

No. A08-1243

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STATE OF MINNESOTA  
IN COURT OF APPEALS

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Glenn Smith,  
Relator,

vs.

Minnesota Department of Human Services,  
Respondent

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**RESPONDENT'S BRIEF AND APPENDIX**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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## LEGAL ISSUES

- I. Is Relator entitled to a fair hearing on a permanent disqualification when it has been determined conclusively that a preponderance of evidence established that Relator committed an act that meets the definition of felony second degree assault?

**In accordance with Minn. Stat. § 245C.29 subd. 2(a)(2) (2007), DHS properly affirmed Relator's disqualification and notified him that the decision was a final agency action, reviewable only through a petition for writ of certiorari.**

Most Apposite Authorities:

Minn. Stat. § 245C.29, subd. 2(a)(2) (2007)

Minn. Stat. § 245C.27, subd. 1(a) (2007)

Minn. Stat. § 256.045, subd. 3(a) (2007)

Minn. Stat. § 245C.15, subd. 1 (2007).

- II. Did the application of the Background Study Law deprive Relator of due process of law?

**DHS properly affirmed Relator's disqualification and notified him that the decision was a final agency action, reviewable only through a petition for writ of certiorari. Relator did not raise this constitutional challenge with the agency below.**

Most Apposite Authorities:

*Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

*Sweet v. Comm'r of Human Servs.*, 702 N.W.2d. 314 (Minn. Ct. App. 2005), *rev. denied* (Minn. Nov. 15, 2005).

## STATEMENT OF THE CASE

This is a certiorari appeal by Glenn Smith ("Relator") from a final agency decision by the Commissioner of Human Services ("DHS"). In Minnesota, individuals who work

with vulnerable populations in certain facilities that are licensed by the State must undergo a background study pursuant to the Background Study Law, Minn. Stat. ch. 245C. Relator was the subject of background studies. On March 11, 2008, pursuant to Minn. Stat. §§ 245C.14-15 (2006), DHS notified Relator that he was disqualified from “any position allowing direct contact with, or access to, persons receiving services from programs licensed by DHS and the Department of Health, from facilities serving children or youth licensed by the Department of Corrections, and from unlicensed personal care provider organizations.” *See* Relator’s Appendix (“Rel. App.”) at 1. The grounds for Relator’s disqualification are statutory: under the Background Study Law, DHS determined there was a preponderance of evidence that Relator committed felony second degree assault on May 23, 1997. *See id.* A preponderance of evidence of the commission of an act that meets the definition of felony second degree assault is a disqualifying characteristic under the Background Study Law, resulting in Relator’s permanent disqualification. *See* Minn. Stat. § 245C.15, subd. 1 (2006). A permanent disqualification cannot be set aside. *See* Minn. Stat. § 245C.24, subd. 2.

Relator sought reconsideration of his permanent disqualification pursuant to Minn. Stat. § 245C.21 (2006), and requested a fair hearing. *See* Respondent App. at R-36 (ROR, Item 55). On June 25, 2008, DHS affirmed Relator’s permanent disqualification on his reconsideration request, and advised Relator that the determination was a final agency decision that could be reviewed only through a timely Petition for Writ of Certiorari with the Minnesota Court of Appeals. *See* Rel. App. at 3-4. This appeal followed.

## STATEMENT OF FACTS

### A. Relator's Permanent Disqualification History.

DHS has notified Relator of his permanent disqualification on three separate occasions.

#### 1. November 2006 disqualification.

On November 30, 2006, after it conducted a statutorily required background study, DHS advised Relator in writing of his permanent disqualification from any position allowing direct contact with or access to persons receiving services from facilities licensed by the Department of Human Services and the Minnesota Department of Health, from facilities serving children or youth licensed by the Department of Corrections, and from unlicensed Personal Care Provider Organizations. Respondent Appendix ("Resp. App.") at RA-1. DHS stated that Relator's disqualification was based on information received from the Federal Bureau of Investigation that a preponderance of evidence showed that in May 1997 he committed an act that met the definition of the disqualifying conduct for felony second degree assault. *Id.* The disqualification notice advised Relator that he could challenge the correctness of the finding that a preponderance of evidence showed he committed felony second degree assault by submitting a request for reconsideration along with information that showed that the determination was not correct.<sup>1</sup> *Id.*

