

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

MOLLY KEITH,

Petitioner,

v.

NEBRASKA DEPARTMENT OF
HEALTH AND HUMAN SERVICES and
NANCY MONTANEZ, DIRECTOR

Respondents.

)
) Case No. CI 04-3591
)
)
)

BRIEF OF PETITIONER

JURISDICTION

This appeal is brought pursuant to Neb. Rev. Stat. § 84-917. The Petitioner is appealing the Finding and Order of the Nebraska Department of Health and Human Services, entered by Director Nancy Montanez on August 23, 2004. The Petition and Praecipe for this appeal were filed on September 14, 2004.

STATEMENT OF THE CASE

On January 13, 2004, the Petitioner filed an administrative appeal with the Nebraska Department of Health and Human Services (NDHHS) challenging NDHHS' determination that: 1) she could not renegotiate her self-sufficiency contract; 2) that she could not include classes toward an Associates Degree in Respiratory Therapy in her self-sufficiency contract; and 3) that the resulting sanction was appropriate. (E3,1:E2,6). On August 23, 2004, Nancy Montanez, Director of NDHHS, entered a Finding and Order upholding NDHHS' decision. (T15).

The issues tried at the administrative hearing, officiated by Audie Wise, Designated Hearing Officer, were whether Ms. Keith should have been allowed to renegotiate her contract to include her Respiratory Therapy degree program as her work activity in her self-sufficiency contract and whether the sanction imposed was appropriate. (T5). The hearing officer found

that Ms. Keith only appealed the imposition of the sanction and not the Department's refusal to allow her to renegotiate the terms of her self-sufficiency contract to include her Respiratory Therapy coursework. (T15).

STANDARD OF REVIEW

“When the petition instituting proceedings for review is filed in the district court on or after July 1, 1989, the court may affirm, reverse, or modify the decision of the agency or remand the case for further proceedings.” Neb. Rev. Stat. § 84-917(6)(b).

“The district court in its de novo review of agency determinations is not required to give deference to the findings of fact by the agency hearing officer.” *Stejskal v. Dep't of Admin. Servs.*, 266 Neb. 346, 350 (2003) (citing *Slack Nursing Home v. Dep't of Soc. Servs.*, 247 Neb. 452, 528 (1995)). “To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.” *Tush v. Neb. Dep't of Health and Human Servs.*, 13 Neb. App. 72 (2004).

ASSIGNMENTS OF ERROR

Director Montanez erred in holding 1) that Ms. Keith did not appeal the Department's decision that she could not renegotiate her contract; 2) that Ms. Keith did not appeal the Department's decision that her classes at Southeast Community College could not count as her work activity; and 3) that the sanction was appropriate even after Ms. Keith made a showing she could be self-sufficient within the time limits for the Aid to Dependant Children (ADC) program by pursuing an Associates Degree in Respiratory Therapy.

STATEMENT OF FACTS

On October 14, 2002, the Nebraska Department of Health and Human Services revised the regulations that allow parents participating in the Employment First program to participate in Education and Job Skills Training. 468 NAC 020.06C (effective October 14, 2002). The new rule added a requirement that the Department would only approve programs that could be completed prior to the recipient reaching the end of his/her ADC time limit. *Id.* The new rule provides: "The participant can participate in Job Skills Training for up to 24 months if s/he can complete the training within his/her time limits." *Id.*

In the fall of 2002, Petitioner Molly Keith enrolled and began taking classes at Southeast Community College in Lincoln, Nebraska in the Pre-Respiratory Care Program. (E3,56:E2,6). In October of 2003, due to a recent divorce, Ms. Keith applied for ADC cash assistance and on October 15, 2003, Ms. Keith signed a self-sufficiency contract providing that her ADC time limit would start November 1, 2004. (E3,27:E2,6). However, at this point, Ms Keith did not have an Employment Plan or Service Plan, which contain the activities she and the Department must complete as part of the plan for self-sufficiency. (E3,6:E2,6).

On November 3, 2003, Ms. Keith met with her case manager, Tracy Slieter, to develop her Employment Plan, which would contain her long-term and short-term goals and her Service Plan, which would contain the activities and services she would use to reach her long-term and short-term goals. (E3,7:E2,6). At this meeting, Ms. Keith requested that she be able to continue participating in the Pre-Respiratory Care Program at Southeast Community College as her work activity. (E2, 48:3-25). Ms. Keith was told by Ms. Slieter that she could not use her classes as her work activity because she could not complete her degree before she reached the end of her ADC time limit. (E2,48:19-25). Ms. Keith signed the Employment Plan and Service Plan

requiring job search only after she was told that she could renegotiate her contract to include a different work activity at any time. (E2,48:25, 49:1-9).

