STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES
BOARD OF APPEALS

In Re:	)	Docket No. 10-2018-PA-14126
	)	
[APPELLANT'S NAME]	)	**REVIEW DECISION AND FINAL ORDER**
	)	
	)	
Appellant	)	Temporary Assistance for Needy Families

I. NATURE OF ACTION

1. An administrative hearing was conducted by Administrative Law Judge (ALJ) David Dunlap on December 5, 2018. An *Initial Order* was issued on December 21, 2018, which concluded that the Department of Social and Health Services (Department) had correctly assessed a $[AMOUNT 1] overpayment against the Appellant under the *Temporary Assistance for Needy Families* (TANF) program. However, the ALJ ruled that the Department was equitably estopped from collecting the overpayment based on the application of Washington Administrative Code (WAC) 388-02-0495.

2. The Department filed a petition for review of the *Initial Order* on January 3, 2018, with the Department's Board of Appeals (BOA) challenging the ALJ's conclusion that the Department was equitably estopped from collecting the established TANF overpayment. The Appellant filed a response to the petition for review with the BOA on January 15, 2019, continuing to assert that her [CHILD] resides with her a majority of the time.

3. Based on the following findings of fact and conclusions of law, the *Initial Order* is **affirmed** as to the establishment of the $[AMOUNT1] TANF overpayment and is **reversed** as to the conclusion that the Department is *equitably estopped* from collecting the overpayment. The Department is entitled to collect the assessed TANF overpayment.

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II. FINDINGS OF FACT

1. On March 2, 2017, the Appellant, born [DOB 1], applied for cash and food assistance for herself and for her minor [CHILD], [NAME 1], born [DOB 2].[1] The cash benefit is called Temporary Assistance for Needy Families (TANF). The Appellant reported that she had no income, her monthly rent was $[AMOUNT 2], and that [NAME 1] used to receive Supplemental Security Income (SSI) which stopped on January 1, 2017.[2]

2. On March 2, 2017, the Department approved the Appellant's Assistance Unit (AU) of two for Basic Food Assistance, with an initial allotment of $[AMOUNT 3][3] and a recurring monthly allotment of $[AMOUNT 4].[4]

3. On March 2, 2017, the Department sent a letter to the Appellant, informing her that her application for TANF benefits was pending her completion of the required WorkFirst orientation.[5]

4. On March 8, 2017, the Department sent a TANF approval notice to the Appellant, informing her that her Assistance Unit, which included herself and [NAME 1], was being approved for TANF benefits with an initial allotment of $[AMOUNT 5] and a recurring monthly allotment of $[AMOUNT 6].[6]

5. On August 10, 2017, the Appellant submitted a mid-certification review (MCR) to the Department.[7] In the MCR, the Appellant reported that [NAME 1] was no longer receiving SSI payments and that her monthly rent had increased to $[AMOUNT 7].[8] As a result, the Department increased the Appellant's TANF benefits to $[AMOUNT 8] per month, effective September 1, 2017.[9]

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[1] Exhibit 5.
[2] *Id.*
[3] Although the Appellant reported a gross monthly income of $[AMOUNT9], the Department calculated her level of benefits by using a gross monthly income of $[AMOUNT10].
[4] Exhibit 6.
[5] Exhibit 7.
[6] Exhibit 8.
[7] Exhibit 9.
[8] *Id.*
[9] Exhibit 10.

6. On August 1, 2018, the Department received information from the Department's Division of Child Support (DCS) that [NAME 1] had been residing primarily with his [PARENT 2], [NAME 2], since July 2015.[10]

7. On August 16, 2018, the Department sent a letter to the Appellant, informing her that it had received conflicting information about the residence of [NAME 1] and that she would need to submit verification of her household composition to the Department by August 26, 2018.[11]

8. On August 16, 2018, the Department referred the Appellant's case as a Fraud Early Detection (FRED) referral to the Department's Office of Fraud and Accountability.[12]

9. On August 24, 2018, the Department received a statement from [NAME 3], the Appellant's landlord, which listed the Appellant and [NAME 1] as the individuals living at the address.[13]

10. On August 28, 2018, the Department sent a letter to the Appellant informing her that TANF benefits would end on September 30, 2018, because she had not provided verification that [NAME 1] was residing with her.[14] The Department also informed the Appellant that she would still need to complete a MCR even if she submits verification of [NAME 1]'s residence to the Department before September 30, 2018.[15]

