IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
FIFTH DIVISION

BRADLEY LEDGERWOOD,
LOUELLA JONES, PEGGY SANDERS,
MARCUS STROPE, WINNIE WINSTON,
and DANA WOLF **PLAINTIFFS**
v. **60CV-17-442**
ARKANSAS DEPARTMENT
OF HUMAN SERVICES **DEFENDANT**

MEMORANDUM ORDER

These parties appeared on May 23, 2018 to be heard concerning Plaintiffs' Motion for Temporary Restraining Order, Preliminary Injunction and Contempt. Kevin DeLiban and Trevor Hawkins appeared for Plaintiffs. Rich Rosen appeared for Defendant. Testimony was received from Bradley Ledgerwood, Rose Naff, and Mark White. Defendant moved to dismiss for want of subject matter jurisdiction. At the end of the hearing, the Court denied the motion to dismiss and granted Plaintiffs' Motion for Temporary Restraining Order. The Court also found Defendant to be in contempt of the permanent injunction that was entered on May 14, 2018, and directed the parties to submit briefs concerning the sanctions the Court should impose.

The briefs have been submitted and considered. This Memorandum Order is issued to document the Court's decision to deny Defendant's Motion to Dismiss, Grant Plaintiffs' Motion for Temporary Restraining, and set out the grounds and sanctions regarding the Court's contempt citation against Defendant.

LITIGATION BACKGROUND SUMMARY

This lawsuit began in this court on January 31, 2017, when Plaintiffs moved for a temporary restraining order and preliminary injunction and contended that a Department of Human Services' (DHS) switch from the ArPath assessment – which relied on a

nurse's assessment of a disabled person's condition in order to determine care – to a reassessment method based on a computer algorithm which assigns disabled persons who need attendant care into one of twenty-three (23) resource utilization group (RUG) tiers as the dispositive factor for determining the amount of attendant care disabled persons are entitled to receive was a rule change that had not satisfied the notice and comment provisions of the Arkansas Administrative Procedures Act.

Based on evidence heard and obtained by the Court during the February 3, 2017 hearing, the Court entered a Temporary Restraining Order on February 7, 2017, enjoining DHS from conducting reassessments on Plaintiffs and from reducing their attendant care hours under RUGs, pending a hearing on Plaintiffs' preliminary injunction motion. DHS thereafter, pursuant to Rule 2(A)(6) of the Arkansas Rules of Appellate Procedure, took an interlocutory appeal from thatTemporary Restraining Order. The Arkansas Supreme Court granted the motion of DHS to stay the temporary restraining order pending the Supreme Court's decision on DHS's interlocutory appeal.

On November 9, 2017, the Arkansas Supreme Court, in a unanimous decision, affirmed this Court's ruling. In doing so, the Supreme Court rejected the argument by DHS that this Court abused its discretion in finding that the Plaintiffs demonstrated a likelihood of success on the merits of their claims that the proposed RUGs reassessment system was a rule issued in violation of the Administrative Procedures Act and was, therefore, invalid and that the Plaintiffs would suffer irreparable harm absent a restraining order. *Arkansas Dep't of Human Svcs v. Ledgerwood,* 2017 Ark. 308, 530 S.W.3d 336.

On May 14, 2018, this Court granted the Plaintiffs' Motion for Summary Judgment and permanently enjoined DHS from using RUGs methodology to determine attendant care hours, unless or until it is properly promulgated. *See May 14, 2014 Memorandum Order.* That injunction was based on the finding that the notice of the proposed rule did not refer to the specific nature and significance of the change in assessment methodology, specifically RUGs, and therefore, was not in substantial compliance with the Arkansas Administrative Procedures Act, specifically A.C.A. § 25-15-204.

On May 18, 2018 (four days later), DHS issued and filed with this Court its "Notice of Compliance" with the permanent injunction order. In its Notice of Compliance, DHS asserted that "to address the deficiencies found by the Court in the promulgation process, as well as to be capable of continuing operations of the ARChoices program, while complying with the court's order," it had filed an emergency rule under the provisions of A.C.A. § 25-15-204(c). That section provides: (1) if an agency finds that imminent peril to the public health, safety or welfare, or compliance with a federal law or regulation requires adoption of a rule upon less than thirty (30) days notice and states in writing its reasons for that finding, it may proceed without prior notice or hearing or upon any abbreviated notice and hearing that it may choose to adopt an emergency rule. Subsection (3) of that statute reads that "except as provided in § 5-64-201, the rule may be effective for no longer than 120 days." The Plaintiffs thereafter brought the instant ex-parte Motion for Temporary Restraining Order and Contempt.

