

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

KENDRA JOHNSEN, JAMIE	)	
LONGWELL, AND JAMIE KOCH,	)	Case No. CI -02-2304
INDIVIDUALLY AND ON BEHALF OF	)	
ALL OTHERS SIMILARLY SITUATED,	)	
	)	
	)	
Plaintiffs,	)	
	)	
v.	)	<b>PLAINTIFFS' BRIEF IN SUPPORT</b>
	)	<b>OF PLAINTIFFS' CROSS MOTION</b>
	)	<b>FOR SUMMARY JUDGMENT</b>
STATE OF NEBRASKA, GOVERNOR	)	
MIKE JOHANNNS, ATTORNEY GENERAL)	)	
DON STENBERG, NEBRASKA	)	
DEPARTMENT OF HEALTH AND	)	
HUMAN SERVICES, and RON ROSS,	)	
DIRECTOR,	)	
	)	
Defendants.	)	

**INTRODUCTION**

This case involves a certified class of approximately 1000 families who lost their desperately needed childcare subsidies through a series of actions by the Defendants. Plaintiffs bring this cross motion for summary judgment because based on the evidence presented at the July 1, 2002 hearing on the Plaintiffs motion for a temporary injunction and the documents uncovered through discovery, there are no issues of material fact or law remaining in this case and the evidence supports a finding of summary judgment in favor of the class of Plaintiffs.

The Plaintiffs bring this motion under Neb. Rev. Stat. § 25-1330 which provides:

A party seeking to recover in district court upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of thirty days from the service of process on the opposing party or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his or her favor upon all or any part thereof.

“Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to

judgment as a matter of law.” *Guerrier v. Mid-Century Insurance Company*, 266 Neb. 150, 154 (2003) (citing *Stoetzel & Sons v. City of Hastings*, 265 Neb. 637, (2003)). A careful examination of the Plaintiffs causes of action in light of the evidence before this Court and the applicable law will reveal that summary judgment in favor of the Plaintiffs is warranted in this case.

## ARGUMENT

This case involves a series of actions by the Defendants that ultimately had the effect of reducing the eligibility limit for the Child Care Subsidy Program from 185% of the federal poverty level to 120%. None of the Defendants in this case had the authority to reduce eligibility for this program either through the line item veto or through the agency rule and regulation process. Moreover, in the process of implementing this change, the Defendants violated the due process rights of the class members by terminating their benefits under a regulation that was invalid under the Nebraska Administrative Procedure Act.

### **I. USING THE LINE ITEM VETO TO REDUCE ELIGIBILITY FOR THE CHILD CARE SUBSIDY PROGRAM VIOLATES ART. II § 1 AND ART. III § 1 OF THE NEBRASKA CONSTITUTION.**

Article II § 1 of the Nebraska Constitution provides that “the powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted.” Article III § 1 of the Nebraska Constitution provides in relevant part “...the legislative authority of the state shall be vested in a Legislature consisting of one chamber.” These provisions define the separation of powers between the legislative, executive and judicial branches of government. In this case, Defendant Johanns violated these provisions by using the line item veto power to legislate a change in eligibility for the child care subsidy program.

During the regular 2002 legislative session, the Nebraska Legislature submitted appropriations bill LB 1309 to the Governor for signing. On April 8, 2002, Defendant Johanns returned LB 1309 to the legislature with several line item vetos. Exhibit 2. One of those vetos was a reduction in the amount in the general fund for Health and Human Services program 347. Exhibit 4, pg. 17. The general fund for program 347 includes funding for a number of social service programs such as Food Stamps, Aid to Dependant Children (ADC), Employment First, Emergency Assistance, Child Welfare, Refugee Assistance, and Assistance to the Aged Blind and Disabled. *Id.* The Child Care Subsidy program, at issue in this case, is also included within program 347.

“For accounting purposes only,” some of the programs included in program 374 are listed out in the appropriations bill with approximate amounts for various programs. *Id.* However, these allocations are not fixed by the legislature and the Department of Health and Human Services has the flexibility to shift funds included in the general fund for program 347 among the various programs.

