

IN THE DISTRICT COURT OF SCOTTS BLUFF COUNTY, NEBRASKA

JESUSITA YOLANDA ARELLANO,	)	Case No. CI-01-51 H
	)	
	)	
Appellant,	)	MEMORANDUM ORDER
	)	ON THE
	)	PETITION FOR REVIEW
	)	FROM ADMINISTRATIVE
v.	)	FINDING AND ORDER
	)	
	)	
STATE OF NEBRASKA,	)	
NEBRASKA DEPARTMENT OF	)	
HEALTH AND HUMAN SERVICES,	)	
and RON ROSS, DIRECTOR,	)	
	)	
	)	
Appellees.	)	

**INTRODUCTION:**

Appellant appealed to this Court as a result of an adverse judgment received by the Appellant following an Administrative Law hearing held by the Nebraska Department of Health and Human Services on December 6, 2000, appealing a sanction that revoked the Appellant's A.D.C. and medical coverage benefit for the month of November 2000. The sanctioning decision was founded upon the Nebraska Welfare Reform Act Article 17, Section 68 and the promulgated rules under the act 468 NAC 2-020.04 through 468 NAC 2-020.09.

**STATEMENT OF FACTS:**

Jesusita Yolanda Arellano (Appellant), a thirty-eight year old resident of Scottsbluff in the County of Scotts Bluff, is a single mother with 5 dependent minor children plus 1 grandchild in her custody. She lost her drivers license for a period of 15 years beginning in 1991 due to a combination of alcohol related offenses and driving while under suspension.

Appellant has received public assistance on and off since 1991. In February of 1999, she was eligible for public assistance through the Nebraska Welfare Reform Act (WRA). Appellant's caseworker for the WRA Employment First Program is Peggy Lohr, with the Nebraska Department of Health and Human Services (NDHHS). Appellant, in

the course of her application for the Employment First Program and in conjunction with the receipt of funds under the program signed three pertinent documents. The NDHHS Employment First Self-sufficiency Contract was signed on 2/1/99 (Exhibit 15) and the NDHHS Employment First Service Plan which was signed 8/6/99 (Exhibit 3). Appellant also signed an Employment First Participation Assessment Form (Exhibit 16). However, the Appellant or Appellee did not date the Employment First Participation Assessment Form. Testimony by DHHS (Peggy Lohr) reflected that the Participation Assessment had most likely been completed within thirty days of February, 1999 as it is customary practice to have applicants complete these forms expeditiously (R.20). Per the Self-sufficiency Contract (Exhibit 15) the benefit period of 24 months began to run 3/1/99

The DHHS Employment First Service Plan (Exhibit 3) listed four items under the Tasks/Planned Hours/ Services Required column. Appellant was to "check on license, computer classes, JPTA, and Doctors note excusing from work". Appellant received the application for reinstatement of Driver's License, per testimony at Administrative Hearing and began gathering the necessary materials in order to complete the reinstatement application. The reinstatement form was not completed, per testimony at the Administrative Hearing. The required computer training classes were completed by the time the Administrative Hearing was held on December 6, 2000. The JPTA was fulfilled, although a requested extension was denied. Appellant was at JPTA from February 23, 2000 until May 23, 2000. Finally, the Doctor's note excusing from work was not received, but a prescription for rehabilitation three times per week was received (Exhibit 13). This rehabilitation was a physical therapy exercise program and was prescribed for radiculopathy of the right knee. The condition prevents Appellant from walking great distances and as a consequence she must rely on some form of transportation. In her case driving is precluded and public transportation is limited to taxi.

Appellant's lack of transportation has been recorded numerous instances in the N-Focus Narrative (Exhibit 2), specifically the following dates: 5/27/98, 1/28/00, and 3/08/00. Due to a lack of transportation, Appellant has missed scheduled appointments with Karen Evans (Workforce Development) and Tanya Cherry (Goodwill Industries). Appellant was to work with Ms. Evans and Ms. Cherry in getting her license reinstated (R.9, R.11, R.23). Appellant was also to work with Ms. Evans to find employment.

