

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

TANYA WALTERS, individually and  
on behalf of all others similarly situated,

Plaintiff,

v.

STATE OF NEBRASKA,  
NEBRASKA DEPARTMENT OF  
HEALTH AND HUMANS SERVICES,  
and RON ROSS, DIRECTOR,

Defendants.

Case No. CI 01\_\_\_\_\_

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)  
) **PETITION FOR DECLARATORY AND**  
) **INJUNCTIVE RELIEF**  
) **AND PRAECIPE**

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) **CLASS ACTION**  
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**COMES NOW** the Plaintiff, by and through her attorneys, and for her causes of action  
alleges as follows:

**PARTIES**

1. The Plaintiff is a woman with minor children who is income and resource eligible to receive public assistance, and is a resident of Wayne County, Nebraska. She has been denied a self-sufficiency contract to get a bachelor's degree at Wayne State College, has appealed to the defendants, and now appeals the defendants' Finding and Order to this Court. Exhibit 1, Finding and Order, August 7, 2001. She also is the named plaintiff for a class which has also been denied the right to negotiate a contract for a bachelor degree.
2. The class member plaintiffs are adults in families receiving cash assistance since December 27, 1997 who are mandatory participants in the time-limited

“Employment First” program whom the defendants have denied a self-sufficiency contract with the work activity consisting of study towards a bachelor’s degree, if such an activity will not lead to completion of a degree within 24 months of the date the contract is signed.

3. The defendants are a state of the United States and the administrative agency charged with implementing the public assistance programs of Nebraska.

### **JURISDICTION AND VENUE**

4. Jurisdiction in Lancaster County is proper because the plaintiff’s causes of action arise under the law of Nebraska. Venue is proper because all material events occurred in the state of Nebraska, and venue is set by statute under the Administrative Procedures Act (APA) NEB. REV. STAT. § 84-911. (Reissue of 1996).
5. The plaintiff brings this action under NEB. REV. STAT. § 84-901 *et seq.*, NEB. REV. STAT. § 25 1062-1080, the Nebraska Welfare Reform Act (WRA), NEB. REV. STAT. § 68-1709 *et seq.*, and the relevant Nebraska Health and Human Services Rules, 468 Nebraska Administrative Code (NAC).
6. The plaintiff brings this action for herself and all others similarly situated under NEB. REV. STAT. § 25-319, NEB. REV. STAT. § 25 1062-1080, NEB. REV. STAT. § 84-901 *et seq.*, the Nebraska Welfare Reform Act, NEB. REV. STAT. § 68-1709 *et seq.*, and the relevant Nebraska Health and Human Services Rules, 468 Nebraska Administrative Code (NAC).

## **FACTS**

7. Tanya Walters is the mother of children three and five years old. She worked in Alliance for several years at a manufacturing plant. She was once Employee of the Month, and made satisfactory wages. But the work was physically very wearing and the working conditions were often dangerous. She was also in a battering relationship and her children's father was eventually imprisoned for threatening to kill her—in front of a police officer. Partly to escape her batterer, and partly to seek work that left her with enough time and energy for her children, she relocated to Wayne in spring of 2000 and applied to enter Wayne State College for a degree in psychology, to become a counselor.
8. Under the WRA, each public assistance recipient is to undergo a complete assets assessment, and then negotiate a contract with her case worker for allowable work activities, “supportive services” (money assistance paid to child care, transportation, and other services), and other programs designed to remove barriers to economic self-sufficiency and/or to enhance skills to maximize economic self-sufficiency. The plan is particularly described in the WRA, NEB. REV. STAT. § 68 1709-1726. “Allowable work activity” is the term for the various activities participants can engage in under their contract. They can range from finishing high school for minors who have a child, to substance abuse treatment, to job search and application skill training, to studying for a two or four year degree, to getting and keeping a job. They are generally described in the

statute in the policy declaration section, § 68-1709, description and purpose of the complete assets assessment, § 68-1718, and a list of possible activities in § 68-1721.

9. The plaintiff's case worker in Wayne refused to sign a contract that provided for her to seek a bachelor's degree as her allowable work activity. The case worker cited 468 NAC 2-020.06B1 Post-secondary Education, which sets out the requirements for a client to seek post-secondary education. This provision does not include a requirement to finish a two-year associate degree (see below). There is one sentence in the rule which says "The participant can participate in post-secondary education for up to 24 months."

