



STATE OF WEST VIRGINIA  
DEPARTMENT OF HEALTH AND HUMAN RESOURCES  
OFFICE OF INSPECTOR GENERAL

Earl Ray Tomblin  
Governor

BOARD OF REVIEW  
416 Adams St.  
Fairmont, WV 26554

Karen L. Bowling  
Cabinet Secretary

May 23, 2016

[REDACTED]

RE: [REDACTED] v. CCRC/WVDHHR  
ACTION NO.: 16-BOR-1699

Dear Ms. [REDACTED]

Enclosed is a copy of the decision resulting from the hearing held in the above-referenced matter.

In arriving at a decision, the State Hearing Officer is governed by the Public Welfare Laws of West Virginia and the rules and regulations established by the Department of Health and Human Resources. These same laws and regulations are used in all cases to assure that all persons are treated alike.

You will find attached an explanation of possible actions you may take if you disagree with the decision reached in this matter.

Sincerely,

Thomas E. Arnett  
State Hearing Officer  
Member, State Board of Review

Encl: Appellant's Recourse to Hearing Decision  
Form IG-BR-29

cc: [REDACTED], [REDACTED] ([REDACTED])

**WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES  
BOARD OF REVIEW**

████████████████████,

**Appellant,**

v.

**Action Number: 16-BOR-1699**

**CHILD CARE RESOURCE CENTER/WEST VIRGINIA  
DEPARTMENT OF HEALTH AND HUMAN RESOURCES,**

**Respondent.**

**DECISION OF STATE HEARING OFFICER**

**INTRODUCTION**

This is the decision of the State Hearing Officer resulting from a fair hearing for ██████████. This hearing was held in accordance with the provisions found in Chapter 700 of the West Virginia Department of Health and Human Resources' Common Chapters Manual. This fair hearing was convened on May 19, 2016, on an appeal filed April 14, 2016.

The matter before the Hearing Officer arises from the April 11, 2016 decision by the Respondent to deny Appellant's application/redetermination for subsidized Child Care benefits.

At the hearing, the Respondent appeared by ██████████, Director, ██████████ (██████████). Appearing as witnesses for Respondent was ██████████, Supervisor, ██████████. The Appellant appeared pro se.

**Respondent's Exhibits:**

- #1 Child Care Status Check forms completed and signed by Appellant – received by ██████████ on 4/11/16
- #2 Verification of Appellant's employment income – ██████████ earnings statement for pay date(s): 3/11/16, 3/25/16 and 4/8/16
- #3 Child Care Parent Notification Letter Notice of Denial or Closure – dated 4/11/16
- #4 WV Child Care Subsidy Policy §3.5
- #5 Appellant's written appeal, filed on 4/17/16

**Appellant's Exhibits:**

- A-1 West Virginia Minimum Wage Frequently Asked Questions – West Virginia Division of Labor – And an article authored by ██████████ XpertHR Legal Editor, dated April 2, 2014, retrieved 5/18/2016, Internet IP address unknown, © 2016 Reed Business Information Inc.

After a review of the record, including testimony, exhibits, and stipulations admitted into evidence at the hearing, and after assessing the credibility of all witnesses and weighing the evidence in consideration of the same, the Hearing Officer sets forth the following Findings of Fact.

### **FINDINGS OF FACT**

- 1) Appellant was an active recipient of subsidized Child Care benefits and was required to undergo a redetermination for continued eligibility in April 2016.
- 2) Upon review of Appellant's information submitted for review (Exhibits #1 and #2), Respondent determined that Appellant's employment income was \$8 per hour.
- 3) On April 11, 2016, Appellant was notified (Exhibit #3), in pertinent part – "...your pay check stubs indicate that you are currently making less than the WV minimum wage of \$8.75." This notice goes on to state – "Per new WV child care policy 3.5.1, Wage Requirement for Eligibility – Any recipient of child care assistance who is an employee in the private sector must be paid at least State minimum wage for all hours of worker performed. If the recipient is not making at least the applicable state minimum wage for all work performed, the recipient will not be eligible for child care services. The state minimum wage is \$8.75 per hour."
- 4) Appellant argued that the subsidized Child Care policy is inconsistent with existing minimum wage laws in the State of West Virginia (Appellant's Exhibit #1), and contended that by law, her previous employer, who employed less than six (6) employees, could pay her \$8 per hour. Appellant noted that she has changed jobs, reestablished subsidized Child Care eligibility effective May 10, 2016, but indicated that this policy has created a hardship for her and her family. Appellant indicated that she wanted the Child Care regulations changed to conform to the minimum wage law in the State of West Virginia.