On November 24, 2003, Ms. Keith met with Ms. Slieter to renegotiate her self-sufficiency contract to include the classes she was taking at Southeast Community College. (E2,25:4-11). At this meeting, Ms. Keith presented Ms. Slieter with a plan outlining how she could be self-sufficient within her ADC time limit by continuing to participate in the Respiratory Care Program at Southeast Community College, even though she would not receive her degree until December 2005. (E2,25:15-24). Ms. Keith's plan illustrated how after participating in the Respiratory Care Program for a period of time, she would be eligible to be hired as a Respiratory Care Assistant (RCA) and would no longer need ADC to help meet her basic needs. (E3,52-53:E2,6). Ms. Slieter refused to allow Ms. Keith to renegotiate her Employment Plan and Service Plan and refused to give Ms. Keith a written explanation of this decision. (E2,25:15-25, 26:1-25). After trying to go to school full time and complete forty hours a week of independent job search, Ms. Keith fell behind in turning in her time sheets and job contacts. (E2,50:12-25, 51:1-13). As a result, Ms. Keith was placed under an ADC sanction on January 7, 2004. (E3,10:E2,6).

On January 13, 2004, Ms. Keith filed an appeal with the Nebraska Department of Health and Human Services challenging: 1) the Department's refusal to let her renegotiate her self-sufficiency contract; 2) the Department's refusal to allow her to include her classes at Southeast Community College in her self-sufficiency contract; and 3) that as a result of these two errors, the sanction was improper. (E3,1:E2,6). On August 23, 2004, Ms. Keith received a decision signed by Director Nancy Montanez upholding the sanction. (T15). On September 14, 2004,

Ms. Keith filed a Petition with the District Court of Lancaster County seeking review of the Department's decision. (T24).

ARGUMENT

The Nebraska Welfare Reform Act was enacted with the purpose of providing temporary, transitional support for Nebraska families so they can achieve economic self-sufficiency. Neb. Rev. Stat. § 68-1709. Nebraska's welfare system is supposed to support, stabilize and enhance individual and family life by, among other things, helping Nebraskans avoid poverty and prevent the need for welfare. *Id.* In recognition that pushing parents into the first low-wage job that comes along will not truly stabilize families, the Legislature mandated that "each individual and family receiving assistance under the Welfare Reform Act shall reach for his or her highest level of economic self-sufficiency." Neb. Rev. Stat. § 68-1726.

Petitioner Molly Keith wanted to find a career that would allow her to adequately provide for her family without the need for public assistance. She found a program that fit her goals and would make her self-sufficient in less than two years. (E3,52-53:E2,6). However, when she discussed this plan with her caseworker, she was told that because she would not receive her degree within the ADC time limits, her plan could not be approved. (E2,25:25, 26:1-11). The Department's misguided policy of looking at degree completion rather than self-sufficiency violates the Welfare Reform Act and should be overturned by this court.

Ms. Keith clearly appealed not only the sanction, but the Department's refusal to let her renegotiate her contract to include her Respiratory Care Program classes in her self-sufficiency contract. The administrative record also establishes that Ms. Keith made a showing that she could be self-sufficient within the ADC time limits by continuing her Respiratory Care Program coursework at Southeast Community College. (E3,52-53:E2,6). Therefore, the Department's

administrative appeal decision should be overturned by this Court and Ms. Keith should be allowed to continue attending classes full time as her only work activity under her self-sufficiency contract.

I. PETITIONER SUCCESSFULLY APPEALED THE SANCTION AND THE DEPARTMENT'S REFUSAL TO CHANGE HER SERVICE AND EMPLOYMENT PLANS.

The Director Montanez based her decision to uphold the Department's action on the basis that Ms. Keith only appealed the sanction and not the Department's refusal to change her Employment and Service Plans to allow her to attend classes at Southeast Community College. (T15). This is clear error on the part of Director Montanez. The ADC appeals process requires a participant to complete and file with the HHS local office a "Request for Fair Hearing" form. On this form, the client is to indicate what action or inaction they would like to appeal and the reason they feel the action or inaction was not appropriate. Ms. Keith clearly indicated on her appeal form the three issues she intended to appeal: "1) failure to allow me to renegotiate my contract; 2) Failure to allow me to include education in my contract; 3) improperly sanctioned me." (E3,1:E2,6).

