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STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 2

DANE COUNTY

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AUDREY MILLER,

Petitioner,

v.

Case No. 95-CV-2488

WISCONSIN DEPARTMENT OF
HEALTH AND SOCIAL SERVICES, uid-:.m _.

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION
TO PETITION FOR JUDICIAL REVIEW

NATURE OF ACTION

This is an action commenced pursuant to sets. 227.52 and 227.53, Stats., to review an order of the Wisconsin Department of Health and Social Services (hereafter "department"), dated July 18, 1995, ultimately concluding that the county agency correctly terminated the AFDC case of Audrey Miller (hereafter "petitioner") based upon the determination that her children are not deprived.

QUESTION INVOLVED

Did the department legally and properly conclude that the county agency correctly terminated petitioner's AFDC case based upon the determination that her children are not deprived?

STATEMENT OF FACTS

Pursuant to a petition filed under sec. 49.45(8) and (51, Stats., and Wis. Admin. Code ch. HSS 225, to review a decision by

the Dane County Department of Human Services to deny Aid to Families with Dependent Children (AFDC), medical assistance (MA) and food stamps (FS), an administrative hearing was held on June 15, 1995. The issues for determination were whether petitioner is ineligible for assistance based upon (1) deprivation of her children and (2) a Job Opportunities and Basic Skills (JOBS) sanction.

Following this administrative hearing, the department through its hearing examiner made the following findings of fact in the decision and order of July 18, 1995 (copy attached), which is the subject of this judicial review action (decision at 2-3):

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

8. 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.

After citing appropriate federal and state authorities and addressing petitioner's arguments in support of her eligibility, the examiner dismissed the petition for review in all respects material to this action with these conclusions of law (decision at 6):

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 in 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.

Petitioner thereafter requested a rehearing under sec. 227.49, Stats., but this petition for rehearing was deemed denied by operation of law when the agency did not enter an order disposing of the petition within thirty days. Sec. 227.49(S), Stats. Petitioner now seeks judicial review and reversal of the final decision and order of July 18, 1995.

ARGUMENT

THE DEPARTMENT LEGALLY AND PROPERLY CONCLUDED THAT THE COUNTY AGENCY CORRECTLY TERMINATED PETITIONER'S AFDC CASE BASED UPON THE DETERMINATION THAT HER CHILDREN ARE NOT DEPRIVED.

- A. The administrative decision applies the correct legal standards and is consonant with the purposes of the Social Security Act.

It should be noted in passing that the JOBS sanction issue was resolved in petitioner's favor and thus is not a part of this judicial review (petitioner's brief at 3, 6). These sanctions are discussed on pages 5 and 6 of the examiner's decision and resolved in petitioner's favor under conclusions of law 5 and 6 as well as the order remanding the matter to the county agency with

instructions to remove the work program sanction from petitioner's case effective March 1, 1995.

On the issue which is the focus of this judicial review, petitioner generally maintains that the administrative decision is incorrect because petitioner's husband was improperly considered a member of the household as of March 21, 1995, and thus his income should not have been considered available. More specifically, petitioner complains that the administrative decision is contrary to law, inconsistent with state policy and prior administrative decisions and contrary to both the substantial evidence in the record and the findings of fact.

The parties are in agreement that the issue is whether the county correctly determined that 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 continued absence of a parent from the home provides:

Continued absence of the parent from the home constitutes the reason for deprivation of parental support or care when the parent is out of the home, the nature of the absence is such as either to interrupt or to terminate the parent's functioning as a provider of maintenance, physical care, or guidance for the child, and the known or indefinite duration of the absence precludes counting on the parent's performance of the function of planning for the present support or care of the child.

