COURT OF APPEALS
DECISION
DATED AND FILED

September 28, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2013 **Cir. Ct. No. 2015CV1786**

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

NASHAWN HARP,

PLAINTIFF-APPELLANT,

V.

DEPARTMENT OF HEALTH SERVICES,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: PAUL R. VAN GRUNSVEN, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

¶1 PER CURIAM. Nashawn Harp (Harp) appeals an order denying her challenge to a decision of a Division of Hearings and Appeals administrative law judge (ALJ) that upheld her disenrollment from a program that provides

financial assistance to participants with disabilities. As sufficient evidence of fraud supports the ALJ's decision, we affirm.

¶2 Harp is an adult with developmental and physical disabilities who lives with her mother and legal guardian, Rebecca Harp (Rebecca). Harp needs total assistance with all aspects of her activities of daily living and qualified for Medical Assistance benefits under the Wisconsin Department of Health Services' (DHS) "Include, Respect, I Self-direct" program, or IRIS. Harp received a monthly allocation of $6,705.09 to cover supportive home care (SHC) and personal care worker (PCW) services. Harp's twin sister, Nishawn, was one of her care providers for both types of services.

¶3 Rebecca signed off on timesheets the service providers, including Nishawn, filled out. Rebecca submitted SHC timesheets directly to IRIS and PCW timesheets to Independence First, a private agency, which in turn submitted them to IRIS. Independence First terminated Nishawn's PCW employment when it discovered she submitted timesheets billing more than twenty-four hours a day.

¶4 The then applicable IRIS policy manual provided that DHS could involuntarily disenroll an IRIS program participant for possible fraud, misrepresentation, or willful inaccurate reporting of services.[1] An investigation into the alleged overbilling ensued. Rebecca claimed she was unaware of any impropriety until receiving an October 31, 2014 Notice of Action and that, as she had not been trained in preparing timesheets, she signed off only that services were performed, not as to the hours claimed. DHS nonetheless concluded that

[1] The more current IRIS policy manual requires that the fraud be "substantiated."

from January through May 2014 she intentionally signed off on Nishawn's timesheets reporting more than twenty-four hours of care in a twenty-four hour period. The Notice of Action advised that Harp would be disenrolled effective November 18, 2014.

¶5 Harp petitioned for review. At the hearing, the ALJ found that Rebecca intentionally signed off on timesheets reporting hours over permitted time limits and work of over twenty-four hours a day, and concluded that DHS properly disenrolled Harp. On judicial review, the circuit court affirmed the ALJ's ruling. This appeal followed.

¶6 In deciding an appeal from a circuit court's order affirming or reversing an administrative agency's decision, we review the agency's decision, not the circuit court's. ***Barnes v. DNR***, 178 Wis. 2d 290, 302, 506 N.W.2d 155 (Ct. App. 1993), *aff'd*, 184 Wis. 2d 645, 516 N.W.2d 730 (1994). An agency's findings of fact are binding on a reviewing court if they are supported by substantial evidence. WIS. STAT. § 227.57(6) (2013-14)[2]; *see also* ***Ralph Gentile, Inc. v. Wisconsin Div. of Hearings & Appeals***, 2011 WI App 98, ¶4, 334 Wis. 2d 712, 800 N.W.2d 555. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." ***Bucyrus-Erie Co. v. DILHR***, 90 Wis. 2d 408, 418, 280 N.W.2d 142 (1979) (citations omitted).

¶7 Appellate courts generally apply one of three levels of deference to an agency's conclusions of law and statutory interpretation. ***Jicha v. DILHR***, 169 Wis. 2d 284, 290, 485 N.W.2d 256 (1992). We accord "great weight" deference

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

where the "agency's experience, technical competence, and specialized knowledge aid the agency in its interpretation and application of the statute," "due weight" if the decision is "'very nearly' one of first impression," and no deference where the issue is "one of first impression for the agency and the agency lacks special expertise or experience in determining the question presented." ***Id.*** at 291 (citations omitted).

¶8 The parties disagree as to the appropriate level of deference to be given to the ALJ's conclusions of law. Harp argues no deference is due because DHS has no technical skill or expertise as to whether the facts alleged prove fraud. DHS, by contrast, argues for "great weight" deference because, it asserts, the issue is whether its decision to disenroll Harp from the IRIS program was a correct application of IRIS policy, which DHS developed and implemented, giving it the experience, technical competence, and specialized knowledge to interpret and apply. We agree with DHS.

¶9 Harp contends that the facts do not support a finding of fraud or that the overbilling was intentional. Rebecca testified that, as she believed she was responsible only for verifying services provided and so paid no heed to the number of hours submitted, she was unaware of Nishawn's overbilling. She contended a September 2013 meeting with Nishawn and the IRIS case worker did not involve fraud allegations but budget planning because of SHC-hour overages due to the day care Harp attended at the time.