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<sup>1</sup> Relator was advised in the disqualification notice that his disqualification permanently barred DHS from setting aside his disqualification or granting a variance, regardless of how much time had past since the disqualifying conduct. In order to challenge the (Footnote Continued on Next Page)

**2. April 2007 disqualification.**

Relator received a second notice of permanent disqualification from DHS dated April 9, 2007, after it conducted another background check following receipt of a background study form regarding Relator from another licensed DHS facility where Relator sought a position. Resp. App. at RA-3. Again, the disqualification notice advised Relator that he was permanently disqualified because information from the FBI and Minneapolis Police Department showed there was a preponderance of evidence that he committed felony second degree assault in May 1997. *Id.*

**3. Reconsideration of November 2006 and April 2007 disqualifications.**

The Background Study Law allows individuals to request reconsideration of a disqualification. *See* Minn. Stat. § 245C.21. The Commissioner of DHS reviews requests for facilities licensed by DHS (Minn. Stat. § 245C.22) When the Commissioner receives a request for reconsideration, the Commissioner reviews the request to determine: 1) whether the underlying information supporting the disqualification is correct, and 2) whether the disqualification should not be set aside because the individual presents a risk of harm to persons served by the program or facility. If the underlying information is incorrect, the disqualification is rescinded; if the person does not present a risk of harm, the disqualification is “set aside.” *See* Minn. Stat. § 245C.22, subds. 2

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correctness of his permanent disqualification, Relator was told that his request for reconsideration had to be submitted within 30 days of his receipt of the disqualification notice. Resp. App. at RA-1.

and 4 (2006). Minnesota law, however, does not allow the Commissioner to “set aside” a permanent disqualification. *See* Minn. Stat. § 245C.24, subd. 2 (2006).

DHS received Relator’s request to reconsider the correctness of his permanent disqualification on February 2, 2007. *See* Resp. App. at RA-5. Although the reconsideration request was untimely in its response to the November 2006 disqualification, DHS reviewed Relator’s request and the information submitted. Resp. App. at RA-18. It also notified Relator that it would use his reconsideration request received on February 2, 2007, as his request for reconsideration of the correctness of the April 2007 disqualification. *Id.*

On May 1, 2007, DHS notified Relator that the information relied upon to permanently disqualify him was correct and a preponderance of evidence showed that he committed felony second degree assault. *Id.* Relator was advised further that he could challenge the correctness decision by requesting a fair hearing in writing within 30 days, or 90 days if good cause was shown for not meeting the 30-day period. *Id.*

#### **4. Relator’s untimely fair hearing request.**

Relator failed to request a fair hearing within in either 30 days or 90 days. Instead, on September 11, 2007, DHS received an untimely request for a fair hearing from Relator. *See* Resp. App. at RA-20. After a telephone hearing was held before a Human Services Judge to address the timeliness of Relator’s request for a fair hearing, on December 28, 2007, the DHS Commissioner dismissed Relator’s fair hearing appeal for lack of jurisdiction because more than 90 days elapsed between the time Relator received notice of his right to request a fair hearing and the time he filed his fair hearing appeal.

Resp. App. at RA-32. As a result of Relator's failure to file a timely fair hearing appeal, the correctness of his permanent disqualification based on a preponderance of evidence showing he committed felony second degree assault was deemed conclusive. *See* Minn. Stat. § 245C.29.

**5. Relator's March 2008 disqualification.**

Relator was notified of his permanent disqualification for a third time in March 2008 when he sought a position with Human Services Program ("HSP"), a facility licensed by DHS. HSP submitted a background study request on Relator to DHS as required by the Background Study Law. *See* Minn. Stat. § 245C.03 (2006). Again, DHS conducted a background study on Relator. On March 11, 2008, it notified Relator that a preponderance of evidence demonstrated that Relator committed an act of felony second degree assault in May 1997, and he was disqualified him from any position allowing direct contact with or access to persons receiving services from facilities licensed by, among others, the Department of Human Services. *See* Rel. App. at 1.