45 C.F.R. '§ 233.90(c) (1) (iii) (1994).

As the examiner noted, the regulation is conjunctive and, therefore, all three elements must be satisfied in order for a child to be considered deprived based upon parental absence. Continued absence alone does not entitle the family to AFDC

benefits. The parental absence must either interrupt or terminate the parent's functioning as a provider of maintenance, physical care or guidance for the child, and the duration of the absence must preclude the parent from planning for the present support or care of the child. Francis v. Com'r of Dept. of Human Services, 513 A.2d 859, 862 (Me. 1986); St., Sec. of sot. & Rehab. Serv. v. Fombv, 11 Kan. App. 2d 138, 715 P.2d 1045, 1051 (1986).

In challenging the underlying decision as inconsistent with state policy and prior administrative decisions, petitioner places considerable reliance upon the department's Income Maintenance Manual, ch. 1, Part A, S.O.O., which is appended to petitioner's brief as Exhibit C. This portion of the manual addresses joint custody cases where the natural or adoptive parents do not live together and where they have joint custody by a mutually agreed to arrangement or court order. As will become apparent from an examination and discussion of the evidence later, these circumstances simply do not exist. There is absolutely no legal barrier to establishing, consistent with any federal mandates, special eligibility standards for joint custody cases, while at the same time determining eligibility on the basis of continued absence under the three elements recited in 45 C.F.R. § 233.90(c) (1) (iii).

As for the prior administrative decisions, it is well-settled that administrative agencies are not bound by stare decisis. Nelson Bros. v. Revenue Dept., 152 Wis. 2d 746, 756, 449 N.W.2d 328 (Ct. App. 1989). The action of an administrative agency or board should not be controlled solely by the fact that there has been a previous determination of even the same issue. Dairy Employees

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Ind. Union v. Wis. E. R. Board, 262 Wis. 280, 283, 55 N.W.2d 3 (1952); Nick v. State Highway Comm., 21 Wis. 2d 489, 495, 124 N.W.2d 574 (1963). Seeming inconsistencies in individual determinations do not prove an irrational or discriminatory agency decision. Seebach v. Public Service Commission, 97 Wis. 2d 712, 727, 295 N.W.2d 753 (Ct. App. 1980). Finally, it is not within the province of the court to determine whether the findings of the agency or board are consistent with those made by it in another case. Chicago, M., St. P. & P. R. Co. v. Public Serv. Comm., 267 Wis. 402, 422, 66 N.W.2d 351 (1954). % 4

In any event, the necessary showing of absence of a parent may be challenged when there is an award of joint custody that includes shared physical custody. Eligibility may be established in the presence of joint physical custody, provided joint legal custody does not also exist. Taylor v. Taylor, 306 Md. 290, 508 A.2d 964, 974 (1986).

Petitioner also places some reliance upon two letter memoranda issued in 1976 and 1982 from the federal agency charged with the oversight and administration of the federal-state cooperative public welfare programs. Nothing contained in those transmittals requires reversal of the present administrative decision, which is correct both as a matter of law and substantial evidence in the record. Courts are the final authority on issues of statutory construction, but the federal or state agency's position, if reasonable, is entitled to some deference. Willev v. Ives, 696 F. Supp. 1388, 1391, 1396 (D. Me. 1988). The effect of the two

federal memoranda is discussed in Matter of Souder, 204 N.J. Super. 132, 497 A.2d 1258, 1263-64 (1984).

In Matter of Souder, the court emphasized that eligibility is not determined on the basis of whether an absent parent has the oportunity to exercise parental responsibility irrespective of the parent's physical presence in the home. The absence, however, must interrupt or terminate the parent's functioning as a provider of maintenance, physical care a guidance for the child, and the known or definite duration of the absence must preclude counting on the parent's performance of the function of the planning for the present support or care of the child. 497 A.2d at 1261. Frequent visits in and of themselves do not negate a finding of absence, and the absent parent must be fulfilling his parental role to disqualify the child from benefits under the AFDC program. 497 A.2d at 1264.

A child is not deprived or dependent within the meaning of 42 U.S.C. 5 606(a) and the federal regulation if the absent parent frequently visits with his children and contributes in any small way to that child's maintenance, guidance and support. If the absent parent provides any amount of physical care, maintenance or guidance to the child or children, they are ineligible for AFDC benefits. On the other hand, if the absent parent completely fails to provide any one of these three elements, the child is eligible.

