

A10-1303

**STATE OF MINNESOTA
IN COURT OF APPEALS**

Harold Young,

Appellant,

vs.

Cal Ludeman, Commissioner of Human Services,
and Steele County Human Services,

Respondents.

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

I. Cessation of Appellant's Elderly Waiver benefits is an adverse action by Respondent from which Appellant has a right to appeal.

Respondent's claim there is no jurisdiction to review a discretionary act of the County Board has no support in the facts or the law.

A. Respondent's proposed termination of benefits is reviewable.

"There is a presumption in favor of judicial review of agency decisions in the absence of statutory language to the contrary." *Minnesota Public Interest Research Group v. Minnesota Environmental Quality Council*, 306 Minn. 370, 376, 237 N.W.2d 375, 379 (1975). Respondent argues that this case involves an action by Steele County that is outside the jurisdiction of the Commissioner's appeal process. The county's argument would deny any forum to Mr. Young when his Elderly Waiver services are terminated – he could simply be forced to move by the county's whim. The claim that termination of Appellant's Elderly Waiver benefits is unreviewable County Board discretion, instead of being an appealable action by a "county agency", has no merit and must be rejected by this Court.

Respondent issued a written notice to appellant on 12 December 2008. (Admin. Record, Exhibit 5, Appendix to Appellant's Brief, at App-1). The notice states that Steele County Human Services is "taking an action affecting your receipt of services under the following program", and below that is an X in a box next to "Elderly Waiver". (*Id.*). The

pre-printed notice states that the “action we are taking is”, and below that there is an X in a box next to “Denial of services”. Another X appears in a box next to “Other action”, followed by the typewritten words “cessation of Elderly Waiver payments to a vendor which Steele County does not have a contract with”. (*Id.*). The face of the notice states in bold face type, “You have a right to appeal this action”. That is precisely what appellant did. Appellant’s effort to obtain judicial review of the proposed termination of his benefits is squarely within the text authorizing an appeal at Minn. Stat. § 256.045, subd. 3(a)(1).

This case raises a significant issue of law – whether appellant’s health care decisions, his right to free choice of qualified providers, is subject to governmental control by the county board. Beyond this, the action proposed by respondent county human services agency will disrupt appellant’s specialized care and services. Appellant’s protest was stated clearly at the beginning of the administrative hearing: “So that notice is the adverse action and Mr. Young is faced with loss of services and moving from the residence he’s been at since at least last May or June of 2008. The fact that he’s being denied services is something that is appealable and so this tribunal has to have jurisdiction over it.” (Tran. 10-11, statement by counsel).

Because respondent proposes to terminate appellant’s Elderly Waiver benefits, the cessation of these benefits will force him to move his residence: since appellant is receiving Medical Assistance, all his income is consumed by his medical and living

expenses. Appellant has no other means of paying for his specialized care. There is no medical or other evidence in this record permitting an inference that forcing a move and changing his care providers will be an easily tolerated, *de minimis* burden for the appellant.

B. There is no substantive legal difference between the County and respondent county human services for purposes of this case.

Respondent tries to draw a distinction between the term “county agency”, agreeing that it is an entity whose actions adverse to recipients can be appealed under Minn. Stat. § 256.045, subd. 3(a)(1), and the county itself, claiming that “the operative action is the termination of a contract by the County Board”. (Resp. Br. 10). That respondent asserts the action is one by the county board does not end the analysis, but merely defines one of the contours of the dispute. Respondent does not cite or distinguish Minn. Stat. § 402.02, subd. 1a, which provides: “If a single county forms a human services board, the county board of commissioners may assume the powers and duties of a human services board.”

Despite making the statement, “the Commissioner lacked authority to review the action of the County Board”, (Resp. Br. 11), respondent’s brief lacks any legal authority demonstrating how the county board slips free of the requirements placed on its human services department.

