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STATE OF WISCONSIN

CIRCUIT COURT  
Branch 2

DANE COUNTY

AUDREY MILLER,

Petitioner,

vs.

Case No. 95CV2488

WISCONSIN DEPARTMENT OF HEALTH &  
SOCIAL SERVICES,

Respondent .

**DECISION AND ORDER AFFIRMING DHSS DECISION DENYING PETITIONER  
AFDC BENEFITS**

Petitioner, Audrey Miller, seeks judicial review of a Department of Health & Social Services decision denying her AFDC benefits on the basis of her husband's income. Miller claims that her husband is an "absent parent", as defined by the Social Security Act and its implementing regulations, and that he was improperly considered a member of her household as of March 21, 1995 when she applied for AFDC assistance in Dane County.

Respondent, DHSS, maintains that the department applied the correct legal standards in determining that Ms. Miller's children were not deprived based upon the relationship between Mr. and Mrs. Miller and that there is substantial evidence in the record to support the Department's decision.

**BACKGROUND**

During the time period at issue, Ms. Miller lived in Sun Prairie, Wisconsin with her two children, Yolanda Miller and Makeshia Penniex. Prior to March 1995, petitioner, her

husband Willie Miller, and her 2 children lived in Racine County where she was an AFDC recipient. Mr. Miller was employed at Goodwill Industries in Racine, Wisconsin and earned income beginning in April 1994. Ms. Miller left Racine County and moved to Sun Prairie, Wisconsin in March 1995. On March 21, 1995, Ms. Miller applied for AFDC benefits in Dane County. She completed an intake interview on March 27, 1995 at which time it was determined that a front-end investigation was necessary. A home visit was conducted on April 6, 1995. Based upon the investigation and a review of the information acquired, the county agency determined that the petitioner's husband, Willie Miller, was not an absent parent and therefore petitioner's children were not deprived for AFDC purposes. On June 15, 1995, a fair hearing on the issue of AFDC household composition was held before a hearing examiner of the Department's Office of Administrative Hearings. On July 18, 1995, the examiner concluded that Mr. Miller was rightfully considered part of the household unit and that his income was available to the family precluding any AFDC benefits as an "absent parent." On or about August 1, 1995, petitioner requested a rehearing pursuant to §227.49, Stats. That request was not answered by the Department and was thus denied by operation of law. §227.49(5), Stats. This appeal follows.

#### STANDARD OF REVIEW

The standard of review of an administrative decision depends on whether the issues presented involve questions of law or fact. A court must separate the factual findings from the conclusions of law and apply the appropriate standard of review to each. Badger State Agri-Credit v. Lubahn, 122 Wis. 2d 718 723 (Ct. App. 1985).

Here, Petitioner raises two assignments of error. First, she contends that DHSS

failed to apply the correct legal standards as set forth in federal statutes and implementing regulations, and that DHSS ignored its own policy and administrative decisions. Whether DHSS erroneously interpreted a provision of law raises an issue of law which this court reviews de *novo* pursuant to §227.57(5), Stats.’ Nevertheless, the court also recognizes that the construction and interpretation of a statute by an administrative agency charged with the responsibility of applying the law is entitled to great weight. NCR Corn. v. DOR, 128 Wis. 2d 442, 447-48 (Ct. App. 1986). Therefore, a reviewing court ought not to reverse an agency’s interpretation of a statute if there exists a rational basis for the agency’s conclusion even if the court does not entirely agree with the rationale. Id. at 448. See also Luetzow Industries v. DOR, 197 Wis. 2d 917, 923 (Ct. App. 1995).

Petitioner’s second assignment of error is that the Department’s decision is not supported by substantial evidence to support its factual findings that Mr. Miller retained sufficient parental bonds to consider him not absent. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It is not required that the evidence be subject to no other reasonable, equally plausible interpretations. Where two conflicting views may each be sustained by substantial evidence, it is for the agency to determine which view of the evidence it wishes to accept. Therefore, an agency’s decision may be set aside by a reviewing court only when, upon examination of the entire

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<sup>1</sup> Section §227.57(5), Stats., provides:

(5) The court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of law.

record, the evidence, including the inferences therefrom, is found to be such that a reasonable person, acting reasonably, could not have reached the decision from the evidence and its inferences. Hamilton v. ILHR Dept., 94 Wis. 2d 611, 617-18 (1980). (citations omitted).

## DECISION

### DHSS Interpretation and Application of Law

The AFDC program established by the Social Security Act provides financial assistance to dependent children. Section 42 U.S.C. §606(a) of the Social Security Act defines a “dependent child” as a needy child under the age of 18 and who has been deprived of parental support and care by reason of, among other things the continued absence from the home of a parent. The critical phrase, “continued absence”, at issue in this matter is defined by federal regulation.

The implementing federal regulation provides that in order to establish deprivation based on continued absence the following elements must be present:

- (1) the parent is out of the home;
- (2) the nature of the absence is such as 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 the function of planning for the present support or care of the child.

45 C.F.R. §233.90(c)(1)(iii).

Advisory opinions received by state officials from the Federal Office of Family Assistance dated in 1978 and 1982 and subsequent caselaw interpreting these provisions

recognize that a pattern of frequent visitations is relevant evidence for evaluating eligibility under AFDC but in itself is not a reason for termination. Visits weigh on the issue of whether the absent parent's ability to perform certain defined functions within the family have been terminated or interrupted. Matter of Souder, 497 A. 2d 1258, 1262 (N.J. Super.A.D. 1985). Furthermore, eligibility for benefits is not determined on the basis of whether the absent parent has the opportunity to exercise parental responsibility irrespective of the parent's physical presence in the home. Simone v. State, 465 A.2d 1226, 1229 (N.J. Super.A.D. 1983).