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/ See Freeman v. Lukhard, 465 F. Supp. 1269, 1271 (E.D. Va. 19791, cited and discussed in Matter of Souder, 497 A.2d at 1262-63; see also Shannon v. Department of Human Services, 157 N.J. Super. 251, 384 A.2d 899 (1978), which also is discussed in Matter of Souder.

On pages 3 and 4 of the administrative decision, the examiner recites a brief history of the AFDC program and with proper citation concludes that Congress has clearly articulated its intention that the AFDC program cover principally families with female heads who are widowed, divorced or deserted. This discussion serves to place the issue in its proper perspective when applying the facts, as found by the examiner, to the federal regulation.

- B. There is substantial evidence in the record to support the examiner's findings of fact and conclusions of law.

In conclusions of law 1, 2, 3 and 4, the examiner concluded that (1) the nature of Mr. Miller's absence is not such as to interrupt or terminate his functioning as a provider of maintenance, physical care or guidance, (2) the duration of the absence does not preclude counting on the performance of his function in planning for the present support or care of his children, (3) the children are not deprived as the required elements under the federal regulation are not satisfied and (4) the county agency correctly terminated petitioner's AFDC case based upon the determination that her children are not deprived. Whether the parent's absence does interrupt or terminate his functioning as a provider of maintenance, physical care or guidance and whether the duration of the absence precludes counting on the performance of his function in planning for the present support or care of his children present questions of fact. Simone v. State, 191 N.J. Super. 228, 465 A.2d 1226, 1229 (1983).

Substantial evidence is II' "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."^{10,11} See Samens v. LIRC, 117 Wis. 2d 646, 659, 345 N.W.2d 432 (1984). The court's review is limited to determining whether the evidence is such that an agency might reasonably find as this agency did. See Bovnton Cab Co. v. ILHR Department, 96 Wis. 2d 396, 406, 291 N.W.2d 850 (1980). The court must search the record to find substantial evidence supporting the agency's decision. See Vande Zande v. ILHR Department, 70 Wis. 2d 1086, 1097, 236 N.W.2d 255 (1975). Substantial evidence does not mean a preponderance of the evidence. See Madison Gas & Elec. Co. v. Public Serv. Comm., 109 Wis. 2d 127, 133, 325 N.W.2d 339 (1982). If more than one inference reasonably can be drawn, the agency's finding is conclusive. See Vocation. Tech. & Adult Ed. Dist. 13 v. ILHR Dept., 76 Wis. 2d 230, 240, 251 N.W.2d 41 (1977).

A reviewing court does not evaluate the credibility or weight of the evidence. See Bucvrus-Erie Co. v. ILHR Department, 90 Wis. 2d 408, 418, 280 N.W.2d 142 (1979). Moreover, from an evidentiary standpoint, the weight to be accorded any particular item of evidence is a matter which lies exclusively within the province of the administrative agency. Reinke v. Personnel Board, 53 Wis. 2d 123, 139, 191 N.W.2d 833 (1971). See also Samens v. LIRC, 117 Wis. 2d at 660, where the supreme court stated: "It is not this court's function to judge the credibility of the witnesses or the weight of the evidence on review. Stacy v. Ashland County Dept. of Public Welfare, 39 Wis. 2d 595, 603, 159 N.W.2d 630 (1968)."¹¹ A court, therefore, may not second guess or overturn an

agency determination as to the weight given the evidence. Robertson Transport. Co. v. Public Serv. Comm., 39 Wis. 2d 653, 658, 159 N.W.2d 636 (1968).

