

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

JENNIFER DAVIO et al,	)	
	)	
Plaintiffs,	)	CI08-2202
	)	
	)	
vs	)	ORDER
	)	
NEBRASKA DEPARTMENT OF	)	
HEALTH AND HUMAN SERVICES	)	
et al,	)	
	)	
	)	
Defendants.	)	

Statement of the Case

Jennifer Davio applied to the State for aid to dependent children. While on ADC she also received medicaid. As a condition of her receiving ADC, Davio was required to participate in the Employment First Program, a self-sufficiency program authorized under the Welfare Reform Act, Neb. Rev. Stat. §68-1709 et seq. All of the programs at issue here are administered by the Department of Health and Human Services. The Department determined that Davio failed to participate in the activities required by the Employment First Program and imposed a sanction, pursuant to 468 NAC 2-020.09B(2)(f), that included the loss of cash assistance for her family (ADC) and medicaid coverage for Davio. She appealed to the Department. After a hearing, the Director of the Department determined that Davio had failed to comply with the Employment First requirements and that the sanction imposed was appropriate. This appeal followed.

In addition to her appeal under the APA, Davio seeks a judgement declaring that 468 NAC 2-020.09B(2)(f) is invalid and unconstitutional because it exceeds the authority delegated to the Department by the Legislature and violates the separation of powers set out in the Constitution of the State of Nebraska. I granted Davio's motion for class action status as it respects the validity 468 NAC 2-020.09B(2). She asks that an injunction issue to bar enforcement of the regulation and that she and members of the class be reimbursed for the medical expenses they paid.

For the reasons that follow I find that Jennifer Davio failed be actively engaged in the activities outlined in her self-sufficiency contract but that the sanction she received should have been limited to the loss of her cash assistance. I find that 468 NAC 2-020.09B(2)(f) is invalid insofar as it removes medicaid benefits for adults who fail to comply with their Employment First contracts, that an injunction should be granted and a further hearing held on the issue of damages.

## The APA Appeal

As it respects Davio's appeal under the APA, my review is *de novo* on the record. It is not clear to me whether Davio has abandoned her appeal of the Department's factual determination or not. To be safe, I will rule on that portion of the case. In this regard it is apparent that the Director did not believe Davio's testimony and neither do I. I find that Davio was required to attend job search check in/check out between 8:15 and 9:15 each morning and 3:30 and 4:00 each afternoon commencing July 12, 2007 and that she failed to do so without good cause. I don't know whether Davio ever intended to comply with the requirement because, although she had to rely on public transportation for everything, she made no effort to find child care within a reasonable distance of her home in order to make compliance possible. Neither did she contact Arbor CM with the difficulty she had in this regard.

In connection with her appeal, Davio cites as error the hearing officer's refusal to receive Exhibit 23 into evidence. Exhibit 23 was not offered at the time of the administrative hearing. Rather, Davio offered it by way of a "Motion for Supplemental Evidence which was denied. The notion that Exhibit 23 is "newly discovered" evidence, as alleged in the motion, is simply not true. I find no error in the evidentiary ruling.

I will deal with the appropriateness of Davio's sanction below.

### The Declaratory Judgement

468 NAC 2-020.09B(2)(f) provides as follows:

If the parent fails or refuses to participate in EF without good cause, all ADC cash assistance for the family must be closed as well as the medical assistance for the adult(s).

It is fundamental that the Legislature may not delegate legislative power to an administrative agency. The Legislature does have the power, however, to authorize an administrative agency to make rules and regulations to carry out the expressed legislative purpose, or for the complete operation and enforcement of the law within designated limitations. It is also fundamental that in the legislative grant of power to an administrative agency, such power must be limited to the express legislative purpose and administered in accordance with standards prescribed in the legislative act. That is, the limitations of the power granted and the standards by which the granted power is to be administered must be clearly and definitively stated in the authorizing act. *Lincoln Dairy Co. v Finigan*, 170 Neb.777, 104 N.W.2d 227 (1960). An administrative agency may not employ its rule making power to modify, alter or enlarge provisions of a statute which it is charged with administering. *Clemens v Harvey*, 247 Neb. 77, 525 N.W.2d 185 (1994)

The Welfare Reform Act is the Act by which self- sufficiency programs were created and tied to the receipt of public assistance through the welfare programs of the State. Neb. Rev. Stat. §68-1723 states that if recipients of cash assistance are not actively engaged in the activities outlined in their self-sufficiency contracts or fail to carry out the terms of those contracts, no cash assistance shall be paid. Davio concedes that she and others can lose ADC for failing to comply with Employment First requirements because ADC is cash assistance. Davio argues that the Department has no authority to remove medicaid because medicaid is not cash assistance. The Department argues the authority to remove medicaid can be found in Neb. Rev. Stat. § 68-1713(d).

In §68-1713(d) the legislature directed that the Department “implement the following policies : . . .(d) Make Sanctions More Stringent To Emphasize Participant Obligations . . .” This provision, argues the Department, authorizes it to impose sanctions in addition to the loss of cash assistance. Some years ago, pursuant to §68-1713(d), the Department added the loss of medicaid to the sanction set forth in the regulations. (46:21-47:14) The difficulty with the Department’s argument is two fold. First, §68-1713(d) is completely devoid of any standard and as such would be an unlawful delegation of legislative authority and, second, it would result in conditioning the receipt of medicaid on compliance with a self-sufficiency contract, thus amending §68-1723, which the Department cannot, by its rule making power, do.

The Department argues that if §68-1713(d) does not grant it the authority to remove medicaid benefits, the Medical Assistance Act , Neb. Rev. Stat. §68-903 *et seq.*, does. But I can find nowhere in the Medical Assistance Act where the legislature has conditioned eligibility for medicaid upon compliance with a self-sufficiency contract. Eligibility is set forth in §68-915. Nowhere there are self sufficiency contracts mentioned. I note that in §68-917, the refusal of a medicaid recipient to cooperate in obtaining reimbursement for medical care provided to him or her would render the recipient ineligible for assistance. There is no comparable provision in the Act which makes a recipient’s refusal to cooperate or comply with a self-sufficiency plan ineligible for medicaid.

The Department directs me to Neb. Rev. Stat. §§68-905 and 912 . Those statutes say that (a) the public policy of the state is to “provide a program of medical assistance that . . . emphasizes personal independence, self sufficiency and freedom of choice . . .” (§68-905); (b) the department may establish . . . requirements for recipients of medical assistance as a necessary condition for the continued receipt of such assistance, including, but not limited to, active participation in care coordination and appropriate disease management programs and activities” (§68-912(1)(c)); and (c) the department is to consider, among other things, public policy, “in establishing and limiting coverage for services under the program.” (§68-912(2)(b)). It can be argued that conditioning receipt of medicaid on compliance with a self-sufficiency contract is consistent with the public policy of the State. Deciding whether to do so, however, is a legislative function not an administrative one.

For the foregoing reasons I find that to the extent 468 NAC 2-020.09B(2)(f) permits the Department to remove medicaid benefits from adults who fail to comply with their Employment First contracts, it exceeds the authority granted to the Department in either the Welfare Reform Act or the Medicaid Act. The Department is enjoined from removing such benefits as a sanction for non compliance. A further hearing shall be held on the matter of damages.

My bailiff shall mail a copy of this order to counsel of record.

Dated June 30, 2009.

By the Court:

  
Karen B. Flowers, District Judge