IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

KENDRA JOHNSEN, JAMIE LONGWELL, and JAMIE KOCH, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, Plaintiffs, v. STATE OF NEBRASKA, GOVERNOR MIKE JOHANNS, ATTORNEY GENERAL DON STENBERG, NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, and RON ROSS, DIRECTOR, Defendants.	Case No. CI 02-2304 **DEFENDANTS' BRIEF IN SUPPORT OF SUMMARY JUDGMENT**

INTRODUCTION

On or about June 26, 2002, Plaintiffs filed a Petition for Declaratory and Injunctive Relief alleging in essence that the implementation of the new eligibility level for the Social Services child care subsidy program at 120% of the federal poverty level is invalid and that the Department of Health and Human Services had failed to give timely and adequate notices to recipients of the child care subsidy program regarding their status under the new legislation. In response, defendants filed its resistance to plaintiffs demand for preliminary injunction, to which the court entered an Order denying the preliminary injunction as to plaintiffs Johnsen and Koch, and granted in part as to plaintiff Longwell. (Or. Granting Defs.' Resistance to Temporary Injunction (Jul. 8, 2002)). Defendants have now filed a Motion for Summary Judgment on the basis that no genuine issue of material fact exists as to plaintiffs' allegations.

STANDARD OF REVIEW

Summary judgment is proper only when the moving party shows that the "pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is 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. *Stoetzel & Sons, Inc. v. City of Hastings*, 265 Neb. 637, 644, 658 N.W.2d 636 (2003).

"The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law." *Wolfe v. Becton Dickinson & Co.*, 266 Neb. 53, 56, 622 N.W.2d 599 (2003) (quoting, *Rush v. Wilder*, 263 Neb. 910, 644 N.W.2d 151 (2002)).

STATEMENT OF FACTS

In the State of Nebraska there are two separate child care subsidy programs administered by the Department of Health and Human Services. These two programs serve two distinct client populations. The first program is part of the so-called "transitional benefits" package provided for a period of up to two years for persons who are coming off of the Aid to Dependent Children program (ADC also known as TANF). These benefits, along with Medicaid coverage, assist persons who have been at the lowest economic levels of our society in their journey towards self-sufficiency. These persons have been recognized by the Legislature as needing these support services pursuant to Neb. Rev. Stat. § 68-1724 (1)(c) (Reissue 1996). In the cited statutory provision the Legislature has

chosen to specify the financial eligibility level for the child care subsidy portion of the transitional benefits package at 185% of the federal poverty level.

The second child care subsidy program is one of a number of programs specified under the general heading of "social services" as set forth at Neb. Rev. Stat. § 68-1202 (2000 Cum. Supp.). This program does not include persons who are in their first two years of transition from the ADC program. Rather, it is designed to assist those low income persons who might otherwise be potential ADC clients in the future as well as those persons who have exhausted their transitional benefits after actually having been a client on the ADC program. The Legislature has not chosen to specify eligibility levels for that program. Rather, it is treated like the ADC program and the Assistance to the Aged, Blind and Disabled (AABD) programs in that rule-making authority is granted to the Department to set the "standard of need" which is the financial eligibility level for each program. Regulatory authority is specifically granted for the Social Services program at Neb. Rev. Stat. §§ 68-1204 and 68-1208 (Reissue 1996). General authority to promulgate necessary rules and regulations is found at Neb. Rev. Stat. § 81-112 (Reissue 1996).

The change in eligibility level being contested in this particular lawsuit is restricted to the Social Services child care subsidy program only. In the waning days of the Nelson administration, the then Director of the Department of Health and Human Services administratively increased the eligibility level for the Social Services child care subsidy program from 120% to 185% of the federal poverty level first through the issuance of an administrative memorandum and then, later, by duly promulgated administrative rules and regulations establishing that eligibility level. That was done without any additional funding having been sought or appropriated in order to support that increase. That decision also

effectively extended the child care transitional benefit beyond the statutory two year period. That eligibility level was maintained until the legislative session of 2002 which was marked by a pronounced concern over budgetary shortfalls due to reduced revenues realized by the State of Nebraska.

