STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1381

In the Matter of the Revocation of the
Family Childcare License of Gina Garding.

Filed June 25, 2012
Affirmed
Bjorkman, Judge

Minnesota Department of Human Services
OAH File No. 61-1800-21705-2

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Lori Swanson, Attorney General, Cynthia Beth Noren Jahnke, Assistant Attorney General, St. Paul, Minnesota; and

Stephanie Beckman, Meeker County Attorney, Elizabeth W. Cummins, Assistant County Attorney, Litchfield, Minnesota (for respondent Minnesota Department of Human Services)

Considered and decided by Halbrooks, Presiding Judge; Worke, Judge; and Bjorkman, Judge.

U N P U B L I S H E D O P I N I O N

BJORKMAN, Judge

Relator challenges a decision by respondent Minnesota Department of Human Services (DHS) disqualifying her from daycare work and revoking her child-care license,

arguing that (1) her due-process rights were violated, (2) she did not commit maltreatment of a child, and (3) the sanctions are not warranted. We affirm.

FACTS

Relator Gina Garding began operating a licensed daycare out of her home in 2009. This case arises out of an incident that occurred on February 16, 2010. On that date, Garding was caring for five children, including four-year-old H.C.P. At 10:30 that morning, Garding began a telephone conversation that lasted two hours. During this conversation, Garding prepared and served lunch to the children in the kitchen.

After lunch, while still on the phone, Garding went into the living room and discovered that H.C.P. had urinated on himself and on the couch where he was sitting. Garding asked H.C.P. why he did this and he replied, "I don't know." There are differing accounts of what happened next. H.C.P. stated that Garding took hold of his left ear and dragged him into the bathroom. Garding denies grabbing H.C.P.'s ear, stating that she merely directed him into the bathroom. Once in the bathroom, Garding removed H.C.P.'s clothes, including his tight-fitting shirt. H.C.P. reported that Garding hit him with his clothes; Garding denies this assertion. Garding then left the bathroom briefly and returned to find that H.C.P. had urinated on the bathroom floor. Garding again left the bathroom to retrieve a towel and when she returned she found that H.C.P. had defecated on the floor. After cleaning the bathroom, Garding put a diaper on H.C.P. Garding remained on the phone during the incident.

At approximately 4:15 p.m., H.C.P.'s mother arrived to pick up H.C.P. H.C.P. started crying when he saw his mother and told her he was wearing a diaper. Garding told H.C.P.'s mother that H.C.P. urinated on the couch and the bathroom floor.

After leaving Garding's home, H.C.P. went to J.Z.'s home for a haircut. While cutting H.C.P.'s hair, J.Z. noticed marks around his left ear, scratches on his neck, and a bleeding wound on the top of his head. H.C.P. told J.Z. that the "daycare lady" hit him because he urinated on the couch. He then told his mother that Garding pulled his ear and hit him with his clothes. H.C.P.'s mother reported the incident to the Meeker County Sheriff's Department. The responding deputies observed the marks on and around H.C.P.'s ear and on his head. They took photographs of the marks and recommended that H.C.P. be examined at a medical clinic to determine the cause of the injuries.

The next day, Bridey Boese, a certified nurse practitioner, examined H.C.P. He told Boese that the "daycare lady pulled my ear and neck into the bathroom" and "took my pants and underpants off, hit me with my pants a lot and then put me in a diaper." Boese observed one linear broken blood vessel on the front of his left ear, four broken blood vessels clustered on the back top of his left ear, and a 2.5 centimeter purple spot behind his left ear. Boese concluded that H.C.P.'s injuries were consistent with what H.C.P. told her.

The next day, H.C.P. was interviewed by licensed social worker Sarah Brandt at CornerHouse. When Brandt asked if someone hurt him, H.C.P. replied "[d]aycare lady pulled my ear." H.C.P. went on to say that it hurt and that Garding hit him with his clothes.

Meeker County Child Protection (the county) conducted an investigation, including interviews with Garding. The county concluded that Garding committed maltreatment of H.C.P. and recommended that DHS temporarily suspend Garding's child-care license. DHS did so on February 19. Garding appealed, and the parties agreed to have the case decided on written submissions to an administrative law judge (ALJ). On March 4, the county determined that the maltreatment allegation was substantiated and constituted serious maltreatment that disqualified Garding from providing daycare services.

On June 18, the ALJ found that reasonable cause existed to believe Garding posed an imminent risk of harm to the health and safety of children she served and that her license should be suspended. DHS adopted the ALJ's findings. On October 11, DHS notified Garding that she was disqualified, that her disqualification would not be set aside, and that her daycare license was revoked. Garding appealed and a contested hearing was held on January 20, 2011.

The ALJ determined that Garding committed maltreatment and recommended that her disqualification and license revocation be affirmed and the disqualification not be set aside. DHS adopted the ALJ's findings. This certiorari appeal follows.

