

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 3, 2001

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 00-2694

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

ETHELYN C. KLOTH,

PETITIONER-APPELLANT,

v.

**DEPARTMENT OF HEALTH AND FAMILY SERVICES,
DIVISION OF CHILDREN YOUTH & FAMILIES AND
PAUL MOELLER,**

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Kenosha County:
BRUCE E. SCHROEDER, Judge. *Affirmed.*

Before Nettlesheim, P.J., Brown and Snyder, JJ.

¶1 PER CURIAM. Ethelyn C. Kloth appeals from the circuit court's order affirming the Department of Health and Family Services' decision denying her application for a foster care license pursuant to WIS. ADMIN. CODE § HSS 56.04(1)(a). The question on appeal is whether substantial evidence supports the

Department's decision. Because the Department correctly applied WIS. ADMIN. CODE § HSS 56.04(1)(a) and substantial evidence supports the Department's decision, we affirm.

¶2 Kloth applied to the Department for a foster care license. The Department denied her application, citing concern with prior referrals to the Department regarding Kloth and her family.¹

¶3 Kloth appealed the Department's denial. At the administrative hearing, the Department presented testimony and exhibits showing a family history of abuse and neglect. A Department supervisor reported that Kloth's then-husband, Robert Kloth, physically and sexually abused her and her three children. The evidence revealed that the physical abuse was brought to the attention of child protective services in 1977. Kloth's mother reported physical abuse by Robert

¹ The five areas of concern were:

- a. Open CHIPS petition on your children from 1981-1984 because of physical and/or sexual abuse.
- b. Three referrals alleging lack of supervision regarding your own children which resulted in recommendations to provide adequate supervision.
- c. In 1989 a crisis report dealing with your son John not wanting to return home. In this report John reported being sexually abused and you stating that you were unsure if John was actually a victim, or if he consented to being sexually misused.
- d. June 30, 1999 an alleged report of physical abuse by you to your granddaughter. In speaking with the investigating caseworker, it was recommended that all visits between you and your granddaughter be supervised.
- e. Three out of the seven references that you provided came back with reservations on you becoming a foster parent.

toward Laura, Kloth's daughter from a previous marriage.² In an interview with a social worker, Kloth admitted to physical abuse by Robert toward the children. However, she later minimized the problems and recanted any admissions of abuse by her husband. Problems of physical abuse, and later, sexual abuse, continued. In 1980, she left her husband, taking the children with her.

¶4 The supervisor also stated that Kloth's son, who was himself sexually abused, sexually abused children for whom he was babysitting when he was sixteen. He was charged with three counts of child enticement in 1989 for which he was found delinquent. Kloth testified that she was not aware of any present sexual problems because she had successfully intervened and helped him. However, she was inconsistent in her testimony about her son, stating that his father's abuse caused many emotional problems that he may never overcome.

¶5 Further testimony provided that a household fire occurred in 1983 when Kloth left her eleven-year-old daughter home alone to supervise three to four younger children. The fire, of undetermined origin, started at about 4:00 p.m. and Kloth was not due home until 8:00 p.m. The police at the scene referred the matter to child protective services for investigation due to concern for child neglect.

¶6 Finally, evidence at the hearing elicited that Kloth took care of her two-year-old granddaughter for a few days in June of 1999. Upon her return to

² The allegations of abuse by Mr. Kloth included beating his six-year-old stepdaughter with a hose, calling her a "bitch," slapping the four-year-old on the head and face, and slapping the two-year-old. Additionally, there was testimony that Mr. Kloth was sexually abusing his two sons by Kloth, and Kloth's son from a previous marriage was sexually abusing Kloth's daughter, Laura.

her parents, her mother, Liz, noted a bruising on the child's abdomen. The bruising was reported to a counselor who referred the matter to a child protective services worker, Ann Balow. Balow testified at the hearing. She reported that the investigation was inconclusive because there had been no medical exam. She did not interview the family until five days later. By that time, she only observed one faded bruise. However, the worker was suspicious of Kloth because of the multiple stories Kloth related as to how the bruising occurred.