ANALYSIS

The DHS Motion to Dismiss for lack of subject matter jurisdiction is denied because there is no need for a new action. The Court's jurisdiction is ongoing. DHS acknowledged that there is a permanent injunction in its Notice of Compliance. The Notice of Compliance asserts at its second sentence "that order in which the Court granted Plaintiff's Motion for Summary Judgment, permanently enjoined DHS from using RUGs methodology to determine attendant care hours unless or until it is properly promulgated."

Unless otherwise indicated, it is a maxim of long-standing jurisprudence that words are to be given their ordinary and customary meaning. Hence, the word "permanent" is defined as "lasting or meant to last indefinitely." *Oxford American Dictionary,* 1d ed, *sub verbo* "permanent". "Imminent" means "about to occur, likely to occur at any moment." *Oxford American Dictionary,* 1d ed, *sub verbo* "imminent".

It strains credulity, and ordinary understanding of the connotation of the English word imminent, to believe that something is imminent that has been pending since February of 2017—when a temporary restraining order was issued enjoining DHS from utilizing RUGs methodology based on the Court's finding that the Plaintiffs had shown a substantial likelihood of prevailing on the merits of their claim that RUGs was invalidly promulgated pursuant to the Administrative Procedures Act and that the Plaintiffs would likely suffer irreparable harm from issuance of a temporary injunction. The injunction entered on May 14, 2018 made permanent the relief Plaintiffs were granted temporarily in February 2017, relief stayed by the Arkansas Supreme Court during the challenge to the Temporary Restraining Order enjoining the agency from using RUGs methodology

to determine attendant care hours, and affirmed by the Supreme Court unanimously six months before this latest development, in November 2017. *Arkansas Dep't of Human Svcs v. Ledgerwood,* 2017 Ark. 308, 530 S.W.3d 336.

"Peril" refers to "serious danger" of injury. *Oxford American Dictionary,* 1d ed, *sub verbo* "peril". There has been no danger to DHS or any persons on and after May 14, 2018 different from anything that existed since February 2017. Rose Naff—who signed the emergency rule application on behalf of DHS—could not identify any person, or survey of persons indicating that DHS had not been able to provide attendant care. The agency has not suggested that it has not been processing attendant care applications since January 2017 when this lawsuit began.

The question is whether or not the emergency rule promulgated on May 18, based upon a presentation made by the agency on May 17, 2018 is different in substance from the rule that was the subject of this lawsuit in January 2017. The Court finds it is not. The emergency rule relied upon by DHS is plainly an attempt to circumvent the injunction that has been the subject matter of this lawsuit from its inception. There is no proof that DHS requested the Centers for Medicare and Medicaid Services for clarification on whether it could conduct attendant care reassessments as it did before 2016 until DHS complies with the notice and comment requirements of the Arkansas Administrative Procedures Act concerning changing to the RUGs reassessment method.

Put simply, the emergency rule is an "emergency" only because DHS chose to call it that. It is a fabricated and manufactured "emergency" designed by DHS to avoid following the notice and comment requirements of Arkansas law. That is not an

accident. It is purposeful, deliberate, calculated, devised and disobedient of this Court's Order. The DHS statement that it was complying with this Court's Order (which permanently enjoined it from using RUGs methodology until it did so pursuant to a rule promulgated in substantial compliance with the notice and public comment requirements for rulemaking in the Administrative Procedures Act) when it promulgated an "emergency rule" that uses RUGs methodology not only begs credulity. It is manifestly preposterous.

Effective May 23, 2018, the challenged "emergency rule" is found to be factually baseless, legally invalid, and the result of deliberate and calculated disobedience and defiance by DHS of the May 14, 2018 permanent injunction entered by this Court. Accordingly, and pursuant to its bench ruling, the Court hereby grants Plaintiffs' Motion for Temporary Restraining Order, Preliminary Injunction and Contempt.

