wi.us
Internet: <http://dha.state.wi.us>

July 12, 2004

RECEIVED

JUL 13 2004

LEGAL SERVICES OF NE

Derek Rejholec
c/o Cynthia Rejholec
W5512 Highway 28
Waldo, WI 53093

Christine Normington
EDS Federal
6406 Bridge Road
Madison, WI 53784

Cheryl McIlquham
Bureau of Health Care Financing
1 West Wilson Street, Room 350
PO Box 309
Madison, WI 53707-0309

Re: Final Decision
Derek Rejholec, Case No. MSS-59/59925

Dear Parties:

Enclosed is a copy of the Final Decision in the above-referenced matter.

Sincerely,

Kay F. Klubertanz
Program Assistant

cc: Jerry Govert - EDS- Federal
Kathleen Luedtke - SSI Coordinator
Kathy Winter- Sheboygan Co.
Karen S. Roehl-Legal Services of Northeastern Wisconsin
Dan Stier-Secretary-Dept. of Health and Family Services
Kenneth Munson, Deputy Secretary, DHFS
David Schwarz, Administrator, DHA
Louis H. Dunlap, Assistant Administrator, DHA
Joseph Nowick, Administrative Law Judge, DHA



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Derek Rejholec
c/o Cynthia Rejholec
W5512 Highway 28
Waldo, WI 53093

DECISION

MSS-59/59925

The proposed decision of the hearing examiner dated April 6, 2004 is hereby amended as follows and as such is adopted as the final order of the Department.

DISCUSSION section:

- Delete paragraphs 12 - 16 on pages 3 - 4 (beginning with "A review of the language in WI Stats. §§ 49.77 and 49.775 ...").
- Insert new paragraphs 12 - 24 as follows:

Section 49.77, Stats., directs the Department to make supplemental payments to eligible persons. Petitioner's eligibility under sec. 49.77 was dependent on his eligibility for federal SSI benefits. He was determined ineligible for federal payments, thus rendering him ineligible for state supplemental payments. He incorrectly received state payments during the period of ineligibility.

In Mack v. DHFS, 231 Wis.2d 644, 605 N.W.2d 651 (Ct. App. 1999), the court recognized the Department's common law right to recover erroneous payments. The court ruled, however, that the Department was not authorized to recover the overpayments via administrative recoupment in the absence of a statutory right or administrative rule authorizing that method of recovery.

Responding to the Mack holding, the Department promulgated chapter HFS 79, authorizing administrative recoupment of erroneous state supplemental payments. The proposed decision holds that the Department lacked statutory authority to promulgate HFS 79.

The proposed decision is wrong. While sec. 49.77, Stats., does not expressly authorize recovery of overpayments, it is implicitly authorized. The statute expressly directs the Department to make payments to eligible persons. In this case, the Department made payments to an ineligible person. A necessary implication of the express language to make payments only to eligible persons is the authority to seek the return of payments that have been made in violation of the legislative directive. This is particularly true in view of the Department's common law right to recover, coupled with the long-established rule of statutory construction that legislative intent to change the common law must be clearly expressed. See Gaugert v. Duve, 244 Wis.2d 691, 713 (2001).

Whether the Department had statutory authority to promulgate an administrative recoupment rule was considered an open question by the Administrative Law Judge, based on his view that the Mack court never discussed it. The issue was never discussed, however, because the plaintiff conceded it, and because the court from the outset premised its decision on the existence of such authority.

In the opening paragraph of its decision, 231 Wis.2d, at 645, the court “determine[d] that a statutory right or an administrative rule must exist before an administrative recoupment can take place...” (Emphasis added). The plaintiff had no quarrel with the court’s determination. As the court noted, at 647:

In particular, [Mack] takes issue with DHFS’s administrative method of recovery. She argues that DHFS could sue her to exercise its common law recoupment right or it could administratively reclaim the funds pursuant to a statute or rule. Because there is no governing statute or rule, she claims that DHFS’s administrative benefits repayment deduction was unauthorized. We agree. (Emphasis added).

Mack was represented by attorneys employed by Legal Action of Wisconsin, Inc., as is petitioner. Those attorneys were entirely in agreement with the court’s holding that the Department could proceed in one of three ways: 1) file a lawsuit seeking recovery of erroneous payments; 2) seek legislative authority to use administrative recoupment as a method of recovery, or 3) promulgate an administrative rule authorizing administrative recoupment as a method of recovery.

