COURT OF APPEALS
DECISION
DATED AND FILED

March 12, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1544 **Cir. Ct. No. 2013CV568**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

ANNETTE KESSLER,

PETITIONER-APPELLANT,

V.

WISCONSIN DEPARTMENT OF HEALTH SERVICES,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Polk County: JEFFERY ANDERSON, Judge. *Affirmed*.

Before Lundsten, Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Annette Kessler appeals the circuit court's order upholding an agency decision that denied Kessler attorney's fees after Kessler prevailed in a dispute between Kessler and the agency, the Wisconsin Department of Health Services (DHS). Kessler argues that she is entitled to attorney's fees

because DHS took a position in the dispute that was not "substantially justified." *See* WIS. STAT. § 227.485(2)(f) and (3) (2013-14).[1] We disagree and affirm the circuit court.

Background

¶2 The dispute between Kessler and DHS related to Kessler's medical assistance benefits under Wisconsin's BadgerCare Plus program, and the extent to which DHS could collect an "overpayment" of benefits from Kessler based on her own misreporting of household size and income. Eligibility for benefits under the program depends on a number of factors including, most pertinent here, household size and income.[2] *See, e.g.*, WIS. ADMIN. CODE § DHS 103.04(7)(b); BC+ (BadgerCare Plus) Handbook, Release 12-02, chs. 2 & 18.[3]

¶3 Although the applicable rules are complex, we glean from the parties' briefing and their cited authorities that the rules are such that, generally speaking, a larger household size leads to a larger benefit and a larger income leads to a smaller benefit. Here, as we shall see, there was no dispute that Kessler underreported her household size—a circumstance that reduced the benefits she would have otherwise received—*and* underreported at least some income—a

[1] For ease of reference, we cite the current version of the Wisconsin Statutes, the 2013-14 version. The parties point to no changes that matter in the applicable statutes since the time of the first relevant events in this case in 2012.

[2] We avoid using technical terms that are not material to our decision. For example, WIS. ADMIN. CODE § DHS 103.04(7)(b) refers to a "test group," rather than a more intuitive term such as "household size," and we choose to use the more intuitive term "household size."

[3] Both parties rely on the BadgerCare Plus Handbook, and Kessler informs us that the applicable version here is Release 12-02. We therefore cite to that version, which was available at https://www.dhs.wisconsin.gov/publications/p1/p10171-12-02.pdf as of March 10, 2015.

circumstance that increased the benefits that she would have otherwise received—with the end result being that Kessler received at least *some* overpayment of benefits.

¶4 Kessler began receiving benefits in 2011 for herself and her two children. A log of contacts between DHS and Kessler indicates that Kessler contacted DHS in late 2011 to report a separation from her husband and to report that one of her children was no longer in her home. In July 2012, Kessler and her husband divorced and, under their divorce decree, shared equal placement of their two children. In late 2012, Kessler completed a renewal application for benefits and also reported a household size of two people. Kessler reported a household size of two on her renewal application because she incorrectly believed at the time that, given the shared placement arrangement, she could include only one of her two children. In fact, BadgerCare Plus rules would have allowed Kessler to include both children and receive benefits based on a household size of three.

¶5 While the record is unclear as to timing, at some point after Kessler's renewal application DHS determined that Kessler had underreported income beginning in April 2012, resulting in an alleged overpayment of $984 in benefits from June 1, 2012, to December 31, 2012. DHS calculated the $984 figure based on Kessler's actual income and her incorrectly reported household size of two. DHS sent Kessler a notice informing her of the overpayment.

¶6 Kessler requested a "fair hearing" on the overpayment amount and, apparently realizing her mistake, informed DHS that she had underreported her household size. DHS refused to recalculate the $984 overpayment amount, taking the position that it could rely on Kessler's reported household size. The hearing examiner, an administrative law judge, presided at the hearing and disagreed,

requiring DHS to revise the overpayment amount to reflect Kessler's actual household size, thus reducing Kessler's overpayment amount from $984 to $736.35. The hearing examiner reasoned that DHS is required to use actual income when calculating overpayment and, by extension, DHS should be required to use actual household size. The hearing examiner stated that "the purpose of overpayment collections is not to punish inadvertent errors but rather to recover payments that exceed what the person's financial circumstances should have entitled her to."

