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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1762**

Codelia Tehmeh Karn,
Relator,

vs.

Commissioner of Human Services,
Respondent.

**Filed June 18, 2012
Affirmed
Lansing, Judge ***

Department of Human Services
File No. 1049733 CFC

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relator)

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Considered and decided by Bjorkman, Presiding Judge; Larkin, Judge; and
Lansing, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

LANSING, Judge

Codelia Karn appeals the commissioner of human services' decision to sustain her disqualification from employment as a program specialist for a state-licensed foster-care facility. Because the commissioner's decision is supported by substantial evidence and is not arbitrary and capricious or affected by legal error, we affirm. But we note that Karn could seek a variance under Minn. Stat. § 245C.30 (2010) that would allow her to continue working under circumstances that would limit her risk of harm.

FACTS

Mains'l Services operates a group home for adolescents that employed Codelia Karn as a program specialist beginning in August 2010. Mains'l is licensed by the Minnesota Department of Human Services. In compliance with the department's requirements, Mains'l requested the department to conduct a background study in January 2011 to determine whether Karn is disqualified from having direct contact with persons served by Mains'l.

As part of the background study, the department obtained a criminal record that showed that Karn had been convicted in 2007 of misdemeanor theft, which disqualifies her from working at Mains'l. The department notified Karn of the disqualification and explained that she could seek reconsideration.

Karn requested that the commissioner set aside the decision and submitted her explanation of why, despite the misdemeanor offense, she does not pose a risk of harm to any person served by the program. Karn explained that her theft conviction was based on

her improper use of her Macy's employee discount when she was 18 years old to swindle \$937.82 from the company. She further explained that she was questioned by Macy's management, admitted her conduct, and ultimately pleaded guilty to misdemeanor theft. The district court sentenced Karn to ten days in the workhouse, stayed her sentence for one year, and ordered her to pay restitution. Karn paid her restitution and successfully completed her probation. She stated that the misuse of the employee discount "was a huge mistake and will never repeat itself."

Following a review and a risk-of-harm assessment, the commissioner sustained the disqualification. Karn appeals by writ of certiorari.

D E C I S I O N

The Department of Human Services Background Studies Act, Minn. Stat. §§ 245C.01-.34 (2010), provides that individuals who have engaged in certain conduct or committed certain crimes are disqualified from having direct contact with persons served by any program that is licensed by the department. Disqualification based on misdemeanor theft continues for seven years after the discharge of the sentence imposed. Minn. Stat. § 245C.15, subd. 4(a).

A disqualified individual may request reconsideration of the disqualification by showing that the information relied on by the commissioner is erroneous, or that the individual does not pose a risk of harm to any person served by the licensed facility. Minn. Stat. § 245C.21, subs. 1, 3. If the commissioner concludes that the individual does not pose a risk of harm, the commissioner may set aside the disqualification. Minn. Stat. § 245C.22, subd. 4(a). In determining whether the individual poses a risk of harm,

the commissioner must consider nine factors: (1) “the nature, severity, and consequences of the event or events that led to the disqualification”; (2) “whether there is more than one disqualifying event”; (3) “the age and vulnerability of the victim at the time of the event”; (4) “the harm suffered by the victim”; (5) “vulnerability of persons served by the program”; (6) “the similarity between the victim and persons served by the program”; (7) “the time elapsed without a repeat of the same or similar event”; (8) documentation of the disqualified individual’s successful completion of training or rehabilitation pertinent to the event; and (9) “any other information relevant to reconsideration.” Minn. Stat. § 245C.22, subd. 4(b). In considering the factors, the commissioner must “give preeminent weight to the safety of each person served by the license holder.” *Id.*, subd. 3. And “any single factor . . . may be determinative of the commissioner’s decision whether to set aside the individual’s disqualification.” *Id.*

A commissioner’s decision to sustain a disqualification is a final agency action subject to certiorari review. *Hickman v. Comm’r of Human Servs.*, 682 N.W.2d 697, 699 (Minn. App. 2004). On appeal we examine the record to determine whether the commissioner’s decision is affected by error of law, unsupported by substantial evidence, or arbitrary and capricious. Minn. Stat. § 14.69 (d)-(e) (2010); *Sweet v. Comm’r of Human Servs.*, 702 N.W.2d 314, 318 (Minn. App. 2005), *review denied* (Minn. Nov. 15, 2008).

Karn contends that insufficient evidence supports the commissioner’s determination that she poses a risk of harm to persons served by Mains’1. The commissioner relied on three factors when concluding that Karn posed a risk of harm.

First, she noted the vulnerability of the persons served by Mains'l, finding that the clients were vulnerable as a result of their physical disabilities, mental disabilities, or both. Second, she noted the recency of the disqualifying offense, finding it was "too soon" to conclude that Karn had changed her attitude and behavior. Finally, she noted the nature of the disqualifying offense, reasoning that Karn "violated [Macy's] trust." She concluded that "[i]f [Karn] provide[s] direct contact services to clients, [she] would also be in a position of trust because [she] would have potential access to client funds."

