

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

THE ILLINOIS DEPARTMENT OF)
HEALTHCARE AND FAMILY SERVICES,)
and BARRY S. MARAM, in his official)
capacity as the Director of the Illinois)
Department of Healthcare and Family Services,)

Plaintiffs,)

v.)

JESSE WHITE, in his in his official capacity as)
the Secretary of State for the State of Illinois,)

Defendant.)

No.

08C H 118 22

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CIRCUIT COURT OF COOK
COUNTY, ILLINOIS
CHANCERY DIV.
DOROTHY BROWN CLERK

VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT AND MANDAMUS

Plaintiffs, the Illinois Department of Healthcare and Family Services (the "Department") and Barry S. Maram, in his official capacity as its Director (collectively "Plaintiffs"), bring this action for declaratory judgment and *mandamus* against Jesse White, in his official capacity as the Secretary of State for the State of Illinois (the "Secretary of State"), and allege as follows:

INTRODUCTION

1. This action seeks a declaration of the Secretary of State's clear duty to accept, file, publish, and maintain the Department's rule entitled Medical Assistance Programs (89 Ill. Adm. Code 120), which was published on November 26, 2007, at 31 Ill. Reg. 15424 (the "Permanent Rule"), in accordance with Sections 5-65 and 5-70 of the Illinois Administrative Procedure Act ("IAPA") (5 ILCS 100/5-65 and 70), and submitted to him on March 10, 2008. The action further seeks a *mandamus* ordering the Secretary of State to accept the Permanent Rule for filing, publication, and maintenance in the Illinois Register.

2. The Secretary of State's failure to adhere to his clear duties in this regard arises out of the purported suspension by the Joint Committee on Administrative Rules ("JCAR") of the Department's previously filed emergency rule ("Emergency Rule"). In a letter, dated March 21, 2008, the Secretary of State notified the Department that he would not accept, file, publish, and maintain the Permanent Rule in the Illinois Register because JCAR previously suspended the Department's Emergency Rule. JCAR's purported suspension, upon which the Secretary of State relies, however, is a nullity. As has been determined by the United States Supreme Court, and the Supreme Courts of at least nine other states, a legislative committee like JCAR cannot constitutionally impose a veto on the rule making power of the executive branch. JCAR's suspension power violates the Illinois Constitution's Enactment, Presentment and Separation of Powers provisions. JCAR's suspension is also null and void because JCAR was improperly constituted at the time it purported to act with respect to the Emergency Rule and the Permanent Rule. Additionally, JCAR's purported suspension was arbitrary and capricious and exceeded JCAR's statutory authority, rendering it invalid.

3. Because JCAR's suspension of the Department's Emergency Rule is null and void, the Secretary of State must accept, file, publish, and maintain the Rule in the Illinois Register, pursuant to his duties under Sections 5-65 and 5-70 of the IAPA.

FACTS

Parties

4. Plaintiff, the Department, is a State agency which implements, manages, and oversees various public health related programs, including the FamilyCare program.

5. Plaintiff, Maram is the Director of the Department.

6. Defendant, Jesse White, is the Secretary of State for the State of Illinois.

Jurisdiction and Venue

7. Jurisdiction is vested in this Court pursuant to Article VI, section 9 of the Illinois Constitution (Ill. Const. 1970, Art. VI, § 9), and Sections 209(b)(1),(2) and 209(c) of the Code of Civil Procedure (735 ILCS 5/2-209(b)(2) and (c) (West 2007)) because defendant is and was a resident of the State of Illinois when the cause of action arose.

8. Venue is proper in this Court pursuant to section 101 of the Code of Civil Procedure (735 ILCS 5/2-101 (West 2007)) because it is in the county of residence of Jesse White, who is joined in good faith and with probable cause for the purpose of obtaining a judgment against him and not solely for the purpose of fixing venue in that county.

The Rulemaking Process

JCAR and Its Composition

9. JCAR was created by the Legislative Commission Reorganization Act of 1984. *See* 25 ILCS 130/2-1; 5 ILCS 100/5-90.

10. JCAR consists of twelve members of the General Assembly. *See* 25 ILCS 130/1-5(a)(3).

11. JCAR members are appointed by members of the Joint Committee on Legislative Support Services ("Joint Committee"), which consists of (1) the President of the Senate, (2) the Senate Minority Leader, (3) the Speaker of the House, and (4) the House Minority Leader. *See* 25 ILCS 130/1-2.

