

No. A09-371

State of Minnesota
In Court of Appeals

Christine Strecker,

Relator,

vs.

Minnesota Department of Human Services,

Respondent,

Ramsey County Community Human Services,

Respondent.

Respondents Minnesota Department of Human Services
and
Ramsey County Community Human Services Department
Appellate Brief

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STATEMENT OF LEGAL ISSUES WITH APPOSITE CASE

- I. WAS THE DECISION OF THE MINNESOTA DEPARTMENT OF HUMAN SERVICES ARBITRARY, CAPRICIOUS, OR AN ERROR OF LAW AND NOT SUPPORTED BY SUBSTANTIAL EVIDENCE?**

Apposite Authority:

In re Claim for Benefits by Muelzners, 725 N.W.2d 121 (Minn. App. 2006)

Hymanson v. City of St Paul, 329 N.W.2d 324 (Minn. 1983)

In re Burke, 666 N.W.2d 724 (Minn. App. 2003)

Obara v. Minnesota Department of Health, 758 N.W.2d 873 (Minn. App. 2008)

STATEMENT OF THE CASE AND FACTS

A. STATEMENT OF THE CASE

This matter involved the temporary immediate suspension of the child daycare license of Relator Christine Strecker (Relator) by the Minnesota Commissioner of Human Services (the Commissioner) pursuant to the authority granted to him under the provisions of Minn. Stat. §245A.07, subd. 2. The events precipitating the Commissioner's actions arose late in the afternoon of September 16, 2008, in the Relator's home where she provided a child daycare program. Relator's program is licensed by the Minnesota Department of Human Services (DHS) pursuant to Minn. Stat. Ch. 245A. On September 16, at about 4:30 in the afternoon, Relator noticed that J.H., a six month old infant in her care, was behaving in a manner which suggested to her that he was having a seizure. Relator called for an ambulance, and the infant was taken to St. John's hospital. On September 17, 2008, Muriel Leko, a daycare licensing social worker with the Ramsey County Community Human Services Department (RCCHSD), received various medical reports from the Midwest Children's Resource Center (MCRC), to which the infant had been transferred, indicating that the infant had suffered a subdural hematoma and other injuries which were inflicted and not accidental. After receiving additional reports from MCRC, or about September 29, 2008, Ms. Leko, at the request of the Minnesota Department of Human Services, forwarded a recommendation to the DHS that Relator's child daycare license be temporarily immediately suspended (App. 109).

By authority of Minn. Stat. §245A.07, subd. 2, on September 29, 2008, the DHS issued its Order of Temporary Immediate Suspension (App. 111).

It is necessary to bear in mind that this Order of Temporary Immediate Suspension was issued solely for the purpose of suspending Relator's daycare license pending further investigation of the incident (App. 457). Procedurally, the investigation was conducted by Jennifer Neujahr, a senior child protection worker with the RCCHSD (App. 451). Under the provisions of Minn. Stat. §626.556, subd. 3c, the local county welfare agency conducts the maltreatment investigation and decision. Contrary to the assertions by Relator in note 1 of her brief, at page 2, this is not a decision of the Commissioner or DHS.

Ms. Strecker timely appealed the DHS Order of Temporary Suspension under the provisions of Minn. Stat. §245A.07, subs. 2 and 2a. A hearing before Administrative Law Judge (ALJ) Linda Close was held on December 10, 2008 (App. 10-17). This hearing was initially scheduled for November 3, 2008, but at the request of Relator's counsel was continued to December 10. (App. 14).

On January 15, 2009, Judge Close issued her Findings of Fact, Conclusions and Recommendations, and recommended that the Commissioner rescind the Order for Temporary Immediate Suspension (App. 10-17). On February 11, 2009, the Commissioner issued his final Order, rejecting certain conclusions by ALJ Close, and affirming the Order of Temporary Immediate Suspension (App. 5-9).

On December 16, 2008, the RCCHSD issued its findings of maltreatment by letter to Relator (App. 347-349).

