

No. A08-1243

State of Minnesota

In Court of Appeals

Glenn Smith,

Relator,

vs.

Minnesota Department of Human Services,

Respondent.

REPLY BRIEF OF RESPONDENT

Paul D. Baertschi (#156966)
Tallen and Baertschi
4560 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612)337-5577

Attorney for Relator

Daniel Goldberg (#207354)
Assistant Attorney General
445 Minnesota Street, Suite 900
St. Paul, MN 55101
(651) 296-2367

Attorney for Respondent

.

TABLE OF CONTENTS

	<u>Page</u>
Argument	1
Preponderance of Evidence	3
Due Process	3
Validity of Permanent Bar to Set Aside a Disqualification	6
Conclusion	7

TABLE OF AUTHORITIES

	<u>Page</u>
<u>U.S. Supreme Court Cases</u>	
<u>Mathews v. Eldridge</u> , 324 U.S. 319 (1976)	3
<u>Minnesota Statutes</u>	
Minn. Stat. §245C.15, Subd. 1	6
Minn. Stat. §245C.24, Subd. 2	6
Minn. Stat. §245C.27	1
Minn. Stat. §246C.15, Subdivisions 1 to 4	2
Minn. Stat. §256.045, Subd. 3	1
Minn. Stat. §364.01	6
Minn. Stat. §364.03, Subd. 1	6

ARGUMENT

There is nothing set forth in any of the statutes cited by Respondent that supports the ultimate conclusion made by Respondent that Relator is not entitled to a fair hearing on his most recent disqualification simply because in an earlier disqualification, Relator failed to meet the deadline to request a fair hearing.

It is clear that in the first two referenced disqualification notices dated November 30, 2006 and April 9, 2007 (Respondent's Brief, RA-1 and RA-3), Relator is simply told of the opportunity to request reconsideration. There is no information in the notices that Relator will have the right to request a fair hearing if the reconsideration request is denied. Relator then filed his request for reconsideration (Respondent's Brief, RA-5 to RA-7). In this request, Relator made it clear that he was not convicted for the disqualifying offense. In fact, Relator was never even charged with this offense. Relator set forth facts in his reconsideration request in paragraph one that the incident involved was an accident. Relator sets forth in paragraph two of his reconsideration request that a knife was put to his throat, which would indicate that Relator was a victim in this offense. Relator admitted to breaking a window, which would be a misdemeanor offense if he were charged. However, no charges came against Relator from this incident. Then, Respondent was notified of the right to request a Fair Hearing in the trial paragraph of page 2 of a letter dated May 1, 2007 which paragraph he did not read initially (Respondent's Brief, RA-20).

Minn. Stat. §245C.27 sets forth the fair hearing rights when a disqualification is not set aside. The mechanism to obtain a fair hearing is set forth in Minn. Stat. §256.045,

Subd. 3. In this statute, a variety of state agency findings are subject to fair hearing requirements including “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 §246C.15, Subdivisions 1 to 4. . .”. This subdivision specifically allows individuals to contest this specified action by filing a written request for a hearing to the state agency within 30 days after receiving written notice of the action or within 90 days of such written notice with a showing of good cause why the request was not submitted within the 30 day time limit.

There is no language in the preceding statute that states the effect of failure to comply with the opportunity to request a fair hearing within the designated time period. Presumably, an individual would not be able to complain of the particular action, which is a disqualification from the facility listed in the background study submitted. Separate background studies are submitted each time an individual applies for a position for direct contact services involving another agency. While the underlying background study may be similar or even identical in other respects, there is nothing in the statutes that prevents an individual from applying for another position and having a new background study conducted. Certainly it is conceivable that an individual’s record may change. There may be an intervening expungement. There may be a difference in interpretation of the conduct with respect to a subsequent application.

While it is understandable that the Department of Human Services would like to have their determinations and conclusions not subject to review under a future application, there is nothing in the statutes that so provide.

PREPONDERANCE OF EVIDENCE

Respondent maintains that a determination was made based upon a “preponderance of evidence” that Relator committed a second degree assault.

Ballentine’s Law Dictionary defines preponderance as follows:

“The weight, credit and value of the aggregate evidence on either side; the greater weight of the evidence; the greater weight of the credible evidence. In the last analysis, the probability of the truth; evidence more convincing as worthy of belief *than that which is offered in opposition thereto*. (emphasis added) 30 Am. J2d Ev. §1164. The expression does not mean the mere numerical array of witnesses; it means weight, credit and value (citation omitted)”.

Ballentine’s Law Dictionary, 3rd Ed., the Lawyers Co-operative Publ. Co. (1969).

The very notion of the phrase preponderance of evidence suggests an evaluation of two sides of a case. Relator suggests that this phrase requires some type of opportunity to present evidence on the opposite side. While the fair hearing process provides for calling witnesses, the preponderance of evidence process used by Respondent does not. Relator suggests that when Respondent is relying upon mere allegations and not official records of conviction, a process that simply includes reading a police report without considering other evidence or even considering whether the reports are complete is patently unfair and does not constitute an evaluation of evidence by a preponderance of evidence standard.