Appellant missed appointments with Ms. Cherry on 9/19/00, 9/27/00, 10/03/00, 10/10/00, 10/17/00 and 10/24/00. It should be noted that the appointment scheduled for 10/24/00 was after the sanctioning process was set in motion (Exhibit 6). Good Cause for missed appointments can be shown under 468 NAC 2-020.08A, Manual Letter #41-2000 effective 12/27/97 (Exhibit 10). Good Cause can be an "[u]navailability or a breakdown in transportation or child care arrangements with no readily accessible alternative;..." It has been illustrated throughout the record that Appellant does not have a consistent form of transportation. The record also reflects that Appellant has a suspended license that will not be reinstated until 2006 unless she receives dispensation by having the completed reinstatement forms approved. The only time childcare has been of issue is by implication by NDHHS officer Ms. Lohr in her testimony on 12-6-00 and in the N-Focus Case Narrative dated 10-20-00. Appellant had also tried to rely on Tanya Cherry for transportation in order to fulfill her Tuesday meeting times. (R.73). Appellant claims that her missed appointments with Ms. Cherry were a result of not hearing Ms. Cherry at her door due to not having a doorbell which has since been rectified. (R.74).

In a letter addressed to Ms. Lohr from Karen Evans dated October 27, 2000 (Exhibit 7) it states that Ms. Evans requested the forms for the reinstatement of Appellant's driver's license so they could begin working on the process. That letter also documents missed appointments with Karen Evans on 6/07/00, 6/15/00, 9/20/00, 9/28/00 and 10/26/00. Again, the 10/26/00 appointment was after the sanctioning and appeals process was set in motion.

Appellant has received two or three "Gas Vouchers", each for \$5. None had been issued recent to the time of sanction. They were last issued in February 2000. The only form of "public" transportation available in Scottsbluff is through CABCO (taxicab).

Appellant received two WP-5 Warnings (Employment First Notice of Failure to Cooperate). The first was dated 7/31/00 (Exhibit 4). A Conciliation Meeting was scheduled for 8/11/00. The appointment was kept. No sanction resulted. The second WP-5 Warning was issued on 9/29/00 (Exhibit 5). A Conciliation Meeting was scheduled on 10/16/00. Appellant kept this appointment too. No sanction resulted. The Warnings were issued because Appellant failed to keep appointments with her case manager or with

another agency providing service. The sanction was issued on October 20, 2000 due to missed appointments with Karen Evans and Tanya Cherry.

Appellant searched for employment opportunities on her own and was not solely reliant on opportunities provided by NDHHS or its agents. During her job search initiatives, Appellant kept her Caseworker apprised of any potential opportunities. Safeway employed Appellant on 12/3/00 in a full-time capacity. In terms of reliance on Ms. Cherry for employment opportunities, Appellant was informed Ms. Cherry would look into jobs within walking distance of the Appellant, however, the Appellant had not heard from her since that conversation. (R.75).

Notice of Action was dated 10/20/00 (Exhibit 9). Notice placed Appellant on a one-month sanction beginning November 1, 2000. At the time of notice Appellant had six exemptions. As a result of the sanction, Appellant's ADC payment and medical coverage was to stop for the month of November 2000 (Exhibit 9). However, the letter specifically states that the ADC payments would stop for a one-month period (November 2000). The Appeal to Sanction Notice was filed on 10/25/00. The Administrative Hearing was held on 12/6/00 and the adverse Administrative decision was issued on 12/21/00. The Appeal from the Administrative Hearing was filed in this Court on 1/19/01 and oral arguments were heard 6/19/01.

The Employment first Participation Assessment (Exhibit 16) was completed by the recipient/Appellant. It is a standardized assessment that allows space for specific information to be filled-in in the categories of: "My Ideal Job", "Community and Family Support System", "Medical Information", "Legal Information", "Educational Information", "Employment Information" and "Family Issues Assessment" Ideally the form is to be completed previous to the Contract being developed and signed. In the instant case, the assessment was not dated. The Participant Assessment is listed as one of the tools that can be used in establishing an assets assessment of the Participant (468 NAC 2-020.04, R.19, R.20). According to Neb. Rev. Stat. §68-1718(1), an assessment is to be completed at time of application for public assistance. The assessment shall be used: (a) To develop a self-sufficiency contract under Neb. Rev. Stat. §68-1719 and promote services which specifically lead to self-sufficiency; and (b) to determine if the applicant should be referred to other community resources for assistance.

