

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

JENNIFER DAVIO,)
INDIVIDUALLY AND)
ON BEHALF OF ALL)
OTHERS SIMILARLY)
SITUATED,)

Petitioners,)

v.)

Case No. CI 08-2202

DEFENDANTS' BRIEF IN
OPPOSITION TO PETITIONER'S
MOTION FOR
CLASS CERTIFICATION

NEBRASKA DEPARTMENT)
OF HEALTH AND HUMAN)
SERVICES,CHRISTINE Z.)
PETERSON, CHIEF)
EXECUTIVE OFFICER, TODD)
LANDRY,DIRECTOR OF)
DIVISION OF CHILDREN AND)
FAMILY SERVICES, AND)
VIVIANNE CHAUMONT,)
DIRECTOR OF DIVISION OF)
MEDICAID AND)
LONG-TERM CARE)

Defendants)

The Nebraska Department of Health and Human Services and defendants Christine Z. Peterson, Todd Landry and Vivianne Chaumont, in their official capacities as employees of the Nebraska Department of Health and Human Services, (referred to collectively as "Defendants"), by and through counsel, filed Defendants' Motion to Dismiss Petitioner's petition on

or about July 8, 2008 and also filed Defendants' Objection to Petitioner's Motion for Class Certification on September 3, 2008. Defendants oppose Petitioner's Motion for Class Certification and respectfully submit the following brief.

INTRODUCTION

Petitioner is attempting to bring this action on behalf of herself and all persons similarly situated, and claims that members of the alleged class include "all Nebraska parents who have received Aid to Dependent Children and whose Medicaid has been removed because of a sanction for failure to participate in Employment First, pursuant to 468 NAC 2-020.9B1(6) and 468 NAC 2-020.09B2f." See Petitioner's Petition at paragraph 7. Petitioner cannot show that the question at issue in this matter is of "a common or general interest of many persons" as required by Nebraska law, and cannot show that it is impracticable for individual claimants to bring their matters before the court. As a result, Petitioner should not be permitted to sue on behalf of anyone other than herself, and Defendants respectfully request that the Court deny Petitioner's Motion for Class Certification.

ARGUMENT

Nebraska's class action statute provides as follows:

When the question is one of a common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.

Neb. Rev. Stat. §25-319. In determining whether or not a party may sue as a representative of a class, "considerable discretion is vested in the trial court." Lynch vs. State Farm Mutual Automobile Insurance Company, 275 Neb. 136,144, 745 N.W. 2d 291, 298 (2008), citing Berkshire and Andersen vs.

Douglas County Board of Equalization, 200 Neb. 113, 115-116, 262 N.W. 2d 449, 451-452 (1978); Gant vs. City of Lincoln, 193 Neb 108, 110, 225 N.W. 2d 549, 551 (1975). Class certification may be denied even if a named Petitioner meets all of the technical requirements of Neb. Rev. Stat. §25-319. Id., citing Berkshire, 200 Neb at 115-116, 262 N.W. 2d at 452. For a variety of reasons, Petitioner has not and cannot establish her right to proceed as a representative of the alleged class.

PETITIONER CAN NOT ESTABLISH A CLASS WHICH IS SUFFICIENTLY NUMEROUS TO JUSTIFY CERITICATION OF A CALSS ACTION UNDER NEBRASKA LAW

Petitioner is alleging that she was wrongfully denied benefits by the Defendants, and that the authority under which the Defendants denied her benefits is unconstitutional. Petitioner is claiming that she is entitled not only to restoration of her benefits, but is also seeking declaratory and injunctive relief. However as discussed in greater detail in Defendants' brief in support of Motion to Dismiss Petitioners Petition, the Petitioner's requested relief is outside of this court's jurisdiction. The only claims by Petitioner which might be properly before this court are her claims under the Administrative Procedures Act, which vests the court with limited jurisdiction to consider allegations of persons "aggrieved by a final decision in a contested case." Neb. Rev. Stat. §84-917. This court does not have jurisdiction to provide Petitioner with the declaratory and injunctive relief she has requested.

