IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

KELLY L. JONES, Appellant, v. DEPARTMENT OF HEALTH AND HUMAN SERVICES, STATE OF NEBRASKA, Appellee.	)	Case Number CI 00-2511 **ORDER**

This is an appeal from an order issued by the Director of the Nebraska Department of Health and Human Services (the director) on June 19, 2000, brought under the Nebraska Administrative Procedure Act. NEB. REV. STAT. §§ 84-901 through -920 (Reissue 1999). Accordingly, review is conducted by the court, without a jury, de novo on the record submitted to the hearing officer on May 10, 2000. NEB. REV. STAT. § 84-917(5) (Reissue 1999).

In reviewing final administrative orders under the Administrative Procedure Act, the court functions not as a trial court but as an intermediate court of appeals. *Wolgamott v. Abramson*, 253 Neb. 350, 570 N.W.2d 818 (1997). Acting as an intermediate court of appeals, the court will not consider an issue on appeal which was not presented to or passed upon by the director. *See, St. Joseph Dev. Corp. v. Sequenzia*, 7 Neb. App. 759, 585 N.W.2d 511 (1998).

In reviewing the evidence, the court reaches conclusions independent of those reached by the director and tries factual questions de novo, and where credible evidence is in conflict on a material issue of fact and witnesses appeared before the hearing officer, gives weight to the fact the hearing officer, whose action the director affirmed, heard the witnesses and accepted one version of facts over another. *Nebraska Dep't. of Correctional Services v. Hansen*, 238 Neb. 233, 238, 470 N.W.2d 170, 173 (1991). *Accord, Dep't. of Health v. Manor Care, Inc.*, 237 Neb.269, 271, 465 N.W.2d 764, 767 (1991).

FACTS

Some time prior to July 1999, the appellant, Kelly J. Jones (Jones), and his children began receiving Aid to Dependent Children (ADC) benefits. Jones' case worker was Thomas Dayton (Dayton). During fall 1999, Jones was given a three month exemption from the Employment First Program. On January 6, 2000, Dayton mailed Jones a "speednote," setting up an appointment for January 13. The "speednote" stated the purpose of the meeting was to discuss "employment first participation requirements" and that "attendance is mandatory." The "speednote" was mailed to 614 New Hampshire, Lincoln, Nebraska 68508, the address previously given by Jones and used on other mailings from the Nebraska Department of Health and Human Services (HHS), including checks, to Jones. Jones failed to appear for the January 13 appointment and did not call Dayton.

On January 14, Dayton mailed Jones a form entitled "Employment First, Notice of Failure to Cooperate" (the WP-5 notice). The WP-5 notice was mailed to the 614 New Hampshire address. The WP-5 notice alleged Jones failed to cooperate by failing to attend the January 13 meeting and set a subsequent meeting for January 21. The WP-5 notice also advised Jones that, if he did not cooperate, his benefits could be reduced or terminated. Jones failed to appear for the January 21 appointment and did not call Dayton.

On January 21, Dayton mailed Jones a document entitled "Notice of Action" (the sanction notice) imposing a sanction for Jones missing the two appointments. The sanction notice advised Jones of the termination of ADC payments and medical coverage, effective February 1, 2000. The sanction notice informed Jones the sanction would remain in effect through February, regardless of compliance, and would not be lifted until Jones became compliant. Dayton cited 468 NAC 2-021.07 as the authorization for the sanction. (It is undisputed that this was not the applicable authorization for the sanction imposed under the facts of this case.) The sanction notice also asked Jones to contact Dayton, if Jones was working.

Jones claims he did not receive the January 6 "speednote." With respect to the WP-5 notice, Jones said he and his family were out of town from Sunday, January 16, to late Friday, January 21 and he had not received the WP-5 notice prior to leaving town and was unaware of the meeting set for January 21. On the morning of January 24, Jones called and talked with Dayton. Jones says this was the first time he was aware of having missed the two scheduled appointments. Jones called Dayton to inform him that he, Jones, was doing day care for $360. (Coincidentally, this was information directed to be provided by Jones by the sanction notice dated January 21.)