The NDHHS Employment First Self Sufficiency Contract (Exhibit 1) signed by the Appellant and Case Manager is a form contract (WP-6 Rev. 9/97). It provides spaces for the following information to be filled in: Master Case Name (Jessie Arellano), Case Manager's Name (Ronda Sellens), Master Case Number (114180), Date (2-1-99), When the 24 month time limit will start (3/99), 2 lines each for Case Person's Signature (Jessie Y. Arellano) and Date (2-1-99) one of which under each category was filled in, the Case Manager's Signature (Ronda Sellens) and Date (2-1-99). These are the only places where information can be filled in on the contract. Per the Regulations (2-020.05), the Self Sufficiency Contract is based upon the results of assessment. The regulation further states:

"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."

Additionally, the Self-Sufficiency Contract evaluation is a "continuous process", 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."

The Employment First Service Plan (Exhibit 3) is a chart organized form (WP-4C Rev. 6/98). Both the Participant and the Case Manager signed this form approximately six months after having signed the Contract. Aside from the standard tracking information (participant, case number, case manager and date), space is provided for Short term Goal (left blank), Objective/Expected Results (left blank), Tasks/Planned Hours/Services Required (only the task was filled in), Time Frame/Service Dates (filled in), Person/Provider (only Appellant's first name is listed), and Status/Progress (left blank). This form is completed by the Case Manager. The Service Plan which is considered a part of the Employment First Contract is to set a goal for the recipient,

itemize services needed by the recipient, set a schedule to complete the tasks, follow through with a progress note and if necessary re-evaluate the plan and make amendments. The Service Plan in this case merely lists four tasks, who is to perform the task (Appellant only) and dates as to when the task is to be completed.

#### THE LAW:

The Welfare Reform Act's primary purpose "is 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... this 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." Neb. Rev. Stat. §68-1709.

Asset assessments are to be done at the time the individual applies for public assistance. The assessment should be comprehensive including both economic and personal resources available to the applicant. Neb. Rev. Stat. §68-1718. Personal resources include: "education, vocational skills, employment history, health, life skills, personal strengths, and support from the family and the community. The assessment shall also include a determination of the applicant's goals, employment background, educational background, housing needs, child care and transportation needs, healthcare needs and other barriers to economic self-sufficiency." Neb. Rev. Stat. §68-1718(2). The assessment shall be used to develop a Self-Sufficiency Contract under section Neb. Rev. Stat. 68-1719 and promote services that specifically lead to self-sufficiency; and to determine if the applicant should be referred to other community resources for assistance. Neb. Rev. Stat. §68-1718(3)(a) and (b)

The Self-Sufficiency Contract is built upon the premise of urgent action. "To ensure that the applicant can make constant measurable progress toward self-sufficiency, goals shall be set with timelines and benchmarks that facilitate forward momentum". Neb. Rev. Stat. §68-1719.

The Welfare Reform Act specifically sets forth what should be included in the contract. "The responsibilities, roles, and expectations of the applicant family, the case manager, and all other service providers shall be *detalled* [emphasis added] in the Self-

Sufficiency Contract developed under section 68-1719. The contract shall be signed by the applicant and by the case manager representing the state. The state and the applicant shall fulfill their respective terms of the contract." Neb. Rev. Stat. §68-1720.

The Welfare Reform Act enables the Department of Health and Human Services to adopt and promulgate rules and regulations to carry out the Welfare Reform Act under Neb. Rev. Stat. §68-1715. In response to this entitlement, the NDHHS promulgated regulations 468 NAC 2-020.04 through 2-020.09B1a. The regulations parallel the WRA. In 468 NAC 2-020.05, the parameters of the Self-sufficiency Contract are outlined. The duration for receipt of funds is stipulated as being 24 months, commencing the first month following the signing of the contract. It further states that the contract shall identify 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." The self-sufficiency contract is a flexible tool, which should be evaluated and changed accordingly. Adjustments to goals, components, or scheduled activities may be necessary as a result of a variety of individual circumstances.

The Components make up the menu of activities that the participant and case manager choose from when developing the Self-Sufficiency Contract. Each component activity is to be listed as a separate element in the Self-Sufficiency Contract. 468 NAC 2-020.06. The components include: (a) Job Search which may be a group job search workshop; and or independent job search; (b) education if applicable; (c) Post-Secondary Education which is limited to that which is directly related to the fulfillment of an individual's vocational goal. This may last up to 24 months; (d) Job Skills Training which is a specific vocational training in technical job skills and leads to the attainment of a certificate; and (e) Job Readiness.