Among other budgetary adjustments effected through the appropriations process the Governor exercised his constitutional line item veto power by vetoing the portion of the appropriations bill LB 1309 which would have continued funding for the Social Services child care subsidy program at the previous eligibility level of 185% of the federal poverty level. (Exhibit 27). The Legislature failed to override that particular line item veto and that necessitated the promulgation of administrative rules and regulations reducing the eligibility level of the Social Services child care subsidy program from 185% to 120% of the federal level of poverty. It is those regulations that are under attack in this litigation.

ARGUMENT

This lawsuit essentially boils down to two basic components: (1) Allegations relating to the timeliness and adequacy of notice; and (2) Allegations regarding the validity of the regulations implementing the new eligibility level for the Social Services child care subsidy program at 120% of the federal poverty level.

I.

PLAINTIFFS HAVE AN ADEQUATE REMEDY AT LAW TO CHALLENGE ANY CLAIM OF IMPROPER NOTICE AS TO THE CHANGE IN ELIGIBILITY STATUS UNDER THE SOCIAL SERVICES CHILD CARE SUBSIDY PROGRAM

AND PURSUANT TO NEB. REV. STAT. § 68-1016 (2000 Cum. Supp.) AND 465 NAC 2-001.02.

Plaintiffs' have available to them an adequate remedy at law to challenge the timeliness and adequacy of notice with regard to their eligibility status under the Social Services child care subsidy program. Under Neb. Rev. Stat. § 68-1016 (2000 Cum. Supp.) and 465 NAC 2-001.02, plaintiffs are afforded an adequate remedy at law.

Section 68-1016 of the Nebraska Revised Statutes provides in part:

> The Director of Health and Human Services shall provide for granting an opportunity for a fair hearing before the Department of Health and Human Services to any individual whose claim for assistance to the aged, blind, or disabled, aid to dependent children, emergency assistance, medical assistance, commodities, or food stamp benefits is denied, is not granted in full, or is not acted upon with reasonable promptness. An appeal shall be taken by filing with the director a written notice of appeal setting forth the facts on which the appeal is based."

Title 465 of the Nebraska Administrative Code, Nebraska Department of Social Services Manual, provides in relevant part:

> Every applicant for or recipient of assistance or services provided through the Nebraska Department of [Health and Human Services] has the right to appeal any action, inaction, or failure to act with reasonable promptness with regard to the assistance or services. The individual may appeal because[:]

. . . 4. His/her assistance or services are reduced; 5. His her assistance or services are terminated. . ."

An adequate remedy at law "refers to a remedy which is plain and complete, and as practical and efficient to the ends of justice as is the equitable remedy." *O'Connor v. Kaufman*, 260 Neb. 219, 616 N.W.2d 301 (2000). The above-referenced state statute and regulation provide for adequate remedy at law for each of the plaintiff representatives as well as the class members because they present clear entitlements to the appeals process with regard to timeliness and adequacy of notice.

Plaintiffs also allege that they were being terminated without the provision of written notice and have not provided any proof to that effect. Additionally, plaintiffs have failed to show that the sending of notices after the Governor signed the regulations on June 12, 2002, but prior to their effective date of June 17, 2002, was in violation of any state law or in any way harmed the plaintiffs who received notice dated within that time-frame. In fact it appears that the provision of earlier notice benefitted the clients since it allowed them to have additional time to plan what steps they would need to take in order to cope with their loss of benefits. The notice provided- simply gave the clients notification that their benefits would terminate as of July 1, 2002, well after the effective date of the regulations of June 17, 2002. The notice represented no action per se, it simply indicated a future action to occur on July 1, 2002, after the regulations in question became effective. No authority has been cited nor has any cogent argument been offered to support the notion that providing notice to clients within this time frame somehow violated their constitutional rights or any other legal precept. In fact, in the Order denying preliminary injunction, the court concluded that plaintiffs failed to provide proof they were prejudiced by that action. The

