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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0023**

Carol Z. Lively,
Relator,

vs.

Commissioner of Minnesota Department of Health,
Respondent.

**Filed August 29, 2016
Affirmed
Reyes, Judge**

Minnesota Department of Health
Health Care Facility IDS: 900384, 03256, 00741

Carol Z. Lively, La Crosse, Wisconsin (pro se relator)

Lori Swanson, Attorney General, Lindsay K. Strauss, Assistant Attorney General, St. Paul,
Minnesota (for respondent)

Considered and decided by Bratvold, Presiding Judge; Halbrooks, Judge; and
Reyes, Judge.

UNPUBLISHED OPINION

REYES, Judge

Relator appeals an order by respondent disqualifying her from direct-contact work
in licensed facilities, arguing that respondent erred by treating her stay of adjudication as
a disqualifying conviction and by failing to properly consider mitigating circumstances to
set aside her disqualification. Because we conclude that respondent properly considered

relator's stay of adjudication as a disqualifying offense and that his analysis of the statutory factors was not arbitrary or capricious, we affirm.

FACTS

Relator Carol Lively is a registered nurse who performs contract work for facilities licensed by the Minnesota Department of Health (DOH). She travels to smaller regional hospitals and facilities to insert central catheter lines into patients undergoing cancer treatment or other long-term intravenous treatment.

According to a Dakota County Sheriff's incident report, officers responded to a call reporting a vehicle accident with injuries around 10:30 p.m. on February 18, 2014. The accident was between Lively and another driver. The other driver reported to the police that "a vehicle pulled out in front of her while she was traveling westbound . . . and she collided with it." The driver also reported that she injured her hand and right knee. The reporting officer noted that when he spoke with Lively, he "could smell a faint odor of a consumed alcohol beverage." The officer reported that he asked Lively what happened and she responded: "I think I missed the stop sign and I hit her."

Lively acknowledged to an officer that "she had one beer three hours ago and had taken a 5mg Oxycodone pill." She also told the officer that she "has stage four pancreatic cancer which she stated is a terminal illness." Lively took a preliminary breath test, and her alcohol concentration registered at 0.009. On the field sobriety tests, Lively "missed touching the tip of her finger to the tip of her nose on four of the six attempts in the finger to nose test" and exhibited some swaying and loss of balance

during the walking and balancing tests. Because of her performance on the field sobriety tests and admitted use of alcohol and Oxycodone, she was arrested. Lively eventually submitted to a blood test, which yielded the following: “A concentration of 9.1 of Tetrahydrocannabinol, which is a metabolite of THC, a concentration of 0.021 of Oxycodone and a concentration of 0.003 of Alprazolam (Xanax).”

Lively gave a Mirandized and taped statement, summarized in the incident report as follows:

Ms. Lively stated she had one 12 ounce [beer] sometime between 16:00 – 18:00 hours. She stated that she took one 5mg Oxycodone pill for pain between a half hour and one hour before the accident. Ms. Lively stated she smoked a “marijuana roach” at around 15:00 hours. Ms. Lively stated the oxycodone is taken for pain but feels it doesn’t affect her driving as she stated she has been “doing it for three years.”

While performing an inventory search of Lively’s car, one of the officers found a pack of rolling papers and an empty bottle of Oxycodone. According to a drug-influence evaluation, Lively started smoking marijuana when she found out she had cancer.

Lively was charged with six offenses related to the incident: three counts of gross-misdemeanor criminal vehicular operation, two counts of misdemeanor driving while intoxicated, and one count misdemeanor reckless or careless driving. Lively was ultimately convicted of misdemeanor reckless or careless driving in violation of Minn. Stat. § 169.13, subd. 1(a) (2014), and she received a stay of adjudication after pleading guilty to one count of criminal vehicular operation in violation of Minn. Stat. § 609.2113 (2014). The other four charges were dropped.