Choosing the final option, the Department promulgated HFS 79. In response, petitioner’s attorneys have modified their view of the law. Promulgation of an authorizing rule is no longer an option; now it is argued that statutory authorization is required.

That position has no legal basis. The Legislature authorized the Department to make state supplemental payments only to eligible persons. Implicit in that authorization is the authority to recover erroneous payments. Prior to Mack, the only issue was whether the Department could use administrative recoupment as a method of recovery absent an authorizing statute or rule. The Mack court held that a statute or rule was necessary. Consequently, the Department promulgated HFS 79. There is no further lack of authority.

Citing sections 49.195(3) and 49.497, Stats., petitioner’s attorney argues that “if the legislature wanted to grant DHFS the authority to administratively recoup an overpayment of SSI state supplemental benefits, then the legislature would have granted this authority to DHFS under sec. 49.77, Stats., as it did in the above statutes.” Petitioner’s Letter Brief dated March 3, 2004, at 4.

Section 49.195(3), however, does not authorize recovery. It is mandated; i.e., “the department shall promptly recover all overpayments.” Section 49.497, in contrast, permissively states that the “department may recover any payment made incorrectly”). The purpose of that provision, however, is to impose restrictions on the Department’s authority to recover overpayments. Recovery may be sought only when “the incorrect payment results from any misstatement or omission of fact by a person supplying information in an application for benefits” or when “a recipient or any other person responsible for giving information on the recipient’s behalf fails to report the receipt of income or assets in an amount that would have affected the recipient’s eligibility for benefits.”

As discussed above, authority to recover payments to an ineligible person is implicit in a statute that authorizes payment only to eligible persons. The statutes cited by petitioner’s attorney demonstrate only that there are instances where the Legislature chose to mandate that the department recover overpayments, or where it imposed limits on the authority to recover.

The Department possesses the authority to administratively recoup state supplemental overpayments.

CONCLUSIONS OF LAW section:

- Revise as follows:
 1. The Department ~~did not have~~ has the authority to promulgate WI. Admin. Code ch. 79.
 2. The Department ~~did not have~~ has the authority to recoup State SSI overpayments.

ORDERED section:

- Replace with the following:

That the petition is dismissed.

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 that 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.

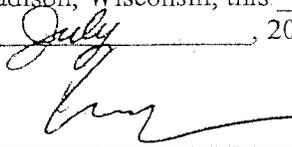
Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. A copy of the statutes can found at your local library or courthouse.

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 Department of Health and Family Services, P.O. Box 7850, Madison, WI 53707-7850.

The appeal must also be served on the other "PARTIES IN INTEREST" named in the proposed 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 12~~th~~ day
of July, 2004.


Kenneth Munson, Deputy Secretary
Department of Health & Family Services



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Derek Rejholec
c/o Cynthia Rejholec
W5512 Highway 28
Waldo, WI 53093

PROPOSED
DECISION

MSS-59/59925

PRELIMINARY RECITALS

Pursuant to a petition filed September 30, 2003, under Wis. Stat. § 49.45, to review a decision by the Division of Supportive Living in regard to SSI State Supplement Payments, a hearing was held on March 3, 2004, at Sheboygan, Wisconsin. At the request of the petitioner, hearings set for October 22, November 19, and December 22, 2003, and January 27, 2004, were rescheduled.

The issue for determination is whether the Department has the authority to recoup an overpayment of SSI State Supplement.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

Derek Rejholec
c/o Cynthia Rejholec
W5512 Highway 28
Waldo, WI 53093

Represented by:

Karen S. Roehl
Oshkosh Area Office
404 N Main Street, Suite 702
Oshkosh, WI 54901

Wisconsin Department of Health and Family Services
Division of Supportive Living
1 West Wilson Street, Room 550
Madison, WI 53707-0309

By: Christine Nornington (By written submission)

ADMINISTRATIVE LAW JUDGE:

Joseph A. Nowick
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN 600-76-4041) is a resident of Sheboygan County.
2. The petitioner is a child who was receiving Social Security Title XVI disability payments.