Petitioner first challenges the Department's application of the purposes of the AFDC program to the circumstances of this case. Petitioner maintains that the Department required total cessation of parental contact based on its application of an "outdated" statement of the purposes of the AFDC program. Despite Petitioner's argument to the contrary, the hearing examiner correctly articulated the purposes of the AFDC statutes. While initially citing older caselaw describing the purposes of the AFDC program, the hearing examiner does expand his analysis to include doctrine from the more recent caselaw which does not require total cessation of parental contact for a determination of absence. \*The sentence structure of this portion of the decision begins with the word "originally" and then includes the phrase "more recently" to incorporate the more recent and expansive interpretations which do not require total cessation of parental contact to find a parent "absent".

Petitioner also challenges the legal analysis in the Department's decision, asserting that the hearing examiner looked at what the absent parent **could do or his potential for involvement** rather than evaluating whether the absent parent was **actually functioning** as a

provider of care and support. Perhaps the language used by the examiner in preparing the decision might lead a reader to initially interpret this decision as petitioner argues. However, a closer reading indicates that the examiner, when applying the various relevant factors, did in fact cite specific affirmative instances of parental involvement by Mr. Miller which go to his provision of maintenance and physical care of the children while he resides in Racine and to his role in planning for their present support and care and that the examiner did not just rely upon Mr. Miller's potential for involvement.

Unlike the situation in Simone, where the "absent parent" lived in the same building as his children but had no contact with the children and provided no resources either financial or otherwise, here, the evidence relied upon by the examiner established not only opportunities for Mr. Miller to exercise parental involvement but also showed that he acted upon those opportunities.

Consequently, I find no error in the hearing examiner's recitation of the law, or the legal analysis which was applied. The hearing examiner did not require total cessation of parental involvement in reaching the conclusion that Mr. Miller was not an "absent parent."

#### Substantial Evidence

Petitioner contends that the Department's decision is not supported by substantial evidence in the record.

The findings that the agency does make are conclusive as long as they are supported by credible and substantial evidence. Section 227.57(6), Stats. Where there are conflicting views each of which might be sustained by the evidence, it is for the agency to determine which view of the evidence it wishes to accept. Hamilton v. ILHR Dent., 94 Wis. 2d 611,

617 (1980). On review this court cannot make an independent determination of the facts - it can only determine whether there was any substantial evidence to sustain the findings that were made. Unruh v. Industrial Comm., 8 Wis. 2d 394, 398 (1959).

Contrary to Petitioner's argument, there is substantial evidence to sustain the findings which the Department makes. For example, the examiner cites to the fact that Mr. Miller sent Petitioner \$60 while she was residing in Dane County; he visited the family twice since they left Racine; he sends the children money so they may purchase clothes, shoes and toys; he serves as an emergency contact on the children's school enrollment forms; petitioner testified that she could count on Mr. Miller to help with any problems with her children while they reside in Dane County while at the same time Mr. Miller has stated that feels responsible for the children while they are in Dane County; Yolanda was sent back to Racine to live with Mr. Miller in Racine; Mr. Miller stated that he needed to stay in Racine in order to acquire profit sharing benefits from his job at Goodwill; and finally, Ms. Miller indicated that the reason she left Racine was not because of marital problems but because of neighborhood violence in Racine. All of this cumulative evidence led the hearing examiner to conclude that Mr. Miller was not an "absent parent" and I conclude that considering this evidence in total, a reasonable mind might accept this evidence as adequate to support the examiner's conclusion.

Petitioner cites to other evidence which she asserts establishes that Mr. Miller's role as a provider was interrupted because of his absence and that he could not be counted on to provide or plan for the children's needs. (See pages 4-5 of Petitioner's Brief). The Department did not deem this evidence as weighty or as credible. The weight and credibility

of evidence is solely within the province of the administrative agency and this court must defer to the examiner's evaluation of disputed evidence including credibility. Amtronix Industries, Ltd. v. LIRC , 115 Wis. 2d 108, 114-115 (Ct. App. 1983).

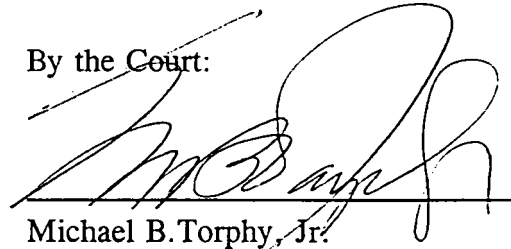
Based upon the evidence relied upon by the examiner, this court finds that there is substantial and credible evidence in the record to support the Department's conclusion.

**CONCLUSION AND ORDER**

For all of the reasons stated above and based on the record herein, the Department of Health and Social Services decision denying Petitioner AFDC benefits is affirmed.

<sup>26</sup>  
Dated: **March@, 1996**

By the Court:



Michael B. Torphy, Jr.  
Circuit Judge

cc:  
ATTY JACK LONGERT  
LEGAL ACTION OF WISCONSIN  
P.O. BOX 9686  
MADISON, WI 53715

AAG DONALD P. JOHNS  
DEPARTMENT OF JUSTICE  
P.O. BOX 7857  
MADISON, WI 53707-7857