C. There is no factual distinction in this case between the County Board and respondent.

Exhibit 7 from the administrative record, reproduced at Respondent’s Appendix 1-

22, is the contract that was in effect at the time appellant began residing at Valleyview. On its face, the contract is “between Steele County Human Services and Valleyview of Owatonna, LLC”. (Resp. App. 1). The document recites that “The Steele County Board of Commissioners, * * * through the Human Services Department, Adult Services Division, hereafter referred to as the “County”, and Valleyview of Owatonna, LLC, * * *, hereafter referred to as the “Provider”, enter into this contract ...”. (Resp. App. 1). The remainder of the contract document uses the term “County” throughout. This document shows on a factual basis that there is no relevant legal distinction between the County *per se* and the respondent Steele County Human Services in this case.

Respondent notes in its brief that the Human Services Judge “did not address the Constitutional question of whether the relief sought by Appellant would violate separation of powers and Respondent does not raise that issue in this appeal.” (Resp. Br. at 10). Respondent argues only that “the plain meaning of the term “county agency” [is] that the term refers to a county body subordinate to the County Board and not the County Board itself”. (Resp. Br. at 10). But even if the plain meaning is that the County Board acts through a subordinate, there is no cited authority that the County Board is not required to follow the law when acting through its subordinate human services agency.

Even if respondent were correct that the operative decision terminating appellant’s Elderly Waiver benefits was one that was discretionary with the county board, the Commissioner’s jurisdiction under the appeal statute authorizes reversal. Respondent has

made no counter to this express language in Minn. Stat. § 256.045, subd. 6(a): “In all matters dealing with human services committed by law to the discretion of the county agency, the commissioner’s judgment may be substituted for that of the county agency”. The Commissioner has the authority to revise the county’s discretion. The failure of the Commissioner to do so must be reversed by this Court.

II. A provider must be “qualified” before the county agency makes a contract to obtain specialized services chosen by an Elderly Waiver recipient.

Respondent’s argument that the county board’s refusal to make a contract makes the Valleyview facility not a “qualified provider” stands the law on its head in this case. There is no support for this claim either in the law or in the facts.

A. Qualification is not the same as having a contract.

The contract that did exist in this case is Exhibit 7 from the administrative record, reproduced in Respondent’s Appendix at 1- 22. Nothing in that contract describes the creation or existence of the contract as equivalent to becoming qualified as a provider. To the contrary, the fourth “Whereas” clause prefatory to the terms of the contract states that “...the Provider represents that it is duly qualified and willing to perform such services...”. (*Id.*; emphasis supplied). Under the terms of respondent’s contract, the provider here already had to be qualified *before* the respondent would enter into a contract with the provider. Respondent’s own contracting process belies the claims of its

brief.

Other portions of the respondent's prior contract with Valleyview support viewing a "qualified provider" as a provider able to supply necessary services to an Elderly Waiver recipient, thus eligible for a contract with the county human services agency. Section 8 of the contract, captioned "Provider Qualifications and Training", does not describe the provider's qualifications in detail, but recites the provider's promise that it will "use only qualified personnel" and that any necessary licenses or certifications will be complied with. (Resp. App. 8.). Being qualified is what the provider brings to the contract – it is not a transformation that occurs when the county makes a contract with the provider.

Section 9 of the contract reiterates the provider's agreement to "remain qualified and licensed to provide the Purchased Services" in accordance with applicable laws and rules. (Resp. App. 9). Section 9.d. is the provider's recital to "comply with all applicable state licensing standards, all applicable accreditation standards, and any other standards or criteria established by the County to assure quality service." (*Id.*). There is no indication in this record of any quality standard by the county that had not been achieved by the provider. Consistent with this, testimony by the human services director disclaimed there were any local, county-established standards that the provider had to meet: "That is not our jurisdiction." (Tran. 36, test. of Mr. Harder).

Section 11.e. of the contract is the provider's promise to give the county

information about the qualifications of its staff so that the county can “verify that the present and subsequent services are being rendered by competent, trained, qualified and properly licensed or certified personnel as described in the applicable federally approved Minnesota state waiver plan”. (Resp. App. 11). Respondent has made no claim on this record that there is any violation of this provision.