The commissioner did not specifically address the other risk-of-harm factors, which appear to weigh in Karn's favor. Those factors include the singularity of the disqualifying offense, the moderate degree of harm suffered by Macy's, the lack of direct similarity between Macy's as a corporate entity and the individuals who are served by Mains'l, Karn's successful completion of probation, and, finally, Karn's employment record with Mains'l which includes a six-month merit raise for "commitment and hard work" and a commendation letter for being part of a team that provided exemplary and compassionate care to a resident who was diagnosed with terminal cancer. In addition, Karn's request for reconsideration contained information on her volunteer activities with social organizations and in an affidavit she stated that she was working toward a degree in social work/psychology at Augsburg College from September 2008 to September 2010.

Turning to the first factor that the commissioner relied on in determining that Karn poses a risk of harm—the vulnerability of the people who receive the direct care—the commissioner states "the clients are vulnerable as a result of their physical and/or mental

disabilities.” The accompanying risk-of-harm assessment indicates that the risk evaluation is based on both the clients’ disabilities and ages. The record supports a determination that Mains’l serves children and adults with developmental and physical disabilities. The commissioner does not provide any more specific information on the individual vulnerability of the clients served or the connection between Karn’s 2007 offense and the vulnerability of Mains’l’s clients.

The second factor that the commissioner relied on in concluding that Karn poses a risk of harm is the “recency of the disqualifying offense.” In evaluating this factor, the commissioner apparently consolidates the factor that considers the time elapsed from the date of the offense with the factor considering whether there is documentation on successful completion of training or rehabilitation related to the event. It is undisputed that Karn successfully completed probation and has had no further offenses and there is no indication of behavior similar to the conviction. The commissioner concluded that, because the request to set aside the disqualification was made only four years after the misdemeanor theft conviction, it was “too soon to conclude [Karn] ha[s] changed [her] attitude and behavior.” The commissioner apparently reaches that determination by comparing the length of time since the offense to the presumptive disqualification period of seven years. We reject this as a proper basis for making a determination on the “recency of the disqualifying offense.” Instead, the evaluation should be based on independent judgment that responds to the criteria that is embodied by the factors and does not rely on a presumption that a seven-year span of elapsed time is the prescribed amount of time to judge rehabilitation.

In evaluating the third factor—the nature, severity, and consequences of the disqualifying offense—the commissioner drew a comparison of the violation of the employer’s trust by abuse of the employee discount and the position of trust that Karn would have at Mains’l because she “would have potential access to client funds.” The conjectural nature of “potential” access undermines to some degree the consideration of the “actual” risk of harm in Karn’s employment.

Although parts of the commissioner’s reasoning appear to be too broadly directed or to extend beyond the statutory factors, we conclude on the record as a whole that the ultimate decision not to set aside the qualification is adequately supported by substantial evidence. The primary duties of Karn’s job as a program specialist relate to the direct physical care of the clients served by Mains’l. The nature of Karn’s 2007 offense and the responsibilities of Karn’s job as a program specialist intersect, however, in the requirement that Karn “under limited supervision, have the ability to . . . conduct[] and record[] financial transactions accurately.” Because there is a reasonable connection between a criminal offense arising from the abuse of an employee discount and the responsibility to accurately record financial transactions, the commissioner’s decision that Karn poses a risk of harm based on the nature of the disqualifying crime is supported by the record.

Having concluded that the commissioner’s decision is supported by substantial evidence, we next address Karn’s arguments that she should not be disqualified because she did not commit a violent crime and that her nonviolent crime was against an entity and not a person. These arguments are defeated by the plain language of the statute,

which, as addressed, specifically includes misdemeanor theft as a disqualifying crime. *See* Minn. Stat. § 245C.15, subd. 4(a). We find no basis in the wording of the statute to support Karn’s argument that disqualification can only be based on an offense that has a person as a victim and not a business entity. Certainly these differences can be taken into account—and were taken into account—by the commissioner’s risk-of-harm assessment. But the statute does not preclude consideration of offenses that involve a business-entity victim rather than a human victim. We also reject Karn’s contention that the commissioner’s decision should be reversed because it is arbitrary and capricious. “An agency’s conclusion is arbitrary and capricious if there is no rational connection between the facts and the agency’s decision.” *Sweet*, 702 N.W.2d at 318. For the same reasons that we conclude that the commissioner’s decision is adequately supported by the facts, we reject the argument that it is arbitrary and capricious.

The regulations, although strict on issues of general disqualification, also provide that if the commissioner sustains the disqualification, the licensed facility may seek a variance that would allow the individual to work in limited circumstances that minimize that individual’s risk of harm. *See* Minn. Stat. § 245C.30, subd. 1. Although we must affirm the commissioner’s decision because it is supported by substantial evidence, is not affected by error of law, and is not arbitrary and capricious, Karn’s circumstances appear to provide a suitable basis for obtaining a variance under Minn. Stat. § 245C.30. A variance is appropriate when “there are conditions under which the disqualified individual may provide direct contact services or have access to people receiving services that minimize the risk of harm.” *Id.* Notes contained in the commissioner’s files that are

part of the record suggest that the department has favorably considered this alternative of allowing a suitably conditioned variance for supervision or restriction of responsibilities related to finances or financial records that would provide enforceable safeguards to address and minimize any risk of harm in Karn's provision of direct care to the vulnerable individuals under Mains'l's care.

Affirmed.