Since the agency's determination concerning the weight to be accorded each item of evidence is not reviewable, the real question is whether the agency's decision is supported by substantial evidence in the record. Gateway City Transfer Co. v. Public Service Comm., 253 Wis. 397, 404, 34 N.W.2d 238 (1948). Substantial evidence does not necessarily mean the preponderance of the evidence, but rather is whether reasonable minds could reach the same conclusion as that reached by the agency. See s. Environmental Decade v. Public Service Comm., 98 Wis. 2d 682, 694-95, 298 N.W.2d 205 (Ct. App. 1980). This is not the same as a reviewing court's weighing conflicting credible evidence to determine what shall be believed. Farmers Mill of Athens, Inc. v. ILHR Dept., 97 Wis. 2d 576, 579-80, 294 N.W.2d 39 (Ct. App. 1980).

Both the examiner's findings of fact and his conclusions of law are supported by substantial evidence in the record.

The first requirement for deprivation under 45 C.F.R. § 233.90(c) (1) (iii) is that the parent be out of the home. There was no testimony presented to indicate to the contrary and, therefore, the examiner concluded that this element is satisfied.

The second element provides 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 examiner concluded that the nature of the father's absence in this case does not satisfy this section,

especially when read in conjunction with the purpose of the AFDC program. In this latter respect, the absence originally contemplated was permanent, such as in cases of death or desertion or antagonistic such as in divorce. The parent could not be relied upon to provide for maintenance, physical care or guidance under any of those circumstances.

More recently, however, a finding of deprivation under the current regulation is possible even without death, desertion or divorce. However, the nature of the absence still must be such as to interrupt or terminate the parent's functioning as a provider of maintenance, physical care or guidance of the child.

Contrary to petitioner's assertion, at no point did the examiner limit the scope of AFDC coverage to female heads of households who are widowed, divorced or completely deserted. Petitioner contends on page 10 of her brief that this earlier and narrow definition has been superseded by relevant case law and "societal events." The societal event in this case might be best defined as an abandonment of convenience,

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Mr. Miller would join her later (Tr. 5). However, she changed her story when she was told that her husband's income would be considered in any grant determination by stating that she did have problems with Mr. Miller (Tr. 6). If his income is included, the family would no longer be AFDC eligible because of excess income (Tr. 10-12, 19-20). See also finding of fact 5 which states: I¹ 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" (Tr. 14).

Petitioner applied for assistance in Dane County on March 21, 1995. Finding of fact 6. She completed an intake interview on March 27, 1995, and at that time the county determined that a front-end investigation was necessary because petitioner had presented inconsistent information concerning her husband. See finding of fact 7 and Exhibits 1 and 10. Petitioner completed an affidavit of separation on March 27, 1995, indicating that her husband continued to work in Racine County and, therefore, that he could not join her at the time of her move to Dane County. Finding of fact 8 and Exhibit 2.

Based upon the review and investigation of petitioner's case, the county agency determined that her husband was not an absent parent qualifying her children as deprived for AFDC purposes (finding of fact 11). Thereafter, by the date of the administrative hearing, June 15, 1995, petitioner's daughter, Yolanda, had left Dane County to reside with Mr. Miller in Racine County for the summer (finding of fact 13). Mr. Miller also visited petitioner at least twice since petitioner moved to Madison (Tr. 43).

Petitioner informed the county and testified herself that her husband is involved in the lives of their children (Tr. 4-5, 43ⁱⁱ, 47-52; County Economic Support Supervisor's letter to state agency, dated June 8, 1995). Petitioner asserted at the hearing that the geographical arrangement prevented Mr. Miller from providing physical care and guidance for the children but, as the examiner

noted, she also admitted that, if she had any trouble with her children, she would contact him at any time and had no doubt that he would assist her. She specifically testified that he feels a responsibility to both of his children and sends money so that they may purchase clothing and other items as necessary.

Although opportunity to exercise parental responsibility is not enough, there is no reason why Mr. Miller cannot provide for maintenance of his children or guide them and provide physical care. He has a full-time job at Goodwill Industries and earns enough income to provide financial support (Tr. 22; finding of fact 10; Exhibit 7). Again when questioned at the hearing, petitioner indicated that she could count on Mr. Miller to help with any problems with her children. Therefore, he showed a willingness and ability to guide the children within the meaning of the federal regulation. Evidence of his ability to provide physical care for his children is found in Yolanda's living with her father during the summer in Racine.