Respondent’s current claim, that by withholding its assent to or by terminating a contract, the provider cannot be recognized as qualified, finds no language to support it in the language of the contract itself. Nor is there any factual claim or evidence in this case that the willing provider appellant has chosen does not have the capacities, licenses, and qualifications necessary to safely supply the specialized living services that he needs.

B. To be a “qualified provider” means having the qualifications, licensing, and capacities to provide the services chosen by an Elderly Waiver recipient.

Respondent’s argument wrenches the term “qualified” to describe something much different than its normal reference to the abilities and capacities – the qualifications – of a provider. The United States Supreme Court used exactly this plain meaning approach in *O’Bannon v. Town Court Nursing Center*, 447 U.S. 773 (1980), which addressed whether individuals whose nursing home expenses were paid by Medicaid had the right to contest the home’s decertification by Medicare and Medicaid. After reviewing the provisions of the Medicaid Act, the Court held that:

Title 42 U.S.C. § 1396a(a)(23) ... gives recipients the right to choose among a range of *qualified* providers, without

government interference. By implication, it also confers an absolute right to be free of government interference with the choice to remain in a home that continues to be qualified. But it clearly does not confer a right on a recipient to enter an unqualified home and demand a hearing to certify it, nor does it confer a right on a recipient to continue to receive benefits for care in a home that has been decertified.

O'Bannon v. Town County Nursing Center, 447 U.S. at 785 (emphasis in original).

Appellant here is asserting his absolute right to be free of government interference with his choice to receive waiver services from a residential facility that continues to be qualified. The respondent county agency has no authority, delegated or otherwise, to interfere with appellant's choice to obtain needed services from an otherwise qualified provider. Rather, the county human services agency is required to arrange for those services chosen by appellant – and under state law that means purchasing through a contract.

There is no factual basis for finding this provider not to be qualified. The prior contract's language itself belies respondent's argument: The county required the provider to attest that it was already qualified and licensed to provide the array of home and community-based services that are itemized in the contract, before it would enter into the contract. The plain meaning of the term qualified, together with the actual conduct of the respondent, show that their argument lacks any factual basis.

III. The Respondent's duties to fulfill the requirements of various human services statutes are carried out under the purchase-of-services contracting statute.

Steele County Human Services' reliance on the word "may" in Minn. Stat. § 256.0112, subd. 1, to support its refusal to contract with an otherwise qualified provider rests on a faulty foundation. This statute is intended to restrict the county's authority, not to enlarge it. The provisions mandate that the county human services agency "use a written grant or purchase of services contract when purchasing community social services". Minn. Stat. § 256.0112, subd. 2(1). This statute controlling the process of purchasing services does not contain the substantive statutory bases that might lead or cause a county agency to make a contract.

A. Minn. Stat. § 256.0112 governs the process for purchasing services.

§ 256.0112 governs how the county goes about purchasing services from vendors to meet the needs that the county is directed to fulfill by other statutes. County human services agencies have many substantive, programmatic services to provide under an array of statutes. Under the CHIPS statutes, a county agency may need to make a contract for an evaluation of a child, or arrange for the out-of-home placement of a youth. County agencies may have to purchase services related to a commitment case, or for juvenile delinquency purposes. When a county human services agency carries out these service functions, it must use these generic contracting provisions because the Legislature has directed that community social services be provided in this way.

B. The County Board can be directed to follow the law.

“Counties are creations of the Legislature.” *In re Welfare of J.B.*, 782 N.W.2d 535, 549 (Minn. 2010). “Counties can exercise only those powers expressly granted to them by the Legislature...”. (*Id.*) “[C]ounties are required to carry out those functions assigned to them by the Legislature.” (*Id.*). Here, the County Board has obligations that are carried out by the respondent county human services agency. These obligations are not found in § 256.0112. Rather, that statute describes how the county human services agency is to go about fulfilling those obligations assigned to the county by other statutes.

