

**Complaint Resolution in the  
Context of Welfare Reform:  
How W-2 Settles Disputes**

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# Overview

With the passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, welfare was no longer held to be an entitlement under federal law. This basic policy shift created the opportunity for states to change the way disputes between welfare recipients and program administrators would be resolved. Wisconsin was unique among the states in taking up this challenge, creating a novel complaint-resolution process as part of its welfare reform program called Wisconsin Works, or W-2. The state's aim was to simplify and streamline the old fair hearing system, and it provided that the agencies administering the W-2 program would be responsible for conducting reviews of their own decisions, with a central state agency hearing appeals.

This paper reports on the implementation of the complaint resolution process during the first three years of W-2 in Milwaukee County, a place where the operation of W-2 has been contracted out by the state to five private agencies. It focuses on several key issues, including how the tensions between caseworker discretion and accountability are being resolved; how a process that is subject to legal scrutiny can operate within a model of decentralized program administration; and how the goal of informality and speed of process can be reconciled with the need to treat clients fairly and equitably.

## Key Findings

- A program model based on decentralized administration and caseworker discretion is a difficult environment for a review process that must meet certain legal standards. While a variety of staffing and organizational models were tried initially, over time the agencies moved toward greater standardization.
- Reconciling the goal of procedural informality and speed with the competing need to protect clients' rights to a full and fair proceeding was a challenge, and over time hearing procedures became more formal. At the same time, techniques aimed at early resolution evolved to help ease the administrative burden.
- Placing responsibility for the impartial review of caseworkers' decisions in the hands of the agencies operating the W-2 program presented a great challenge to staff and management.
- A high proportion of agency decisions have been overturned on appeal by state hearing examiners, revealing the need for agencies to put more resources into training staff on W-2 policies and procedures.

This paper is part of a larger project examining the administration of W-2 in Milwaukee County. In cooperation with of the State of Wisconsin Department of Workforce Development and with support from the Joyce Foundation, The Rockefeller Foundation, the Kellogg Foundation, and the Annie E. Casey Foundation, future papers will address aspects of the assessment process, the contracting process, time-limit extensions, and the community service jobs program.

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# Preface

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 declared welfare no longer to be an entitlement. Among other things, this meant that the standard by which courts had reviewed the practices of welfare program administrators under Aid to Families with Dependent Children (AFDC) would not necessarily apply to the new generation of welfare programs. Welfare benefits under AFDC had been considered to be a form of government property that clients could not be deprived of without due process of law. The Temporary Assistance to Needy Families (TANF) legislation that succeeded AFDC requires states to continue to provide for fair and equitable treatment of welfare recipients. But it is no longer clear what level of due process, or procedural safeguards, must be afforded to clients who may be aggrieved by program administrators' actions. These are issues that will be contested in courts and legislatures for some time to come.

While the TANF legislation authorizes states redesigning their welfare programs to adopt new complaint resolution models, very few have taken on that challenge. Wisconsin was one of the first to do so when its pathbreaking welfare-system reform, called Wisconsin Works, or W-2, took effect in the wake of the 1996 federal law. The Wisconsin program has replaced the long-established fair hearing system, used under AFDC to resolve disputes between welfare clients and program administrators, with a new mechanism for dispute resolution. The new process, it was hoped, would be more streamlined and informal than the old hearing system had become.

This report, the first to study the complexities of the complaint resolution process in the new welfare environment, is one in a series of papers that address several key aspects of the implementation of W-2 in Milwaukee County during the program's first three years. Milwaukee is of interest not only because of its size, but because operation of the program has been contracted out to several private agencies and, thus, lacks a centralized administrative authority. Wisconsin's welfare reform law makes the W-2 agencies responsible for conducting the first-level review, or fact finding, of program participants' complaints. But having no previous experience in this area, the W-2 contractors in Milwaukee had to design and implement procedures that would fulfill the program's aims of making complaint resolution simple, accessible, and quick, while at the same time safeguarding participants' rights to a full and fair hearing. In addition, the new procedures had to withstand legal scrutiny, both from attorneys representing the participants and from the state agency charged with hearing appeals from the fact finding decisions. The challenges of meeting these goals were made more difficult by the decentralization of administration, which impeded the flow of information and staff development. Over time, the program practices became more consistent and more formalized across agencies, spurred in large part by increased oversight by the state and its agents, and by a centralized appeals process that imposed greater uniformity.

Welfare reform continues to evolve at the state level, and there may be increasing interest in changing current mechanisms for complaint resolution. As practitioners and policymakers deliberate how best to modify these procedures, it is hoped that this paper will help them strike the appropriate balance between ease and speed of process with fairness and equity of treatment.

Judith M. Gueron

# Acknowledgments

This case study could not have taken shape without the contributions of many people. I am especially grateful to the fact finders and mediators of the five W-2 agencies in Milwaukee County who generously gave of their time to be interviewed and to provide detailed information on the workings of the review process at the ground level: Christine Koehler and Paul Hammes, Employment Solutions, Inc.; Awilda Torres and Marge Reasby, Maximus; Vivian Norwood and Roger Williams, Opportunity Industrialization Center of Greater Milwaukee; Gilberto Lopez and Judy Andino, United Migrant Opportunity Services, Inc.; and Kimberly Coleman, YW Works. Thomas M. Pantea, of the Washington Law Offices, who conducts fact findings on contract for OIC and YW Works, was also helpful in this regard.

Valuable guidance and insight also were provided by Wisconsin state agency staff, in particular William Goehring, Assistant Area Administrator, Division of Economic Support (now the Division of Workforce Solutions); Howard Bernstein, legal counsel, Department of Workforce Development; Louis H. Dunlap, Assistant Administrator, Division of Hearings and Appeals; and Dianne Reynolds, Section Chief, Bureau of Workforce Programs, Department of Workforce Development. Delores Parr and the staff at the Private Industry Council of Milwaukee County also gave generously of their time and expertise. The attorneys at Legal Action of Wisconsin, Inc. — Patricia DeLessio, Karen Rotker, and Anne L. De Leo — provided critical information in interviews and documents, and in comments on this report.

Pamela Fendt, policy analyst at the University of Wisconsin-Milwaukee's Center for Economic Development, played a major role in this report, doing much of the research and spending hours with us analyzing the information and framing the issues. Without her contributions, this report would have been a much less comprehensive treatment of the subject.

At MDRC, Fred Doolittle has overseen the W-2 study from its inception and provided valuable feedback on how to shape and conceptualize the issues. Susan Gooden, Assistant Professor at Virginia Polytechnic Institute, generously shared her insights as the paper progressed. Tom Brock reviewed drafts and gave helpful comments and encouragement. Research assistants Anne Sweeney and Melissa Diaz performed vital services in the overall research effort. Louis Richman edited the report.

The Author

## I. Introduction

The enactment of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) marked the end of more than sixty years of the Aid to Families with Dependent Children (AFDC) program, shifting funding and unprecedented authority for overseeing welfare programs from Washington, D.C. to state governments under the new Temporary Assistance for Needy Families (TANF) program. The new autonomy given to the states under TANF was itself the result of a process begun years earlier as states experimented with various welfare-reform initiatives under the waiver provisions of the Social Security Act.

Wisconsin was a pioneer among those states, enacting the Wisconsin Works (W-2) program in 1997, which put a strong emphasis on employment and participation in employment-related activities for welfare recipients. A central premise of the TANF legislation was its explicit rejection of one of the touchstone features of AFDC that all who were eligible for welfare assistance would be entitled to receive it. Instead, the legislation stated that the new law “shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part.”<sup>1</sup> The implications of this change for the administration of welfare programs are myriad, not least in the area of complaint resolution.

Under AFDC, states had been required to afford a “fair hearing” to welfare recipients whose claims had been denied or who had otherwise been adversely affected by the decisions of program administrators. By the early 1970s, the hearings had evolved into quasi-judicial proceedings, a development spurred by the 1970 U. S. Supreme Court decision in *Goldberg v. Kelly*. That case held that welfare recipients could not be denied benefits without due process of law because benefits were an entitlement. The TANF legislation, by contrast, says simply that state plans submitted to the U. S. Department of Health and Human Services (HHS) must “set forth objective criteria for the delivery of benefits and the determination of eligibility and for fair and equitable treatment, including an explanation of how the State will provide opportunities for recipients who have been adversely affected to be heard in a State administrative or appeal process.”<sup>2</sup> While this language was intended to give the states greater leeway to experiment with alternative complaint-resolution models, nearly all states have chosen thus far to retain their existing fair hearing processes.

Wisconsin, however, has been an exception to that pattern. It created a new two-level review process for the W-2 program: Initial responsibility for resolving complaints is lodged in the local agencies administering the program; appeals from agency decisions fall within the jurisdiction of the Department of Workforce Development (DWD), the state agency charged with oversight of the W-2 program. DWD, in turn, has delegated its authority to hear appeals to the State Department of Administration, Division of Hearings and Appeals (DHA).

The goal of this report is to describe and analyze how the new review process was implemented in Milwaukee County, Wisconsin’s largest urban area, during the first three years of W-2. Though the report is not intended to be a comprehensive overview, it is hoped that a selective examination of a few implementation issues will shed light on these key questions: Is a decentralized model appropriate for complaint resolution, or do considerations of equity and

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<sup>1</sup>42 U.S. Code § 601 (b).

<sup>2</sup>42 U.S. Code §.602 (a) (1) (B) (iii).

fairness dictate a high level of standardization? How formal must review proceedings be? Can agencies whose actions are challenged be trusted to provide a fair forum for a client with a grievance? How much scrutiny will be given to a system that no longer considers welfare benefits to be an entitlement?

Part of a larger project examining the administration of W-2 in Milwaukee County, this report's focus on a large urban community should yield lessons of interest to other big cities. And because the state has contracted out the administration of W-2 to nongovernmental agencies, the report provides an opportunity to examine aspects of the privatization of welfare. The overall project of which this paper is a part is being conducted by the Manpower Demonstration Research Corporation (MDRC) with funding from the Joyce Foundation, The Rockefeller Foundation, the Kellogg Foundation, and the Annie E. Casey Foundation, and with the cooperation of the State of Wisconsin Department of Workforce Development, which has provided access to records and staff administering the program.

## **II. Overview**

### **A. The W-2 Program in Brief**

Even before the passage of PRWORA, Wisconsin was one of many states that had begun to redirect their welfare programs to emphasize employment over entitlement. Viewed in this context, the change in federal law reflected an emerging consensus among policymakers and practitioners about the place of work in public assistance programs. In other ways, however, W-2 was unusual, most notably in how it set forth substantive aspects of the program in detail in the state statute and policy manual, even as it was much less prescriptive in providing guidance to local agencies on implementation issues. Caseworkers, meanwhile, were given considerable latitude when it came to determining the employability and service needs of individual participants.

