

IN THE SUPREME COURT OF THE STATE OF NEBRASKA

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

CASE NO. S09-00985

APPELLEE)

v.)

NEBRASKA DEPARTMENT OF)
HEALTH AND HUMAN SERVICES,)
KERRY T. WINTERER, CHIEF)
EXECUTIVE OFFICER, TODD)
RECKLING, DIRECTOR OF DIVISION)
OF CHILDREN AND FAMILY)
SERVICES, AND VIVIANNE M.)
CHAUMONT, DIRECTOR OF)
MEDICAID AND LONG TERM CARE,)
APPELLANTS)

APPELLANTS' REPLY BRIEF

On appeal from The District Court of
Lancaster County, Nebraska

The Honorable Karen B. Flowers, Lancaster County
District Court Judge, presiding.

Submitted by:

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SUMMARY OF ARGUMENT

The district court erred by taking subject matter jurisdiction over this matter. In addition, the court erred by certifying a class in this case where neither the commonality or numerosity requirements were established by Appellee. The court further erred by entering an order that the Appellants were without the authority to impose sanctions of the type at issue in this matter, as Appellants have a clear grant of authority and explicit direction from the Unicameral and there is no restriction or prohibition preventing the Appellants from issuing these types of sanctions.

ARGUMENT

I.

THE DISTRICT COURT DID NOT HAVE SUBJECT MATTER JURISDICTION OVER APPELLEE'S CLAIMS.

Appellee alleged that the lower court had jurisdiction over her claims pursuant to Neb. Rev. Stat. §§ 84-901 *et seq.* (T2). However, Appellee also alleged that she was no longer challenging the validity of the sanction imposed on her at the administrative level. (T11). As a result, she is not asserting any claim under the Administrative Procedure Act as to her own alleged harm. Consequently, she also cannot be heard to challenge the rule or regulation that was the basis for her sanction.

Neb. Rev. Stat. §84-911 provides that the validity of a regulation may be subject to declaratory judgment “if it appears that the...regulation...interferes with or impairs or threatens to interfere with or impair the legal rights or privileges of the petitioner.” Appellee in this matter no longer has such rights or privileges. (T11). She is not challenging the application of the regulation as it pertains to her own factual

circumstances. There are no existing facts or rights to be determined. *Wilcox vs. City of McCook*, 262 Neb 696, 699, 634 N.W. 2d 486 (2001). The issues presented are no longer alive. *Id.* As a result, her case is moot.

The Appellee's allegation that she is no longer contesting the sanctions renders her case under the Administrative Procedure Act moot for all purposes. She is no longer asserting rights or privileges which would vest the court with the alleged jurisdiction under Neb. Rev. Stat. §84-911. "A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of litigation." *Chambers vs. Lautenbaugh*, 263 Neb. 920, 926, 644 NW 2nd 540, 547 (2002), citing *Greater Omaha Realty Company vs. City of Omaha*, 258 Neb. 714, 605 NW 2nd 472 (2000). In addition, Appellee lacks standing:

As an aspect of jurisdiction and justiciability, standing requires that the litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf.

Chambers, 263 Neb. at 927, 644 NW 2nd at 547, citing *State ex rel Steinke vs. Lautenbaugh*, 263 Neb. 652, 642 NW 2nd 132 (2002). Appellee in this case does not have any special injury to herself that would justify the lower court's jurisdiction over this matter. *Chambers*, 263 Neb. at 927-28, 644 NW 2nd at 547-48, citing *Steinke*, 263 Neb. at 657-58, 642 NW 2nd at 138. (other citations omitted.)

Appellee asserts that the court had jurisdiction even if there is no jurisdiction under §84-917. However, the cases cited by Appellee are inapposite. Both *Upper Big*

Blue Natural Resources Department vs. State of Nebraska Department of Natural Resources, 276 Neb. 612, 756 N.W. 2d 145 (2008) and *Weeks vs. State*, 204 Neb. 659, 284 N.W. 2d 843 (1979) involved live cases and controversies, and therefore were within *Wilcox, supra*. In addition, in *Weeks*, there was a contract claim that was considered separate and apart from the proceeding under the Administrative Procedure Act, thereby giving the court an additional basis for jurisdiction. *Weeks*, 204 Neb. at 663, 284 N.W. 2d at 846, citing *Brady vs. Board of Trustees of Nebraska State Colleges*, 196 Neb. 226, 242 NW 2d 616 (1976) (contractual case not involving proceedings under the Administrative Procedures Act.)