Relator has appealed this decision to temporarily suspend her license. The final action on her license revocation has been made by the Commissioner and an appeal before the Office of Administrative Hearings (OAH) is pending.

B. STATEMENT OF FACTS

Respondents generally accept the statement of facts presented by Relator in her Brief.

ARGUMENT

A. STANDARD OF REVIEW

This matter, as previously noted, involves an Order for Temporary Immediate Suspension of the Relator's child daycare license by the Minnesota Department of Human Services through its Commissioner. The temporary immediate suspension of a daycare provider's license is required under the provisions of Minn. Stat. §245A.07, subd. 2, which provides that if a license holder's actions or failure to act poses an imminent risk of harm to persons served by the program, the Commissioner shall act immediately to suspend the license.

Minn. Stat. §245A.07, subd. 2 and 2a provide for an expedited appeal hearing process if the license holder appeals the decision to suspend a license. The license holder must appeal within five days of the order (Minn. Stat. §245A.07, subd. 2); within five days of receipt of the appeal notice, the Commissioner must arrange for a hearing before

an administrative law judge (Minn. Stat. §245A.07, subd. 2a); and the hearing must be held within 30 days of the hearing request.

Significantly, the only issue to be decided at such hearing is whether the temporary immediate suspension order should remain in effect pending further investigation and the Commissioner's final order. At the expedited hearing, the Commissioner has the initial burden to demonstrate that reasonable cause exists to believe the license holder's actions pose a risk of harm to individuals served by the program. Minn. Stat. §245A.07, subd. 2a.

On judicial review of an agency decision, the court presumes the correctness of the agency decision. *In re Claim for Benefits by Meulzners*, 725 N.W.2d 121, 123 (Minn. App. 2006). The party challenging the agency's decision bears the burden of proof to establish that the agency's decision was incorrect. *No Power Line, Inc. v. Minnesota Environmental Quality Council*, 262 N.W.2d 312, 325 (Minn. 1977).

An agency's decision may be reversed only if the Relator can prove that the agency's decision is "arbitrary, capricious . . . are made upon unlawful procedure . . . or are unsupported by substantial evidence in view of the entire record." *In re Burke*, 666 N.W.2d 724, 726 (Minn. App. 2003).

This standard of review is not altered when the agency rejects or modifies the findings of an ALJ and makes a decision different from the recommendations of the ALJ. *Hymanson v. City of St. Paul*, 329 N.W.2d 324, 326-27 (Minn. 1983).

It is also settled that an agency's decisions are not arbitrary and capricious so long as there is a rational connection between the facts as found and the choice made by the

agency. *In the Matter of the Excess Surplus Status of Blue Cross and Blue Shield Minnesota*, 624 N.W.2d 264, 277 (Minn. 2001).

B. SUBSTANTIAL EVIDENCE IN THE RECORD SUPPORTS THE COMMISSIONER'S DECISION TO SUSPEND RELATOR'S CHILD DAYCARE LICENSE PENDING A FINAL ORDER BY THE COMMISSIONER

As an initial and fundamental matter when reviewing the facts in this case and evaluating whether the DHS and Commissioner have met their burden of proof under Minn. Stat. §245A.07, and if so, whether the Relator has met her burden of proof under the statute, it is necessary to remember that the overriding public purpose of Chapter 245C, and indeed, the entire daycare licensing system in Minnesota, is to protect the health and safety of society's most vulnerable members – its children, the aged, and the disabled. *See, Obara v. Minnesota Department of Health*, 758 N.W.2d 873, 879, 880 (Minn. App. 2008). These groups are uniquely vulnerable. *Andrade v. Ellefson*, 391 N.W.2d 836, 842 (Minn. 1986). This concern is reflected in Minn. Stat. §245C.22, subd. 3 (2008), which requires that when the Commissioner reviews requests for reconsideration of licensing disqualification actions he or she takes, he or she “... shall give preeminent weight to the safety of each person served by the license holder . . . over the interests of the disqualified individual”. *Obara, Id.*

In short, it is the clear public policy of the state that in close factual situations, the protection of children, such as six-month old J.H. must trump the interests of the daycare provider or other license holder.