¶7 Balow also testified about an interview with John, the child's father and Kloth's son. John informed Balow that his mother used to break wooden spoons over his head but he never thought his mother would do that to her granddaughter. He reported that he was upset over the incident and felt his mother was responsible for the bruise. He further informed the worker that his mother would not have any more unsupervised visits with his daughter.

¶8 John testified at the hearing. He stated that his mother hit him over the head with broken wooden spoons "once in a blue moon." However, he testified that his mother never physically abused him. Finally, he said that he agreed to supervised visits for his daughter to placate his wife.

¶9 According to Kloth's testimony, she was always active in seeking the help her children needed in terms of counseling, social services and court action. Kloth testified that she sought counseling for her three children for abuse suffered due to their father. She stated that she worked with the school and social services when her son was in trouble in 1989. In short, she portrayed herself as someone who knew and used the resources of the community to assist her children.

¶10 Concerning the granddaughter's bruising, Kloth provided two possible reasons in her testimony for the injuries. She testified that while the child was in her care, she slipped "going down or going frontwards" on the high chair. She further stated that the child pinched herself between the crib and the bunk bed. Finally, Kloth appeared to blame the incident on Liz's emotional problems connected with her own abuse. She did not claim any responsibility for the bruising.

¶11 The administrative law judge (ALJ) concluded in a written decision that the Department had correctly denied Kloth's application. The ALJ cited the abuse problems in the 1970s and 1980s, the fire incident in 1983, and the suspected abuse of the granddaughter as the basis of his decision. Further, the ALJ discussed Kloth's contentions and testimony in sustaining the agency's denial of the application. The decision also stated that although there was no allegation that Kloth was involved in the earlier abuses, "there is a suggestion here that she should have been more active in supervising and safeguarding her children's welfare." The decision stated that "[t]he available evidence confirms the county agency conclusion that [Kloth] has not demonstrated that she has the sound judgment and capacity necessary to successfully nurture foster children."

¶12 The Department has delegated the final decision-making authority of the Department to the Division of Hearing and Appeals for foster care issues.³

³ See WIS. STAT. § 48.67 (1999-2000), and WIS. ADMIN. CODE § HSS 56.07(1), (2). Section 48.67 provides the Department with authority to promulgate rules concerning the issuance of licenses to, and establishing standards for the operation of foster homes and those rules are contained in WIS. ADMIN. CODE § HSS 56.07(1) and (2). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

Therefore, in reviewing the decision of the ALJ, we are reviewing the final decision of the Department. WIS. ADMIN. CODE § HA 3.09(9)(a).

¶13 Kloth contends that the Department misapplied WIS. ADMIN. CODE § HSS 56.04(1)(a). When an administrative agency is interpreting its own rules or regulations, the agency's interpretation is controlling unless plainly erroneous or inconsistent with the language of the rule or regulation. *Hillhaven Corp. v. DHFS*, 2000 WI App 20, ¶12, 232 Wis. 2d 400, 606 N.W.2d 572.⁴

¶14 Kloth also takes issue with the Department's view of the evidence.

If the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The

⁴ The *Hillhaven* court explained:

The deference we apply to an agency interpretation of its own rule or regulation is different than the deference we give to an agency interpretation of a statute....

[F]or agency interpretations of their own rules or regulations, we generally apply only one level of deference. This level of deference has been, at times, termed "controlling weight," or even "great weight." However, it is described using different terminology than that used for the "great weight" deference applied to statutory interpretations. See *State v. Busch*, 217 Wis. 2d 429, 441, 576 N.W.2d 904 (1998) (holding that an agency's interpretation of its own regulations "is controlling in determining their meaning unless plainly erroneous or inconsistent with the regulations"). Despite the different terminology, the deference for an agency interpretation of its own rules appears to be similar to the "great weight" level of deference applied to agency statutory interpretations, as both turn on whether the agency interpretation is reasonable and consistent with the meaning or purpose of the regulation or statute.

Hillhaven Corp. v. DHFS, 2000 WI App 20, ¶12 n.6, 232 Wis. 2d 400, 606 N.W.2d 572 (citations omitted).

court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.