DUE PROCESS

The three part test of Mathews v. Eldridge, 324 U.S. 319 (1976) clearly weighs in favor of Relator. First, it is clear that Relator has a property interest in the right to pursue employment, particularly after he invested time and substantial resources in pursuing and

obtaining a Bachelor's Degree in Criminal Justice (brief of Respondent, Appendix RA-24).

The second factor also weighs heavily in favor of Relator. The police reports relied upon by Respondent were relied upon by the authorities in deciding not to charge Relator. There was no judicial finding that Relator committed the facts, much less any judicial finding of probable cause, as there is no evidence of any charge being brought against Relator. The risks of an erroneous deprivation of rights is apparent to anyone with experience in criminal practice. Witnesses may blurt out various allegations out of anger or to deflect responsibility for their behavior. To determine the truth of accusations of felonies, there is a process in the criminal court system. Several players are involved to examine the facts. The police start off examining the facts to determine whether they wish to even submit the charge to the prosecuting authority. Many cases are deflected at this stage. There is no evidence that Relator's situation was not in fact deflected by the police, based upon a determination that the information against him was inaccurate. The next level is the County Attorney. The County Attorney is trained in the law, in due process and understanding the burden of proof. If there is probable cause to bring a charge, a prosecutor will normally file a formal complaint. The third level is a judge deciding on the basis of the complaint whether to approve it and begin the prosecution. The fourth level is a second judicial review of probable cause at a probable cause or omnibus hearing. Finally, the person accused would be entitled to a trial by a jury of his or her peers. If these procedures had occurred and Relator was charged and convicted of an offense, he would not be in a good position to argue that there is a significant risk of

an erroneous deprivation of his rights. In the absence of those procedures however, this is a prime situation to argue the huge risk of an erroneous lifetime deprivation of an interest through a subjective evaluation of a police report without getting any information from the witnesses.

The third factor is the burden on the government that additional procedural requirements would entail. This burden is no different than in any other situation where a person is being deprived of a serious right. If the government wishes to deprive an individual for a full lifetime the opportunity to pursue his chosen career, procedures are set forth for a simple hearing without a jury where witnesses would be called and Relator would have a chance to cross examine those witnesses. The truth would come out at such a hearing.

Relator was deprived of any opportunity to have a fair hearing simply because he was so distraught at the continued denial of his right to pursue his chosen career that he was late in reading page two of the notice that informed him of his right to ask for a fair hearing. Relator applied for a position another time and went through the background study process and followed all the procedural provisions in connection with that case. Respondent is showing no interest in gathering the truth, but rather in simply affirming the decisions of the bureaucrats involved. Relator respectfully requests this Court to afford him the process that he is due to get to the truth of the allegations as to whether by a preponderance of real evidence he committed an act that disqualifies himself from direct contact services and his chosen career.

VALIDITY OF PERMANENT BAR TO SET ASIDE A DISQUALIFICATION

Minn. Stat. §245C.24, Subd. 2 prohibits Respondent from setting aside a disqualification under §245C.15, Subd. 1 under any circumstances and at any time.

Relator asserts that there is no rational basis for a lifetime disqualification. This

Draconian provision directly contradicts Minn. Stat. §364.01, which states as follows:

“The legislature declares that it is the policy of the State of Minnesota to encourage and contribute to the rehabilitation of offenders and to assist them in the resumption of the responsibilities of citizenship. The opportunity to secure employment or to pursue, practice, or engage in a meaningful and profitable trade, occupation, vocation, profession or business is essential to rehabilitation and the resumption of the responsibilities of citizenship.”

Minn. Stat. §364.03, Subd. 1 states as follows:

“Notwithstanding any other provision of law to the contrary, no person shall be disqualified from public employment, nor shall a person be disqualified from pursuing, practicing, practicing or engaging in any occupation for which a license is required solely or in part because of a prior conviction of a crime or crimes, unless the crime or crimes for which convicted directly relate to the position of employment sought or the occupation for which the license is sought.”

Subdivision 3 of that statute requires allowing a person to show competent evidence of sufficient rehabilitation before being disqualified from public employment because of a conviction.

These provisions apply *much more strongly* with respect to Relator as opposed to persons merely arrested for but not charged with an offense. A blanket rule which directly contradicts Chapter 364 of the Minnesota statues should be found invalid on statutory and due process grounds. Whether or not the permanent bar is valid on

statutory grounds, Relator fails to see a rational basis for refusing to allow evidence of rehabilitation for the lifetime of the person.

CONCLUSION

Relator respectfully requests this Court to remand this case and order a fair hearing.

Dated: Nov. 4, 2008

By: 

Paul D. Baertschi, Atty. Reg. No. 156966
TALLEN & BAERTSCHI
4560 IDS Center
80 South 8th Street
Minneapolis, MN 55402
(612) 337-5577
Attorney for Relator