This is particularly true in situations where a temporary immediate suspension is necessary. Such a suspension becomes necessary when possible harm to the children in daycare is so great and so immediate that society cannot take the risk of leaving these vulnerable citizens exposed to possible injury while a more thorough investigation is being conducted, and while the appeal process is underway. A temporary immediate suspension requires the license holder to discontinue operating immediately, Minn. Stat. §245A.02, subd. 2, while if a license holder receives an ordinary sanction they may continue to operate the program during the pendency of any appeal.

• This interest in the protection of vulnerable individuals has been held “of paramount interest”. *Sweet v. Commissioner of Human Services*, 702 N.W.2d 314, 321 (Minn. App. 2005).

It is the clearly stated public policy of this state and the obligation of the Commissioner and DHS if they err, to do so on the side of protection of vulnerable persons, and not on the side of protecting private interests in licenses.

In the context of this temporary immediate suspension, on September 29, 2008, the Commissioner and DHS had in hand the following undisputed facts:

1. On September 16, 2008, a six-month old infant, J.H., was dropped off at Relator’s daycare home at approximately 8:30 a.m. by his father (App. 541).
2. At the time he was dropped off, he seemed perfectly normal and exhibited no symptoms of distress (App. 393).
3. From 8:30 a.m. on September 16, 2008, until he exhibited injuries, he was in the exclusive adult custody of Relator (App. 393).

4. At approximately 4:30 p.m. on September 16, 2008, Relator observed J.H. and believed him to be having some kind of seizure. As a result, she called an ambulance and the child was taken to St. John's Hospital (App. 363; 544; 11).

5. A report from Dr. Mark Hudson of the Midwest Children's Resource Center (MCRC) dated September 17, 2008, stated that J.H. had a small subdural hematoma (App. 101) and tonsillar lesions.

6. On September 18, 2008, in a follow-up report, the MCRC Physician, Dr. Mark Hudson stated that the lack of trauma history made inflicted injury the primary consideration (App. 103-104).

7. On September 19, 2008, Dr. Hudson filed another report (App. 103-110), in which he included a report of Dr. Susan Schloff, an ophthalmologist. In her report, Dr. Schloff noted the presence of pre-retinal, retinal, and sub-retinal hemorrhages in both eyes (App. 107). In his report, Dr. Hudson noted that the presence of retinal hemorrhages increased the already significant concern for non-accidental injury (App. 107). Dr. Hudson also noted in this report that when the injury occurred was unclear; that retinal hemorrhages cannot be dated accurately; and that while the subdural hematoma could have occurred on the date of presentation, it could also have occurred days earlier (App. 107).

Based on these facts which were in the possession of the Commissioner, the temporary immediate suspension order was issued on September 29, 2008. Given that an infant had been subjected to a traumatic injury, that the symptoms of the injury developed while in Relator's care, and that these appeared to be inflicted, not accidental

injuries, the Commissioner, mindful of his obligation to give paramount consideration the health, safety, and welfare of the children in Ms. Strecker's program, had no real choice except to suspend Relator's license pending further investigation.

Even Sgt. Mark Koenig, a witness called on behalf of Relator, conceded that had he had such information in hand he would have been nervous about Relator continuing to provide daycare (App. 508-509).

Sgt. Koenig's testimony is significant. He is an experienced child abuse investigator with the Minneapolis Police Department (App. 492). He also has children at Relator's daycare (App. 493-494); and his sister and two high school friends had their children with Relator (App. 494). Moreover, he has known Relator and her spouse since 1986, and had attended high school with Relator and her husband (App. 495). He testified that he has not seen her lose her temper or become violent in all those years, and that he had no reservations about Relator's abilities and that his children would be in her care but for the temporary immediate suspension (App. 505, 506).

