

9/25/95
STATE, OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

51,147

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1017267

AUDREY MILLER,

Petitioner,

vs.

WISCONSIN DEPARTMENT OF HEALTH
AND SOCIAL SERVICES,

Respondent.

PETITION FOR REVIEW
OF AN ADMINISTRATIVE
DECISION

Case No. 95CV2488

Class Number 30607

Now comes the petitioner, Audrey Miller, by her attorney, Jack Longert, Legal Action of Wisconsin, Inc., and respectfully represents that:

1. Petitioner Audrey Miller is an adult resident of Dane County. During the time period in issue, she resided with her two minor children. The petitioner and her children were applicants for Aid to Families with Dependent Children (AFDC) benefits.

2. Respondent Department of Health and Social Services (DHSS) is an agency of the State of Wisconsin and is responsible for administering the AFDC program in Wisconsin.

3. Petitioner seeks review of a decision of the DHSS pursuant to S227.52 Wis. Stats. (1993-94) on the grounds that the decision is contrary to federal law and implementing regulations, DHSS policy, the equal protection clauses of the United States and Wisconsin Constitutions and the substantial evidence in the record.

4. In March, 1995 the petitioner requested AFDC benefits for

her children from the Dane County Department of Human Services (DCDHS). She received a notice dated April 26, 1995 from the county agency advising her that her children were not eligible for benefits because they are not deprived.

5. Pursuant to §49.50(8) Wis. Stats. (1993-94) the petitioner appealed DCDHS's decision and on June 16, 1995 a hearing was held to review the petitioner's request. At the hearing the salient issue was whether or not the children's father was an absent parent as that term is defined for AFDC purposes.

6. On July 19, 1995 a hearing examiner for the DHSS Office of Administrative Hearings issued a decision finding that the father of petitioner's children was not an "absent parent"; that the county's decision denying petitioner's request for AFDC benefits was correct; and dismissing the petition for review. See Complaint Exhibit A attached.

7. On August 1, 1995 petitioner requested a rehearing of the decision. Petitioner's rehearing request was not acted upon within 30 days, thus denied by operation of law pursuant to §227.49(5) Stats. on September 1, 1995.

8. Petitioner is aggrieved by the decisions of July 19 and September 1, 1995 in that they are contrary to the AFDC provisions of the Social Security Act and implementing regulations.

9. Petitioner is aggrieved by the aforementioned decisions in that it is contrary to DHSS policy.

10. Petitioner is aggrieved by the decisions aforementioned in that they are not based on the substantial evidence in the record or supported by the findings of fact.

WHEREFORE, petitioner prays that:

1. This Court review the July 19 and September 1, 1995 decisions of the Department of Health and Social Services;

2. Allow counsel for petitioner to submit written and if necessary, oral argument on the questions involved herein;

3. Reverse the aforementioned decisions of DHSS pursuant to §§227.57(5) and (8);

4. Award petitioner reasonable costs and attorney fees; and

5. Grant petitioner such further relief as the Court deems proper.

Dated at Madison, Wisconsin ^{21st} ~~this~~ day of September, 1995.

LEGAL ACTION OF WISCONSIN, INC.

By: *Jack Longert*
JACK LONGERT
Attorney for Petitioner
State Bar No. 01005672

P.O. ADDRESS:

LEGAL ACTION OF WISCONSIN, INC.
31 South Mills Street
P.O. Box 9686
Madison, Wisconsin 53715
(608) 256-3304



STATE OF WISCONSIN
DEPARTMENT OF HEALTH & SOCIAL SERVICES

In the Matter of

DECISION

Audrey Miller
1115 Park Circle
Sun Prairie, WI 53590

FOO-13/88414

P R E L I M I N A R Y R E C I T A L S

Pursuant to a petition filed May 8, 1995, under sec. 49.50(8), Wis. Stats., sec. 49.45(5), Wis. Stats. and HSS 225, Wis. Adm. Code, to review a decision by the Dane County Dept. of Human Services to denial of Aid to Families with Dependent Children (AFDC), Medical Assistance (MA) and Food Stamps (FS), a hearing was held on June 15, 1995, at Madison, Wisconsin. A hearing set for May 30, 1995 was rescheduled at the petitioner's request.

The petitioner's representative made hearsay objections to several exhibits presented by the county agency. Pursuant to sec. 227.45, Wis Stats. those objections are all overruled on the basis that administrative hearings are not required to strictly follow the rules of evidence.