On October 15, 2015, the department of human services (DHS) sent Lively a letter informing her that her guilty plea to gross-misdemeanor criminal vehicular operation disqualified her from holding any position allowing direct contact with, or access to, persons receiving services from programs licensed by DOH or DHS. On October 28, 2015, Lively filled out a form requesting reconsideration of her disqualification. She maintained that the information on which her disqualification was based was incorrect because she was “only convicted for the traffic offense of ‘reckless or careless driving.’” She attached a copy of her public criminal history from the Minnesota Bureau of Criminal Apprehension, three letters of recommendation, a certificate of completion for a one-day DWI program, and a letter from her doctor stating that the level of pain medication in her system at the time of the accident was consistent with her prescribed levels.

On November 9, 2015, respondent, the commissioner of health, sent Lively a letter informing her that her disqualification had not been set aside. The commissioner attached a request-for-consideration assessment form explaining how he evaluated the statutory factors relevant to his decision. Lively sent in additional information, and the commissioner wrote her another letter in response informing her that her disqualification would still not be set aside. Lively appeals by writ of certiorari.

D E C I S I O N

Lively argues on appeal that the commissioner’s denial of her request to set aside her disqualification was arbitrary and capricious for two reasons. First, she contends that

the commissioner erred in determining that she was convicted of a disqualifying crime. Second, she challenges the commissioner's analysis of the applicable statutory factors.

A disqualified individual can request reconsideration to have the disqualification set aside. Minn. Stat. § 245C.21, subd. 1, .22, subd. 4 (2014). The person requesting reconsideration bears the burden of demonstrating that she “does not pose a risk of harm to any person served by the applicant, license holder, or other entities as provided in this chapter.” Minn. Stat. § 245C.22, subd. 4. In determining whether the individual has met her burden, the commissioner must consider the following factors set forth in Minn. Stat. § 245C.22, subd. 4(b):

- (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 successful completion by the individual studied of training or rehabilitation pertinent to the event; and
- (9) any other information relevant to reconsideration.

In applying these factors, the commissioner must give “preeminent weight to the safety of each person” to be served by the license holder “over the interests of the disqualified individual.” *Id.*, subd. 3 (2014).

The commissioner's decision to deny Lively's requests to set aside her disqualification was a quasi-judicial decision. *See Rodne v. Comm'r of Human Serv.*, 547

N.W.2d 440, 444 (Minn. App. 1996). “An agency’s quasi-judicial determinations will be upheld unless they are . . . arbitrary and capricious.” *Cole v. Metro. Council HRA*, 686 N.W.2d 334, 336 (Minn. App. 2004) (quotation omitted).

An agency determination is arbitrary and capricious if:

the agency (a) relied on factors not intended by the legislature; (b) entirely failed to consider an important aspect of the problem; (c) offered an explanation that runs counter to the evidence; or (d) the decision is so implausible that it could not be explained as a difference in view or the result of the agency’s expertise.

Citizens Advocating Responsible Dev. v. Kandiyohi Cty. Bd of Comm’rs, 713 N.W.2d 817, 832 (Minn. 2006). The party seeking review of an agency’s determination has the burden of proving that it was arbitrary and capricious. *See Markwardt v. State, Water Resources Board*, 254 N.W.2d 371, 374 (Minn. 1977).

In addition, appellate courts defer to the commissioner’s expertise in administering and enforcing the applicable statutes. *See In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 278 (Minn. 2001) (“When reviewing agency decisions, we adhere to the fundamental concept that decisions of administrative agencies enjoy a presumption of correctness, and deference should be shown by courts to the agencies’ expertise and their special knowledge in the field of their technical training, education, and experience.” (quotation omitted)). We also defer to the commissioner’s determination on “technical matters within the scope of the agency’s authority.” *Id.*

I. Stay of adjudication

Lively first challenges the foundation of the commissioner's disqualification determination. She maintains that she was only convicted of misdemeanor reckless or careless driving, which is not a disqualifying offense, and that she received a stay of adjudication for the gross-misdemeanor criminal-vehicular-operation offense. She contends that the stay of adjudication is not a conviction for the purposes of license disqualification. Lively's argument is misguided.

The Minnesota Department of Human Services Background Studies Act (the act) requires individuals who seek to work with vulnerable populations in facilities licensed by the state to undergo a background study. Minn. Stat. § 245C.03, subd. 1(a) (2014).