WIS. STAT. § 227.57(6). The substantial evidence test is whether reasonable minds could arrive at the same conclusion as the ALJ. *Daly v. Natural Res. Bd.*, 60 Wis. 2d 208, 219-20, 208 N.W.2d 839 (1978). When two conflicting views may be sustained by substantial evidence, the agency determines which view of the evidence it wishes to accept. *Id.* at 220. The substantial evidence standard of review “should be construed to confer finality upon an administrative decision on the facts when, upon an examination of the entire record, the evidence, including the inferences therefrom, is found to be such that a reasonable man, acting reasonably, *might* have reached the decision.” *Id.*

¶15 The applicable part of WIS. ADMIN. CODE § HSS 56.04(1)(a) provides:

A person licensed to operate a foster home shall be a responsible, mature individual who is fit and qualified, who does not abuse alcohol or drugs or have a history of law violations that substantially relate to operating a foster home and who exercises sound judgment and displays the capacity to successfully nurture foster children.

¶16 Evidence was presented that Kloth placed her children at risk at least from 1977 to 1980 when they continued to reside with an abusive father/stepfather. Moreover, she minimized the problems the family was experiencing when speaking with a child protective services worker at the time. The fire in 1983 led to a referral to child protective services by the police. Another report to child protective services occurred when the granddaughter returned from Kloth's house with a bruise on her abdomen. In her testimony, Kloth took no responsibility for protecting her children from abuse. Additionally,

the pattern of her minimization of abuse issues continued in the case of the granddaughter's injury.

¶17 Although these incidents did not result in any formal charges, they are still relevant to the question of fitness to be a foster parent, under WIS. ADMIN. CODE § HSS 56.04(1)(a). WISCONSIN STAT. § 48.68(1) provides that “[i]n determining whether to issue or continue a license, the department may consider *any action* by the applicant ... that constitutes a substantial failure by the applicant ... to protect and promote the health, safety and welfare of a child.” (Emphasis added.) There are no time limits for actions nor are there requirements that the actions result in formal legal action to be considered in determining fitness to be a foster parent.

¶18 Kloth argues that the evidence demonstrates that she is a maternal figure who has always advocated for the “betterment” of her own children and others. However, the evidence showed that Kloth knew of Robert's abuse of the children by 1977 but she did not leave that home with the children until 1980.⁵ Moreover, a fire was started in her home in 1983 when an eleven-year-old girl was left in charge of three or four younger children for several hours. Finally, there was testimony that John, Liz and Balow were concerned about possible abuse to the granddaughter by Kloth.

¶19 The parties presented two different views of the evidence at the hearing. It was for the ALJ, and the Department, to determine which view of the evidence it wished to accept. *Daly*, 60 Wis. 2d at 220. This court cannot

⁵ Regardless of Kloth's motives for remaining with Mr. Kloth until 1980, the end result was that her children were placed at risk.

substitute its judgment for that of the agency as to the weight of the evidence on disputed findings of fact. WIS. STAT. § 227.57(6). The ALJ wrote, “there is a suggestion here that [Kloth] should have been more active in supervising and safeguarding her children’s welfare.” Substantial evidence supports that inference. A reasonable person could have determined that, based upon the evidence adduced at the hearing, Kloth had not demonstrated “sound judgment” and the “capacity to successfully nurture foster children.” Substantial evidence supports the Department’s findings, and its application of WIS. ADMIN. CODE § HSS 56.04(1)(a) to those findings is not plainly erroneous or inconsistent with the language of the regulation.

¶20 In closing, we can think of no situation better suited to deference to an agency than the licensing of foster homes. These decisions affect the most vulnerable of our citizens—children—and the most vulnerable of children—children in crisis. Further, the Department’s decision promotes the underlying purpose of the rule, that is, to protect and promote the health, safety and well-being of the child. *See UFE Inc. v. LIRC*, 201 Wis. 2d 274, 289-90, 548 N.W.2d 57 (1996). That mandate leads to the inevitable conclusion that the agency should err on the side of caution when dealing with these vulnerable citizens.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