The issue for determination is whether the petitioner is eligible for assistance based upon: (1) deprivation of her children and (2) a Job Opportunities and Basic Skills (JOBS) sanction.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:
Audrey Miller
1115 Park Circle
Sun Prairie, WI 53590

By: Jack Longert
Legal Action of Wisconsin
31 South Mills Street, P.O. Box 9686
Madison, WI 53717

Wisconsin Dept. of Health & Social Services
Bureau of Welfare Initiatives
1 W. Wilson St., Room 350
P.O. Box 7851

Madison, WI 53707-7851
By: Diana Lee, ESS1
Pat Schmid, ESS
Cindy Lease, Fraud Investigator

Complaint Exhibit A

Dane County Dept. of Human Services
1819 **Aberg** Avenue, Suite D
Madison, WI 53704

EXAMINER: Kenneth P. Adler, Attorney
Department of Health & Social Services

F I N D I N G S O - F F A C T

1. The petitioner (SSN: **398-54-7988**; **CARES** no. 9100591131) is a married resident of Dane County. She has two children - Yolanda Miller and Makeisha Penniex. Her husband is Willie Miller.
2. The petitioner was previously an AFDC recipient in Racine County. The petitioner, her husband and her two children were members of the household.
3. On February 7, 1995 the petitioner completed a Dane County shelter cost/residence verification form indicating she would be moving to 1115 Park Circle in Sun Prairie on March 1, 1995. Exhibit 11
4. On March 1, 1995 Racine County imposed a JOBS sanction against the petitioner's case. Exhibit 6
5. On March 17, 1995 Racine County issued a notice of decision informing the petitioner her AFDC, MA and FS would end effective April 1, 1995 as she was above the income limit and her JOBS sanction had not been cured. Exhibit 12
6. The petitioner applied for assistance in Dane County on March 21, 1995.
7. The petitioner completed an intake interview on March 27, 1995. At that time the county determined a front-end investigation was necessary as the petitioner had presented inconsistent information concerning her husband, Willie Miller. Exhibits 1, 10
 - a. The petitioner completed an affidavit of separation on March 27, 1995 indicating her husband continued to work in Racine County and therefore could not join her at the time of her move to Dane County. Exhibit 2
9. The county completed a home visit on April 6, 1995. Exhibit 3
10. On April 7, 1995 the county agency sent an Employment Information **Form** to Willie Miller's employer, Goodwill Industries. That form was returned to Dane County on April 20, 1995 indicating Mr. Miller had earned income from April 1994 to April 1995. Exhibit 7
11. Based upon a the review and investigation of the petitioner's case, the county agency determined the petitioner's husband was not an absent parent qualifying her children as deprived for AFDC purposes.
12. On April 26, 1995 Dane County issued a notice of decision informing the petitioner her AFDC, MA and FS applications were denied as a JOBS sanction was not cured and she was not the caretaker of an eligible child. Exhibit 13

13. As of the date of the hearing, Yolanda had left Dane County to reside with Mr. Miller in **Racine** County for the summer.
14. The petitioner and her husband have no intention of divorcing.

D I S C U S S I O N

I. AFDC Termination

The first issue to be addressed is whether **the county** correctly determined that the petitioner's children are not deprived for AFDC purposes based upon the relationship between Mr. Miller and his children.

The federal regulation defining deprivation based upon absence provides as follows:

Continued absence of the parent from the home constitutes the reason for the deprivation of parental support when:

1. The parent is out of the home,
2. The nature of the absence is such as either to interrupt or terminate the parent's functioning as a provider of maintenance, physical care, or guidance for the child, **and**
3. the known or indefinite duration of the absence precludes counting on the parent's performance of his function in planning for the present support or care of the child.

45 CFR 233.90 (c)(1)(iii)(emphasis added). The statute is conjunctive and therefore all three elements must be satisfied in order for a child to be considered deprived based upon parental absence.

When initially implemented in 1935, the AFDC program was termed Grants to States for Aid to Dependent Children. The appropriation was established "[f]or the purpose of enabling each state to furnish financial assistance, as far as practicable under the conditions in such State, to needy dependent children . . ." See ch. 531, title IV, § 401, 49 Stat. 627, Aug. 14, 1935.

Subsequently the above statute was amended to mandate a state furnish financial assistance and rehabilitation:

. . . to needy dependent children and the parents or relatives with whom they are living to help maintain and strenothen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection . . .

