

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

MOLLY KEITH,)	Case No. CI 03-119
)	
Petitioner,)	
)	
v.)	RESPONDENTS' BRIEF
)	
NEBRASKA DEPARTMENT OF)	
HEALTH AND HUMAN SERVICES)	
and NANCY MONTANEZ, DIRECTOR,)	
)	
Respondents.)	

Respondent, Nancy Montanez, through her attorneys John Bruning, Attorney General, and Douglas D Dexter, Assistant Attorney General, hereby submits the following brief for the court's consideration.

INTRODUCTION

On January 7, 2004, the Lincoln Local Office of the Nebraska Department of Health and Human Services ("NDHHS") notified the Petitioner, Molly Keith, of its determination that she had violated her self-sufficiency contract under the Employment First program by neglecting to complete weekly time sheets for her independent job search. The sanction for that violation was a suspension of the Petitioner's Aid to Dependent Children ("ADC") grant and Medicaid coverage effective February 1, 2004. (E7, p.1) In direct response to the decision to impose sanctions, the Petitioner filed a request for an administrative hearing with

the NDHHS on January 13, 2004. (E3, p.1) On August 23, 2004, Nancy Montanez, Director of the NDHHS, entered a Finding and Order upholding the NDHHS' decision to impose sanctions on the Petitioner. The Petitioner has filed a Petition for Review of NDHHS' decision that sanctions were appropriate and that she failed to properly appeal the issues of not being allowed to renegotiate her self-sufficiency contract and include her educational goals in that contract.

STATEMENT OF FACTS

The Nebraska Welfare Reform Act was passed "to provide temporary, transitional support for Nebraska families so that economic self-sufficiency is attained in as an expeditious manner as possible, *with the goal of attaining such self-sufficiency within two years of the initial receipt of public assistance.*" Neb. Rev. Stat. § 68-1709 (emphasis added). The statute requires that each aid recipient complete a self-sufficiency contract that includes setting goals with "timelines and benchmarks" that facilitate progress to self-sufficiency. Neb. Rev. Stat. § 68-1719. Neb. Rev. Stat. § 68-1721 states that a self-sufficiency contract must require an aid recipient to participate in "one or more of the following: Education, job skills training, work experience, job search, or employment."

Tracy Slieter (Slieter), a case manager for the Employment First Program, received the Petitioner's referral on September 24, 2003. The Petitioner attended orientation for the program on October 15, 2003, and at that time Slieter learned the Petitioner was attending classes. (20: 13-24) The Petitioner was studying at Southeast Community College to become a respiratory therapist. (45: 2; 47: 24) On October 28, 2003, Slieter met with the Petitioner again and informed the Petitioner that because the Petitioner's schooling would not

be complete within two years of her initial receipt of public assistance, the Petitioner could not include that schooling in her self-sufficiency contract. At that time, the Petitioner agreed to include an independent job search as a component of her self-sufficiency contract. (21: 8-23) On November 3, 2003, an Employment First service plan was developed for the Petitioner, and though the Petitioner voiced some frustrations with the requirements, she agreed to engage in an independent job search and turn in time sheets for that search weekly. (22: 4-11) On November 26, 2003, the Petitioner met with Slieter and requested a form certifying that the Petitioner's educational plan could not be approved as part of her self-sufficiency contract. The Petitioner was not given such a form but was instead given a letter verifying she had come to discuss her plan as well as a copy of her assessment, contract and service plan. (22: 24-25; 23: 1-11)

On December 11, 2003, the Petitioner received a WP-5 Notice of Failure to Participate because she had not turned in time sheets as mandated by her contract. The WP-5 informed the Petitioner she was required to turn in the time sheets by December 18, 2003. (23: 12-14) On December 19, 2003, the Petitioner's doctor sent a note to Slieter, excusing the Petitioner from turning in her time sheets from November 27 through December 12. (23: 16-18) The doctor's note, however, did not excuse the Petitioner from completing some of the time sheets she had failed to turn in, and the Petitioner was sent a second Notice of Failure to Participate, instructing the Petitioner to turn in the unexcused time sheets by December 29, 2003. The Petitioner did not comply with the order and the sanction request was issued. (23: 21-25; 24: 1-4)

The Petitioner requested an administrative hearing concerning the imposition of the

sanction. (E1, p.1) The recommended sanction was temporarily suspended until the administrative hearing could reach a decision on the matter. The decision to impose a sanction was upheld on August 23, 2004. The Petitioner now appeals the NDHHS decision.

ARGUMENT

The NDHHS correctly applied a sanction on the Petitioner for her failure to turn in job search time sheets in accordance with her Employment First self-sufficiency contract.

The Petitioner did not request an administrative hearing concerning her ability to include her secondary education in her Employment First self-sufficiency contract. Even assuming the Petitioner did successfully appeal that issue at the administrative hearing, the Petitioner was properly denied permission to amend her contract. A valid self-sufficiency goal must be able to be completed within the two-year time frame during which an individual qualifies for ADC assistance. The Petitioner's secondary education plans were properly omitted from her self-sufficiency contract because she could not complete the program within the requisite two years.

I

THE EVIDENCE SHOWED THAT THE PETITIONER FAILED TO COMPLY WITH HER SELF-SUFFICIENCY CONTRACT.