The record also indicates that the Department was well aware that all three issues were a part of this appeal. Art Weiland, Ms. Keith's NDHHS caseworker, testified that the issues being raised at the administrative appeal were "that we did not allow her to renegotiate her contract...[n]umber two was failure to allow her to...include education in her contract, and three was that we improperly sanctioned her." (E2,8:1-8). This testimony is also recounted on the first page of Director Montanez's decision. (T5-6). Moreover, the entire substance of the administrative proceeding was about Ms. Keith's desire to have her educational program as her work activity in her self-sufficiency contract. To say that the only issue before the administrative

hearing officer was whether Ms. Keith failed to turn in time sheets is to ignore the evidence in the record and the entire administrative proceeding. Ms. Keith successfully appealed all three issues and established a record from which this Court can determine that Ms. Keith should have been allowed to include her plan to achieve self-sufficiency by continuing her coursework to become an RCA and then Respiratory Therapist in her self-sufficiency contract.

II. PETITIONER SHOULD HAVE BEEN ALLOWED TO RENEGOTIATE HER CONTRACT TO INCLUDE HER RESPIRATORY CARE PROGRAM.

In 1996, the Legislature fundamentally changed the ADC program to focus on moving families from dependence on the welfare system to self-sufficiency through employment. To meet this end, the Legislature enacted the Nebraska Welfare Reform Act and created a system that capitalizes on a family's strengths and works at developing additional skills to move parents into sustainable employment. As part of this change in the system, all able bodied adults that receive cash assistance are required to participate in the Employment First program. 468 NAC 2-000 (effective October 14, 2002). The Employment First program requires all participants to engage in a full time work activity, which can include post-secondary education and coursework toward an Associates Degree. Neb. Rev. Stat. § 68-1721.

The only issue presented in this case is whether under the Nebraska Welfare Reform Act, an Employment First participant can count classes toward an Associates Degree as his/her only work activity, when the participant will not be able to complete their degree within the ADC time limits, but can show that the coursework will lead to self-sufficiency within the ADC time limits. The rule cited by the Department as controlling this case is 468 NAC 2-020.06D which provides in relevant part:

Job Skills Training is specific vocational training in technical job skills. The completion of Job Skills Training leads to the attainment of a certificate, or diploma, or an Associates degree. Job Skills training is limited to that which is directly related to the fulfillment of

an individual's vocational goal. The participant can participate in Job Skills Training for up to 24 months if s/he can complete the training within his/her time limits....

The Department modified this rule on October 14, 2002 to include the language "if s/he can complete the training within his/her time limits." "Although administrative bodies are empowered to adopt and promulgate rules and regulations to carry out Nebraska administrative statutes, administrative bodies may not adopt rules and regulations that are in conflict with the statutes. An administrative agency may not employ its rulemaking power to modify, alter, or enlarge provisions of a statute which it is charged with administering." *Tush v. Neb. Dep't of Health and Human Servs.*, 13 Neb. App. 72, 9 (2004).

The Welfare Reform Act specifically allows ADC recipients to participate in post-secondary education and job training activities without any requirement that they complete a degree within the time limits. The plain language of the Act provides:

- (1) Under the self-sufficiency contract developed under section 68-1719, the principal wage earner and other nonexempt members of the applicant family shall be required to participate in one or more of the following: Education, job skills training, work experience, job search, or employment.
- (2) Education shall consist of the general education development program, high school, Adult Basic Education, English as a Second Language, postsecondary education, or other education programs approved in the contract.
- (3) Job skills training shall include vocational training in technical job skills and equivalent knowledge. Activities shall consist of formalized, technical job skills training, apprenticeships, on-the-job training, or training in the operation of a micro-business enterprise. The types of training, apprenticeships, or training positions may include but need not be limited to, the ability to provide services such as home repairs, automobile repairs, respite care, foster care, personal care, and child care. Job skills training shall be prioritized and approved for occupations that facilitate economic self-sufficiency....

Neb. Rev. Stat. § 68-1721.

In addition, the Nebraska Supreme Court has already interpreted the provisions of the Welfare Reform Act relevant to this matter in *Kosmicki v. State*, 264 Neb. 887 (2002). In *Kosmicki*, an Employment First participant was seeking to have her four-year degree program

counted as her work activity in her self-sufficiency contract. *Id.* The Supreme Court held that “it may be possible for a recipient of benefits to demonstrate that even without obtaining a degree, his or her course of post-secondary education will lead to self-sufficiency within the cash assistance limitation period.” *Id.* at 896. However, Ms. Kosmicki failed to make such a showing in her case. *Id.* at 895.