Supportive Services must be provided to the client to the extent determined necessary by the case manager in order to permit the individual to participate in any component of Employment First if no other source is available at no cost to the client or to the agency. 468 NAC 2-020.07. Transportation is a category provided for under the

area of supportive services. "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." 468 NAC 2-020.07C.

Non-Participation is grounds for sanctioning under the regulations. 468 NAC 2-020.08B. However, before a sanction can be implemented, the case manager is to issue a WP-5 form. This is intended to be a conciliation process that allows the client and case manager the opportunity to resolve the non-participation issue. "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; (2) worked with the family to assist them in removing any barriers to performance; and (3) 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." If cooperation is restored or good cause established then no sanction is imposed.

#### ISSUES:

The sanctions are punitive in nature and implemented because of non-compliance with the participation aspect of Employment First. This is illustrated under 468 NAC 2-020.08B2f(2), the length of the sanctions. The first sanction lasts for a minimum of one month, the second for a minimum of three months and the third for twelve months or the balance of the 48 month period, whichever is shorter. For a sanction to be lifted, "the participant is required to engage in the activity to which s/he previously agreed in the Self-Sufficiency Contract or in another activity agreed upon in the contract for a period of one calendar week, in order to demonstrate willingness to participate." 468 NAC 2-020.08B2f(3). This is both in accordance and opposition with the goals of the WRA which are to provide assistance and promote self-sufficiency. Sometimes punishment can be used as a motivational factor to ensure recipients comply with the requirements of their contracts. However, removing the financial assistance needed by the recipient without allowing for resumption of assistance in less time than is stipulated in the



sanction removes the much needed income from the family as a whole and punishes the entire family unit.

It is required that both the Appellant and the Appellee follow the terms and provisions of the Contract, Regulations, and the WRA. Appellant has followed her portion of the Self-Sufficiency Contract. She encourages her children to attend school, is receiving health benefits under the Act, and is receiving child support which is being turned over to the state in order for her to receive the ADC grant. These were the Appellant's obligations under the Contract (Exhibit 15). Incorporated as a part of the contract was the Employment First Service Plan (Exhibit 3). As was discussed earlier, the Service Plan was scantily completed by the Case Manager. However, the tasks of the Appellant were worked on and in some instances attained.

The Appellant did not meet requirements of the regulations. 468 NAC 2-020.08 clearly includes "a failing to keep appointments with the case manager or with another agency..." in the definition of non-participation. Non-participation may then serve as a prelude to sanctions in 468 NAC 2-020.08B. The documentation of missed appointments with Tanya Cherry and Karen Evans does show the failure to keep appointments. Thus, it appears that the Appellant did fulfill obligations stemming from her contract, but not obligations stemming from administrative regulations.

The NDHHS however did not maintain its portion of the Contract or fulfill its obligations under the Regulations or the WRA. The Regulations and the Act stipulate that a Self-Sufficiency Contract is to be developed in identifying goals to be achieved that are clear and specific, realistic, adequate, and reasonable in their nature, in that they are attainable within the overall time limit. The NDHHS did not set a short-term goal for the Appellant. The information under "Tasks" was vague and inconclusive. She was told to "check on license" which she did and discovered that it would be unlikely the suspension would be removed. She attended computer classes and JTPA. There was no indication made of her status or progress in any of these areas. She didn't get a doctor's note excusing her from work. One of her overall goals was to become employed and a doctor's note excusing her from work would be contrary to this goal. However, she did obtain a prescription showing she was in need of physical therapy. The Service Plan that

was incorporated as part of the contract was not updated or revised. No follow-up notes were made. The Service Plan/Contract was incomplete.

In sum, an effective Self-Sufficiency Contract was never developed. Development of the Contract was to take the efforts of both parties. The Appellant completed a Participation Assessment. This was one of the tools the case manager was to utilize in developing an *individualized* plan for the Appellant. Instead, a *form contract* was completed and an addendum page was added six months later that was slightly more individualized although not complete or detailed. As a result, if the Court attempts to enforce this Contract, it would leave both the Appellant and Appellee in the same predicament they started – partially compliant with an ineffective contract.