¶10 The ALJ found, however, that the September 2013 meeting was called because of concerns about billing discrepancies; that IRIS staff advised Nishawn of her per-pay-period and per-month hourly limits; that Rebecca signed an IRIS Self-Direction Responsibilities Checklist at the meeting; that Rebecca

continued to sign off on timesheets that overbilled; and that she had to have been aware that she was billing IRIS and Independence First for duplicate services because in July 2014 alone Nishawn regularly reported twenty-four SHC hours a day and never less than nineteen and other PCW providers also were caring for Harp during this time. The record shows that by signing the Checklist, Rebecca acknowledged that she understood how timesheets were to be filled out, that they must be filled out correctly, and that signing off on them meant they were correct.

¶11 Harp's effort to highlight contrary evidence is to no avail. Determining "[t]he weight and credibility of the evidence are for the agency, not the reviewing court," ***Ralph Gentile, Inc.***, 334 Wis. 2d 712, ¶4 (citations omitted), and where conflicting views of the evidence may be sustained by substantial evidence, it is for the agency to decide which view to accept. ***Hamilton v. DILHR***, 94 Wis. 2d 611, 617, 288 N.W.2d 857 (1980). As substantial evidence supports the ALJ's finding that Rebecca intentionally overbilled, it is conclusive on this court.

¶12 Harp next contends DHS violated her substantive and procedural due process rights because it failed to follow its own policy to make an effort to resolve the matter—such as by repayment, additional oversight, using time clocks, or employing only workers through an agency—before disenrolling her.[3] Harp asserts that any billing errors resulted from Rebecca being overwhelmed with her care, confused by the timesheets, and unaware of Nishawn's actions, and believing

[3] The policy statement IRIS Policy 3.03.1, "Involuntary Disenrollment," provides: "It is the IRIS Program policy to make reasonable efforts to help a participant to address and resolve issues to prevent an involuntary disenrollment whenever possible."

the self-directed nature of the program meant only that she had to stay within the monthly allowance.

¶13 Due process rights emanate from the Fourteenth Amendment. ***Penterman v. Wisconsin Elec. Power Co.***, 211 Wis. 2d 458, 480, 565 N.W.2d 521 (1997); *see also* WIS. CONST. art. I, § 8. Substantive due process "has been traditionally afforded to fundamental liberty interests, such as marriage, family, procreation, and bodily integrity," ***Monroe Cty. DHS v. Kelli B.***, 2004 WI 48, ¶19, 271 Wis. 2d 51, 678 N.W.2d 831, and "protects one from [S]tate conduct that 'shocks the conscience … or interferes with rights implicit in the concept of ordered liberty,'" ***State v. Joseph E.G.***, 2001 WI App 29, ¶13, 240 Wis. 2d 481, 623 N.W.2d 137 (citation omitted).

¶14 The threshold inquiry is whether there has been a showing of a deprivation of a liberty or property interest protected by the constitution. ***Penterman***, 211 Wis. 2d at 480. IRIS Policy 3.03.1, "Involuntary Disenrollment," lists the reasons a participant may be disenrolled, one of which is fraud. Policy 3.03.1 also provides: "If a participant is disenrolled, then the IRIS Consultant Agency works with the participant/guardian and the Aging and Disability Resource Center to transition the participant to other services as appropriate." Harp has not established that she has a fundamental liberty or property interest in IRIS benefits in particular, especially in the face of fraud, or that disenrolling her upon substantial evidence of fraud shocks the conscience.

¶15 Procedural due process also first requires identifying a liberty or property interest interfered with by the State and, if so, then "whether the procedures attendant upon that deprivation were constitutionally sufficient." ***State v. Stenklyft***, 2005 WI 71, ¶64, 281 Wis. 2d 484, 697 N.W.2d 769 (citation

omitted). Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." ***Milwaukee Dist. Council 48 v. Milwaukee Cty.***, 2001 WI 65, ¶50, 244 Wis. 2d 333, 627 N.W.2d 866 (citation omitted).

¶16 Harp implies that IRIS participation is a protectible property interest. "The key attribute of a constitutionally protected property interest is a 'legitimate claim of entitlement to it,' as opposed to a 'unilateral expectation' of it." ***Fazio v. Department of Emp. Trust Funds***, 2005 WI App 87, ¶11, 280 Wis. 2d 837, 696 N.W.2d 563 (citing ***Board of Regents v. Roth***, 408 U.S. 564, 577 (1972)), *aff'd*, 2006 WI 7, 287 Wis. 2d 106, 708 N.W.2d 326. Harp directs us to no statute or rule that would support a claim of entitlement to IRIS benefits.

¶17 Harp did not establish that she has a protectible property interest in IRIS benefits in the face of fraud. Nonetheless, she was given notice and an opportunity to be heard. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 64, 334 N.W.2d 559 (Ct. App. 1983). She, Rebecca, and Nishawn were advised in September 2013—well before the November 2014 disenrollment—of the overbilling, instructed how to properly complete timesheets, and informed of hour limits per pay period and per month. She also received written notice of the planned disenrollment and had the opportunity to appeal it to the agency, the circuit court, and this court. The agency's ruling stands.

By the Court.—Order affirmed.

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