12. JCAR is a legislative support services agency for the Joint Committee. *See* 25 ILCS 130/1-3.

Emergency Rulemaking Procedures and JCAR's Role

13. The IAPA governs rulemaking in Illinois. *See* 5 ILCS 100, *et. seq.*
14. IAPA Section 5-45, in pertinent part, provides that “[i]f any agency finds that an emergency exists that requires adoption of a rule upon fewer days than is required by Section 5-40 and states in writing its reasons for that finding, the agency may adopt an emergency rule without prior notice or hearing upon filing a notice of emergency rulemaking with the Secretary of State under Section 5-70.” *See* 5 ILCS 100/5-45.
15. IAPA Section 5-125, in pertinent part, provides that JCAR may seek to suspend an emergency rule if it issues a statement that the emergency rule is “objectionable under any of the standards for ... review specified in Section 5-100, 5-105, 5-110, 5-120, or 5-130 and would constitute a serious threat to the public interest, safety, or welfare...” 5 ILCS 100/5-125(a).
16. IAPA Section 5-125, in pertinent part, provides that JCAR may issue a suspension “only upon the affirmative vote of three-fifths of the members appointed to [JCAR],” *i.e.* eight members of the twelve person committee, by delivering a certified copy of a suspension statement to the agency that proposed the rule and to the Secretary of State. 5 ILCS 100/5-125(a).
17. JCAR, may however, withdraw a suspension statement within 180 days after its issuance upon affirmative vote of a majority of its members. 5 ILCS 100/5-125(a).
18. Section 5-125 further provides that during the 180 day period, the agency may not file and the Secretary of State may not accept for filing any rule that has the same purpose and effect as the suspended rule. 5 ILCS 100/5-125(b).

The Promulgation of the Emergency and Permanent Rules and JCAR's Action

19. On November 7, 2007, pursuant to its authority under Sections 5-2 and 12-13 of the Illinois Public Aid Code (the "Code"), the Department promulgated an immediately effective Emergency Rule under 89 Ill. Adm. Code 120, entitled "Medical Assistance Programs." 305 ILCS 5/5-2 and 12-13. A copy of the Emergency Rule is attached hereto as Exhibit A and incorporated herein.

20. On or about November 7, 2007, the Department filed a copy of the Emergency Rule with the Secretary of State.

21. The Department determined an emergency existed warranting the promulgation of the Emergency Rule and submitted the Emergency Rule pursuant to Section 5-45 of the IAPA. 5 ILCS 100/5-45.

22. As required by emergency rulemaking procedures, the Department filed, together with the Emergency Rule, a statement containing its reasons for its finding that an emergency existed. *See Ex. A.*

23. At its meeting on November 13, 2007, JCAR voted to object to and suspend the Emergency Rule.

24. JCAR's Objection, Recommendation and Suspension of Emergency Rules (the "Suspension"), filed with and published by the Illinois Secretary of State, provides that:

At its meeting on 11/13/07, [JCAR] voted to object to and suspend the [Emergency Rule] which becomes effective 11/7/07, because, contrary to Section 5-45 of the [IAPA], **no emergency situation existed that warranted adoption of this entire emergency rule.** The agency is maintaining that the loss of the federal SCHIP waiver warrants the adoption of an emergency rule to continue coverage of adults served under that waiver. However, this emergency rule is not limited to that issue. It contains other provisions that this Committee does not recognize as an emergency situation. JCAR recommends that the Department adopt a rule that

addresses the loss of the SCHIP waiver. This Committee finds that inclusion of policy within this emergency rule that does not address a valid emergency is not in the public interest.

(emphasis added). A copy of JCAR's Suspension is attached hereto as Exhibit B and incorporated herein.