3. The federal Social Security Administration (SSA) notified the petitioner's mother that her son had been ineligible for Title XVI payments because he was not disabled during the months in question.
4. The SSA found that there had been an overpayment of that benefit. Subsequently, SSA agreed to waive the entire amount.
5. The Department notified the petitioner's mother that an overpayment of \$586.46 had been made to the child for the period from December 1, 2002, to June 30, 2003. This is the amount of State SSI Supplemental payments that were made in the period in question. The basis of the action is that the child was not receiving SSI for the months in question.
6. The Department did not appear at the hearing but Christine Normington, the State SSI Supervisor, submitted a written response.

DISCUSSION

There is no factual dispute in this matter, only a legal one. As discussed in Proposed Decision MSS-40/59428, effective January 1, 1996, the State of Wisconsin began sending out its State Supplemental SSI payments separately from federal SSI payments (they had previously been sent out as one check by the Social Security Administration). See sec. 49.77, Wis. Stats. (formerly 49.177), which mandates the state supplements, was amended effective January 1, and currently reads, in relevant portion, as follows:

(2) Eligibility.

(a) The following persons who meet the resource limitations and the nonfinancial eligibility requirements of the federal supplemental security income program under 42 USC 1381 to 1383d are entitled to receive supplemental payments under this section:...

2. Any needy person or couple residing in this state and receiving benefits under federal Title XVI...

The petitioner's eligibility for the state supplement rested on the provision in (2)(a)2, supra. The Social Security Administration discontinued the petitioner's federal SSI payments based on its determination that he was not disabled. It then sought to recoup the Social Security paid for the period when the petitioner was not eligible for the disability payments. Later, the Social Security Administration agreed to waive the overpayment.

The Department cites provisions in WI Admin Code ch. HFS 79 as the basis for its recoupment action. WI Admin Code HFS § 79.40 allows for the Department to recoup overpayments of incorrect assistance that has been paid, regardless of fault. (Eff.: May 1, 2001). The basis for the petitioner's SSI State Supplement overpayment is that she was not eligible for Title XVI payments during the time in question.

Per WI Admin Code § HFS 79.50(2), this makes the benefits "incorrectly paid".

(2) "Incorrectly paid benefits" means payments of any amount dispersed to an individual who was not eligible for any benefit amount during the period for which the payment was made or in an amount which was in excess of the amount for which the person was eligible during the period for which the payment was made.

It is important to note that the administrative law judges in DHA are creatures of state law and are bound by *duly* enacted state laws and rules. The petitioner raises the issue as to whether the provisions in WI Admin Code ch. HFS 79 were duly promulgated because there is no enabling statute.

Before proceeding, the petitioner also argued that the Department's overpayment action is premature, as it is not "ripe". No statute, rule, or case law was provided to support that assertion. The concept of ripeness certainly is crucial to whether judicial review of an administrative decision is available. The legislative intent in the underlying statute in WI. Stats. § 227.52 was to limit judicial review of administrative agency actions to final orders of agency. See, Wisconsin Dept. of Revenue v. Hogan, 543 N.W.2d 825, Wis.App.,1995. However, this case concerns an administrative action that is based on a prior administrative determination, a decision by a federal ALJ. Thus, I cannot find that the Department is precluded from seeking an overpayment at this time on that basis.

The petitioner argues that the Department had no authority to promulgate WI. Admin. Code ch. HFS 79.

It is the general rule that an agency or board created by the legislature only has the powers which are either expressly conferred or necessarily implied from the four corners of the statute under which it operates. The effect of this rule has generally been that such statutes are strictly construed to preclude the exercise of a power which is not expressly granted.

See Village of Silver Lake v. Department of Revenue, 87 Wis. 2d 463 (Ct. of Appeals, 1978). This line of reasoning is applicable to the promulgation of administrative rules.

In considering whether an administrative agency exceeds its statutory authority in promulgating a particular rule, we are guided by the general rule that an administrative agency has only those powers as are expressly conferred upon it or which may be fairly implied from the statutes under which it operates, and as a consequence, it cannot promulgate any rule which is not expressly or impliedly authorized by the legislature.

See Peterson v. Natural Resources Board, 94 Wis.2d 587, 592-93, 288 N.W.2d 845 (1980).