Court found that the notices indicated a future action. Or. Granting Defs.' Mot. In Opp. To Preliminary Injunction 7-8 (Jul. 8, 2002). Furthermore, the court found as to plaintiff Jamie Longwell, that at the time of the petition in this matter as well as petition for preliminary injunction, she remained eligible for services. As to plaintiff Kendra Johnsen, evidence was presented that she had received proper notice that her benefits would terminate on July 1, 2002. It was only as to Plaintiff Jamie Koch that the court found inadequacy of notice. However, because of testimony provided by director Ron Ross, such inadequate notices were to be remedied and services to be reinstated until such time as adequate and proper notices were sent to Ms. Koch, as well as to members of the class who were similarly situated. Or. Granting Defs.' Mot. In Opp. To Preliminary Injunction 7-8. Essentially, upon its own initiative, the Department engaged in a self-imposed injunction, so-to-speak, to remedy the situation. Since that time, any such defects in notices have since been cured as to Ms. Koch as well as to other members of the class similarly situated. Therefore, there is no genuine issue as to any material fact that inadequate notice or improper notices have violated plaintiffs' constitutional rights. Thus, any injunctive relief, temporary or permanent, with regard to all notice-related allegations contained in the Petition should be dismissed.

II.

THE DEPARTMENT OF HEALTH AND HUMAN SERVICES NOR THE GOVERNOR DID NOT ACT WITHOUT THE AUTHORITY OF THE LEGISLATURE IN DECREASING THE ELIGIBILITY LEVELS FROM 185% TO 120% OF THE

FEDERAL POVERTY LEVEL, THUS 392 NAC 3-004.1D DOES NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE.

The plaintiffs have alleged that the challenged regulations violate the Separation of Powers doctrine in the Nebraska Constitution. The Separation of Powers doctrine provides:

> 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.

Neb. Const. Art. II, § 1.

The [Department of Health and Human Services] is a part of the executive branch of government. *Clemens v. Harvey*, 247 Neb. 77, 82, 525 N.W.2d 185 (1994). The legislative branch enacts statutes setting forth the law and cannot delegate those powers to any other branch of government. *Clemens*, 247 Neb. at 82, 525 N.W.2d 185. Thus, the Legislature cannot delegate its duties to the Department of Health and Human Services the power to decrease the level of eligibility from 185% to 120% of the federal poverty level in connection with the transitional benefits child care subsidy program for those persons coming off of the ADC/TANF program. In the instant case, however, clear legislative direction prompted the exercise of administrative discretion when the Legislature sustained Governor Johanns' veto of the appropriations line item in LB 1309. This legislative directive was clear and unequivocal in that it established the level of funding necessary to

set the financial eligibility level for the Social Services child care subsidy program at 120% of the federal poverty level. The executive branch of government as headed by the Governor, must faithfully carry out the laws as passed by the Legislature. Nebraska Constitution, Art. IV § 6. Since this appropriations bill, Laws 2002, LB 1309, as modified by the line item veto mandated the financial level of eligibility due to the reduced appropriation, the Department, through its director, as appointed by the Governor, had no choice but to make an adjustment in eligibility for this program. The plaintiffs would like to engage in a public policy debate about what budgetary or programmatic measures should or should not have been taken. This is a debate best served in the Legislature and for the public hearing regarding the promulgation of regulations. This public policy debate is not, however, an appropriate consideration for this Court. Furthermore, this program falls within the authority of the Department under Neb. Rev. Stat. § 68-1202 (2000 Cum. Supp.), which program does not include the transitional clients of the ADC/TANF program. Under this statute, the Department is granted rule-making authority in setting the standard of need for each program, including the Social Services child care subsidy program.