*Specificity of structure.* The W-2 philosophy holds that 1) for everyone who can work, only work should pay, and 2) W-2 should provide only as much service as an eligible person needs for requests. Program participants who are able to work are not eligible for cash grants, although they may qualify for support services. Those who are not ready for immediate employment, however, can receive cash assistance, but they must participate in employment-related activities designed to equip them for the world of work. Following this rationale, W-2 established four tiers, or categories, of work for participants, from unsubsidized employment and subsidized trial jobs to community service jobs and W-2 transitional placements. With each tier come specific services, cash grants, and participation expectations. For example, participants assigned to the first two tiers do not receive cash grants; their income comes from wages earned while working. Those assigned to community service jobs and W-2 transitional placements, by contrast, are eligible for grants of \$673 and \$628, respectively. But participants who receive cash grants or get subsidies as part of their placement can remain no more than 24 months in that tier unless they are granted an extension. They are expected to progress up the ladder to eventual unsubsidized employment.

*Decentralization.* Public assistance in Wisconsin has traditionally been a system that was state supervised but locally administered. Under AFDC, the state issued two different kinds of contracts to local providers, one for the distribution of benefits and the other for administering employment services. County department of human services staff were responsible for



overseeing the income-maintenance program, while a variety of private and public sector entities provided specified employment services under the Job Opportunities and Basic Skills training program, a division of responsibilities that also characterized the welfare program in Milwaukee. Under W-2, the DWD assumes overall state-level responsibility for the program, with direct oversight falling under the purview of its Division of Economic Support (DES).<sup>3</sup> When W-2 was enacted, the benefit and employment components of public assistance were consolidated into one contract, and nongovernmental agencies were eligible to bid. (The TANF legislation explicitly authorizes states to contract with “charitable, religious, or private organizations” to administer all or part of their welfare programs.<sup>4</sup>) The implementation of TANF, however, did not affect food stamps and Medicaid, which remained federal entitlements. In Milwaukee, those programs continued under the jurisdiction of the county’s department of human services.

*Caseworker discretion.* It is the responsibility of W-2 service-provider staff to choose the appropriate W-2 tier and mix of activities for participants. Guided by a set of rules that are prescriptive yet permit the exercise of discretion, the caseworker, called a financial and employment planner (FEP), must make determinations about the applicant’s suitability for employment and his or her service needs. The FEP must also produce a plan that outlines a specific course of action designed to move the participant up the employment ladder into unsubsidized employment. While the state law and policy manual enumerate factors that must be taken into account in determining placement in an employment tier, there are no fixed rules for deciding which tier is the right one. The FEPs are encouraged to use their discretion, within a specified set of possibilities, in making many of the key decisions for the participant.

*The Review Process.* Under the AFDC program, welfare recipients and applicants who wished to appeal any adverse agency actions were entitled to a fair evidentiary hearing, with all of the due process protections mandated by the U. S. Supreme Court in *Goldberg v. Kelly*. These included the right to adequate and timely notice, the opportunity to present one’s case and confront adverse witnesses, the right to (though not the guarantee of) counsel, and the right to be heard by an impartial arbiter. Perhaps most importantly, appellants enjoyed the right to continue to receive benefits during the hearing process; if a decision were ultimately made against the petitioner, overpayments of benefits paid during the appeal would be recouped over time by the State. In Wisconsin, AFDC fair hearings were conducted by administrative law judges employed by the State Department of Administration, Division of Hearings and Appeals (DHA), under authority delegated to them by the DWD.

In place of the fair-hearing system under AFDC, W-2 provides for a two-level review process. Participants or applicants with complaints about an agency’s decision or action must first go through a fact-finding review conducted by the local W-2 agency itself, in hearings that may be presided over by agency employees or independent contractors. While the state statute is mostly silent on what procedural safeguards must be followed, state policy guidelines afford a number of protections that echo those associated with fair hearings. Thus, W-2 petitioners must receive adequate and timely notice of their right to a hearing; they must be given the right to present their case and to question witnesses; and they may be represented by counsel. Remedies

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<sup>3</sup>DES was renamed the Division of Workforce Solutions in early 2001. To minimize confusion, this report refers to the agency as DES throughout.

<sup>4</sup>42 U.S. Code § 604a (a)(1).

available to the participants pending the outcome of the review, however, are more limited than they were under AFDC.

The agencies have made an effort to minimize the administrative burdens of fact-finding reviews through early resolution of complaints, sometimes even before the fact-finding request is submitted. These pre-hearing investigations, variously referred to by agency staff as “mediation” or “settlement,” are not required under state law or policy. But they have been useful in resolving informally many of the simpler cases, and they can provide a short cut through the hearing process.

Appeals against fact-finding decisions may be made either by the W-2 agency or, with certain limitations, by the participant. The state statute designates the DWD as the agency that hears appeals, but this department has delegated its authority to the DHA, which has the power to issue rulings in the name of DWD.<sup>5</sup> The DHA hearing examiners who hear these appeals are the same group who formerly presided over AFDC hearings and who still hear Medicaid and food stamps cases.

## **B. The Administration of W-2 in Milwaukee**

In preparation for W-2, the state divided Milwaukee County into six geographical regions, with an average of 3500 AFDC recipients in each, and issued a request for proposals from organizations interested in becoming local W-2 providers.<sup>6</sup> In January 1997, five nongovernmental agencies (some not-for-profit and others for-profit) were selected to administer the W-2 program in Milwaukee County. Of these, four had been employment-service providers under the AFDC program.<sup>7</sup> The selected agencies were assigned to regions as follows:

- **Region 1: YW Works.** YW Works was initially established by three partners as a limited liability, for-profit corporation in 1996, but it has evolved into a nonprofit organization in partnership with the YWCA of Greater Milwaukee, which has a long history in the community and experience in case management and employment training.
- **Region 2: United Migrant Opportunity Services, Inc. (UMOS).** UMOS is a nonprofit, community-based organization founded in 1965, to provide services to migrant and seasonal farm workers and other underserved populations throughout Wisconsin. Prior to W-2, the organization provided services under a variety of programs, including JOBS and the Jobs Training Partnership Act (JPTA).
- **Region 3: Opportunities Industrialization Center of Greater Milwaukee, Inc. (OIC).** Founded in 1965, OIC is a nonprofit organization, which prior to

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<sup>5</sup>Wisconsin Administrative Code, Chap. HA 3.

<sup>6</sup>While many other Wisconsin counties ended up contracting with the state, Milwaukee County had failed to meet certain program criteria, namely, a reduction in caseload that would have given it the right of first selection as the W-2 service provider. As a result, it chose not to compete in the bidding process. The county, however, did retain its jurisdiction over Food Stamps and Medicaid, which remained federal entitlement programs. The county also retained several other roles related to W-2. County workers continued to authorize payment for child care and operated a part of the W-2 community service jobs program.

<sup>7</sup> See State Legislative Audit Bureau, *Wisconsin Works Expenditures*, February 1999, Report 99-3.

W-2 provided employment services to Milwaukee's low-income, inner city residents under JOBS, JTPA, and other programs.

- **Regions 4 & 5: Employment Solutions of Milwaukee, Inc. (ES).** ES is a nonprofit corporate subsidiary of Goodwill Industries of Southeastern Wisconsin, Inc. Prior to its selection as a W-2 contractor, ES operated a JOBS center.
- **Region 6: Maximus, Inc.** Founded in 1975, Maximus is a for-profit firm that provides human services management in a variety of public assistance programs, including AFDC, Medicaid, and food stamps, as well as employment services for federal, state, and local government clients.

Because Milwaukee County lacked a central entity to administer W-2, the state also contracted with the Milwaukee County Private Industry Council (PIC) to act as its intermediary with the five agencies. There have been three sets of contracts between the state and the local W-2 agencies and the PIC. The start-up contracts ran from March 1997 through August 1998; the first implementation contracts ran from September 1997 through the end of 1999; and the current implementation contracts are scheduled to run through the end of 2001.

### **C. Framework for this Paper and Findings in Brief**

This paper examines how the complaint-resolution process was implemented in Milwaukee County during the first three years of W-2 and identifies themes that emerged during this initial period. While not intended as a comprehensive overview of the system, it is hoped that this discussion will help guide policymakers and practitioners on how successful complaint-resolution systems can be designed and carried out.

The report is based mainly on findings from interviews with fact-finding staff directly involved in the complaint-resolution process at the five W-2 agencies in Milwaukee. At the state level, staff from DWD (both in Madison and in the DES regional office) and administrative staff in the DHA were interviewed. Talks were also held with staff at the Milwaukee County PIC, a contractor performing W-2 contract-administration functions for the state. Finally, interviews were conducted with several attorneys with Legal Action of Wisconsin (LAW) who were actively representing W-2 participants and applicants in the review process. Most of the interviews took place between April and November 2000, with some additional follow-up in early-2001. In addition to interviews, the study is based on readings of fact-finding decisions from the agencies, DHA appeals decisions, and reports on the review process from the state Legislative Audit Bureau (LAB). This report also drew upon field research — primarily focus groups of community advocates and caseworkers, or FEPs, conducted in 1998 — carried out by other members of the W-2 team at MDRC.

The key themes can perhaps best be described in terms of the tension observed among competing and not always compatible principles underlying the W-2 program:

- *Decentralization vs. standardization:* While W-2 was designed to provide local agencies with discretion in many areas of program administration, complaint resolution may be an area where a wide variation in implementation approaches is not desirable. Because fact-finding procedures must withstand

legal review and a centralized appeal process, it may be preferable to standardize the review process across agencies.

- *Discretion vs. accountability*: The W-2 program is designed to give FEPs discretion in how they make decisions about each participant, but the review process holding them accountable for following policies and procedures sets limits on that discretion. The agencies have not fully resolved this tension, which has resulted in a high degree of stress for staff involved in the review process, and in a large number of reversals of agency-level decisions on appeal.
- *Formality vs. informality in the hearing process*: State officials wanted the functioning of the W-2 program to mimic the processes and procedures of the world of work, and it was based on that rationale that the state permitted local W-2 agencies to design the details of their review processes. Yet as it relates to initial fact-finding procedures, this informality contributed to leaving staff confused about their roles and leading to conflicts of interest, hearings marked by disorganization and confrontation, and inadequate records for the purposes of appeal. Over time, the hearings became more formal, as fact finders came to recognize the shortcomings of the informal procedures. As with FEPs, however, staff turnover and inadequate training of new staff adversely affected fact finders' performance.
- *The changed legal status of benefit eligibility vs. the obligations of due process*: Under AFDC, individuals who met the eligibility criteria were entitled to receive welfare benefits, leading the Supreme Court to rule that welfare was a kind of property that could not be denied without due process of law. Fair hearings — quasi-judicial in nature — were a logical vehicle for adjudicating rights that were fixed under statute. But if under TANF welfare benefits are no longer an entitlement, what level of due process protection is due to recipients whose claims are denied or who are otherwise adversely affected by agency decisions? Clearly, some degree of procedural fairness must be observed in the administration of such programs, but the level of protection will vary according to the nature of the rights at stake, the government's interest in orderly administration, and other considerations.