**B. Reconsideration Of Relator's March 2008 Disqualification.**

DHS, in its letter of March 11, 2008, notified Relator that he could request reconsideration of the correctness of his disqualification. *See* Rel. App. at 1-2.<sup>2</sup> As before, it advised Relator that if the information used to disqualify him was incorrect, he should identify what information was wrong, why the information was wrong, and send

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<sup>2</sup> DHS also advised Relator that his disqualifying act was permanently disqualifying conduct that prohibits the Commissioner from setting aside the disqualification based on a risk of harm analysis regardless of how much time has passed. *Id.*

in the correct information. *See id.* Relator requested reconsideration, but he submitted no information along with the request. *See* Resp. App. at RA-36. In his reconsideration request, Relator asked for a fair hearing. *Id.*

On June 25, 2008, DHS sent Relator written notice that his permanent disqualification had been affirmed. It advised Relator that the Commissioner's determination was a final agency decision. The agency decision is final because Relator had already had the opportunity to request a fair hearing, which he failed to do so in a timely manner. The notice also advised Relator that the decision was subject to further review only upon filing a petition for a *writ of certiorari* to the Court of Appeals. *See* Rel. App. at 3-4 and Minn. Stat. § 245C.27, subd. 1(c). By *writ of certiorari* filed with this Court on July 24, 2008, Relator appealed the decision by DHS. *See* Resp. App. at 37.

### SCOPE OF REVIEW

Relator's certiorari appeal is before this Court pursuant to Minn. Stat. § 480A.06, subd. 3 (2006), and Minn. Stat. ch. 606. *See Rodne v. Comm'r of Human Servs.*, 547 N.W.2d 440, 444 (Minn. Ct. App. 1996). A decision concerning a request for reconsideration is a quasi-judicial decision. *See id.* at 444. On certiorari appeal from a quasi-judicial decision of a state agency not subject to the Administrative Procedures Act, the Court inspects the record to review:

. . . questions affecting the jurisdiction of the agency, the regularity of its proceedings, and, as to merits of the controversy, whether the order or determination in a particular case was arbitrary, oppressive, unreasonable, fraudulent, under an erroneous theory of law, or without any evidence to support it.

*Rodne*, 547 N.W.2d at 444-45 (quoting *Dietz v. Dodge County*, 487 N.W.2d 237, 239 (Minn. 1992) (other quotations omitted)).<sup>3</sup>

Relator bears the burden of proving at least one of the above criteria apply to the Commissioner's Order. See *Markwardt v. State, Water Res. Bd.*, 254 N.W.2d 371, 374 (Minn. 1977). In this case, Relator argues that the language of the statute at issue, the Background Study Law, entitles him to a fair hearing upon his challenge to his permanent disqualification. Further, he maintains that failure to afford him a fair hearing to challenge his permanent disqualification violated the due process guarantees under the United States Constitution. Relator's arguments lack merit and are not supported by the law.

In considering the appeal of DHS' decisions, deference should be given to the agency's expertise in administering and enforcing the disqualification statutes. As the Minnesota Supreme Court stated in *In re Excess Surplus Status of Blue Cross and Blue Shield of Minnesota* (hereinafter "*Blue Cross*"), 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 agency's expertise and their special knowledge in the field of their technical training, education, and experience." [Citation omitted.] The agency decision

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<sup>3</sup> Minn. Stat. § 14.69, which applies to contested case decisions under Minn. Stat. ch. 14, provides that an agency decision may be reversed if the substantial rights of a party were prejudiced because the agency decision was in violation of constitutional provisions, in excess of statutory authority, made upon unlawful procedure, affected by errors of law, unsupported by substantial evidence, or arbitrary or capricious. The Minnesota Supreme Court has applied the standard outlined at Minn. Stat. § 14.69 to judicial review of other agency determinations. See *Brunner v. State Dep't. of Pub. Welfare*, 285 N.W.2d 74 (Minn. 1979).

maker is presumed to have the expertise necessary to decide technical matters within the scope of the agency's authority, [citation omitted] and judicial deference, rooted in the separation of powers doctrine, [footnote omitted] is extended to an agency decision maker in the interpretation of the statutes that the agency is charged with administering and enforcing.

*Blue Cross*, 624 N.W.2d at 278 [Citation omitted].