The statutory basis for WI. Admin. Code ch. HFS 79 is found in § HFS 79.10:

HFS 79.10 Authority and purpose. This chapter is promulgated under the authority of ss. 49.77, 49.775 and 227.11 (2) (a), Stats., to administer supplemental security income state supplemental payments to low-income elderly and disabled residents of Wisconsin and their dependent children. This chapter establishes the basis for the recovery of benefits incorrectly paid to individuals who receive benefits under s. 49.77 or 49.775, Stats., or both, provides for the department's waiver of recovery of incorrectly paid benefits and establishes the appeal right of an individual from whom the department seeks to recover benefits incorrectly paid to the individual.

The language in WI Stats. § 227.11(2)(a) states the following:

Each agency may promulgate rules interpreting the provisions of any statute enforced or administered by it, if the agency considers it necessary to effectuate the purpose of the statute, but a rule is not valid if it exceeds the bounds of correct interpretation.

A review of the language in WI Stats. §§ 49.77 and 49.775 does not reveal any specific language either mandating or permitting the Department from drafting a rule concerning the collection of overpayments of the State SSI Supplement.

It would appear that the Department might be using the decision in Mack v. DHFS, 231 Wis. 2d 644, 605 N.W. 2d 651(Ct. App. 1999) as a basis for the promulgation of WI. Admin. Code ch. HFS 79. This would be the exact opposite of the petitioner's interpretation of that case.

Mack concerns the recoument of an overpayment of State SSI Supplement to Janice Mack. It occurred prior to the promulgation of WI. Admin. Code ch. HFS 79. That court found that there was no statutory authority for the Department to administratively recover its overpayment from future benefits payments. The court also found that WI Stats. § 49.77 only explains state SSI eligibility and payment levels and provides DHFS the option to allow the federal government to administer the distribution of payments. There is nothing concerning the authority to promulgate a rule concerning overpayments.

At the time of Mack, the Department relied on a written policy as support for the procedure used to recoup the benefits overpayments to Mack. Thus, the decision discusses whether that policy was actually an illegally promulgated rule under WI Stats. ch. 227, Stats. That portion of the decision is no longer on point given that a rule was promulgated. The Department might rely on several parts of the decision as supporting the promulgation of ch. 79. For example, the court states:

Because there is no governing statute or rule, she claims that DHFS's administrative benefits repayment deduction was unauthorized. We agree.

Because DHFS has not complied with ch. 227, Stats., and properly promulgated the rule, DHFS lacks the authority to administratively recoup the benefits overpayment. We reverse the circuit court's order upholding DHFS's actions.

See Mack, at 646 and 651. Both statements could suggest that the court was stating that if the Department had promulgated a rule, it would have had the authority to recoument the benefits. However, the court was never required to look at the Department's authority to pass such a rule so it never discussed it. The court used the term "properly promulgated" which means complying with the applicable provisions in WI Stats. ch. 227 including § 227.11(2)(a). That is, a rule will not be valid if it exceeds the bounds of correct interpretation of the statute it is designed to implement. Per the Mack court, there was no statutory authority for DHFS to administratively recover its overpayment from future benefits payments and there has been no change to the statute since that time.

I must also point out that the Department argued in Mack that it has a common law right of recovery of the erroneous overpayments. The court agreed that the Department, like any administrative agency generally possesses a common law right of recoument to recover erroneous payments of public funds. However, the court also agreed with Mack that the Department could sue to exercise its common law recoument right.

CONCLUSIONS OF LAW

1. The Department did not have the authority to promulgate WI. Admin. Code ch. 79.
2. The Department does not have authority to recoup State SSI overpayments.

NOW, THEREFORE, it is

ORDERED

That the matter be REMANDED to the Department with instructions to not recoup the alleged overpayment of a Wisconsin State SSI Supplement and, within ten days of the date of the final Decision in this matter, to refund to petitioner the amounts, if any, that have already been recouped from petitioner's Wisconsin State SSI Supplement.

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 IMPLEMENTED 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 for final decision-making.

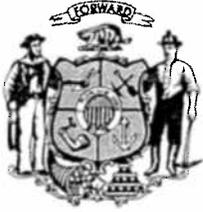
The process relating to Proposed Decision is described in Wis. Stat. § 227.46(2). Department of Health and Family Services for final decision-making.