The Commissioner did not, on September 29, 2008, have this long intimate history with Relator, which would have allowed him, in essence, to simply say "Oh, I know her well enough to say she couldn't have done that." The Commissioner was more like Sgt. Koenig who admitted, absent such personal knowledge of the daycare provider trust he had of Relator and, given the facts the Commissioner had, he too would have been nervous about permitting the daycare program to continue.

Subsequent to the issuance of the September 29, 2008, Order by the Commissioner and DHS, the RCCHSD child protection unit continued its investigation. Ms. Neujahr

interviewed the child's parents and Relator, the only adults who had had custody of the child. In a report dated December 16, 2008 (App. pp. 360-367). Jennifer Neujahr concluded that the evidence she had in hand, which included the MCRC reports, various police reports, and polygraph results, interviews with all adults who had custody of the child, and the fact that the child's injuries could not have been sustained accidentally on his own, supported a finding of maltreatment by Relator.

The results of the polygraph examinations were admitted in the hearing before the ALJ on December 10, 2008 (App. 461-464). Both of the child's parents passed the polygraph test (App. 464).

Relator, on the advice of counsel, declined to take the polygraph test (App. 553).

At the December 10 hearing before Administrative Law Judge Close regarding the temporary immediate suspension, Relator called as a witness Dr. William Ford, a physician with a specialty in neurology and spine intervention (App. 523). Dr. Ford did not prepare a written report, but he obtained the child's CT scan and MRI scan dated September 16 and 17 (App. 524). Dr. Ford, in his crucial finding, concluded that the injury to the child could have occurred three to seven days prior to the MRI and CT scans on September 17 (App. 529-530), and that the injury could have occurred on or before September 13 (App. 530). The ALJ found as a fact that the injury occurred at least five days before the MRI on September 17, which would have placed the injury no later than September 12, 2008 – the Friday before the symptoms manifested themselves on September 16 (App. 13).

The ALJ's recommendation was reversed by the Commissioner by order and memorandum dated February 11, 2009. (App. 5-9). Two significant pieces of information were available to the Commissioner at that time and which had not been available to him on September 29, the date of his initial Order of Suspension; first, that of the three adults who had custody of the child (Relator and his parents) and who possibly could have inflicted the injuries to the child, the parents both had agreed to take polygraph tests and had passed, but Relator, on the advice of counsel, declined. By process of elimination, with two of the three adults out of the picture, only Relator was left as a possible perpetrator. Second, while Dr. Ford disagreed with Dr. Hudson's conclusion that the injury could have occurred on September 16, Dr. Ford also said that the injury could have occurred during the previous week, three to seven days before September 17, when the MRI was read. During this previous week, the Relator had custody of the child every day, except Friday afternoon. (App. 561).

The Commissioner rejected the recommendation of the ALJ to rescind the temporary immediate suspension because while the evidence as to the exact date the injury occurred was unclear, it was clear that the Relator remained a possible source of the injury, as she had custody of the child within the time period when the child's injuries could have been inflicted.

With regard to the polygraph results, while no inference that Relator would have failed the test can be drawn simply because she declined to take it, the fact remained that only three adults could have inflicted these injuries – and two of them had passed the polygraph exam.

The DHS and RCCHSD recognize that its burden in these matters is to produce substantial evidence that reasonable cause exists to believe that a licensee's activities pose a risk of harm to the safety of persons in the program. The standard for determining whether there is substantial evidence such that the agency's decision is not arbitrary and capricious is established in *Muelzners*, supra, at 123, when this court articulated the following factors to consider:

- (a) did the agency rely on factors not enacted by the legislature;
- (b) did the agency fail to consider an important aspect of the problem;
- (c) did the agency offer an explanation which runs contrary to the evidence;
- (d) did the agency make a decision so implausible that it could not be explained as a difference in view or a result of the agencies' expertise.