The reliance on private agency contractors to administer the W-2 program in Milwaukee raises more questions about the extent to which their conduct will be subject to due process constraints. Among the salient concerns are the financial incentives embedded in the state's contracts with the agencies. Initial implementation contracts for the first two years of W-2 allowed the agencies to profit from unspent program funds. Because the caseloads were smaller than predicted, agencies spent substantially less than the contracted amounts serving their clientele, which, some have argued, resulted in windfall profits.<sup>8</sup> Critics of W-2 pointed to this as

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<sup>8</sup>Report of LAB, Apr. 2001, pp. 32-27.

evidence of the fundamental unfairness of having agencies review their own actions when they stood to profit from denying people services.<sup>9</sup>

To a large extent, DWD addressed these concerns in the current set of contracts that are scheduled to run to the end of 2001. Now, agency bonuses are tied to performance benchmarks that are based on participant outcomes.<sup>10</sup> But while agencies are no longer allowed to benefit financially from a failure to serve clients, it remains an open question whether the same agencies whose performance will be judged on how well they implement W-2 and serve clients can, at the same time, act as disinterested arbiters of complaints made against them.

### **III. State Law and the Policy Debate**

#### **A. State Law and Guidelines**

Within the broad parameters of the W-2 program set forth in its enabling legislation, one provision of the law specifically addresses appeals of agency decisions by establishing the first and second-level review process.<sup>11</sup> More detailed procedural guidelines can be found in the W-2 Policy Manual issued by the DWD's Division of Economic Support (DES).<sup>12</sup>

*First-Level Reviews.* Anyone whose W-2 application is not acted upon by the agency with "reasonable promptness," whose application is denied, whose benefit is modified or canceled, who believes the benefit was incorrectly calculated, or who thinks he or she has been assigned to an inappropriate employment tier may petition the agency for review within 45 days of the agency's action. But beyond mandating that agencies give the applicant or participant "reasonable notice and opportunity for a review", the law is silent on how the review must be conducted. Agencies are obligated to render their decisions "as soon as possible after the review" is concluded and to mail a certified copy of the decision to the appellant. Finally, the law provides that when a petition is withdrawn or abandoned, the agency shall deny review or refuse to grant relief.<sup>13</sup>

In the more detailed guidelines found in the DES's W-2 Policy Manual, the first-level reviews (or "fact findings," as the manual calls them) are described as "an informal process to resolve issues, explain the proposed action...and permit the petitioner to present information." But while the reviews themselves may be informal in tone, the agencies and petitioners must fulfill a number of specific requirements. Each step of the process, from the initial request for review to the final rendering of a decision, is subject to a time limit, with the aim that all proceedings be completed in no more than thirteen days. Thus, the W-2 agency must notify the petitioner of the fact-finding review within three days of the date the request is received, and the review must be offered within five days of the date of the notification. The decision must be issued no later than

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<sup>9</sup>See, e.g., Statement of Sen. Moore, February 22, 2000, in support of SB 123; testimony of Carol Medaris, Wisconsin Council on Children and Families, Feb. 23, 2000, in support of SB 123; compare testimony of Dianne Reynolds, DWD, Feb. 22, 2000.

<sup>10</sup>LAB, Apr. 2001, p. 32.

<sup>11</sup>The law governing W-2 broadly can be found in Wis. Stat. 49.141 et seq.; provisions governing review procedures can be found in Wis. Stat. 49.152.

<sup>12</sup>Further details are contained in periodic Operations Memos issued by the Bureau of Welfare Initiatives (BWI), an office within DES, but research for this study found few memos that specifically addressed the review process.

<sup>13</sup>See generally, Wis. Stat. 49.152.

five business days following the review date, although that period can be extended to permit additional evidence to be gathered. On the day the decision is made, a copy must be mailed to the petitioner.<sup>14</sup>

To ensure that the fact-finding review is perceived as fair and unbiased, the process is designed to give the petitioner a chance to be heard, require agency staff to produce evidence to support their actions, and establish a record of proceedings that can be reviewed on appeal. To satisfy those core goals, each agency must have one individual assigned to perform fact-finding reviews. To ensure objectivity, that person cannot be the same individual who took action on the case in the first instance, and he or she must be knowledgeable about W-2 programs. Petitioners have a right to be represented, and attendance is mandatory unless the petitioner can show good cause for failure to appear. The fact finder is required to keep a file on each case, and it is recommended that the proceeding be tape-recorded. The agency worker in the case is presumed to be able to present the agency's case by producing thorough documentation of all pertinent events and familiar with applicable policies. Fact finders are instructed to weigh conflicting testimony and make judgments to the best of their ability.

*Second-Level Reviews.* The W-2 statute provides for two types of reviews of agency fact-finding decisions — mandatory and discretionary — and designates the DWD to oversee both. DWD has delegated its statutory authority to DHA, which, in turn, *may* review an agency decision upon the request of either the individual or the agency, when the subject of the agency decision is one of the circumstances set forth previously as grounds for the first-level review. The department *shall* review an agency decision upon the request of either party when the agency decision concerns a denial of a W-2 application based solely on a determination of financial ineligibility. In either case, the individual's petition for second-level review must be filed within 21 days of the mailing of the agency decision to the individual. (An agency's petition is not subject to a time limit.) In conducting its review, the DHA is free to undertake any further investigation it considers necessary, subject only to the requirement that it must render its decision "as soon as possible." Department decisions are final, although they can be revoked or modified if intervening events require. For its part, DWD has retained authority to review DHA decisions that involve broad questions of W-2 policy, and Policy Manual guidelines.

The Policy Manual guidelines aim to ensure that appeals are completed as quickly as possible, but they set no time frame within which the DHA must render its decision. Two areas merit comment: First, the guidelines require the DHA to issue a proposed decision when it appears that the case involves broader questions of policy, in order to allow for a review by DWD. The guidelines, however, do not specify when DWD must complete its review so that a proposed decision can be finalized. Second, the guidelines are ambiguous as to the scope of second-level review. They characterize it as limited to a review of the record, but they also permit DHA to gather additional evidence as needed.

*Remedies.* Both the statute and the W-2 Policy Manual address the question of what remedies are available when the reviewer overturns an agency action, and the same range of remedies apply to both levels of review. For example, if a W-2 agency's initial denial of eligibility for placement in an employment position or placement in an inappropriate employment position is overturned in either the fact-finding review or DHA appeal stage, the

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<sup>14</sup>See generally, W-2 Policy Manual, Chap. 19.

agency must place the individual in the first available employment position that is appropriate.<sup>15</sup> In this instance, the individual's eligibility for benefits associated with the remedy begins on the date the new placement is made; the benefits are not awarded retroactively. In other cases, such as when it is determined on appeal that a W-2 participant's cash benefit was improperly calculated, modified, or canceled, the agency must restore the benefit to the appropriate level retroactively. There is no right, however, for benefits to be continued at the old level pending resolution of the dispute.

The W-2 Policy Manual makes clear that decisions made by the fact finder or DHA are binding only on the agency that is party to the appeal and only with regard to the facts of a particular case. However, when DWD exercises its prerogative to review a DHA decision and determines that a change in W-2 policy is warranted, it may impose its appeal ruling on all W-2 agencies by sending a statewide directive stating the new policy.

## **B. The Policy Debate at the State Level**

Since the W-2's enactment, there have been several attempts in the state legislature to amend the law with regard to the review process. Most of these have tried to reinstate AFDC-style fair hearings, by doing away with fact finding reviews at the agency level, broadening the grounds on which an individual can petition for review, and expanding available remedies to continue benefits while a review is pending and to pay retroactive benefits when participants prevail.<sup>16</sup>

Not surprisingly, the state has resisted these efforts and officials have marshaled several arguments in defense of the W-2 review process. At the most fundamental level, the state officials argue that the new process is necessary to convey the message that W-2 is a break with the old system of entitlements.<sup>17</sup> Their defense of the new approach is multifaceted. First, they say, the informal process undertaken by the W-2 agency mimics the way disputes in the workplace are resolved, thus teaching participants what they can expect when they are employed. Second, by lodging responsibility for the first level review in the W-2 agencies, they provide them autonomy that is consistent with the state's underlying aim of decentralizing program administration. Third, they maintain that the continuation of benefits under fair hearings created a financial incentive for welfare recipients to prolong the resolution of disputes. Through the suspension or cancellation of benefits pending resolution, W-2 was brought into line with other non-entitlement government benefit programs. As the Director of the Division of Economic Support (DES), an office within DWD, testified:

A basic tenet of the W-2 program is to provide a significant amount of autonomy and responsibility to the local agencies in order that they can be most effective in helping W-2 families. Local agencies are most likely to [have] the personal relationships and knowledge of family circumstances to be in the best position to make an accurate assessment of a situation . . . restoration of the fair hearing process would also create an unnecessary delay in the decision-making process. This delay would then have the potential to alienate participants from the

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<sup>15</sup>In this use, "employment position" means any W-2 tier, including those not requiring participation in employment per se, but in related activities such as education or drug treatment.

<sup>16</sup>See 1997 Assembly Bill 679; Senate Bill 432 (1998); Sen. Bill 123 (1999).

<sup>17</sup>See for example, letter of June 27, 1997, from DWD Secretary Linda Stewart to W-2 providers.

agency. . . . As the experts tell us with raising children, “just wait 'til Dad gets home” is not a good idea.<sup>18</sup>

Another DES representative, citing records showing that the average fact-finding review took 13 business days compared to four months for the average fair hearing, argued that the delay would have an unintended negative consequence for recipients:

This bill [SB 123] would take any dispute directly to a more formal hearing without requiring the two parties affected to make immediate efforts to resolve disputes and with a disincentive for the participant to make any effort to resolve the dispute. Yet, during the time that participants would wait for a fair hearing, their “clocks” would continue to run without their benefiting from the many other services available under W-2.<sup>19</sup>

Advocates for W-2 participants counter these arguments by pointing out that making the agencies whose actions are being challenged responsible for the first-level review raises concerns about fairness and equity of treatment. As the representative of one prominent charity put it: “The local flexibility given agencies to provide ‘family specific’ case management services is a strength of W-2. But there must be some common standard for determining eligibility and compliance with program requirements.”<sup>20</sup>

Lawyers representing W-2 participants decry what they see as inherently biased fact findings that are often intimidating, or even abusive.

The system also lacks an appearance of fairness. When a public assistance applicant or participant walks into a room with an independent examiner from the state, they rightfully believe that their side will be heard . . . The perception of W-2 participants is quite different. Most believe that they will not be heard. The fact finders are W-2 agency employees or contract agencies, a fact not lost on recipients. Most fact finders have daily contact with the staff appearing at the fact findings. In some cases this results in reluctance to require the staff to produce needed documentation or evidence, or the failure to keep control and order at the fact finding.<sup>21</sup>

Advocates also assert that the system creates unnecessary hardship for participants who appeal by failing to provide continuing benefits pending the resolution of their disputes and by refusing to make payment of benefits retroactive when they prevail.

We have clients who have been without income for two months or more, who are facing eviction, utility disconnection or who are homeless, who have been improperly denied assistance. Although we are eventually successful in securing future assistance for them, there is nothing to remedy the past mistake, to make up for the overdue rent, the eviction, and their hardship.<sup>22</sup>

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<sup>18</sup>Testimony of Jean Rogers, May 19, 1999, in opposition to SB 123.