The Appellant was sanctioned for non-participation, "failing to keep appointments with the case manager or with another agency providing service to the client..." 468 NAC 2-020.08(5). Looking at the Contract with its addendum, there is nothing listed that says she needs to meet with anyone at Goodwill Industries or Workforce Development. She is informed that she needs to be working on the reinstatement of her driver's license. She has. The space indicating a provider is left blank, this is where Workforce Development or Goodwill Industries should have been listed. During the hearing, the NDHHS kept referring to the non-completion of the reinstatement forms, implying that was the true reason for the sanction. If that is the case, the Contract did not stipulate that the forms were to be completed certainly not by a certain date. Thus a timeframe or benchmark was not set for this activity in violation of both the Act and the Regulations. If the true reason for sanctioning was missed appointments, then the Appellant should have been allowed to show Good Cause. Good Cause according to 468 NAC 2-020.08A can be shown by unavailability of transportation with no readily available alternative. Here, the lack of transportation is attributed both this area as it lacks public transportation and the fact that the Appellant is unable to drive due to a suspended license.

The consequences for the Appellant not upholding her portion of the contract could range from a one-month sanction to loss of assistance. The consequence of NDHHS not fulfilling its portion of the contract could result in an extension of benefits

for an additional twenty-four months. Both of these consequences are printed on the Self-Sufficiency Contract (Exhibit 15).

#### CONCLUSION:

Based on the facts shown by the record in this case, the Nebraska Welfare Reform Act, and regulations promulgated by the Department of Health and Human Services under that act, the court reaches certain conclusions. These conclusions are:

The Appellant should not be sanctioned because of claimed non-compliance with her contractual obligations. This is because the contract itself is not specific in establishing that she was to make application for a reinstatement of her driving privileges and had to meet certain appointments in order to get that done. It may be that the contract should have been revised to so provide, but that was never done. It is also true that the failure of specificity and changes in the contract was more a failure of the Department of Health and Human Services than it was a failure of the Appellant. It would not be just to sanction the Appellant for contractual failures when the other party was just as guilty of contractual failures as she was, and the contract was never drafted to clearly delineate such consequences because of the contract's failure of language itself.

The Appellant should, however, be sanctioned because the regulations under the Nebraska Welfare Reform Act clearly provide the basis for sanction because of non-participation. The pattern of Appellant missing appointments was documented well and covered a long period of time. She had been formally warned about the problem of missing appointments at least two times before being sanctioned. The hearing did not show any specific good cause for missing the appointments, except for a generalized complaint that transportation was a problem for her. It is true that transportation was a problem for her, but it cannot explain or excuse the volume and persistence of missed appointments shown by the record herein.

The record does show a failure of the Department of Health and Human Services to fulfill its obligations under the contract, their regulations and the Nebraska Welfare Reform Act. The contract and the Nebraska Welfare Reform Act do say that a consequence of that failure is an extension of Appellant's benefit period for an additional twenty-four months. However, this case is an appeal under the Nebraska Administrative Procedure Act of agency action sanctioning the Appellant by withholding November of

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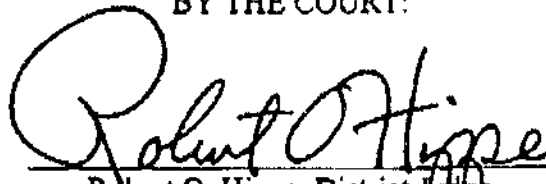
2000 ADC cash benefits and medical coverage. It is not a suit to enforce the contract against the Department of Health and Human Services. They had no notice that this was the object of this court proceeding, and the court concludes that it is without subject matter jurisdiction to enforce an agency obligation to provide services to Appellant for an additional twenty-four months.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the agency action withholding Appellant's ADC and medical benefits for the month of November, 2000, by the Gering Local Office of the Nebraska Department of Health and Human Services implementing an Employment First Initial Sanction be affirmed.

IT IS FURTHER ORDERED that the oral request of the appellant to decree an additional twenty-four month eligibility period under the Nebraska Welfare Reform Act in this case be denied.

DATED this 10<sup>th</sup> day of July 2001.

BY THE COURT:

  
Robert O. Hippe, District Judge

Cc: R. A. Schmitz ✓  
R. Harper