25. JCAR's Suspension further provides that "[u]nder Section 5-125(b) of the [IAPA], the suspended emergency rule may not be enforced by the [Department] for any reason, nor may the Department file with the Secretary of State any rule having substantially the same purpose and effect as the suspended rule for at least 180 days following receipt of this certification and statement by the Secretary of State."

26. On November 26, 2007, the Secretary of State published the Emergency Rule.

27. At the same time that the Department promulgated the Emergency Rule, it promulgated a permanent rule (the "Permanent Rule"), which was identical to the Emergency Rule. A true and accurate copy of the Permanent Rule is attached hereto as Exhibit C and incorporated herein.

28. On March 10, 2008, the Department filed with the Secretary of State a certified copy of the Permanent Rule. A copy of the Permanent Rule is attached hereto as Exhibit D and incorporated herein.

29. On March 11, 2008, JCAR transmitted its suspension of the Emergency Rule to the Department. A copy of JCAR's letter, dated March 11, 2008, is attached hereto as Exhibit E.

30. On March 21, 2008, the Secretary of State refused to accept the Permanent Rule for publication and maintenance in the Illinois Register "because the 'adopted' rule [Permanent Rule] has the same purpose and effect as the emergency rule that has been suspended, and

because the suspension has not been withdrawn by JCAR" A copy of the March 21, 2008 letter from the Secretary of State is attached hereto as Exhibit F and incorporated herein.

31. The Secretary of State relied on Section 5-125 of the IAPA when rejecting the Permanent Rule.

32. JCAR's Suspension of the Emergency Rule, however, is null and void because: (1) JCAR's power to suspend and prohibit agency rules under Sections 115 and 125 of the IAPA is unconstitutional, (2) JCAR was improperly constituted at the time it acted on the Emergency Rule and the Permanent Rule, and (3) JCAR acted arbitrarily and capriciously, and outside its statutory authority in issuing the Suspension. Therefore, the Secretary of State has no valid reason or legal basis to refuse to accept the Permanent Rule for publication. Accordingly, this action seeks a declaration that the suspension of the Emergency Rule is void and *mandamus* that the Secretary of State must perform his non-discretionary duty of accepting the Permanent Rule and publishing it in the Illinois Register, in accordance with IAPA Sections 5-65 and 5-70.

The Suspension Is Null And Void Because JCAR's Power To Suspend Rules Is Unconstitutional

33. Through Section 5-125, the General Assembly purports to give a small legislative committee, JCAR, veto power over the Executive Branch's proper exercise of rulemaking authority lawfully delegated to it by the entire General Assembly.

34. JCAR's power under Section 5-125 to suspend proposed administrative rules violates the Illinois Constitution's Separation of Powers, Enactment and Presentment Clauses.

35. Article II, § 1 of the Illinois Constitution of 1970 provides that "[t]he legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another." Ill. Const. 1970, Art. 2, § 1.

36. JCAR's suspension power unconstitutionally encroaches upon the powers of the executive and judicial branches.

37. JCAR's Suspension usurped the authority and duty of the Department under the Public Aid Code (the "Code"), to "make all rules and regulations and take such action as may be necessary or desirable for carrying out the provisions of this Code." 305 ILCS 5/12-13.

38. JCAR's Suspension is also an unconstitutional encroachment upon the authority and duty of the Judicial Branch to interpret and apply the Code, 305 ILCS 5/12-13, in determining whether a rule is consistent therewith.

39. Accordingly, JCAR's Suspension is null and void because JCAR's suspension power under the IAPA violates the Separation of Powers clause of the Illinois Constitution.

40. JCAR's legislative veto power violates the Enactment provision of the Illinois Constitution.

41. The Enactment provision, codified in Article IV, § 8 of the Illinois Constitution of 1970, in pertinent part, provides:

(b) The General Assembly shall enact laws only by bill. Bills may originate in either house, but may be amended or rejected by the other.

(c) No bill shall become a law without the concurrence of a majority of the members elected to each house. Final passage of a bill shall be by record vote. In the Senate at the request of two members, and in the House at the request of five members, a record vote may be taken on any other occasion. A record vote is a vote by yeas and nays entered on the journal.

* * *

Ill. Const. 1970, Art. 4, § 8.