As a means of explaining his vetos to LB 1309, Defendant Johanns provided the legislature with a letter containing his veto message and a three page attachment referred to as a “list of the individual vetos.” Exhibit 2. Included in that listing was an “individual veto” that read “return non-ADC child care subsidy eligibility to 120% FPL.” *Id.* It is through this attachment of “individual vetos” that Defendant Johanns went outside the authority granted him under Art. VI. § 15 of the Nebraska Constitution and sought to use the line item veto power to perform a legislative function in violation of Article II § 1 of the Nebraska Constitution.

The line item veto power is a “negative power...it is a power to delete or destroy a particular item and not a power to alter, enlarge or increase the effect of remaining items...[and]

not the power to enact or create new legislation by selective deletions....” 2001 WL 770967 (Neb.A.G.). Under Art. IV § 15 of the Nebraska Constitution, the Governor of Nebraska has the extremely limited power to use a line item veto only to “...disapprove or reduce any *item or items of appropriation* contained in bills passed by the Legislature...” (emphasis added).

An item of appropriation is defined as “an indivisible sum of money dedicated to a stated purpose.” 2001 WL 770967 (Neb.A.G.) (citing *Green v. Rawls*, 122 So.2d 10, 15 (Fla. 1960)). In determining if something is an item of appropriation, the first step is to examine the appropriations bill itself. The legislature has the option of being as detailed as it wants in creating appropriations bills. 1983 WL 145933 (Neb.A.G.). The Nebraska Legislature has adopted an appropriations bill format that appropriates money by broad program areas, such as program 347, rather than including every individual program in the bill. *Id.*

In this case, in constructing LB 1309, the legislature chose to lump funding for the Child Care Subsidy Program in with a number of other programs rather than making it a separate “item of appropriation.” Exhibit 4. When the Governor is exercising the line item veto power, it can only be used to strike or reduce specific items of appropriation listed in the bill and not to target subprograms within the larger item of appropriation. LB 1309 does list out some of the subprograms but not as separate items of appropriation, they are merely listed for “accounting purposes only.” When things are listed for accounting purposes only or for informational purposes only they are not considered “items of appropriation.” *See* 1989 WL 509527 (Neb.A.G.). Therefore, the Child Care Subsidy Program was not an “item of appropriation” within LB 1309.

In addition, there was certainly no “item of appropriation” or even specific language in LB 1309 that referenced the eligibility level for the Child Care Subsidy program. Tr. 53:10-14

and Exhibit 4. As such, targeting specifically the eligibility level for the Child Care Subsidy Program through the line item veto was not possible. Only reducing or striking funding to program 347 was possible.

Moreover, if funding for the child care subsidy program could have been specifically targeted by the line item veto, elimination of funding for a program does not result in an automatic substantive change to the program. A line item veto cannot be used to grant or change the authority of an agency to operate a program in a certain way, it can only delete the authority to expend funds during the current fiscal year. *See* 1977 WL 25362 (Neb.A.G.). However, it is clear from the testimony of Defendant Ross during the preliminary injunction hearing that his department only promulgated the rules and regulations to effectuate a change in the eligibility levels because he felt that he had received a legislative mandate through the line item veto process and had no choice but to reduce the eligibility standards. Tr. 41:6-10. There is no evidence in the record that the Department would have made this change or that they had the authority to make this change had the funds for the program been reduced without the language contained in the listing of "individual vetos." Ross described how he viewed the veto process as follows:

When the Legislature saw on the veto that we went from 185 percent to 120 percent, that is a – and they did not override that veto, that, to me, is a directive of \$4.5 million coming out of that program, and their intent would be for me to run that program for people on subsidy at 120 percent of poverty.

Tr. 53:13-18. Ross reiterated this again by saying:

I would say, again, it was specifically stated in the veto override that we were going to go from 185 to 120 percent. It was not, "Here's child care program – or Child Care Subsidy Program, \$4.5 million less, you figure out how to do it." It was \$4.5 million less, and we're going from 185 to 120 percent...this was a communication from the Governor to the Legislature. The legislature having a difficult job, the Governor having a difficult job to manage a budget during hard times. The veto explicitly said we would take it from

185 to 120 and they did not override that, and so that's what we did and that's what we're proposing to do.

Tr. 66:19-24, 67:6-12.