<sup>19</sup>Testimony of Dianne Reynolds, DES, Feb. 22, 2000, in opposition to SB 123.

<sup>20</sup>Testimony of John Huebsher, Executive Director, Wisconsin Catholic Conference, May 19, 1999, in support of SB 123.

<sup>21</sup>Testimony of Patricia DeLessio, Legal Action of Wisconsin, June 10, 1999, in support of SB 123.

<sup>22</sup>Idem.



It is striking that there has been active debate over the W-2 review process in the state legislature every year since 1997. Clearly, the various stakeholders in this controversy remain far apart in their understanding of what a fair and equitable review process should look like, and to what extent the current system meets that standard.

## **IV. Implementation of Fact-Finding Reviews**

### **A. Issues for the Agencies in Becoming Arbiters of First Resort**

The State's mandate that the W-2 agencies conduct the first-level reviews presented them with new challenges. Under AFDC, many of the local agencies in Milwaukee had provided employment-related services to welfare recipients, but they had not been required to make determinations about eligibility or benefit levels. These remained the responsibility of governmental agencies. Because unlike employment-related services, AFDC benefits were viewed as entitlements, their denial or reduction could be challenged on an individual basis for failing to adhere to fixed standards of eligibility. The vehicle for resolving these challenges — the fair hearing — was a centralized, administrative law program run by judges and was a step removed from program administration. Requiring W-2 agencies to perform both program administration and complaint resolution was a significant departure from past practices.<sup>23</sup>

Wisconsin's decision to make the local W-2 agencies the arbiters of first resort raised a number of questions. In counties where the program is wholly administered by private entities, what standard should be used to review their actions? Is the goal of having disputes settled quickly and informally at the agency level realistic in light of the fact that they would be subject to legal review? To what extent should the review process be consistent across the local agencies given that they would operate within a decentralized administration model? Could private agencies be expected to provide a full and fair opportunity for clients to be heard when it is their actions that would be challenged?

Due in part to efforts by DWD to coordinate and share information, there appears to be an increasingly greater consistency among agencies overall in how fact findings are conducted. During the transition from AFDC to W-2 in 1997, for example, the DES unit of DWD encouraged agencies to establish "pre-hearing and fair hearing preparation" processes and to designate pre-hearing examiners to oversee them. DES began convening regular meetings with the pre-hearing examiners to offer guidance on implementation. Those meetings continued with the advent of W-2, with agency fact finders taking over from the pre-hearing examiners. The Milwaukee County PIC, which had oversight of fact findings among other aspects of the agencies' programs during the first three years of W-2, also played a role, and its monitoring may have contributed toward greater standardization. Further contributing toward standardization of procedures was the fact that appeals from fact findings are centralized and heard by the same hearing examiners who presided over fair hearings under AFDC. Not all

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<sup>23</sup>Throughout this report, information describing dispute resolution procedures at Milwaukee W-2 agencies is based on interviews with the following agency employees: Christine Koehler and Paul Hammes, Employment Solutions of Milwaukee, Inc.; Marge Reasby and Awilda Torres, Maximus, Inc.; Vivian Norwood and Roger Williams, Opportunities Industrialization Center of Greater Milwaukee, Inc.; Judy Andino and Gilberto Lopez, United Migrant Opportunity Services, Inc.; Kim Coleman, YW Works. Ann DeLeo, Patricia DeLessio, and Karen Rotker, Legal Action of Wisconsin, provided material for these sections. Finally, material from interviews with William Goehring, DES, and Margie Marcus, Archbishop Cousins Catholic Center, was also used.

stakeholders agree that the agencies have progressed toward more standardized procedures, however. In interviews, LAW attorneys Karen Rotker, Ann DeLeo and Pat DeLessio said that each agency's approach to fact findings is unique, and that the process as a whole remains "unsystematic and sloppy."

Fact finding hearings have also become more formal, a development that to some extent seems inevitable despite W-2's underlying objectives to emulate workplace dispute-resolution procedures and to give caseworkers more discretion in the handling of individual cases. After all, the W-2 Policy Manual guidelines are designed to ensure that the review process comports with certain due process requirements, such as adequate and timely notice to participants and that hearings follow basic evidentiary rules. Though the balance between informality and formality has not been completely resolved, the adoption by the agencies of pre-hearing resolution procedures appears to be a step toward achieving the goals of speed and informality while assuring all parties a full and fair opportunity to be heard.

It is fair to say that the trend toward standardization and formality of fact-finding reviews is in some part a response to pressures brought by legal advocates, particularly LAW attorneys, who sought to represent as many W-2 participants as their resources permit. Concerned that both stripping welfare benefits of their entitlement status and placing the review process in the hands of private agencies would result in more lenient scrutiny by the courts than had been the case under AFDC, the attorneys pushed agency staff in the fact findings to document interactions with clients and defend their actions. (In many ways, the role of LAW is similar to the role played by Legal Services attorneys from the late 1960s through the mid-1970s in shaping the AFDC fair hearing system after the U. S. Supreme Court ruling in *Goldberg v. Kelly*, holding that welfare benefits were an entitlement which could not be denied without due process of law.) LAW's efforts were successful in no small degree because of the fact that participants who lost at the agency level could appeal their cases to DHA, where they have been partially or completely successful in the vast majority of appeals. While the jurisdiction of DHA hearing examiners is constrained in the sense that they are supposed to limit themselves to the facts of the case and not rule on broad questions of W-2 policy, agency fact finders report that they do pay attention to their rulings and try to issue decisions that are consistent with the principles DHA has enunciated.

The task of becoming the administrators and primary providers of W-2 services in Milwaukee County forced changes in the culture of the local agencies. Staff at YW Works, OIC, and UMOS — all agencies with a longstanding history of community-based service and advocacy — had to adjust to their assumption of a more authoritative enforcement role in determining the eligibility of their constituents, devising employability plans for them, and sanctioning them for non-compliance. The responsibility for conducting fact findings brought additional stresses. Fact finders reported that they often felt resented by FEPs whose decisions they reviewed and sometimes overruled. For their part, the FEPs were working toward what must have seemed to some as conflicting program goals. On the one hand, they had been given a great deal of discretion to work with clients and to make decisions about their employability plans, work and activity assignments, and support services. On the other hand, their decisions and actions were subject to the scrutiny of other workers paid by the agency. One concern heard repeatedly from fact-finders, as well as from DES and DHA staff, was that FEP training was inadequate, a problem that was exacerbated by high staff turnover

## **B. Pre-Fact Finding Investigations and Resolutions**

Each of the five W-2 agencies in Milwaukee has devised a way to resolve complaints at an early stage — in some cases before a request for review has been submitted or at least before the hearing is held. Each agency assigns to an employee (often the FEP, her supervisor, or both) the responsibility to receive complaints, make an early assessment of their merits, and, when appropriate, to try to resolve issues by dealing informally with the involved parties. Agency staff refer to these early-stage procedures variously as mediations, investigations, or settlements, though for the most part, this report uses the terms “pre-hearing resolution” or “investigation.”<sup>24</sup>

Procedures for resolving complaints at the pre-hearing stage are not mandated by state law nor are they addressed in the W-2 Policy Manual, yet they have become an integral part of the overall fact-finding process in Milwaukee. Under the AFDC/ Pay for Performance (PFP) program in the year prior to the introduction of W-2, the State introduced the agencies to the concept of handling complaints directly by instituting a “pre-hearing and fair hearing preparation” process.<sup>25</sup> AFDC/PFP recipients were required to complete a certain number of hours in job-related activities in order to “earn” their AFDC check. This resulted in increased grant reductions for hours that were not spent in those activities, which, in turn, engendered more requests for fair hearings. To accommodate the increase in volume, each JOBS provider in Milwaukee was requested to implement an early-resolution process whereby a disinterested employee of the agency would try to resolve the case before the fair hearing.<sup>26</sup>

All of the W-2 agencies have retained aspects of the AFDC/PFP pre-hearing function. The benefit to the agencies is obvious: Resolving complaints early is less expensive and time consuming than conducting fact-finding hearings. It often works to the advantage of clients with easily solved problems, as well. LAW attorneys generally prefer resolving complaints at an early stage, too, because doing so minimizes delays in getting relief to clients erroneously denied aid. However, as one lawyer who was interviewed pointed out, “a settlement approach doesn’t lead to policy development.” The attorneys face a tension between serving the client’s immediate needs and the desire to reform policy.

*Numbers of complaint resolved at pre-hearing stage.* Agency staff interviewed for this report seem to share the impression that a large proportion of complaints are resolved prior to the hearing stage, but it is not clear that is the case. For instance, data from YW Works, the one agency that specifically tracked “mediations,” show that there were 18 mediations for the entire year 2000, seven of which did not successfully resolve the case. There were also 96 fact findings that year, including the seven failed mediations. The figures for the first seven months of 2001 are similar, although the proportion of mediations is higher: There have been 17 mediations, of which six were unsuccessful, and a total of 58 fact findings. Though no data were available from ES, another W-2 agency, interviews with the attorney who handles pre-hearing matters there, appear consistent with these caseloads. He estimated that about ten to twenty percent of complaints are settled before a request for a fact finding has been filed. He reports that the majority of complaints — between 65 percent and 75 percent — are settled only moments before

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<sup>24</sup>LAW attorneys object to the characterization of these procedures as “mediation,” because they do not ordinarily involve neutral third parties.

<sup>25</sup>See BWI Operations Memo 97-01, Jan. 9, 1997.

<sup>26</sup>The model, in turn, was based upon an AFDC program that operated in several Wisconsin counties during the 1980s, under which pre-hearing examiners would attempt resolve disputes quickly.

the scheduled hearing. In these cases, the outcome is more likely — and possibly more accurately — to be recorded as a finding after a hearing rather than a negotiated settlement.

Although all agencies submit to the DES regional office monthly logs that track fact-finding cases and include a category for “resolved” cases, it is difficult to interpret what the data mean. Complaints that have been settled successfully may show up as “resolved,” but they may also appear in the logs as “withdrawn” or “abandoned.” Perhaps because of the inconsistent characterizations, the state’s estimates of the frequency with which complaints are settled through pre-hearing are less than definitive. For instance, a DWD official testified that approximately 157 issues statewide were resolved prior to a hearing during 1999, compared to 324 fact findings.<sup>27</sup> By comparison, the April 2001 Legislative Audit Bureau (LAB) report of April 2001 found that only 82 cases were resolved, or just 6 percent of the 1,372 fact-finding requests filed statewide between May 1999 and September 2000. The small number of “resolved” cases, however, almost certainly reflects underreporting. Some of the 489 cases (35.6 percent of the total) recorded as “withdrawn” as well as some of the 225 cases identified as “dismissed” (16.4 percent of the total) were probably settled at the pre-hearing stage, too.<sup>28</sup>

*The complaint intake process.* W-2 applicants and participants are made aware of their right to request a review of agency actions at a number of junctures in the program. The information is included in orientation materials, posted in agency offices, and included on agency-decision notices. Staff are trained to inform individuals of their rights at the time the adverse action is taken (although LAW attorneys dispute that they do). Because requests for fact findings filed within 45 days of agency action are considered timely, the parties can theoretically solve problems before they become formal complaints. Early in the first three years of the program, two agencies, UMOS and Maximus, designated staff members to act as mediators. In this role, the staffers became the central point of intake for complaints. They would conduct investigations involving the clients and the caseworkers and their supervisors, and if possible, they would broker settlements. Early settlement often meant that no formal request for a fact finding would be filed. Both agencies, however, subsequently eliminated the mediator position and moved to a model whereby FEPS and their supervisors became responsible for pre-hearing resolution efforts.