### **APPLICABLE POLICY**

West Virginia Child Care Subsidy Policy & Procedures Manual includes the following applicable regulations:

#### **3.5 Wage Requirements**

Applicants receiving child care assistance in order to work must earn wages that comply with applicable federal and state laws. Child care funds cannot be used to support employment with employers who do not comply with the Fair Labor Standards Act and West Virginia Division of Labor Wage and Hour laws.

##### **3.5.1 Wage Requirement for Eligibility**

Any recipient of child care assistance who is an employee in the private sector must be paid at least state minimum wage for all hours of work performed. If the recipient is not making at least

the applicable state minimum wage for all work performed, the recipient will not be eligible for child care services, with the following notes:

### **3.5.1.1 Self Employed Individuals:**

Self-employed child care recipients must make at least the current state minimum wage for each hour of work performed, to be eligible for child care services. Self-employed individuals still in their Launch/Grace period for new self-employment endeavors (See Chapter 4 Section 3.7) are exempt from this requirement.

### **3.5.2.2. Employees that Receive Gratuities**

In West Virginia the minimum wage an employer can pay employees who receive gratuities is \$6.13 per hour, *if* the employee makes enough tips to achieve the minimum wage of \$8.75. This practice is called an “Employer Tip Credit” – tips are credited towards the minimum wage requirement. If the employee does not make enough in tips to achieve the minimum wage of \$8.75 – the employer must pay the employee minimum wage. (The “employer tip credit” is disallowed.) Employees who receive gratuities must make at least \$8.75 per hour after their wage and tips are combined in order to be eligible for child care services. Employees that receive gratuities, but whose combined hourly wages/tips do not equal \$8.75 or greater, are not eligible for services.

### **3.5.3. What is Minimum Wage?**

The state minimum wage is: \$8.75 per hour. Employees who customarily receive gratuities must be paid at least \$6.13 per hour.

West Virginia Code §21-5C-1(e) - **MINIMUM WAGE AND MAXIMUM HOURS STANDARDS FOR EMPLOYEES** – includes the following definition: "Employer" includes the State of West Virginia, its agencies, departments and all its political subdivisions, any individual, partnership, association, public or private corporation, or any person or group of persons acting directly or indirectly in the interest of any employer in relation to an employee; and who employs during any calendar week six or more employees as herein defined in any one separate, distinct and permanent location or business establishment.

## **DISCUSSION**

Employment income (Wage Requirements) outlined in the Child Care regulations provide that applicants receiving Child Care benefits due to employment must be paid at least state minimum wage for all hours worked. Child Care regulations clearly indicate that the state minimum wage is \$8.75 per hour, and the only exceptions for the purpose of receiving subsidized Child Care benefits are those individuals who are self-employed, or employees that receive gratuities. The regulation cited by the Appellant is used solely for the purpose of defining the term employer for labor standards, and while it offers some level of flexibility to wages paid by a business owner, it has no bearing on the eligibility requirements set forth in the Child Care regulations.

### **CONCLUSIONS OF LAW**

- 1) Pursuant to the regulations, individuals who receive subsidized Child Care benefits must be paid minimum wage for all hours of work performed. The minimum wage in West Virginia, effective January 2016, is \$8.75 per hour. The only exceptions include individuals who receive gratuities and those who are self-employed.
- 2) Appellant was neither self-employed, nor working in a position where she received gratuities, and was making \$8.00 per hour in April 2016.
- 3) The Respondent was correct in determining the Appellant was not eligible for subsidized Child Care benefits effective May 1, 2016.

### **DECISION**

It is the decision of the State Hearing Officer to UPHOLD the Respondent's decision to deny Appellant's application/redetermination for Child Care assistance benefits effective May 1, 2016.

**ENTERED this \_\_\_\_ Day of May 2016.**

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**Thomas E. Arnett  
State Hearing Officer**