The constitutionality of the statute is a question of law which this court reviews *de novo*. See *Sweet v. Commissioner of Human Services*, 702 N.W.2d 314, 319 (Minn. Ct. App. 2005), *rev. denied* (Minn. Nov. 15, 2005). Minnesota statutes are presumed constitutional, and the power to declare the statutes unconstitutional should be exercised with extreme caution and only when absolutely necessary. See *Associated Builders and Contractors v. Ventura*, 610 N.W.2d 293, 298-99 (Minn. 2000); *In re Haggerty*, 448 N.W.2d 363, 364 (Minn. 1989). A party challenging the constitutionality of a statute "carries the heavy burden of demonstrating beyond a reasonable doubt that the statute is unconstitutional." See *Sweet*, 702 N.W.2d at 319 (quoting *Unity Church of St. Paul v. State*, 694 N.W.2d 585, 591 (Minn. Ct. App. 2005), *rev. dismissed* (Minn. June 29, 2005)); see also *Haggerty*, 448 N.W.2d at 364.

As demonstrated below, Relator's challenge to his permanent disqualification was handled in accordance with the law, and Relator has not shown that the Background Study Law is unconstitutional.

## ARGUMENT

### **I. BECAUSE RELATOR'S PERMANENT DISQUALIFICATION IS CONCLUSIVE, HE IS NOT ENTITLED TO A FAIR HEARING UNDER THE BACKGROUND STUDY LAW TO CHALLENGE THE MARCH 2008 DISQUALIFICATION.**

Relator mistakenly argues that the Background Study Law entitles him to a fair hearing to challenge his March 2008 disqualification. The Law plainly does not provide Relator the relief he seeks. Relator's permanent disqualification, based on a preponderance of evidence that he committed an act that meets the definition of felony second degree assault, became conclusive when he failed to make a timely request for a fair hearing after his initial disqualification was upheld on reconsideration. Because his permanent disqualification is now conclusive, he is not entitled to a fair hearing to challenge the correctness of the disqualification. The State correctly applied the law.

The Background Study Law, Minn. Stat. § 245C, provides for fair hearing rights when a disqualification is not set aside upon a request for reconsideration. The relevant statute states that individuals are allowed a fair hearing "if the commissioner does not set aside a disqualification of an individual under section 245C.22 who is disqualified on the basis of a preponderance of evidence that the individual committed an act or acts that meet the definition of any of the crimes listed in section 245C.15 . . . " Minn. Stat. § 245C. 27, subd. 1(a).<sup>4</sup>

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<sup>4</sup> Here, it is not disputed that Relator was permanently disqualified for an act that is included in the crimes covered under Minn. Stat. § 245C.15, subd. 1(a). The statute specifically includes "a felony offense under section 609.221 or 609.222 (assault in the first or second degree)." Relator was arrested in May 1997 for second degree assault, and in conducting its initial - and subsequent - background study, DHS determined that a (Footnote Continued on Next Page)

Further, Minn. Stat. § 256.045 makes it clear that fair hearings are available to individuals disqualified based on a preponderance of evidence. The relevant portion of the statute states:

State agency hearings are available for the following: . . . (10) except as provided under chapter 245C, an individual disqualified under sections 245C.14 and 245C.15 on the basis of . . . a preponderance of the evidence that the individual has committed an act or acts that meet the definition of any of the crimes listed in 245C.15, subdivisions 1 to 4.

Minn. Stat. § 256.045, subd. 3(a)

To be entitled to a fair hearing before the agency, an individual's appeal must be timely. To request a fair hearing to challenge a permanent disqualification based on a preponderance of evidence, individuals are required to submit "a written request for a hearing to the state agency within 30 days after receiving written notice of the action, decision or final disposition, or within 90 days of such notice if the applicant . . . shows good cause why the request was not submitted within the 30 -day time limit." Minn. Stat. § 256.045, subd. 3(a).

Further, the Background Study Law specifies when a disqualification is conclusive and not subject to a fair hearing challenge. The statute provides that disqualifications are conclusive if:

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preponderance of evidence showed that Relator committed an act that met the definition of this disqualifying crime.

(2) a preponderance of the evidence shows that the individual committed an act or acts that meet the definition of any of the crimes listed in section 245C.15 [and]

...

(iii) the individual did not request a hearing on the disqualification under section 256.045 . . .

