

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

KELLY JONES, JANICE MONTGOMERY,
AQUARIUS HOPKINS, SARA ENGLEHART,
and LYNN HOUSEMAN, Individually and on
behalf of all others similarly situated,

Plaintiffs,

v.

STATE OF NEBRASKA, NEBRASKA
DEPARTMENT OF HEALTH AND HUMAN
SERVICES, and RON ROSS, Director,

Defendants.

Case No. CI 00-2771

ORDER

This matter came on for hearing on October 31, 2001, on the Plaintiff's Motion for Summary Judgment and the Defendant's Cross Motion for Summary Judgment. Attorneys Wall and Mumgard appeared for the plaintiffs and Attorneys Rumbaugh and Harper appeared for the defendants. Hearing was held and evidence was adduced. The court being duly advised in the premises, now finds and orders as follows:

STANDARD OF REVIEW

Summary judgement is only proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to a judgment as a matter of law. *Parnell v. Madonna Rehab. Hosp.*, 258 Neb. 125, 602 N.W.2d 461 (1999); *Ferguson v. Union Pacific RR. Co.*, 258 Neb. 78, 601 N.W.2d 907 (1999). On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists. *NECO, Inc. v. Larry Price & Assoc.*, 257 Neb. 323, 597

N.W.2d 602 (1999); *Dvorak v. Bunge Corp.*, 256, Neb. 341, 590 N.W.2d 682 (1999).

The party moving for summary judgment has the burden of showing that no genuine issue of material fact exists as a matter of law. *Nebraska Popcorn v. Wing*, 258 Neb. 60, 602 N.W.2d 18 (1999); *Knudsen v. Mutual of Omaha Ins. Co.*, 257 Neb 912, 601 N.W.2d 725 (1999). A movant for summary judgement makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to a judgment if the evidence were uncontroverted at trial. *Fackler v. Genethy*, 257 Neb 130, 595 N.W.2d 884 (1999); *Stiver v. Allsup, Inc.*, 255 Neb 687, 587 N.W.2d 77 (1998). After the movant makes a prima facie case for summary judgment, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion. *Nebraska Popcorn v. Wing*, supra. Additionally, the evidence is to be viewed in the light most favorable to the nonmoving party and the nonmoving party is afforded the benefit of all reasonable inferences. *Battle Creek State Bank v. Preusker*, 253 Neb. 502, 571 N.W.2d 294 (1997).

An action for declaratory judgment determines the rights of the parties in a justiciable controversy and is binding on any further adjudication between the parties as the rights so declared. *Russell v. First York Sav. Co.*, 218 Neb. 112, 352 N.W.2d 871 (1984). Declarations made by a court in declaratory judgment proceedings have the force and effect of a final judgment or decree. *Morrell v. Towle*, 141 Neb. 370, 3 N.W.2d 655. The district court has power to retain jurisdiction and grant further relief where it has entered a declaratory judgment declaring the rights of the parties under a contract. *First Nat. Bank v. Omaha Nat. Bank*, 191 Neb. 249, 214 N.W.2d 483. Courts of record are empowered to render declaratory judgments. *Haynes v. Anderson*, 163 Neb. 50, 77 N.W.2d 674.

ANALYSIS

This matter is before the Court on a petition for declaratory and injunctive relief brought

by the plaintiffs and the class they represent. For the purposes of these motions for summary judgment the court concludes that there are no genuine issues of material facts. The parties have stipulated that the members of the class are "Those families eligible for ADC and receiving ADC cash assistance at any time since July 31, 1998, who had the 24 month calculation for time limited cash assistance begin 90 days after the date a signed application for cash assistance was received in a local office of the defendants and who had not signed a self-sufficient contract." This case involves the receipt of cash benefits pursuant to the Nebraska Welfare Reform Act, *Neb.Rev.Stat.* §§68-1708, et.seq. Pursuant to *Neb.Rev.Stat.* §68-1724, recipients of cash assistance are entitled to benefits for a period of two years after a self sufficiency contract is signed.