42. JCAR's Suspension is unconstitutional because it permits a lawfully enacted rule, which has the force and effect of law, to be rejected by a small legislative committee rather than by a bill passed by the requisite number of votes in the Senate and House.

43. JCAR's Suspension is null and void because it is an unconstitutional legislative veto, in violation of the Presentment clause of the Illinois Constitution.

44. Article IV, § 9 of the Illinois Constitution of 1970, in pertinent part, provides:

Every bill passed by the General Assembly shall be presented to the Governor within 30 calendar days after its passage. The foregoing requirement shall be judicially enforceable. If the Governor approves the bill, he shall sign it and it shall become law.

Ill. Const. 1970, Art. 4, § 9.

45. JCAR's authority to suspend agency rules violates Article IV § 9 of the Illinois Constitution of 1970 because JCAR is not required to present its decision to suspend a rule to the Governor for approval.

The Suspension Is Null And Void Because JCAR Was Improperly Constituted

46. Appointments to JCAR are made by each of the members of the Joint Committee, and must be made in writing and filed as a public record with the Secretary of State. See 25 ILCS 130/1-5.

47. 25 ILCS 130/1-5(a)(3), in pertinent part, provides:

[m]embers [of JCAR] shall serve a 2-year term, and must be appointed by the Joint Committee during the month of January in each odd-number year for terms beginning February 1. Any vacancy in an Agency shall be filled by appointment for the balance of the term in the same manner as the original appointment. A vacancy shall exist when a member no longer holds the elected legislative office held at the time of the appointment or at the termination of the member's legislative service.

25 ILCS 130/1-5(a)(3) (emphasis added).

48. On information and belief, Representative Lang was appointed to replace Representative Tom Holbrook on JCAR sometime between JCAR's August 14, 2007 meeting and its September 18, 2007 meeting.

49. On information and belief, Representative Holbrook was appointed as a member of JCAR less than two years prior to the appointment of Representative Lang.

50. On information and belief, Representative Holbrook's two year term had not expired at the time of the appointment of Representative Lang.

51. At the time of Representative Lang's appointment, Representative Holbrook still held the elected legislative office held at the time of his appointment to JCAR, *i.e.* a member of the Illinois House of Representatives, and he continues to serve in the Illinois House of Representatives.

52. The appointment of Representative Lang violates 25 ILCS 130/1-5(a)(3) because he was not appointed to fill a vacancy. Representative Holbrook still holds the elected legislative office held at the time of his appointment to JCAR, *i.e.* a member of the Illinois House of Representatives, and he continues to serve in the Illinois House of Representatives.

53. The appointment of Representative Lang violates 25 ILCS 130/1-5(a)(3) because he was not appointed to JCAR during January of an odd-numbered year.

54. Representative Lang voted for the Suspension of the Emergency Rule.

55. Because JCAR acted with one or more improperly appointed members, JCAR was improperly constituted.

56. Because JCAR was unlawfully constituted at the time it suspended the emergency rule, JCAR's Suspension is void.

The Suspension Is Null And Void Because It Is Arbitrary and Capricious, And JCAR Acted Beyond The Scope Of Its Statutory Authority

57. JCAR exceeded the scope of its statutory authority and acted in an arbitrary and capricious manner by issuing the Suspension.

58. In issuing the Suspension, JCAR failed to base its decision upon the criteria set forth in IAPA Sections 5-100, 5-105, 5-110, 5-120, or 5-130.

59. In issuing the Suspension, JCAR failed to base its decision upon the criteria set forth in 1 Ill. Admin. Code 230.550 for determining whether the Emergency Rule constitutes a serious threat to the public interest, safety, or welfare.

60. When determining whether the Emergency Rule poses a serious threat to the public interest, JCAR must apply the following criteria set forth in 1 Ill. Admin. Code 230.550:

1) Does the emergency rule represent a serious threat to the public interest?

A) Does the emergency rule contain policies that have been previously considered and rejected by the General Assembly?

B) Does the emergency rule unconstitutionally or unlawfully discriminate against any citizen of this State?

C) Does the emergency rule unconstitutionally or unlawfully inhibit the free exercise of the rights of any citizen of the State?