Appellant is eligible for Elderly Waiver services under the Medical Assistance program. He is entitled to choose which vendors will supply those services, so long as the provider is “qualified to furnish the services; and willing to furnish them to that particular recipient”. 42 C.F.R. § 431.51(b)(1)(i)-(ii). This is the obligation that has been assigned to respondent – to use the standard contracting templates designed by the state Department of Human Services for the Elderly Waiver program to obtain services freely chosen by waiver participants, and in this process the county may not alter the document “in any way that would exclude otherwise qualified providers or restrict or create lack of choice for consumers among qualified providers.” (DHS Bulletin #09-25-03, Appellant’s Addendum at ADD-34).

There is nothing in these instructions remotely authorizing the county to withhold a contract if it would “exclude otherwise qualified providers”. Respondent here has done

exactly that. The state has not delegated unreviewable discretion to the county human services agency; instead, the county is deprived of authority to exclude otherwise qualified providers or to ‘create lack of choice’. If a contract were the *sine qua non* of being “qualified”, as respondent asserts, this set of instructions from the state Department of Human Services would be completely overturned.

III. The issue in this case is whether Appellant can exercise free choice, not whether there are other providers who could supply adequate services.

The evidentiary hearing in this case did not delve into the factual questions of whether there were other providers of Elderly Waiver services from which appellant could obtain adequate care. Respondent’s apparent argument that the “offer” of other potential placements means that the county’s action was not a substantial impairment of appellant’s free choice (Resp. Br. 17) goes beyond the factual record, and misconstrues appellant’s claim.

Appellant’s guardian and daughter provided a brief amount of testimony at the hearing (Tran. 48-53). Ms. Catherine Smith confirmed that three out of five waiver slots offered by the county’s case manager “were outside this county that I was given the choice for” (Tran. 50). As for the only two places in Steele County, Mr. Young had been in Cedarview recuperating from a broken hip (Tran. 51), and then the county evaluated Mr. Young and approved him going to Valleyview. (Tran. 51). The reason that appellant moved from Cedarview to Valleyview was not explored, nor were the relative merits of

the out-of-county facilities addressed at all. Ms. Smith was appealing to protect her father's rights, because she did not understand why he had to be moved. The hearing focused primarily on the legal issues of the extent of appellant's right to free choice of qualified providers, and whether the county agency could be required to effectuate that choice by arranging a contract with appellant's chosen provider.

A. Neither the state nor the county has authority to restrict appellant's free choice of qualified providers.

Respondent cites to several subparagraphs of 42 C.F.R. § 431.55 to support an argument that it has only applied a reasonable restriction to appellant's free choice. (Resp. Br. 12-13, 16). But respondent has overlooked the language in § 431.55(a), limiting this regulation's application to Medicaid waivers under § 1915(b) of the Social Security Act, 42 U.S.C. § 1396n(b). The waiver involved in appellant's case is made under § 1915(c). Within Minnesota's Elderly Waiver program, where participants are not enrolled in a restricted-provider managed care plan but may arrange for their care and services on a fee-for-service basis, the state's waiver operates with the principle that "...all willing and qualified providers can be enrolled and that people have access free choice of providers". (Tran. 74, test. of Rotegard). Mr. Young is one of the 7% of Elderly Waiver participants in this waiver for whom the state doesn't have authority to restrict that free choice: "...that's correct". (Tran. 80, test. of Rotegard).

Since the state has not been granted a waiver to restrict Mr. Young's freedom of choice, then it follows that the respondent county agency, and the county board, have not

been given that authority either. That this is true is born out by the terms of respondent's contract with the provider, Valleyview. Under the contract, the county agrees that it will advise applicants and eligible persons of their rights to a fair hearing, including the right to appeal "...failure to recognize a person's choice of services". (Exhibit 7, paragraph 14.b., at Resp. App. 12). The contract also provides that "Any additional provisions that limit or restrict a person's choice or access to services shall be considered invalid." (Exhibit 7, paragraph 24.a.1., Resp. App. 17). Respondent apparently recognized that these freedom of choice rights were beyond its authority to alter or infringe.

CONCLUSION

This Court must reject the respondent's efforts to take away appellant's federal right to free choice of providers, and require respondent to take the steps necessary to effectuate appellant's choice of a willing and qualified provider of Elderly Waiver services. The Commissioner's decision must be reversed.

Respectfully submitted,

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Dated: *10 November 2010*



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