§68-1724 provides in part:

- (1) Cash assistance shall be provided for a period or periods of time not to exceed a total of two years for recipient families with children subject to the following:
 - (a) If the state fails to meet the specific terms of the self-sufficiency contract developed under section 68-1719, the two-year time limit established in this section shall be extended for an additional period of not more than two years;
 - (b) **The two-year time period for cash assistance shall begin when the self-sufficiency contract is signed or when any children born into the recipient family prior to the initial ten months of assistance reach the age of six months, whichever is later.**

An administrative agency is empowered to adopt rules and regulations concerning statutes and legislative policies which they are charged with administering. Pursuant to *Neb.Rev.Stat.* §68-1715, the Legislature directed the Department of Health and Human Services (DHHS) to adopt rules and regulations to implement the Welfare Reform Act. In implementing this Act, DHHS adopted the following rules:

Rule 468 NAC 2-020.09B1, which provides:

"The 24 months begin with the earlier of the following:

1. The month following the month the Self-Sufficiency Contract is signed; or
2. 90 days after the date the signed application received is in the local office.”, and

Rule 468 NAC 2-020.05, which provides:

“When the Self-Sufficiency Contract is signed, the 24-month time limit on the receipt of cash assistance begins, effective the first of the month following the month of signature. The Contract must be signed 90 days after the date the signed application is received in the local office.”

The plaintiffs allege that Rules 468 NAC 2-020.09B1 and 468 NAC 2-020.05 should be declared void and unenforceable. Specifically, it is alleged that these rules unlawfully modify and alter §68-1724 and that the adoption of these rules exceeds the authority of DHHS.

The Nebraska Supreme Court has held that: “The legislature may delegate to an administrative agency the power to make rules and regulations to implement 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 power to modify, alter, or enlarge provisions of a statute which it is charged with administering.” *Clemens v. Harvey*, 247 Neb. 77, 80 (1994) (quoting *State ex rel. Spire v. Stodola*, 228 Neb. 107 (1998).) See also, *Robotham v. State*, 241 Neb. 379 (1992). The Nebraska Supreme Court has further stated: “In order to be valid, a rule must be consistent with the statute under which it is promulgated.” *Wagoner v. Central Platte Nat. Resources District*, 247 Neb. 233 (1995).

Neb.Rev.Stat. §68-1724(1)(b) clearly states that the two year period for cash assistance “shall begin when the self sufficiency contract is signed or when any children born into the recipient family prior to the initial ten months of assistance reach the age of six months, whichever is later.” *Neb.Rev.Stat.* 68-1723(1) further provides: “Cash assistance shall be provided only while recipients are actively engaged in the specific activities outlined in the

self-sufficiency contract developed under section 68-1719. If the recipients are not actively engaged in these activities, no cash assistance shall be paid.”

In light of the foregoing statutes, it is clear that recipients are not entitled to cash assistance pursuant to the Welfare Reform Act until a self sufficiency contract has been signed. Pursuant to the Act, recipients do not become entitled to these cash assistance benefits when the application is filed. Rather, the entitlement to cash assistance does not occur until the contract is signed, and no cash assistance shall be paid if the recipient is not involved in the activities required by the contract. In other words, if there is no self sufficiency contract, then there should be no cash assistance payments pursuant to the Welfare Reform Act. §68-1723 and §68-1724.

The defendants argue that Rules 468 NAC 2-020.09B1 and 468 NAC 2-020.05 are necessary to implement the provisions of the Welfare Reform Act in an urgent and expeditious fashion. DHHS further argues that these provisions are necessary to prevent recipients from delaying the signing of the contract and thereby extending the period of time that they are eligible for benefits. As previously stated, it is clear that the recipient is not entitled to cash assistance benefits under the Welfare Reform Act until the recipient signs the contract.