11. On August 30, 2018, Administrative Law Judge (ALJ) Eliza Manoff issued an administrative decision titled *Final Order* finding that [NAME 1] had resided solely with [NAME 2] since at least July 2015.[16] The *Final Order* was based on a hearing conducted on August 28, 2018, at which the Appellant failed to appear and was held in default.[17] ALJ Manoff

[10] Exhibit 11.
[11] Exhibit 12.
[12] Exhibit 13.
[13] Exhibit 14.
[14] Exhibit 15.
[15] *Id.*
[16] Exhibit 22.
[17] *Id.*

based her decision on [NAME 2]'s uncontroverted, sworn testimony and three signed collateral statements - from his landlord, from his neighbor, and from his friend - that all stated that [NAME 1] had resided with [NAME 2] for the last three years.[18] The *Final Order* did not establish a child support obligation against [NAME 2] because ALJ Manoff concluded that [NAME 2] was [NAME 1]'s custodial parent.[19]

12. The Department subsequently received verification from [NAME 4], [NAME 2]'s landlord, that [NAME 1] was residing primarily with [NAME 2] for the last three years.[20] [NAME 4]'s statement, dated August 2, 2018, stated "I [NAME 4] witnessed [NAME 1] living here for the last three years."[21]

13. Investigator Scotti Bower has an associate degree in criminal justice and a bachelor's degree in interdisciplinary studies.[22] She worked in the corrections field for fifteen years.[23] She has been an investigator in the FRED Unit since May 2015.[24]

14. On September 19, 2018, FRED Investigator Scotti Bower contacted [NAME 3], the Appellant's landlord, to clarify her previous statement that the Appellant and [NAME 1] resided at the same address.[25] On September 28, 2018, [NAME 3] submitted an e-mail to Ms. Bower stating that she "saw no evidence of any [CHILD] at this apartment ([NAME 1] [last name redacted])."[26]

15. On September 20, 2018, the Department mailed another notice to the Appellant informing her that the Department had received the statement from her landlord, but that additional verification was required because the Department had received conflicting

[18] *Id.*
[19] *Id.*
[20] Exhibit 21.
[21] *Id.*
[22] Testimony of Ms. Bower.
[23] *Id.*
[24] *Id.*
[25] Exhibit 18
[26] Exhibit 20, p. 1.

information.[27] The Department's verification request included a blank Statement from School form (DSHS 14-223).[28]

16. On September 25, 2018, Investigator Bower received [NAME 1]'s school records showing [NAME 1]'s home address as that of the Appellant's address.[29] Ms. Bower contacted [NAME 2] and shared with him what the school records stated regarding [NAME 1]'s residence. [NAME 2] responded that the Appellant asked if she could enroll [NAME 1] in school and he allowed this because he is trying to get along with her. [NAME 2] indicated that he would update [NAME 1]'s school records to accurately reflect that [NAME 1] is living with him.[30]

17. On September 25, 2018, [NAME 2] informed Ms. Bower that [NAME 1] has lived with him for three years and stays with the Appellant one or two days per month.[31]

18. On October 2, 2018, Investigator Scotti Bower completed a FRED report, finding that [NAME 1] had not resided with the Appellant since July 2015.[32]

19. Department records show that the Appellant received the following TANF amounts during the alleged overpayment period:

3/2017	$[AMOUNT 11]
4/2017	$[AMOUNT 12]
5/2017	$[AMOUNT 12]
6/2017	$[AMOUNT 12]
7/2017	$[AMOUNT 12]
8/2017	$[AMOUNT 12]
9/2017	$[AMOUNT 8]
10/2017	$[AMOUNT 8]
11/2017	$[AMOUNT 8]
12/2017	$[AMOUNT 8]
1/2018	$[AMOUNT 8]
2/2018	$[AMOUNT 8]
3/2018	$[AMOUNT 8]
4/2018	$[AMOUNT 8]
5/2018	$[AMOUNT 8]
6/2018	$[AMOUNT 8]
7/2018	$[AMOUNT 13]

[27] Exhibit 17.
[28] Exhibit 17, p. 2.
[29] Testimony of Ms. Bower; Exhibit 18, p. 2; and Exhibit B, p. 1.
[30] Exhibit 18, p. 2.
[31] Exhibit 18, p. 3.
[32] Exhibit 18, p. 1.

