

The previous court also ruled that the plaintiffs would not likely succeed in their effort to have the defendants rule, which is in direct contradiction of the specific statutory directive about when the time limit on receipt of Aid to Dependent Children (ADC) may begin.

The plaintiffs seek the Court's declaration that the defendants' use of a rule which truncates the plaintiffs' access to services and benefits mandated under the Nebraska Welfare Reform Act (WRA), NEB. REV. STAT. § 68-1709 *et seq.*, is an impermissible modification of the statute. Several of the named plaintiffs have exhausted their administrative remedies without attention to this issue from the defendants, much less any success receiving redress of their harm. The plaintiffs argue that further administrative procedures on this issue will be futile.

FACTS

Named Plaintiffs' Situations

Plaintiff Kelly Jones

The named plaintiff Kelly Jones appealed several actions by the defendants and an administrative hearing was held on May 10, 2000. The issue of the 90 Day Rule challenged in this case was addressed in his hearing, but there is no mention of it, nor most of the issues he raised, in the defendants' Finding and Order. (Exhibit 6, attached). He has no other remedy to get back the months of eligibility the defendants are counting against his 24 month allotment without a contract and without the services and help he should have received along with the ADC checks. He appealed other issues in a separate action, and joins this case as an example of someone who has been penalized by the application of the 90 Day Rule, who exhausted his

administrative remedy and failed to even get the attention of the defendants to that issue, much less a decision favorable to him. Mr. Jones has three young children. One child is severely disturbed and Mr. Jones cannot keep jobs when he is continually called away to deal with the child at school or child care. He and his children will be denied basic needs of life, and they will be irreparably harmed if he cannot keep his benefits during the prosecution of this case.

Plaintiff Aquarius Hopkins

The plaintiff Aquarius Hopkins is a young mother of a small child and is studying for a degree in education. Although she meets the defendants' qualifications to pursue a college degree as an allowable work activity under the Welfare Reform Act (WRA), the defendants refused to sign a contract with that option and took no action on her case for a full year. The defendants have invoked the 90 day rule which is the issue in this case, and have counted her months of eligibility for Aid to Dependent Children (ADC) without ever having signed a contract with her. As her affidavit states, the defendants have closed her case, claiming she has used up her two years of eligibility. This leaves her without health insurance, her family with no food stamps, and no ADC when she is in school full-time and cannot not work enough to be ineligible for ADC.

She appealed her case in the summer of 1999 and the defendants took months to respond to discovery requests before she could have her hearing. The issue of the 90 Day Rule was addressed in her appeal hearing (Hopkins Finding and Order, Exhibit 6, attached, pp. 5,6,8, 9), and the holding just repeats, without comment or analysis, the defendant's position.(Ex. 6, p. 26). Ms. Hopkins' appeal of that finding is subsumed in this lawsuit. She has no other

remedy at law except to seek this Court to declare the defendants' 90 Day Rule impermissibly alters the Nebraska Welfare Reform Act (WRA) and the underlying intent of the legislature to enhance the skills of welfare recipients during their time limited stay on Aid to Dependent Children (ADC).

Plaintiff Sarah Engelhart

The named plaintiff Sarah Engelhart appealed the application of the 90 Day Rule and was told she had received no adverse action and had nothing to appeal. (Exhibit 7, Engelhart Appeal File, p.8) Subsequent requests to both explain why the counted months constituted an adverse action and to ask why the plaintiff Engelhart had not received a response to the request evidence that further attempts to appeal this issue are futile. (Ex. 7, pp. 9-11). Ms. Engelhart has two small children. She is extremely dyslexic and cannot read. The defendants have refused to offer her remedial services, so job opportunities are limited and low-paying. She needs to receive services every month she qualifies for ADC, she needs to be able to negotiate a contract so that her wishes for services and a work plan are included and so that she understands what the contract says even if she cannot read it for herself. She and her children will be irreparably harmed if they cannot receive their benefits when Ms. Engelhart's jobs do not provide enough hours to support them.

Plaintiff Lynn Houseman

The named plaintiff Lynn Houseman—

Plaintiff Janice Montgomery

The plaintiff Janice Montgomery has not yet exhausted her administrative remedies, she has an appeal on this issue scheduled for August 29, 2000. However, at this point, the defendants have shown an inability to understand the seriousness of the problem caused by this rule. When it is brought up on administrative appeals it is ignored completely, and Plaintiff Engelhart was forbidden even to have a hearing. It is very clear that further appeals on this issue will be just a futile as past appeals have been.

The plaintiff was to have a comprehensive asset assessment according to the statute (NEB. REV. STAT. § 68-1718), and then sit down and negotiate an “Employment First” contract and Service Plan for the client to maximize her skills, remove any barriers, and achieve her highest level of economic self-sufficiency.

The plaintiff’s case worker did a very cursory review of a self-assessment completed by the plaintiff. Once she heard that the plaintiff wished to continue her studies and earn a four year degree, she tried to talk the plaintiff out of that plan, then abruptly cut off further negotiations and sanctioned the plaintiff.