¶7 Kessler moved the hearing examiner for attorney's fees under WIS. STAT. § 227.485, arguing that she was a prevailing party and that DHS took a position that was not substantially justified.[4] The hearing examiner issued a proposed decision, concluding that Kessler had prevailed but that DHS's position was substantially justified. DHS adopted the hearing examiner's decision as a final agency order, effectively denying Kessler's request for attorney's fees. The circuit court upheld the agency's decision.[5]

[4] WISCONSIN STAT. § 227.485(3) provides:

> **(3)** In any contested case in which an individual, a small nonprofit corporation or a small business is the prevailing party and submits a motion for costs under this section, the hearing examiner shall award the prevailing party the costs incurred in connection with the contested case, unless the hearing examiner finds that the state agency which is the losing party was substantially justified in taking its position or that special circumstances exist that would make the award unjust.

[5] In order to avoid confusion between DHS's decision and DHS's arguments as a party, we refer below to DHS's final decision on fees as the "hearing examiner's" decision.

Discussion

¶8 The parties dispute whether the hearing examiner erred in concluding that DHS's position was substantially justified. DHS does not dispute that Kessler prevailed, and we do not address that topic.

¶9 DHS seems to concede that our review of the hearing examiner's decision on attorney's fees is de novo. We are uncertain whether this concession is appropriate, but need not decide the correct standard of review.[6] Even applying de novo review, the standard most favorable to Kessler, we would uphold the hearing examiner's decision for the reasons explained below.

¶10 An agency's position is "substantially justified" if that position has "a reasonable basis in law and fact." *See* WIS. STAT. § 227.485(2)(f). More specifically, the agency must show that its position has "(1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory propounded; and (3) a reasonable connection between the facts alleged and the legal theory advanced." ***Stern v. DHFS***, 212 Wis. 2d 393, 398, 569 N.W.2d 79 (Ct. App. 1997) (quoted source and internal quotation marks omitted). "Neither losing the case nor advancing a novel but credible interpretation of the law constitutes grounds for finding a position lacking in substantial justification." ***Id.*** "In evaluating the government's position to determine whether it was substantially justified, we look to the record of both the underlying government conduct at issue

[6] *See, e.g.*, ***Board of Regents of Univ. of Wis. Sys. v. State Personnel Comm'n***, 2002 WI 79, ¶43, 254 Wis. 2d 148, 646 N.W.2d 759 (supporting the proposition that, under some circumstances, an agency's "substantially justified" conclusion is entitled to great weight deference).

and the totality of circumstances present before and during litigation." ***Id.*** (quoted source and internal quotation marks omitted).

¶11 Before proceeding to discuss the hearing examiner's reasoning, we pause to observe that Kessler makes several arguments that, so far as we can tell from the record before us, Kessler failed to raise when she sought attorney's fees in the administrative proceedings below. For example, Kessler now argues for the first time that, even if DHS reasonably relied on her reported household size of two, DHS made an arbitrary decision in choosing which month to begin calculating overpayment amounts based on that household size. "It is settled law that to preserve an issue for judicial review, a party must raise it before the administrative agency." ***Bunker v. LIRC***, 2002 WI App 216, ¶15, 257 Wis. 2d 255, 650 N.W.2d 864. Although we may ignore this forfeiture rule, "[o]rdinarily a reviewing court will not consider issues beyond those properly raised before the administrative agency." ***Id.*** We see no reason to depart from our ordinary practice here, and we decline to address Kessler's many forfeited arguments. And, it is worth noting, even if we chose to ignore forfeiture, it is far from apparent that any of Kessler's new arguments are winning ones.[7]

¶12 When we limit our analysis to Kessler's preserved arguments, we perceive that the material facts are undisputed and that the only issue is whether DHS took a position with a reasonable basis in law. Specifically, the question is whether DHS reasonably took the position that, even after Kessler informed DHS

[7] In addition to making new arguments, Kessler cites authorities that we do not find in the materials she presented to the hearing examiner when she requested attorney's fees. Regardless, we have considered Kessler's cited authorities to the extent that they relate to her preserved arguments.

in June 2013 that her *actual* household size was three, DHS was entitled to collect overpayment for 2012 in the amount DHS originally calculated based on Kessler's previously reported household size of two.[8]

¶13 As we understand the hearing examiner's decision on attorney's fees, the hearing examiner reasoned that DHS's position was substantially justified because DHS's position represented a novel but reasonable interpretation of a regulation governing overpayment, WIS. ADMIN. CODE § DHS 108.03(3)(c), as that regulation applied to a relatively unusual fact pattern. Section DHS 108.03(3)(c) provides that DHS may recoup the amount of "benefits incorrectly provided." More specifically, we read the hearing examiner's reasoning to be the following:

- Underreporting household size would normally result in a lower benefit payment than the recipient would have otherwise received; it would not normally result in an overpayment.
- When such underreporting of household size is later discovered, there is no mechanism for the recipient to obtain additional benefits, except as to time periods going forward, because, the hearing examiner explained, "[n]othing in medical assistance law or policy allows a person to receive additional benefits retroactively if that person's error led to the underissuance of benefits."