In addition, this Court's jurisdiction is only applicable to those persons who have exhausted their administrative remedies with the Department of Health and Human Services. Petitioner's petition alleges that she has exhausted her administrative remedies. However, there is no evidence or allegation to suggest that there is a large class of persons who have

similarly exhausted their administrative remedies, as required by §84-917 and as required in order to constitute a class under §25-319. Defendants request the court take judicial notice of its own docket, which establishes there is only one other case in which a Petitioner is alleging exhaustion of administrative remedies and wrongful denial of medical assistance benefits due to the Employment First sanctions. This is not sufficient to satisfy the numerosity requirements of §25-319. While recognizing “[t]here is no mechanical test for determining whether in a particular case the class is so numerous that the requirement of numerosity has been satisfied....” the Nebraska Supreme Court in Hoiengs noted “it would be absurd to say that two persons litigating a question of common interest should, for that reason alone, be afforded class action treatment...” Hoiengs vs. County of Adams, 245 Neb 877, 901, 516 N.W. 2d 223, 240-41 (1994) (ultimately holding that a group of 9,000 parties does meet the numerosity requirement). See also Benesch v. City of Schuyler, 5 Neb.App. 59, 67-68, 555 N.W.2d 63, 68-69 (Neb.App.,1996) (Finding that 11 parties do not satisfy the numerosity requirement.). It is Petitioner’s burden to establish compliance with Neb Rev Statute §25-319, and she cannot sustain her required proof.

**CERIFICATION OF THE CLASS ALLEGED BY PETITIONER WOULD
VIOLATE THE ADMINISTRATIVE PROCEDURES ACT**

Petitioner’s argument that the alleged class should include all claimants who have been sanctioned likewise cannot be sustained. Petitioner’s Motion for Class Certification essentially requires this court to disregard and nullify the requirements of the Administrative Procedures Act. This would violate the Act and allow claims which are not properly before the court to proceed. Such a certification would raise multiple issues and problems.

First, those persons who have not exhausted their administrative remedies are not entitled to seek relief in this court. The requirements of the Administrative Procedures Act are clear and failure to comply with those procedures acts as a bar. Roubal ex rel. Holm v. State, Dept. of Health and Human Services, 14 Neb.App. 554, 710 N.W.2d 359 (Neb.App.,2006). The time for some of the persons who have been sanctioned to pursue administrative remedies and/or legal action in court has expired. A claimant has ninety days from imposition of a sanction to pursue an appeal. 465 NAC 2-001.02A If the claimant is not satisfied with the results of that appeal, a claimant must file an appeal in the county in which the agency took action (Lancaster County) within 30 days from the time he/she is served with the agency's order. Neb Rev Statue §84-917 (2)(a). The failure to properly and timely pursue administrative and legal remedies on the part of some of the individuals cannot be remedied by Petitioner's attempt to include them in this alleged class action. Such a determination by this court would have the effect of resurrecting claims which are clearly barred.

Second, the procedural requirements of the Administrative Procedures Act are in place in order to allow the Defendants the opportunity to further assess and consider the factual circumstances of each claimant. Those individuals whose claims have not been further assessed and considered under the administrative remedies available to them do not have a common or general interest with the Petitioner, as required by §25-319.

Third, the evidence will suggest that some applicants who have been sanctioned under the Employment First Program have successfully appealed those sanctions and have had their benefits restored. Petitioner's alleged class therefore may contain persons who have not suffered any harm and who are receiving all of the benefits to which they are entitled.

Finally, many of the alleged members of the class may no longer be eligible for benefits. These persons may have obtained income or assets which would preclude them from receiving benefits, regardless of their compliance with the Employment First Program. These persons may have moved away from the State of Nebraska and/or may be receiving benefits in other jurisdictions. Because these individuals have not pursued their administrative remedies, the Defendants have not been afforded the opportunity to further assess and consider if they are eligible for benefits. There are innumerable mitigating or aggravating circumstances which may impact the agency's determinations, and which must be made on a case by case basis. The Administrative Procedures Act is designed to ensure that such determinations are made and Petitioner's attempt to circumvent this process should be rejected by this Court. Petitioner's request for class certification would result in potential claims being made on behalf of person who have no active claim and who have no intent to pursue any claim.

**PETITIONER DOES NOT SHARE A COMMON OR GENERAL INTEREST
WITH THE ALLEGED MEMBERS OF THE CLASS**

Separate and apart from the issues under the Administrative Procedures Act, Petitioner can not establish that the persons in the alleged class have a common interest under the applicable regulations. The Employment First regulations require claimants' compliance under a self-sufficiency contract. The claimants who comply with the self-sufficiency contracts receive additional benefits under the Aid to Dependent Children. The consideration provided to the claimants is their agreement to participate and cooperate in fulfilling the terms of the self-sufficiency contract, which provides them with the opportunity to attain economic self-sufficiency. 468 NAC 2-020. There are various components available to the applicants,

including Job Search/Job Readiness training, Work Experience, Vocational Training and subsidized or unsubsidized employment. 468 NAC 2-020.07.