Even if there is jurisdiction under Neb. Rev. Stat. §84-911, the relief sought by Appellee in this case is simply not available. While Appellee is attempting to seek a declaration under Neb. Rev. Stat. §84-911 regarding whether the Department's regulations at issue are valid, she cannot obtain the relief she seeks under this statutory provision. This Court has previously held that "§84-911 of the Administrative Procedure Act is limited to judicial determination of the validity of any rule or regulation of a State agency and does not confer jurisdiction for judicial resolution of a factual question pertaining to the merits of a controversy." *Riley vs. State* 244 Neb. 250, 258, 506 NW 2nd 45, 50 (1993)).

If this court were to declare the regulations at issue to be invalid, individuals affected by this regulation would still be required to take further administrative actions in order to obtain the relief that they seek (reinstatement of their Medicaid benefits). See *Dozler vs. Conrad*, 3 Neb. App 735, 743, 532 NW 2nd 42, 48-49 (Neb. App. 1995). This would be no different than would be the result of this court ruling on Appellee's claim

under §84-917 that the Department's regulations are unconstitutional. Thus, Appellee's attempt to use §84-911 to substantiate her class action claims in this proceeding should be disregarded.

II.

APPELLEE FAILED TO ESTABLISH A SUFFICIENT BASIS ON WHICH TO CERTIFY THIS MATTER AS A CLASS ACTION.

The lower court certified a class in this matter, consisting of "those persons who, on or after May 20, 2008, are or in the future will be under a sanction pursuant to 468 NAC 2-020.09B1(6) or 468 NAC 2-020.09B2f and, thus, had or will have their medicaid removed for failure to comply with an Employment First contract." (T94). The certification of the class action in this matter was improper as there are no sufficient questions of law and fact common to all class members. Members of the class who have had Medicaid removed, according to the terms of the class as established by the lower court, may have moved out of state, and thus may have no further eligibility. They may no longer be eligible based on income and assets restrictions. The class as certified likely contains individuals who are not entitled to any relief.

The class does not contain members with a common or general interest because not all members of the class have exhausted their administrative remedies. While it may be accurate that the exhaustion of administrative remedies is not required for class certification under Neb.Rev.Stat. §25-319, the proposed members of this class are seeking relief which can only be granted to those individuals who have exhausted those administrative remedies. While Appellee maintains that DHHS' opportunity to review

and assess the factual circumstances of each class member is immaterial, that is nevertheless a requirement of the Administrative Procedure Act.

This issue also goes to the numerosity of the members of the class. Because there is evidence of no more than one, and possibly two, class members, the numerosity requirement is simply not satisfied. Again, Appellee attempts to divorce the Administrative Procedure Act issues from the numerosity issues, with the result that requirements of the Administrative Procedure Act are simply ignored. This violates the terms of that Act.

III.

THE NEBRASKA WELFARE REFORM ACT DOES NOT PROHIBIT DHHS FROM IMPOSING SANCTIONS ON RECIPIENTS OF MEDICAID BENEFITS FOR VIOLATIONS OF THEIR SELF-SUFFICIENCY CONTRACTS.

In adopting the Welfare Reform Act, the Nebraska Legislature clearly intended its goal “to be accomplished through individualized assessments of the personal and economic resources of each applicant for public assistance and through the use of individualized self-sufficiency contracts.” Neb. Rev. Stat. § 68-1709. The Act applied to all applicants for public assistance, and not just applicants for ADC/cash assistance.

In the absence of constitutional authority, an administrative agency has only that power which has been granted to it by the Legislature. *Nebraska Public Service Com'n. v. Nebraska Public Power District*, 256 Neb. 479, 590 N.W. 2d 840 (1999). Administrative bodies have only that authority specifically conferred upon them by statute or by construction necessary to achieve the purpose of the relevant act. *Grand*

Island Latin Club, Inc. v. Nebraska Liquor Control Com'n, 251 Neb. 61, 554 N.W. 2d 778 (1996), citing *Centra, Inc. v. Chandler Ins. Co.*, 248 Neb. 844, 540 N.W. 2d 318 (1995); *Chrysler Corp. v. Lee Janssen Motor Co.*, 248 Neb. 281, 534 N.W. 2d 568 (1995). Standards which guide an administrative agency need not be embodied in one statute, but may be found in others. *In re Application U-2*, 226 Neb. 594, 413 N.W. 2d 290 (1987). Limitations of power granted an administrative agency and the standards by which the granted powers are to be administered must be clearly and definitely stated in an authorizing act. *Lincoln Dairy Co. v. Finigan*, 170 Neb. 777, 104 N.W. 2d 227 (1974). State agencies have broad discretion “where the manner and method of carrying out the agencies' statutory duties is not specifically prescribed.” *D.K. Buskirk & Sons, Inc. v. State*, 252 Neb. 84, 560 N.W. 2d 462 (1997) “When a statute does not prescribe the action to be taken, leaving the agency or employee to make a judgment and this judgment is based on social, economic or political considerations, it will be protected by the discretionary function.” *Id.* See also *Security Investment Co. v. State*, 231 Neb. 536, 437 N.W.2d 439 (1989); *First Nat'l Bank of Omaha v. State*, 241 Neb. 267, 488 N.W.2d 343 (1992); *Jasa v. Douglas County*, 244 Neb. 944, 510 N.W.2d 281 (1994).