The defendants interpret that sentence to mean the degree must literally be earned in the next 24 consecutive months after signing the contract. They cite a "policy" of not allowing education programs which cannot be completed in two years or less.

The Post-secondary Education Rule refers to bachelor's degrees, since shorter degree programs are covered in the Job Skills Training rule. Two year associate degrees are, in fact, authorized separately in 468 NAC 2-020.06C Job Skills Training.

10. The plaintiffs have it on information and belief that the above-referenced "policies" are extra legal interpretations of statute and rules created and used by the defendants. The alleged "policies" are not written anywhere. No rulemaking

process has been implemented or followed by the defendants to establish these “policies”. They have never been properly promulgated as administrative rules. There is no authority in the statute and the rules consistent with the interpretations represented in the “policies.” They lead to arbitrary decisions by administrators and case workers that harm clients. They circumvent the statute, the legislative intent and the properly promulgated rules. For purposes of this case there are three issues subject to these “policies.” First, there is a “policy” that no approved education program can last longer than twenty-four consecutive months from the date the contract is signed. Second, there is a “policy” that all approved education programs must be able to be completed with a certificate, degree, or diploma. Third, there is a “policy” that if a client has a “marketable job skill,” she is not eligible for any other training. (See below.) If a client has held any job, she can be deemed to have a “marketable job skill,” and is often denied any further training or skill building activities.

The impact of these “policies” is to diminish the ability to of clients to reach economic self-sufficiency. They contravene the intent of the WRA, for families “to attain or regain and maintain economic self-sufficiency.” § 68-1716 . . . evaluation of act.

10. In October 2000 the case worker sanctioned the plaintiff for Failure to Cooperate by refusing to sign a contract which did not include studying for a bachelor’s degree as an allowable work activity and for not seeking employment.

11. The Post-secondary Education Rule (above) says that a client may not seek a bachelor's degree if she already has a "marketable job skill" and "the skill can be reasonably expected to provide a wage leading to economic self-sufficiency in the current, area-specific labor market and the client is physically, mentally and emotionally able to utilize those skills through employment." 468 NAC 2-020.06B.
12. At her appeal hearing on December 14, 2000, the case worker admitted that the several kinds of manufacturing jobs in the Wayne area were shrinking, and that those employers were laying employees off instead of hiring. F&O, at 3. She further testified then, and at the appeal hearing being appealed in this case, on July 24, 2001, that other jobs available in the area would not lead to economic self-sufficiency. Ms. Walters testified that she could no longer physically and emotionally do manufacturing work because it left her without sufficient resources to properly care for and raise her children. F&O at 3-4. Thus, according to labor market information and the client's testimony, she was qualified to seek a contract under Post-secondary Education Rule.
13. The Legislature was specifically amended WRA in 1995 to include the actual words "post-secondary education," meaning study towards a bachelor's degree, in the list of allowable work activities. NEB. REV. STAT. § 68-1721(2). There was always recognition from the senators that for clients with the capacity to earn a bachelor's degree, it was one of the most certain ways to become economically

self-sufficient and should be encouraged. Exhibit 3. Legislative History, statements in support of post-secondary education as an allowable work activity.

14. As held in *Kosmicki v. State*, CI 00-4209, “it is clear that post-secondary education is a permissible work activity for the purposes of a self-sufficiency contract. . . . It is clear the Legislature did not directly limit post-secondary education as an acceptable activity for the purposes of a self-sufficiency contract.” Order, March 27, 2001 at 6, attached. And, after reviewing the Post-secondary Rule 468 NAC 2-020.6B1, the court observed that “nowhere in the statutes or in the above rule does it state that the post-secondary education program must lead to a diploma or a degree.” *Id.* at 7. Additionally, the court noted that the defendants themselves had agreed to a contract with Kosmicki for a two-year community college program as an allowable work activity and concluded that “limiting participation in four year colleges to those who can finish their degrees in less than two years is not consistent with the policies of the Welfare Reform Act or the rules promulgated by DHHS. *Id.* at 8.
15. The statute envisions that while receiving public assistance, recipients will reach their “highest level of self-sufficiency.” NEB. REV. STAT. § 68-1726. The defendants insist that the only approved education programs are ones which can be completed in “two years,” or in other words, within the next 24 consecutive calendar months. This interpretation misinterprets the law. When the welfare changes were begun in the early 1990s, before the federal Aid to Families with