During the telephone conversation of January 24, Dayton told Jones he would review the additional income being received by Jones, to see whether it would exceed the grant standard, and if it would, the sanction would be rescinded, since the issue would be moot. Since the projected income did not exceed the grant standard, the sanction stood. Jones presumed the projected income would exceed the grant standard, so he thought the sanction would be rescinded.

It is not clear when Jones first became aware the sanction had not been rescinded; however, on April 4, 2000, he was mailed a "speednote" from Patrick McClure. The McClure "speednote" advised Jones he needed to be participating in the Employment First program on a full time basis, ". . . for 1 calendar week in order to have your current employment first sanction lifted and benefits restored . . .." The speednote further informed Jones that, as a condition to the lifting of the sanction imposed by Dayton, it was mandatory that he develop an employment plan and sign a self-sufficiency contract. (There is no dispute that, at all relevant time in this case, Jones had not executed a self-sufficiency contract.)

On April 14, 2000, Jones filed a Request for Fair Hearing with HHS, to contest the sanction imposed by Dayton in the sanction notice of January 21. A telephonic hearing on the request was held on May 20, 2000, before a representative of the director, who acted as a hearing officer. Jones was present during the hearing and was represented. On June 19, 2000, the director issued an order, affirming the sanction imposed in the sanction notice

of January 21. In essence, the director determined that Dayton's citation to the wrong authorization for the sanction imposed was harmless and that the imposed sanction was appropriate for Jones' failure to keep appointments with Dayton. This appeal followed.

DISCUSSION

It is undisputed that, prior to January 6, 2000, Jones was receiving ADC benefits from HHS. As a general rule, as a condition of eligibility for and while receiving ADC benefits, recipients are to participate and engage in appropriate employment preparation or training programs. NEB. REV. STAT. § 43-504.01 (Reissue 1998) and NEB. REV. STAT. § 68-1723 (Reissue 1996). At the time an individual applies for public assistance, HHS conducts an assessment, which includes an individual, comprehensive asset assessment. NEB. REV. STAT. § 68-1718 (Reissue 1996). Among other things, a purpose of the assessment is to develop a self-sufficiency contract. *Id.*

A self-sufficiency contract is developed between the individual and a case worker and, "[t]o insure that the applicant can make constant, measurable progress toward self-sufficiency, goals shall be set with timelines [sic] and benchmarks that facilitate forward momentum." NEB. REV. STAT. § 68-1719 (Reissue 1996). The self-sufficiency contract is to contain "[t]he responsibilities, roles and expectations of the applicant family, the case manager, and all other service providers . . .," and is to be signed by the applicant and the case manager and each side is to ". . . fulfill their respective terms of the contract." NEB. REV. STAT. § 68-1720 (Reissue 1996).

During the summer and fall of 1999, Jones and Dayton had several appointments to put together a self-sufficiency contract; however, a contract was not signed. During the last quarter of 1999, Jones was exempt from participating in the Employment First program. The purpose of the January 13 and January 21 meetings was to develop Jones' self-sufficiency contract.

The hearing officer found, and the director adopted his finding, that Jones failed to cooperate with Dayton in establishing a self-sufficiency contract, by failing to attend the meetings scheduled for January 13 and 21, 2000. The court finds the evidence presented to the hearing officer supports that conclusion and, giving weight to the hearing officer having heard the witnesses, reaches the same conclusion, independent of the director's conclusion.

In response to Jones' failure to keep the appointments, Dayton, in his sanction notice of January 21, 2000, terminated Jones' ADC payment and medical coverage, effective February 1, 2000. The sanction notice cited 468 NAC 2-021.07 as the authorization for the sanction and it is undisputed that was the wrong citation. Dayton testified the authorization he was operating under for the imposed sanction was contained within 468 NAC 2-020.08 and 2-020.08B.