A determination of DHHS' authority with respect to the Medical Assistance Act requires a review of Neb. Rev. Stat. §68-908, which provides:

68-908. Department; powers and duties.

- (1) The department shall administer the medical assistance program.
- (2) The department may (a) enter into contracts and interagency agreements,
(b) adopt and promulgate rules and regulations...and (e) perform such other

activities as necessary and appropriate to carry out its duties under the Medical Assistance Act.

Neb. Rev. Stat. § 68-908. The very general nature and scope of this statute, in comparison with the nature and scope of the Medicaid program, lends support to the conclusion that the Legislature intended to grant to DHHS broad discretion in administering the Medicaid program. Although Neb. Rev. Stat. § 68-908 (2) (a) through (d) include specific actions which DHHS is authorized to take, the Legislature included a very broad “catch-all” in the form of subsection (e), which authorizes DHHS to “perform such other activities as necessary and appropriate to carry out its duties under the Medical Assistance Act.” Neb. Rev. Stat. § 68-908, reviewed in light of *Buskirk*, provides DHHS with broad discretion to carry out its duties under the Medical Assistance Act. In addition, it is the public policy of the state that the Medicaid program be appropriately managed and fiscally sustainable. Neb. Rev. Stat. § 68-905 (7).

Appellee argues that Neb. Rev. Stat. § 68-1723 limits self-sufficiency contract/employment First participation and related sanctions only to the ADC program. The statutes contain no such limitation, however, and merely require that, at a minimum, sanctions of ADC benefits are to be imposed for failure to comply with self-sufficiency contract requirements. That the Legislature has set forth a specific requirement for the ADC program cannot be construed as a prohibition on the Department’s ability to impose similar requirements and sanctions on other public assistance programs (such as medical assistance). Appellee alleges that the Department has violated the Separation of Powers clause by exceeding the authority delegated to it by the Legislature. (T12). However, the Department has acted within the grant of its authority by the Legislature.

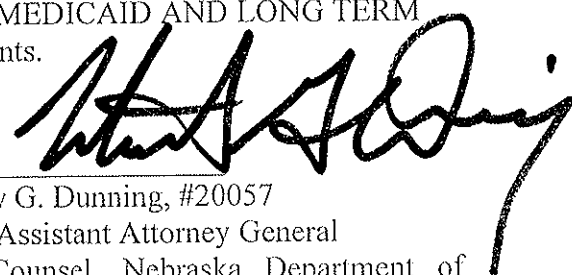
CONCLUSION

Based on the foregoing, Defendants request that the Court reverse the Lancaster County District Court and remand this matter for proceedings consistent with its opinion.

DATED this 30th day of March, 2010.

NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, KERRY T. WINTERER, CHIEF EXECUTIVE OFFICER, TODD RECKLING, DIRECTOR OF DIVISION OF CHILDREN AND FAMILY SERVICES, AND VIVIANNE M. CHAUMONT, DIRECTOR OF DIVISION OF MEDICAID AND LONG TERM CARE, Appellants.

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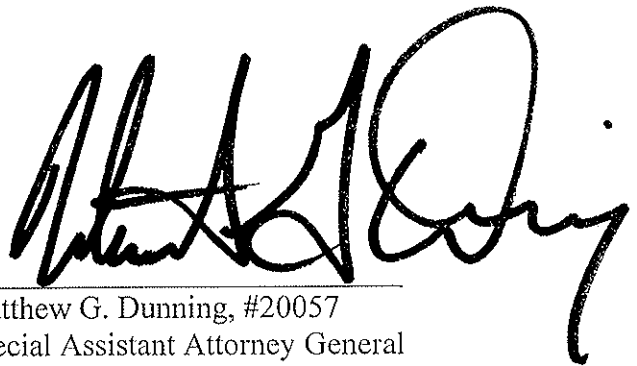
V.)

NEBRASKA DEPARTMENT OF)
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CHAUMONT, DIRECTOR OF)
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APPELLANTS)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 30 day of March, 2010, two copies of the foregoing Appellants' brief has been served on the Plaintiffs by mailing a copy to their attorneys of record by regular United States mail, first class postage prepaid as follows:

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