With respect to the first of these criteria, Relator does not offer any argument that the agency relied on factors not intended by the legislature. Indeed, the record is clear that the agency took into account the express mandate of the legislature to give paramount consideration to the health and safety of the persons served by a licensed program as it dealt with this matter. The Commissioner cannot be constrained to act only in those cases where there is no doubt that a licensee has violated a law or regulation, particularly in those emergency situations where a temporary suspension must be imposed long before an investigation is complete because the state has decided that it often cannot wait for a complete investigation and cannot afford to leave vulnerable

citizens in the care of persons who are suspected of violating rules or laws. It is the Commissioner's obligation to remove the vulnerable persons served by a program from the possibility of harm, and unlike a criminal case, this cannot be done by imprisoning the source of risk of harm pending trial, but can only be accomplished by suspending operation of the program. There is no evidence that the agency considered factors not intended by the legislature.

With respect to the second factor, it is also clear that the Commissioner reviewed and considered all the arguments and evidence of the case. The Commissioner recognizes that it is not possible to pinpoint the date and time the child's injury occurred. Dr. Hudson says it could have occurred on September 16, but might have occurred earlier. Dr. Ford said it could not have occurred on September 16, but might have occurred as early as September 10. The Commissioner reviewed this timeframe, and reached a conclusion that the Relator remains a possible source of the injury and therefore, the license should be suspended pending investigation and final decision.

With respect to whether the agency's explanation is contrary to the evidence, while there is conflicting evidence, the conflict is between medical experts and still allows for the possibility that Relator inflicted the injuries on the child, if not on September 16 then during the week previous. There is no evidence which exonerates the Relator.

Finally, there is no doubt that the agency's decision to suspend Relator's license is completely plausible and reflects its interpretation and acceptance of marginally

conflicting evidence. The Commissioner's action is based on a different interpretation of the evidence, not in contradiction of it.

Based on the foregoing, it cannot be doubted that the Commissioner, DHS, and RCCHSD have had substantial evidence in their possession which supports the temporary immediate suspension action taken. The Respondents have acted in a deliberate, cautious manner, but have based their decision on facts and evidence in the context of their primary obligation to protect the health and safety of persons served by Relator's program. It makes no difference that there is a dispute in the evidence or that Relator has offered evidence contrary to that relied upon by the Respondents. No rule of law says that the Respondents must accept and give weight to all evidence offered by a licensee or that, in this case, the Respondents have wrongly decided that the evidence presented by Relator does not warrant rescinding the temporary suspension. The Respondents have not, under the facts of this case, acted in an arbitrary and capricious manner, and have ample evidence to support their decision to suspend Relator's license.

It is necessary to note that the Commissioner's action is only to suspend Relator's license; whether or not to take action to permanently sanction her license awaits another hearing and another day.

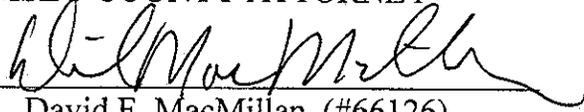
CONCLUSION

The evidence in this case, while disputed, clearly supports the Respondents' actions in this matter. There can be no conclusion that there was not substantial evidence to justify their actions, or that they acted in an arbitrary and capricious manner. This

court should uphold the Commissioner's action temporarily suspending Relator's child daycare license.

Dated: June 29, 2009

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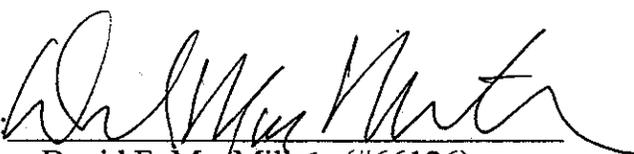
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CERTIFICATE OF COMPLIANCE

I hereby certify that Respondents' Brief complies with the word count limitation of Minn. R. Civ. App. P. 132.01, subd. 3(a). I further certify that, in preparation of this Brief, I used Microsoft Word 2007, and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count. All text is 13-point Times New Roman. I further certify that the Brief contains 3,513 words.

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