Apparently, recipients are receiving cash assistance prior to the signing of a self sufficiency contract. It would appear that this is occurring under other statutory provisions. *Neb.Rev.Stat.* §43-512. Whether DHHS has the authority to make these payments (before a self sufficiency contract is signed) after the enactment of the Welfare Reform Act is not an issue before this court. If in fact these cash assistance payments are being made under some authority other than the Welfare Reform Act, it is clear that DHHS would have the ability to withhold benefits if the recipient is not cooperating, i.e.- not entering into a self sufficiency contract in a timely and reasonable fashion. Therefore, the court rejects the arguments of DHHS that Rule

468 NAC 2-020.09B1 (which begins the two year calculation 90 days after the application is filed) is necessary to prevent the improper extension of benefits.

Regardless of whether a recipient is already receiving cash assistance, the Legislature clearly stated that the two year period commences to run upon the signing of the contract. The Legislature has made no provision for this two year time period to run if the recipient fails to sign a contract within 90 days. It is the conclusion of the court that DHHS, in enacting and implementing Rule 468 NAC 2-020.09B1 has exceeded its authority and has improperly modified, altered, or enlarged the provisions of the Welfare Reform Act. *Clemens v. Harvey*, 247 Neb. 77, 80 (1994) (quoting *State ex rel. Spire v. Stodola*, 228 Neb. 107 (1998).) See also, *Robotham v. State*, 241 Neb. 379 (1992).

The plaintiffs also claim that Rule 468 NAC 2-020.05 should also be declared void and unenforceable. Rule 468 NAC 2-020.05 provides: "When the Self-Sufficiency Contract is signed, the 24-month time limit on the receipt of cash assistance begins, effective the first of the month following the month of signature. The Contract must be signed 90 days after the date the signed application is received in the local office." Unlike Rule 468 NAC 2-020.09B1, this rule does not alter the calculation of the two year period set forth in §68-1724. It simply places a time restriction requirement on the time within which a self sufficiency contract needs to be signed. Pursuant to the Welfare Reform Act, both the recipient and DHHS have responsibilities to work towards the goal of self sufficiency. This Rule places a duty on both the applicant and DHHS to negotiate and execute a self sufficiency contract in a timely manner. It was the intent of the Legislature that self sufficiency occur in as expeditious a manner as possible. The time limitation of this rule certainly serves that purpose. It is the conclusion of the court that this rule is consistent with the statute and is a proper exercise of the authority given to DHHS to

implement the policy of the Welfare Reform Act. This rule does not improperly modify, alter, or enlarge the provisions of the Welfare Reform Act.

In light of the foregoing, it is the conclusion of the court that the Rule 468 NAC 2-020.09B1 is not enforceable and is void. It is the further conclusion of the court that Rule 468 NAC 2-020.05 is valid and enforceable.

IT IS THEREFORE HEREBY ORDERED, ADJUDGED, AND DECREED that the plaintiffs' motion for summary judgment is sustained and judgment is entered in favor of the plaintiffs and the members of the class that they represent and against the defendants as to Rule 468 NAC 2-020.09B1. It is ordered that the defendants are hereby permanently enjoined from implementing and enforcing Rule 468 NAC 2-020.09B1. As to all plaintiffs and the members of the class they represent, defendants are further ordered to calculate the two year eligibility for cash assistance benefits from the date the self sufficiency contract is signed pursuant to §68-1724.

It is further ordered that the defendant's cross motion for summary judgment is sustained and judgment is hereby entered in favor of the defendants and against the plaintiffs as to Rule 468 NAC 2-020.05.

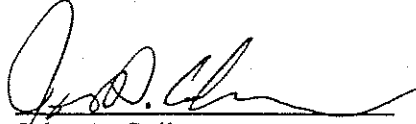
Any request for relief by any party not specifically granted by this order is denied.

The costs of this action are taxed to the defendants.

A copy of this order is sent to counsel of record.

Dated this 12th day of December, 2001.

BY THE COURT:


John A. Colborn
District Judge