When the OIC first receives a complaint, it is directed to the Quality Assurance (QA) manager who serves what the agency calls a mediation function. Within the eight-day period between the date the request is filed and the date the hearing is held, the assistant to the QA Manager will attempt to meet with the parties to see if the dispute can be resolved. Whether or not these efforts are successful, the hearing will proceed since the request has already been filed.

YW Works probably has the most formal policy on pre-hearing resolutions. Internal manuals outline a “mediation process” whereby clients are given the option of going to a mediator first before a complaint is filed. Two FEP supervisors have been designated as mediators. (FEPs are divided into two groups: The supervisor for “group A” will mediate complaints against FEPs in “group B,” and vice versa.) ES, by contrast, has opted for a two-attorney model with one attorney acting as the fact finder while the other tries to resolve cases

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<sup>27</sup>Testimony of Dianne Reynolds, DWD, February 22, 2000, in opposition to SB 123.

<sup>28</sup>LAB Report, p. 60.

prior to the hearing. Once the matter goes to a hearing, however, that attorney represents the agency.

*Role confusion among agency staff.* Early W-2 implementation saw the agencies go through several staffing configurations before arriving at their current model. Some of the changes can be attributed to staff turnover, but it appears that they also reflect changing notions of what works. A number of agencies attempted to combine pre-hearing resolutions with fact findings by having the same staff perform both functions. For instance, Maximus hired a Grievance Officer in January 1998, who initially handled both pre-fact finding investigations and mediation as well as fact-finding reviews. A position of Grievance Officer Assistant was subsequently added to take over the mediation role. Ultimately, mediation responsibilities were shifted to FEPs and their supervisors, and the Grievance Officer Assistant position was eliminated.

Several agencies studied for this report experienced a similar evolution in the staffing of the pre-hearing and fact-finding functions. At ES, for example, one staff person handled both pre-hearing duties and fact findings for about 18 months. Ultimately, the fact-finding function was turned over to a lawyer on contract to the agency, an arrangement that turned out to be short-lived. Shortly thereafter, two lawyers were hired as employees to handle fact findings. They eventually split the pre-hearing and fact-finding functions between them.

OIC also initially designated one person to handle both pre-hearing and fact-finding duties. That situation prevailed for about a year until attorneys on contract to the agency took over the fact finder role, while the QA manager took on the pre-hearing responsibilities. YW Works similarly designated one staff member to serve both as pre-hearing investigator and fact finder. After experimenting with several staffing patterns, however, the agency ultimately opted to hire lawyers on contract to act as fact finders.

Perhaps as a result of these frequent changes in staffing patterns, the agencies continue to be troubled by a confusion of roles among those responsible for investigating and resolving complaints at the pre-hearing stage and those responsible for the fact finding hearings. Indeed, the DES assistant area administrator responsible for convening the monthly fact-finder meetings reported in an August 2000 interview that he found it necessary on several occasions to remind fact finders not to get involved in the investigation and settlement of disputes before the hearing.

*Tensions among fact finding staff handling pre-hearing investigations and FEPs.* The agencies may not have anticipated the need to help caseworkers understand the benefit of pre-hearing resolution, namely that it would be helpful to have staff who were not directly involved in the case review the file for potential errors. All of the staffers involved in pre-hearing resolutions who were interviewed for this report said that they were resented initially by other staff, particularly by the FEPs, who often saw them as advocates for the participants. For example, the mediator at Maximus said that her vigorous efforts to settle disputes had earned her the nickname “Legal Action” among some of the FEPs. The UMOS mediator characterized her role as a “compassionate advocate” for the participants but reported that she was resented by FEPs for being too energetic in performing her duties. Interestingly, these two mediator positions were later eliminated and replaced by a procedure for settling cases at the pre-hearing stage that vested responsibility with the FEPs whose actions were being reviewed.

At YW Works, the staff person who served as pre-hearing examiner during the transition from AFDC to W-2 and subsequently as fact finder under W-2, said she thought of herself as someone who is “employed by YW but works for the customer.” She reported that initially her colleagues misunderstood her attempts to be impartial and took it personally when she ruled against them. Similarly, the attorney at ES who handled pre-hearing matters reported that when he was hired, the FEPs had initially “cheered,” thinking he would be representing them at the hearings. It was only later that they realized his job was to represent the agency and not the individual caseworkers.

Having a non-caseworker handle pre-hearing matters gave rise to another kind of problem in one instance. Management at Maximus noticed that with the arrival of the Grievance Officer Assistant, FEPs were becoming more passive, relying on the newcomer to “fix” problems. This led them to scuttle the model and make FEPs responsible for investigating each other’s cases. Now, the FEPs understand that it is their responsibility to know the policies and to be able to defend their actions during the reviews. One unanticipated benefit of this change has been a strengthening of the relationships between FEPs and their supervisors.

Some degree of tension between those involved in the review process and other staff may be inevitable, given the underlying and not always compatible program values. W-2 is designed to give FEPs wide latitude in how they make decisions about individual cases, but that discretion must be exercised within a well-defined set of parameters. And giving agencies the responsibility of reviewing the decisions of their own staff means that FEPs can be second-guessed by people they regard as co-workers. Despite these internal stresses, however, staff interviewed for this paper unanimously reported that relations between the FEPs and staff handling pre-hearing matters have steadily improved as the program evolved.

### **C. Fact Finding Reviews**

The lack of specificity in the state law concerning the review process suggests that W-2 agencies were intended to have a lot of flexibility in implementing the program. For instance, the law requires only that the agency give the petitioner who formally submits a request in a timely way be given “reasonable notice and opportunity for review.” It offers no further guidance as to how the process should be set up. The W-2 Policy Manual, by contrast, is quite specific about the various steps in the process, the timeframe for taking action, the conduct of hearings, and the required recordkeeping. These highly prescriptive procedures indicated that the state is aware that flexibility in this area is subject to legal constraints.

A look at how agencies have implemented fact findings reveals how these tensions are being resolved. At the beginning of the program, each agency proceeded to establish its review process with little or no coordination with the other agencies. Over time, however, the process became more standardized as oversight entities, namely the DES regional office within DWD and the Milwaukee County PIC, proactively increased the monitoring of these activities and encouraged more communication among the agencies. Equally important, the success rate of participants who appealed adverse fact-finding decisions to DHA also appear to have spurred the agencies to improve how their practices conformed to a common set of standards.

*Role conflicts and tensions among staff.* According to state guidelines, the people W-2 agencies assign to handle fact finding reviews cannot have had any previous involvement with

the case. They must be neutral and provide an objective review, and they must have a thorough understanding of the relevant programs and policies. But whether the fact finders are as neutral or knowledgeable about the applicable law and regulations as they should be remains a source of some contention.

Some members of the welfare-advocacy community believe that fact finders who are agency employees or contractors are incapable of impartiality.<sup>29</sup> State officials counter that the outcomes of fact findings, a majority of which are won by participants, prove that fact finders can be neutral.<sup>30</sup> For their part, fact finders report that while they believe they can successfully maintain their neutrality, they continue to face pressures from coworkers and supervisors.

The fact finders interviewed for this report indicated that other agency staff were confused about whose interests they represented. They believed that FEPs initially thought it would be role of the fact finders to provide representation at the agency hearings equivalent to what the LAW attorneys provided clients. For instance, the YW Works staff member who at one time handled both pre-hearing matters and fact findings explained that FEPs told her they felt “unprotected” going into the fact findings and took personally findings that reversed their initial decisions. At the same time, she said, she heard from LAW attorneys that, as an employee of the agency, she was unavoidably biased in favor of the agency.

OIC uses independent contractors, both of whom are lawyers, as fact finders or grievance officers. Since the initial interviews for this report were completed, YW Works also opted to use attorneys as grievance officers and, in November 2000, contracted with the same law firm that OIC retains to conduct fact-finding hearings. The fact that these lawyers are on contract does not insulate them from some of the same pressures that employee-fact finders face. In an interview, the OIC staff person who initially designed the agency process (and for a time acted as both mediator and fact finder) reported that, at first, she had a difficult time making the FEPs understand that the attorneys were supposed to be impartial and were not there to provide representation for the FEPs.

The pressures on fact finders do not always come from FEPs. At one agency, for instance, the fact-finding staff reported that during the time they reported directly to the W-2 administrator, there were problems when the administrator disagreed with their interpretations of W-2 policies. At another agency, the fact finder reported that a superior instructed her to change one of her decisions, an order she said she refused to follow.

*Staffing configurations.* There is no consistent pattern across the agencies concerning the place fact-finding reviews occupy within the organizational structure. The ES attorneys, who are employees of the agency, report nominally to the Director of Policy and Training, but they essentially see themselves as autonomous. At YW Works, the staff person who coordinates many fact finding-related functions (and who at one point conducted the hearings) stated that the fact finder does not have a “natural home” in the organization; she reports to the director of Quality Control. Since the initial interview, YW Works has reassigned the fact-finder duties to attorneys on contract.

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<sup>29</sup>See, e.g., Testimony of Carol Medaris, Wisconsin Council on Children and Families, May 19, 1999, in support of SB 123.

<sup>30</sup>See testimony of Jean Rogers, DWD, May 19, 1999, in opposition to SB 123.

At OIC, fact-findings and what the agency calls “mediation” come under the jurisdiction of the Quality Assurance manager. Hearings at OIC are conducted by attorneys on contract to the agency. At Maximus, the Grievance Officer (as the individual assigned the role of fact finder was called), has moved among several departments. Though this position reported initially to the W-2 director, it was later transferred to Quality Control. Subsequently the position was reconfigured as part of Operations, and later still, it was moved to Administration.

