



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

Bill J. Crouch
Cabinet Secretary

Board of Review
416 Adams Street Suite 307
Fairmont, WV 26554
304-368-4420 ext. 30018
Tara.B.Thompson@wv.gov

Jolynn Marra
Inspector General

July 26, 2022

[REDACTED]
[REDACTED]
[REDACTED]

RE: [REDACTED] v. WVDHHR
ACTION NO.: 22-BOR-1787

Dear [REDACTED],

Enclosed is a copy of the decision resulting from the hearing held in the above-referenced matter. In arriving at a decision, the Board of Review 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 that may be taken if you disagree with the decision reached in this matter.

Sincerely,

Tara B. Thompson, MLS
State Hearing Officer
State Board of Review

Enclosure: Appellant's Recourse
Form IG-BR-29

CC: Brittany Lucci, Child Care Resource Center
Kelly Coen, Child Care Resource Center

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

████████████████████,

Appellant,

v.

ACTION NO.: 22-BOR-1787

**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 of Chapter 700 of the West Virginia Department of Health and Human Resources' (DHHR) Common Chapters Manual. This fair hearing was convened on July 19, 2022 on an appeal filed with the Board of Review on June 27, 2022.

The matter before the Hearing Officer arises from the Respondent's June 23, 2022 decision to deny the Appellant eligibility for child care benefits.

At the hearing, the Respondent appeared by Kelly Coen, Child Care Resource Center. Appearing as a witness for the Respondent was Brittany Lucci, Child Care Resource Center. The Appellant appeared *pro se*. Appearing as a witness for the Appellant was ██████████, the Appellant's husband. All witnesses were sworn in and the following exhibits were entered as evidence.

Department's Exhibits:

- D-1 ██████████ Paystubs
- D-2 ██████████ Paystubs
- D-3 Child Care Parent Notification Letter, dated June 23, 2022
- D-4 Child Care Subsidy Policy §§ 3.4.2.12 through 3.5.3
- D-5 West Virginia Division of Labor State Minimum Wage Requirements —
West Virginia Minimum Wage Exemptions
- D-6 Email Correspondence, dated June 23, 24, and 27, 2022
- D-7 ██████████ letter, dated June 24, 2022
- D-8 Email Correspondence, dated June 6, 20, 22, 23, 24, and 27, 2022

- D-9 Request for Fair Hearing
- D-10 Recission of Joint Employer Status Under the Fair Labor Standards Act Rule 29 USC Ch. 8: Fair Labor Standards
Federal Register 29 CFR Part 792, January 16, 2020

Appellant's Exhibits:

- A-1 West Virginia State Tax Department Business Registration Certificate
Office Supervisor, [REDACTED] Job Description
Appellant Pay Period Log
[REDACTED] Salary/Wage Scale, approved July 15, 2022
Appellant Paystub, dated July 19, 2022

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 following Findings of Fact are set forth.

FINDINGS OF FACT

- 1) The Appellant applied for child care benefit eligibility.
- 2) On June 23, 2022, the Respondent issued a notice advising the Appellant's application for child care was denied because she failed to provide proper verification (Exhibit D-3).
- 3) The June 23, 2022 notice references policies — including §§ 3.5 and 3.5.2 — that reflect child care eligibility minimum wage requirements (Exhibit D-3).
- 4) The Appellant was denied child care eligibility on the basis that her rate of pay did not meet minimum wage requirements, not because she refused or failed to provide requested income verification.
- 5) The Respondent determined that the Appellant received an hourly wage of \$7.04 paid by joint employers (Exhibits D-6 and D-8).
- 6) The Appellant is employed with the [REDACTED] West Virginia, as Office Supervisor (Exhibits D-1 and D-7).
- 7) At the time of the Respondent's eligibility denial, the Appellant's hourly wage was \$14.08 (Exhibit D-7).
- 8) The [REDACTED] is a local government employer (Exhibit D-7).
- 9) The [REDACTED] is a division of the [REDACTED] (Exhibits D-1).

- 10) The Appellant's job responsibilities include receiving customer payments for water bills, municipality charges, and business licenses.
- 11) Payments processed by the Appellant are deposited into separate bank accounts determined by the type of payment being made.
- 12) At the time of the Respondent's eligibility denial, the Appellant's hourly wage was paid from two separate [REDACTED] accounts (Exhibits D-1 and D-7).
- 13) In July 2022, the Appellant's pay rate increased to \$14.88 per hour (Exhibit A-1).