8/2018	$[AMOUNT 13]
9/2018	$[AMOUNT 13]
Total	$[AMOUNT 1][33]

20. The Appellant did not dispute the amounts of the TANF benefits issued to her by the Department.

21. By letter dated October 1, 2018, the Department informed the Appellant that she had been overpaid $[AMOUNT 1] in TANF benefits received from March 2017, to September 2018.[34] This letter also included an explanation of the Appellant's administrative hearing rights to challenge the assessed TANF overpayment.[35]

22. On October 12, 2018, the Appellant requested an administrative hearing.[36]

23. The Appellant last resided with [NAME 2] in 2002.[37] Due to an incident of domestic violence, the Appellant obtained a no-contact order against [NAME 2].[38]

24. Pursuant to a note from [DOCTOR 1], [NAME 1]'s health care provider, the Appellant has accompanied [NAME 1] to "most if not all of his numerous" health care appointments since [NAME 1] was [AGE] years old.[39]

25. Pursuant to a sworn statement from [NAME 5], the Appellant's [RELATIVE 1], "[APPELLANT'S NAME] is the only individual with custody of [NAME 1], to my knowledge, from birth to present."[40] However, [NAME 5] did write in the same statement, "Recently [NAME 1] is spending more time with his [PARENT 2] because his residence is within walking distance to his school."[41]

26. The Appellant has not worked since 2015, due to a shoulder injury.[42]

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[33] Exhibit 1.
[34] *Id.*
[35] *Id.*
[36] Exhibit 4.
[37] Testimony of the Appellant.
[38] *Id.*
[39] Exhibit A, p. 9.
[40] Exhibit D, pp. 5-6.
[41] *Id.*
[42] Testimony of the Appellant.

27. The Appellant has resided at her current residence for over 9 years.[43]

28. The Appellant testified that [NAME 1] began spending time with his [PARENT 2] in 2017.[44] She claims that [NAME 1] has been going back and forth between her residence and [NAME 2]'s residence since then.[45] The Appellant was unsure how many nights [NAME 1] resides with her per month.[46] The Appellant asserts that [NAME 1] has clothes at her residence and at [NAME 2]'s residence.[47]

29. The Appellant's income is comprised of TANF benefits, Food Assistance benefits, and financial support received from [NAME 5].[48] The Appellant has applied for Social Security Disability benefits, but her application was denied.[49] She currently pays $[AMOUNT 14] per month for rent and receives housing assistance form the [CITY 1] Housing Authority in the amount of $[AMOUNT 15] per month.[50]

III. CONCLUSIONS OF LAW

Jurisdiction, Standard of Review, and Standard of Proof

1. The petition for review of the *Initial Order* was timely filed and is otherwise proper.[51] Jurisdiction exists to review the *Initial Order* and to enter the final agency decision.[52]

2. In conducting this review, the undersigned's authority is the same as the ALJ's with the exception that the undersigned is required to consider the ALJ's ability to observe the witnesses, if applicable.[53]

3. The undersigned has reviewed the audio record of the hearing, the documents admitted as exhibits, the *Initial Order,* the Department's petition for review, and the Appellant's

[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] WAC 388-02-0580.
[52] WAC 388-02-0217(3) and 388-02-0560(1).
[53] WAC 388-02-0600(1). The parties attended the hearing by teleconference call and so the ALJ was not able to "physically observe" the parties while they testified under oath during the hearing.

response to determine the adequacy and appropriateness of the *Findings of Fact* made by the ALJ in the *Initial Order.* After review, the undersigned finds that those *Findings of Fact,* with minor amendments and supplements, are supported by substantial evidence based on the entire record. For this reason, the *Findings of Fact,* with minor amendments and supplements, are adopted and are incorporated by reference into this decision as set forth above.[54]