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 6th day
of April, 2004.



Joseph A. Nowick
Administrative Law Judge
Division of Hearings and Appeals
311/JAN



State of Wisconsin DIVISION OF HEARINGS AND APPEALS

David H. Schwarz, Administrator
5005 University Avenue, Suite 201
P.O. Box 7875
Madison, WI 53707-7875

Telephone: (608) 266-7667
FAX: (608) 264-9885
E-mail: dha.mail@dha.state.wi.us
Internet: http://dha.state.wi.us

August 20, 2004

Karen S. Roehl
Oshkosh Area Office
404 N Main Street, Suite 702
Oshkosh, WI 54901

RECEIVED
AUG 23 2004

STATE OF WISCONSIN

Re: Rehearing Request Order
Derek Rejholec MSS-59/59925

Dear Ms. Roehl:

Your request for a rehearing dated August 2, 2004 was forwarded to the Office of the Secretary of the Department of Health & Family Services for consideration since the initial decision was a Proposed Decision. The Rehearing Order from the Secretary's Office is enclosed.

Sincerely,

Patricia A. Hotter

DIVISION OF HEARINGS AND APPEALS

cc: Kathleen Luedtke - SSI Coordinator
Cheryl McIlquham - BHCE
Chris Normington - EDS Federal
Kathy Winter- Sheboygan Co.
Derek Rejholec, Petitioner



STATE OF WISCONSIN
Department of Health and Family Services

In the Matter of

Derek Rejholec

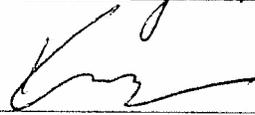
ORDER

MSS-59/59925

The request for rehearing is denied for failure to establish any of the grounds required by Wis. Stats. § 227.49(3).

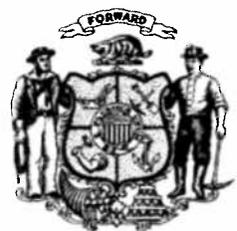
This is an order disposing of a petition for rehearing. Parties having standing to appeal may file a petition to Circuit Court under Wis. Stats. § 227.53. A petition to Circuit Court must be filed no more than 30 days after the date of a denial of a timely rehearing petition. An appeal must be served on the Department of Health and Family Services, PO Box 7850, Madison, WI 53707-7850, as respondent. Copies of the appeal must also be served on all other 'Parties in Interest' identified in the original administrative hearing decision in this case.

Given under my hand at the City of
Madison, Wisconsin, this 20th
day of August, 2004.


Kenneth Munson, Deputy Secretary
Department of Health & Family Services



WISCONSIN STATE LEGISLATURE



STATE OF WISCONSIN

CIRCUIT COURT

MILWAUKEE COUNTY

STATE OF WISCONSIN,

Plaintiff,

NOTICE OF RETAINER

Case No. 03-CV-06540

Code No. 30703

v.

WISCONSIN CENTER DISTRICT, GRUNAU/HUNT, A
JOINT VENTURE, GRUNAU PROJECT
DEVELOPMENT, INC., HUNT CONSTRUCTION
GROUP, INC. and HARENDA ENTERPRISES, INC.,

Defendants.

PLEASE TAKE NOTICE that we are retained by defendant, Harenda Enterprises, Inc. (improperly designated in the Summons as "Harrenda Enterprises, Inc."), in the above-entitled action and demand that a copy of all papers, pleadings, notices and orders, subsequent to the Summons and Complaint herein as required to be served on said defendant be served at the address indicated below.

Dated September 30, 2003.

HOSTAK, HENZL & BICHLER, S.C.

By: 

Thomas M. Devine #1017536
Attorneys for Defendant,
Harenda Enterprises, Inc.

840 Lake Avenue
P.O. Box 516
Racine, WI 53401
(262) 632-7541

STATE OF WISCONSIN,

Plaintiff,

v.

ANSWER AND
AFFIRMATIVE DEFENSES
Case No. 03-CV-06540
Code No.30703

WISCONSIN CENTER DISTRICT,
GRUNAU/HUNT, A JOINT VENTURE,
GRUNAU PROJECT DEVELOPMENT, INC.,
HUNT CONSTRUCTION GROUP, INC. and
HARENDA ENTERPRISES, INC.,

Defendants.