D E C I S I O N

"Administrative-agency decisions enjoy a presumption of correctness and may be reversed only when they are arbitrary and capricious, exceed the agency's jurisdiction or statutory authority, are made upon unlawful procedure, reflect an error of law, or are unsupported by substantial evidence in view of the entire record." *In re Revocation of*

Family Child Care License of Burke, 666 N.W.2d 724, 726 (Minn. App. 2003). "A reviewing court must defer to the agency's fact-finding process and be careful not to substitute its findings for those of the agency." *Id*. But we review legal issues de novo. *Dep't of Human Servs. v. Muriel Humphrey Residences*, 436 N.W.2d 110, 117 (Minn. App. 1989), *review denied* (Minn. Apr. 26, 1989).

I. Garding's due-process rights were not violated when the ALJ denied Garding's request to call H.C.P. as a witness.

This court reviews de novo the procedural due-process rights afforded a party. *Zellman ex rel. M.Z. v. Indep. Sch. Dist. No. 2758*, 594 N.W.2d 216, 220 (Minn. App. 1999), *review denied* (Minn. July 28, 1999). We first "consider whether a substantive right of life, liberty or property is implicated." *Olson v. Ford Motor Co.*, 558 N.W.2d 491, 497 (Minn. 1997). If a substantive right is implicated, we then "balance the interests of the individual and the risk of erroneous deprivation of such interests, against the governmental interests at stake." *Id.*; *see also Mathews v. Eldridge*, 424 U.S. 319, 334-35, 96 S. Ct. 893, 903 (1976) (describing balancing test). In evaluating the risk of erroneously depriving an individual of a private interest, we assess "the probable value, if any, of additional or substitute procedural safeguards." *Mathews*, 424 U.S. at 335, 96 S. Ct. at 903.

The parties agree that DHS's decision implicates Garding's significant property interest in continuing her employment as a daycare provider. Accordingly, we must consider the risk of erroneous deprivation of Garding's property interest against the government's interest in protecting a child victim.

As to the risk-of-erroneous-deprivation factor, Garding first argues that the ALJ erred in finding H.C.P. was incompetent to testify. We disagree. The ALJ did not make a competency determination, noting that children under the age of ten are presumed to be competent witnesses. Rather, the ALJ's denial of Garding's request to question H.C.P. turned on the ALJ's assessment of H.C.P.'s best interests, the likely probative value of H.C.P.'s testimony, and public policy.

Garding next asserts that H.C.P.'s testimony was needed to evaluate the credibility of his statements. We are not persuaded. H.C.P.'s mother, J.Z., and Boese all testified about H.C.P.'s account of the incident. Garding had the opportunity to cross-examine these witnesses. And the evidence included the video recording of Brandt's interview of H.C.P. The ALJ's findings reveal that he carefully evaluated all of this evidence. The ALJ analyzed H.C.P.'s spontaneous statements differently from the statements he made in response to Brandt's leading questions, concluding that there was "significant doubt about whether or not [Garding] caused [H.C.P.'s] scalp injury" because of Brandt's questioning methods. Garding's ability to cross-examine other witnesses and argue the reliability of H.C.P.'s recorded statements helped guard against the risk that Garding's property interest would be denied in error.

With respect to the government's competing interest, the ALJ relied on the public policy of discouraging "interviews that are unnecessary, duplicative, or otherwise not in the best interests of the child." Minn. Stat. § 626.561, subd. 1 (2010). And the ALJ noted that it is unlikely a young child would remember details of an incident that occurred one year earlier and that any such testimony would be duplicative. On this

record, we conclude that denial of Garding's request to question H.C.P. strikes an appropriate balance between Garding's significant property interest and the government's interest in protecting a child witness. Garding's opportunity to indirectly challenge H.C.P.'s account of the incident adequately protected her procedural due-process rights.

II. Substantial evidence supports the ALJ's determination that Garding committed serious maltreatment.

"'Physical abuse' means any physical injury, mental injury, or threatened injury, inflicted by a person responsible for the child's care on a child other than by accidental means, or any physical or mental injury that cannot reasonably be explained by the child's history of injuries . . . ." Minn. Stat. § 626.556, subd. 2(g) (2010). "Serious maltreatment" is defined as physical abuse that results in serious injury. Minn. Stat. § 245C.02, subd. 18(a) (2010). Serious maltreatment includes "bruises, bites, skin laceration, or tissue damage." *Id*., subd. 18(c) (2010).

Garding argues that there is not substantial evidence to support the finding that she committed serious maltreatment. We disagree. Garding does not dispute that the injury to H.C.P.'s ear meets the statutory definition of "serious injury." Accordingly, we focus on whether the evidence supports a causal connection between Garding's conduct and the injury. In doing so, we defer to the ALJ's credibility determinations. *Cnty. of Nicollet v. Haakenson*, 497 N.W.2d 611, 615 (Minn. App. 1993).

The evidence shows that H.C.P. consistently told his mother, Boese, and Brandt that Garding pulled his ear and threw his clothes at him. These statements were spontaneous, and he repeated them multiple times. Boese testified that H.C.P.'s ear

injury is consistent with his account of Garding pulling him by the ear. The ALJ carefully evaluated H.C.P.'s statements, finding his consistent, spontaneous reports regarding his ear injury to be credible.