4. It may help to explain briefly at the outset the unique characteristics and specific limitations of the administrative hearing process. An administrative hearing is held under the auspices of the *executive branch of government* and neither the ALJ nor the Review Judge enjoy the broad equitable authority of a Superior Court Judge within the *judicial branch of government.* It is well settled that administrative agencies, such as the OAH and the Board of Appeals, are creatures of statute, without inherent or common law powers, and, consequently, they may exercise only those powers expressly granted in enabling statutes or necessarily implied therein.[55] It is also well settled that an ALJ's or a Review Judge's jurisdictional authority to render a decision in an administrative hearing is limited to that which is specifically provided for in the authorizing statute(s) or Washington Administrative Code (WAC) provision(s).[56] This is because ALJs and Review Judges must first apply the Department rules adopted in the WAC to resolve an issue.[57] If there is no Department WAC governing the issue, the ALJ and the Review Judge must resolve the issue on the basis of the best legal authority and reasoning available, including that found in federal and Washington constitutions, statutes and regulations, and court decisions.[58] The ALJ and the Review Judge may not declare any rule invalid, and challenges to the legal validity of a rule must be brought *de novo* in a court of proper jurisdiction.[59]

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[54] RCW 34.05.464(8).
[55] *Skagit Surveyors & Eng'rs, L.L.C. v. Friends of Skagit County*, 135 Wn.2d 542, 558 (1998), and *Taylor v. Morris,* 88 Wn.2d 586, 588 (1977). *See also* WAC 388-02-0216 which provides, "The authority of the ALJ and the review judge is limited to those powers conferred (granted) by statute or rule. The ALJ and the review judge do not have any inherent or common law powers."
[56] *Id.*
[57] WAC 388-02-0220(1).
[58] WAC 388-02-0220(2).
[59] WAC 388-02-0225(1).

5. The ALJ had jurisdictional authority to adjudicate a Department claim for overpayment of TANF benefits.[60] Although the Appellant did not timely petition for review of the ALJ's conclusion that the Appellant was overpaid TANF cash benefits in the amount of $[AMOUNT 1], she continued to raise her defense that [NAME 1] resided with her a majority of the time in her response to the Department's petition for review. For this reason, the undersigned will first address the validity of the alleged TANF overpayment.

6. The ALJ provided a reasoned analysis as to why the evidence in the hearing record proves, by a preponderance of the evidence, [NAME 1] resided with his [PARENT 2] a majority of the time at issue in this matter. The most critical evidence is the *Final Order* entered by the OAH on August 30, 2018. In that order, the ALJ concluded that [NAME 2], rather than the Appellant, was the custodial parent of [NAME 1] since at least July of 2015.[61] Although the ALJ in this case concluded that the *Final Order* entered in the Division of Child Support case did not have "precedential value," the *Final Order* does collaterally estop the Appellant from challenging, in this proceeding, the custodial decision made in that case.

Collateral Estoppel or Issue Preclusion

7. If an issue has been previously decided by a court of competent jurisdiction, previous litigation may preclude the necessity to decide that same question in a later proceeding. Such issue preclusion or collateral estoppel requires that four requirements be met: 1) the issue in the prior adjudication must be identical to the issue currently presented for review; 2) the prior adjudication must be a final judgment upon the merits; 3) the party against whom the doctrine is asserted must have been a party to, or in privity with a party to, the prior adjudication; and 4) barring the relitigation of the issue will not work an injustice on the party against whom the doctrine is applied.[62]

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[60] RCW 74.08.080(1)(a).
[61] *See* Exhibit 22, *Final Order,* p.3. *Conclusion of Law 5.3,* entered under Docket No. [DOCKET NUMBER], on [DATE 2].
[62] *State v. Harrison,* 148 Wn.2d 550, 561, 61 P.3d 1104 (2003), *citing Nielson v. Spanaway Gen. Med. Clinic, Inc.,* 135 Wn.2d 255, 262-63, 956 P.2d 312 (1998).

8. The physical custodianship of [NAME 1] raised by [NAME 2] as a defense in the child support hearing held on August 28, 2018, is identical to the defense raised by the Appellant to the assessed TANF overpayment in this case. The first of the *collateral estoppel* requirements is met in this case.

9. There is no evidence that any party timely appealed the *Final Order* entered on August 30, 2018, or that the Appellant petitioned to vacate the default entered against her in that *Final Order.* The *Final Order* became a final judgment on the merits of physical custodianship of the child by operation of law.[63] The second requirement for *collateral estoppel* is met in this case.