The above-named defendant, Harenda Enterprises, Inc. (improperly designated in the Summons as "Harrenda Enterprises, Inc."), answers the Complaint of the plaintiff as follows:

1. In answering paragraphs 2, 3, 4, and 5 of the plaintiff's Complaint, the answering defendant lacks knowledge and information sufficient to form a belief as to the truth of the allegations contained therein.

2. In answering paragraph 6 of the plaintiff's Complaint, the answering defendant denies that the principal offices of Harenda Enterprises, Inc., are located at 1701-5B Pearl Street, Waukesha, WI 53186, and denies that the defendant is engaged in the business of asbestos abatement consulting services. The answering defendant affirmatively alleges that the principal offices of Harenda Enterprises, Inc., are located at S98 W12712 Loomis Road, Muskego, WI 53150. The answering defendant affirmatively alleges that the defendant, Harenda Enterprises, Inc., is engaged in the business of environmental, health and safety consulting and contracting.

3. In answering paragraph 7 of the plaintiff's Complaint, the answering defendant lacks knowledge and information sufficient to form a belief as to the truth of the allegations contained therein.

4. In answering paragraph 8 of the plaintiff's Complaint, the answering defendant admits that Harenda Enterprises, Inc., was hired by WCD to provide asbestos consulting services for the Milwaukee Auditorium project. The answering defendant lacks knowledge and information sufficient to form a belief as to the truth of the remaining allegations contained therein concerning the obligations of Harenda Enterprises, Inc.

5. In answering paragraph 9 of the plaintiff's Complaint, the answering defendant admits that on February 21, 2002, Balestrieri Environmental & Development, Inc., filed a Notification of Demolition and/or Renovation with the DNR for the Milwaukee Auditorium renovation project. The answering defendant admits that the Notification identified certain asbestos-containing areas. The answering defendant admits that at the time of the filing of the Notification, Balestrieri was acting under the direction of defendant Grunau/Hunt and defendant WCD. The answering defendant lacks knowledge and information sufficient to form a belief as to the truth of the allegations concerning what information Balestrieri was relying on at the time of filing of the Notification, and which areas were identified for asbestos abatement. The answering defendant further denies that the Notification failed to identify approximately 20,000 to 30,000 square feet of asbestos-containing plaster that was inside the Milwaukee Auditorium structure, and denies that said Notification requires that all areas of the building to be renovated or demolished that are constructed of asbestos-containing material be identified.

6. In answering paragraph 10, 11, 12 of the plaintiff's Complaint, the answering defendant denies the allegations contained therein.

7. In answering paragraph 13 of the plaintiff's Complaint, the answering defendant alleges that said allegation is a conclusion of law and is not a statement of fact and therefore is not subject to admission or denial. Furthermore, this answering

defendant denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth therein.

8. In answering paragraph 14 of the plaintiff's Complaint, the answering defendant alleges that said allegation is a conclusion of law and is not a statement of fact and therefore is not subject to admission or denial. Furthermore, this answering defendant denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth therein.

9. In answering paragraph 15 of the plaintiff's Complaint, the answering defendant denies the allegations contained therein.

10. In answering paragraph 16 of the plaintiff's Complaint, the answering defendant alleges that said allegation is a conclusion of law and is not a statement of fact and therefore is not subject to admission or denial. Furthermore, this answering defendant denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth therein.

11. In answering paragraph 17 of the plaintiff's Complaint, the answering defendant realleges its answers to the allegations contained in paragraphs 1 through 13 of the plaintiff's Complaint.

12. In answering paragraph 18 of the plaintiff's Complaint, the answering defendant alleges that said allegation is a conclusion of law and is not a statement of fact and therefore is not subject to admission or denial. Furthermore, this answering defendant denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth therein.

13. In answering paragraph 19 of the plaintiff's Complaint, the answering defendant denies the allegations contained therein.

14. In answering paragraph 20 and 21 of the plaintiff's Complaint, the answering defendant realleges its answers to the allegations contained in paragraphs 1 through 13 and 16 of the plaintiff's Complaint.

15. In answering paragraph 22 of the plaintiff's Complaint, the answering defendant alleges that said allegation is a conclusion of law and is not a statement of fact and therefore is not subject to admission or denial. Furthermore, this answering defendant denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth therein.