Under the Nebraska Welfare Reform Act, an ADC recipient shall have the right to request an administrative hearing to review the state's compliance with a self-sufficiency contract *or* to review "a determination by the department that the recipient or the recipient family has not complied with the terms of the self-sufficiency contract." Neb. Rev. Stat. § 68-1723(3). The Petitioner directly appealed an order that sanctions be imposed on her for

failure to comply with the terms of her self-sufficiency contract. The Petitioner's Request for Fair Hearing specifically states she was appealing the "Employment First #1 Sanction." (E1, p.1) Therefore, the NDHHS could only render a decision regarding the Petitioner's compliance with her Employment First self-sufficiency contract. The facts elicited at the hearing clearly indicate the Petitioner did not complete job search time sheets as mandated by her self-sufficiency contract, making imposition of sanctions proper. (24: 2-4) See Neb. Rev. Stat. 68-1723(1).

As stated above, the Petitioner's appeal *did not* address her ability to include the secondary education program in her self-sufficiency contract. However, assuming *arguendo*, the Petitioner could appeal her ability to renegotiate her self-sufficiency contract, the law clearly does not give the Petitioner the right to include her secondary education program in that contract.

II.

PETITIONER HAD NO RIGHT TO RENEGOTIATE HER CONTRACT TO INCLUDE HER RESPIRATORY CARE PROGRAM BECAUSE IT COULD NOT BE COMPLETED IN 24 MONTHS.

Under the Nebraska Welfare Reform Act, an Employment First participant *may not* count classes toward an Associates degree as his or her only self-sufficiency work activity if the participant will not be able to complete that degree within the two-year self-sufficiency time limit. 468 NAC 2-020.06D reads:

Job Skills Training is specific vocational training in technical job skills. The completion of Job Skills Training leads to the attainment of a certificate, a 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.

Contrary to the Petitioner's assertion, the NDHHS did not modify or alter the Welfare Reform statute when it added the regulatory language "if s/he can complete the training within his/her time limits" on October 14, 2002. Rather, the additional language in the regulation affirms the meaning of the statutory language in the Nebraska Welfare Reform Act. The Act itself says its "primary purpose" is to "provide temporary, transitional support...with the goal of attaining such self-sufficiency within the two years of the initial receipt of public assistance." Neb. Rev. Stat. § 68-1709 (emphasis added). "In reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense." *Tush v. Nebraska Dept. of Health and Human Services*, 688 N.W.2d. 883, 887 (Neb. 2004). The Petitioner is correct in observing that the Act was intended to help each welfare recipient "reach for his or her highest level of economic self-sufficiency." Neb. Rev. Stat. § 68-1709. However, that goal is not without limits, and the Petitioner fails to consider the statutory language in its entirety. The current version of the NDHHS regulation is perfectly consistent with the plain language and overall purpose of the Act, which is for public aid recipients to attain self-sufficiency within two years.

The Petitioner relies heavily on *Kosmicki v. State*, 264 Neb. 887 (2002). However, *Kosmicki* does not support the Petitioner's argument. In *Kosmicki*, the Nebraska Supreme Court said:

The Department's regulations, consistent with the purpose and language

of the Act, require that postsecondary education must lead to economic self-sufficiency to be included in a self-sufficiency contract and that the goals set forth in a self-sufficiency contract must be attainable within the 24-month overall time limit imposed by the Act. See §§ 020.05 and 020.06B1. In this case, it is not disputed that Kosmicki's proposed goal – a bachelor's degree from UNL – could not be achieved within the 24 month overall time limit. It was, therefore, unacceptable pursuant to § 020.05. *The legislative history of § 68-1721 supports the conclusion that the Legislature did not intend for recipients of public assistance to pursue a course of postsecondary education that cannot be completed prior to the end of the cash assistance limitation period....* The debate, considered as a whole, reflects the Legislature's understanding that the postsecondary education provision was intended to permit a recipient of public assistance to complete a course of postsecondary education within the cash assistance limitation period. *Id.* at 890-891 (emphasis added).

Additionally, the Nebraska Supreme Court *did not hold* that an aid recipient's post-secondary education may lead to self-sufficiency within the two-year time limit even if the recipient fails to graduate within that time. Rather, the *Kosmicki* court declined to address the issue, saying "[t]hat circumstance... is not presented in the instant case." *Id.* at 892.

Equally important, Petitioner has not demonstrated her self-sufficiency will be attained within the requisite two years. Petitioner claims she will be eligible for employment as a Respiratory Care Assistant ("RCA") before she receives her Associates degree. (56: 7-22) However, future employment as an RCA is merely speculative. If the Petitioner fails to obtain RCA employment, she will possess neither employment nor a degree at the end of two years and will have failed to comply with the self-sufficiency requirement.

Under the Nebraska Welfare Reform Act, the self-sufficiency contract "shall be built on the premise of urgent action." Neb. Rev. Stat. § 68-1718. Allowing the Petitioner to base her self-sufficiency contract entirely on educational goals that cannot be attained within two years would be completely contrary to that premise. Under the circumstances, allowing the

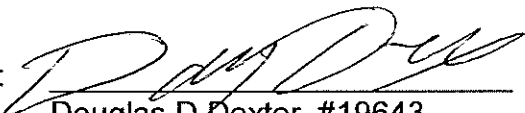
Petitioner to use her current educational program as her *only* self-sufficiency goal would make her efforts toward swift self-sufficiency speculative, indefinite and entirely offensive to the purposes of Nebraska's Welfare Reform Act.

CONCLUSION

For all of the foregoing reasons, the Defendant asks this Court to uphold the decision of NDHHS.

NEBRASKA DEPARTMENT OF
HEALTH AND HUMAN SERVICES and
NANCY MONTANEZ, Director,
Respondents

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