10. The Appellant was listed as a party in the *Final Order* and was served with notice of the August 28, 2018 hearing. The Appellant was a party to that proceeding and resulting *Final Order.* The Appellant had a stake in that child support proceeding and an incentive to participate based, not only on what child support obligation could be established against [NAME 2], but also because a successful claim by [NAME 2] that he was the primary custodian of [NAME 1] since at least March 2017 would undermine the Appellant's claim for TANF benefits for that time period and create a basis for an overpayment being assessed against her. The third requirement of *collateral estoppel* is met in this case.

11. The Appellant provided no reason why she did not appear for the August 28, 2018 child support hearing which decided the physical custodianship of [NAME 1] for a majority of the time from at least July 2015 through the date of the hearing. If the Appellant believed she was at some level of risk in attending the hearing, she could have arranged to attend telephonically or from a remote undisclosed site. Furthermore, if she was concerned about possible domestic violence or otherwise felt threatened by any form of involvement with [NAME 2] through the child support establishment hearing process, she could have petitioned

[63] WAC 388-14A-3110(9)(c).

the Department to be excused from cooperating with the Division of Child Support pursuant to WAC 388-14A-2045.

12. The Appellant applied for and received public assistance funds for her child and, in doing so, assigned her right to child support from the child's other parent pursuant to WAC 388-422-0005(2) and 388-14A-2030(1). An applicant for public assistance for a child cannot expect to receive such assistance and then not cooperate in establishing the "non-custodial parent's" support obligation for the child. Such administrative establishment of child support will often involve determining who actually has primary physical custody of the child when the alleged "non-custodial" parent raises the defense of physical custody of the child in response to the attempt to administratively establish a child support obligation for that child. It is exactly this system of child support assignment and administrative establishment of support that helps ferret out who exactly has primary physical custody of a child and what each parent's economic responsibility is for the child.

13. As a recipient of public assistance for a child, the Appellant is required to keep the Department apprised of her current address.[64] Based on this address information, the Appellant was both served with notice of the child support hearing held on August 28, 2018, and received a copy of the *Final Order* holding her in default and concluding that [NAME 2], and not her, was the primary physical custodian of [NAME 1]. Attachments to the *Final Order* explained exactly what each party had to do if they did not agree with the decision or wished to have a default order entered against them vacated. If the Appellant did not agree with the *Final Order's* conclusion that she was not the primary physical custodian of [NAME 1] or wished to have the default against her vacated, she was given the information to do that. For this reason, the Appellant cannot now claim that barring relitigation of the physical custody issue would work an injustice to her. The fourth and final requirement of *collateral estoppel* is met in this case.

[64] *See* WAC 388-406-0010(6)(a) and 388-472-0005.

14. Even if the *Final Order* had never been entered, the evidence provided by [NAME 2] and others through the FRED investigation outweigh the somewhat vague evidence provided by the Appellant. For this reason, the *Initial Order's Conclusion of Law 5.5* is adopted by reference into this decision. The ALJ did not err as a matter of law in finding [NAME 1] resided primarily with his [PARENT 2] during the period claimed in the TANF overpayment assessment. For this reason, the affirmation of the TANF overpayment by the ALJ cannot be changed on review.

Equitable Estoppel as a Defense in a TANF Overpayment Case

15. In the petition for review, the Department asserts that the ALJ erred in concluding the Department is *equitably estopped* from collecting the assessed TANF overpayment. A defense to a claim based on the detrimental reliance of one party to the actions or representations of the claiming party is commonly known as *equitable estoppel.* The applicable regulations allow the ALJ to consider the defense of *equitable estoppel* against the Department when the facts of the case indicate that *equitable estoppel* applies to a party in the hearing.[65]

16. The regulation addressing the defense of *equitable estoppel,* references the defense as defined by case law.[66] This reference requires consideration of the precedents set by reported Washington state appellate case law regarding the *equitable estoppel* defense and review of the relevant case law is essential in rendering a decision in this case.

17. The doctrine of *equitable estoppel* is applicable when a party, by their acts or representations, causes another to change his/her position to his/her detriment. In such a case, the party who performs such acts or makes such representations will be precluded from asserting to their own advantage the conduct or forbearance of the other party. *Hartman v. Smith,* 100 Wn.2d 766, 769, 674 P.2d 176 (1984). The party who asserts equitable estoppel must establish:

> *(1) an admission, statement, or act inconsistent with the claim afterward asserted; (2) action by the other party on the faith of such admission, statement, or act; and (3)*

[65] WAC 388-02-0495.
[66] WAC 388-02-0495(1).