The act further provides:

The commissioner shall disqualify an individual who is the subject of a background study from any position allowing direct contact with persons receiving services from the license holder or entity identified in section 245C.03, upon receipt of information showing, or when a background study completed under this chapter shows any of the following: (1) a conviction of, *admission to*, or Alford plea to one or more crimes listed in section 245C.15, regardless of whether the conviction or *admission* is a felony, gross misdemeanor, or misdemeanor level crime[.]

Minn. Stat. § 245C.14, subd. 1 (2014) (emphasis added). Section 245C.15 lists gross-misdemeanor criminal vehicular operation in violation of Minn. Stat. § 609.2113 as an offense requiring a ten-year disqualification. Minn. Stat. § 245C.15, subd. 3 (2014).

Under the act, an individual is expressly disqualified if her background study shows "a conviction of [or] *admission to*" one of the disqualifying offenses. Minn. Stat.

§ 245C.14, subd. 1(a)(1) (emphasis added). Accordingly, Lively need not be convicted of gross misdemeanor criminal vehicular operation; she need only admit to facts supporting the offense. *See Obara v. Minn. Dep't of Health*, 758 N.W.2d 873, 880 (Minn. App. 2008) (noting that a conviction is not necessary for disqualification). Here, Lively pleaded guilty to criminal vehicular operation and, as part of that plea, admitted to the facts supporting criminal vehicular operation. *See State v. C.P.H.*, 707 N.W.2d 699, 704 (Minn. App. 2006) (“[A] stay of adjudication . . . involves a finding or admission of guilt.”). Thus, because Lively admitted to facts supporting a disqualifying offense, we conclude that the commissioner did not err in its disqualification determination.

II. Weighing of the factors

Next, Lively challenges the commissioner’s analysis of the applicable statutory factors, arguing that the commissioner “did not weigh the factors properly and failed to consider the mitigating evidence put forth.” We address the disputed factors in turn, noting that the commissioner’s findings under factors two, three, four, and six are either neutral or weigh in Lively’s favor and require no further analysis here. *See* Minn. Stat. § 245C.22, subd. 4(b)(2)-(4), (6).

A. Factor One

In considering “the nature, severity, and consequences of the event or events that led to the disqualification,” Minn. Stat. § 245C.22, subd. 4(b)(1), the commissioner found that Lively pleaded guilty to gross misdemeanor criminal vehicular operation. The commissioner also found that Lively was “involved in a traffic accident which caused injury to the other party, while [she was] under the influence of controlled substances.”

Again, Lively relies on her assertion that her stay of adjudication is not a conviction, which is meritless. Lively also argues that “there was never an adjudication that she was under the influence of controlled substances.”

The record supports the commissioner’s finding. Based on the police report and related materials, Lively was under the influence of controlled substances at the time of the accident. Lively admitted that she consumed a beer. Although Lively submitted evidence that the oxycodone and Xanax found in her blood were prescribed and her levels were consistent with her prescription doses, there is also evidence in the record that she smoked marijuana on the day of the accident: she admitted using marijuana in a taped, Mirandized statement, and a THC metabolite was present in her blood test. There is also evidence that she performed poorly on the field sobriety tests.

B. Factors five and seven

Factor five instructs the commissioner to consider the “vulnerability of persons served by the program.” Minn. Stat. § 245C.22, subd. 4(b)(5). The commissioner found that the population Lively served is “very vulnerable” and “includes individuals with physical and/or cognitive impairments, who are consequently dependent on their caregivers to assist them with activities of daily living.” The commissioner also found that the served population is “vulnerable to diversion of their prescribed controlled substances, which could result in reduced pain control, other negative health impacts, and financial loss to them.”

Factor seven concerns “the time elapsed without a repeat of the same or similar event.” Minn. Stat. § 245C.22, subd. 4(b)(7). The commissioner found that Lively’s

disqualifying incident happened recently and concluded that Lively's offense resulted in disqualification for ten years from when she is discharged from probation. The commissioner stated that it was aware that Lively received a stay of adjudication and that her case may be dismissed if she complies with probation but that "this may not occur until April 2018, based on [her] sentence."