Dependent Children (AFDC) laws were repealed, the states were encouraged to experiment with different changes through approved waivers from current federal laws and administrative rules. Nebraska's Waiver allowed a 48-month absolute time limit during which the twenty-four months of time-limited Aid to Dependent Children (ADC) could be received. That feature was permanently added to state law by LB 864 § 12 in 1997, codified at NEB. REV. STAT. § 68-1710 (1998 Cumm.Supp.). "Two years" is, in fact, shorthand for "24 time-limited months of ADC received within a maximum of 48 consecutive calendar months" under the statute. The defendants may not write or interpret rules which alter, modify or enlarge the provisions of the statute they are administering. *Clemens v. Harvey*, 247 Neb. 77, 180 (1994).

16. The requirement in the Post-secondary Education Rule that studying for a bachelor's degree is only possible if a client does not have a marketable job skill, or there are no jobs in her skill area, is also a misinterpretation of the statute. The statute requires a complete assets assessment, and a contract which may enhance skills and lead to her highest level of economic self-sufficiency. If the client is income and resource eligible to receive benefits and be in a mandatory time-limited program, the duty of the defendants is to negotiate with her for the allowable work activity which will lead to her to maximize her skills in the time she has available. If she does qualify for assistance, then there is a reason why she is not working at the job for which she is supposedly qualified. Working hours,

working conditions, actual ability to earn more than all public assistance benefits provide, availability of child care, transportation, and other considerations come into play. The term “marketable job skill” has no known definition to the plaintiffs. It is subject to the “policy” interpretations that the better defined Post-secondary Education Rule is seen to be subject to, in violation of the statute, and to the detriment of the clients. The defendants must not interpret its rules and regulations in such a manner so that self-interpreted rules and regulations contravene the statute. *Dodge Co. v. Dept. of Health*, 218 Neb. 346 (1984).

Further, the defendants’ interpretations will be accorded deference, if they are not plainly erroneous or inconsistent. *Vinci v. Neb. Dept. Corr. Servs.*, 253 Neb. 423 (1997).

17. The members of the class are too numerous to bring to court individually to seek relief. According to the defendants, there are approximately 10,000 families receiving ADC. Defendants report that the average family stays on assistance for an average of eleven months. Exhibit 2, defendants’ TANF Caseload Reduction Report, at 1. Plaintiffs do not know how many of those clients requested a work activity of studying for a bachelor’s degree and were diverted to low-paying work sufficient to earn just slightly more than the ADC qualification threshold, in direct violation of the statute and the rules.
18. The named plaintiff is a fair representative of the class. She is income and resource eligible for assistance and is mandatory for time-limited assistance. She

cannot find employment in her current labor-market area which will lead to economic self-sufficiency. She has the capacity to study for a bachelor's degree, makes acceptable grades, and meets all the requirements necessary to have post-secondary education as her allowable work activity. Even while acknowledging there are not jobs available for which she qualifies that would lead to economic self-sufficiency, the defendants have applied their "policy" that no one can study for a bachelor's degree even if they will not graduate within two years of when the contract is signed. This decision leaves the plaintiff in the untenable position of working at jobs which will not get her off public assistance, which is contrary to the welfare reform plan. The application of the defendants' "policies" leads to an absurd result which defeats the purpose of the program—economic self-sufficiency.

### **FIRST CAUSE OF ACTION**

(Two-year post-secondary education policy violates delegated authority)

19. The plaintiffs incorporate herein as if fully set forth the allegations contained in paragraphs 1 to 18.
20. The defendants lack the authority to promulgate rules which are not in substantial compliance with the provisions of the act, and which modify, alter or enlarge the provisions of the statute they are charged with administering. NEB. REV. STAT. § 84-906(2), *Clemens*, at 80.
21. Specifically, the defendants shall not deny the plaintiffs the right to choose studying for a bachelor's degree as their allowable work activity in their economic

self-sufficiency contract. NEB. REV. STAT. § 68-1721(2), 468 NAC 2-020.06B1; and

22. Such actions by the defendants deny the plaintiffs opportunities to which they are lawfully entitled, and the imposition of sanctions when plaintiffs attempt to secure those opportunities deny them much needed basic subsistence benefits for which they are legally qualified and entitled to, thereby causing harm to the family members.