The plaintiff timely appealed and an administrative hearing was held on March 17, 2000. The plaintiff appeals from an adverse ruling in that hearing.

The plaintiff has received a temporary restraining order to maintain her benefits through the appeal process and seeks a permanent stay of the administrative hearing decision until the conclusion of this case.

ARGUMENT

The plaintiffs will likely prevail in District Court because the 90 Day Rule at issue is in direct opposition to the clear language of the statute, and works adversely to the compliance with the requirements necessary to precede the signing of a self-sufficiency contract, which triggers the counting of the time limited months of ADC. The plaintiffs are on the economic margin of basic survival. They and their children will suffer irreparable injuries if a mandatory temporary injunction, or stay, is not granted. Other parties will not be substantially harmed, and there is no threat to public health, safety or welfare. An injunction should be granted to stay the decisions of the administrative hearing officers until the appeal process is complete.

An injunction should be granted because the facts of the case show the plaintiffs are likely to prevail.

Neb. Rev. Stat. § 84-917(3)[1] (Cum. Supp. 1992) provides that upon the filing of a petition for review, an agency may order a stay or the court may order a stay. The stay can only be granted, however, when the court finds that (1) the applicant is likely to prevail when the court finally disposes of the matter. The facts support the conclusion the plaintiffs will prevail on appeal so the injunction should be granted.

“The Legislature may delegate to an administrative agency the power to make rules and regulations to implement the policy of a statute, but this delegated authority is limited to the powers delegated to the agency by the statute which the agency is to administer. An administrative agency may not employ its rulemaking 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), quoting State ex re. Spire v. Stodola, 228 Neb. 107, 421 N.W.2d 436 (1988).

The defendants have placed the 90 Day Rule in two places in their regulations, 468 NAC 2-020.09B1, and 468 NAC 2-020.05. The first says the time limit on benefits starts with the earlier

of the month after the contract is signed, or 90 days after the signed application for assistance is received in the local NDHHS office. The second rule mandates that the contract be signed within 90 days of receipt of the application.

In contrast, the WRA is very clear that two things must happen before a contract is signed, a complete assets assessment must be completed, (§ 68-1718) and the contract must be negotiated between the case worker and the client based on the results of the assets assessment (§ 68-1719). Then, and only then, after the contract is signed may the defendants begin to count the months of ADC against the two year time limit (or after a new baby is six months old, whichever is later.) NEB. REV. STAT. § 68-1724(1)(b).

The imposition of the 90 Day Rule functions to truncate the assessment and negotiation activities for the named plaintiffs and the class they represent. It abrogates the legislature's plan to exchange a limited number months of ADC for specialized, individualized services and directed money allotments during each of those precious twenty-four months of eligibility. The intended result of the exchange is to reduce barriers which keep the ADC recipients from functioning successfully to be economically self-sufficient, and to build skills which will lead to their highest level of economic self-sufficiency. Any month that ADC is counted against the plaintiffs' two year time limit without the corresponding services and benefits is an adverse action. The proper services and benefits are not determined between the client and the defendants until the contract is agreed upon and signed.

The assertion of the 90 Day Rule by the defendants denies the plaintiffs impermissibly modifies and alters the statute. It fosters incomplete and inadequate assets assessments, and it

functions as a coercive mechanism to force clients to sign contracts to meet the deadline on threat of losing benefits without the ability to fairly negotiate the services and benefits they need to reduce barriers and build skills.

An injunction should be granted because without relief the applicant will suffer irreparable injuries and the grant of relief to the applicant will not substantially harm other parties to the proceedings.

Neb. Rev. Stat. § 84-917(3)[2][3] (Cum. Supp. 1992) provides that upon the filing of a petition for review, an agency may order a stay or the court may order a stay of the administrative review decisions. The stay can only be granted, however, when the court finds that...(2) without relief, the applicant will suffer irreparable injuries; (3) the grant of relief to the applicant will not substantially harm other parties to the proceedings. If a stay is not granted, the plaintiffs will suffer irreparable injury and the other parties will not be substantially harmed.

The considerations for issuing a preliminary injunction are held in the Eighth Circuit to be: (1) the likelihood of the moving party's succeeding on the merits of the case; (2) the threat of irreparable harm to the moving party if the injunction is denied; (3)...balance of hardships tipping decidedly toward the party requesting preliminary relief; and (4) the public interest. Chu Drua Cha v. Levine, 696 F.2d 594, (8th Cir. 1982), quoting Dataphase Systems, Inc. v. C L Systems, Inc., 640 F.2d 109, (8th Cir. 1981).