SANCTIONS

The Court directed DHS to file its notice on or before May 30, 2018 as to why it should not be sanctioned for that contempt, directed Plaintiffis to response within seven (7) days thereafter, and ordered DHS to file any rebuttal within five (5) days of Plaintiffs' response. The parties have submitted their arguments as ordered on the issue of sanctions. The Court now addresses that concern.

DHS insists that its action in promulgating an "emergency" rule was not an attempt to disobey or defy the permanent injunction but was, instead, intended to comply with the permanent injunction. As stated above, that contention is preposterous.

DHS took an interlocutory appeal from the temporary restraining order which enjoined it from reassessing attendant care needs by using the RUGs method. The

Supreme Court unanimously affirmed the Court's TRO ruling. After the parties filed competing motions for summary judgment, this Court entered an injunction that permanently enjoins DHS from reassessing attendant care needs using the RUGs method unless and until DHS properly promulgates a rule for doing so in compliance with the notice and comment requirements of the Arkansas Administrative Procedures Act. As stated above, the "emergency" claimed by DHS when it promulgated the rule that is subject to the instant order was fabricated.

However unpleasant it may be, the Court is obliged to state an obvious truth. Less than a week after this Court permanently enjoined DHS from carrying out attendant care reassessments based on the RUGs method because it had sought to do so without substantially complying with the notice and public comment requirements for rulemaking, DHS deliberately chose to promulgate a rule that its legal counsel and other administrators knew, or should have known based on the exercise of ordinary legal competence, would not require notice and public comment compliance. DHS did so by asserting to the Arkansas General Assembly that an "emergency" existed involving "imminent peril" to public health, safety, and welfare, or compliance with federal law. The proposed "emergency rule" was fundamentally identical to what this Court preliminarily enjoined over a year earlier and permanently enjoined only four days beforehand.

This Court rejects the notion that one of the largest agencies in Arkansas did not know it was violating an injunction that agency resisted and sought to overturn for more than a year. Furthermore, this Court refuses to believe the absurd claim that DHS believed that employing an "emergency rule" to conduct attendant care reassessments

using RUGs methodology without notice and public comments according to the Administrative Procedure Act was "compliance" with the permanent injunction against conducting attendant care reassessments using RUGs methodology, in violation of the notice and public comment requirements in the Administrative Procedures Act.

DHS also argues that because it has not actually conducted attendant care reassessments using the RUGs methodology pursuant to the "emergency" rule, it should not be sanctioned for contempt. That contention is equally unpersuasive. DHS clearly planned to perform attendant care reassessments using the RUGs methodology contrary to the permanent injunction. DHS sought the "emergency" rule in furtherance of that obvious plan. DHS has argued across the life of this litigation that it is entitled to perform attendant care reassessments using RUGs methodology without satisfying the notice and public comment requirements in Arkansas law concerning administrative rule-making. Plaintiffs' emergency ex parte motion for temporary restraining order and this Court's grant of that motion are the only reasons DHS has not performed attendant care reassessments using RUGs methodology since the permanent injunction was entered. The Court will not credit DHS for being prevented – by advocacy by Plaintiffs and this Court's latest temporary restraining order – from doing what DHS plainly intended to do, but which the Court had already permanently ordered it to not do.

And, the Court rejects the notion that DHS was confused about the effect of the permanent injunction and the meaning of the term "properly promulgated." Until now, DHS has not claimed that it was confused about the effect of injunctive relief concerning use of RUGs methodology for attendant care reassessments. To accept the claim that DHS is or has been confused about what "properly promulgated" means as that term

appears in the permanent injunction ruling requires that one ascribe to learned counsel for DHS – Richard Rosen and David Sterling – a degree of legal imbecility this Court does not endorse. Rosen, Sterling, and Mark White (one of the DHS administrators involved in the "emergency:rule" scheme), are lawyers presumed to possess the legal competence required to comply with court orders. The Court rejects the idea that DHS leaders and its legal counsel are imbeciles. However, because DHS strangely claims, through its legal counsel, to have been confused about the obligation to satisfy the notice and public comment requirements for rulemaking prescribed in the Administrative Procedure Act, the Court will refer Rosen, Sterling, and White to the Arkansas Supreme Court Committee for Professional Conduct, as that body is tasked with investigating and determining whether the knowledge, competence, and conduct of lawyers meets the ethical standards of the legal profession in Arkansas found in the Arkansas Code of Professional Conduct. After all, every lawyer is ethically obligated to "provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." *Arkansas Rules of Professional Conduct, Rule 1.1.*