> *injury resulting from allowing the first party to contradict or repudiate [such admission, statement, or act].*

In re Hunter, 52 Wn. App. 265, 758 P.2d 1019 (1988).

18. A party asserting equitable estoppel against either the government or a private party must prove each element of estoppel with clear, cogent, and convincing evidence. *Kramarevcky v. DSHS*, 122 Wn.2d 738, 863 P.2d 535 (1993). The relevant regulation sets the standard of proof as *clear and convincing.*[67] Consistent with the decision in the *Hunter* case, the Washington Supreme Court in the *Kramarevcky* case set out the elements of equitable estoppel as: (1) a party's admission, statement or act inconsistent with its later claim; (2) action by another party in reliance on the first party's act, statement or admission; and (3) injury that would result to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission. *Kramarevcky,* supra at 743. The court found that equitable estoppel against the government is not favored and that the courts should be most reluctant to find the government equitably estopped when public revenues are involved. *Kramarevcky*, supra at 744. For this reason, the court found that two additional requirements must be met when the defense is asserted against the government: equitable estoppel must be necessary to prevent manifest injustice, and the exercise of governmental functions must not be impaired as a result of the estoppel. *Kramarevcky,* at 743.

19. The Department's *equitable estoppel* rule restates the elements set forth by the court in *Kramarevcky,* but also attempts to clarify each element by example. The rule is reproduced below:

> (1) Equitable estoppel is a legal doctrine defined in case law that may only be used as a defense to prevent the department from taking some action against you, such as collecting an overpayment. Equitable estoppel may not be used to require the department to continue to provide something, such as benefits, services, or a license, or to require the department to take action contrary to a statute.
>
> (2) There are five elements of equitable estoppel. The standard of proof is clear and convincing evidence. You must prove all of the following:

[67] WAC 388-02-0495(2).

(a) The department made a statement or took an action or failed to take an action, which is inconsistent with a later claim or position by the department. For example, the department gave you money based on your application, then later tells you that you received an overpayment and wants you to pay the money back based on the same information.

(b) You reasonably relied on the department's original statement, action or failure to act. For example, you believed the department acted correctly when you received money.

(c) You will be injured to your detriment if the department is allowed to contradict the original statement, action or failure to act. For example, you did not seek help from health clinics or food banks because you were receiving benefits from the department, and you would have been eligible for these other benefits.

(d) Equitable estoppel is needed to prevent a manifest injustice. Factors to be considered in determining whether a manifest injustice would occur include, but are not limited to, whether:

(i) You cannot afford to repay the money to the department;

(ii) You gave the department timely and accurate information when required;

(iii) You did not know that the department made a mistake;

(iv) You are free from fault; and

(v) The overpayment was caused solely by a department mistake.

(e) The exercise of government functions is not impaired. For example, the use of equitable estoppel in your case will not result in circumstances that will impair department functions.

(3) If the ALJ concludes that you have proven all of the elements of equitable estoppel in subsection (2) of this section with clear and convincing evidence, the department is stopped or prevented from taking action or enforcing a claim against you.

20. The ALJ ruled that the Department's current claim for return of TANF funds is inconsistent with the initial payment of the TANF benefits and, for this reason, the first element, (2)(a), of the *equitable estoppel* defense has been proven to exist in this case. This conclusion has a certain embracing simplicity to it, but if unconditionally accepted, the first element of the defense would exist in every overpayment case as an overpayment, by definition, is the payment of a benefit and then the reclaiming of that same benefit. The example provided in the rule for the first element of the defense is that "the department gave you money based on your application, then

later tells you that you received an overpayment and wants you to pay the money back ***based on the same information***." (Emphasis added). In the *Kramarevcky* case, the Department erroneously paid public assistance to Mr. Kramarevcky based on accurate family and income information he had provided to the Department and the Department later claimed this constituted an overpayment based on the *same information.* What the Department did not do in the case at hand is find eligibility and issue TANF benefits to the Appellant with the knowledge that [NAME 1] resided a majority of the time with his [PARENT 2]. The claim for return of the TANF benefits is *not based on the same information* as provided in the Appellant's application for the benefits. Therefore the first element of the defense, (2)(a), of *equitable estoppel* has not been proven by clear and convincing evidence.

