

IN THE DISTRICT COURT OF SCOTTS BLUFF COUNTY, NEBRASKA

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| JESUSITA YOLANDA ARELLANO, |) | Case No. Ci- 01-51 H |
| |) | |
| Appellant, |) | |
| |) | APPELLANT'S REPLY BRIEF |
| v. |) | |
| |) | |
| STATE OF NEBRASKA, |) | |
| NEBRASKA DEPARTMENT OF |) | |
| HEALTH AND HUMAN SERVICES, |) | |
| and RON ROSS, DIRECTOR, |) | |
| |) | |
| Appellees. |) | |
| _____ |) | |

REPLY TO APPELLEES' STATEMENT OF FACTS

Yolanda Arellano, a single mother of five children and one grandchild, has a history of alcoholism and child neglect. She lost her drivers' license for 15 years for alcohol related offenses. She has no transportation. She is required to become self-sufficient in twenty four months. She "contracts" with the Department to become self-sufficient but her "contract" requires her to overcome her transportation barrier singlehandedly and doesn't require the Department to do anything but provide cash assistance until the time runs out.

The recipient tries to figure out how to reinstate her license. She talks to her state senator, she talks to a lawyer, she talks to the Board of Pardons, she starts filling out a 21 page reinstatement application, she gets letters of reference, and copies of court documents, but somehow she doesn't "complete the necessary paperwork" even though "the necessary paperwork" is never clearly defined.

She agrees to "cooperate," but admittedly misses appointments because she doesn't have transportation. She does not have the power to make the Department provide her with transportation to her appointments. The Department does not address her transportation need nor her history of alcoholism. The Department provides no analysis, no strategy, no collaboration,

no plan, no goals, no objectives, no tasks, no timelines, no definition of roles and responsibilities,
no accommodation for rides, no periodic reviews. No nothing.

The recipient is sanctioned for “noncooperation” because she missed appointments to which she had no transportation and because she did not “file the necessary paperwork” to get her license reinstated. She is caught in a maddening trap of unrealistic expectations and powerlessness.

REPLY TO ARGUMENT I

The State quotes the NAC rules defining non-participation, the action to be taken after non-participation, and sanctions (Exhibit 10). However these rules and regulations are subject to the qualifications in 468 NAC 2-020.08A:

2-020.08A Good Cause: The following are some examples of good cause for *failing or refusing to participate in Employment First:*

1. The *participant's illness or incapacitation*
3. *Family crisis or change in family circumstances which interfere with participation*
3. *Unavailability or breakdown in transportation or child care arrangements with no readily accessible alternative;*
5. **Weather conditions** which would prohibit the client from participating in the prescribed activity;

8. The *participant's* mental or *physical inability* to do the job.

The Appellant is not arguing here that she should have been excused altogether from participating in the Employment First program, but only that the DHHS Case Managers have the discretion to temper justice with mercy when circumstances such as the participant's lack of transportation, physical ailments that prevent her from walking long distances, weather conditions, and family emergencies prevent her from keeping an appointment.

Likewise, it is true that 468 NAC 2-020.08Bf recites the action to be taken following non-participation *unless the participant is excused under one of the above categories*; 468 NAC 2-020.082f (1), but even if the participant is not excused for good cause and a Form W-P (Notice of Sanction) is issued:

[The] WP-5 process is designed as a conciliation period to give the client and the case manager the opportunity to resolve the non-participation issue. The client may also request that the conciliation process be initiated. 468 NAC 2-020.088. **The conciliation process may last a maximum of 10 days.** If it is obvious before the 10 days have elapsed that the participant does not intend to participate (i.e., failed to keep conciliation appointment and did not reschedule) and /or the issue cannot be resolved, the case manager may end the conciliation period. Before imposing the *first* or second sanction, the case manager shall present the recommendation to his/her supervisor for review to ensure that the case manager has:

1. **Reviewed the contracted steps** to assure that they are reasonable and that the *parent is both physically and mentally able to carry them out*;

- A. *Worked with the family to assist them in removing any barriers to performance; and*
- B. *Provided the family with an opportunity to resolve the proposed sanction through a mediation process, and if the family is dissatisfied with the results of the mediation, to additionally receive a fair hearing. 468 NAC 2-020.088*

This supervisory review may last a maximum of 10 days.