Based upon all of these factors and evidence, the examiner concluded that the nature of Mr. Miller's absence does not prevent him from involving himself in the lives of his children. Moreover, he indeed has been and is involved to a much greater extent than conceded in petitioner's recitation of the facts. The court's attention also is invited to Exhibit 4, which is an affidavit prepared and submitted by a fraud investigator for the Dane County Department of Human Services (Tr. 6-9). Although the facts contained therein are for the most part cumulative in light of the oral testimony and other evidence admitted at the hearing, it is

significant that the investigator similarly concluded that Audrey and Willie Miller were temporarily apart only for the purpose of employment and/or convenience and should be considered an intact family for eligibility determination. Although obviously this observation is not controlling on either the hearing examiner or this court, it is a reflection of what the investigator discovered by way of evidence when interviewing petitioner, Mr. Miller and petitioner's landlord.

The third element of deprivation 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 child. While petitioner did not confirm whether or not Mr. Miller would be moving to Dane County in the near future, she at least did not rule out that possibility (Tr. 21, 23, 54). Therefore, the examiner did not find that 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, resolution of such a question is not necessary to this determination.

When questioned why she remains married to Mr. Miller, petitioner gave no indication concerning any impending divorce (Tr. 21, 23; finding of fact 14) even though she suggested that the couple had problems "just like everybody else does" (Tr. 42).

Petitioner indicated and the record reflects that her main reason for moving to Dane County was to escape the violence and

crime in Racine (Tr. 23, 49). The examiner rejected a further reason when he concluded (decision at 5) :

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.

Surely the intent of the federal regulation was not to permit any family to exclude disqualifying income merely by separating geographically. This type of intentional abandonment of a parent's full-time functioning for economic gain, even when coupled with other legitimate reasons, should not be approved by the court. While deprivation is no longer limited to the traditional cases of death, desertion or divorce, it is highly questionable whether Congress or the federal agency had this case in mind when enacting and promulgating the federal statute and regulation defining deprivation based upon the continued absence of a parent from the home.

The examiner ultimately concluded (decision at 5) (emphasis added) :

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.

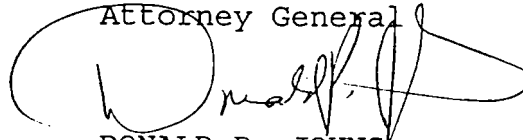
CONCLUSION

It is respectfully submitted that this court should refuse to reverse, vacate or modify upon any of the grounds or for any of the reasons set forth in the petition the department's decision and order of July 18, 1995, and thereby affirm said decision and order.

Dated this 5th day of January, 1996.

JAMES E. DOYLE

Attorney General

A handwritten signature in black ink, appearing to read "Donald P. Johns", written over the typed name and title of the signatory.

DONALD P. JOHNS

Assistant Attorney General

State Bar #100 456

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Attorneys for Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3406

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STATE OF WISCONSIN
DEPARTMENT OF HEALTH & SOCIAL SERVICES

In the Matter of

DECISION

Audrey Miller
1115 Park Circle
Sun Prairie, WI 53590

FCC-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-0. 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

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

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

I r I N D z N G s O E E A G 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 AF'DC 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
8. 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 1594 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, S 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 strensthen 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 Hr. 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 560 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 Hr. Biller, 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 JpBS agency nor the Racine County economic support unit. However, Exhibit P6, 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, 11-G-2.2.1. It is the responsibility of the county agency to provide a 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.

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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

ORDERED

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, Hadison, 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.

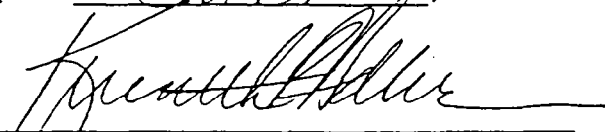
Your request for a new hearing must be received no later than 20 days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in Sec. 227.49 of the state statutes. A copy of the statutes can be found at your local library or courthouse.

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, Attv - LAW