We have no doubt that irreparable harm is occurring to the plaintiff class as each month passes without the AFDC level of benefits. . . . For people at the economic margin of existence, the

loss of \$172 a month and perhaps some medical care cannot be made up by the later entry of a money judgment. See, e.g. Goldberg v. Kelly, 397 U.S. 254, 264(1970) (complete loss of AFDC is such a serious deprivation that a post-termination hearing with a retroactive reimbursement of benefits is constitutionally insufficient); Turner v. Walsh, 435 F. Supp. 707, 711 (W.D. Mo. 1977) (termination or reduction of Medicaid benefits is sufficient irreparable injury to justify temporary restraining order), aff'd per curiam, 574 F.2d 456 (8th Cir. 1978); Nelson v. Likins, 389 F. Supp. 1234, 1237, 1242 (D. Minn 1974) (loss of \$80 to \$100 a month in AFDC benefits is sufficient irreparable injury to justify preliminary injunction and denial of stay of preliminary injunction pending appeal), aff'd per curiam, 510 F.2d 414 (8th Cir. 1975).

The plaintiffs and their children will suffer irreparable injury by not receiving their ADC because they will not be able to purchase the necessities of life without the money, such as food and shelter. In addition, if a medical emergency does occur, the plaintiffs will be injured severely financially by not being able to pay their bills and their credit rating and ability to obtain financing in the future may be ruined. The plaintiffs' children can maintain Medicaid coverage under the Kids Count program, but their parents face potential loss of health care

coverage if they lose their benefits. Since the amount of food stamp benefits is tied to the ADC allocation each month, loss of ADC affects food stamps as well.

Nebraska's Supreme Court has ruled the "injunction is an extraordinary remedy and ordinarily will not be granted except in a clear case where there is an actual and substantial injury. The right must be clear and the damage, irreparable." Nebraska Public Power Dist. v. Lockard, 237 Neb. 589, 467 N.W.2d 53 (1991), quoting City of Lincoln v. Cather & Sons Constr., Inc., 206 Neb. 10, 290 N.W.2d 798 (1980). As noted by the U.S. Supreme Court above, these plaintiffs are those whose right to benefits is clear and for whom the damage is irreparable.

On the second point in Database, the balance of hardships tips toward the plaintiffs. A loss of money for the plaintiffs will affect their well being in a way the State will not and can not be affected because of the unlimited amount of funding the state has available. Because the plaintiffs will be affected in a severe way, the balance of hardship tips toward them. In addition, the other party involved, the State of Nebraska, will not be substantially harmed by granting of an injunction because of the amount of funding available to keep programs such as ADC and medical benefits available.

For a Supreme Court case on point see e.g., Goldberg v. Kelly, 397 U.S. 254 (1970), (The interest of the eligible recipient in the uninterrupted receipt of public assistance, which provides him with essential food, clothing, housing, and medical care, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens). For other

cases in support see e.g., Fennell v. Butler, 570 F.2d 263, 264 (8th Cir.), Cert. denied, 437 U.S. 906, 98 S. Ct. 3093, 57 L. Ed. 2d 1136 (1978), (The Second Circuit held that a preliminary injunction should be issued upon a clear showing of either (1)... possible irreparable injury, Or (2)...balance of hardships tipping decidedly toward the party requesting the preliminary relief); Chromalloy American Corporation v. Sun Chemical Corporation, 611 F.2d 240; 1979 U.S. App., (Traditionally, a party seeking a preliminary injunction must prove...and (2) irreparable injury if injunctive relief is not forthcoming).

Because the plaintiffs will suffer irreparable injury and the other party, the State of Nebraska, will not be substantially harmed, the injunction should be granted.

F. An injunction staying the administrative court decision should be granted because the threat to public health, safety, or welfare relied upon by the agency is not sufficiently serious to justify the agency’s action in the circumstances.

Neb. Rev. Stat. § 84-917(3)[4] (Cum. Supp. 1992) provides that upon the filing of a petition for review, an agency may order a stay or the court may order a stay. The stay can only be granted, however, when the court finds that...(4) the threat to public health, safety, or welfare relied upon by the agency is not sufficiently serious to justify the agency’s action in the circumstances. The agency has not shown these elements are affected in a serious manner so, therefore, an injunction staying the decision should be granted.

In Miller v. Horton, the court held, “[t]he stay can only be granted, however, when the court finds...the threat to public health, safety, or welfare relied upon by the agency is not sufficiently serious to justify the agency's action in the circumstances.” Miller v. Horton, 253 Neb. 1009; 574 N.W.2d 112 (1998 Neb.). The record does not indicate the administrative

officer relied upon the health, safety, or welfare of the public in his decision. Because these elements were not relied upon, this section of § 84-917 does not apply and the court can allow an injunction to be granted without considering the threat to public health, safety, or welfare.

In addition, in this case, there is no present threat to the public health, safety, or welfare. On the contrary, the threat is to the plaintiffs and their children because they will lose money and medical coverage for the adults. Because none of these elements are present in the case at bar, an injunction should be granted staying the administrative hearing officers decision.

CONCLUSION

The injunctions staying the administrative court decision should be granted. The facts show the plaintiffs should prevail on appeal, Ms. Houseman will suffer irreparable injuries, and the other party to the proceeding, the State of Nebraska, will not be substantially harmed. In addition, there is no threat to public health, safety, or welfare, so this section of the statute does not affect Ms. Houseman. Because the facts support the plaintiff's propositions, the injunction should be granted and Ms. Houseman should continue receiving her benefits until the appeal process is concluded.

Respectfully submitted,

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