Were Defendant Johanns simply to have reduced the appropriation to the general fund of program 347 he would not have offended the Nebraska Constitution. However, in this case, he went a step further and used the line item veto to change the eligibility standards for the child care subsidy program. To allow Defendant Johanns to exercise his line item veto power in this way would allow the Governor to usurp legislative power away from the Unicameral in violation of Art. II § 1 and Art. III § 1 of the Nebraska Constitution.

**II. THE DEPARTMENT OF HEALTH AND HUMAN SERVICES EXCEEDED THE AUTHORITY GRANTED TO IT BY THE NEBRASKA LEGISLATURE WHEN IT REDUCED ELIGIBILITY FOR THE CHILD CARE SUBSIDY PROGRAM.**

Following the line item veto process, the Department of Health and Human Services promulgated rules and regulations that had the effect of reducing eligibility for the child care subsidy program from 185% to 120% of the federal poverty level. As noted above, the driving force behind making this change was a belief by Defendant Ross that he had received a legislative mandate authorizing and requiring this specific eligibility change. However, authority to make a substantive change to a program cannot be delegated merely through a line item veto reduction in funds. In addition, there is no statute in place requiring, authorizing or mandating this change. In fact, the Department of Health and Human Services lacks the necessary authority to reduce eligibility for the child care subsidy program on its own.

“It is fundamental that the Legislature may not delegate legislative power to an administrative or executive authority.” *Lincoln Dairy Co. v. Finigan*, 170 Neb. 777, 780 (1960). However, the “Legislature does have power to authorize an administrative or executive department to make rules and regulations to carry out an expressed legislative purpose or for the

complete operation and enforcement of a law within designated limitations.” *Id.* In determining whether a delegation is an unconstitutional delegation of legislative authority, the issue is whether the Legislature has “provided reasonable limitations and standards for carrying out the delegated duties.” *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 951 (1996).

The starting point for determining whether an agency or department has authority to take a specific action is to examine the statutes involved that delegate authority. The Defendants first assert that they received a legislative mandate authorizing and in fact requiring that they reduce eligibility for the Child Care Subsidy Program. See Tr. 53:13-18, 66:19-24, and 67:6-12, and the Regulation Development Request prepared by Chris Peterson. However, as discussed above, the line item veto cannot be used to grant such authority. It can only be used to reduce or eliminate funding for a particular program. 1977 WL 25362 (Neb.A.G.).

The Defendants also argue that their authority to set eligibility is derived from the authority to promulgate rules and regulations for the Child Care Subsidy Program found at Neb. Rev. Stat. § 68-1204 which provides in relevant part:

For the purpose of providing or purchasing social services described in section 68-1202, the state hereby accepts and assents to all applicable provisions of the federal Social Security Act, as amended. The Director of Health and Human Services may adopt and promulgate rules and regulations, enter into agreements, and adopt fee schedules with regard to social services described in section 68-1202....

This section does grant the Department authority to do several things, but setting eligibility is not one of them. Under this statute, the Nebraska Legislature binds the state and the Department to compliance with the federal Social Security Act, which includes the Child Care and Development Block Grant Act, the program that creates and funds the Child Care Subsidy Program in Nebraska. It also specifically grants the Department the authority to enter into agreements and to adopt fee schedules for social services programs. However, there is no

reference in this section to the authority to set eligibility levels for social service programs or specifically for the Child Care Subsidy Program.

The Nebraska Supreme Court has continually recognized that for a delegation of authority to exist and be constitutional the Legislature must provide standards that are “reasonably adequate, sufficient, and definite for the guidance of the agency in the exercise of the power conferred upon it and must also be sufficient to enable those affected to know their rights and obligations....” *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 952 (1996) (quoting *State ex rel Douglas v. Nebraska Mortgage Finance Fund*, 204 Neb. 445, 464-65 (1979)). Even assuming that somewhere in § 68-1204 there is a delegation of authority to set eligibility, there is no language in that section that provides any guidance to the agency on how to set eligibility or anything that would provide notice to participants about their rights concerning eligibility for the Child Care Subsidy Program, both of which are required for a delegation of authority to be constitutional.