APPLICABLE POLICY

West Virginia Code §§ 21-5C-1(e) and 21-5-5(a)(1) and United States Code 29 USC § 152(2) provide in pertinent parts:

"Employer" includes the State of West Virginia and all its political subdivisions.

West Virginia Code § 21-5C-2(a)(5) provides in pertinent part:

In the State of West Virginia after December 31, 2015, every employer shall pay to each of his or her employees wages at a rate not less than \$8.75 per hour.

Code of Federal Regulations 29 CFR § 103.40(a) (June 23, 2022) provides in pertinent part:

An employer, as defined in Section 2(2) of the National Labor Relations Act (the Act), may be considered a joint employer of a separate [emphasis added] employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment.

Code of Federal Regulations 29 CFR § 206(a)(1)(C) (June 23, 2022) provides in pertinent part:

Every employer engaged in commerce shall pay to each of his employees ... wages at the following rates: \$7.25 an hour.

Child Care Subsidy Policy §§ 3.5 through 3.5.1, and 3.2 provide in pertinent parts:

Applicants receiving child care assistance in order to work must earn wages that comply with applicable federal and WV 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.

Any recipient of child care assistance who is an employee in the private sector must

be paid at least West Virginia minimum wage for all hours of work performed. If the recipient is not making at least the applicable West Virginia minimum wage for all work performed, the recipient will not be eligible for child care services.

DISCUSSION

The policy stipulates that to be eligible for child care assistance while working, the applicant must earn wages that comply with applicable federal and West Virginia state laws. The Respondent's notice based the Appellant's denial on Child Care Subsidy Policy sections including § 3.5.1. The Respondent incorrectly relied upon this section of policy to determine the Appellant's eligibility because this policy section stipulates that employees of the private sector must be paid at least West Virginia minimum wage. The preponderance of the evidence established that the Appellant is employed in the public sector. Although the Appellant is employed in the public sector and not subject to this specific policy section, the applicable federal and West Virginia state laws must be applied. Pursuant to West Virginia Code § 21-5C-2(a)(5), to be eligible for child care benefits while working, the Appellant's employer had to pay the Appellant wages at a rate not less than \$8.75 per hour.

The Respondent bears the burden of proof. To prove that the Respondent correctly denied the Appellant eligibility for child care benefits, the Respondent had to demonstrate by a preponderance of the evidence that the Appellant's employer paid the Appellant wages at a rate less than \$8.75 per hour.

The Respondent argued that because the Appellant receives pay from two departments of the [REDACTED] the Appellant's employer is a joint employer liable for each paying the Appellant at least the amount of West Virginia minimum wage. The regulations identify an employer as the State of West Virginia and all its political subdivisions. Pursuant to the regulations, an employer may be considered a joint employer of a separate [emphasis added] employer's employees only if the two employers share or codetermine the employees essential terms and conditions of employment.

Pursuant to the state regulations, the [REDACTED] is a political subdivision of the State of West Virginia. [REDACTED] is a division of the [REDACTED], not a separate employer. The evidence verified that the Appellant was paid wages from two separate accounts of the same employer. The Appellant submitted a letter from the [REDACTED] stipulating her rate of pay was \$14.08 per hour. No evidence was entered to reflect that the [REDACTED] letter was unreliable. No evidence was entered to establish that the Appellant's employer's issuance of wages from two separate accounts violated the West Virginia Division of Labor Wage and Hour laws or the Fair Labor Standards Act. The Respondent incorrectly applied joint employer status to the Appellant's employer. Because the Appellant received an hourly wage of \$14.08 from one employer, the Respondent's decision to deny the Appellant eligibility for child care benefits was incorrect.

CONCLUSIONS OF LAW

- 1) To be eligible for child care benefits while working, the Appellant's employer had to pay the Appellant wages at a rate not less than \$8.75 per hour.
- 2) The preponderance of evidence verified that the Appellant received wages from one employer at a rate of \$14.08 per hour.
- 3) The Respondent incorrectly denied the Appellant eligibility for child care benefits.

DECISION

It is the decision of the State Hearing Officer to **REVERSE** the Respondent's decision to deny the Appellant child care benefit eligibility. It is **ORDERED** that the Appellant's child care benefit eligibility be retroactive to the date of application.

ENTERED this 26th day of July 2022.

Tara B. Thompson, MLS
State Hearing Officer