21. The second element of the defense, (2)(b), requires addressing whether the Appellant reasonably relied on the Department's decision to award TANF cash assistance in the amount issued by accepting and retaining such a benefit. The ALJ concluded that the Appellant reasonably relied on receiving TANF benefits "because she believed that [NAME 1] was residing with her during that time." This conclusion is in error based on the evidence in the hearing record and the *Final Order* entered in the child support hearing addressed above. The application form for TANF benefits specifically requests that the Appellant "list everyone *in your household*." (Emphasis added). The award letters issued to the Appellant clearly list [NAME 1] as a member of the Appellant's assistance unit and based the award of TANF on his presence in the Appellant's household. Any assertion that a TANF applicant can reasonably believe they are entitled to TANF benefits for a child based on less than majority physical custodianship of the child is not valid and rejected. No one knew better than the Appellant and [NAME 2] where [NAME 1] was primarily residing during the assessed overpayment period. At the very least, the Appellant had an obligation to accurately report exactly how many days a month [NAME 1] was actually in her household (physical custody) and to timely ask the Department what effect this "shared custody" arrangement would have on her TANF eligibility for the child. The undersigned recognizes that the

Appellant may have been the primary custodian of [NAME 1] for most of his life and continues to have a significant parental role as evidenced by her sole efforts in taking [NAME 1] to medical appointments and her active participation in [NAME 1]'s schooling. However, these facts do not create a valid basis for claiming primary custodianship of the child for TANF eligibility purposes when, in 2017, [NAME 1] began to spend a majority of his time in his [PARENT 2]'s physical custody. Based on the significant period of time [NAME 1] resided with his [PARENT 2] and the Appellant's failure to disclose this living arrangement with the Department, the Appellant could not "reasonably rely" on the Department's issuance of TANF benefits to her for the child. The second element, (2)(b), of the defense has not been proven to exist by clear and convincing evidence in this case.

22. The ALJ misstates the effect and purpose of the third element, (2)(c), of the equitable estoppel defense. The ALJ's analysis regarding the fact the Appellant has no income and repayment of the overpayment would cause financial injury to her belongs under the fourth element of the defense (*manifest injustice*) and not under the third element of the defense (*detrimental injury*). Under the third element of the *equitable estoppel* defense, the Appellant would need to show that she would be injured to her detriment if the Department were to prevail in the overpayment claim. In other words, the Appellant needs to show that she "gave up" or "forwent" some other benefit or choice of action based on the Department's erroneous distribution of TANF cash assistance benefits for the period of the assessed overpayment. This is often the most difficult element for an appellant to prove by clear and convincing evidence. The ALJ's analysis does not address the necessary requirements of the element under relevant case law.

23. The court in *Kramarevcky* ruled that to establish "injury," the party asserting the defense must show more "than the mere obligation to repay." *Kramarevcky,* at 747. The party "must show a detrimental change in position." *Id.* The appellant in that case, Mr. Kramarevcky, could have qualified for Refugee Assistance benefits but for the Department's error in initially finding him eligible for benefits under the Family Independence Program. In the accompanying

case, the court found that the appellant, Ms. Jinneman, could have sought medical care alternatives but for the Department's initial error in finding her eligible for medical assistance. In other words, the party asserting *equitable estoppel* must show that they gave up or forwent some other alternative in reliance on the representations or actions of the Department.

24. The Appellant did not provide at hearing any evidence that she could have applied for, or would have been eligible to receive, some other form of assistance (public or private) had the TANF benefits not been distributed to her for the relevant time period in the amount that was issued.[68]

25. The Appellant must prove that the defense of *equitable estoppel* is necessary to prevent manifest injustice under the facts of her case. To prove manifest injustice would occur if the Department is not equitably estopped from collecting the overpayment, certain factors need to be considered which may include, but are not limited to: the Appellant cannot afford to repay the money to the Department; the Appellant gave the Department timely and accurate information when required; the Appellant was unaware that the Department made a mistake in issuing the TANF benefits; the Appellant was free from fault; and the overpayment was caused solely by a Department mistake.