Minn. Stat. § 245C.29, subd. 2(a)(2)(iii) (2007).

All of these provisions apply to Relator's disqualification and result in a permanent disqualification that is conclusive and not subject to a fair hearing challenge. Relator was initially disqualified in November 2006 based on a preponderance of evidence that he committed an act that met the definition of felony second degree assault, a permanently disqualifying offense under Minn. Stat § 245C.15, subd. 1. When the commissioner determined that Relator's November 2006 permanent disqualification was correct and refused to set it aside after he requested reconsideration, it is not disputed that the statute permitted Relator to challenge the correctness of the disqualification at a fair hearing. Relator, however, did not file a timely request for a fair hearing: His written appeal was not made within the 30 or 90 days required by the statute and it was dismissed for lack of jurisdiction. Relator waived his right to appeal his disqualification to a fair hearing and it is now deemed conclusive under Minn. Stat. § 245C.29, subd. 2(a). Accordingly, he is not entitled to a fair hearing challenging the correctness of the most recent permanent disqualification notice which is based on the same preponderance of evidence that he committed an act that meets the definition of felony second degree assault.

## **II. THE STATE'S PERMANENT DISQUALIFICATION OF RELATOR UNDER THE BACKGROUND STUDY LAW DOES NOT VIOLATE DUE PROCESS.**

Relator erroneously contends that his permanent disqualification without the opportunity for a fair hearing violates the United States Constitution's due process guarantee. He was not denied due process because he was provided a meaningful opportunity to present a challenge to the correctness of the disqualification.

All statutes are presumed constitutional. *Id.* (quoting *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440, 105 S. Ct. 3249, 3254 (1985)). A court's power to declare a statute unconstitutional "must be exercised 'only when absolutely necessary and then only with great caution.'" *Lundberg v. Jeep Corp.*, 582 N.W.2d 268, 270 (Minn. Ct. App. 1998) (quoting *Snyder v. City of Minneapolis*, 441 N.W.2d 781, 788 (Minn. 1989)). An individual challenging the constitutionality of a statute has the heavy burden of proving the law's invalidity. *Skeen v. State of Minnesota*, 505 N.W.2d 299, 312 (Minn. 1993). The individual must establish beyond a reasonable doubt that the statute violates a constitutional right. *In Re Conservatorship of Foster*, 547 N.W.2d 81, 85 (Minn. 1996). Moreover a court, when determining the constitutionality of a statute, cannot substitute its judgment for that of the Legislature. *Skeen*, 505 N.W.2d at 312

### **A. The Application Of The Background Study Law to Relator Did Not Deprive Him Of Due Process.**

Relator contends that he has been deprived of procedural due process guaranteed by the United States Constitution because he was not afforded a fair hearing to challenge his disqualification. The due process guarantees under the United States Constitution and Minnesota Constitution are identical. *See Sarteri v. Harnischfeger Corp.*, 432 N.W.2d

448, 453 (Minn. 1988). Procedural due process protections restrain government action that deprives individuals of 'liberty' or 'property' interests within the meaning of the due process clause. *See Humenansky v. Minn. Bd. of Med. Examiners*, 525 N.W.2d 559, 565 (Minn. App. 1994), *rev. denied* (Minn. Feb. 14, 1995).

**1. The State provided due process to Relator.**

The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). This principle requires that a petitioner receive notice and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally. *Goldberg v. Kelly*, 397 U.S. 254, 267-68, 90 S. Ct. 1011, 1020 (1970); *see also Fosselman v. Comm'r of Human Servs.*, 612 N.W.2d 456, 463 (Minn. Ct. App. 2000).

Relator was provided such an opportunity under the statute. *See Respondent App.* at R-18 (ROR #36) ("Pursuant to Minnesota Statutes, section 245C.27, you may appeal this disqualification by requesting a fair hearing under Minnesota Statutes, section 256.045. If you choose to request a fair hearing . . . the request must be submitted within 30 days of receiving this notice, or within 90 days if you can show good cause why the request was not submitted within the 30-day period."). Relator's failure to take advantage of that process does not create a due process violation. *See Campbell v. St. Mary's Hospital*, 312 Minn. 379, 387, 252 N.W.2d 581, 586 (Minn. 1977) (physician cannot claim a violation of due process when he did not use his administrative appeal right to challenge surgical board's decision to rescind his license privileges); *Application*