It needs to be pointed out and emphasized that determining these regulations are invalid and that the standard of need or financial eligibility level in the Social Services child care subsidy program cannot be legally set by administrative rule and regulation would effectively terminate that program since all standards of need in that program, both past and present, were established by rule and regulation. That would make it legally impossible to make an payments or set any standards of need, even reverting back to the previous standard of need of 185% of the Federal poverty level. If the 185% standard, also set by rule and regulation of this agency, was acceptable and legal, then the 120%

standard, while not acceptable to the plaintiffs, is legal as well. Therefore, plaintiffs argument that these rules and regulations are invalid on the basis of its constitutionality, is not convincing and thus, no genuine issue as to any material fact exists as to whether the challenged regulations are in violation of the Separation of Powers doctrine of the Nebraska Constitution. Plaintiffs' allegations on such grounds should therefore be dismissed.

III.

THE ALLEGATIONS OF IMPROPER NOTICE AS THEY PERTAIN TO THE PLAINTIFF CLASS ARE MOOT.

A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a cognizable interest in the outcome of litigation. A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive. *Stoetzel & Sons, Inc. v. City of Hastings*, 265 Neb. 637, 645, 658 N.W.2d 636 (2003).

Pursuant to the Order denying preliminary injunctive relief, the Court found that at least as to plaintiff Jaime Longwell that her case was moot because she remained eligible for benefits. As to plaintiff Kendra Johnsen, evidence was adduced at the hearing on this matter that she received proper notice. It was only as to plaintiff Jaime Koch and other class members similarly situated that proper notice was not given. Since that time, the Department of Health and Human Services has remedied any defective notices or unnoticed plaintiff members rendering any allegation of improper notice moot. Aff. Ron Ross, ¶¶ 2-5 (Jul.23-2003)(hereinafter,"Ross Aff."). In fact Defendant Ron Ross and

NDHHS reviewed all notices that were sent to child care subsidy clients who were losing benefits due to program eligibility adjustments in 2002, and those that were determined to be legally inadequate. Benefits were reinstated for an additional month and legally adequate notice was prepared and sent out in a timely manner. Ross Aff. ¶ 4.

As a general rule, a moot case is subject to dismissal. *Stoetzel & Sons, Inc.*, 265 Neb. at 646. Nebraska, however, recognizes a public interest exception to the mootness doctrine. The public interest exception to mootness requires the consideration of the public or private nature of the question presented, the desirability of an authoritative adjudication for guidance of public officials, and the likelihood of recurrence of the same or similar problem.

In the instant case, once the notices have been remedied, the likelihood of repetition that improper notices will be sent to the plaintiffs no longer exists until such time as the legislature enacts new legislation on the levels of eligibility. Any such enactment is a future unknown and cannot be the basis of the possibility of repetition. In fact, the legislature could increase the levels of eligibility, at which point similar litigation is not likely to arise from these same plaintiffs that the Department has set the level of eligibility too high so as to include them in the program once again. Additionally, the Department, under the direction of the Governor-appointed director, did not act outside the scope of its authority and was acting pursuant to clear legislative action. Therefore, the exception to the mootness doctrine does not apply.

CONCLUSION

Pursuant to the foregoing arguments, it remains clear that no genuine issue as to any material fact exists as applied to the timeliness and adequacy of notices and as it is applied whether the challenged regulations are in accordance with the Separation of Powers doctrine of the Nebraska Constitution. Furthermore, the issue of improper notice is now moot as it relates to the Plaintiff class. Accordingly, Defendants pray that summary judgment be granted in its favor as a matter of law, and that the above-captioned action be dismissed with prejudice.

STATE OF NEBRASKA, GOVERNOR MIKE JOHANNS, ATTORNEY GENERAL DON STENBERG, NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, and RON ROSS, DIRECTOR, Defendants.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Defendant's Resistance to a Temporary Injunction was served on the Plaintiffs herein by United States Mail, first class postage prepaid, on this 23rd day of July, 2003, addressed to Rebecca L. Gould and D. Milo Mumgaard, Nebraska Appleseed Center, 941 "O" Street, Suite 105, Lincoln, NE 68508.

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15-15-24