### **SECOND CAUSE OF ACTION**

(Two-year post-secondary education “policy” violates the APA)

23. The plaintiffs incorporate herein as if fully set forth the allegations contained in paragraphs 1 to 22.
24. The defendants lack the authority to devise “policies” which are unwritten, and not promulgated, and which do not comply with the provisions of the WRA, and modify, alter or enlarge those provisions, and apply them to the plaintiffs. NEB. REV. STAT. § 84-906(2), *Clemens*, at 80, *Dodge*, at 354, *Vinci*.
25. Specifically, the defendants may not pronounce and apply a policy of denying the plaintiffs the right to choose studying for a bachelor’s degree as their allowable work activity in their economic self-sufficiency contract because the course work will take more than two calendar years without following the specific rulemaking provisions of the APA; and

26. The defendants may not pronounce and apply a policy of denying the plaintiffs the right to choose studying for a bachelor's degree as their allowable work activity in their economic self-sufficiency contract by requiring the receipt of a diploma within a two-year period, defined as the next 24 calendar months without following the specific rulemaking provisions of the APA;
27. Such actions by the defendants deny the plaintiffs opportunities to which they are lawfully entitled, and the imposition of sanctions when plaintiffs attempt to secure those opportunities deny them much needed basic subsistence benefits for which they are legally qualified and entitled to, thereby causing harm to the family members.

### **THIRD CAUSE OF ACTION**

(Interpretation of "24 month" reference in post-secondary rule is plainly erroneous and inconsistent)

28. The Plaintiff incorporates herein as if fully set forth the allegations contained in paragraphs 1 to 30.
29. The defendants lack the authority to interpret their rules and regulations so that they contravene the statute they administer, or in a manner that is plainly erroneous and inconsistent. *Dodge*, at 354, *Vinci* at 434.
30. The alleged "policies" are not written anywhere. They have never been properly promulgated as administrative rules. There is no authority in the statute and the rules consistent with the interpretations represented in the "policies." They lead to

arbitrary decisions by administrators and case workers that harm clients. They circumvent the statute, the legislative intent and the properly promulgated rules.

31. The defendants interpret one sentence in the Post-secondary education rule as a two-year time limitation on any post-secondary education work activities which might be undertaken by the plaintiffs. This interpretation is plainly erroneous and inconsistent with the rest of the rule which sets out the requirements plaintiffs must follow when they choose studying for a bachelor's degree as an allowable work activity.
32. The defendants' interpretation that study for a bachelor's degree must be completed in literally two years contravenes the statute, and limits choices the plaintiffs have to reach their highest level of economic self-sufficiency.
33. Such actions by the defendants deny the plaintiffs opportunities to which they are lawfully entitled, and the imposition of sanctions when plaintiffs attempt to secure those opportunities deny them much needed basic subsistence benefits for which they are legally qualified and entitled to, thereby causing harm to the family members.

#### **FOURTH CAUSE OF ACTION**

(“Marketable job skill” policy violates delegated authority)

34. The Plaintiff incorporates herein as if fully set forth the allegations contained in paragraphs 1 to 35.
35. The defendants lack the authority to promulgate the use of an undefined phrase such a “marketable job skill” as a means to deny the plaintiffs the right to choose

studying for a bachelor's degree as their allowable work activity in their economic self-sufficiency contract. NEB. REV. STAT. § 84-906(2), *Clemens*, at 80.

36. The statute does not include limitations on the approved types of educational programs identified for inclusion as allowable work activities. NEB. REV. STAT. § 68-1721(2).
37. The use of such an undefined phrase to deny the plaintiffs opportunities to which they are lawfully entitled, and the imposition of sanctions when plaintiffs attempt to secure those opportunities deny them much needed basic subsistence benefits for which they are legally qualified and entitled to, thereby causing harm to the family members.