NEB. REV. STAT. § 43-515 (Reissue 1998) provides, in part, that a recipient of benefits is to be notified in writing ". . . as to the discontinuance of payments." 468 NAC 1-009.03B provides, *inter alia*, that, in cases involving *intended* termination of benefits, ". . . the worker shall give the client adequate and timely notice." 468 NAC 1-009.03A1 provides that an adequate notice must include ". . . a statement of what action(s) the worker *intends* to take, the reason(s) for the intended action(s), and the specific manual reference(s) that supports or the change in federal or state law that requires the action(s)." (Emphasis added.)

The WP-5 notice sent by Dayton was the notice which advised Jones that, if he did not attend the meeting set for January 21, his ADC payments and medical coverage may be "reduced or closed" (i.e., it provided the notice for Dayton's intended action(s)). The WP-5 notice cites to 468 NAC 2-020.08ff as authorization for that action. Although the court has been unable to locate that specific subsection, Chapter 2 of Title 468 does relate to the Employment First program and was the chapter intended to be used by Dayton for

any sanction to be imposed, if Jones failed to keep the scheduled appointment. Jones received adequate notice of Dayton's intended action(s) and the authorization therefor.

Dayton testified the sanction he imposed was imposed under the authorization of 468 NAC 2-020.08. Title 468 is entitled "Aid to Dependent Children (ADC) and the Nebraska Medical Assistance Program (MNAP)." Chapter 2 of Title 468 sets forth the rules and regulations governing the "Employment First Self-Sufficiency Program." Dayton testified non-participation is defined by 2-020.08, with 2-020.08B providing action(s) permissible after a determination of non-participation.

As previously noted, Jones had not executed a self-sufficiency contract at any time prior to the sanction being imposed by Dayton. 468 NAC 2-020.08 has the following note at the end: "If the client has not yet signed a Self-Sufficiency Contract, see 468 NAC 2-005.01B." 468 NAC 2-005.01B provides as follows:

> If the parent in an ongoing ADC case has not yet signed an EF [Employment First] self-sufficiency contract and terminates employment or refuses a bona fide offer of employment without good cause, the unit is ineligible for a calendar month, taking into account adequate and timely notice. *Once an EF self-sufficiency contract is signed, EF sanctions are imposed* (see 468 NAC 2-020.08). [Emphasis added.]

It is clear that a condition precedent to the applicability of 2-020.08 is the execution of a self-sufficiency contract. There was not an executed self-sufficiency contract in this case; therefore, the imposition of a sanction under the guise of 2-020.08B was inappropriate and unauthorized.

CONCLUSION

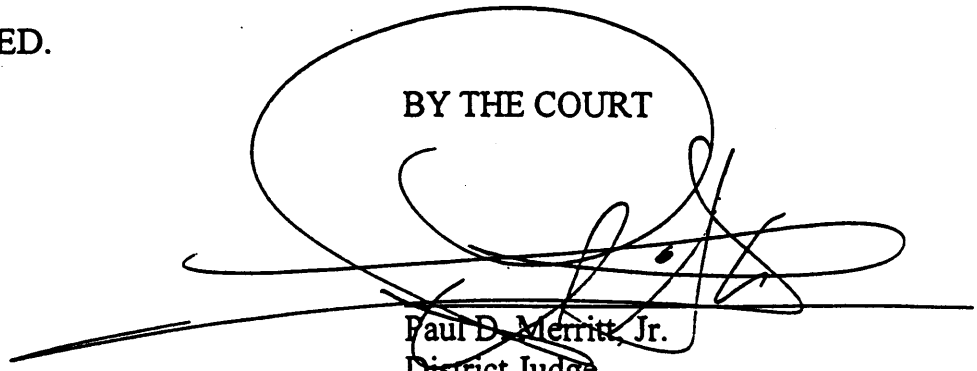
For the reason given herein, the court finds the decision of the director set forth in his order of June 19, 2000, should be, and hereby is, reversed. The costs of this action are taxed to the appellee.

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

Dated March 1, 2001.

SO ORDERED.

BY THE COURT



Paul D. Merritt, Jr.
District Judge