1 Ill. Admin. Code 230.550.

61. JCAR must set forth its reasons for issuing the Suspension. 5 ILCS 100/5-125.

62. In its Suspension, JCAR states that the reason for issuing the Suspension was because "no emergency existed that warranted the adoption of this entire emergency rule." Ex. B.

63. In its Suspension, JCAR also stated that it found that "inclusion of policy within this emergency rule that does not address a valid emergency is not in the public interest." Ex. B.

64. Lack of an emergency is not one of the criteria enumerated in IAPA Section 125 to be considered by JCAR when determining if an emergency rule is objectionable.

65. Lack of an emergency is not among the factors to be considered by JCAR in determining whether a proposed rule constitutes a "serious threat to the public interest." 5 ILCS 100/5-125; 1 Ill. Admin. Code 230.550.

66. Administrative agencies, such as JCAR, must follow their own rules as written, without making *ad hoc* exceptions or departures therefrom. JCAR is bound by its own rules and regulations and cannot arbitrarily disregard them.

67. The IAPA confers on the agency, not JCAR, the power to determine whether an emergency exists.

68. Section 5-45 of the IAPA defines an "emergency" as any situation that any agency finds reasonably constitutes a threat to the public interest, safety, or welfare. 5 ILCS 100/545.

69. No provision of the IAPA permits JCAR to second guess and overrule an agency's determination of the existence of an emergency.

70. By issuing its Suspension based upon considerations not enumerated in 5 ILCS 100/5-125 or 1 Ill. Admin. Code 230.550, JCAR exceeded the scope of its statutory authority.

71. By issuing its Suspension based upon considerations not enumerated in 5 ILCS 100/5-125 or 1 Ill. Admin. Code 230.550, JCAR acted arbitrarily and capriciously.

COUNT I
(Declaratory Judgment)

72. Plaintiffs incorporate by reference paragraphs 1-71 and re-allege the same as if fully restated herein.

73. There is an actual and justiciable controversy between Plaintiffs and the Secretary of State concerning the Secretary of State's duty to accept, publish, and maintain the Permanent Rule in the Illinois Register pursuant to IAPA Sections 5-65 and 5-70 and Secretary of State rules adopted pursuant thereto.

74. IAPA Section 65, in pertinent part, provides:

(a) Each agency shall file in the office of the Secretary of State and in the agency's principal office a certified copy of each rule and modification or repeal of any rule adopted by it. The Secretary of State and the agency shall each keep a permanent register of the rules open to public inspection.

* * *

5 ILCS 100/5-65.

75. Section 70 of the IAPA, in pertinent part, provides

(a) The Secretary of State may prescribe reasonable rules concerning the form of documents to be filed with the Secretary of State and may refuse to accept for filing certified copies that do not comply with the rules. In addition, the Secretary of State shall publish and maintain the Illinois Register and may prescribe reasonable rules setting forth the manner in which agencies shall submit notices required by this Act for publication in the Illinois Register. The Illinois Register shall be published at least once each week on the same day ... and sent to subscribers who subscribe for the publication with the Secretary of State.

* * *

5 ILCS 100/5-70 (emphasis added).

76. Plaintiffs assert that the Secretary of State has a clear duty to accept, publish, and maintain the Permanent Rule in the Illinois Register pursuant to IAPA Sections 5-65 and 5-70 because JCAR's Suspension is invalid.

77. The Secretary of State denies that he has a clear duty to accept, publish, and maintain the Permanent Rule in the Illinois Register pursuant to IAPA Sections 5-65 and 5-70 because of JCAR's Suspension.

78. An actual controversy exists between Plaintiffs and the Secretary of State in that the Secretary of State has refused to accept, publish, and maintain the Permanent Rule in the Illinois Register pursuant to IAPA Sections 5-65 and 5-70.

79. Plaintiffs have an interest in this claim and the Secretary of State has an interest in opposing this claim.

80. Plaintiffs have made a definite assertion of its legal rights to have the Permanent Rule accepted, published, and maintained in the Illinois Register pursuant to IAPA Sections 5-65 and 5-70. The Secretary of State has denied Plaintiffs' legal right to have the Permanent Rule accepted, published, and maintained in the Illinois Register pursuant to IAPA Sections 5-65 and 5-70.