In this case, Ms. Keith has clearly made a showing that her course of study will lead to self-sufficiency within the ADC time limits. On November 26, 2003, Ms. Keith met with her caseworker, Tracy Slieter, to renegotiate her contract. (E2,25:4-11). Ms. Keith presented Ms. Slieter with a plan of how she could achieve self-sufficiency within her ADC time limit by continuing with her Respiratory Therapy classes. (E2,25:15-24). The plan provides in relevant part:

...I realize that I only have 24 months that I can receive ADC cash assistance. I also realize that my 24 months will run out on September 30, 2005. Although I will not graduate from SCC with my Respiratory Therapist degree until December of 2005, I can be self-sufficient by September 30, 2005 by continuing to complete my coursework at SCC to become a Respiratory Therapist...During my last month of participation in the Employment First program, I will continue going to school full time, but I will also search for employment as an RCA [Respiratory Care Assistant] with the goal of starting employment by October 1, 2005. Securing employment at \$9.38 an hour (the current wage for an RCA at Bryan LGH) would make me no longer eligible for ADC and I would be considered self-sufficient.

(E3,52-53:E2,6).

The Respiratory Care Assistant (RCA) position was created specifically for students enrolled in a Respiratory Care Program who have completed at least 1 year of the program. (E3,52-53:E2,6). Once an RCA completes their Associates Degree, they can move into a Respiratory Therapist position. *Id.* While Ms. Keith will not be able to obtain her degree before October 1, 2005, she will be able to complete enough coursework to qualify for an RCA position, a position that would make her no longer eligible for ADC and therefore self-sufficient.

Id. There is a high demand for both RCA's and Respiratory Therapists in Nebraska, and thus a strong likelihood that Ms. Keith could obtain such a position. *Id.*

Although all this information was provided to her caseworker, Ms. Keith was not allowed to renegotiate her contract to include her Respiratory Therapy classes. (E2,25:15-25, 26:1-11). The only reason provided by the caseworker that the classes could not be approved was because Ms. Keith would not obtain her degree before October 1, 2005 as required by 468 NAC 2-020.06D. *Id.* As the Supreme Court recognized in *Kosmicki*, the focus of the ADC program is achieving self-sufficiency within two years. 264 Neb. 887, 896 (2002). There is simply no language in the Welfare Reform Act mandating that a degree must be completed within the time limits. By modifying the regulation to require degree completion, the Department has clearly exceeded the authority granted to it by the Welfare Reform Act.

Furthermore, to require degree completion in this case would create an absurd result. Ms. Keith will receive her degree in Respiratory Therapy only three months after the end of her time limit. If forced to stop taking classes and seek employment, Ms. Keith will be bound to earning a much lower wage and an increased likelihood that she and her children will need to return to public assistance in the future. If allowed to pursue her course of study and become an RCA, and then a Respiratory Therapist, Ms. Keith will have the ability to earn a much higher wage, help fill a need in Nebraska's job market, and decrease the likelihood she will need public assistance in the future.

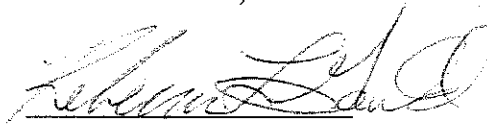
CONCLUSION

For all of the foregoing reasons, we ask that this Court overturn the decision of the Department, strike down the Department's policy requiring degree completion and allow Ms. Keith to continue her Respiratory Therapy coursework at Southeast Community College.

DATED: November 19, 2004

MOLLY KEITH, Petitioner

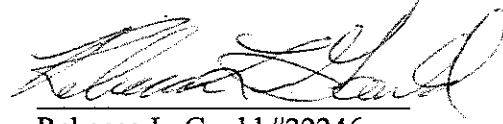
By:


Rebecca L. Gould #22246
Nebraska Appleseed Center
for Law in the Public Interest
941 O Street, Suite 105
Lincoln, NE 68508
(402) 438-8853

CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing Brief of Petitioner were served on the Respondents via United States First Class Mail to the Respondents' counsel Royce Harper, Assistant Attorney General, 2115 State Capitol, Lincoln, NE 68509, Douglas D. Dexter, Assistant Attorney General, 2115 State Capitol, Lincoln, Nebraska 68509, and Gail Steen, Legal Counsel for NDHHS, P.O. Box 95026, Lincoln, NE 68509 on November 19, 2004.

By:


Rebecca L. Gould #22246
Nebraska Appleseed Center
for Law in the Public Interest
941 O Street, Suite 105
Lincoln, NE 68508
(402) 438-8853