A sanction is meant to be a “last resort” penalty after numerous attempts have been made by the Case Manager and the client together to resolve alleged non-compliance with the Employment First Contract Agreement. Sanctions may be applied only when an Employment First client demonstrates continued non-compliance with the contract without justification. A client cannot be sanctioned as long as he/she is negotiating in good faith and attending scheduled appointments.

Before a sanction is imposed, the client and the Case Manager must review the steps in the contract to make sure that the client is both physically and mentally able to carry them out. Recipients should receive notices and phone calls from the case manager indicating an attempt to determine their physical and mental capacity to do what is outlined in the Employment Self Sufficiency Contract.

Before a sanction is imposed, the Case Manager must work with the applicant and the family to assist them in removing any barriers to performance.

Before a sanction is imposed, and after the above attempts to work with the client have been made and failed, the case manager will mail the NDHHS WP-5 form. It is the last chance for conciliation before a sanction is imposed. The WP-5 has a meeting time

that must be kept in order to try and work things out with the Case Manager and stop the sanction.

This Claimant never even had a chance for resolution at the conciliation meeting of October 16, 2000. The conciliation was a sham. Just four days after the presumed conciliation meeting had taken place, a first sanction was imposed upon the Claimant. The case manager testified that her actions were prompted by a phone call she received that the client had not shown for her appointment. The case manager was unable to name who the caller was, or what kind of appointment the Claimant had missed. The case manager made no efforts to contact the client to ask why, or whether she had in fact missed an appointment.

A review of the case file narratives, Exhibit 2, reveals a perception on the part of the Case Manager to view situations such as a family crisis as a burdensome drawback that is exclusively the recipient's problem, when the rules clearly say that part of the key to successful performance of the contract includes intense assistance and services to the client to remove any barriers which may include family crisis. This would include assisting this client through a crisis such as the birth of her grandchild so that she might continue to perform under her contract. Under the rules, if the client is not achieving progress in his/her contract, it should be evaluated and changed accordingly. Adjustments to goals, components, or scheduled activities within components may be necessary as a result of changes in labor market conditions, or a variety of individual circumstances.

The client provided a detailed account of her efforts to secure the reinstatement of her driver's license. Those efforts included working with Tanya on her license application, a day or two after the conciliation meeting of October 16, 2000.

Additionally, she testified that she sought advice from private attorney, Bell Island, regarding reinstatement of her driver's license; and that the attorney had advised her that her chances of getting a license were slim, because of a DUS citation she received after the suspension occurred. She made inquiries with the Department of Motor Vehicles; and inquired about the reinstatement procedure with the Board of Pardons; she contacted Senator Adrian Smith, asking for his assistance in getting her license reinstated; she worked with a local agency employee, Liz Marrero; she obtained five reference letters; she obtained copies of the Court dispositions for the last 10 years from the local courthouse; and she looked into getting a temporary driving work permit with no success. Claimant went on to say that the application process is a very difficult and time consuming; that the application itself is 21 pages long; that she must show she has successfully completed an alcohol counseling treatment program; demonstrate sobriety for a certain length of time via AA meetings; to name a few. She also advised that she is still working on the application and gathering the necessary attachments. Nevertheless, according to the State, the Claimant failed "to complete the necessary paperwork."

The Court should not focus so much on the episodes of missed appointments, but look at the overall picture and the reality of Claimant's individual circumstances. Surely this recipient did every reasonable thing to "check on her license." And in the absence of a reasonable plan

defining her obligations to "file the necessary paperwork," she did the best she could. The Department failed to address the transportation barriers from the initial stages of assessment, and this client was set up to fail. Given her circumstances and limitations, this Claimant performed in good faith and to the best of her abilities.

REPLY TO ARGUMENT II

It is agreed that the intent of the Legislature is outlined explicitly in Neb. Rev. Stat. §68-1709 (Reissue 1996) as quoted by the Appellee:

[T]o 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.

However, the Appellee conveniently omits the very next sentence in the same paragraph which is crucial to the interpretation of the statute:

[T]his goal is to be accomplished through individualized assessments of the personal and economic resources of each applicant for public assistance and through the use of individualized self-sufficiency contracts. (Emphasis added.)