*of Hanson*, 275 N.W.2d 790, 796 (Minn. 1978) (law school's failure to seek accreditation and challenge accreditation approval process rendered meritless bar applicant's claim that rule requiring graduation from an ABA accredited law school to sit for bar examination violated due process). Relator had the statutory right to seek a fair hearing to challenge the correctness of his permanent disqualification when the Commissioner upheld his first disqualification upon reconsideration on May 1, 2007. Had Relator appealed the Commissioner's decision within the statutory timeframe, he would have had a fair hearing challenging the correctness decision. But he failed to timely appeal. *See* Respondent App. at 32 (ROR Item #48). The correctness of his permanent disqualification based on a preponderance of evidence showing he committed felony second degree assault became conclusive, and not subject to future fair hearing challenges. *See* Minn. Stat. § 245C.29. Consequently, the Background Study Law is not unconstitutional because it provides due process. But for Relator's failure to file a timely appeal, due process in the form of a fair hearing would have been extended to Relator.

**2. This Court has upheld the Background Study Law from a procedural due process challenge.**

Relator's procedural due process challenge to the Background Study Law is not a case of first impression in this Court. This statute was upheld against a procedural due process challenge in *Sweet v. Comm'r of Human Services*, 702 N.W.2d 314 (Minn. App. 2005). As the discussion below demonstrates, the principles announced in *Sweet* are applicable here and Relator's due process challenge should be rejected by this Court.

In *Sweet*, a DHS background study revealed that Mr. Sweet had been convicted of disqualifying crimes listed in Minn. Stat. § 245C.15. *See* 702 N.W.2d at 316. As a result, DHS notified Mr. Sweet that he was disqualified from his counseling job at a drug and alcohol counseling service. *See id.* Mr. Sweet submitted a written request for reconsideration and, according to § 245C.27, subd. 1(c), was given no opportunity to request an evidentiary hearing on his challenge to DHS' disqualification decision. *See id.* at 316-17. On appeal to this Court, Mr. Sweet challenged the constitutionality of the Background Study Law because he was not afforded a fair hearing to challenge his disqualification.

The Court rejected Mr. Sweet's procedural due process challenge. Initially, it had to determine whether Mr. Sweet had a property interest in his ability to pursue employment as a counselor in state-licensed programs. *See Sweet*, 702 N.W.2d at 320. Next, it employed the three-factor due process balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 322, 335 (1976), quoted in *Fosselman v. Comm'r of Human Servs.*, 612 N.W.2d 456, 462 (Minn. Ct. App. 2000). The factors that must be balanced are: (1) the property interest at stake; (2) the risk of an erroneous deprivation of such interest through the procedures used; and (3) the burden on the government that additional procedural requirements would entail. *See id.*

The Court found that, as to the first *Mathews* factor, Mr. Sweet had a property interest in his ability to pursue employment as a counselor in state-licensed programs and that this interest weighed in his favor. *See Sweet*, 702 N.W.2d at 320. The Court determined, however, that the second factor (the risk of erroneous deprivation) weighed

in favor of DHS. The Court found the following items to be significant in its analysis: (1) that Mr. Sweet had the burden of proof under Minn. Stat. § 245C.22, subd. 4, to show that he is not disqualified by the statutory criteria; (2) that Mr. Sweet “had the unfettered right to present all evidence . . . that he thought the Commissioner should consider in his written submission”; and (3) that the agency presented no controverted testimony, and thus a hearing was not necessary to permit cross-examination of witnesses. *See* 702 N.W.2d at 321. The Court stated:

Based on this record, we discern no likely value to an evidentiary hearing. Whether the case is presented orally or in writing to the commissioner, Relator would submit the same evidence. Therefore, we conclude that allowing the appellant to file written submissions provided appellant with an adequate opportunity to present his case. Secondly, we also conclude that the potential risk of an erroneous decision is the same under either procedure. The commissioner is required to review and analyze Relator’s evidence regardless of the format in which it is presented.