42 USC 601 (emphasis added)

Congress clearly articulated its intention that the AFDC program would cover "principally families with female heads who are widowed, divorced or deserted." S. Rep. No 528, 74 Congress 1st Sess. p. 17 (1935) Accordingly, the **Congress** undoubtedly contemplated desertion or divorce as the classic type of situation

where a child was "deprived of parental support or care by reason of the . . . continued absence from home . . . of a parent." Id.

The first requirement for AFDC deprivation listed at 45 CFR 233.90 (c)(1)(iii) is that the parent be out of the home. There was no testimony presented in this case to indicate to the contrary. Therefore, the first element is satisfied.

The second element indicates that the nature of the absence must be such as to either interrupt or terminate the parent's functioning as a provider of maintenance, physical care, or guidance for the child. The nature of the father's absence in this case does not satisfy this section when read in conjunction with the purpose of the AFDC program as defined above. Originally, the absence contemplated was permanent, such as in death or desertion, or antagonistic such as in divorce. In those cases the parent could not be counted on to provide for maintenance, physical care or guidance. More recently, situations such as joint custody have resulted in a finding of deprivation even though both parents visit the child. However, the nature must still be such as to interrupt or terminate the parent's functioning as a provider of maintenance, physical care, or guidance of the child.

The petitioner resides in Dane County and her husband remains in Racine County. Her representative asserted this arrangement prevents Mr. Miller from providing physical care and guidance for his children. However, the petitioner testified her husband is involved in the lives of her children. She indicated that if she had any trouble with her children she would contact him at any time. She had no doubt he would assist her. She testified he feels a responsibility to both of his children and sends money so they may purchase clothing, etc. as is necessary.

There is no reason Mr. Miller cannot provide for maintenance of his children, guide them or provide physical care for them. He has a full-time job at Goodwill Industries and therefore could support his children. When questioned at hearing, the petitioner indicated she could count on Mr. Miller, and his father, to help with any problems with her children. He is therefore willing and able to guide his children. Finally, the petitioner testified at hearing that Yolanda had gone to live with her father during the summer in Racine. This is evidence of the ability to provide physical care for his children. Therefore I conclude the nature of Mr. Miller's absence does not prevent him from involving himself in the lives of his children.

The third element requires that the known or indefinite duration of the absence precludes counting on the parent's performance of his function in planning for the present care and support of his or her child. Again, to define "duration" it is instructive to review the intent of the statute. While the petitioner could not confirm whether Mr. Miller would be moving to Dane County in the near future, she would not rule out this possibility. Therefore, I do not find the duration of his absence precludes counting on the performance of his function in planning for the present support and care of his children. While the petitioner stated at hearing that she did not have any idea what Mr. Miller's future role might be in planning his children's lives, such a question is not necessary to the determination.

When questioned why she remains married to Mr. Miller the petitioner testified there is no reason to obtain a divorce as she and her husband love one another. She stated they encounter stressful situations, but that is no reason to file for divorce. She indicated her husband has sent her about \$60 since she moved to Dane County.

The petitioner indicated, and the entire record reflects, her main reason for moving to Dane County was to escape the violence and crime in Racine. A second, though not persuasive, reason for the move was the desire to separate herself and her children from her husband and his family. As she has no desire or intention to divorce her husband, and one of her children has been sent to live with Mr. Miller, this second assertion simply is not supported by the record. When the petitioner was asked why she allowed her daughter to return to her father in a city she believes is unsafe, she **indicated her** husband resides with his father in a better neighborhood in Racine.

The petitioner has provided no persuasive evidence that the nature or duration of her husband's absence from her home prevents him from supporting or caring for his children. This office has previously concluded that situations where a parent has the ability and desire to care and support his children do not meet the intentions nor requirements of the AFDC program regulations.

Although the petitioner has been determined not eligible for AFDC as her children are not considered deprived, it is important to address the JOBS sanction in the event the petitioner becomes eligible for AFDC in the future.

II. JOBS Sanction

The Job Opportunities and Basic Skills (JOBS) program is an AFDC employment and training plan. Certain recipients of AFDC are required to participate in the JOBS program as a condition of receiving benefits. They must cooperate with the work program, including attending scheduled appointments. 45 CFR 250.34. A sanction is imposed when an AFDC mandatory JOBS participant fails to participate in the JOBS program. When a person fails to cooperate with the AFDC work **program**, AFDC benefits can be reduced by removing the mandatory work participant's needs from the grant. In the case of a first sanction for failing to cooperate, the grant is reduced until the mandatory participant agrees to comply. 45 CFR 250.34(a)(1)(i), AFDC Handbook, Appendix 5.7.6. The second sanction **results** in a grant reduction until the failure to comply ends, or three months, whichever is longer. 45 CFR **250.34(a)(1)(ii)**, AFDC Handbook, Appendix 5.7.6. Each subsequent sanction runs until the mandatory participant complies or 6 months, whichever is longer. 45 CFR **250.34(a)(1)(iii)**, AFDC Handbook Appendix 5.7.6.