Lively contends that neither of these factors should be dispositive because "[b]y definition, EVERY person served by licensed facilities is vulnerable" and because disqualifying incidents are almost always recent because background checks are performed annually. Accordingly, she argues that neither factor on its own should be a basis for refusing to set aside a disqualification.

Lively's argument is unavailing. First, as Lively acknowledges, Minn. Stat. § 245C.22, subd. 3, expressly states that "any single factor under subdivision 4, paragraph (b), may be determinative of the commissioner's decision whether to set aside the individual's disqualification." Second, there is no indication that the commissioner's findings under either factor were the only basis for its decision not to set aside Lively's disqualification. Lively failed to present evidence that she does not pose a risk of harm to persons receiving services. In addition, the commissioner's findings under factor seven are consistent with the record, and it does not appear that the commissioner gave the factor any special weight. Accordingly, we conclude that the record supports the commissioner's findings on factors five and seven.

C. Factor eight

Factor eight instructs the commissioner to consider “documentation of successful completion by the individual studied of training or rehabilitation pertinent to the event.”

Minn. Stat. § 245C.22, subd. 4(b)(8). The commissioner found that Lively had completed “[s]ome treatment and/or training” but that she “[d]oes not accept responsibility” for the incident. Addressing Lively, the commissioner explained:

You provided evidence of a driving while intoxicated educational class. You have not completed probation and did not provide evidence of compliance with probation. You provided letters of recommendation.

You described the incident as a motor vehicle accident. You did not make any statement in your request for reconsideration as to whether you believe your use of your prescribed medications or your nonprescribed use of marijuana contributed to the accident. You did not state you have ceased use of marijuana. You described the harm only as damage to the other vehicle. Based on your failure to discuss the possible contributing factors and your minimizing of the harm you caused, it does not appear you take responsibility for the incident.

Lively responds that she “completed everything that was required of her and provided proof.” She argues that she “admitted she learned some things and is now a more conscientious driver,” and that “she is rehabilitated because this was a [one-time] event and she is a more careful driver now.” We conclude that the commissioner’s findings are consistent with the evidence in the record and that Lively has not met her burden to demonstrate reversible error under this factor.

D. Factor nine

Finally, under factor nine, the commissioner is instructed to consider “any other information relevant to reconsideration.” Minn. Stat. § 245C.22, subd. 4(b)(9). Here, the commissioner found that “[w]ithout the passage of more time demonstrating [Lively’s] ability to avoid wrong choices,” he was “not convinced” that her interests outweighed the risk of harm to vulnerable people. In making this finding, the commissioner noted that he is “charged with giving preeminent weight to the safety of vulnerable persons over the interests of the disqualified individual.”

On appeal, Lively acknowledges that the commissioner “must give preeminent weight to the safety of the clients served” and that any one factor may be determinative, but she argues that “there still needs to be a reasonable basis for determining that [she] poses a safety risk to patients and not all factors should be given equal weight.” She also argues that the commissioner “did not weigh the factors properly and failed to consider the mitigating evidence put forth.” She notes that the commissioner did not expressly consider her “age, her health, her experience, or the lack of accidents or serious traffic violations or any prior convictions of crimes, coupled with the fact that driving has nothing to do with Lively’s care of patients.”

While we are certainly sympathetic to Lively’s situation, the record reflects that the commissioner carefully considered all the factors and evidence provided, including mitigating factors. Lively has been in her current position since 2003, and her letters of recommendation state that she has done an excellent job. In addition, her prescribed- and unprescribed-chemical use are related to her stage-four cancer diagnosis, and, at the age of

68, she does not appear to have any other driving or chemical-use incidents on her record. But, in light of the highly deferential standard for agency decisions, we cannot conclude that the commissioner's decision was arbitrary and capricious. *See Citizens Advocating Responsible Dev.*, 713 N.W.2d at 832. In addition, the commissioner's decision is consistent with the statutory instruction to give "preeminent weight" to the safety of the persons served in programs licensed by the department. *See* Minn. Stat. § 245C.22, subd. 3. Accordingly, Lively did not meet her heavy burden to overturn the commissioner's decision on appeal.

Affirmed.