26. As addressed previously in the second element of the defense, a preponderance of the evidence supports the ultimate finding that [NAME 1] did not reside with the Appellant a

[68] Although the defense of equitable estoppel was not set forth specifically as an issue for the hearing in the *Notice Of Hearing* issued on [DATE 1], when the ALJ recognized that *equitable estoppel* may be applicable in this case, it would have been helpful if the ALJ had specifically inquired during the hearing as to what the Appellant would, or could, have done if she had not received the TANF cash assistance. The undersigned notes that the Division of Child Support (DCS) equitable estoppel defense regulation at WAC 388-14A-6500(2) specifically obligates the ALJ to develop the record so as to address each of the elements of the defense when "the facts indicate" the defense may be applicable. WAC 388-02-0495 is less clear in assigning this responsibility to the ALJ. Because the equitable estoppel defense was not specifically raised at the hearing, but addressed in the *Initial Order,* the undersigned cannot simply conclude that the Appellant had not proven the injury (*detrimental reliance*) element by clear and convincing evidence and reverse the ALJ's decision on that basis. At the very least, the case would need to be remanded for a supplemental hearing to allow the Appellant to provide testimony as to what she gave up or forwent to her detriment when she relied on the Department's issuance of the TANF payments from March 2017 through September 2018. However, because the Appellant has failed to prove *other* elements of the defense by clear and convincing evidence, the matter can be decided without a remand to determine whether the third element of the defense has been proven by clear and convincing evidence.

majority of the time during the assessed overpayment period and the Appellant was aware of this fact. The Appellant's failure to report this critical fact to the Department upon her application and renewal of TANF benefits denied the Department information that could have led to a denial of TANF to her for the child and prevented the assessed TANF overpayment.

27. The Appellant's failure to initially provide accurate information to the Department related to how often she had [NAME 1] in her physical custody and in her "household," does not leave her with the requisite "clean hands" to assert the *equitable estoppel* defense against the Department's overpayment claim. The Appellant failed to timely provide the Department with relevant and complete information and, thus, was not free from fault in causing the erroneous issuance of TANF cash benefits during the overpayment period. For this same reason, the evidence in the hearing record does not support a finding that the issuance of the TANF cash benefits was caused solely by a Department mistake. Indeed, the Department made no mistake based on the information provided by the Appellant through the TANF application process. The Appellant has failed to prove by clear and convincing evidence the existence of the fourth element, (2)(d), of the *equitable estoppel* defense.

28. The assignment of a "custodial" parent's child support rights to the state in exchange for acceptance of TANF benefits for a child allows the state to proceed to establish, collect, and retain child support from the "non-custodial" parent. This process allows the state to place the responsibility for the economic support of a child where it belongs, primarily with the parents of that child. To allow a parent to receive TANF benefits for a child as if they were the primary "physical custodian" and then equitably estop the state from collecting an overpayment against that parent when it is later determined that he/she is not the primary custodian of the child simply because the TANF applicant "believed" he/she was a custodial parent, would undermine this assessment of economic responsibility for a child and the timely issuance of TANF benefits. To require the Department to determine in every case who has physical custody of a child as an absolute fact prior to issuance of TANF benefits would unduly delay the issuance of critically

needed public assistance. Such an application of the equitable estoppel defense would impair the state's ability to timely provide TANF benefits where legitimately needed and to later recover such benefits when it is finally determined that the TANF recipient was not the custodial parent of the child eligible to receive such benefits. The fifth element, (2)(e), of the *equitable estoppel* defense has not been proven by clear and convincing evidence in this case.

29. Because the Appellant is required to prove all five of the elements of the *equitable estoppel* defense by clear and convincing evidence and has failed to prove the existence of at least elements (2)(a), (b), (d), and (e) of the defense, the Department can not be estopped from collecting the assessed TANF overpayment in this case.

IV. DECISION AND ORDER

Based on the conclusions entered above, the *Initial Order* is **affirmed** as to the establishment of the $[AMOUNT 1] TANF overpayment and is **reversed** as to the conclusion that the Department is *equitably estopped* from collecting the overpayment. The Department is entitled to collect the assessed TANF overpayment.

Mailed on the 1st day of February, 2019.

JAMES CONANT
Review Judge/ Board of Appeals

Attached: Reconsideration/Judicial Review Information

Copies sent to: [APPELLANT'S NAME], Appellant
Amy Murray, Department's Representative, MS: N27-26
Office of Financial Recovery (OFR), Other, MS: 45862
Community Services Division, Program Administrator, MS: 45440
David Dunlap, ALJ, [CITY 2] OAH