**FIFTH CAUSE OF ACTION**  
("Marketable job skill" rule violates APA)

38. The Plaintiff incorporates herein as if fully set forth the allegations contained in paragraphs 1 to 37.
39. The defendants lack the authority to interpret their rules with undefined, unpromulgated phrases, in this case "marketable job skill," because it is subject to plainly erroneous and inconsistent applications with inconsistent results for clients.
40. Such erroneous and inconsistent applications cause plaintiffs to be denied opportunities to which they are lawfully entitled, and to the imposition of sanctions when plaintiffs attempt to secure those opportunities which deny them

much needed basic subsistence benefits for which they are legally qualified and entitled to, thereby causing harm to the family members.

### **PRAYER FOR RELIEF**

WHEREFORE, the plaintiffs pray that this Court:

1. Certify this action as a class action, said class defined as: adults in families receiving cash assistance since December 27, 1997 who are mandatory participants in the time-limited “Employment First” program whom the defendants have denied a self-sufficiency contract with the work activity consisting of study towards a bachelor’s degree, if such an activity will not lead to completion of a degree within 24 consecutive months of the date the contract is signed.
2. Order the defendants be temporarily and permanently enjoined to notify all members of the class of their right to negotiate a contract choosing study for a bachelor’s degree as an allowable work activity.
3. Declare that the plaintiff may negotiate a contract to study for a bachelor’s degree in psychology at Wayne State College, maintain her supportive services and benefits as for any allowable work activity and receive twenty-four months of ADC as she is income and resource eligible, paid over a period of up to forty-eight months from the month after she signs a contract.
4. Order the defendants to be temporarily and permanently enjoined to negotiate self-sufficiency contracts with clients who choose studying for a bachelor’s degree as

their allowable work activity, who meet all the requirements in 468 NAC 2-020.06B1, except application of the “marketable job skill” requirement.

5. Declare that the rules promulgated by the defendants must substantially comply with the provisions of the WRA and must not modify, alter or enlarge the provisions of the WRA, in particular:
  1. Plaintiffs may choose an education program to study for a bachelor’s degree for their allowable work activity even though it may not be completed within twenty-four calendar months of the date the contract is signed;
  2. Plaintiffs may choose an education program to study for a bachelor’s degree for their allowable work activity even though they may not receive a diploma or other certificate of completion within twenty-four calendar months of the date the contract is signed.
6. Order the defendants be temporarily and permanently enjoined to approve contracts for an education program to study for a bachelor’s degree as an allowable work activity even though the program may not be completed, nor a diploma or other certificate of completion is not awarded within twenty-four calendar months from the date the contract is signed.
7. Declare that the defendants shall apply only rules or “policies” which are written, properly promulgated, which are in substantial compliance with the statute and the administrative rules, and which do not alter, modify or enlarge the provisions of

the statute.

8. Order the defendants be temporarily and permanently enjoined to apply rules which allow clients to choose studying for a bachelor's degree as their allowable work activity in their economic self-sufficiency contract, even though the program may not be completed, nor a diploma awarded within twenty-four calendar months from the date the contract was signed.
9. Declare the defendants shall promulgate definitions for words and phrases before they are used to determine which allowable work activities clients may choose for their economic self-sufficiency contracts, in particular the phrase "marketable job skill."
10. Order the defendants be temporarily and permanently enjoined to promulgate a definition for words and phrases, in particular the phrase "marketable job skill" before it is used to determine which allowable work activities clients may choose for their economic self-sufficiency contracts.
11. Order that costs and attorneys' fees be taxed to the defendants.
12. Order any and all such further relief as may be right and just.

Date \_\_\_\_\_

**Tanya Walters, Plaintiff, individually and  
on behalf of all others similarly situated,**

By \_\_\_\_\_  
D. Milo Mumgaard #19919

By \_\_\_\_\_  
Sue Ellen Wall #21552

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**This case was filed in forma pauperis**

**PRAECIPE**

TO THE CLERK OF THE LANCASTER DISTRICT COURT:

Please issue a summons in the above captioned matter to be served along with a copy of the petition upon the defendants, at the office of Attorney General Don Stenberg, Room 2115 State Capitol, Lincoln NE 68509, during usual business hours.

By \_\_\_\_\_  
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