[8] Kessler argues that, after she requested a "fair hearing" and informed DHS of her correct household size in June 2013, DHS failed to comply with an administrative code provision requiring DHS to "review and investigate the facts surrounding the recipient's request for fair hearing in an attempt to resolve the problem informally." WIS. ADMIN. CODE § DHS 104.01(5)(c). However, so far as we can tell, when Kessler requested the hearing and informed DHS of her actual household size in June 2013, DHS accepted this information at face value but took the legal position that this corrected information did not matter because the law did not require recalculation of Kessler's prior overpayment amounts. Kessler does not explain what other facts DHS might have reviewed or investigated to bring about an informal resolution given DHS's apparent legal position.

- Kessler's situation was different because she underreported her *income* as well as her household size, resulting in an overpayment, which she then sought to reduce by providing her correct household size after the fact.

- Given that "[n]othing in medical assistance law or policy allows a person to receive additional benefits retroactively if that person's error led to [an] underissuance of benefits," DHS could reasonably argue that the "correct" amount of benefits in Kessler's situation is based on her *reported*, albeit too low, household size and her correct, higher-than-reported income.

- Because DHS could reasonably argue that the "correct" amount for overpayment purposes is based on Kessler's reported household size, DHS reasonably took the position that the amount of "benefits incorrectly provided" under WIS. ADMIN. CODE § DHS 108.03(3)(c) equaled the difference between this "correct" amount and the benefits Kessler actually received, i.e., $984.

¶14 We agree that DHS took a novel position that, at first look, seems counter-intuitive and possibly unfair. But a closer look reveals that DHS's position is in keeping with the undisputed fact that recipients are responsible for overpayments based on their mistakes, but cannot normally recoup underpayments retroactively based on their mistakes.

¶15 We see nothing in WIS. ADMIN. CODE § DHS 108.03(3) that plainly precludes DHS's position. Kessler refers to other statutory and administrative code provisions with similar language. *See, e.g.*, WIS. STAT. § 49.497(1)(a) ("department may recover any payment made incorrectly for benefits provided"). However, Kessler points to nothing in those provisions that directly contradicts DHS's position.

¶16 Rather, Kessler seems to argue that DHS's position is unreasonable because *other* provisions, mainly provisions in DHS's BadgerCare Plus Handbook, show that DHS is required to use actual household size when

calculating overpayment. We disagree that the provisions Kessler cites are clear on this point.

¶17 Kessler relies on Handbook § 28.4.2, which formed the basis for the hearing examiner's underlying merits decision and which addresses the calculation of overpayment amounts. As the hearing examiner recognized, this Handbook section plainly states that overpayment calculations must be based on "actual income." *See* Handbook § 28.4.2. That section does not, however, contain a similar requirement for household size. *See* ***id.***

¶18 Kessler also relies on Handbook §§ 9.1, 9.9, and 9.10 as support for the proposition that DHS was required to affirmatively verify her reported household size on her renewal application. As we understand it, Kessler means to argue that these provisions show that DHS did not reasonably rely on her underreported household size in the first place and, therefore, must bear the brunt of any mistake. We are not persuaded.

¶19 Handbook §§ 9.1 and 9.9 provide that DHS must verify certain "[m]andatory" items of information—including income—when there is a benefits "application," a "review," a change in household size, or any other change that affects benefit eligibility levels. However, these provisions do *not* list household size as a mandatory verification item. *See* Handbook § 9.9. Further, § 9.9 provides that self-reporting is generally acceptable for non-mandatory items. *See* ***id.*** It is true that Handbook § 9.10 directs DHS to verify non-mandatory, self-reported items that DHS determines are "questionable." However, Kessler fails to explain why DHS should have thought at the pertinent time that Kessler's self-reported household size was questionable.

¶20 Kessler also relies on administrative code and Handbook provisions stating that DHS "will" or "shall" include all household members when DHS determines financial "eligibility." *See* WIS. ADMIN. CODE § DHS 103.04(7); Handbook § 2.6. While these provisions plainly govern eligibility determinations on the front end, it is not obvious that they govern overpayment calculations or that they preclude an overpayment calculation based on a recipient's erroneously self-reported household size. At a minimum, DHS could have reasonably argued that these eligibility provisions do not govern in the overpayment context.

¶21 Accordingly, we conclude that DHS took a reasonable position based on WIS. ADMIN. CODE § DHS 108.03(3)(c) and Kessler's circumstances.

Conclusion

¶22 For the reasons stated above, we affirm the circuit court's order upholding the final administrative decision denying Kessler's request for her attorney's fees.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.