Simply put, DHS attempted to circumvent and defy the permanent injunction that it not conduct attendant care reassessments using RUGs methodology unless and until it complies with the notice and public comment requirements for rulemaking prescribed by the Arkansas Administrative Procedures Act. This Court will not tutor counsel for DHS on how to satisfy those rulemaking requirements. Perhaps the Committee on Professional Conduct will direct Rosen, Sterling, and White to complete remedial education in civil procedure, remedies, and administrative law given their professed

misunderstanding or uncertainty on those subjects insofar as compliance with the permanent injunction is concerned.

Sadly, DHS, the agency of the State of Arkansas responsible for meeting the attendant care needs of disabled Arkansans, apparently has chosen to forego its duty to annually reassess attendant care beneficiaries unless it does so using RUGs methodology without complying with the Administrative Procedure Act. Apparently, DHS would have this Court and the general public forget that attendant care beneficiaries were annually, and competently, reassessed by registered nurses before January 1, 2016, pursuant to the ArChoices assessment waiver approved by the U.S. Centers for Medicare and Medicaid Services. Apparently, DHS believes this Court is unfamiliar with the voluminous record about that attendant care assessment history before the RUGs method was improperly introduced.

The Court knows that DHS has registered nurses available to perform attendant care reassessments. Rather than perform attendant care reassessments using those registered nurses – as it did before 2016 – DHS now claims that hundreds of deserving attendant care beneficiaries are not being reassessed, cannot be reassessed, and will not receive the annual reassessments they deserve because this Court has enjoined it from using RUGs methodology until it complies with the notice and public comment mandates for rulemaking prescribed by the Administrative Procedures Act. That declaration is the latest example of DHS defiance of the permanent injunction, its callous disregard for the rule of law, and its calculated disingenuous representations to this Court, the disabled community it is legally obligated to serve, and the general public.

SANCTIONS

To sanction the willful defiance by DHS of the permanent injunction in this case, DHS is hereby ordered:

1. Within five (5) days of this Memorandum Order, DHS shall publish on its website and serve notice to the Court and opposing counsel the number of persons it assessed and re-assessed for attendant care using registered nurses for every month before January 1, 2016, when it began employing the RUGs methodology.
2. At the same time (within five – 5 – days of this Order), DHS shall also publish on its website and serve notice to the Court and opposing counsel the number of persons it has failed or refused to reassess each month since February 7, 2017, when this Court initially enjoined its use of RUGs methodology to determine attendant care needs.
3. DHS will continue to publish and update the aforementioned information on its website each month until relieved of the duty to do so by this Court. The publication requirement is hereby made an explicit element of the permanent injunction.
4. DHS is hereby ordered, effective immediately, to provide the Court and opposing counsel, under seal, the names and contact information of the persons it has failed or refused to reassess since January 1, 2016, and shall continue doing so on or not later than the fifth business day of each month until relieved by this Court of the duty to do so.

5. Richard Rosen and David Sterling – legal counsel for DHS - and Mark White – a lawyer involved in senior management in DHS – are hereby referred to the Arkansas Supreme Committee for Professional Conduct for determination whether they possess the requisite legal knowledge, skill, thoroughness, and preparation reasonably necessary to represent DHS in complying with the permanent injunction entered in this litigation. A copy of this Memorandum Order and the pleadings and orders leading to it will be submitted to the Committee for Professional Conduct accordingly.

6. This Court will continue to exercise superintending jurisdiction over this dispute for the purpose of entertaining and adjudicating any further requests for relief related to this dispute.

Accordingly, Plaintiffs' Motion for Temporary Restraining Order, Preliminary Injunction, and Contempt is hereby GRANTED. Defendant is hereby found in contempt of the May 14, 2018 permanent injunction, and sanctions are hereby imposed.

IT IS SO ORDERED, this 25th day of June, 2018.

CIRCUIT JUDGE