In contrast, Garding's accounts of the incident were inconsistent. During her first interview with a deputy, Garding said that she observed fading marks on H.C.P.'s body on the day in question. Later in the same interview, she said H.C.P. had no marks on his body. Garding also denied touching H.C.P., stating that he removed his own clothes alone in the bathroom. But she testified that she removed H.C.P.'s clothes and that his tight-fitting shirt may have brushed against his ear. Garding claimed for the first time during the contested hearing that she had laryngitis on the date of the incident making it impossible to yell at H.C.P., as he reported. The ALJ expressly discredited this testimony because it is "inconsistent with admitted facts and lacks believability, particularly since [Garding] conducted a telephone conversation with her cousin on the day in question for two hours." Overall, the ALJ found that Garding lacked candor.

Based on our careful review of this record, we conclude that the evidence amply supports the finding that Garding caused H.C.P.'s injuries and the determination that these injuries constitute serious maltreatment.

III. The agency did not abuse its discretion in sanctioning Garding.

Garding argues that disqualification and license revocation are extreme sanctions that are not commensurate with Garding's actions. We review an agency's choice of sanction for abuse of discretion. *Burke*, 666 N.W.2d at 726.

> An individual is disqualified under section 245C.14 if less than seven years has passed since a determination or disposition of the individual's:
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> . . . .
>
> (2) substantiated serious or recurring maltreatment of a minor under section 626.556, . . . for which: (i) there is a preponderance of evidence that the maltreatment occurred, and (ii) the subject was responsible for the maltreatment.

Minn. Stat. § 245C.15, subd. 4(b)(2) (2010). As noted above, substantial evidence supports the ALJ's determination that Garding committed serious maltreatment against H.C.P. Accordingly, disqualification and license revocation is required unless the disqualification is set aside. *Id.*; Minn. R. 9502.0335, subp. 6 (2011).

DHS may set aside a disqualification if it finds that the individual does not pose a risk of harm to any person the individual serves. Minn. Stat. § 245C.22, subd. 4(a) (2010). In deciding whether to set aside the disqualification, the commissioner must consider:

> (1) the nature, severity, and consequences of the event or events that led to the disqualification;
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> (2) whether there is more than one disqualifying event;
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> (3) the age and vulnerability of the victim at the time of the event;
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> (4) the harm suffered by the victim;
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> (5) vulnerability of persons served by the program;
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> (6) the similarity between the victim and persons served by the program;
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> (7) the time elapsed without a repeat of the same or similar event;
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> (8) documentation of successful completion by the individual studied of training or rehabilitation pertinent to the event; and
>
> (9) any other information relevant to reconsideration.

Id., subd. 4(b) (2010). Any of these factors, standing alone, "may be determinative of the commissioner's decision whether to set aside the individual's disqualification." *Id.*, subd. 3 (2010). When considering whether to set aside a disqualification, the commissioner must give "preeminent weight" to the safety of the individuals served by the license holder. *Id.*

The ALJ considered all of the risk-of-harm factors but identified five as "determinative": (1) the vulnerability of the children Garding serves, (2) the similarity between H.C.P. and the persons Garding serves, (3) the nature of the disqualifying act, (4) the recency of the incident, and (5) Garding's failure to explain how she has been rehabilitated. We consider each of these factors in turn.

As to the vulnerability of the persons served by Garding and their similarity to the victim, the record is clear that H.C.P. was four years old at the time of the incident. Garding had four other children in her care at that time ranging from 18 months to 4 years of age. Moreover, Garding's license at the time authorized her to care for up to ten similarly aged children. Garding does not dispute that children in this age range are vulnerable. And the record supports a conclusion that there is a high risk that Garding could face a situation similar to the incident involving H.C.P.—a challenging or defiant child—and respond in a similar way.

With respect to the "nature of the disqualifying act" factor, Garding argues that the record does not support a finding that she caused H.C.P.'s ear injury. We previously rejected this argument. We also disagree with Garding's contention that H.C.P.'s injury

was minimal; it is undisputed that H.C.P. suffered tissue damage, which is statutorily defined as "serious injury."

As to the last two factors the ALJ found to be determinative, the incident occurred less than one year before Garding's set-aside request. There is no record evidence that Garding has undergone any training or rehabilitation to address the issues that led up to the incident. Because Garding did not demonstrate that she participated in any training or rehabilitation efforts, the record supports DHS's conclusion on this factor. We also note the ALJ's observation that Garding did not show any "genuine concern for [H.C.P.'s] injuries or well-being" throughout the course of this proceeding. Garding's failure to take responsibility for or address her actions further supports the agency's denial of her set-aside request.

On this record, we conclude that the agency did not abuse its discretion in disqualifying Garding from providing child-care services, denying her set-aside request, and revoking her child-care license.

Affirmed.