*Id.*

Finally, as to the third *Mathews* factor (the burden on the government of requiring more process), the Court in *Sweet* found that the government’s interests weighed in favor of the Commissioner. The Court stated:

[T]he governmental interest in protecting the public, especially vulnerable individuals attending counseling for drug and alcohol addiction, is of paramount importance. Minn. Stat. § 245C.22, subd. 3. The government also has an interest in saving time and money by considering disqualifications quickly and efficiently, without the additional time, expenses, and personnel required to provide evidentiary hearings to disqualified individuals. If an individual disqualified for criminal convictions were due an oral evidentiary hearing, the commissioner would need to hold one on the same issue every time the same individual was hired or re-hired by a state-licensed program.

*See Sweet*, 702 N.W.2d at 321-22. The Court concluded that “an evidentiary hearing was not required to afford Relator with procedural due process; providing Relator with the right to submit evidence in writing was adequate to meet the requirements of due process.” *See id.* at 322. The Court held that the statutory language in Minn. Stat. § 245C.27, subd. 1(c) “is not unconstitutional on its face or as applied to Relator.” *See id.*

An analysis of the *Mathews* factors in the instant case demonstrates that Relator’s procedural due process rights have not been violated. First, although Relator may have a property interest in his ability to pursue employment, under *Sweet*, the loss of that interest, when weighed against the other two factors specified in *Mathews*, is not sufficient to violate due process.

The second *Mathews* factor, whether there was an erroneous deprivation due to the procedures used, weighs in favor of the State. First, after the commissioner’s May 1, 2007 decision upholding his disqualification based on correctness, Relator had the opportunity to seek a fair hearing. Relator failed to take advantage of the process that was afforded to him. Further, after his March 2008 disqualification Relator was given the opportunity to present evidence on the issue of correctness on reconsideration. *See Rel. App.* at A1. The State reviewed Relator’s request for reconsideration and determined, as it had before, that the factual basis for the disqualification was correct. *See Rel.’s App.* at A3. Contrary to Relator’s assertion that there has been an erroneous deprivation of his property interest (Rel.’s Brief at 3), the record shows that the disqualification was based upon correct information: a preponderance of evidence showed he committed an act that

constituted felony second degree assault. Thus, the commissioner's decision denying Relator's request for reconsideration of his March 2008 disqualification is a final decision subject to appeal as a final agency determination. *See* Minn. Stat. § 245C.27, subd. 1(c).

As to the third *Mathews* factor, the Background Study Law plainly states that the State "may not set aside the disqualification . . . regardless of how much time has passed, if the individual was disqualified for . . . conduct listed in Section 245C.15, subdivision 1." *See* Minn. Stat. § 245C.24, subd. 2. Relator's permanent disqualification based on a preponderance of evidence showing he committed an act amounting to felony second degree assault is now conclusive. A hearing to It consider a request that cannot be granted places an unnecessary burden on the government. Accordingly, the third *Mathews* factor supports the process used by the State in reviewing Relator's case.

Relator received adequate process, and thus his due process challenge fails. The procedural due process that was afforded Relator under the Background Study Law insured that Relator was given a "meaningful opportunity to present [his] case" that the disqualification was correct. *See Mathews*, 424 U.S. at 349. Relator has not met his heavy burden of showing that Minn. Stat. § 245C.27, subd. 1(c) is unconstitutional "beyond a reasonable doubt." *See Sweet*, 702 N.W.2d at 219 (challenger must show statute is unconstitutional beyond a reasonable doubt). Accordingly, Relator's procedural due process argument fails.

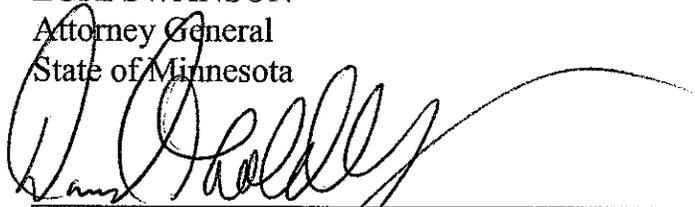
**CONCLUSION**

Based upon the foregoing, the State respectfully requests that this Court affirm Relator's permanent disqualification.

Dated: October 27, 2008

Respectfully submitted,

LORI SWANSON  
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State of Minnesota

A handwritten signature in black ink, appearing to read "D. Goldberg", is written over a horizontal line. The signature is cursive and extends to the right of the line.

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