The Defendants argue that if this Court finds they do not have the authority to set eligibility for the Child Care Subsidy Program, the program would effectively end. Tr. 45:21-25, 46:1-2. This is simply not the case. As the Department recognizes in its own rules and regulations, they are subject to directives from both state and federal law. 465 NAC 1-003.02 (effective August 21, 1995). Under state law, the Nebraska Legislature has clearly directed the Department to provide child care services as part of its menu of social services programs. Neb. Rev. Stat. § 68-1202. The Legislature has also clearly directed that the Department be subject to the guidelines and restrictions contained in the federal Social Security Act. Neb. Rev. Stat. § 68-1204.



The Department acknowledges in its rules and regulations that federal authority for the Child Care Subsidy program comes from the Child Care and Development Block Grant Act. 392 NAC 1-001 (effective June 17, 2002). The federal statutes making up the Child Care and Development Block Grant Act set the basic framework for states to administer their Child Care Subsidy Programs. This basic framework includes provisions for who should be eligible to receive child care subsidies under the block grant. 42 U.S.C. § 9858n(4) defines who will be considered a child eligible to receive a child care subsidy:

Eligible child. The term "eligible child" means an individual—

- (A) who is less than 13 years of age;
- (B) whose family income does not exceed 85 percent of the State median income for a family of the same size; and
- (C) who—
  - (i) resides with a parent or parents who are working or attending a job training or educational program; or
  - (ii) is receiving, or needs to receive, protective services and resides with a parent or parents not described in clause (i).

In the absence of a statute setting eligibility or a statute constitutionally delegating authority to the Department to set eligibility, the federal law takes over and specifies who is eligible, given the Legislature's and the Department's clear intent they be subject to the federal Social Security Act and specifically the Child Care and Development Block Grant Act. In this case, the Child Care and Development Block Grant Act clearly mandates that children whose family incomes do not exceed 85 percent of the state median income for a family of the same size, should be eligible to receive a Child Care Subsidy. (For 2002 in Nebraska 85 percent of the state median income translated to roughly 270% of the federal poverty level.)

After examining the pertinent statutes it becomes clear that, while the Department was clearly granted the authority to make certain decisions with regard to the Child Care Subsidy Program, setting eligibility was not one of them. Because the Department set eligibility without

properly delegated authority to do so, they violated Art. II § 1 and Art. III § 1 of the Nebraska Constitution.

**III. THE DEFENDANTS VIOLATED THE CLASS MEMBERS' DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, § 3 OF THE NEBRASKA CONSTITUTION.**

The Fourteenth Amendment to the United States Constitution provides no state shall "...deprive any person of life, liberty, or property without due process of law...." The due process requirements of the Nebraska Constitution are similar to the federal Constitution. *See Hass v. Neth*, 265 Neb. 321 (2003). In this case, the Plaintiffs were deprived of their property by the Defendants without due process of law when the Defendants failed to provide adequate notices. "Procedural due process limits the ability of the government to deprive people of interests which constitute 'liberty' or 'property' interests within the meaning of the Due Process Clause and requires that parties deprived of such interests be provided *adequate notice* and an opportunity to be heard." *Id* at 326 (citing *Marshall v. Wimes*, 261 Neb. 846 (2001) (emphasis provided).

It is essential that when benefits are being terminated that the family receiving the notice know the reason for the termination with enough specificity that they can determine if the action being taken is correct or not. The public benefits programs including the Child Care Subsidy program are extremely complex and involve a number of rules and regulations. The Department of Health and Human Services recognizes this complexity and therefore requires that all notice of action letters that go out to clients include "a statement of what action(s) the worker intends to take, the reason(s) for the intended action, and the corresponding manual references." 392 NAC 4-002.03 (effective June 17, 2002).

The record in this case reflects that the Defendants issued notices to class members that did not provide an adequate explanation of why their Child Care Subsidy was being terminated. The Defendants' attorney admitted at the preliminary injunction hearing that the notices should contain the regulation number being used to terminate child care subsidy benefits. Tr. 91:4-5. The three notices sent to Plaintiff Jaime Koch which did not include a manual reference or an adequate explanation of why benefits were terminated are just an example of the inadequate notices provided to the class members. Exhibits 18, 19, and 20.