The petitioner was enrolled in the JOBS program in Racine County. There was no representative from either the Racine County **JOBS** agency nor the Racine County economic support unit. However, Exhibit #6, submitted by the petitioner's JOBS case manager in Racine County, indicated as follows: The petitioner had been working full-time since August 15, 1994. Contact between the JOBS case manager and the economic support worker revealed conflicting stories presented by the petitioner concerning her employment. Therefore, the petitioner was scheduled for an appointment with her JOBS case manager on January 13, 1995. She appeared at that appointment and indicated she was working full time. On January 17, 1995 the petitioner met with her economic support worker and stated she was not working at all. A fact-finding appointment was scheduled for February 8, 1995.

Effective March 1, 1995 the CARES computer system indicated a first sanction had been imposed for nonparticipation.

Before a negative action is taken by a county agency, the agency must mail an adequate notice of the action at least ten days' before the effective date of the action. 45 **CFR 205.10(a)(4)(i)(A)**; 42 CFR 431.211; 7 CFR **273.13(a)(1)**; Income Maintenance Manual, 1X-G-2.2.1. It is the responsibility of the county agency to provide of copy of this notice to demonstrate that such notice was, in fact, issued by the agency within the requisite timeframe.

In addition, it is a well-established principle that a moving party generally has the burden of proof, especially in administrative proceedings. State v. Hanson, **295 N.W.2d 209**, **98 Wis. 2d 80** (Wis. App. 1980). The court in Hanson stated that the policy behind this principle is to assign the burden to the party seeking to change a present state of affairs.

In this particular case, there was no notice provided to indicate the petitioner was timely notified of the change in her case. In addition, the county in this case has not met its burden of proof supporting the imposition of the sanction. There is no evidence the petitioner failed to attend the fact-finding appointment, other than the fact a sanction was subsequently imposed. Even the petitioner's JOBS case manager asserts the imposition of the sanction "suggests Audrey Miller did not show up." Exhibit 6, page 2. Therefore, I have no way to determine whether the imposition of the subsequent sanction was correct.

C O N C L U S I O N S O F L A W

1. That the nature of the absence of the father of the petitioner's children is not such as to interrupt or terminate his functioning as a provider of maintenance, physical care, or guidance for the child.
2. That the duration of the absence of the father of the petitioner's children does not preclude counting on the performance of his function in planning for the present support or care of his children.
3. That the petitioner's children are not deprived as the required elements listed at 42 CFR **233.90(c)(1)(iii)** are not satisfied.
4. That the county agency correctly terminated the petitioner's **AFDC** case based upon the determination her children are not deprived.
5. That the petitioner did not receive timely notice of the imposition of the JOBS sanction against her case.
6. That the county agency has not met its burden of proof to support the imposition of a JOBS sanction against the petitioner's case.

NOW, THEREFORE, it is

O R D E R E D

That the matter be remanded to the county agency with instructions to remove the work program sanction from the petitioner's case effective March 1, 1995. In all other respects, the petition for review is hereby dismissed.

REQUEST FOR A NEW HEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would **change** the decision. To ask for a new hearing, send a written request to Office of Administrative Hearings, P. O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important. Or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.


Your **request** for a new hearing must be received no later than 20 days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in Sec. 227.49 of the state statutes. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than 30 days **after** the date of this hearing decision (or **30 days after a denial of rehearing, if you ask for one**). The appeal **must be served on the Department of Health and Social Services as respondent, P. O. Box 7850, Madison, WI 53707-7850.**

The appeal must **also be served on the other "PARTIES IN INTEREST"** named in this decision. The process for Court appeals is in Sec. 227.53 of the statutes.

Given under my hand at the City of
Madison, Wisconsin, this 18th
day of July, 1995.


Kenneth P. Adler, Attorney
DEPARTMENT OF HEALTH & SOCIAL SERVICES
6/15/95kpa

cc: Petitioner
Dane Co. DHS
Jack Longert, Atty - LAW

RECEIVED

JUL 19 1995

OFFICE OF ALTERNATIVE INVESTMENTS
BY *[Signature]*

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