*Time Frames.* In order to minimize potential harm to the participant in the event the agency has erred, the state has sought to ensure that fact findings would be completed expeditiously. At the same time, the state wanted to allow W-2 applicants and participants sufficient time to submit a request for review and provided them a generous 45 days to do so. Once the process is triggered, however, the goal is to move swiftly. Agencies are required to notify the petitioner of the date of the fact finding review within three days of submission of the request for review, and the hearing itself must be offered within five workdays of the date of the notification. The agency must issue its decision within five working days after the review date, although that time can be extended if the petitioner had been given extra time to present evidence. In all, the process should be completed within thirteen working days.<sup>31</sup>

A review of sample fact-finding decisions found that these time frames do not appear to pose a problem for the agencies or the petitioners, but it is not clear whether requests for review are always handled in the timely manner the guidelines prescribe. The CARES software that W-2 agencies use statewide to document cases is not programmed to reflect the precise date of an agency action, so it has sometimes been in doubt when precisely the 45-day clock starts ticking. This has been a major source of contention at hearings, and according to the Legislative Audit Bureau (LAB) April 2001 report, is the third most common issue on which appeals are based. While the issue had been discussed at monthly meetings of fact finders on more than one occasion and clarification was requested from DWD, the matter took months to resolve.<sup>32</sup>

*Hearing attendees.* The FEP or W-2 worker who made the decision and the petitioner and her representative, if she has one, are required to attend hearings. A petitioner who fails to show up at the hearing without good cause will be considered to have abandoned her request for review. While fact finders have the flexibility to accommodate parties who cannot be physically present — through teleconferencing, for example — the obligation remains on petitioner to show good cause for failure to attend.<sup>33</sup>

*How the hearings are conducted.* The W-2 Policy Manual specifies the rules and roles to be followed in the hearing process. It is the job of the FEP to present the case for the agency, and the guidelines spell out the kinds of evidence he or she must be prepared to submit. The FEP is expected to be familiar with the facts of the case, as well as applicable program policies and procedures. The FEP must also ensure that the record is complete by having documentation of all relevant events such as notes of phone calls, prior assignment notifications, and other pertinent materials. The petitioner is then offered the opportunity to rebut the information presented by the

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<sup>31</sup>See W-2 Policy Manual, Chap. 19.

<sup>32</sup>The CARES program was changed, in May 2001, to keep track of the passage of the 45-day appeal-filing period from either the date notice was sent or from the effective date of the decision announced in the notice, whichever comes later.

<sup>33</sup>See generally W-2 Policy Manual, Chap. 19.



agency. If the parties' versions of what happened conflict, the fact finder must make a credibility determination.

What actually happens during the hearings has been a source of much contention among the agency staff and advocates interviewed for this report. Nearly all of the fact finders said that the FEPs had not been adequately trained to assume the roles they were expected to play at the agency hearings. The FEPs were described as initially unsure of themselves, often lacking sufficient documentation to defend the agency position, and unfamiliar with W-2 policies and procedures. For instance, the fact finder at Maximus complained that when she had the job as mediator, the FEPs would often depend upon her to know the applicable program rules and to apply them as circumstances required. The situation improved when Maximus eliminated the mediator position, sending the message that it was the FEPs' responsibility to know the rules and to be able to defend their actions. The agency went further by requiring the FEP supervisor as well as the FEP to attend the hearings. Taking this step has both raised the FEPs' level of expertise and given supervisors more insight into which practices work and which do not. In August 1999, Maximus prepared a handout containing preparation guidelines for FEPs itemizing the elements needed for each case presentation.

FEPs at YW Works experienced a similar learning curve, according to that agency's fact-finding coordinator. At first, the FEPs were intimidated by having to participate in a hearing, feelings that ran especially high when the petitioners were represented by legal counsel. The FEPs often took the fact finders' rulings personally. Over the last year, however, the fact-finding coordinator reported that relations between the FEPs and LAW attorneys have improved because FEPs better understand the role of the lawyers and because the lawyers are less confrontational.

A similar evolution in the FEPs role in the hearing process occurred at OIC. The agency's fact finder described FEPs generally as overly quick to personalize disputes. The FEPs had to be trained to present the case at the hearing, not tell a personal story. Initially, they found it difficult to accept the fact that participants could be legally represented while they had to represent themselves.

Seeing a need to better inform FEPs of what they need to know for the reviews, UMOs managers prepared a set of instructions to FEPs in July 1999. The agency fact finder later supplemented these with a memo that aimed to provide direction to FEPs facing their first review. He opined that there is a continuing need to improve FEPs' training to keep pace with the growing need for complete documentation. He believes that because time limits are looming, LAW attorneys are beginning to ask FEPs more detailed questions about assessments, placements, and number of contacts, among other things. He thinks the monthly fact finder meetings should become occasions to surface issues that require additional staff training the agencies can jointly push for.

The stakes for all parties concerned in the hearing process appear to be raised when petitioners have legal representation. The OIC staffer suggested that petitioners with lawyers might tend to make more of their complaints because they feel that they can now have their "day in court." Relations between the LAW attorneys and agency staff were particularly difficult in the early stages of W-2 implementation. Staff felt outmatched by the lawyers, and the lawyers believed that they had to assume an aggressive posture in order to establish early on that a program of no entitlements would nonetheless be held to standards of due process. Agency staff

interviewed for this report described LAW attorneys in the early days of W-2 as inclined to throw their weight around and to intimidate staff, “badgering and uncooperative,” too often taking on borderline cases, and “posturing.”

In contrast to this earlier tension, agency staff describe relations between lawyers representing the client and agency employees as appearing to have improved markedly over time. Fact finders unanimously praise the LAW attorneys for having forced agency staff to present tighter, more coherent defenses of their actions. They also credit them for being able to get their clients to be clearer and more concise in stating the problem. Several staff members seemed almost grateful for the presence of attorneys, describing hearings with lawyers as faster and more efficient.

The perception that the situation has improved is not shared by LAW attorneys, who describe fact findings as little changed from the early days of W-2. They echoed the fact finders in characterizing FEPs as contentious and ill prepared at the hearings. They attributed those shortcomings to the belief on the FEPs’ part that because they had been given considerable discretion in how cases should be handled, they should not be answerable to outside reviewers or lawyers. The attorneys also faulted the fact finders as too prone to believe what the FEPs tell them. They credit the fact finders, however, for having learned a few basic precepts, such as the advisability of asking the FEP for a current employability plan and the need to have the proceedings recorded. Overall, the LAW attorneys concede that there has been modest improvement. In their words, the agencies’ “arrogance has been worn down” — a development they attribute to repeated reversals of fact-finding decisions at the appeals level.

*Issues raised at hearings.* Not surprisingly, the kinds of frictions that culminate in fact finding reviews have changed as the W-2 program has evolved. According to the LAW attorneys, administrative problems associated with the conversion from AFDC to W-2 were an initial source of many disputes. The interviewees attributed these problems to a combination of factors, including the state not giving the agencies sufficient lead time to get their operations running smoothly, insufficient resources to train agency staff adequately, and the agencies’ underestimation of staffing and resource needs. The co-location of certain county workers with agency staff also placed strains on the agencies’ resources. The social services director with the Archbishop Cousins Catholic Center, complained, for example, that agency phone lines were so jammed, at first, that participants could not get through to the county workers or to their caseworkers. In the confusion, this advocate asserted, some participants were wrongfully terminated from the program. State officials dispute this claim.

On another front, delays in the authorization of child care subsidies arose as a problem early on. The determination of eligibility for childcare subsidies remained a responsibility of county officials under W-2 just as it had been under AFDC. But even though county staff were co-located, the decoupling of child care program functions is thought to have contributed partly to a problem of delays in the authorization of these subsidies. Initial placements of participants also became a source of early controversy. Interviews with LAW attorneys revealed that some in the advocacy community thought that agency staff were underutilizing the W-2 T tier, or transitional-placement category, designed for applicants with multiple barriers to employment. At the same time, advocates felt there was an over-reliance by agency staff on the top tier of unsubsidized employment and excessive diversion of applicants away from W-2 altogether.

As W-2 evolved, agency staff and LAW attorneys report that recent fact findings have most commonly involved issues around sanctions for nonparticipation. Transfers and the questionable placement of applicants in the top tier of unsubsidized employment, which carries no cash assistance, have continued to engender disputes leading to fact findings. Other issues, such as denials of transportation and housing assistance, and emergency assistance are more likely to be handled through informal settlement. Agency staff predict that the future will bring more cases involving time limits. At UMOS, the fact finder reported in an interview that the agency has already seen an increase in the number of requests for reviews based on denials of extensions on time limits.

The April 2001 Legislative Audit Bureau (LAB) report on W-2 confirmed the impressions of this report's interviewees, at least as they relate to more recent fact findings.<sup>34</sup> Out of 1,372 fact-finding requests filed statewide from May 1999 through September 2000, 1,150, or almost 80 percent, concerned participation in assigned activities, with childcare issues a distant second at slightly more than eight percent.<sup>35</sup> Interestingly, the report pointed out that although W-2 participants in Milwaukee made up 81 percent of the statewide caseload, approximately 90 percent of the total number of requests for fact findings were made by Milwaukee participants, an imbalance that may have been the result of a difference in relations between FEPs and participants, the greater availability of lawyers, or more intensive settlement efforts by agencies outside of the city. It may also have reflected the fact that, unlike the county social services departments that administer W-2 in the rest of the state, the W-2 agencies in Milwaukee had had no previous experience administering a welfare program.

*Fact-finding outcomes.* This report examined two sets of data collected by the state — those contained in the LAB report and those collected by DWD — to explore the outcomes of the W-2 fact-finding process. The two data sets covered different time periods and the data in both sets provided only an incomplete description of outcomes, so they must be interpreted with caution. Nonetheless, each was consistent with the other overall.

The LAB reviewed the disposition of 1,372 fact finding requests during the period May 1999 to September 2000, of which just 41.6 percent of these resulted in decisions. Two hundred and seventy-nine requests (20.3 percent) were resolved in favor of the agency; another 240 (17.5 percent) were in favor of the petitioners; and 52 requests (3.8 percent) were split decisions. The majority of the requests were disposed of without decisions: 489 cases (35.6 percent) were withdrawn; 225 (16.4 percent) were dismissed; and 82 (6 percent) were resolved informally.

DWD's data covered the period of September 1997 through February 2001. According to the DWD data, out of 2,958 fact-finding cases held in Milwaukee County during this time, 342 were found in favor of the participant and 483 were found in favor of the agency. As with the LAB data, however, the DWD data show that the vast majority of cases were classified as "others," a category that includes abandoned cases, resolved cases, and split decisions.

Though outcomes favoring participants and those favoring agencies were about evenly divided when a resolution was reached when one looks at both the LAB's and DWD's analyses, it is more difficult to determine which side actually prevailed when the vast majority of cases

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<sup>34</sup>See LAB Report, p. 59.

<sup>35</sup>May 1999 was selected as the beginning date for analysis because, according to the LAB, that was when DWD began to centralize the record keeping of this kind of information.

that did not result in a final determination are factored in. In interviews, fact-finding staff said that the terms used to describe case outcomes did not always capture the true resolution, e.g., a case designated as “withdrawn” might appear to be a victory for the agency but could, in fact, more accurately be characterized as a mediation that found in the participant’s favor. Similarly, an “abandonment” might be interpreted as an outcome favorable to the agency, but it could also reflect a participant not having shown up at a scheduled fact-finding hearing because the matter had previously been resolved informally to her satisfaction.