81. The controversy between Plaintiffs and the Secretary of State is *bona fide*.

82. A declaratory judgment of the rights and obligations of Plaintiffs and the Secretary of State will not prejudice the rights of persons not parties to the proceeding.

83. Entry of a declaratory judgment that the Secretary of State has a clear duty to accept, publish, and maintain the Permanent Rule in the Illinois Register pursuant to IAPA Sections 5-65 and 5-70 would terminate the uncertainty or controversy giving rise to the proceeding.

WHEREFORE, Plaintiffs, the Illinois Department of Healthcare and Family Services and Barry S. Maram, pray that the Court:

- (a) Declare that Sections 115 and 125 of the Illinois Administrative Procedure Act are unconstitutional;
- (b) Declare that JCAR's suspension of the Emergency Rule is null and void;
- (c) Declare that the Secretary of State has a clear duty to accept, publish, and maintain the Permanent Rule, 31 Ill. Reg. 15424, in the Illinois Register pursuant to IAPA Sections 5-65 and 5-70; and

(d) Grant Plaintiffs such further and other relief as the Court deems just.

COUNT II
(Mandamus)

84. Plaintiffs incorporate by reference paragraphs 1-83 and re-allege the same as if fully restated herein.

85. On March 10, 2008, the Department filed with the Secretary of State a certified copy of the Permanent Rule for publication and maintenance in the Illinois Register. See Ex. E.

86. The certified copy of the Permanent Rule complies with the Secretary of State's rules concerning the form of documents, set forth at 1 Ill. Adm. Code 100, *et seq.*

87. Plaintiffs have met all the requirements of the IAPA and accompanying rules.

88. IAPA Section 5-70, in pertinent part, provides that "the Secretary of State shall publish and maintain the Illinois Register." 5 ILCS 100/5-70 (emphasis added).

89. On March 21, 2008, the Secretary of State refused to accept the Permanent Rule for publication and maintenance in the Illinois Register because of JCAR's Suspension of the Emergency Rule. But for JCAR's invalid Suspension of the Emergency Rule, the Secretary of State would have published the Permanent Rule.

90. JCAR's Suspension of the Emergency Rule is null and void.

91. The Secretary of State has a statutory duty to accept, publish, and maintain the Permanent Rule in the Illinois Register.

92. The Secretary of State has the ministerial duty to accept, publish, and maintain the Permanent Rule in the Illinois Register.

93. The Secretary of State's powers and duties with respect to acceptance, publication, and maintenance of rules are defined and circumscribed by IAPA Sections 5-65 and 5-70 and Secretary of State's rules adopted pursuant thereto.

94. The Secretary of State's powers and duties are ministerial, and he is without discretion to contravene the requirements of IAPA Sections 5-65 and 5-70 and Secretary of State's rules adopted pursuant thereto.

95. The Secretary of State lacks any legislative or constitutional authority to unilaterally disregard the requirements of IAPA Sections 5-65 and 5-70 and Secretary of State's rules adopted pursuant thereto.

96. The Secretary of State has failed to comply with the requirements of IAPA Sections 5-65 and 5-70 and Secretary of State's rules adopted pursuant thereto.

97. Plaintiffs have a clear and undeniable right to have the Department's Permanent Rule accepted, published, and maintained by the Secretary of State in the Illinois Register.

WHEREFORE, Plaintiffs, the Illinois Department of Healthcare and Family Services and Barry S. Maram, pray that the Court:

- (a) Enter an order of *mandamus* directing the Secretary of State to accept the Permanent Rule, 31 Ill. Reg. 15424, and publish it in the Illinois Register pursuant to IAPA Sections 5-65 and 5-70, *nunc pro tunc*, to March 10, 2008; and
- (b) Grant Plaintiffs such further and other relief as the Court deems just.

Date: March 28, 2008

THE ILLINOIS DEPARTMENT OF
HEALTHCARE AND FAMILY SERVICES and
BARRY S. MARAM, in his official capacity as the
Director of the Illinois Department of Healthcare
and Family Services

By 
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