Petitioner has not alleged that the components of her self-sufficiency contract are the same or similar to the components of the self-sufficiency contracts for the other applicants who have been sanctioned. Nor has the Petitioner alleged that she is in the same phase of sanctions as the other claimants who have been sanctioned under the Employment First Program, or that she has made the same efforts to cooperate with the terms of the Employment First Program.

The Nebraska Administrative Code provides for varying levels of sanctions:

2-020.09B2f(2) Length of Sanction: If the individual who has failed to participate is a parent, the sanctions will be as follows:

1. The first imposition of a sanction will last one month or until the failure to participate ceases, whichever is longer.
2. The second sanction will last for three months or until the failure to participate ceases, whichever is longer.
3. The third and subsequent sanctions must not be imposed without a second-level supervisory review. This sanction will last for a minimum of 12 months or until the failure to participate ceases, whichever is longer.

468 NAC 2-020.09B2f(2). In addition, the regulations provide that the sanctions may be lifted if the participant fulfills the participation requirements of the Self Sufficiency Contract. 468 NAC 2-020.09B2f(3). Petitioner's Petition does not limit the alleged class to those persons who have been subject to the same level of sanction as her. Likewise, the Petition's allegations do not limit the alleged class to those persons who have the

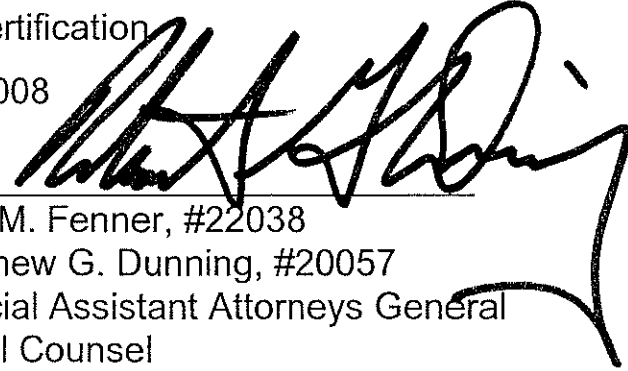
same level of participation or cooperation, or lack thereof, as Petitioner. Rather, Petitioner claims that the class consists of all parents who have been sanctioned under 2-020.09B2f, regardless of length of sanction or level of cooperation. The varying levels of cooperation among the alleged members of the class can result in differences in treatment and eligibility for benefits. Not all members of the class will be denied benefits, and not all members of the class will have their benefits restored. The treatment of Petitioner may vary significantly from the treatment of the other alleged members of the class, and Petitioner does not have a sufficient common or general interest with the alleged class members to be entitled to pursue for their benefit.

CONCLUSION

The allegations in Petitioner's Petition do not support a certification of the alleged class. As a result, Defendants respectfully request that the Court deny Petitioner's Motion for Class Certification.

DATED this 4 day of September, 2008

BY: _____



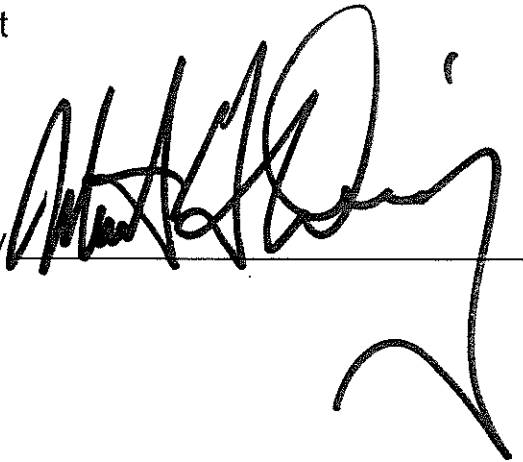
Jodi M. Fenner, #22038
Matthew G. Dunning, #20057
Special Assistant Attorneys General
Legal Counsel
Nebraska Department of
Health and Human Services
301 Centennial Mall
Lincoln NE 68509
Tel: (402) 471-4731
Attorneys for Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 4 day of September, 2008, a copy of the foregoing Defendants' Brief In Opposition to Petitioner's Motion for class certification has been served on the Petitioners by hand delivery to the following attorneys of record:

Erin A. Ching
Rebecca L. Gould
Nebraska Appleseed Center
For Law in the Public Interest
941 O Street, Suite 920
Lincoln, NE 68508
FAX: (402) 438-0263

By

A handwritten signature in black ink, appearing to read "Erin A. Ching", is written over a horizontal line. The signature is stylized and cursive.