*Remedies.* Apart from the fact that agencies themselves conduct the fact-finding reviews, the single most controversial aspect of W-2 concerns the remedies available to petitioners pending completion of the fact-finding process. According to the statute, when the proceeding results in a determination that a petitioner was wrongly deemed ineligible for an employment position or was placed in an inappropriate employment position, she must be placed in the first available employment slot that is appropriate. (“Employment position” in this context means any of the four W-2 tiers, including those that do not require participation in employment per se but rather in employment-related activities.) Cash assistance or other benefits to which the participant might also have been eligible, however, would not be available for the period of time she was not properly assigned but only from the date the appropriate placement begins. A determination that a petitioner’s benefits were improperly reduced or cancelled, however, would result in the restoration of cash benefits to the level determined appropriate retroactive to the date on which the assistance was first reduced or terminated. The law contains no provision for continuing benefits at the prior level pending resolution of the dispute.<sup>36</sup>

Both the lack of retroactivity in benefits under the first scenario and the failure to provide continuing benefits in the second are departures from the practice under AFDC, which made retroactivity and continuation of benefits pending resolution of disputes the rule. The rationale underlying the differences was that because W-2 benefits were not an entitlement as they had been under AFDC, the W-2 review process was not obligated to provide the same range of protections for applicants to or participants in the program.<sup>37</sup>

Not surprisingly, advocates and community groups are dissatisfied with the narrower range of remedies available under W-2. Attempts to amend the law’s provisions on the review process have focused on broadening the remedies available to petitioners who prevail. The changes would provide for retroactive benefits and a continuation of benefits pending resolution of the dispute if a hearing has been requested before the effective date of the agency action, or within ten days after the mailing of the notice of the action.<sup>38</sup> Proponents of the amendment to continue benefits pending resolution of the dispute point to the DWD’s own estimate that, in cases involving disputes over levels of cash assistance, W-2 agencies are upheld on appeal only one-third of the time.<sup>39</sup> As regards retroactive benefits, community advocates argue that there is currently no remedy for work-program benefits denied in error, which can spell months of hardship for participants and their families. In effect, they claim,

W-2 agencies may ignore repeated requests for help until after a hearing and a decision ordering placement in a work program. There are no consequences for the W-2 agency and thus

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<sup>36</sup>Wis. Stat. 49.152(3).

<sup>37</sup>See memo from DWD to W-2 providers concerning proposed changes to the W-2 legislation, June 27, 1997.

<sup>38</sup>See, e.g., Assembly Bill 679, Dec. 23, 1997; Sen. Bill 432, Feb. 3, 1998, and subsequent amendments.

<sup>39</sup>Medaris testimony, May 19, 1999, in support of SB 123.

no incentive to make sure that benefits are properly provided. In fact money has been saved by the delay in benefits.<sup>40</sup>

Advocates' efforts to reinstate AFDC-style remedies may also have been influenced by their belief that the W-2 agencies were not complying with fact finders' decisions promptly. In an interview, LAW attorneys explained that they often have to follow up with the fact finder, DHA, or DES to ensure that the agency complied with the fact-finding decision. State officials have countered the advocates' charges, saying that there were no incentives for the system or the recipients to resolve problems promptly under the old fair-hearing system and pointing out that it was not uncommon for a fair hearing to take four months. The delay, the officials claimed, fostered a sense of alienation in the participants who feel "lost in the shuffle," just as it hampered the state's ability to fight fraud and abuse. This argument was echoed in testimony by a staff person at YW Works, who claimed that the continuation of benefits under AFDC caused customers to "file repeated appeals, and not appear [at] the hearings, knowing they would get their grants if they filed their appeals."<sup>41</sup>

State officials have also pointed to the burden that unrecovered benefits have imposed on taxpayers. Where it is found that the agency's decision was correct, "the agency's recovery options are limited to reduction of future benefits or tax intercept (neither of which has been proven very effective)."<sup>42</sup> With regard to an earlier bill introduced in the state senate that would have provided for continuation of benefits pending resolution of disputes, the Legislative Fiscal Bureau similarly concluded that recovery of benefits would be difficult for the agencies, and would have a "significant fiscal impact on agencies."<sup>43</sup>

## **V. Oversight**

### **A. Milwaukee Private Industry Council**

In January 1997, the Department of Workforce Development (DWD) contracted with the Milwaukee County PIC to perform certain contract administration functions throughout the county. Essentially, the PIC was to monitor program compliance, coordinate activities and information sharing among the W-2 agencies, and provide technical assistance.<sup>44</sup> As part of its responsibilities, the PIC was to review all fact-finding proceedings conducted by the agencies, with a goal of having PIC and DWD share oversight responsibilities for W-2 in Milwaukee. However, the W-2 administrator for the PIC and the Assistant Area Administrator for DES, conceded that it was difficult to coordinate the oversight activities. The lack of effective oversight during the first two years of the contract also came in for criticism from the Legislative Audit Bureau.<sup>45</sup> By all accounts oversight began to improve by the third year of the contract, but

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<sup>40</sup>Idem; see also, testimony of LAW, June 10, 1999, in support of SB 123.

<sup>41</sup>Testimony of Kim Coleman, YW Works, February 2, 2000, in opposition to SB 123.

<sup>42</sup>Testimony of Jean Rogers, DES, May 19, 1999; and Dianne Reynolds, DES, Feb. 22, 2000, both in opposition to SB 123.

<sup>43</sup>Memo of Mar. 2, 1998, from Legislative Fiscal Bureau to Sen. Moore on SB 432.

<sup>44</sup>Much of this section is based on interviews with Delores Parr, W-2 administrator for the Milwaukee County PIC, and her staff. Additional information was provided by William Goehring, Assistant Regional Administrator for DES.

<sup>45</sup>LAB Report, Apr. 2001, pp. 70-75.

there had been enough problems with the PIC performance to lead DWD to conclude that the contract should not be renewed when it expires.

In the performance of its fact-finding oversight responsibilities, the PIC's principal activity appears to have consisted of sending its staff, called regional liaisons, to conduct monthly audits of the fact-finding cases at each agency. These reviews took place at the agencies' offices where the fact finders themselves were questioned. Reports produced by the auditors flagged apparent errors made in the review process, but for the first two years they were sent only to the fact finders and not to agency management or to the DES regional office, making it difficult to determine whether errors had been corrected. According to interviews conducted in May 2000 with PIC staff members, the PIC began sending copies of the audit memos to agency management and DES, in early 2000, as part of an overall effort to step up monitoring of fact findings. According to DES regional staff, this change allowed them to give feedback directly to agency fact finders and to reinforce the PIC's comments.

A survey of PIC audit reports from July 1999 through August 2000 underscored the evidence this study found of an increasing level of scrutiny over time. Although the memos throughout the period examined varied in terms of the depth of detail they provided, the earlier memos were more likely to be cursory, focusing chiefly on whether documentation of case dispositions was sufficient or on the neatness of the files. Audit memos from January through August of 2000, by contrast, demonstrate that more attention was being paid to the underlying facts of cases and to whether the FEPs' presentation of evidence supported the agencies' actions. Recurring issues as reflected in the PIC monthly audits include: frequent failure to date-stamp papers so that timeliness cannot be assessed; lack of documentation indicating disposition of cases (making it difficult to distinguish between mediations, abandonments, and withdrawals); failure of FEPs to track interactions between line workers, employers, and participants adequately; and the failure to document the agencies' compliance with the fact finders' decisions.

## **B. DES Regional Office**

DES regional office staff began meeting with what were then called pre-hearing examiners during the final days of AFDC under the Pay for Performance (PFP) program. During the initial transition to W-2, these meetings were used as occasions to train the new fact finders (some of whom had served as pre-hearing examiners under PFP). For instance, DES brought in the supervisor of the DHA hearing examiners to explain some basic due process concepts and to give advice on how to run hearings. The DES regional staff has continued holding monthly meetings for fact finders in order to facilitate cross-agency communication and to impart information about program rules and regulations. The agendas for these meetings are set by DES, which occasionally invites guests from DHA, LAW, or other interested entities. Initially, these meetings were rotated only among the W-2 agencies, but the PIC office was added into the rotation at some point in 2000. According to an interview conducted with a DES source, the kinds of issues raised included some that only the state could address, such as the problems resulting from the inability of CARES software to keep track of the starting date of an agency action. At other meetings, however, fact finders were educated on some of the more sensitive aspects of their jobs, such as explaining why participants with legal representation do not personally have to request reviews, and why it is contrary to state policy for fact finders to involve themselves in mediation efforts.

An examination of minutes from various meetings bears out this description of what transpired. Fact finders' questions ranged from how to control the tone of the hearings to whether they had the authority to ensure the agencies' compliance with their orders. The DES administrator characterized the fact finders as improving in their overall knowledge of the program and understanding of their role, though he regretted the lack of a more systematic training program to prepare them to perform their jobs better. The lack of more thorough training is made more regrettable in his view by the high turnover among fact-finding staff at many of the agencies.

One issue that has been raised periodically at the monthly fact finder meetings, according to both agency and PIC staff is the format for the monthly logs fact finders are expected to keep. Though both DES and the PIC insist agencies keep records on the number of fact findings held and case dispositions, the information required by the two entities is not the same, thus forcing the agencies to compile different sets of numbers. Evidently, the PIC requested statistics on the number of fact-finding requests *disposed of* each month, while DES wanted the number of fact-finding requests *filed* each month. When questioned about this, DES staff claimed that the problem had recently been resolved by having the agencies submit the same information to both DES and PIC.

The way fact findings are recorded in the agencies' monthly reports makes it difficult to correctly interpret the data. For instance, when a case is successfully resolved after a request for review has been filed but before the fact finding hearing has taken place and the petition is not formally withdrawn, the complaint can show up on the agency's monthly log as unresolved when in fact it has been settled for all practical purposes. Staff at ES complained that requiring them to file formal withdrawals before they could record a case as resolved made them look less productive than they really were. Similarly, if the petitioner failed to appear at the hearing because it was resolved earlier, the petition would be recorded as abandoned. In this case, the entry in the log may suggest an outcome favorable to the agency when in fact a "no show" may reflect just the opposite.

## **VI. Second-Level Reviews**

Though state law allows either party to appeal the fact-finding decision, the statute places jurisdictional limits on that right.<sup>46</sup> Review is mandatory when the W-2 agency is itself contesting the fact-finding decision, but for appeals brought by W-2 participants, review is mandatory only when there has been a denial of an application based solely on a determination of financial ineligibility. In cases where participants' appeals are not related to financial eligibility, DHA, the agency designated to hear the appeals, may grant review at its discretion. The advocacy community has criticized this restriction, but DHA administrators assert that all appeal requests have been granted to date.

Appeals by participants must be filed within 21 days of the date when the fact-finding decision was mailed to them. W-2 agencies bringing appeals, however, have no such filing deadline. Upon receiving the case, the DHA must promptly notify the W-2 agency of the request for review, and the agency, in turn, must submit the fact-finding file to DHA within five days of

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<sup>46</sup>Material for this section is based largely on interviews with Louis Dunlap, DHA; and Howard Bernstein, DWD Counsel's Office.

notification. If after examining the file DHA decides further investigation is necessary, it can remand the case to the W-2 agency for more information, interview the parties by telephone, or request additional written materials. Unless there are specific grounds for extending the investigation, the review should be completed within ten days. The guidelines, however, do not specify a time within which DHA must issue its decision.