16. In answering paragraph 23 of the plaintiff's Complaint, the answering defendant denies the allegations contained therein.

17. In answering paragraph 24 and 25 of the plaintiff's Complaint, the answering defendant realleges its answers to the allegations contained in paragraphs 1 through 13 and 16 of the plaintiff's Complaint.

18. In answering paragraph 26 of the plaintiff's Complaint, the answering defendant alleges that said allegation is a conclusion of law and is not a statement of fact and therefore is not subject to admission or denial. Furthermore, this answering defendant denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth therein.

19. In answering paragraph 27 of the plaintiff's Complaint, the answering defendant denies the allegations contained therein.

20. In answering paragraph 28 and 29 of the plaintiff's Complaint, the answering defendant realleges its answers to the allegations contained in paragraphs 1 through 13 and 16 of the plaintiff's Complaint.

21. In answering paragraph 30 of the plaintiff's Complaint, the answering defendant alleges that said allegation is a conclusion of law and is not a statement of fact and therefore is not subject to admission or denial. Furthermore, this answering defendant denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth therein.

23. In answering paragraph 31 of the plaintiff's Complaint, the answering defendant denies the allegations contained therein.

24. In answering paragraph 32 of the plaintiff's Complaint, the answering defendant realleges its answers to the allegations contained in paragraph 16 of the plaintiff's complaint.

AFFIRMATIVE DEFENSES

Now and for their affirmative defenses in this matter, the answering defendant alleges as follows:

1. That upon information and belief, the plaintiff has failed to mitigate the damages as required by law.

2. That the injury and/or damage which is the subject of the Complaint was caused by the actions of an individual or entity for which the answering defendant is not responsible.

3. That the plaintiff is estopped from asserting the claims, and/or enforcing the claims, and/or demanding money judgments in the Complaint, because upon information and belief, the DNR's action or nonaction has induced reliance by the answering defendant to its detriment; and that upon information and belief, the DNR has a special relationship with the answering defendant in the performance of the investigation for the presence of asbestos; that the DNR was included in all efforts so that there would be no violation of rule or statute; that the defendant obeyed all lawful orders of the DNR and trusted the DNR as a partner in the asbestos abatement required in the renovation; that upon information and belief, the DNR failed to timely disclose information to the answering defendant.

4. That upon information and belief, the DNR has arbitrarily and capriciously applied the statutory standards and has violated the constitutional rights of the answering defendant.

5. That the answering defendant never assumed the duties of nor acted as an owner or operator in the performance of its contract, and exercised the appropriate judgment in performing its contractual obligations on the Milwaukee Auditorium project.

6. That upon information and belief, the rules upon which this action is based may be invalid because they violate constitutional provisions, exceed statutory authority, and/or were promulgated without compliance with statutory rulemaking procedures.

WHEREFORE, these answering defendants demand judgment as follows:

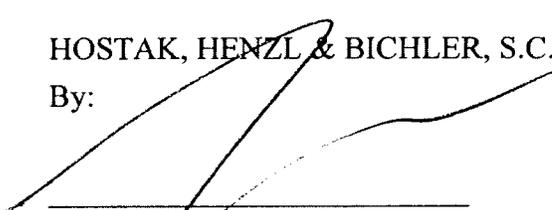
1. Dismissing plaintiffs' complaint and all claims associated therewith.
2. For costs and disbursements incurred herein;
3. For such other relief as the court deems just.

THE DEFENDANT HEREBY DEMANDS A JURY OF 12 PERSONS.

Dated September 3rd, 2003.

HOSTAK, HENZL & BICHLER, S.C.

By:



Thomas M. Devine

State Bar No. 1023260

Kristin M. Cafferty

State Bar No. 1023260

Attorneys for Defendant, Harenda Enterprises, Inc.

840 Lake Avenue
P.O. Box 516
Racine, WI 53401
(262) 632-7541

CIVIL PROCESS

Served: 10-2, 2003

Time: 2:50 p.m.

Address: 409 South State Capitol

- Personal Service
- Substituted Service
- Service on Corporation
- Post-mail

Person Served: Hon. Joe Leibhaus

Process Server: Steph Middle