It is not sufficient that a self-sufficiency contract signed by the Department and the recipient say merely: “Get a job.” The statutes require that recipients receive individualized assessments and “collaborate” to develop a self-sufficiency contract with measurable goals, periodic reviews, and timelines for the accomplishment of tasks (68-1718 and 68-1719) as well as supportive services to be provided by the Department such as transportation assistance.

The Department adopted rules and regulations to implement these statutory directives in relevant part as follows:

468 NAC 2-020.04 Assets Assessment: Once the applicant is determined eligible for ADC, the client participates in agency and/or vendor provided assessment(s) designed to provide a framework for self sufficiency planning. The purpose of assessment is to gather and organize information about the client's skills, aptitudes, strengths, interests and family circumstances. Assessment should be conducted when a client's circumstances change, when she is not able to continue forward movement in his/her self sufficiency Contract activities, or at any time the case manager and/or the client determines it is necessary. See 468-000-312 for assessment guidelines.

In Yolanda's case the Assessment (Exhibit 16) clearly identified "transportation" and "emotional issues" as barriers to self-sufficiency. But no planning was ever done to address these needs in the Self-Sufficiency contract. And in nearly 24 months no review or adjustment of the contract was ever undertaken.

2-020.05 Self-Sufficiency contract: When the Self-Sufficiency Contract is signed, the 24 months 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.

Based on the results of an assessment, the case manager and the client will develop an individualized Self-Sufficiency Contract. The Contract should stress urgent action toward self-sufficiency. *The contract will identify the goals to be achieved and will include time lines and benchmarks that facilitate forward momentum. The goals should be clear and specific;*

measurable and verifiable; realistic - within the control of the individual; adequate - contribute to accomplishment of the goal; congruent with the individual's values; and time-limited - can be accomplished in a reasonable time frame and within the overall time limit. In the case of an entire family applying for assistance, each family member must have responsibilities within the Self-Sufficiency Contract. Children must agree to regularly attend school. The adults will outline their path to self-sufficiency. *The responsibilities, roles and expectations of the applicant family, the case manager, the Department and all other service providers must be detailed in the Self-Sufficiency Contract.* Final approval of the Self-Sufficiency Contract is a responsibility of the Department.

468 NAC 2-020.06

The Self Sufficiency Contract is to be used as a *flexible tool*. If the *client is not achieving progress in his/her contract, it should be evaluated and changed accordingly*. Adjustments to goals, components, or scheduled activities within components may be necessary as a result of changes in labor market conditions, or a variety of individual circumstances.

2020.07 Supportive Services:

Clients must be provided with *supportive services* to the extent determined necessary by the case manager to permit the individual to participate in any component in Employment First if no other source is available at no cost to the client or to the agency.

2-020.07C Transportation:

The case manager may *authorize payment for transportation to enable a client to participate in any EF component*. Bus tokens, gasoline vouchers, car repairs, transportation to and from child care, and relocation assistance are some examples of transportation services that can be provided. Public transportation and taxis must be used when available.

The cost of court fines must not be paid with EF funds. The cost of reinstating a driver's license, when the loss of the license was due to driving while intoxicated, must not be paid with EF funds.

These NAC Rules and Regulations set forth more particularly the duties and the responsibilities of the Department in implementing the directives of the Welfare Reform Statutes. If anything, they serve to highlight the horrific lack of meaningful goals, objectives, tasks, timelines and reviews in this self-sufficiency contract. Indeed, it is argued here that the terms of this purported "contract" are too vague and indefinite to have constituted a valid contract in the first place and that the purported contract is unenforceable.

Copies of the foregoing recited NAC rules are attached in their entirety to this Reply brief.

CONCLUSION

The Appellant asks the Court to reverse the decision of the NDHHS to impose a sanction therefore relieving the Appellant of the duty to reimburse the State for benefits paid to her during the pendency of this appeal. The Appellant further asks the Court to find that the State has failed to enter into a valid contract with the Appellant and that the State should be required to extend the two-year limit on cash assistance while the State and the Appellant collaborate to develop a valid self-sufficiency contract which takes into

account the named barriers to self-sufficiency and addresses these barriers according to the Welfare Reform Act and the applicable NAC rules and regulations.

DATED this _____ day of June, 2001.

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Appellant

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and accurate copy of the foregoing

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