While it is true that Ms. Koch received injunctive relief from this Court under the Plaintiffs' Motion for a Preliminary Injunction, the Defendants admit that a number of the class members, beyond Ms. Koch, did not receive adequate notice. Tr. 91:6-8. The Defendants have the ability to determine who received notices that did not provide an adequate explanation or include the appropriate manual references by using their computer system. Tr. 91:9-11.

The evidence on the record clearly illustrates and the Defendants admit that they violated the due process rights of the class members in this case. Therefore, the class members would ask this Court to grant them summary judgment on this issue and provide the relief requested.

**IV. THE CLASS MEMBERS' RIGHTS TO DUE PROCESS WERE VIOLATED WHEN BENEFITS WERE TERMINATED UNDER A RULE THAT WAS NOT VALID UNDER THE NEBRASKA ADMINISTRATIVE PROCEDURE ACT.**

Following the line item veto process, the Department drafted new rules and regulations that were designed to carry out a reduction in the eligibility level for the child care subsidy program from 185% to 120% of the federal poverty level. The Nebraska Administrative Procedure Act regulates the rule and regulation making process of all administrative agencies including the Nebraska Department of Health and Human Services. Neb. Rev Stat. § 84-906 provides in relevant part:

No rule or regulation of any agency *shall be valid* as against any person until *five days* after such rule or regulation has been filed with the Secretary of State. No rule or regulation required under the Administrative Procedure Act to be filed with the Secretary of State shall remain valid as against any person until the certified copy of the rule or regulation has been so filed on the date designated and in the form prescribed by the Secretary of State....

(emphasis added).

Even assuming that the Department had the authority to promulgate rules and regulations that set eligibility for the Child Care Subsidy Program, the notices used to advise the class of their rights were invalid. The rules and regulations in this case that were used to terminate eligibility for the Child Care Subsidy Program are found at 392 NAC 3-004.01D. This new regulation was filed with the Secretary of State on June 12, 2002, and therefore under § 84-906 was not valid against any person until five days later or June 17, 2002.

The record reflects that and the Defendants admit that some notices were sent out to class members terminating their Child Care Subsidy benefits prior to June 17, 2002. *See* Exhibit 17, Tr. 16:15-20, and Tr. 90:16-18. This likely happened due to an email sent from Sandra Scott to the HHSS Economic Assistance Policy Staff and Policy Supervisors, which directed case managers to start sending out notices on June 12, 2002, a full five days before the regulation was valid. Surprisingly, this happened despite assertions in emails from Terry Schmitt, an attorney within the Department's legal division, that implementation of the reduction in eligibility before the effective date of any regulation would result in the department being "taken to court and losing."

The Nebraska Supreme Court has held that the plain meaning of § 84-906 is clear, no rule can be valid against any person until it has been on file with the Secretary of State for at least five days. *Gausman v. Dept. of Motor Vehicles*, 246 Neb. 677 (1994). The Defendants argue that while the rule was not yet effective, the class members were not prejudiced by the agency's

actions. However, the Nebraska Supreme Court has clearly stated that an individual does not have to show they were prejudiced to have had their due process rights violated under § 84-906. *Id.* See also, *Cain v. Dept. of Motor Vehicles*, 2 Neb. App. 492, (1995). Therefore, because the regulation was not valid at the time notices were sent to class members, the class members' due process rights were violated and the notices sent were not effective in terminating eligibility.

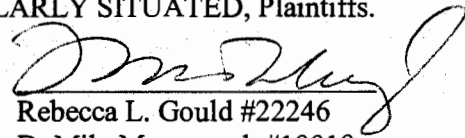
### CONCLUSION

For all of the reasons provided above, this Court should issue summary judgment in favor of the Plaintiffs and against the Defendants in this case.

Date: July 24, 2003.

KENDRA JOHNSEN, JAMIE  
LONGWELL, AND JAMIE KOCH,  
INDIVIDUALLY AND ON  
BEHALF OF ALL OTHERS  
SIMILARLY SITUATED, Plaintiffs.

By:

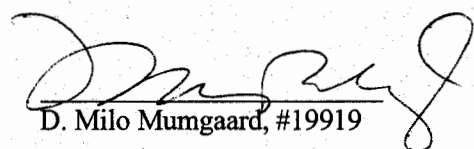


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### CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Brief was served upon the following attorneys designated below by hand delivery on July 24, 2003:

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