Remedies available to participants who prevail in the second-level reviews are identical to those available upon fact-finding reviews. The final decision is binding upon the W-2 agency, which has ten days to comply with the ruling. If DWD determines that a DHA decision's underlying rationale requires a change in statewide program operations, it will issue a directive to that effect. But until it does, other W-2 agencies not parties to the case must continue to follow existing policies and procedures. According to a DHA official interviewed for this report, DHA has not detected an unusual number of instances where W-2 agencies have failed to comply with its rulings. LAW attorneys, by contrast, allege that there has been a high level of non-compliance with fact-finding decisions on the part of local agencies.

Approximately 130 DHA decisions handed down since 1998 were reviewed for this report to get a sense of what issues arose most often. Though an exact count was not made, it was clear that the majority of appeals concerned the imposition of sanctions related to nonparticipation, an impression confirmed by the April 2001 LAB report. According to the LAB, 66 out of the 216 appeals filed from September 1997 through December 2000 fell into this category. Appeals contesting employment placement decisions were second in frequency with 21 cases, and appeals regarding the timeliness of the fact-finding request were third with 16 cases.<sup>47</sup>

The review of DHA decisions conducted for this paper also revealed some uncertainty as to whether DHA has the authority to look at the evidence anew (*de novo*) or whether it must defer to the agency's findings of facts. Obviously, a *de novo* standard gives DHA more power to shape the agency fact-finding process and to establish norms for how agencies prove their cases. Judging from the decisions read for this report, the unanimous view among hearing examiners was that a *de novo* standard would be appropriate, given the silence of the W-2 statute on this question. This interpretation, however, ran counter to the Policy Manual's directive that DHA conduct a limited review of the record, a point not lost on the hearing examiners. In several of the published opinions, the limited-review standard was explicitly rejected as not legally binding on DHA.

It is unclear just how precisely outcomes on appeal can be determined. In a letter dated April 10, 2000, a DHA administrator wrote that he believed that the "clear majority" of cases have been decided partially or completely in favor of the participants. He based that conclusion on a survey of 182 appeals filed from the program's beginning through April 2000. The lack of precision was attributed to the terms used to describe decisions, which did not always indicate what actually happened. For instance, a decision recorded as withdrawn in a case brought by a participant could be taken to mean that the participant lost, but it could also be interpreted to mean that the agency reversed itself prior to the hearing and that the participant prevailed. Similarly, a remand might be seen as indicating an outcome at least partially in favor of the participant, but it could also indicate only that the case was sent back to the agency for a recalculation of benefits, not to change the basic decision. These interpretation problems are identical to those identified by agency fact finders when they were asked to characterize the outcomes of their cases.

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<sup>47</sup>LAB Report, Apr. 2001, p. 61.



Based on its survey of 216 decisions issued by the DHA from the inception of W-2 through December 2000, the Legislative Audit Bureau (LAB) presents more definitive data. The LAB reported that of nearly 70 percent of those cases, or 151 cases in all, were decided in favor of the applicant or participant. Fully 79 percent of all appeals in Milwaukee County resulted in decisions favorable to the program participants.<sup>48</sup> Though the LAB figures on appeal outcomes may be subject to similar problems of interpretation as the DHA data, it's clear from the one-sided evidence showing that participants are prevailing in their appeals that there is a substantial gap in the understanding and interpretation of W-2 policies and practices between agency fact finders and DHA hearing examiners. The DHA administrator interviewed for this report underscored that interpretation. He described the incidence of DHA appeal decisions in favor of the agencies during the first two years of W-2 operations as "rare." The agencies' success rate in recent years, he added, had improved.

Though DHA decisions are generally considered final, state law provides that they may be revoked or modified "as altered conditions may require."<sup>49</sup> This provision has been interpreted to allow DHA to issue proposed decisions in situations that involve questions of W-2 policy though not in cases involving a ruling on the facts. When policy issues are involved, DHA will submit the proposed decision for comments from the parties and a review by DWD, but the process by which some decisions are designated as "proposed" had become a source of tension between DWD and DHA. In an interview for this report, a lawyer with the DWD counsel's office said that DHA hearing examiners were not always reliable in their judgments of which cases involved questions of policy. This inconsistency, he asserted, had resulted in DHA handing down as final decisions that should have been issued as proposed and submitted to DWD for review. To address this problem, DWD proposed a new rule, in December 2000, that would allow the losing party in any appeal to request that DWD review any DHA decision. The proposed change is under consideration as of this writing, but both DHA and DWD staff agree that the issue it intends to correct is of waning importance. After three years of W-2 implementation, there are fewer policy areas that have been left unexplored.

Because the statute does not specify how long DWD may take before completing review of the DHA-proposed decisions, the appeals process is sometimes subject to considerable delay. In 1999 testimony, LAW attorneys said that final decisions in at least fifteen cases had been delayed six months or more.<sup>50</sup> Given the limitations on retroactive relief and the lack of continuing benefits, lengthy delays between the proposed and final decisions raise real concerns about fairness and hardship to participants. The lawyer in the DWD counsel's office acknowledged that there had been some serious delays in DWD's review of DHA proposed decisions in W-2's first two-to-three years. But he said, the backlog on proposed decisions has been eliminated over the past two years, and proposed decisions are now promptly reviewed. Again, the problem may be abating with time. As hearing examiners gain greater understanding and familiarity with W-2 program policies and practices, DWD staff say, the number of proposed decisions being issued by DHA has declined in the last year or two.

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<sup>48</sup>Ibid.

<sup>49</sup>Wis. Stat. 49.152(2)

<sup>50</sup>Testimony of Patricia DeLessio, LAW, June 10, 1999, in support of SB 123.

## VII. Observations and Lessons

The experience in Milwaukee County during the first three years of W-2 suggests that there are many challenges to successful implementation of the two-level review process, and that they have been met with varying degrees of success. Several points that emerge from this analysis are:

- **A program model based on decentralized administration and caseworker discretion is a difficult environment in which to operate a review process that better lends itself to standardization.**

Having had no prior experience conducting reviews, the W-2 agencies varied widely, at first, in how they implemented the fact findings, sometimes experimenting with a succession of different staffing and organizational configurations. Over time, however, implementation became more consistent across agencies, as they responded to pressures from several directions. Among these: The DWD regional office made greater efforts to coordinate and facilitate information sharing among agency fact finders. Milwaukee County PIC increased its monitoring activities. The appeals process imposed greater consistency in the application of policies and practices. Agencies paid more attention to training staff involved in the review process. And the LAW attorneys exerted their influence as advocates for participants.

Assuming the trend toward standardizing the review process will continue, the state should consider improving the agencies' collection of data on the system's performance. Agencies, for example, could record case subject matter and outcome information more clearly, so that recurring problems can be spotted more effectively in the review process. The state might also consider comparing the different agencies' performance, using such factors as the proportion of outcomes favorable to either side both at the fact-finding level and on appeal. The state might also increase its oversight of how well the W-2 agencies are doing in terms of complying with the decisions of fact finders and DHA hearing examiners by examining their implementation of remedies.

- **The agencies have reconciled competing values of informality and speed in the processing of complaints with fairness and equity by increasing the formality of the fact finding hearing while informally resolving some cases at the pre-hearing stage.**

While the state guidelines presented fairly detailed descriptions of fact-finding procedures, the agencies still had to struggle with various implementation issues. Advocates complained most frequently about poorly trained fact-finding staff and hearings that were sometimes disorganized and marked by confrontation. Agency staff, in turn, expressed some confusion about the proper limits of their roles. Over time, it appears that some agencies began to put more effort into internal staff education, while others opted for an attorney-driven review process. In both instances, agency staff believe the process functions more professionally. Advocates, however, continue to complain of pervasive disorganization. Given the disagreement over how well hearings are being conducted, the agencies should be encouraged to put more resources into additional monitoring and fact-finding staff training.

The agencies' efforts to resolve complaints before they reach the hearing stage should be encouraged, as the benefits to agencies and clients alike are obvious. Two issues merit attention

here. First, the importance of the pre-hearing resolution in the overall functioning of the review process merits greater understanding and appreciation. Agencies should become more systematic in tracking complaints, even if they do not result in formal requests for review, in order to understand better how often cases are resolved at this early stage, what kinds of complaints are amenable to this approach, and how often the outcomes favor either side. Second, the issue of whether the pre-hearing process functions with appropriate neutrality merits closer study. LAW attorneys argue placing responsibility on the FEPs for the early resolution of complaints against them does not result in a system that can be fairly described as neutral. They favor a mediation approach under which a third party would consult with both sides and negotiate a settlement. The agencies, however, feel that involving FEPs and their supervisors at the pre-hearing stage allows them to catch errors early and to learn more thoroughly the program rules and regulations.

- **Making W-2 agencies responsible for conducting reviews of their decisions presents serious challenges for agency staff and management.**

It is inherently stressful on all agency staff involved when an agency's actions are reviewed by people on the agency's payroll. Fact-finding staff report that they are perceived with mistrust or even hostility by the FEPs on whom they sit in judgment. While this report found no substantiated evidence that agency-conducted reviews cannot meet standards of fairness or objectivity, there is probably no way of knowing whether fact finders may be influenced by the fact that they work for the agencies. Agency fact finders interviewed conducted for this report were acutely aware of the trust that has been placed in them, and they tried hard to be honest and fair in their dealings. Still, advocates have alleged that fact finders have been too quick to believe FEPs at the expense of the participants.

The statistics on outcomes are inconclusive on the issue of fact-finder neutrality. While most estimates place the ratio of fact-finding decisions favorable to the agencies and to the participants as roughly even, outcomes on appeal are much more favorable to participants. Depending on one's perspective, this could be taken as evidence of either bias or fairness. State officials maintain that the roughly even success rate of the agencies and participants at the agency level shows that fact finders can be disinterested arbiters. Advocates argue that the agencies' high reversal rate shows the fact finders are prejudiced against participants. Improvements in the collection of data on fact findings at the agency level should shed more light on this issue. Additionally, the state should continue to scrutinize the financial incentives embedded in the contracts with the agencies in order to minimize the possibility that agencies can profit by denying services and assistance to clients.

- **The centralized appeal process has been a critical counter-weight to the decentralized process at the agency level.**

Statistics gathered by the State show that a high proportion of fact-finding decisions from Milwaukee County were overturned on appeal. At the very least, this suggests that more resources should be put into training agency staff — both FEPs and fact finders — in W-2 policies and procedures. The high reversal rate also raises concerns about how the system treats participants. Because state law does not allow for retroactive cash assistance or continuation of benefits pending resolution of a case, participants who must await the outcome of an appeal in which they ultimately prevail may be subjected to considerable financial hardship. These concerns suggest that efforts should be made to identify the issues that are most commonly the

basis for an appeal as well as those that most often result in reversals of agency actions. Collecting data that better track appeal outcomes and that are cross-referenced to specific issues would be an important first step. Additionally, stepped up efforts should be made to track the agencies' record of compliance with DHA rulings.